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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY POOL, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. ISSUES PRESENTED

1. Where the defendant failed to request that the alleged prior felony convictions of Mr. Wolf be specifically “named” during trial, should this Court exercise its discretion and decline review of the defendant’s claim because the defendant has not demonstrated any error under RAP 2.5(a)?

2. Should the defendant have been permitted to use the “named” felony convictions of Mr. Wolf to establish that Mr. Wolf and Mr. Smith had the propensity to commit the charged crime of first degree robbery?

3. Can the defendant change evidentiary theories on appeal arguing for the first time that Mr. Wolf’s putative convictions should have been “named” for the jury to advance an alternative suspect theory at trial?

4. Did the deputy prosecutor commit misconduct during closing argument if he relied on the DNA scientist’s “likelihood ratio” to argue a similar algebraic analogy of “tossing a coin” to illustrate the scientist’s statistical conclusion?

II. STATEMENT OF THE CASE

Procedural facts.

Jeffrey Pool was charged by information in the Spokane County Superior Court with two counts of first degree robbery, four counts of second degree assault, and four counts of first degree kidnapping for two

take-over robberies of the same store in 2015 and 2016. CP 1-2. He was subsequently convicted, as charged, by a jury and this appeal timely followed.

Substantive facts.

May 2015 incident.

On May 20, 2015, Tom Busby was an assistant manager for the Dollar Tree store located at 2424 First Street in Cheney. RP 102-05, 369. At 9:00 p.m., Mr. Busby was in the office and in the process of closing out his till when he heard a noise. RP 112-13. As Mr. Busby opened the door to the office, he and other employees were suddenly charged at by a man pointing a pistol.¹ RP 113, 219, 232. Several employees stood behind Mr. Busby, including Mikaela Norrish. RP 113, 218. The man with the pistol, Mr. Pool, appeared apologetic, calm, remarked he did not want to hurt anyone, and was in the store to “rob” the employees. RP 114-15, 223. At one point, Mr. Pool remarked: “Don’t make me use the gun.” RP 115. Mr. Pool then demanded the money from the tills which had been brought into the office. RP 115, 220-21. Mr. Pool also collected the employees’ phones and placed them into the safe. RP 115-16, 220-22, 233. Thereafter,

¹ Mr. Busby, who was retired from the Navy after twenty years of service and familiar with .9 millimeter pistols and .45 caliber pistols, believed the firearm used during the robbery was genuine. RP 103, 114. It looked like a Glock pistol. RP 119, 219-20. Ms. Norrish also stated it was an all-black handgun. RP 220.

Mr. Pool rummaged through the tills and the safe and took the money. RP 116-18, 221. Mr. Pool then marched the employees to the front door, so that it could be unlocked, informed the employees he did not want to shoot them, and ordered them to walk to the restroom and not look backward. RP 120-21. Mr. Pool took approximately \$2,500. RP 123. The employees were very shaken during and after the event. RP 121, 125-26, 223-25, 231.

Mr. Pool had on a dark knit cap pulled down over his face, with the eye holes cut out, an Eastern Washington University red/black sweatshirt, black warmup pants, gloves, and a bag. RP 118, 159, 219. Mr. Pool was described as a white male with brown or dark blond hair, with bluish or hazel eyes. RP 120.

The robbery was investigated by the Cheney Police Department. Sergeant Chris English contacted two males, Michael Smith and Frank Wolf, in the Taco Bell parking lot shortly after the robbery. RP 376. Mr. Smith and Mr. Wolf were originally in the NAPA parking lot and were asked to move their car into the Taco Bell parking lot by officers. RP 372. The pair was relaxed, cooperative with officers, and provided a written statement. RP 376-78. However, Detective Sergeant Justin Hobbs attempted to contact Mr. Wolf and Mr. Smith after the incident to no avail. RP 499. Mr. Smith had a 21-year-old juvenile felony conviction from King County, and a legal financial warrant issued in 1994 (failure to pay

restitution) at the time of the robbery. RP 517-18, 569. After the incident, a canine tracked from the Dollar Tree Store to the NAPA auto parts store where the track stopped. RP 747. The dog did not move in the direction of Mr. Smith and Mr. Wolf. RP 752. Mr. Smith and Mr. Wolf did not fit the suspect or clothing description provided by witnesses to law enforcement after the incident. RP 376, 753.

On May 31, 2015, a citizen contacted the Cheney Police Department regarding a suspicious item in the barrow pit on State Route 904 (First Street)² near the Cheney city limits. RP 277, 281. Officer Zebulon Campbell responded and collected the item, which was a black knit hat, fabricated into a robbery type ski mask. RP 277, 284, 511. Ms. Norrish and Mr. Busby subsequently identified the mask as being used during the robbery. RP 213-14 (Busby), 227 (Norrish), 229-30 (Norrish), 280 (Norrish).

July 2016 incident.

On July 9, 2016, Mr. Busby was again working in the store near closing time. RP 124-28. At 8:50 p.m., he walked to the employee restroom, attempted to open the door, and found it blocked by someone hiding behind it. RP 131-32. Mr. Busby placed his foot against the door to prevent

² The black knit hat was found at the 3000 block of First Street, approximately six blocks from the Dollar Tree store. RP 282.

Mr. Pool from exiting. RP 132. Mr. Pool had on a motorcycle helmet.³ RP 137-38. Mr. Busby subsequently grabbed Mr. Pool's helmet, and pinned him against the wall. RP 138. A scuffle ensued between the two men, and Mr. Pool stated he had a gun. RP 139-40. Mr. Busby let go of the individual, who subsequently padded Mr. Busby down for weapons and asked if anyone else was in the store. RP 142. At this point, Mr. Pool was holding a gun. RP 142-43. He produced several "figure 8" wire ties⁴ and instructed Mr. Busby to put them on and tighten them. RP 143. Mr. Pool then shoved the gun in Mr. Busby's back, grabbed him, and forced him out of the restroom, through the store. RP 144, 332-33. Mr. Pool then forced Mr. Busby and another employee, Sarah Cousins, into the warehouse portion of the store. RP 145-46, 333-34.

After prompting by the Mr. Pool, Ms. Cousins advised Mr. Pool that there were several customers remaining in the front of the store. RP 147. Still armed with the firearm, Mr. Pool attempted to cut the wire ties, so that

³ Mr. Pool drove a motorcycle to work at 10:00 p.m. the evening of the robbery. RP 597.

⁴ The "flex cuffs" used at the crime scene were the same type as used by corrections officers at the Airway Heights Corrections Facility. RP 694-95. The zip ties are assembled "to be used for quick application. [Correction officers] use them for if we have a large-scale disturbance to where we don't have enough mechanical restraints. So these are ready to go to be applied on the wrists and tightened up for restraint purposes" in the prison. RP 696-97. The "flex cuffs" were twenty-two inches in length. RP 696.

Mr. Busby could usher the remaining customers out of the store. RP 147, 336. Ultimately, Mr. Busby closed the store while Mr. Pool held Ms. Cousins at bay in a store aisle. RP 150, 333, 339.

Thereafter, the employees were shepherded into the office where Mr. Pool collected all the paper money, including the money in the safe. RP 151, 153-55, 346-47. Mr. Pool then placed all phones into the safe. RP 155-56. Thereafter, he placed the gun into Mr. Busby's back and steered the employees to the front of the store, so he could exit the store. RP 157-58. Mr. Pool then directed the employees to the restroom, and left the store. RP 158. Mr. Busby called 911 shortly after the event. RP 158, 164-65, 167-69. He believed the suspect was the same person who committed the earlier robbery in May, based upon the suspect's mannerisms. RP 151-52.

Eric Blazekovic had worked at the Dollar Tree store the night of the July robbery and observed Mr. Pool, with a black motorcycle helmet, in the store shortly before closing, around 8:35 p.m.⁵ RP 299, 307. Mr. Blazekovic had eye contact with Mr. Pool in the store. RP 307. Mr. Blazekovic recognized Mr. Pool because both had attended Cheney High School at the same time. RP 303. Ms. Wojciechowski testified that Mr. Pool had

⁵ Mr. Blazekovic described Mr. Pool's clothing as dark -- dark jacket or sweatshirt and dark pants. RP 302.

previously worked at the Dollar Tree store in 2012 or 2013, for approximately eleven months. RP 253-54, 270.

When law enforcement arrived at the scene, Mr. Busby was alarmed and Ms. Cousins was shaken and crying. RP 429. Together, the employees provided a description of the suspect as a white male, mid-twenties, five-feet, ten- inches tall, 175 to 185 pounds wearing a black motorcycle helmet, with a visor, gray EWU sweatshirt with white lettering, dark military-style pants, a security/police gun belt, black shoes, black leather gloves, and carrying a red bag with black drawstring, and the gun used was possibly a Glock pistol. RP 429-30.

Mr. Pool was employed as a corrections officer at the Airway Heights Corrections Center. After the July 9, 2016 robbery, Mr. Pool arrived at the facility around 9:30 p.m. on his motorcycle and asked a fellow employee if he could store his firearm inside the employee's vehicle.⁶ RP 719. This was the first-time Mr. Pool had made this request. RP 719-20. During this time-period, Mr. Pool was having a new home built, and was working overtime shifts to have sufficient money at the time of closing. RP 725-26. Mr. Pool was making approximately \$13 dollars an hour at the time, and his take home pay was \$2,600 a month. RP 725, 810.

⁶ Employees were not allowed to bring personal firearms into the facility. RP 717-18.

Mr. Pool was taken into custody on July 12, 2015, at his workplace at Airway Heights Corrections Center. RP 452-53. Mr. Pool was wearing a duty uniform, consisting of dark blue pants, black work boots, uniform shirt, and duty belt. Law enforcement subsequently executed a search warrant for Mr. Pool's clothing, automobile, and DNA. RP 453, 455. A DNA swab was subsequently taken from Mr. Pool. RP 533.

In the center console of Mr. Pool's car, officers found a box of .9 millimeter cartridges. RP 460-61. In the trunk, officers located a black pair of BDU pants⁷ and a black, long sleeve shirt. RP 461. In addition, a search warrant was executed in Mr. Pool's bedroom at his residence⁸ in Cheney; officers located a Smith & Wesson MMP pistol,⁹ which is like a Glock 9 millimeter in that both are somewhat "blocky," have similar construction material, and have slides characterized by their "squareness." RP 464, 535, 537. Officers also found two black motorcycle helmets in the bedroom, one with a visor and one without. RP 466-69. In addition, a black and red Nike bag and polarized sunglasses were collected from the bedroom. RP 474-75,

⁷ BDU is an abbreviation for Battle Dress Uniform. Captain Richard Beghtol of the Cheney Police Department stated the witness's description of the clothing (i.e., pants) worn by the suspect during the two robberies was consistent with a correction officer's uniform. RP 580, 582, 613.

⁸ Mr. Pool's residence was approximately three miles from the Dollar Tree Store. RP 539.

⁹ A receipt dated October 6, 2015, with a serial number for the firearm was also collected by the officers. RP 492.

487. Finally, a red Eastern Washington University sweatshirt was found in Mr. Pool's bedroom. RP 541-42.

A Washington State Patrol DNA forensic scientist determined Mr. Pool was one of two significant contributors to the DNA profile developed from the robber mask collected on the roadway on May 31, 2015, and it was "140 times more likely that the observed DNA typing profile occurred as a result of a mixture of Jeffrey Pool and an unknown individual than having originated from two unrelated individuals selected at random from the U.S. population." RP 667.

III. ARGUMENT

A. THE DEFENDANT HAS WAIVED ANY CHALLENGE UNDER RAP 2.5 TO ARGUE THE TRIAL COURT ERRED WHEN IT ORDERED THE PARTIES NOT MENTION THE NATURE OF MR. WOLF'S PRIOR FELONIES DURING TRIAL. MOREOVER, THE TRIAL COURT PROPERLY EXCLUDED "NAMING" THE PRIOR FELONY CONVICTIONS PURSUANT TO THE PROPENSITY RULE.

Mr. Pool argues the trial court erred when it prohibited "naming" the assumed 21-year-old juvenile felony convictions and LFO warrant of Mr. Wolf, one of the two individuals contacted in the NAPA Auto Parts store, shortly after the first robbery at the Dollar Tree Store.

Standard of review.

A trial court's evaluation of relevance under ER 401 and its balancing of probative value against prejudicial effect, or when excluding

evidence, is reviewed for abuse of discretion. *State v. Luvene*, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An abuse of discretion occurs only when the decision of the court is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.3d 32 (2009). Stated differently, an abuse of discretion occurs only when no reasonable judge would take the view chosen by the trial court. *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). “Appellate courts cannot substitute their own reasoning for the trial court’s reasoning, absent an abuse of discretion.” *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007).

To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence. ER 401. Even if relevant, however, evidence may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.¹⁰

¹⁰ For a trial court to admit evidence of other wrongs under ER 404(b), the court must: “(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.”

In the present case, the State moved in limine to exclude mention of two males, Mr. Wolf and Mr. Smith, who were contacted by law enforcement shortly after the May 19, 2015 Dollar Tree Store robbery, where they were openly seated in a car in a nearby NAPA Auto Parts store. RP 8. It was determined by the Cheney Police Department the next day, on May 20, 2015, that one of the individuals had a 1994 LFO warrant out of King County from a 1992 juvenile kidnapping and robbery case. RP 8-9. The other male had some criminal history out of Oregon, although no specifics were known or presented at the time of the motion. RP 9.

The defense did not proffer any testimony, pleadings or make an offer of proof regarding *any* conviction data or criminal history regarding these two individuals that it sought to introduce at the time of trial, but rather argued that it should be allowed to question law enforcement regarding the two individuals concerning the thoroughness of the department's investigation. Specifically, defense counsel argued:

[DEFENSE ATTORNEY]: [W]e would argue that they're not witnesses. They're facts in a case. We are not seeking testimony to impeach them. We're not seeking to admit hearsay. Their credibility is not in question. They are facts that concern the case of the investigation of the officers, how thorough were they, when did they realize this, what have

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Where the trial court correctly interprets ER 404(b), its ruling to admit or exclude evidence of misconduct is reviewed for abuse of discretion. *Id.*

they done to follow up on the suspects; which nothing has been done to this date.

RP 14.

[DEFENSE ATTORNEY]: So the first point, Your Honor, is we do not believe these two individuals are witnesses. They're more facts. How can the defense ask Captain Beghtol why did you put these two people as suspects in reference to the June 3rd [DNA analysis] request without getting into this inquiry?

The second, if the Court were to believe that they were witnesses or these type of questions would put them in the category of witnesses, then we would argue that the probative value greatly outweighs the prejudice. What prejudice do they have? They're not here. They're not being impeached, none of their statements are coming in. There's no prejudice to them or the State except for the State does not want this evidence.

RP 15.

Thereafter, the lower court ruled that the defense could use the fact that Mr. Wolf and Mr. Smith had purported felony convictions and a LFO warrant to show that law enforcement had some information and question how law enforcement investigated that information, illustrating the quality or lack of quality of the investigation. RP 17-19. However, the court ruled the evidence could not be used to establish that Mr. Smith and Mr. Wolf had the propensity to commit the first degree robbery of the store. RP 17-

19. Moreover, the court found that ER 404(b) and ER 609 were not applicable. RP 17-18. The trial court further ruled:

The defense would be prohibited from trying to introduce any type of argument that those two individuals must have committed this crime because they're acting in conformity with something they'd done in the past. That would implicate 404(b), and the Court's not authorizing that.

RP 19.

Subsequently, during trial, the lower court reaffirmed its earlier ruling stating:

THE COURT: Since Monday there's been this issue about previous convictions that one of the two people near the store had. In reviewing everything, it appears that evidence of those previous convictions is relevant because it caused or maybe didn't cause law enforcement to take certain directions during the course of the investigation.

The Court also has to weigh the prejudicial effect of exactly what those allegations are. I know my ruling originally was it's not prior bad acts because it's not being used to prove the truth or prove they acted in conformity with anything; plan, knowledge, motive, or anything else. Rather, it's used to determine whether or not the investigation was adequate because there was knowledge that these individuals or at least one of them has some criminal history.

If the Court were to allow the nature of those offenses to come into evidence, the only conclusion that could be drawn is that those persons must have acted in conformity with that. We can get to the same result by introducing evidence that they had prior felony convictions without exactly what those convictions are.

Originally the Court indicated that they're not prior bad acts because they're not being used to prove knowledge, plan, or

anything else. And if those offenses were to come in as what they have been convicted of, that would be the only conclusion the jury could draw from that evidence.

So this witness might testify that he had knowledge that they had previous felony convictions from whenever those occurred, but the exact nature of those convictions would be unduly prejudicial because it would leave the jury just to speculate as to whether or not they acted in conformity with some prior conviction. And that's not the reason the Court was allowing that in.

So if you won't inquire into what those two convictions were.

MR. JOHNSON: Yes, Your Honor. But as far as the warrant...

THE COURT: Right. You can get into the warrant and his knowledge that they had prior felony convictions.

RP 566-67.

1. Defense counsel never proffered any argument or supporting documentation to the trial court regarding a request to allow witnesses to specifically "name" Mr. Wolf's two prior convictions under ER 404(b) or as alternative suspect evidence.

To the extent that Mr. Pool argues the trial court should have admitted the nature of the prior convictions under ER 404(b) or as alternative suspect evidence, his argument is raised for the first time on appeal and need not be addressed by this Court. RAP 2.5(a). In the alternative, Mr. Pool cannot change theories, on appeal, for admissibility of the evidence. *See State v. Pavlik*, 165 Wn. App. 645, 651, 268 P.3d 986 (2011), *review denied*, 174 Wn.2d 1009 (2012).

a. *RAP 2.5.*

In general, an error raised for the first time on appeal will not be reviewed. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). In that regard, RAP 2.5(a) was not designed to allow parties a means for obtaining new trials whenever they can identify a constitutional issue not litigated below. *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999).

Mr. Pool fails to show that he can raise this claim for the first on appeal under RAP 2.5(a)(3).¹¹ To raise an error for the first time on appeal, an appellant must demonstrate (1) the error is truly of constitutional dimension, and (2) the error is manifest. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). “Manifest” in RAP 2.5(a)(3) requires a showing of actual prejudice. *Id.* at 99. To establish actual prejudice, there must be a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* “[T]he focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” *Id.*

¹¹ RAP 2.5(a), in relevant part, reads: “**(a) Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.”

Regarding RAP 2.5, evidentiary errors are not of constitutional magnitude. *In re Pers. Restraint of Duncan*, 167 Wn.2d 398, 408, 219 P.3d 666 (2009); *see also State v. Chase*, 59 Wn. App. 501, 508, 799 P.2d 272 (1990) (any violation of ER 403 is not of constitutional magnitude and cannot be raised for the first time on appeal). In addition, evidentiary errors under ER 404(b) are not constitutional errors. *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012).

Mr. Pool fails to establish that the unpreserved, alleged error is manifest or that it is a constitutional error. Defense counsel never requested the purported prior felonies be “named” during trial. *See* RP 560-565. Furthermore, the trial court’s exclusion of “naming” the prior felonies did not have practical and identifiable consequences at trial. The lower court authorized defense counsel to attack the completeness of the investigation at trial regarding Mr. Smith and Mr. Wolf, with their purported felony convictions and putative warrant, without naming the felony conviction. Indeed, defense counsel did question several law enforcement witnesses regarding what, if any, bearing the purported 1992 convictions had on the scope or thoroughness of the investigation. *See* RP 517-521, 625-26, 751.

Moreover, identifying the purported 1992 juvenile convictions of kidnapping and robbery would not have established either Mr. Wolf or Mr. Smith committed the robbery at the Dollar Tree Store. Mr. Wolf and

Mr. Smith did not physically match the description provided by witnesses and the dog track stopped before reaching their vehicle. Furthermore, defense counsel offered *nothing* in the way of alternative suspect evidence regarding these two individuals. It is apparent from the record that the defendant's sole purpose for wanting to introduce the prior convictions and warrant history was to show that Mr. Wolf acted in conformity with his prior bad conduct 24 years earlier. Such evidence was not admissible under ER 404(b) or as alternative suspect evidence, and the trial court did not abuse its discretion.

For instance, in *State v. Donald*, 178 Wn. App. 250, 253, 316 P.3d 1081 (2013), *review denied*, 180 Wn.2d 1010 (2014), the defendant was convicted of first degree assault and attempted robbery. At trial, Donald argued that an accomplice, Leon, acted alone, and committed the crimes. Donald argued on appeal that the trial court violated his constitutional right to present a defense by refusing to admit his propensity evidence consisting of Leon's criminal history and mental health to support his defense. Division One of this Court held the lower court did not err. The court stated:

ER 404(b) prevented him only from presenting propensity evidence the common law generally excludes because it is distracting, time-consuming, and likely to influence a fact finder far beyond its legitimate probative value. Exclusion of propensity evidence furthers two goals that [*United*

States] v. *Scheffer*[,] [523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.413 (2005)] recognized as reasonable. It ensures the reliability of evidence introduced at trial and avoids litigation collateral to the primary purpose of the trial. As with polygraph evidence in *Scheffer*, the per se exclusion of propensity evidence to prove how a person acted on a particular occasion is not disproportionate to the ends it is designed to serve.

Although not dispositive, we note that ER 404(b) reflects the general rule. This strongly suggests that the Washington Supreme Court did not act arbitrarily when it adopted the rule. It also suggests that the rule is not disproportionate to the ends it is designed to serve.

Id. at 268 (internal footnotes omitted).

Similarly, in *Jordan v. State*, 895 P.2d 994, 998-99 (Alaska Ct. App. 1995), *overruled on other grounds*, *Joseph v. State*, 315 P.3d 678 (Alaska Ct. App. 2013), an officer attempted to stop a vehicle for joyriding. The vehicle stopped, the passengers exited and then ran. The officer ultimately contacted a backseat passenger. It was determined the vehicle was stolen and Jordan was identified by the officer as the driver of the vehicle. At trial, Jordan asserted that an occupant of the vehicle, Caldwell, had a prior joyriding conviction, which made it likely that Caldwell was the driver of the vehicle, and the joyriding conviction should have been admitted to establish that likelihood. *Id.* at 998. The trial court ruled the prior conviction

was inadmissible because it was based upon propensity evidence. The

Alaska Court of Appeals affirmed stating:

Caldwell’s prior joyriding conviction would be relevant to establish his identity as the driver only if the circumstances of the previous case were so similar to the current case as to disclose a unique modus operandi. Absent circumstantial similarities sufficiently unique to constitute a “signature crime,” a prior conviction for a similar offense tends to establish identity only through the impermissible inference of propensity: “[M]uch more is demanded than the mere repeated commission of crimes of the same class, such as burglaries or thefts.” The bare evidence of Caldwell’s prior joyriding conviction—all that Jordan offered in this case—was not relevant to the issue of identity apart from its tendency to prove propensity.

Id. at 999 (internal citations omitted).

Finally, in *State v. Rousan*, 961 S.W.2d 831, 848 (Mo. 1998), the trial court did not allow Rousan to show that an alternative suspect attempted to gain control of a family business and had a motive to murder the victim. The Missouri high court affirmed the lower court stating:

To be admissible, evidence that another person had an opportunity or motive for committing the crime for which a defendant is being tried must tend to prove that the other person committed some act directly connecting him with the crime. The evidence must be of the kind that directly connects the other person with the corpus delicti and tends clearly to point to someone other than the accused as the guilty person. “Disconnected and remote acts, outside the crime itself cannot be separately proved for such purpose; and evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference

as to the commission of the crime by another, is not admissible.”

Id. at 848 (Mo. 1998) (citations omitted).

Furthermore, Mr. Pool offers nothing in the way of how he was prejudiced by the trial court’s ruling, other than he was prohibited from offering propensity evidence regarding Mr. Smith and Mr. Wolf. As previously stated, a defendant cannot proffer propensity evidence regarding alternative suspects.¹² Mr. Pool fails to show that his unpreserved claimed evidentiary error falls within an exception to RAP 2.5(a) and this Court should decline to review his claim to the extent it involves ER 404(b) and alternative suspect evidence. The trial court did not abuse its discretion.

Finally, if the Court finds error, it was harmless. A non-constitutional error is reversible if there is a reasonable probability the error materially affected the verdict. *State v. Everybodytalksabout*,

¹² It is unclear from the record how the two citizens contacted in the NAPA Auto Parts parking lot were “linked” as suspects to the robbery, as now advocated by the defendant for the first time on appeal. In that regard, the defense never proffered any “other suspect” evidence to the trial court and did not request the court allow “other suspect” evidence at trial. The proponent bears the burden of establishing the admissibility of “other suspect” evidence. *State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008 (2016). The premise underlying the introduction of “other suspect” evidence is to show that someone other than the defendant committed the charged crime and the standard for admission is whether the proffered evidence tends to indicate a reasonable doubt as to the defendant’s guilt. *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014). Notwithstanding, the unsubstantiated 1992 juvenile robbery and kidnapping convictions of a person parked at a nearby business shortly after the robbery does not cast a reasonable doubt on Mr. Pool’s guilt.

145 Wn.2d 456, 468+69, 39 P.3d 294 (2002); *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Here, there is no reasonable probability that the excluded evidence (naming the specific felony) affected the verdicts. Mr. Pool was allowed to question witnesses regarding the unnamed felonies and the impact, if any, the convictions and warrant had on the investigation. Mr. Pool has not offered any argument or authority how his defense or theory of the case was impacted. If error, it was harmless.

b. Mr. Pool cannot offer an alternative theory on appeal for admission of the evidence.

Although not argued in the trial court, Mr. Pool now attempts to argue the identity of the purported felonies should have been admissible under an alternative suspect theory. At trial, he merely argued that the conviction history was necessary to impeach the investigation, which he was allowed to do. “A party cannot change theories of admissibility on appeal.” *Pavlik*, 165 Wn. App. at 651. “A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.” *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); *see also* RAP 2.5(a). Mr. Pool voiced no objection in the trial court and did not argue for admissibility of the apparent “named” felony convictions and warrants under ER 404(b) or under an alternative suspect theory in the lower court. Accordingly, he has lost his opportunity for review on that basis.

B. THE DEPUTY PROSECUTOR’S “COIN TOSS” ANALOGY ADVANCED DURING CLOSING ARGUMENT REFERENCING THE “LIKELIHOOD RATIO” EXPRESSED BY THE DNA SCIENTIST WAS NOT AN IMPROPER REFERENCE TO FACTS NOT IN EVIDENCE AS IT WAS BASED UPON THE DNA SCIENTIST’S “LIKELIHOOD RATIO” PROBABILITY CONCLUSION.

Mr. Pool next alleges the deputy prosecutor committed misconduct during closing argument by arguing facts not in evidence, regarding the DNA scientist’s likelihood ratio and the DNA sample collected from the “robber” mask.

Washington State Patrol DNA forensic scientists, Anna Wilson and Alison Walker, examined several pieces of evidence. Regarding the zip ties taken from the store and used on Mr. Busby, the DNA mixture was too complex to make any comparisons. RP 639. However, a profile was developed from the “robber” mask was a mixture consistent with having originated from at least three individuals, including two significant contributors. The DNA scientist opined that inclusions were possible to the two significant contributors, but no inclusions were possible to the remaining minor contributor. RP 663.

When the scientist compared the DNA typing profile of Jeffrey Pool to the DNA mixture developed from the knit hat, Mr. Pool was included as

one of the two significant contributors to the DNA profile. RP 666.

Specifically, the scientist stated:

The mixed DNA profile, two significant contributors is consistent with originating from Jeffery Pool and an unknown individual. It is 140 times more likely that the observed DNA typing profile occurred as a result of a mixture of Jeffrey Pool and an unknown individual than having originated from two unrelated individuals selected at random from the U.S. population. And then, again, I say no inclusions are possible to that minor component, some exclusions may be possible.

So what this statistic looks at is it looks at the weight of two hypotheses. The first hypothesis is that it is a mixture of Jeffrey Pool and an unknown individual, and then it weighs that against the alternative hypothesis that it is two unrelated individuals. And this likelihood ratio is that it's 140 times more likely the data is represented by a mixture of Jeffrey Pool and an unknown than if it were two unrelated individuals selected at random from the U.S. population.

RP 667.

[A] likelihood ratio is the ratio of the two hypotheses. So you have the first hypothesis, in this case that the profile for the two significant contributors is represented by Jeffrey Pool and an unknown. That weighted over the hypothesis that it is two unrelated individuals. And so the likelihood ratio is just a weight of those two against each other and which one is more likely.

RP 679.

Regarding the strength of the likelihood ratio, the scientist remarked: "The likelihood ratio to that would fall somewhere between

moderate evidence and moderately strong evidence based just on a likelihood ratio at those three locations.” RP 685.

During closing argument, the deputy prosecutor made the following remarks:

[DEPUTY PROSECUTOR]: And after a DNA sample is taken from Jeffrey Pool, that DNA sample goes to the lab. And when that DNA sample is run against the two major contributors on the mask, there’s an interesting -- there’s an interesting result. It’s 140 times more likely that the two major contributors on the mask are Jeffrey Pool and an unknown individual than not. So here’s what that means.

If you have a coin and on the head side you have Jeffrey Pool and a face with a question mark –

MR. JOHNSON: Objection, Your Honor. This is – I don’t think there’s been any testimony as far as how to relate those likelihood ratio numbers to an analogy, Your Honor.

THE COURT: Overruled. Argument.

[DEPUTY PROSECUTOR]: So you have a coin with Jeffrey Pool’s face and another face with just a question mark on it. And then on the other side you have two faces with question marks. The science tells us that if today you flip that coin 140 times, 139 times it’s Jeffrey Pool and the unknown individual. 140 times more likely that it’s Jeffrey Pool’s.

And as Mr. Johnson pointed out, and I was obviously wrong, I called those results in my opening nebulous. That is not at all what the expert testified to. She said no, no, no, no, that’s actually moderately strong DNA evidence. Guess what. Go with the expert. That’s the -- that’s the evidence that you have, right?

But here's the great thing about the science of DNA. There's nobody in the world who disagrees with it. There's nobody in the world who has any alternative theory of DNA. There's no doubt that the DNA was found, right?

So that means that tomorrow you take out that same coin and you flip it 140 times. 139 times it's still Jeffrey Pool.

And the next day you take out that coin and you flip it 140 times and 139 times it's still Jeffrey Pool. No matter how many times you repeat the experiment, it is 140 times more likely, moderately strong evidence, that that knit cap was worn by Jeffrey Pool.

RP 862-64.

Standard of review.

A prosecutor has wide latitude to make arguments and may draw reasonable inferences from the evidence. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009); *State v. Rodriguez-Perez*, 1 Wn. App. 2d 448, 458, 406 P.3d 658 (2017). To prevail on a claim of prosecutorial misconduct, a defendant bears the burden of proving that the prosecutor's argument was improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). An appellate court first determines whether the prosecutor's conduct was improper. *State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). Any allegedly improper statements are reviewed in the context of the prosecutor's entire argument, the issues in the case, the evidence discussed during closing argument, and the jury instructions. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). If the prosecutor's

conduct was improper, the question turns to whether the misconduct resulted in prejudice. *Emery*, 174 Wn.2d at 760; *Rodriguez-Perez*, 1 Wn. App. 2d at 458. It is improper for a prosecutor to assert during closing argument facts not admitted as evidence during trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012).

If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Id.* at 760. To analyze prejudice, an appellate court reviews the comments "in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009).

Contrary to Mr. Pool's argument, the State did not advance an argument that was unsupported by the evidence. The DNA scientist testified regarding the statistical formula known as a "likelihood ratio." A likelihood ratio is:

[a] calculation [which] measures the strength of evidence under alternative hypotheses about the source(s) of the DNA in the unknown sample. For instance, an LR calculation estimates how much more likely it is that the suspect is the source of the evidence than it is that the evidence originated from a randomly selected member of the population unrelated to the suspect. NRC¹³ II at 127–28. Essentially,

¹³ NRC is an abbreviation for National Research Council.

this calculation involves dividing the probability of one origin hypothesis (e.g., that the suspect's DNA is in the sample) by another origin hypothesis (e.g., that DNA in the sample came from someone else). "The greater the likelihood ratio, the stronger is the evidence in favor of the hypothesis corresponding to the numerator, that the source of the evidence-sample DNA and the suspect are the same person." NRC II at 128. Thus, "in the usual case, the likelihood ratio is the reciprocal of the probability of a random match." NRC II at 128.

State v. Bander, 150 Wn. App. 690, 707-08, 208 P.3d 1242 (2009), *review denied*, 167 Wn.2d 1009 (2009); *see also Com. v. McNickles*, 434 Mass. 839, 847, 753 N.E.2d 131 (2001) (a likelihood ratio "compares the probability that the defendant was a contributor to the sample with the probability that he was not a contributor to the sample").

Here, the deputy prosecutor posited the probability that the DNA evidence located on the mask was derived from Mr. Pool and an unrelated individual when compared to the probability that the source of the DNA evidence was from two unrelated individuals selected at random, taking the ratio of the two probabilities and using a coin toss as an example. The DNA scientist stated that the probability that the DNA mixture of Mr. Pool and an unknown individual was 140 more times likely than it was from a DNA source from two unrelated individuals selected at random in the U.S. population. A likelihood ratio of 140 to one conveys that the match is 140 times as probable if the DNA evidence sample and the suspect DNA sample

share the same DNA profile are from the same person as it is if the samples are from different persons. Stated differently, the profile match is 140 times more likely if the DNA is from the suspect than if the DNA is from a random individual.

The deputy prosecutor argued the algebraic equivalent of the DNA scientist's conclusion; i.e., there was a 139 to 1¹⁴ chance that the DNA was deposited by the defendant rather than a random individual. Mr. Pool's argument supposes the DNA scientist did not testify to the probabilities, and consequently that the deputy prosecutor's argument was unsupported by the evidence, when, in fact, the DNA scientist did testify to the relative probabilities concerning the mixed sample of DNA found on the mask. The deputy prosecutor did not assert facts not admitted as evidence during closing argument and drew reasonable inferences from evidence at trial. Moreover, the deputy prosecutor's argument fell within a prosecutor's wide latitude to draw reasonable inferences from the evidence. The argument was proper.

If this Court determines the deputy prosecutor's argument was improper by arguing facts not in evidence, Mr. Pool has not established the

¹⁴ A more precise ratio would have been 140/1.

remarks were prejudicial. Mr. Pool cannot meet his burden to establish prejudice because the jury was instructed prior to closing argument that:

[t]he lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 45, RP 838.

Absent evidence the jury was improperly influenced, a reviewing court presumes the jury followed the trial court's instructions. *State v. Montgomery*, 163 Wn.2d 577, 595-96, 183 P.3d 267 (2008); *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211 (1983). Therefore, by analogy, an appellate court presumes that the jury disregarded any argument that was not supported by the evidence or the law. Furthermore, any impropriety could easily have been cured by an admonishment to the jury. *See, e.g., Emery*, 174 Wn.2d at 763-64 (holding that prosecutor's improper closing remarks could have been cured by an objection and proper instruction, therefore the defendant's prosecutorial misconduct claim failed); *Montgomery*, 163 Wn.2d at 596 ("There was no written jury inquiry or other evidence that the jury was unfairly influenced,

and we should presume the jury followed the court's instructions absent evidence to the contrary").

Here, there is no evidence the jury did not follow the court's instructions. In addition, the defense did not request a curative instruction. Even if there was error, the defendant has not established the jury was improperly influenced by the deputy prosecutor's algebraic equation analogy regarding the DNA probability. There is no reversible error. This claim fails.

IV. CONCLUSION

The defense never moved the lower court to admit the "named" felonies and associated LFO warrant of the two males located in the NAPA parking lot shortly after the robbery, either under ER 404(b) or as alternative suspect evidence. At the defendant's request, the lower court permitted the defense to use the purported prior felony convictions and associated warrant of Mr. Wolf in attempt to impeach the police investigation. For the first time on appeal, Mr. Pool argues the prior felonies should have been named to support a theory of alternative suspects. This Court should decline the invitation to review this issue. If the Court does review the issue, the trial court did not err when it excluded mention of the nature of the prior felonies as the only purpose for introduction of those felonies would have been for propensity.

Furthermore, the deputy prosecutor did not error when it used an algebraic equation to summarize the testimony of the DNA scientist's testimony concerning the likelihood ratio of the evidence located on the robber mask.

The State requests this Court affirm the judgment and sentence.

Respectfully submitted this 27 day of February, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY POOL,

Appellant.

NO. 35296-0-III

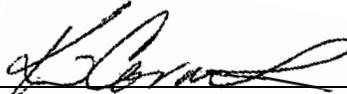
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 27, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jason G. Johnson
jason@providentlawfirm.com

2/27/2018
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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