

FILED
Feb 17, 2017
Court of Appeals
Division III
State of Washington

NO. 34497-5-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RODNEY L. HARLAN, Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT	6
A. THE COURT’S DECISION TO ADMIT EVIDENCE OF PRIOR UNCHARGED BURGLARIES WAS A PROPER EXERCISE OF DISCRETION	6
B. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS	18
IV. CONCLUSION.....	25

TABLE OF AUTHORITIES

CASES

<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)	18
<i>State v. Bonner</i> , 21 Wn. App. 783, 587 P.2d 580 (1978)	11
<i>State v. Bowen</i> , No. 47286-5-II (Ct App. Div. II Aug. 16, 2016) (unpublished).....	12-3
<i>State v. Briejer</i> , 172 Wn. App. 209, 289 P.3d 698 (2012).....	10-11
<i>State v. Darden</i> , 145 Wn.2d 612, 621 41 P.3d 118 (2002).....	10
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	19
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	13
<i>State v. Garcia</i> , 20 Wn. App. 401, 579 P.2d 1034 (1978).....	19
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	19
<i>State v. Green</i> , 94 Wash. 2d 216, 616 P.2d 628 (1980).....	18
<i>State v. Jackson</i> , 62 Wn. App. 53, 813 P.2d 156 (1991)	19
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	14
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007)	6
<i>State v. McBride</i> , 74 Wn.App. 460, 873 P.2d 589 (1994)	17
<i>State v. Olsen</i> , 70911-9-I (Ct App. Div. I January 20, 2015) (unpublished).....	11,13,17
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	11
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982)	10
<i>State v. Schaffer</i> , 63 Wn.App. 761, 822 P.2d 292 (1991).....	14
<i>State v. Stubsjoen</i> , 48 Wash. App. 139, 738 P.2d 306 (1987)	6
<i>State v. Sublett</i> , 156 Wn. App. 160, 231 P.3d 231 (2010).....	14
<i>State v. Tharp</i> , 27 Wn. App. 198, 616 P.2d 693 (1980)	6-7,14
<i>State v. Tharp</i> , 96 Wn.2d 591, 637 P.2d 961 (1981)	15
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	19

OTHER AUTHORITIES

5 Karl B. Tegland, <i>Washington Practice: Evidence</i> § 115, at 398 (3d ed.1989).....	14-5
--	------

RULES

ER 401 10
ER 404(b)..... 10,14

JURY INSTRUCTIONS

WPIC 77.11..... 23
WPIC 77.21..... 19-20

I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

- A. Was the court's decision to admit evidence of prior uncharged burglaries a proper exercise of discretion?
- B. Was there sufficient evidence to support the convictions?

II. STATEMENT OF THE CASE

The appellant, Rodney L. Harlan, was charged in count one with residential burglary, for unlawfully entering the dwelling of Cresencio Montes de Oca at 1304 Hamilton Avenue. CP 6. In count two, he was charged with possessing a stolen vehicle, a red Nissan Pathfinder belonging to Ken Anderson. CP 6. And in count two, he was charged with third degree possession of stolen property for possessing a Toyota Tacoma car key belonging to Andrew Eakin. CP 7. The charges stemmed from the following facts:

On December 20, 2015, Kenneth Anderson called the police because he noticed that his Nissan Pathfinder was gone from his driveway at 5502 Bristol Way in Yakima. RP 153, 155, 159. His SUV had been parked outside his garage on the evening of the 19th and had an automatic garage door opener on the sun visor. RP 156-7. He did not give anyone permission to drive his vehicle. RP 157, 161. Items were also missing

from inside his garage including a drill press, jumper cables, and other tools. RP 158.

Detective Yates later showed him a photo that he had from a security camera and he asked if it was his vehicle and Mr. Anderson said that it was. RP 159-60. About a few weeks later, the police called him and told him that they had his SUV stopped a mile or two away from him at an address off of 47th Avenue. RP 160. The SUV was sitting in a carport behind a house. RP 160. Mr. Anderson went to the location and noticed that his Pathfinder had its fuel door open and the gas cap was missing. RP 160-1. He identified the SUV as his and the same one stolen from his house on the evening of December 19th or early morning of December 20th. RP 160. He put his key in it and started it up. RP 161. He noticed that the gas gauge was below empty. RP 161, 163.

On or about December 21, 2015, Trent Price contacted the police about a red SUV parked about one block away outside of a house at 3 or 3:30 in the morning. RP 174-5. He was driving home when he turned onto Hamilton Avenue and saw a man taking things from the garage and putting them into the older red SUV. RP 174-5, 189. Mr. Price was 10 to 15 feet from the man as he drove by. RP 187. The SUV had a spare tire that swung out on it which was really noticeable. RP 175, 179, 189. The SUV looked out of place to him because there were no lights on while the

man was taking stuff out of the garage. RP 176. He saw the man walk from the vehicle to the garage multiple times. RP 178, 188. Mr. Price identified Harlan in a photomontage and in court as the man he saw taking items from the garage. RP 177, 180-3. Crescencio Montes de Oca Torres, who lives at 1304 Hamilton Avenue in Yakima does not know Harlan never gave Harlan permission to be in her garage. RP 166-8.

On December 23, 2015, Andre Eakin had his 2014 Toyota Tacoma truck stolen while it was parked in his driveway directly in front of his garage. RP 194-5. He never gave anyone permission to drive his Tacoma. RP 195. His garage door opener was in his truck. RP 196. He discovered things missing from his house but there were no signs of a forced entry. RP 196. A day or two later, his Tacoma was found after being ditched in a police chase. RP 198, 201. He identified the truck as his. RP 202-3. He used a spare set of keys to take his vehicle home. RP 204.

On December 29, 2015, Officer Erin Levy, who was on patrol for the City of Yakima, saw a red SUV that matched the suspect vehicle involved in a burglary the day before. RP 131-4, 145. What caught her eye was the color of the SUV and the tire on the back. RP 146. She noticed that the sole driver was wearing a dark hoodie jacket. RP 135, 150. She tried to get the license plate but the suspect drove down a long

driveway. RP 136, 149. Officer Levy continued past the driveway and did a U-turn. RP 136. As she drove back, she saw the SUV parked in a stall of a carport and saw a subject in dark hoodie standing outside the driver's side door of the SUV. RP 136-7, 149. No one else was seen around the vehicle. RP 137.

Officer Levy called for backup and Officer Irwin arrived. RP 138. They walked up to the SUV and discussed how everything about the SUV matched the SUV involved in a burglary the day before. RP 139. The hood of the SUV was up and there was a gas can next to the "gas side" of the SUV. RP 139. Officer Levy walked to the door of the house, identified as 401 South 47th Avenue, to see if anyone was home but no one was there. RP 140-1, 143, 151, 209. As she did so, the officers discovered the defendant, Harlan, hiding by a Volkswagen that was also parked in the carport. RP 141. Harlan was wearing a dark hoodie jacket and was crouched down by the wheel well. RP 141, 151. Harlan claimed to be looking for a friend, David Nediffer. RP 142.

The homeowner, who was out of town at the time, was Tawnya Engle. RP 208-9. Her carport at 401 South 47th holds two vehicles, including her husband's '98 Volkswagen Bug. RP 209. When she returned from being out of town, she knew something was not right because items were out of place and she saw two gas cans in addition to

hers. RP 212-3. Her husband found a set of altered or filed-down keys and gloves under the fender well of their Volkswagen. RP 213-4. She does not know Harlan or anyone with the last name of Nediffer, and never gave Harlan permission to be on her property or to have access to her Volkswagen. RP 210, 214-15.

Harlan was arrested. RP 142. After his arrest, Officer Levy removed all property from Harlan's person and found a Toyota key with a red key chain attached to it, and another set of random keys. RP 142. Officer Levy gave the keychain to Detective Yates for evidentiary purposes. RP 143. Detective Yates called Mr. Eakin about his missing set of keys. RP 197-9, 204. The keys had a red bottle opener from Tide Insider Works, and a Toyota Care tag, with the VIN number to his truck on it. RP 200, 205. Mr. Eakin went to the Yakima Police Department and identified the keys. RP 198, 200. He confirmed the key worked on his truck by starting it up. RP 199.

Harlan was convicted at trial of residential burglary, possession of stolen motor vehicle, and third degree possession of stolen property. CP 137. He was sentenced to 84 months in prison. CP 139.

This appeal followed.

III. ARGUMENT

A. THE COURT’S DECISION TO ADMIT EVIDENCE OF PRIOR UNCHARGED BURGLARIES WAS A PROPER EXERCISE OF DISCRETION.

The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse. *State v. Stubsjoen*, 48 Wash. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wash. 2d 1033 (1987). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). A trial court also abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies an incorrect legal standard, or bases its ruling on an erroneous legal view. *Id.* at 284. Here, the trial court’s decision to admit evidence of prior uncharged burglaries was a proper exercise of discretion.

Prior to trial, the defense moved to exclude testimony regarding a burglary and stolen motor vehicle in “YPD incident numbers 15Y054312 (12-21-2015) and 15Y054602 (12-23-15).” CP 15-6. The State filed a motion to admit 404(b) evidence. CP 52-56. The State argued that evidence of three prior uncharged burglaries was necessary for a complete description of the crime charged under *State v. Tharp*, 27 Wn. App. 198,

616 P.2d 693 (1980). CP 54. In addition, the State argued that the crimes, charged and uncharged, were part of common scheme or plan. CP 54.

A motions hearing was held prior to trial. During the hearing, the State argued that all of the incidents were part of the *res gestae* of the charged crimes. CP 30-1. Specifically, the prosecutor argued that the incidents were closely related in time and occurrence, were similar, and were related both to the defendant and the red SUV. CP 30. The State also argued that the evidence was admissible to show a unique *modus operandi* in that the suspect committed burglaries by breaking into a car parked outside the home, stealing the garage door opener from the car, and then using the garage door opener to access the home. CP 30.

In addition, the State argued that evidence of the December 28th burglary was needed to explain why Officer Levy was looking for a particular vehicle on December 29th – he “had pictures of it from the day before.” RP 105. The prosecutor argued that it was not bad acts evidence but rather, *res gestae* evidence. RP 106.

The trial court ruled that evidence of the prior uncharged burglaries was admissible and after a weighing on the record, that the evidence was relevant, and not unfairly or unduly prejudicial. RP 115. The court explained that the burglaries were similar, very close in time, and within a

relatively small area of Yakima City proper. RP 113-4. The court also discussed the connection or tie between the defendant and the burglaries:

If it wasn't for the tie – Mr. Harlan, the keys being related to the Toyota Tacoma from the December 23rd event, the tie of the neighbor purporting to be able to make an identification on December the 21st event, and the Nissan Pathfinder tie with the events of December 19 – then the relevance might not outweigh the prejudice and, but for that tie, I would likely have deemed it unduly prejudicial. But here with that tie, the relevance, in my opinion, outweighs the prejudice, and for those reasons I believe it's not only relevant, but admissible under the methodology of *Herzog* and the relevance versus prejudicial balancing test the trial court is asked to go through on each case.

RP 116.

At trial, Ken Anderson testified about the burglary occurring late on December 19 (or early on December 20). He testified that his Nissan Pathfinder, the stolen vehicle charged in count two, was taken from his driveway, along with a few items from his garage. RP 153, 155, 158-9. He later identified and recovered his vehicle when police officers found it on December 29th. RP 160-1.

Testimony about the December 23rd burglary was elicited from victim Andre Eakin. Mr. Eakin testified that his 2014 Toyota Tacoma was stolen from his driveway on December 23. RP 195. Harlan was convicted of possessing the stolen keys to that vehicle. CP 137.

And the following testimony was elicited from Officer Levy regarding the burglary report taken on December 28:

On the day before, on December 28th, I had taken a burglary report on 56th Avenue. The victim of the burglary had a surveillance system and caught a vehicle of the suspect who had burglarized the house. This victim provided me with pictures of a vehicle. And it was a very – it stood out. This vehicle was something that would stand out if I saw it. It was a maroon SUV with a sunroof. It had a big wheel on the back: The tire was attached to the back of the car. The pictures were from above, so it had snow on the top of the hood of the car that was visible.

...

I took the report on that call and got the pictures of the suspect vehicle, attached it to my report that I had turned in, and, and provided the pictures the next – well, the 29th in the morning. We talked about the car and to keep an eye out for it, and we had the pictures.

RP 132-3. On December 29, 2015, Officer Levy, who was on patrol for the City of Yakima, saw a red SUV that matched the one involved in a burglary the day before. RP 134. Officer Levy compared pictures from the burglary on the 28th to this SUV. She said everything matched and it was the car from the burglary the day before. RP 139, 145.

1. Evidence of the prior uncharged burglaries was admissible under ER 404(b).

Evidence Rule (ER) 404(b) governs admission of evidence of the defendant's other bad acts as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior bad acts are admissible only if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs any prejudicial effect. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. Put another way, evidence is relevant if a logical nexus exists between the evidence and the fact to be established. *State v. Briejer*, 172 Wn. App. 209, 225-6, 289 P.3d 698 (2012). Relevance is a very low bar. *State v. Darden*, 145 Wn.2d 612, 621 41 P.3d 118 (2002). Even minimally relevant evidence is admissible. *Id.*

Here, the prior burglaries were relevant to the background of the investigation. Courts have held that testimony establishing the background to the investigation which ultimately led to the defendant's arrest is relevant evidence. *See State v. Briejer*, 172 Wn. App. 209, 226, 289 P.3d 698 (2012), *State v. Bonner*, 21 Wn. App. 783, 793, 587 P.2d 580 (1978). Thus, if the evidence merely establishes the background to the investigation, without more, it may be relevant. *Id.*

Prior misconduct evidence may also be highly probative and relevant to prove a required mental state. In *State v. Powell*, 126 Wn.2d 244, 262, 893 P.2d 615 (1995), the court held that prior misconduct evidence is necessary to prove intent when intent is at issue or when proof of the doing of the charged act does not itself conclusively establish intent. For example, in *State v. Olsen*, 70911-9-I (Ct App. Div. I January 20, 2015) (unpublished), the defendant was charged with voyeurism at an espresso stand. *Id.*, slip op. at 3. At trial, the court admitted an early uncharged incident at a different espresso stand less than two miles away and just a few hours before the charged crime. *Id.*, slip op. at 4. The court found that the prior incident was highly probative and relevant to proving that the defendant *knowingly* viewed the victim for the purpose of arousing or gratifying his sexual desire. *Id.*, slip op. at 8.

Similarly, in *State v. Bowen*, No. 47286-5-II (Ct App. Div. II Aug. 16, 2016) (unpublished), evidence of a burglary was deemed relevant to the charge of possession of stolen property. In *Bowen*, the defendant was charged with possession of a stolen vehicle, a Ford Explorer, and second degree possession of stolen property. *Id.*, slip op. at 5. The Explorer was present during the burglary and ransacked between February 24 and March 5, 2014. *Id.*, slip op. at 9. The defendant was caught in the Explorer on March 8, 2014. *Id.*, slip op. at 2. The court held that “...establishing that the Ford Explorer and items found within the vehicle were in fact stolen items was necessary and evidence that went to proving this element was relevant.” *Id.*, slip op. at 20-1. As such, evidence of the burglary was relevant. *Id.*, slip op. at 20. The court stated that the evidence also went to Bowen’s knowledge that the the vehicle and items were stolen. *Id.*, slip op. at 21.

Here, the trial court’s decision was a proper exercise of discretion. Regarding counts two and three, the State had to prove that the items Harlan possessed were in fact stolen. Both of the items were stolen during two separate burglaries. Evidence regarding the December 19th burglary was necessary to show that the motor vehicle was in fact stolen. The events on December 19 and 20 were necessary to fully inform the jury of the history of the stolen motor vehicle charge as well as to completely

describe that charge. Similarly, evidence of the uncharged December 23 burglary was necessary to prove that the Toyota keys were in fact stolen. This testimony was relevant to the background of the investigation. And like *Bowen* and *Olsen*, the testimony also went to Harlan's knowledge that the vehicle and keys were stolen.

During the pretrial motions, the State also argued that the evidence was admissible under common scheme or plan. As explained in *State v.*

DeVincentis:

Admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. Such evidence is relevant when the existence of the crime is at issue. Sufficient similarity is reached only when the trial court determines that the "various acts are naturally to be explained as caused by a general plan."

150 Wn.2d 11, 21, 74 P.3d 119 (2003) (citations omitted). The prior acts must be "(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial." *Id.* at 17.

Here, as noted by the trial court, there was substantial similarities between the uncharged burglaries and the charged burglary, the one occurring on December 21. RP 113-14. In addition, the purpose of the

admission was to show a common plan or scheme and relevant to prove elements of the crimes charged. The court balanced the probative value of the evidence with its prejudicial effect on the record. *See* RP 115-6. As such, the trial court did not abuse its discretion when it admitted evidence under ER 404(b) because it applied the law and had tenable grounds and reasons for its decision.

2. Evidence of the prior uncharged burglaries was admissible under the res gestae exception.

In addition to the exceptions identified in ER 404(b), Washington courts have recognized that “res gestae” or “same transaction” evidence may be admissible to “complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980)). Res gestae evidence is not evidence of unrelated prior criminal activity but rather part of the crime charged. *State v. Sublett*, 156 Wn. App. 160, 196, 231 P.3d 231 (2010). This exception permits the admission of evidence “if it is so connected in time, place, circumstances, or means employed that proof of such other misconduct is necessary for a complete description of the crime charged, or constitutes proof of the history of the crime charged.” *State v. Schaffer*, 63 Wn.App. 761, 769, 822 P.2d 292 (1991) (quoting 5 Karl B. Tegland,

Washington Practice: Evidence § 115, at 398 (3d ed.1989). Courts admit res gestae evidence so that “a complete picture [will] be depicted for the jury.” *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). A defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmented version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant’s bad character. *Id.* at 697.

In *State v. Tharp*, the defendant was charged with second degree felony murder. *Id.* at 695. Although no direct evidence tied the defendant to the theft of a truck that was found two blocks away from the home of the murder victim, the court found that the State met its burden of demonstrating the defendant’s connection with the collateral crimes introduced into evidence. *Id.* at 696-7. The court stated that although circumstantial, there was substantial and clear evidence that the defendant took the truck and used it to get to the vicinity of the victim’s residence. *Id.* at 697.

Here, the State showed the connection between the December 20th and December 23rd burglaries to the charges in counts two and three. It completed the story of the crimes on trial by describing how the items were stolen to begin with. Very little information was admitted about

those two burglaries. Rather, just enough evidence was admitted to complete the story for the jury.

Regarding the December 19th burglary, Harlan's main argument is that "[b]ecause the vehicle was in the driveway, the theft was not necessarily connected to any burglary or theft of any other property." Appellant's Brief at 18. According to him, the analysis hinges entirely on where the vehicle was parked at the time of the burglary (in or outside the garage). The fact that the vehicle was in the driveway does not change the fact that it was taken in the course of the burglary and that the burglary completes the story for the jury.

Regarding the December 23rd burglary, Harlan's argument is that there was no evidence as to where Mr. Eakin's Toyota Tacoma key was before it was stolen. However, Mr. Eakin testified that after finding his truck gone, he noticed that stuff was missing from his house and his garage. RP 196. He said that later on Detective Yates called him about his missing keys. RP 197-9, 204. A reasonable inference that could be drawn from this testimony is that the keys were missing from his garage or house, the only two places that Mr. Eakin mentioned in his testimony.

As to the December 28th burglary, very little information was shared with the jury -- only where the burglary occurred and the fact that photos were taken of a suspect vehicle. It was clear from the testimony

that the only reason this burglary was being mentioned was to show why the officer focused her attention on Harlan on December 29th. This is a valid basis for admission of the evidence.

In *State v. McBride*, 74 Wn.App. 460, 873 P.2d 589 (1994), an officer testified that he witnessed what appeared to be three drug deals just prior to the drug delivery that was charged. Division Three held that there was no abuse of discretion in admitting the evidence. *Id.* at 464. The court stated that it was important for the jury to see the whole sequence of events and explained what attracted the officer's attention to the defendant. *Id.* And in *State v. Olson*, the court admitted evidence of a prior uncharged incident to explain why officers attempted to stop the defendant when they saw him. 70911-9-I (Ct App. Div. I January 20, 2015) (unpublished). Similarly, the December 28th burglary explained why Officer Levy contacted Harlan on December 29th – she suspected the vehicle was involved in the burglary the day before.

The appellant agrees that the fact that the SUV was sought as part of an active, recent police investigation is relevant to explain the actions of Officer Levy. Appellant's Brief at 20. However, Harlan claims that the specifics of the investigation were separable and superfluous. *Id.* But he fails to state what specifics were admitted that were superfluous. *See id.*

There was very little testimony admitted regarding the burglary on December 28th.

Assuming, for sake of argument, that there was any error in admission of evidence regarding the uncharged burglaries, the error was not prejudicial. There was overwhelming evidence in this case, including a completely neutral eyewitness who identified Harlan out of a photomontage and again in court. Then, when apprehended on 47th Avenue hiding in someone's carport, he was in possession of a stolen Nissan Pathfinder and a stolen Toyota Tacoma key. He then falsely claimed to be looking for a friend. He also left behind a set of shaved or altered keys at that location and a pair of gloves.

B. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS.

Harlan claims that there is insufficient evidence to support counts two and three. In reviewing a challenge to the sufficiency of the evidence, courts review the evidence in the light most favorable to the State to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wash. 2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The verdict will be upheld unless no reasonable jury could have found each element

proved beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 599, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The evidence is interpreted most strongly against the defendant. *Id.* Evidentiary inferences favoring the defendant are not considered in a sufficiency of the evidence analysis. *State v. Jackson*, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

Circumstantial evidence may be used to prove any element of a crime. *State v. Garcia*, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

1. POSSESSION OF STOLEN MOTOR VEHICLE

In count two, Harlan was charged with possessing a stolen red Pathfinder that belonged to Ken Anderson. CP 6.

WPIC 77.21 sets forth the only elements that the State must prove beyond a reasonable doubt:

To convict the defendant of the crime of possessing a stolen motor vehicle, each of

the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date), the defendant knowingly [received] [retained] [possessed] [concealed] [disposed of] a stolen motor vehicle;
- (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
- (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
- (4) That any of these acts occurred in the State of Washington.

Harlan claims that there was insufficient evidence to prove that the vehicle was stolen. Brief at 23. On December 20, Kenneth Anderson called the police because he noticed that his Nissan Pathfinder car was gone from his driveway. RP 155, 159. The car had been parked outside of the garage and had an automatic garage door opener on the sun visor. RP 156-7. He did not give anyone permission to drive his vehicle. RP 157, 161. A few weeks later, the police called him and told him that they had the Nissan stopped a mile or two away from him at an address off of 47th Avenue. RP 160. The vehicle was setting in a carport behind a house. RP 160. The Pathfinder had its fuel door open and gas cap gone. RP 160-1. Mr. Anderson identified the vehicle as his and found that the gas gauge was below empty. RP 161, 163. He put his key in it and started it up. RP 161.

Officer Levy testified that nine days after the burglary, on December 29, 2015, she was on patrol for the City of Yakima, saw a red SUV that matched the one involved in a burglary the day before. RP 131-4, 145. She noticed the the driver was wearing a dark hoodie jacket. RP 150. She tried to get the license plate and the SUV pulled into a carport. RP 136. Officer Levy then saw a subject in dark hoodie standing outside the driver's side door of the SUV. RP 137, 149. Officer Levy called for backup and Officer Irwin arrived. RP 138. They walked up to the car and discussed how everything about the SUV matched the SUV from the burglary the day before. RP 139. Officer Levy walked to the door of the house, identified as 401 South 47th Avenue, to see if anyone was home. RP 141, 143. As she did so, they found the appellant, Rodney Harlan, hiding by a Volkswagen that was also parked in the carport. RP 141. Harlan was wearing a dark hoodie jacket and was crouched down by the wheel well. RP 141, 151. Harlan claimed to be looking for a friend. RP 142. Harlan was arrested. RP 142.

The homeowner at 401 South 47th Avenue, who was out of town at the time, was Tawnya Engle. RP 208-9. Her carport holds two vehicles, including her husband's '98 Volkswagen Bug. RP 209. When she returned from being out of town, she saw two gas cans and knew something was not right. RP 212-3. Her husband found a set of filed-

down keys and gloves under the fender well of the Volkswagen. RP 213-4. She never gave Harlan permission to be on her property or to have access to her Volkswagen. RP 215.

This evidence, unrebutted at trial, supports any rational juror's determination beyond reasonable doubt that Harlan was in possession of a motor vehicle that had been stolen from Ken Anderson. He testified that his stolen red Pathfinder was recovered a few weeks later on 47th and returned to him by the police. He went to the scene on 47th and used his car keys to take possession of it. That testimony, combined with Officer Levy's testimony and Ms. Engle's testimony, is sufficient to prove that the SUV Harlan was driving, and found crouched next to at 401 S. 47th Avenue, was the same SUV stolen from Mr. Anderson on December 20th.

Harlan's argument is that "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." Appellant's Brief at 25-6. However, this testimony would have invaded for the province of the jury. The decision that the vehicle was stolen from Kenneth Anderson from a certain address was a decision for the jury to make. In addition, the State did not have to prove the make and model of the vehicle through Officer Levy in order to prove all the elements of the crime beyond a reasonable doubt. The jury

had sufficient evidence through all of the witnesses that testified that Harlan possessed a vehicle that was stolen from Ken Anderson.

2. THIRD DEGREE POSSESSION STOLEN PROPERTY

In count three, Harlan was charged with possessing a stolen Toyota Tacoma car key belonging to Andrew Eakin. CP 7.

WPIC 77.11 sets forth the only elements that the State must prove:

To convict the defendant of the crime of possessing stolen property in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date), the defendant knowingly [received] [retained] [possessed] [concealed] [disposed of] stolen property [not exceeding \$750 in value];
- (2) That the defendant acted with knowledge that the property has been stolen;
- (3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto; and
- (4) That any of these acts occurred in the [State of Washington] [City of] [County of].

The element being challenged in this case is the first one, that the property was stolen. Appellant's Brief at 27. Harlan claims that there was no evidence that the keys found on Harlan were in fact the key stolen from Mr. Eakin on December 23. *Id.* at 29.

The testimony at trial showed that on December 23, 2015, Andre Eakin had his 2014 Toyota Tacoma stolen. RP 194. It was parked in his driveway directly in front of his garage. RP 195. He never gave anyone permission to drive his Tacoma. RP 195. His garage door opener was in his truck. He discovered things missing from his house but there were no signs of a forced entry. RP 196. A day or two later, his Tacoma was found after being ditched in a police chase. RP 198, 201. He identified the truck as his. RP 302-3. He used a spare set of keys to take his vehicle home. RP 204.

Harlan was arrested on December 29, 2015. RP 142. Post-arrest, Officer Levy removed all the property on him and found a Toyota key with a red key chain attached to it and another set of random keys. RP 142. The keys were given to Detective Yates. RP 143. Mr. Eakin testified that within a week or week and a half of the theft, he got his other set of keys back from Detective Yates. RP 197-9, 204. The keys had a red bottle opener from Tide Insider Works, and a Toyota Care tag, with the VIN number to his truck on it. RP 200, 205. He confirmed the key worked on his truck. RP 199.

The testimony of Mr. Eakin, combined with the testimony of Officer Levy, was sufficient to prove beyond a reasonable doubt that Harlan possessed the Toyota Tacoma car key that was stolen from Mr.

Eakin. There is direct and circumstantial evidence that the stolen keys were found on Harlan, seized by Officer Levy, given to Detective Yates by Officer Levy, and finally, returned to Mr. Eakin by Detective Yates.

Harlan argues that “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.” Again, like Harlan’s previous argument, this testimony would have invaded the province of the jury. Officer Levy could not have testified to this without an objection. It was for the jury to decide if the key found was the key stolen from Mr. Eakin on December 23. And there was sufficient evidence through all of the State’s witnesses, for the jury to make that decision.

In this case, any rational trier of fact could have found all of the essential elements of the crimes charged beyond a reasonable doubt. As such, the convictions should be affirmed.

IV. CONCLUSION

In conclusion, the State asks that the court affirm Harlan’s convictions. The admission of prior uncharged burglaries was not a manifest abuse of discretion and the evidence was sufficient to support convictions.

Respectfully submitted this 17th day of February, 2017,

s/TAMARA A. HANLON
TAMARA A. HANLON, WSBA 28345
Senior Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on February 17, 2017, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Christopher Taylor at taylor@crtaylorlaw.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17th day of February, 2017 at Yakima, Washington.

s/Tamara A. Hanlon
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