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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT
v.

DANIEL H. DUNBAR, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by allowing the prosecutor to introduce evidence of an unauthorized check found in the travel trailer and evidence of Mr. Dunbar's lack of income as propensity evidence for theft of the trailer.
2. The prosecutor committed misconduct by instructing the jury that the presumption of innocence did not apply to the State's evidence of Mr. Dunbar's prior statements made to Sergeant Eckersley, vouching for the State and its witnesses, and discrediting Mr. Dunbar.
3. The trial court erred in imposing a consecutive sentence for current offenses.

II. ISSUES PRESENTED

1. Whether the trial court erred in admitting evidence of a check found in the stolen trailer where that check, and the testimony regarding the check demonstrated that the defendant possessed the trailer and undercut the defendant's claim that he had paid to rent or purchase that trailer?
2. Whether the trial court erred in admitting evidence of the defendant's financial status where the State was required to demonstrate that the defendant had wrongfully obtained the trailer,

and evidence of the defendant's inability to afford the trailer was probative of whether he had lawfully rented or purchased it?

3. Whether, considering the record as a whole, the prosecutor engaged in flagrant or ill-intentioned misconduct during closing argument that could not have been cured by a defense objection and a curative instruction?
4. Whether this Court should remand to the sentencing court for entry of appropriate findings where the oral record is clear that the court intended an exceptional sentence but did not enter findings supporting that sentence?

III. STATEMENT OF THE CASE

The defendant, Daniel Dunbar, was charged in the Spokane County Superior Court with one count of first degree theft and one count of forgery under cause number 16-1-03608-3. CP 4. He was alleged to have stolen a travel trailer, and when the trailer was located by law enforcement, a forged check, in the defendant's name, was also discovered in the trailer.

Pretrial Proceedings.

On the first day of trial, before jury selection, the defendant moved for the court to sever the charges. RP 26. The trial court denied the motion,¹

¹ The trial court determined that the strength of the two charges was similar, the defenses on each count did not detract from each other, the court could instruct the jury to consider each count separately, and the two counts were intertwined and

RP 88, and immediately upon that ruling, the defendant indicated he wished to plead guilty as charged to the forgery, RP 90; CP 11-22. The court accepted the defendant's guilty plea, notwithstanding the State's concern that the plea was an attempt to excise evidence regarding the stolen check from trial. RP 90, 93-98; CP 22.

After the jury was selected, but before trial commenced, defense counsel moved to exclude witness Lori Eastep from testifying on the basis that her testimony was irrelevant and a "veiled attempt" to demonstrate the check in Mr. Dunbar's possession was forged. RP 315. The State proffered that the testimony was relevant because:

Mr. Dunbar made [statements] to Sergeant Eckersley ... that he purchased the trailer or he was renting the trailer for \$315 a month. When asked about that, he told Sergeant Eckersley with reference to that check that that came from him working and doing maintenance work for Grassroots Therapy Group. Ms. Eastep ... is expected to testify that at no point in time did Grassroots Therapy Group ever employ Mr. Dunbar... He has never worked for the company and that nobody who had the authority to issue checks on that account had ever issued a check to Mr. Dunbar. In other words, can't make the argument that he had a job working maintenance for Grassroots ... as a basis to say he purchased or was renting the trailer. That's it. Nothing about forged. Just that they never sent, never gave him a check.

RP 317.

demonstrated opportunity, knowledge, and "almost like a res-gestae circumstance." RP 89-90.

While defense counsel agreed that the check was relevant insofar as it established that Mr. Dunbar was in possession of the travel trailer, she contended that any evidence that the check was not authorized by Grassroots was a prior bad act or wrongful action that was irrelevant. RP 320-21. In response, the State argued that the check and Ms. Eastep's testimony was being offered to demonstrate that what Mr. Dunbar told Sergeant Eckersley during his interview was false, and that he was not being paid by Grassroots.² RP 333.

The court ruled that the check was admissible:

For me it's just too hard to tailor the proffered evidence the way that you're asking me to. I think to the contrary, it would be confusing to omit the drawer. It would give the jury the false inference, or to use your phrase "allude that it's a legitimate check with money that could be used to pay rent or purchase." And I'm mindful under ER 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show acts in conformity therewith. That's not what's happening here.

And then it goes onto provide, "it may, however, be admissible for other purposes." And the other purposes here are the check ties Mr. Dunbar to the trailer, and the witness's testimony demonstrates that he was not telling the truth to Sergeant Eckersley, at least as Sergeant Eckersley described what Mr. Dunbar said. That's my ruling.

RP 338.

² The State argued that when interviewed by Sergeant Eckersley, the defendant claimed no other source of income (besides work for Grassroots) that would allow him to pay the claimed \$315 dollar rent on the trailer or its purchase price. RP 332-33.

State's Case-In-Chief.

Margaret Farrell resided in Greenacres, Washington, and owned a Komfort Trailblazer travel trailer. RP 368-69. On September 4, 2016, she and her husband took a trip to Yellowstone for a week, leaving the trailer next to their garage. RP 370. Her brother called her on September 10, 2016, to ask if she had allowed someone to borrow the trailer, advising her it was no longer at her house; however, she had not done so. RP 371. Ms. Farrell reported the theft to crime check. RP 372. She also posted a photograph of the missing trailer on social media. RP 373.

Karen Thompson was a member of a Facebook page called To Catch a Thief.³ RP 361. On September 5, 2016, she took photographs of a travel trailer at 4507 North Myrtle that appeared suspicious to her as its rigging was not set up correctly. RP 362. At the time she observed the trailer, she also observed the defendant, Daniel Dunbar, working on the trailer. RP 366. She sent the photographs privately to the system administrator of the Facebook page. RP 361.

Spokane Police Department Sergeant Brian Eckersley was contacted by the system administrator of the To Catch a Thief Facebook

³ Sergeant Eckersley described this page as “the new block watch” where individuals can share information about crimes in their neighborhoods. RP 395-96.

page on September 10, 2016. RP 395. Sergeant Eckersley was provided the photographs posted by Ms. Farrell and sent to him by Ms. Thompson, and the administrator indicated he believed the photos depicted the same trailer. RP 397. Sergeant Eckersley determined the license plates shown in the photographs matched, and responded to the North Myrtle address to determine if the stolen trailer was still there. RP 397. Although the trailer was gone, Sergeant Eckersley spoke with individuals at that location, and determined Mr. Dunbar to be a person of interest. RP 398.

Sergeant Eckersley learned that Mr. Dunbar had been arrested the previous day on unrelated charges at 4130 South Sundown. RP 398. On the evening of September 10, 2016, Sergeant Eckersley went to the Sundown address and located the trailer at the end of a driveway, license plate facing away into a wooded area. RP 399. Ms. Farrell responded, identified the trailer, and identified her personal items within in the trailer. RP 374-76, 404. She also identified items that were not hers. RP 376, 405. The trailer appeared dirty, lived-in, and had suffered damage to its door locks, a window and the bathroom fan. RP 377. In searching the trailer, Sergeant Eckersley located a stack of men's pants next to the bed, and next to those pants was a check, written to Mr. Dunbar by Grassroots Therapy. RP 406.

The next evening, Sergeant Eckersley contacted Mr. Dunbar at the Spokane County Jail, advised him of his *Miranda*⁴ rights, and Mr. Dunbar agreed to speak with him. RP 407. Mr. Dunbar confirmed that he had been living in the trailer at 4130 South Sundown Drive. RP 407. He stated that he had been renting the trailer from a man named Ocean at that property, and that he was paying \$315 dollars per month. RP 408. Mr. Dunbar stated that he had been renting the trailer since August 28, 2016, which was prior to the theft. RP 407. Mr. Dunbar admitted to Sergeant Eckersley that he had taken the trailer to a dumping station, and then to the North Myrtle address to show his son. RP 408. Mr. Dunbar confirmed to Sergeant Eckersley that he had told his son that he had purchased the trailer. RP 408. Mr. Dunbar also confirmed the check Sergeant Eckersley located in the trailer was his, and that it was a paycheck for maintenance work he had done for that company. RP 409. Mr. Dunbar claimed that he worked for someone named “AZ” at the company. RP 409.

Sergeant Eckersley later listened to Mr. Dunbar’s jail telephone calls to his girlfriend, Brittany Snow, who had also been living in the trailer. RP 411-15. In one call, Mr. Dunbar stated, “if cops wouldn’t have come, it would have been fine.” RP 414. In another call, the discussion focused on

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct 1602, 16 L.Ed.2d 694 (1966).

Ms. Snow not having anywhere to live. RP 414. Mr. Dunbar then said, “I could take another trailer,” and laughed. RP 414-15, 428.

Sergeant Eckersley was unable to connect the names “Ocean” or “AZ” to real people.⁵ RP 425. Lori Eastep owned Grassroots Therapy Group; that business does not employ any person or company to do maintenance work. RP 477. Grassroots had never employed the defendant or anyone by the name of “AZ.” RP 477.

Defendant’s Case-In-Chief – Direct Examination.

Mr. Dunbar testified at trial. RP 507-556. He stated that because Sergeant Eckersley interviewed him in the jail, he did not have access to his phone to retrieve the telephone number for “Ocean,” the individual who rented him the trailer. RP 508. He denied having told Sergeant Eckersley that he had told his son that he had purchased the trailer. RP 508. He denied telling Sergeant Eckersley that he worked for Grassroots Therapy, but stated that he told Sergeant Eckersley that he worked for someone else. RP 509. He claimed that he told his girlfriend he could “take another trailer” in jest, to bring levity to a frustrated argument. RP 510.

⁵ Mr. Dunbar did not provide Officer Eckersley with these individuals’ full names. RP 435-36.

Cross-Examination of the Defendant.

When asked where he was working at the time, Mr. Dunbar claimed he was working for a friend, Azariah Hulsey, doing maintenance around his apartment complex. RP 511. Mr. Dunbar was unable to testify to how much he earned per hour, because he was paid per job. RP 512. He worked for Mr. Hulsey “a few” times. RP 512, 528. He later testified that he worked “on and off” for Mr. Hulsey for a couple of months, but was paid under the table and could not recall how much he was paid. RP 529. However, Mr. Hulsey paid him by check – and had given him two checks for the work he had done. RP 533. However, when asked, he told the prosecutor that the amount of his earnings per job from Mr. Hulsey was “irrelevant.” RP 514.

Mr. Dunbar stated he also had a full-time job at Spokane Quick Lube, but could not remember the date he stopped working there; however, it was sometime in the early summer of 2016. RP 512-13. Then he changed his testimony and stated that he did not leave the Quick Lube until September 2016. RP 513.

Mr. Dunbar stated that he was paying rent in cash for the trailer to “Ocean.” RP 514. While he initially claimed he had rented the trailer, he subsequently testified that it was Ms. Snow who had paid for its rental. RP 515. He initially could not remember any of the details of how he discovered the trailer was available to rent on Ocean’s property, RP 541,

but then remembered that Ocean offered to rent the trailer to him when Mr. Dunbar spoke to Ocean about potentially renting a house or several rooms in Ocean's house. RP 543.

Mr. Dunbar admitted to having taken the trailer from the Sundown property to dump waste and add water to it. RP 518. However, the defendant ultimately claimed that Ms. Snow had the financial resources to afford the Suburban which was used to tow the trailer, as well as the fees to empty the trailer's tanks and fill it with water. RP 526.

Ms. Snow, "Ocean," and Mr. Hulseley were not called by the defendant as witnesses.

Defendant's Motion for Mistrial.

During the State's redirect examination of Sergeant Eckersley, the State questioned Sergeant Eckersley about Mr. Dunbar's demeanor during the jail interview. Sergeant Eckersley responded that Mr. Dunbar was vague, giving noncommittal answers, and then became short and angry with Sergeant Eckersley when Sergeant Eckersley advised him the trailer had been reported stolen. RP 436. The State then asked "How did you interpret that" to which Sergeant Eckersley testified, "A sign of guilt." RP 436-37. Defendant objected and moved to strike the testimony, which was sustained and granted. RP 437. Outside the presence of the jury, the defendant moved for a mistrial based on this testimony. RP 438. After the court heard much

argument on the motion, it ruled that while the testimony was improper, a mistrial was not the appropriate remedy, as the testimony had been stricken from the record. RP 460-66. The court offered to give an additional curative instruction, which was requested by the defendant; the court gave the jury such an instruction before any additional questioning commenced. RP 466-67, 473-74. The court also requested the State to refrain from “go[ing] close to the line of ultimate opinion about either guilt or credibility.” RP 469.

Closing Argument.

During closing argument, the prosecutor stressed to the jury that it should pay close attention to the court’s instructions. RP 578. The State argued that it was uncontroverted that Ms. Farrell’s trailer had been stolen. RP 581. It was uncontroverted that Mr. Dunbar possessed the trailer shortly after it was stolen. RP 582. It was uncontroverted that a check with the defendant’s name was located in the trailer upon its discovery. RP 586.

The State asked the jury whether the defendant’s testimony made logical sense – that his best friend, Ocean, rented him the trailer, but Mr. Dunbar did not know his best friend’s last name. RP 586-87. The State asked the jury whether Mr. Dunbar’s testimony that he had the financial resources to rent the trailer made sense, and then called the jury’s attention to the defendant’s later claim that Ms. Snow had actually paid for the trailer. RP 587.

The State emphasized that the jury was to use its “individual collective common sense” in determining the credibility of the testimony presented at trial, after having had the ability to witness the testimony given. RP 588-89. Additionally, the State asked the jury to use its collective common sense to determine whether the defendant’s statement “I will take another trailer” was made in jest. RP 590.

In response to these arguments, defense counsel asked the jury to keep an open mind, and to hold the State to its burden of proof. RP 591-60. Counsel conceded the defendant did not contest the trailer had been stolen. *Id.*

Defense counsel argued that no one had seen Mr. Dunbar take the trailer from Ms. Ferrell’s property. RP 593. She stressed that Mr. Dunbar stated he was renting the trailer and was living openly in the trailer – it was not hidden, altered, painted, or otherwise obscured. RP 594. Counsel stressed that Sergeant Eckersley failed to follow up and further investigate the statements Mr. Dunbar made to him while in custody. RP 595-96. She argued that the telephone calls had been taken out of context and were made in jest. RP 595. She argued that the State’s evidence regarding Mr. Dunbar’s financial status was “almost irrelevant” and intended “by the State to distract you from what Mr. Dunbar’s testimony was.” RP 596. Defense counsel told the jury that Mr. Dunbar’s behavior on the stand was

attributable to being scared, nervous, defensive, worried, and that Mr. Dunbar took the stand “today as the accused, and he’s up here fighting, and you, the jury get to decide if that affects his credibility” “consider[ing] everything that Mr. Dunbar has at stake.” RP 597. Defense counsel claimed that the defendant would not have made any incriminating statements in his telephone conversations, knowing that they were recorded. RP 598. She stated that “the State and law enforcement is changing that or presenting it to you in a way that it’s not the way Mr. Dunbar intended.” RP 598. She posited that Sergeant Eckersley’s summary of Mr. Dunbar’s statements was unreliable because the sergeant had recorded those statements months earlier, and is involved with hundreds of cases, whereas the defendant, who does not have hundreds of cases, “got up on the stand and he told you what he remembers from that conversation and what his intentions were and that he didn’t say it in the way that Sergeant Eckersley is reporting.” RP 599. Defense counsel accused the State of presenting one-sided evidence at trial and of burden shifting when the State questioned Mr. Dunbar about why he did not provide Sergeant Eckersley with complete information about the person who had written him the check or had rented him the trailer, stating that Mr. Dunbar was under no obligation to prove his innocence to the sergeant when questioned in the jail. RP 600.

In rebuttal, the State again asked the jury that, if it was “going to evaluate motive and credibility about what’s going on, then who has the most motive to get you to believe that something happened? Not the State, Not Sergeant Eckersley... It’s Mr. Dunbar... He wants you to ignore his actions and listen to his words and believe his words.” RP 602. The prosecutor continued:

Ignore the fact that he’s found with the trailer. Ignore the fact that the trailer is stolen. Ignore the fact that Mr. Dunbar is seen with the stolen trailer on the 5th, ignore all of those facts and simply because he got angry on the stand, that some how he is fighting for his life and that everything he told you is true. Really? That some how he was joking with Ms. Snow when he made that statement. Really? What does your individual common sense tell you? So there is no motive on the part of Sergeant Eckersley or the State to falsely accuse Mr. Dunbar of a crime. That’s called malicious prosecution. That itself is a crime.

Now the argument is, well, the State didn’t provide you any evidence, the hard rock solid evidence of the value of the trailer... You are entitled to accept the evidence from whatever source to evaluate and fulfill your task...

The claim is that the statements by Mr. Dunbar were taken out of context. Well, Sergeant Eckersley provided you with the context. So evaluate it as you will, but the context has been provided to you. Sergeant Eckersley filed his report within days of completing his investigation of this case. The presumption of innocence attaches when somebody is formally charged. You can be arrested, but unless you are charged, there is no presumption of innocence. So at the time when Sergeant Eckersley is speaking and interviewing Mr. Dunbar, there is no presumption of innocence attached to that. It attaches as soon as the Information is filed charging somebody for the crime. That’s where it attaches.

So to claim that somehow the presumption of innocence attached to Mr. Dunbar as he's sitting in that interview with Sergeant Eckersley, it might as well be a disco ball dropping down. What happens when a disco ball drops down? Does anybody look at their shoes? Everybody look around? Everybody check their wallet? No. You look at the disco ball because it's shining and it's reflecting and it's showing nice lights everywhere. That's our initial reaction is to look at that, and look at stuff on the wall, not a person picking our pocket. Not what's happening right around us.

So what's happening here is we have had simply the State's characterization. We have had the disco ball drop down in front of the jury in the form of Mr. Dunbar's testimony and you're supposed to take from that that somehow Mr. Dunbar has been falsely accused; that somehow the State hasn't met its burden of proof; that somehow, well, we'll grant that the State only, the State no question that it's burden of proof about it happened in the State of Washington, but the rest of it, no. Please, use the court's instructions. Please evaluate the credibility of the evidence with your common sense. Thank you.

RP 601-04.

The jury subsequently convicted the defendant as charged of first degree theft. CP 42.

Sentencing.

On May 25, 2017, the defendant came before the court for sentencing on two cases; the first involved one count each of possession of a stolen motor vehicle and witness tampering (case number 16-1-04019-2), and the second involved one count each of theft of a motor vehicle and forgery (the instant case, number 16-1-03608-3).

The defendant had previously been sentenced for three other offenses. On May 1, 2017, Judge Cooney sentenced the defendant to 57 months incarceration for one count of possession of a stolen motor vehicle (Spokane Superior Court cause number 16-1-02252-0). RP 661. On May 3, 2017, Judge Fennessey sentenced the defendant to 57 months incarceration for a second count of possession of a stolen motor vehicle (Spokane Superior Court cause number 16-1-04019-6), and ordered that sentence to run concurrently with the sentence earlier imposed by Judge Cooney. RP 661-62. On May 19, 2017, Judge Fennessey imposed twelve months and a day for one count of possession of a controlled substance, methamphetamine (Spokane Superior court number 16-1-03524-9), and ordered that sentence to run consecutively to the two earlier sentences. RP 662.

On the case number ending in 4019-2, Judge Clary imposed 60-month sentences for both the witness tampering and possession of stolen motor vehicle offenses, to run concurrently with each other, but consecutively to the sentences from Judge Cooney and Judge Fennessey. RP 665.

On the instant case, number 16-1-03608-3, Judge Clary sentenced the defendant to 57 months for first degree theft of the trailer camper, and 22 months for forgery. CP 302. The 57 months was ordered to run

concurrently with the witness tampering and possession of stolen motor vehicle charges under case number 4019-2. RP 665. The 22 months ordered for the forgery was ordered to run consecutively to the witness tampering and possession of stolen vehicle. RP 665; CP 302. The total amount of confinement ordered was 151 months for all five cases. RP 666. However, the trial court did not enter written findings of fact and conclusions of law in pronouncing its sentence.⁶

The defendant timely appealed.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY REGARDING THE CHECK IN DEFENDANT'S POSSESSION OR QUESTIONING AND ARGUMENT REGARDING THE DEFENDANT'S FINANCIAL MEANS.

Standard of Review.

A trial court has discretion concerning the admissibility and relevance of evidence. *State v. Sherburn*, 5 Wn. App. 103, 105,

⁶ However, the court did find substantial and compelling reasons to depart from the SRA. The court indicated that the SRA allows a trial court to impose consecutive sentences for multiple current convictions where a defendant's high offender score results in no sentence or time for some of the current offenses, citing RCW 9.94A.535(2)(c). The trial court found that in his allocution, the defendant "frequently blamed or made attribution to others for his choices to commit crimes ... did not appear to accept responsibility for his actions [and] has not appeared to present himself as remorseful or contrite." RP 664. Although Mr. Dunbar's attorney explained the costs associated with lengthy incarceration, the sentencing court determined that the defendant's previous 63-month sentence on an unrelated charge "does not appear to have changed his course of conduct or choices as evidenced by the current cases." RP 664.

485 P.2d 624 (1971). The standard for relevancy is whether the evidence gives rise to reasonable inferences regarding the issue at hand or sheds any light upon it. *Id.* at 105. Relevancy means a logical relation between evidence and the fact to be established. *Id.* If evidence is relevant, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403. Evidence is unfairly prejudicial if it is “more likely to arouse an emotional response than a rational decision by the jury.” *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009).

An appellate court also reviews a trial court’s decision to admit evidence under ER 404(b) for an abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Evidence may be admitted under ER 404(b)⁷ to prove an essential element of the charged crime. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). ER 404(b) was not designed “to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from

⁷ ER 404(a) and (b) state, in pertinent part:

(a) Character Evidence Generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(b) 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.

suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.” *Id.* at 175.

Where evidence is admissible for a proper purpose, the party against whom the evidence is admitted is entitled, upon request, to a limiting instruction informing the jury that the evidence is only to be used for the proper purpose and not for the purpose of proving the character of a person in order to show that the person acted in conformity with that character. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

If the party challenging an evidentiary ruling establishes that the trial court abused its discretion, an appellate court will not reverse a conviction unless the evidentiary ruling prejudiced the outcome. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Since evidentiary errors are not of constitutional magnitude, they are harmless unless “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Such an error is harmless if “the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *Id.*

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, 702 P.2d 1182 (1985). Evidentiary errors, such as erroneous admission of ER 404(b) evidence, are not of constitutional magnitude. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Thus, evidentiary error claims are not reviewable under RAP 2.5 where the specific objection was not preserved at trial. *See State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009).

1. Forged Check.

On appeal, the defendant contends that the trial court erred in admitting testimony regarding the Grassroots Therapy check, as it was improper propensity evidence.

There was no testimony, whatsoever, that Mr. Dunbar, himself, had forged the check from Grassroots Therapy. For all the jury knew, Azariah Hulseley had written him a bad check. The jury did not see the check, nor did Ms. Eastep ever accuse him of writing the check, or attempting to cash it. The check was still in Mr. Dunbar's possession, so the logical inference was that he had not attempted to cash the check. The only testimony elicited in front of the jury was that a check in the defendant's name was found in the trailer, which was highly probative of the defendant's possession of the trailer, and that Ms. Eastep does not personally employ maintenance workers and did not employ Mr. Dunbar or "AZ."

Thus, the trial court correctly ruled that the check was probative, and was admissible for purposes other than to show propensity:

For me it's just too hard to tailor the proffered evidence the way that you're asking me to. I think to the contrary, it would be confusing to omit the drawer. It would give the jury the false inference, or to use your phrase "allude that it's a legitimate check with money that could be used to pay rent or purchase." And I'm mindful under ER 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show acts in conformity therewith. That's not what's happening here.

And then it goes onto provide, "it may, however, be admissible for other purposes." And the other purposes here are the check ties Mr. Dunbar to the trailer, and the witness's testimony demonstrates that he was not telling the truth to Sergeant Eckersley, at least as Sergeant Eckersley described what Mr. Dunbar said. That's my ruling.

RP 338.

In order to prove Mr. Dunbar committed the crime of theft, the State was required to demonstrate, beyond a reasonable doubt, that the defendant wrongfully obtained or exerted unauthorized control over property belonging to another, exceeding \$5,000 in value, with the intent to deprive the other person of the property. CP 38-39. The defendant claimed that he was renting (or had purchased) the trailer from "Ocean." This claim, if believed, was a defense to the crime of theft because it supported the argument that the defendant did not "wrongfully obtain or exert unauthorized control" over the trailer. Thus, testimony and evidence

tending to demonstrate the falsity of the defendant's claims that he had *rightfully obtained or exerted authorized control* over the trailer were highly probative, and necessary to proving the aforementioned essential element of the crime of theft.

Therefore, testimony regarding the check was admitted for a proper purpose. It was not used to demonstrate that the defendant is a "criminal type" and therefore, more likely to steal a travel trailer. Instead, it was admitted to demonstrate that the check was not "a legitimate check ... that could be used to pay rent or purchase." RP 338. While a limiting instruction could have been given which limited the jury to considering the check only insofar as it tied the defendant to the trailer and bore on his claimed ability to pay for the trailer, no such limiting instruction was requested by the defendant, and the court was not obligated, *sua sponte*, to give such an instruction. *State v. Russell*, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011).⁸

2. Defendant's Financial Status.

The defendant further contends that the State's questioning and evidence relating to the defendant's financial status and inability to pay for the trailer were improper ER 404(b) evidence. There was no objection to

⁸ Such an instruction may also be an improper comment on the evidence, and a defendant may wish not to have such an instruction given as a tactical choice not to add emphasis to the evidence.

this testimony on ER 404(b) grounds; therefore, it is waived. *See, e.g., Guloy*, 104 Wn.2d 412.

In any event, neither *State v. Jones*, 93 Wn. App. 166, 968 P.2d 888 (1998), nor *State v. Matthews*, 75 Wn. App. 278, 877 P.2d 252 (1994), *review denied*, 125 Wn.2d 1022, 890 P.2d 463 (1995), cited by defendant, are ER 404(b) cases. Thus, they do not stand for the proposition that a defendant's financial status qualifies as an "other crime, wrong or act" within the meaning of ER 404(b). And, by the plain language of the rule, financial status is not a "crime," "wrong" or "act." Thus, it is doubtful that ER 404(b) governs the admissibility of financial status evidence.

However, under *Jones* and *Matthews*, the admissibility of this evidence may be governed by ER 403. Defendant did not object upon this basis at trial, and therefore, this specific objection is waived. *See, e.g., Guloy, supra*.

In any event, neither *Jones* nor *Matthews* preclude the defendant's financial status from being discussed in a trial such as this. *Jones* involved whether a defendant's financial status is relevant under certain circumstances under ER 401 or is overly prejudicial under ER 403. *Jones* noted that the *Matthews* court acknowledged that "inquiry into a defendant's financial status may be useful when considered in conjunction with other probative evidence. *Jones*, 93 Wn. App. at 174-75. The *Jones*

court stated that theoretically a jury could be invited to infer that, because a defendant is of meager means, that he or she is more or less likely to have committed a financially motivated offense, and that such an “inference is impermissible. That is not to say, however, that financial status evidence is per se inadmissible.” *Id.*

Here, it was highly probative for the deputy prosecutor to inquire as to whether the defendant had any means to purchase or rent the trailer, as he had claimed to Sergeant Eckersley in his interview. Under other circumstances, such as where a defendant does not claim to have purchased or rented a property, but rather borrowed that property, his or her financial means *may not* be probative. But where, as here, a defendant claims to have rented or purchased a trailer as a defense to the theft of the trailer, his financial means to do so is pertinent. No argument was proffered that because Mr. Dunbar was of modest means, he must have been more likely to have committed the crime of theft. Rather, because Mr. Dunbar was of modest means, his claims that he purchased or rented the travel trailer, were less credible.

B. THE PROSECUTOR’S ARGUMENTS WERE NOT SO FLAGRANT AND ILL-INTENTIONED THAT A CURATIVE INSTRUCTION COULD NOT REMEDY ANY RESULTING PREJUDICE.

In closing argument, the prosecutor has wide latitude in making arguments to the jury and can draw reasonable inferences from the evidence, including evidence respecting the credibility of witnesses. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that in the context of the record and all of the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). When, as here, the defendant fails to object at trial to the challenged conduct, he or she waives the misconduct claim unless the argument was so “flagrant and ill[-]intentioned” that “no curative instruction would have obviated any prejudicial effect on the jury.” *Id.* (quoting *Thorgerson*, 172 Wn.2d at 455). However, “reviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. ‘The criterion always is, has such

a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial.” *Id.* at 762.

Defendant concedes that the claimed errors were not objected to, Appellant’s Br. at 18, but alleges that that the misconduct was flagrant and ill-intentioned. While perhaps inarticulate, or even ill-advised, the prosecutor’s statements do not amount to flagrant and ill-intentioned misconduct that could not have been cured by a defense objection and an instruction by the court.

1. Presumption of Innocence.

While perhaps confusing or inarticulate, the State’s argument that the presumption of innocence did not attach to the defendant’s pre-arrest statements, made before an information was filed charging him with a crime, was not wholly inaccurate, as “criminal defendants” are entitled to such a presumption; but, without being charged with a crime, one is not a “criminal defendant.”

Ultimately, this statement should be viewed in the context of the prosecutor’s entire argument, the manner in which that argument responded to the defendant’s closing arguments, the evidence as a whole, and the instructions given by the court. This statement was in response to defense counsel’s argument that Mr. Dunbar was under no obligation to prove his innocence to Sergeant Eckersley during the jail interview. RP 600. The

State is entitled to make a “fair response” to defendant’s closing arguments. *See, e.g., State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

Even if this comment were misconduct, it is not so flagrant or ill-intentioned that a curative instruction could not have obviated any prejudice to the defendant. In *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008), cited by defendant, Appellant’s Br. at 18-19, the Supreme Court determined that the prosecutor had undermined the burden of proof beyond a reasonable doubt and misled the jury as to the presumption of innocence. However, even in that case, where the prosecutor stated, “it doesn’t mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt” the Supreme Court determined that the trial court’s intervention by giving an “appropriate and effective” curative instruction obviated any prejudice to the defendant. Thus, under these circumstances, had defense counsel objected, and had the court given a proper curative instruction, any resulting prejudice from this prosecutor’s argument could have been cured. Therefore, the failure to object to the statement precludes review.

Furthermore, and importantly, the prosecutor repeated at the end of his rebuttal argument the State’s request for the jury to follow the court’s instructions: “Please, use the court’s instructions. Please evaluate the credibility of the evidence with your common sense. Thank you.” RP 604. This statement, in the absence of a curative instruction, would obviate any

potential prejudice resulting from the earlier argument. The last thing the jury heard from the prosecutor was that it was to follow the court's instructions. The prosecutor's argument was not so flagrant and ill-intentioned that a curative instruction could not have remedied any resulting prejudice.

2. Vouching.

Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness. *Thorgerson*, 172 Wn.2d at 443 (citing *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010)). Whether a witness testifies truthfully is an issue entirely within the province of the trier of fact. *Id.*

In *State v. Russell*, the court explained that while it is misconduct for the prosecutor to suggest that evidence not presented at trial provides additional grounds for the jury to return a guilty verdict, it is not misconduct for the prosecutor to argue that evidence does not support the defense theory or to fairly respond to defense counsel's argument. 125 Wn.2d at 87. The court said it appeared that the prosecutor's statement was aimed more at responding to defense criticisms than at finding an additional reason to convict. *Id.*

Such is the case here. Although, at first glance, the prosecutor's statements may appear to vouch for Sergeant Eckersley's credibility, these statements must be evaluated in the context of the argument and record as a whole. The defendant argued in closing that Sergeant Eckersley had twisted his words to portray a one-sided case. This argument implied that Sergeant Eckersley was not being truthful and was biased in describing to the jury the defendant's jail interview and the jail phone calls he listened to. In response, the State implored the jury to "use its collective common sense" in evaluating the credibility of the statements made by the defendant and Sergeant Eckersley. The State was entitled to a fair response to the defendant's allegations that the investigation was one-sided and hastily or poorly conducted.

Furthermore, as above, even assuming the prosecutor's discussion that Sergeant Eckersley or the State would be liable for malicious prosecution if they falsely accused Mr. Dunbar, the defendant has failed to demonstrate how any resulting prejudice could not have been cured by an objection and a curative instruction. And, in light of the prosecutor's final words to the jury, that they were to follow the court's instructions, any prejudice was cured.

3. Discrediting the Defendant.

Though the disco-ball analogy used by the prosecutor during trial is potentially inapt, *Thorgerson* makes it clear that a curative instruction could have obviated any prejudice to the defendant. In *Thorgerson*, the prosecuting attorney accused defense counsel⁹ of “sleight of hand,” stating, “look over here, but don’t pay attention to there, pay attention to relatives that have nothing to do with the case . . . don’t pay attention to the evidence.” *Thorgerson*, 172 Wn.2d at 451. The court concluded that this was ill-intentioned misconduct because it was planned ahead of time by the prosecutor, but that it could have been cured by a curative instruction by the court. *Id.* The court determined that the error was not likely to have affected the outcome of the case. *Id.*

Furthermore, the disco-ball analogy was an attempt to respond to defense counsel’s arguments that (1) the State’s evidence regarding Mr. Dunbar’s financial status was intended “by the State to *distract* [the jury] from what Mr. Dunbar’s testimony was,” RP 596 (emphasis added), and (2) “the State and law enforcement is *changing* that or presenting it to you in a way that it’s not the way Mr. Dunbar intended,” RP 598 (emphasis

⁹ *Thorgerson* involved whether the prosecutor impugned defense counsel. Defendant has not alleged that the State impugned his attorney, but rather, that it discredited him.

added). Thus, the prosecutor's response that the defendant was attempting to distract the jury from the facts of the case was in direct response to the same accusation from defense counsel. Again, as above, the State is entitled to a fair response to defendant's arguments. And, also as above, the defendant is unable to demonstrate, especially in light of *Thorgerson*, that a curative instruction or that the prosecutor's final remarks, that the jury should follow its instructions, were insufficient to obviate any resulting prejudice.

4. Any Error Did Not Affect the Outcome of the Case.

The trial court instructed the jury on the burden of proof, the elements of the charge, the presumption of innocence and the jury's role as the sole judge of witness credibility. CP 29, 32. The jury is presumed to follow the court's instructions. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). Both the prosecutor and defense counsel reminded the jury that credibility determinations are solely within the province of the jury, and that the jury was to follow the court's instructions. RP 578, 588-89, 597, 604.¹⁰

¹⁰ On appeal, defendant contends that the prosecutor's conduct was flagrant and ill-intentioned in light of the court's ruling on the defendant's motion for mistrial. First, the jury is presumed to have followed the court's curative instruction after the motion for mistrial. Second, even if the conduct was flagrant and ill-intentioned, which the State does not concede, the true question is whether a curative instruction could have obviated any resulting prejudice. The defendant has failed to make that showing, as discussed above.

In this case, the most damaging evidence that was offered against the defendant were his jail telephone calls. Had the defendant not stated “if cops wouldn’t have come, it would have been fine” and “I could take *another* trailer,” the jury might have believed that he had been duped into renting or purchasing a stolen trailer. RP 414-15 (emphasis added). However, the defendant’s first statement is clearly an acknowledgment that he knew that the trailer was stolen, or at the very least, possession of the trailer could result in arrest, and the second statement is an acknowledgment that he, himself, had taken it. The jury clearly did not believe that these statements were made in jest, as claimed by the defendant at trial. Thus, even if the prosecutor made improper remarks during closing argument, any error was harmless.

C. THE STATE AGREES THAT WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD HAVE BEEN ENTERED UPON THE COURT’S ORDER OF AN EXCEPTIONAL SENTENCE.

RCW 9.94A.535 states: “Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” In *State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015), our Supreme Court held “the entry of written findings is essential when a court imposes an exceptional sentence.” In so holding, the court reasoned (1) permitting

verbal reasoning to substitute for written findings ignores the plain language of RCW 9.94A.535, (2) a written judgment and sentence affords a defendant finality, and (3) the absence of written findings hampers public accountability as both “the Sentencing Guidelines Commission and the public at large [cannot] readily determine the reasons behind exceptional sentences.” *Id.* at 394-95. Applying these principles, the *Friedlund* court remanded the case for entry of written findings and conclusions as the record was “devoid of written findings.” *Id.* at 395.

A court may impose an exceptional sentence above the standard range if it finds “[t]he defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.” RCW 9.94A.535(2)(c); *State v. Mutch*, 171 Wn.2d 646, 660-61, 254 P.3d 803 (2011). Such an exceptional sentence may be imposed without a finding of fact by the jury. RCW 9.94A.535(2).

RCW 9.94A.589(1) states in pertinent part:

Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score... *Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.*

(Emphasis added.)

RCW 9.94A.589(3) states in pertinent part:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced *unless the court pronouncing the current sentence expressly orders that they be served consecutively.*

(Emphasis added.)

Although the sentencing court expressly ordered that the forgery was to run consecutively to the other charges, this situation is governed by RCW 9.94A.589(1) rather than RCW 9.94A.589(3). The State agrees with the defendant, that, to the extent no written findings of fact were entered by the trial court when it imposed consecutive sentences in this case, the sentence violates the statutory requirements set forth above and the holding in *Friedlund*.¹¹

However, the record is clear that the trial court intended to impose an exceptional sentence based on the defendant's high offender score which resulted in some of the defendant's crimes going unpunished. RP 663-64;

¹¹ Before *Friedlund*, the failure to enter written findings of fact upon imposition of an exceptional sentence could potentially be excused if the court's oral ruling was sufficient to establish substantial and compelling reasons for the exceptional sentence. See, e.g., *State v. Bluehorse*, 159 Wn. App. 410, 423, 248 P.3d 537 (2011). The holding in *Friedlund* makes it clear that written findings are required.

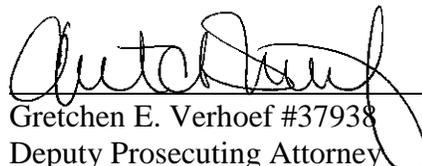
see also n.5, *supra*. The trial court was also cognizant of the goals of the SRA, including proportionate sentences, frugal use of resources, protection of the public, and decreasing risk of re-offense. RP 658-59. The court deferred sentencing the defendant on the original sentencing date, and took time to carefully consider what sentence it would impose. RP 658-59. The only error in the imposition of this sentence was the failure to enter written findings as required by *Friedlund* and RCW 9.94A.535. For this reason, remand for entry of such findings is appropriate. *Friedlund*, 182 Wn.2d at 397.

V. CONCLUSION

For the reasons set forth herein, the State respectfully requests that this Court affirm the trial court and jury verdict.

Dated this 5 day of April, 2018.

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