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Court of Appeals  
Division III  
State of Washington

**NO. 34497-5-III**

In the Court of Appeals of the State of Washington  
Division 3

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STATE OF WASHINGTON, Respondent

v.

RODNEY L. HARLAN, Appellant

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**APPELLANT'S BRIEF**

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A) ASSIGNMENT OF ERROR

1. The trial court erred in granting State's Motion in Limine to Admit Evidence of Defendant's Similar Conduct Pursuant to ER 404(b).
2. Jury received insufficient evidence from which any rational trier of fact could have found the vehicle stolen beyond a reasonable doubt.
3. Jury received insufficient evidence from which any rational trier of fact could have found the key stolen beyond a reasonable doubt.

B) ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court erroneously admit evidence of the uncharged burglaries occurring on December 19, 2015; December 23, 2015; and December 28, 2015?
  - a) Was the admission of evidence of uncharged burglaries justified on the basis of the *modus operandi* or identify exception to ER 404(b)?
  - b) Was the admission of evidence of uncharged burglaries justified on the basis of the *res gestae* exception to ER 404(b)?
  - c) Was that erroneous admission of evidence of uncharged burglaries harmless error?
2. Was there sufficient evidence admitted at trial that the vehicle Mr. Harlan was found crouched next to was stolen, and therefore support a conviction regarding Count II, possession of stolen motor vehicle?

3. Was there sufficient evidence admitted at trial that the key found in Mr. Harlan's pocket was stolen, and therefore to support a conviction regarding Count III, third degree possession of stolen property?

C) STATEMENT OF THE CASE

Rodney Harlan was charged by Third Amended Information in Yakima County Superior Court under Case No. 16-1-00080-39 with single counts each of “residential burglary,” “possession of stolen motor vehicle,” and “third degree possession of stolen property.” CP 5-6. The “residential burglary” was alleged to have occurred “[o]n or about December 21, 2015” at a “dwelling...located at 1304 Hamilton Avenue, Yakima Washington, the residence of Cresencio” Montes de Oca Torres. CP 5; *see also* RP 165. The “possession of stolen motor vehicle” was alleged to have occurred “[o]n or about December 29, 2015” involving a “red Pathfinder” belonging to “Kenneth Anderson.” CP 5. The “third degree possession of stolen property” was alleged to have occurred “[o]n or about December 29, 2015” involving a “Toyota Tacoma car key” belonging to “Andrew W. Eakin.” CP 6.

At trial, the State moved “in limine to admit evidence of Defendant's similar conduct pursuant to ER 404(b).” CP 52-55. The State's offer of proof concerned events on five dates: December 19, 2015; December 21, 2015; December 23, 2015; December 28, 2015; and

December 29, 2015. CP 53-54. The State's offer of proof described a burglary on December 19, 2015, which was not charged. CP 6-7, 53; *see also* RP 104. The State's offer of proof also described a burglary on December 23, 2015, which was also not charged. CP 6-7, 53; *see also* RP 104-05. And the State's offer of proof also described a burglary on December 28, 2015, which was also not charged. CP 6-7, 53; *see also* RP 105.

In its written motion, the State argued for admissibility under both the “res gestae” and “scheme or plan” exceptions to ER 404(b)'s general prohibition on the admission of evidence of other crimes. CP 54; *see also* RP 30-31, 104-05. During oral argument, State also argued the “modus operandi” exception the ER 404(b)'s general rule of inadmissibility. RP 30, 110.

The trial court granted the State's motion over Mr. Harlan's objection. RP 111-12; *see also* RP 32. The trial court's ruling identified “res gestate” and “identity” as the applicable exceptions to ER 404(b)'s presumption of inadmissibility. RP 112-14. The trial court did not analyze admissibility under the “plan” exception, and did not admit the evidence on that basis. *See* RP 112-17.

Regarding the “modus operandi” exception, the trial court applied a “more consistent than inconsistent” standard, not a “uniqueness”

standard, to find sufficient similarity between the charged and uncharged crimes to admit the evidence of the three uncharged burglaries. RP 114.

Regarding the “res gestae” exception, the trial court found two of the uncharged burglaries—those on December 19 and 23—to have been associated with the thefts of the stolen property Mr. Harlan was alleged to have possessed. RP 113-14. The trial court, however, did not find those burglaries to be inseparable. *See* RP 112-17. The trial court also did not explicitly address the res gestae exception with respect to the December 28 uncharged burglary. *Id.*

At trial, a witness, Trent Price, observed “a man taking things out of [a] garage and putting it into...[an] SUV” at “3 or 3:30 at night” from the residence of Crescencio Montes de Oca Torres. RP 174. Mr. Price described the SUV as a “90s-modeled, older-looking red SUV” and having a “spare tire that swung out on it which was really noticeable.” RP 179. Mr. Price described getting “a look” at the “man” loading things into the SUV. RP 176. Mr. Price identified Mr. Harlan as that man at trial. RP 177.

Mr. Price made these observations from a vehicle moving at 15-20 miles per hour. *Id.* He made these observations at about 3:30 AM, possibly having worked “8 a.m. to 3 p.m.” the day before, after having a “full day of activities” the day before, and while he was “tired.” RP 185-86. He

could not recall the exact date on which he made these observations. RP 184. The only lighting were streetlights. RP 187. And when he looked at a photo montage, Mr. Price was only “80 percent sure” of his identification of Mr. Harlan. RP 191. Mr. Price never identified the red SUV he observed as being the same as the red SUV Mr. Harlan was crouched beside at the time of his arrest on December 29.

Mr. Montes de Oca Torres testified he lived at 1304 Hamilton Avenue in Yakima, Washington on December 21, 2015. RP 166. Mr. Montes de Oca Torres did not testify about his residence being entered unlawfully, about any items being stolen, or about his whereabouts on December 21, 2015. *See* RP 166-68. No evidence was introduced that Mr. Harlan was in possession of any items taken from Mr. Montes de Oca Torres' residence.

Yakima Police Department Officer Erin Levy testified that on December 29, 2016, she observed Mr. Harlan crouched next to a “maroon SUV with a sunroof” and a “big wheel on the back; the tire was attached to the back of the” vehicle. RP 130, 132-33, 141. That maroon SUV was “very close to what [Officer Levy] had seen in the pictures” “provided” to her by the December 28 burglary victim. RP 132, 134. On December 28, when she first examined the pictures, Officer Levy believed the vehicle to have been an Isuzu Rodeo, and did not have a license plate. RP 144. Upon

further inspection, Officer Levy opined the maroon SUV inspected on December 29 appeared to be the same vehicle as that depicted in the pictures from December 28. RP 139. Later, after Officer Levy arrested Mr. Harlan, she found “a Toyota key with a red key chain attached to it” in Mr. Harlan's pocket, which she “ultimately ended up getting to Detective Yates...for evidentiary purposes.” RP 142.

Officer Levy never testified to the jury that the maroon SUV was a Nissan Pathfinder in general, or the red Nissan Pathfinder that was stolen from Kenneth Anderson on December 19 in particular. *See* RP 130-152. Officer Levy never testified to the jury the “Toyota key with a red key chain attached to it” she found in Mr. Harlan's pocket was the key stolen from Mr. Eakin on December 23. *See id.* Officer Levy did not testify about any further particulars about the key; such as whether the “red key chain” had any uniquely identifiable markings; whether the key was accompanied by a vehicle identification number, and if so what that number was; whether the key worked on any particular vehicle; or whether anyone claimed ownership of the key. *Id.*

Other than Officer Levy, no other law enforcement officer testified.

At trial, Kenneth Anderson testified he did own a red Nissan Pathfinder that was stolen from his driveway on or about December 19,

2015. RP 155-57. Mr. Anderson did not testify about the location of the Pathfinder's spare wheel, or whether it had a sunroof. RP 155-57.

Mr. Anderson also testified that “Detective Yates showed [him] a picture [of his Pathfinder] that [Detective Yates] had from a security camera.” RP 159-60. Mr. Anderson also testified he “a couple of weeks” later, he went to “an address off of 47<sup>th</sup> Avenue” “about a mile [from his] house” where his Pathfinder was “in a carport maybe behind a house,” and that he spoke to a “woman police officer.” RP 160, 163.

At trial, Andrew Eakin testified his 2014 Toyota Tacoma was stolen from his driveway on December 23, 2015. RP 194-95. Mr. Eakin also testified they keys to that Tacoma were stolen. RP 197. Mr. Eakin also testified he received his keys back from “Detective Yates” at some point, he did not “recall the exact date.” RP 197-98. Mr. Eakin also testified the keys were attached to “a red bottle opener” bearing the phrase “Tide Insider Works” on it, and testified the keys were accompanied by a “multicolored laminated plastic” “tag” from “Toyota Care” “with the VIN” written thereon. RP 204-05.

The jury convicted Mr. Harlan of all three counts. CP 122-24. Mr. Harlan timely appealed. CP 147.

D) ARGUMENT

**1. The trial court erroneously admitted evidence of the uncharged burglaries occurring on December 19, 2015; December 23, 2015; and December 28, 2015.**

Generally, “[e]vidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” ER 404(a). Specifically, generally “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). “Evidence of other crimes, wrongs or acts...may, however, be admissible for other purposes.” *Id.* “[E]vidence of prior bad acts” is “presum[ed]...inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17 (2003). “The overriding policy of excluding such evidence, despite its...probative value, is the practical experience that its disallowance tends to prevent the confusion of issues, unfair surprise and undue prejudice.” *State v. Herzog*, 73 Wn. App. 34, 49 (1994) (internal citation omitted). One concern is that such evidence may “weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend himself against a particular charge.” *Id.* (internal citation omitted).

Examples of “other purposes” that may rebut the presumption of inadmissibility include “proof of motive, opportunity, intent, preparation, plan, knowledge, identity,...absence of mistake or accident” or “res gestae.” *Id.*; *State v. Tharp*, 27 Wn. App. 198, 204 (1980) (aff’d in all relevant respects by *State v. Tharp*, 96 Wn.2d 591 (1981)).

“ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403.” *State v. Saltarelli*, 98 Wn.2d 358, 361 (1982). That is, in ruling on the admissibility of other crimes, the court necessarily must also consider both whether the evidence “ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more...or less probable” and whether the “probative value [of the evidence] is substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury.” ER 401, 402, 403. “In no case, however, regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith.” *Saltarelli*, 98 Wn.2d at 362. Moreover, the court determining admissibility of other crimes “must identify [on the record] the purpose for which the evidence is to be admitted.” *Id.*; see also *State v. Burgess*, 43 Wn. App. 253, 265 (1986).

An appellate court reviews a trial court's "interpretation of an evidentiary rule [such as ER 404(b)] de novo as a question of law." *DeVincentis*, 150 Wn.2d at 17. If the trial court's interpretation of the rule is deemed correct, "the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *Id.* "A trial court abuses its discretion if its evidentiary ruling is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Briejer*, 172 Wn. App. 209, 223 (2012) (internal citation omitted). "Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion." *State v. Foxhoven*, 161 Wn.2d 168, 174 (2007).

Here, the State moved to admit "evidence at trial regarding the defendant's similar conduct pursuant to ER 403(b)." CP 52. The State's offer of proof concerned events on five dates: December 19, 2015; December 21, 2015; December 23, 2015; December 28, 2015; and December 29, 2015. CP 53-54. At trial, Mr. Harlan was charged with three counts: a burglary occurring on December 21, 2015; a possession of a stolen vehicle occurring on December 29, 2015; and a possession of stolen property occurring on December 29, 2015. CP 6-7. Mr. Harlan was not charged with the burglary that the State described as having occurred on December 19, 2015. CP 6-7, 53; *see also* RP 104. Mr. Harlan was not charged with the burglary that the State described as having occurred on

December 23, 2015. CP 6-7, 53; *see also* RP 104-05. And Mr. Harlan was not charged with the burglary that the State described as having occurred on December 28, 2015. CP 6-7, 53; *see also* RP 105.

In its written motion, the State argued for admissibility under both the “res gestae” and “scheme or plan” exceptions to ER 404(b)'s general prohibition on the admission of evidence of other crimes. CP 54; *see also* RP 30-31, 104-05. During oral argument, State also argued the “modus operandi” exception the ER 404(b)'s general rule of inadmissibility. RP 30, 110.

The trial court granted the State's motion over Mr. Harlan's objection. RP 111-12; *see also* RP 32 (“What we're asking the Court to do is limit the State to the two crimes that are charged. Let them prove those two crimes against my client without mentioning...other cases that he's not charged with. He's not on trial for those”). The trial court's ruling identified “res gestate” and “identity” as the applicable exceptions to ER 404(b)'s presumption of inadmissibility. RP 112-14. The trial court did not analyze admissibility under the “plan” exception, and did not admit the evidence on that basis. *See* RP 112-17.

**a) Evidence of uncharged burglaries not admissible under *modus operandi* or identify exception to ER 404(b).**

“Evidence that the accused committed an uncharged crime can be relevant to identify the perpetrator in as few as one or as many as three ways.” *Herzog*, 73 Wn. App. at 44. “The first way involves general propensity.” *Id.* “Evidence that the accused committed an uncharged crime tends to prove that the accused has a propensity to commit crime.” *Id.* “The second way involves specific propensity.” *Id.* at 44. “Evidence that the accused committed an uncharged crime of the same type as the crime charged tends to prove that the accused has a propensity to commit that specific type of crime.” *Id.* Both general and specific propensity evidence are inadmissible under ER 404(b). *Id.* at 48.

“The third way does not involve propensity at all,” and does not run afoul of ER 404(b)'s inadmissibility mandate. *Id.* at 45. “Rather, it depends upon a three-step process of logical deduction.” *Id.* First, the court “compare[s] the facts of the uncharged crime to the facts of the charged crime.” *Id.* “The object is to determine whether the same person committed both crimes.” *Id.* Second, the court “determine[s] whether the accused committed the uncharged crime.” *Id.* at 46. Third, the court deduces logically that “[i]f the same person committed the charged and uncharged crimes, and if the accused committed the uncharged crime,”

then it is more probable that “the accused is the person who committed the charged crime.” *Id.* “Evidence meeting all three steps is commonly labeled evidence of a 'signature crime', evidence of 'modus operandi', or, as in ER 404(b), evidence of 'identity'.” *Id.*

Regarding the first step, “[t]he method employed in the commission of both [the charged and uncharged] crimes must be...unique,” not simply “similar[.]” *State v. Smith*, 106 Wn.2d 772, 777 (1986) (internal citation omitted). “There must be something distinctive or unusual in the means employed in such [uncharged] crime[] and the crime charged.” *Id.* (internal citation omitted). The *Smith* court found “few, if any distinctive or unique characteristics shared in common between the burglaries and rapes” at issue in that case. *Id.* at 779. Specifically, the *Smith* court noted “several general similarities...with respect to time, manner and location;” the presence of a “leather jacket and gloves” worn by the perpetrators while “committing the crimes;” and the “not unusual, let alone unique” “mode of entry, through a door or window” “might have been as much due to coincidence as to modus operandi.” *Id.*

Similarly, where two uncharged burglaries and one charged burglary “took place in the early morning hours at a retail store” in which “a van was used to transport stolen merchandise” and where “the van left the scene when police arrived” and “[t]he passenger...left the van and fled

on foot” and “a suspect was found concealed near the place where the passenger was seen to leave the van” were found “similar,” but not “distinctive or unusual” enough to be considered “unique.” *State v. Colvin*, 50 Wn. App. 293, 298 (1988).

Here, the trial court found similarities between the three uncharged and one charged burglaries. Specifically, the trial court noted the burglaries all occurred “very close in time in Yakima City proper.” RP 113. The trial court also noted each burglary involved “a remote control extricated from a vehicle parked in a driveway and then used as a mechanism of entry into the garage initially and then potentially into a home.” *Id.* Finally, the trial court found “a vehicle was taken as part of the action on the 19<sup>th</sup>, the 21<sup>st</sup> and the 23<sup>rd</sup>.” *Id.* The trial court concluded “similarities in...modus operandi” were present. RP 114.

However, the trial court did not find these similarities to establish “uniqueness,” or were “unusual” or “distinctive.” Rather, the trial court, in finding the first step met, held

[T]his case isn't as if they left a signature red rose on the pillow in the home, but on the spectrum [of] unrelated to – related, the methodology used to gain access is more consistent than inconsistent.

RP 114. By using a “more consistent than inconsistent” standard, rather than a uniqueness standard, the trial court abused its discretion by failing to adhere to the requirements of ER 404(b).

Furthermore, the trial court's ruling was based upon the State's offer of proof, which was misleading in at least two respects. First, the burglary from December 21, which was the only burglary charged, did *not* involve the theft of a motor vehicle or tools. RP 167. Moreover, although the burglary from December 21 did involve accessing the garage, and the garage was accessible by way of a “remote,” no evidence was introduced that the remote was *actually used* to access the garage on this occasion. *See* RP 167-68, 174. Finally, there was no evidence the burglary on December 28 involved accessing a garage or involved the use of a remote. *See* RP 132, 139, 144-45.

Because the trial court employed the wrong standard for assessing how similar the charged and uncharged burglaries were in admitting the evidence of the uncharged burglaries under the identify exception to ER 404(b), and because the State's offer of proof represented the number of similarities, the trial court erred in admitting this evidence under the identity exception.

**b) Evidence of uncharged burglaries not admissible under *res gestae* exception to ER 404(b).**

Evidence of other crimes, wrongs or acts may be admissible if it is “relevant and necessary to prove an essential element of the crime charged.” *Tharp*, 27 Wn. App. at 204. This “‘res gestae,’ or ‘same transaction,’ exception” allows “evidence of other crimes to complete the story of happenings near in time and place.” *Id.* (internal citation omitted). To be admissible under “res gestae” exception, the other crimes must be “an inseparable part” of the crime charged. *State v. Trickler*, 106 Wn. App. 727, 734 (2001).

The *Trickler* court found, where the defendant was charged with one count of “possession of [a] stolen credit card,” evidence about “missing surgical equipment, a seat to a Mustang automobile, an antique safe, and tools,” as well as a “missing pocketknife,” was separable, and therefore inadmissible under the *res gestae* exception, even though all the items were found at the same time and in the same places by law enforcement. *Id.* at 730, 733-34.

Furthermore, allowing a jury to hear evidence consisting of “superfluous information” may be “highly prejudicial.” *Id.* at 734. Where the State “introduce[s] evidence of...allegedly stolen evidence (for which [the defendant] is not charged) in order to give the jury a complete picture

of the events leading to the discovery of the stolen” property for which the defendant is charged, “[i]n practice...the jury [is] left to conclude [the defendant] is a thief.” *Id.*

Finally, the “evidence [of the uncharged crimes] must clearly connect the defendant with the other crime.” *Tharp*, 27 Wn. App. at 203. The State must prove by “a preponderance of the evidence” “the defendant's connection” to “admissible collateral crimes.” *State v. Tharp*, 96 Wn.2d 591, 593 (1981).

Here, Mr. Harlan was charged with “residential burglary” involving “the residence of Cresencio Montesdeoca [sic]” that was alleged to have occurred “[o]n or about December 21, 2015”; “possession of a stolen motor vehicle” involving “a red Pathfinder” that was “own[ed]” by “Kenneth Anderson” that was alleged to have occurred “[o]n or about December 29, 2015”; and “possession of stolen property” involving a “Toyota Tacoma car key” that was alleged to have occurred “[o]n or about December 29, 2015.” CP 6-7.

Regarding the December 19, 2015 event, the State's written offer of proof indicated that on that date a “red Nissan [sic] Pathfinder sport utility vehicle (SUV)” was “stolen” from a “driveway.” CP 53. At the same time, the residence to which that driveway was associated “was burglarized” and “various tools were stolen.” The State supplemented its

offer of proof orally to indicate that this “red Pathfinder” the same vehicle “driv[en]” by “Mr. Harlan.” RP 30.

The State bore the burden at trial of establishing Mr. Harlan possessed a vehicle that was stolen, and that Mr. Harlan knew it was stolen. CP 113. Certainly, admission of evidence of the motor vehicle theft itself meets the “inseparability” requirement of the res gestate exception. However, the burglary and theft of tools are not inseparable from the possession of stolen motor vehicle charge in this case. Because the vehicle was in the “driveway,” the theft was not necessarily connected to any burglary or theft of any other property. Therefore, the trial court erred in admitting the evidence of the collateral burglary on December 19 under the res gestate exception.

Regarding the December 23, 2015 event, the State's written offer of proof indicated that on that date, “a 2014 Toyota Tacoma [was] stolen” from a “driveway.” CP 53. At the same time, the residence connected to the driveway was “burglarized,” and “[t]ools [and] computer equipment...were stolen.” *Id.* And “a car key...[that] operate[d] the 2014 Toyota Tacoma stolen in the December 23...burglary” was “[l]ocated in [Mr. Harlan's] front pants pocket” on December 29. CP 53-43. The State supplemented its offer of proof orally by indicated “the keys to that 2014 Tacoma were in the garage” and were also stolen. RP 28.

The State bore the burden at trial of establishing Mr. Harlan possessed a key that was stolen, and that Mr. Harlan knew it was stolen. CP 118. Certainly, admission of evidence of the theft of the key itself meets the “inseparability” requirement of the res gestate exception. Moreover, because, according to the offer of proof, the “keys” were located in the garage at the time of the theft, in contrast to the burglary on December 19, the burglary would also be arguably inseparable.

However, the State failed to meet its offer of proof by presenting any evidence that the key to the 2014 Toyota Tacoma were located in the garage at the time it was stolen. *See* RP 193-205. Therefore, evidence of the collateral burglary on December 23 should not have been admitted under the res gestate exception.

Furthermore, in contrast to the offer of proof, the evidence at trial failed to establish by a preponderance of the evidence Mr. Harlan's connection to either the December 19 or December 23 burglaries. As argued below, the State failed to introduce any evidence that Mr. Anderson's red Nissan Pathfinder *was* the vehicle Mr. Harlan was found crouched beside at the time of his arrest on December 29. And the State failed to introduce any evidence that Mr. Eakin's key to his 2014 Toyota Tacoma *was* the key in Mr. Harlan's pocket at the time of his arrest on December 29. Therefore, evidence of the collateral burglaries on

December 19 and 23 should not have been admitted under the res gestate exception.

Regarding the December 28, 2015 event, the State's written offer of proof indicated that on that date, a “maroon/red SUV type vehicle” was “involved with [a] burglary,” and that vehicle was “photograph[ed].” CP 53. And that on December 29, 2015, “police saw [Mr. Harlan] driving a vehicle matching the description of the red SUV involved in the burglary” on December 28. *Id.*

Certainly the evidence that the vehicle was being sought as part of an active, recent police investigation is relevant to explain the actions of Officer Levy. However, the specifics of that investigation are separable and superfluous. Just as the evidence of uncharged allegations of possessing stolen property was inadmissible in *Trickler*, even though it was those uncharged allegations that prompted law enforcement to investigate in the first place, the specific uncharged allegation of a burglary on December 28 was inadmissible under the res gestate exception to ER 404(b). Therefore, the trial court erred in admitting evidence of the collateral, uncharged burglary from December 28 under the res gestate exception.

**c) The trial court's erroneous admission of evidence of uncharged burglaries was harmful error.**

“An accused cannot avail himself of error as a ground for reversal unless it has been prejudicial.” *Smith*, 106 Wn.2d at 780. “Evidentiary errors under ER 404 are not of constitutional magnitude.” *Id.* (internal citation omitted). “Where the error is not of constitutional magnitude...error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Id.* (internal citation omitted).

Here, the evidence that a residential burglary even took place on September 21, 2015, let alone that Mr. Harlan was involved, was limited to one eyewitness.

That one eyewitness, Mr. Price, observed “a man taking things out of [a] garage and putting it into...[an] SUV” at “3 or 3:30 at night.” RP 174. However, the homeowner, Mr. Montes de Oca Torres did not testify about his residence being entered unlawfully, about any items being stolen, or about his whereabouts on December 21, 2015. *See* RP 166-68. Mr. Price described the SUV as a “90s-modeled, older-looking red SUV” and having a “spare tire that swung out on it which was really noticeable.” RP 179. Mr. Price described getting “a look” at the “man” loading things into the SUV. RP 176.

However, Mr. Price made these observations from a vehicle moving at 15-20 miles per hour. *Id.* He made these observations at about 3:30 AM, possibly having worked “8 a.m. to 3 p.m.” the day before, after having a “full day of activities” the day before, and while he was “tired.” RP 185-86. He could not recall the exact date on which he made these observations. RP 184. The only lighting were streetlights. RP 187. And when he looked at a photo montage, Mr. Price was only “80 percent sure” of his identification of Mr. Harlan. RP 191. Finally, Mr. Price never identified the red SUV he observed as being the same as the red SUV Mr. Harlan was crouched beside at the time of his arrest on December 29.

In short, the evidence of guilt of the residential burglary is distinctly underwhelming. Therefore, within reasonable probabilities, the outcome of the trial as to the burglary was materially affected by the trial court's erroneous admission of evidence of other burglaries. Thus, this Court should reverse the conviction for Count I, and remand for a new trial. Furthermore, for the reasons outlined below, the evidence was even more weak, if not non-existent, regarding the two possession charges. Therefore, this Court should, if it declines to reverse and dismiss those counts, reverse and remand for a new trial as to those counts as well.

**2. Insufficient evidence was admitted at trial that the vehicle Mr. Harlan was found crouched next to was stolen, and therefore his conviction of Count II, possession of stolen motor vehicle, should be reversed and dismissed.**

The due process clause of the Fourteenth Amendment mandates that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const., amend. XIV, § 1. In a criminal prosecution, “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). On an appeal from a criminal conviction, due process further guarantees a defendant the right to challenge the sufficiency of the evidence proffered by the government. *Jackson v. Virginia*, 443 U.S. 307, 314-16 (1979).

“In evaluating the sufficiency of the evidence, [appellate courts] review the evidence in the light most favorable to the State.” *State v. Ehrhardt*, 167 Wn. App. 933, 943 (2012) (citing *State v. Drum*, 168 Wn.2d 23, 34 (2010)). “The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* (internal citation omitted). “A claim of insufficient

evidence admits the truth of the State's evidence and all reasonable inferences therefrom.” *Id.*

“If the reviewing court finds insufficient evidence to prove [an] element, reversal is required.” *State v. Hickman*, 135 Wn.2d 97, 103 (1998). “Retrial following reversal for insufficient evidence is unequivocally prohibited, and dismissal is the remedy.” *Id.* (internal citation omitted).

“A person commits the crime of Possession of Stolen Motor Vehicle when he or she possesses a stolen motor vehicle.” CP 109. “Stolen means obtained by theft.” CP 112. To convict Mr. Harlan “of the crime of Possession of a Stolen Motor Vehicle in Count 2,” the jury would need to find “proved beyond a reasonable doubt,” *inter alia*, that “the defendant...received or retained or possessed or concealed or disposed of a...motor vehicle” *and* that the motor vehicle was “stolen.” CP 113.

An unpublished opinion of the Court of Appeals is instructive on what constitutes insufficient evidence that property is “stolen.” *See State v. Hansen*, No. 45961-2-II (Ct. App. Div. II Jul. 7, 2015); *see also* GR 14.1(a). In that case, the defendant was charged with “second degree trafficking in stolen property.” *Id.*, slip op. at 3. An element of that crime is that the property trafficked is “stolen.” RCW 9A.82.055(1); *see also id.*, slip op. at 13. The *Hansen* court—after excluding statements made by the

defendant under the *corpus delicti* rule, which is not at issue in this case— found the “evidence establishes only that [the defendant]...sold commonly available wire to a recycler at roughly the same time that [a witness] noticed the same kind of wire missing from [a] mill.” *Id.*, slip op. at 13. The *Hansen* court held “[v]iewing this evidence in the light most favorable to the State, no rational trier of fact could find beyond a reasonable doubt that [the defendant]...sold stolen wire.” *Id.*, slip op. at 14.

The present case is analogous to *Hansen*.

Officer Erin Levy testified that on December 29, 2016, she observed Mr. Harlan crouched next to a “maroon SUV with a sunroof” and a “big wheel on the back; the tire was attached to the back of the” vehicle. RP 132-33, 141. That maroon SUV was “very close to what [Officer Levy] had seen in the pictures” “provided” to her by the December 28 burglary victim. RP 132, 134. On December 28, when she first examined the pictures, Officer Levy believed the vehicle to have been an Isuzu Rodeo, and did not have a license plate. RP 144. Upon further inspection, Officer Levy opined the maroon SUV inspected on December 29 appeared to be the same vehicle as that depicted in the pictures from December 28. RP 139.

Officer Levy never testified to the jury that the maroon SUV was a Nissan Pathfinder, let alone the red Nissan Pathfinder that was stolen from

Kenneth Anderson from the Bristol Way address on December 19. *See* RP 130-152. Other than Officer Levy, no other law enforcement officer testified. Furthermore, Mr. Anderson's description of his vehicle only identified that it was a red Pathfinder; he did not the location of its spare wheel, or whether it had a sunroof. RP 155-57.

Mr. Anderson did testify that “Detective Yates showed [him] a picture [of his Pathfinder] that [Detective Yates] had from a security camera.” RP 159-60. Mr. Anderson also testified he “a couple of weeks” later, he went to “an address off of 47<sup>th</sup> Avenue” “about a mile [from his] house” where his Pathfinder was “in a carport maybe behind a house,” and that he spoke to a “woman police officer.” RP 160, 163. But Mr. Anderson did not testify precisely when or where he retrieved his Pathfinder such that the jury could have done more than speculate that his retrieval was somehow connected to Mr. Harlan's arrest on December 29, 2015. Indeed his testimony about timing makes it impossible, or at least implausible, (1) that the “security camera” “picture” Detective Yates showed him was the same “picture” Officer Levy obtained on December 28; and (2) that the “address off of 47<sup>th</sup> Avenue” was the Walnut street address where Mr. Harlan was arrested on December 29.

In short, the jury heard no evidence establishing the maroon SUV beside which Mr. Harlan was crouched on December 29 was the same

vehicle as Mr. Anderson's stolen Pathfinder. Moreover, the jury heard contrary evidence, including that Officer Levy believed the vehicle from the December 28 pictures to be an Isuzu Rodeo, and that Mr. Anderson retrieved his vehicle a “couple of weeks” after he was shown a security camera picture of his Pathfinder.

The evidence admitted at trial essentially established only that (1) a red SUV was stolen; and (2) Mr. Harlan was found ten days later in possession of a red SUV. And just as the *Hansen* court found insufficient evidence, this Court should also find insufficient evidence that the vehicle found near Mr. Harlan at the time of his arrest was stolen. Therefore, this Court should reverse the conviction for possession of a stolen motor vehicle, and dismiss that charge.

**3. Insufficient evidence was admitted at trial that the key found in Mr. Harlan's pocket was stolen, and therefore his conviction on Count III, third degree possession of stolen property, should be reversed and dismissed.**

The evidence regarding the key found in Mr. Harlan's pocket was stolen is similarly non-existent.

After arrest, Officer Levy found “a Toyota key with a red key chain attached to it” in Mr. Harlan's pocket, which she “ultimately ended up getting to Detective Yates...for evidentiary purposes.” RP 142.

However, Officer Levy never testified to the jury the “Toyota key with a red key chain attached to it” she found in Mr. Harlan's pocket was the key stolen from Mr. Eakin on December 23. *See* RP 130-152.

Moreover, Officer Levy did not testify about any further particulars; such as whether the “red key chain” had any uniquely identifiable markings; whether the key was accompanied by a vehicle identification number, and if so what that number was; whether the key worked on any particular vehicle; or whether anyone claimed ownership of the key. *Id.*

Furthermore, although Mr. Eakin did testify he received his keys back from “Detective Yates” at some point, he did not “recall the exact date.” RP 197-98. And Detective Yates did not testify about from where he obtained the key he provided to Mr. Eakin, or when that transfer occurred. Mr. Eakin did testify the keys were attached to “a red bottle opener” bearing the phrase “Tide Insider Works” on it, and testified the keys were accompanied by a “multicolored laminated plastic” “tag” from “Toyota Care” “with the VIN” written thereon. *See* RP 204-05. However, Officer Levy did not testify about any of those details. Moreover, Officer Levy testified it was a single “key” in Mr. Harlan's pocket that was attached to the red key chain, not a “keys” as described by Mr. Eakin. *Compare* RP 142 *with* RP 205.

In short, the jury heard no evidence establishing the “key” Officer Levy found in Mr. Harlan's pocket was in fact the “keys” stolen from Mr. Eakin on December 23.

The evidence admitted at trial essentially established only that (1) a key to a Toyota Tacoma attached to a red bottle opener was stolen; and (2) Mr. Harlan was found six days later in possession of a Toyota key attached to a red key chain. And just as the *Harlan* court found insufficient evidence, this Court should also find insufficient evidence that the key found in Mr. Harlan's pocket at the time of his arrest was stolen. Therefore, this Court should reverse the conviction for possession of a stolen motor vehicle, and dismiss that charge.

#### E) CONCLUSION

No rational trier of fact could have found beyond a reasonable doubt from the evidence admitted at trial, viewed in the light most favorable to the State, that the vehicle Mr. Harlan was found crouched beside when he was arrested on December 29, 2015 was stolen. Therefore, this Court should reverse the conviction for Count II, possession of stolen motor vehicle, and dismiss that charge.

No rational trier of fact could have found beyond a reasonable doubt from the evidence admitted at trial, viewed in the light most favorable to the State, that the key found in Mr. Harlan's pocket when he

was arrested on December 29, 2015 was stolen. Therefore, this Court should reverse the conviction for Count III, third degree possession of stolen property, and dismiss that charge.

The trial court applied the wrong legal standards in finding the evidence of the uncharged burglaries admissible under both the “modus operandi” and “res gestae” exceptions to ER 404(b)'s presumption of inadmissibility. Specifically, the trial court applied a “more consistent than inconsistent,” rather than a “uniqueness,” standard when assessing the similarity between the charged and uncharged crimes. Moreover, the trial court neglected to assess whether evidence of the burglaries was separable from the evidence of motor vehicle thefts. The trial court, therefore, abused its discretion in admitting the evidence of the uncharged burglaries. Furthermore, that erroneous admission of ER 404(b) evidence was prejudicial. Therefore, this Court should reverse the conviction for Count I, residential burglary, and remand for a new trial.

DATED this 31<sup>st</sup> day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT'S BRIEF was emailed on this 31<sup>st</sup> day of October, 2016 to counsel for Respondent, Tamara Hanlon at [tamara.hanlon@co.yakima.wa.us](mailto:tamara.hanlon@co.yakima.wa.us); and was mailed, postage prepaid, on this 31<sup>st</sup> day of October, 2016 to Appellant as follows:

Rodney L. Harlan  
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c/o Washington State Penitentiary  
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Walla Walla, WA 99362

/s/ Christopher Taylor \_\_\_\_\_  
Christopher Taylor