

NO. 35168-8

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Appellant,

v.

SERGIO SAVAS MORENO,

Respondent.

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Appeal from Franklin County Superior Court  
Honorable Jacqueline Shea-Brown  
No. 16-1-50210-11

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OPENING BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ASSIGNMENTS OF ERROR ..... 1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

IV. STATEMENT OF CASE ..... 2

V. ARGUMENT ..... 5

    A. THE TRIAL COURT ERRED IN ALLOWING THE  
        ADMISSION OF OTHER CRIMES ..... 5

        1. LAW ..... 5

        2. ANALYSIS ..... 7

    B. INSUFFICIENT EVIDENCE WAS PRESENTED  
        TO SUBSTANTIATE A FINDING OF GUILT FOR  
        POSSESSION OF STOLEN PROPERTY ..... 8

        1. LAW ..... 8

        2. ANALYSIS ..... 9

VI. CONCLUSION ..... 10

**TABLE OF AUTHORITIES**

**Cases**

*Bailey v. Alabama*, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911) ..... 9

*Jackson vs. Virginia*, 443 U.S. 307, 320, 99 S.Ct. 2781 ..... 5, 9

*State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) ..... 8

*State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)..... 8

*State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) ..... 5

*State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997) ..... 8

*State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) ..... 8

*State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986)..... 6

*State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) ..... 8

*State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)..... 8

*State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013)..... 9

**Statutes**

RCW 9A.56.140..... 9

RCW 9A.56.160..... 9

**Rules**

ER 404(b)..... 1, 2, 5

## **I. INTRODUCTION**

Appellant, Sergio Savas Moreno, appeals a conviction for possession of stolen property after items were found in the back of a vehicle he was in with four other passengers. The trial court erred when it admitted: 1) evidence of other crimes which prejudicially painted Appellant as a criminal; 2) drug paraphernalia in the vehicle; 3) the criminal status of the other passengers; and 4) the nature of the burglary from whence the stolen property presumably came.

Furthermore, insufficient evidence was presented that Appellant knew the property was stolen. The only evidence of knowledge was that Appellant was physically in the vehicle, which was entirely circumstantial and clearly insufficient when balanced with the fact that Appellant voluntarily contacted law enforcement months later to ask for the property back. The judgment should be reversed.

## **II. ASSIGNMENTS OF ERROR**

- A. The trial court erred in allowing the admission of other crimes.
- B. Insufficient evidence was presented to substantiate a finding of guilt for possession of stolen property.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A.1. Whether the trial court failed to undergo a mandatory ER 404(b) analysis regarding the admissibility of other crimes.
- A.2. Whether the trial court erred in permitting the admission of the evidence that was prejudicial to Appellant.

B. Whether substantial evidence was presented that defendant knew the property was stolen when defendant in fact voluntarily telephoned law enforcement requesting the property back.

#### **IV. STATEMENT OF CASE**

Appellant was found guilty after a jury trial of one count of Possession of Stolen Property Second Degree. CP 27-40. Appellant and four other individuals were stopped for a traffic violation on December 10, 2015. The arresting officer noticed drug paraphernalia in the vehicle, discovered active warrants for other individuals in the vehicle, and eventually impounded the vehicle. During impound some days later, coins and collectibles were found in the back of the vehicle later identified by the victim as stolen property.

Improper evidence of other crimes was presented throughout the trial even over Appellant's defense counsel's objection.

The first witness, the arresting officer, spent a significant amount of time testifying about "other crime" evidence: the methamphetamine paraphernalia observed in the vehicle. The State presented multiple photographs of those items. VRP 42-50. No apparent connection was ever made between the drug paraphernalia and the stolen property; leaving it irrelevant except as "other crimes" evidence.

In fact, the prosecuting attorney used the very phrase from ER 404(b) "other crimes" in his question to the officer, whereupon defense counsel timely objected:

Q: As a result of your inquiry with the Moses Lake Police

Department did you obtain information regarding any other crimes that might have occurred?

MS. MAPES: Objection, your Honor. May we approach?

THE COURT: We can do a side bar.

(Heard at side bar:)

MS. MAPES: I'm objecting on the basis that anything he would testify to would be hearsay. I was never given discovery for it. I'm objecting on the basis that everything that he would say is hearsay. Additionally I was never given discovery about the Moses Lake Police report, so any of the -- any potential crimes that happened there, I don't have any discovery. I would object on the basis of that as well.

*See* VRP 53.

The court overruled the objection with little explanation:

THE COURT: I'll allow it and overrule the objection, given it's not for the truth of the matter asserted.

*See* VRP 54.

Later, the officer admitted that he misspoke when he stated earlier in testimony that the Appellant had a warrant out for another crime:

Q. Right. I believe upon further clarification you indicated he had a warrant, and I'm wondering if it was a misstatement?

A. I might have misspoke. He did not have a warrant at the time of the contact.

*See* VRP 74.

Defense counsel again objected to the victim testifying about the burglary of his home, a crime Appellant was not charged with. VRP 86.

The court again overruled with little explanation:

THE COURT: So I understand why defense counsel brings this to the Court's attention. However, the nature of Mr. Lybbert's testimony is really, if not explicit, implicitly telling that someone took his property. And it would be an easy conclusion for the jurors

to draw that that's true, that his property was taken from his home, which in essence is a burglary.

So I think with that, and, Miss Mapes, your ability to cross examine this witness as to any knowledge he may have as to your client's involvement I think will essentially address the issues that you've raised from a concern of prejudice.

*See* VRP 86-87.

While the other individuals in the vehicle had been charged with possession of stolen property, the Appellant was not charged until 2 months later when he called law enforcement and asked for the property in the vehicle back. VRP 72-73. Appellant even went so far as to give the officer the case number of the incident. *Id.*

The officer testified that there was “[n]o direct evidence” the Appellant was involved with the stolen property. VRP 74.

In closing, the State again referenced other crimes:

As a result three individuals are arrested, not for possessing stolen property but for outstanding warrants.

*See* VRP 111.

And at that point they're not sure what they have, but they collect the items and they have put out a broadcast in the area to determine if anyone's had any recent burglaries, that certain items might have been stolen such as they found. And sure enough they get a hit out of Moses Lake Police Department. And they were indicating that a Mr. Lybbert had his home burglarized and many of his collectible items had been stolen.

*See* VRP 118.

The State acknowledged that there was not enough information to charge the Appellant until he called the police:

And in this case the police officers didn't have enough of a case to charge the defendant with unlawful possession of stolen property until he made the phone call, until he began describing the property

that was stolen from Moses Lake, and then not only described the property but claimed it as his own. That was the final piece. That's what proves this case beyond a reasonable doubt. That's why you need to return to this jury room with a guilty verdict. Thank you.

*See* VRP 118.

## V. ARGUMENT

### A. THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF OTHER CRIMES

#### 1. LAW

Under ER 404(b), the admissibility of evidence of ‘other crimes’ is an act scrutinized carefully by the courts, and under clearly established and rigorously applied standards; neither of which happened here.

ER 404 (b) addresses the use of evidence of other crimes at trial:

Other Crimes, Wrongs, or Acts. 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.

Appellate courts review the trial court’s interpretation of ER 404(b) *de novo* as a matter of law. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). If the trial court interprets ER 404(b) correctly, appellate courts review the trial court's ruling to admit or exclude evidence of misconduct for an abuse of discretion. *Id.* A trial court abuses its discretion where it fails to abide by the rule's requirements. *Id.*

A trial court must undergo a thorough relevancy analysis at trial before evidence of other acts can be admitted. *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). If the court fails to undergo this analysis, an error of law has been committed. *Id.*

The requirements of this analysis are set forth below from *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986):

In *Saltarelli*, this court defined the analysis a trial court must employ before admitting evidence of other crimes. First, the court must identify the purpose for which the evidence is to be admitted. *Saltarelli*, 98 Wash.2d at 362, 655 P.2d 697. Second, the court must determine the relevancy of the evidence. In determining relevancy, (1) the purpose for which the evidence is offered “must be of consequence to the outcome of the action”, and (2) “the evidence must tend to make the existence of the identified fact more ... probable.” *Saltarelli*, at 362–63, 655 P.2d 697. Third, after the court has determined relevancy, it must then “balance the probative value against the prejudicial effect ...” *Saltarelli*, at 363, 655 P.2d 697. As stated in *State v. Bennett*, 36 Wash.App. 176, 180, 672 P.2d 772 (1983), “[i]n doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.

In *Smith*, the Washington Supreme Court stressed the substantial danger posed by evidence of other crimes:

ER 403 requires exclusion of evidence, even if relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. See *State v. Goebel*, supra. As stated in *State v. Coe*, 101 Wash.2d 772, 780–81, 684 P.2d 668 (1984), “[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases<sup>1</sup>, where the potential for prejudice is at its highest.”

*Smith* is factually similar to the present case, in that evidence of burglary was also offered at trial, when the defendant was not charged with that crime. The court made it clear that it must undergo the analysis set forth above to determine the relevancy of the burglary evidence: “As stated above, *Saltarelli* requires that we identify the purpose for which the burglary evidence was offered.”

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<sup>1</sup> The heightened consideration mentioned here in sex crimes does not obviate application of the same rule in all cases.

CrR 7.5 provides one of the grounds for a new trial:

(a) The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:...(6) Error of law occurring at the trial and objected to at the time by the defendant.

## 2. ANALYSIS.

Here, the admission of the evidence of drug paraphernalia in the vehicle, the active warrants for the other individuals in the vehicle, the burglary of the home, and the victim's testimony about the burglary of the home were all irrelevant to whether the defendant had and knew he had stolen property. In fact, that evidence was highly prejudicial because it simply painted defendant as a criminal engaged with other criminals. Defense counsel properly objected twice, and twice the Court failed to undergo the three-part test outlined in *Smith*. The court's first reasoning that the evidence was admissible because it was "not for the truth of the matter asserted" is not the applicable inquiry when the objection is based on prejudice to the defendant. The court's second reasoning similarly failed to analyze the prejudice to the defendant; instead the court improperly instructed defense counsel to obviate any prejudice by asking the witness certain questions:

So I think with that, and, Miss Mapes, your ability to cross examine this witness as to any knowledge he may have as to your client's involvement I think will essentially address the issues that you've raised from a concern of prejudice.

*See* VRP 86-87.

Each of these errors of law significantly affected a substantial right of the defendant and are reversible error.

**B. INSUFFICIENT EVIDENCE WAS PRESENTED TO SUBSTANTIATE A FINDING OF GUILT FOR POSSESSION OF STOLEN PROPERTY**

1. LAW

In determining the sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A defendant claiming insufficiency of the evidence “admits the truth of the State’s evidence.” *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). It makes no difference whether the evidence is direct, circumstantial, or a combination of the two, so long as the evidence is sufficient to convince a jury of the defendant’s guilt beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

Circumstantial and direct evidence are to be considered equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

“[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). A “modicum ” of evidence does not meet this standard. *Jackson vs. Virginia*, 443 U.S. 307, 320, 99 S.Ct. 2781.

*Bailey v. Alabama*, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911) (“To justify conviction, it was necessary that this intent [to injure or defraud] should be established by competent evidence, aided only by such inferences as might logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.”).

RCW 9A.56.160 - Possessing stolen property in the second degree—Other than firearm or motor vehicle:

(1) A person is guilty of possessing stolen property in the second degree if:

(a) He or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value; or

RCW 9A.56.140 - Possessing stolen property—Definition—Presumption.

(1) "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

## 2. ANALYSIS

Here, insufficient evidence supported a finding of guilt for the crime of possession of stolen property. The only circumstantial evidence that Appellant had knowledge that the property was stolen was that he was the

driver of the vehicle that contained it. The officer admitted there was no direct evidence. VRP 74. In fact, the evidence at trial supported the conclusion that Appellant lacked knowledge, when he voluntarily telephoned law enforcement to ask for the property back. It is difficult to reason why Appellant would willingly submit himself to law enforcement scrutiny with this request, two months after the other passengers had been charged. There was no evidence submitted that Appellant had any connection to the burglary. That Appellant had knowledge of the stolen property was precisely the mere “speculation” and “arbitrary assumption” prohibited by the caselaw above.

## **VI. CONCLUSION**

The judgment and sentence should be reversed.

Respectfully submitted this 8th day of September, 2017.

*/s/ Edward Penoyar*

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