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NO. 62772-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ABDU MOHAMMED BERHAN-ABDU,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY M. RAMSDELL

BRIEF OF RESPONDENT

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DANIEL T. SATTERBERG
King County Prosecuting Attorney

RANDI J. AUSTELL
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. A trial court has the discretion to forgo a pretrial ER 404(b) evidentiary hearing where the existence of a defendant's prior acts can be determined by the State's offer of proof. Here, defense counsel did not contest the existence of the prior acts; rather, he accepted the State's proffer but argued that the probative value was outweighed by the prejudicial effect. Did the trial court act within its discretion by determining, without a hearing, that the uncontested prior acts occurred?

2. Evidence of prior acts is admissible for non-propensity purposes, such as identity or to provide the jury with context. In this case, the trial court admitted evidence that the defendant had engaged in signature-like acts on at least eight prior occasions to prove identity. Additionally, the court admitted the evidence to provide the jury with context for otherwise seemingly innocuous behavior by the defendant. Where the entire defense was to distinguish the defendant's *modus operandi* from the charged offense, and then to urge the jury to acquit the defendant of robbery and find him guilty only of theft, did the trial court act within its discretion in admitting the evidence?

3. When a party fails to except to the trial court's refusal to give a proposed jury instruction, the issue is waived on appeal. Here, after defense counsel acknowledged that the facts that came out at trial did not support his requested jury instruction on an inferior degree offense, counsel did not except to the court's refusal to give an improper instruction. Has the defendant waived appellate review of this issue?

4. An inferior degree offense instruction should be given only if the facts presented at trial support a reasonable inference that only the lesser crime was committed. In this case, the victim said that, as the defendant fled with some stolen watches, he displayed what appeared to be a firearm. The defendant admitted the theft, but denied the use of any force. Did the trial court exercise sound discretion in finding that there were no facts to support an inference that the defendant committed second-degree, instead of first-degree, robbery?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By Amended Information, the State charged defendant Abdu Mohammed Berhan-Abdu with one count of robbery in the first

degree.¹ CP 4. The jury convicted Berhan-Abdu as charged.
CP 64. The trial court imposed a low-end standard range sentence
of 31 months. CP 69, 71. Berhan-Abdu timely appeals. CP 76.

2. SUBSTANTIVE FACTS

a. K-Mart's Loss Prevention Policies.

K-Mart has specific policies that govern its Loss Prevention Officers' (LPOs) activities. 4RP 15.² To stop a suspected shoplifter outside the store, an LPO must see the suspect: (1) enter the store, (2) walk up to a product, (3) select the product, (4) conceal the product, (5) walk toward an exit, and (6) leave K-Mart with the misappropriated product. 4RP 15. Only then may an LPO apprehend a suspect. 4RP 15. In addition, unless these six steps have been satisfied, an LPO is forbidden from speaking to the suspect; i.e., he may not accuse the suspect of having stolen

¹ Pre-trial, the State moved to dismiss count 2, bail jumping, because the defendant missed his court appearance when he was an in-patient at a drug treatment facility. 1/12/09RP 3.

² The verbatim report of proceedings consists of five volumes designated as follows: 1RP (1/8/09 - pretrial); 2RP (1/12/09 - pretrial); 3RP (1/13/09 - trial); 4RP (1/14/09 - trial); 5RP (2/20/09 - sentencing).

merchandise — or even mention the product that the LPO believes the suspect stole.³ 4RP 16-17.

Alternatively, if an LPO fails to satisfy the six steps, he may attempt "recovery" or "prevention," as opposed to apprehension. 4RP 15. Specifically, the LPO may follow the suspect outside or "jump around" the suspect to try and entice him to drop the merchandise. 4RP 15-16.

b. Berhan-Abdu's Previous Visits To K-Mart.

Berhan-Abdu frequented the K-Mart store at 130th and Aurora Avenue, but he never bought anything. 3RP 10; 4RP 9-10, 18. Instead, Berhan-Abdu pushed a shopping cart that contained towels or pillows, hid watches under those items, ripped open the watch cases (often using a pair of pliers), and stole the watches. 4RP 18-19. K-Mart's former LPO, Samuel Steiner, had seen Berhan-Abdu steal, or attempt to steal, watches in this manner on

³ K-Mart's policy is quite restrictive. On one occasion, just after Samuel Steiner had been hired as K-Mart's LPO, he saw a suspect steal a cellular telephone and then go into a restroom. 4RP 16. K-Mart does not permit its LPO to apprehend a suspect if the suspect goes into a restroom (ostensibly because the LPO would not have been able to maintain constant visual contact). 4RP 16. Steiner approached the suspect and simply said, "cell phone." 4RP 17. Steiner's action constituted a violation of K-Mart's policy, for which a district manager sat down with Steiner and explained K-Mart's policies anew. 4RP 16-17.

eight or nine occasions.⁴ 4RP 18. According to Steiner, Berhan-Abdu "pretty much did the same thing every time he came in." 4RP 19. Yet, Steiner never fulfilled the six steps needed to apprehend Berhan-Abdu – Steiner's actions had always been limited to recovery or prevention. 4RP 20.

Once, Steiner watched Berhan-Abdu enter K-Mart, approach the jewelry case, use a pair of pliers to rip open the watch cases, and conceal the watches. 4RP 18-19. But Steiner had not watched Berhan-Abdu long enough to satisfy the six elements needed for an apprehension, so he attempted a recovery or prevention. 4RP 18, 41. He stood by the entrance to K-Mart, making it obvious to Berhan-Abdu that he was a security or loss prevention officer. 4RP 18. Berhan-Abdu approached Steiner and asked him if he could watch his bag. 4RP 18. Steiner replied that he could not. 4RP 18. Berhan-Abdu then went to the front counter, put some watch cases down and said, "All of these broke while I was holding them." 4RP 18-19. Berhan-Abdu then left the store – once again, without purchasing anything. 4RP 19.

⁴ Steiner left K-Mart's employment in July 2008 because he wished to return to school and his work and class schedules conflicted. 4RP 10-11.

c. The Robbery.

On March 16, 2008, at approximately 8:00 p.m., Berhan-Abdu stole five watches from K-Mart. 3RP 10, 23; 4RP 20. Per Berhan-Abdu's usual practice, he pushed a shopping cart with pillows and towels down one of the store aisles. 4RP 21-22. Steiner observed him through mirrored ceiling tiles. 4RP 22. Berhan-Abdu concealed the watches underneath the towels and cut the watch cases open with a pair of pliers. 4RP 22, 60. He then hid the watches inside a pocket of his trench coat. 4RP 22. Because Steiner's view was limited, he lacked confidence that he had satisfied all six steps for an apprehension; thus, he decided to "go for a prevention or a recovery like [he] had done a number of times before." 4RP 22-23.

Steiner followed Berhan-Abdu out the double-set of front doors. 4RP 23. When Berhan-Abdu turned and saw Steiner, he screamed and then said, "[O]kay, here, you can have it, you can have it." 4RP 23. Berhan-Abdu threw down his trench coat and fled. 4RP 23-24.

Steiner chased Berhan-Abdu (but did not say anything to him because that would have violated K-Mart's policies). 4RP 24. Steiner wanted to scare Berhan-Abdu so that he would drop the

watches. 4RP 24, 31. Berhan-Abdu screamed that he had a gun. 4RP 25. He lifted his shirt and displayed what appeared to be the butt of a handgun. 4RP 25, 38. Steiner immediately stopped chasing Berhan-Abdu. 4RP 26. Berhan-Abdu said, "Yeah, don't fuck with me. Don't fuck with me." 4RP 26, 38. He then fled up the hill to Aurora Avenue. 4RP 26, 38.

Steiner called 911. 4RP 30. While he waited for the police, he picked up Berhan-Abdu's trench coat. There was a pair of pliers in one of the pockets. 4RP 30-31. Steiner provided the police officer who responded with Berhan-Abdu's description, which the officer broadcasted. 3RP 11-12, 48, 54, 56, 61.

At approximately 8:30 P.M., a patrol officer spotted Berhan-Abdu within a few blocks of the K-Mart store. 3RP 13. Berhan-Abdu kept walking; he appeared to be purposefully avoiding eye contact with the police officer. 3RP 15. Berhan-Abdu went into a mini-market/gas station for a moment and he then came out and abruptly changed direction. 3RP 17, 20. The police officer tapped his horn twice to draw his attention, but Berhan-Abdu ignored him. 3RP 20.

Berhan-Abdu went into a restaurant, the 125th Street Grill. 3RP 21. The police officer lost sight of him while he parked his

patrol car. 3RP 21. The police officer then followed Berhan-Abdu into the restaurant, but did not see him. Moments later, he saw Berhan-Abdu exit the women's restroom. 3RP 22. Because the information broadcasted included "suspect armed," the officer ordered Berhan-Abdu to show his hands. 3RP 22. As Berhan-Abdu raised his arms, he dropped a small blue glove. 3RP 22.

After a back-up officer had arrived and Berhan-Abdu was arrested, the police searched the women's restroom. 3RP 22-23. Inside the feminine hygiene disposal can, police recovered three watches and a set of keys. In the last stall, police recovered two more watches. 3RP 23. By the sink, police found the matching blue glove. 3RP 23.

Steiner was transported to the 125th Street Grill for a one-on-one identification procedure. 3RP 27, 50; 4RP 33. He positively identified Berhan-Abdu. 3RP 50, 66; 4RP 33.

As one police officer transported Berhan-Abdu to the precinct, another officer took Steiner back to K-Mart. 3RP 27, 51, 67; 4RP 34. After Steiner explained Berhan-Abdu's "M.O.,"⁵ the

⁵ *Modus operandi* or mode of operation.

police officer looked at the watch display, the area in which the watch cases had been disassembled, and the shopping cart.

3RP 67. The police officer said, "[E]verything Steiner was telling me about the M.O. made sense because I was now seeing it."

3RP 67.

The police officer saw a shopping cart with pillows; under the pillows were broken watch cases. 3RP 68; 4RP 36-37. He located towels in an aisle — out of place — in which there were smashed watch cases. 3RP 68; 4RP 34. In total, he recovered five watch cases, two of which matched the watches recovered in the restroom (one brand, "Joe Boxer," is sold exclusively at K-Mart). 3RP 69; 4RP 38. In addition, the police recovered Berhan-Abdu's trench coat and a pair of needle-nose pliers.⁶ 3RP 58-59; 4RP 67-68.

The police never recovered a gun; it was not located on Berhan-Abdu when police frisked him and it was not recovered in the restroom or from the mini-market/gas station. 3RP 40-41, 50, 76. There are myriad locations in which to hide a gun between K-Mart and the 125th Street Grill. 3RP 80-81. One police officer

⁶ Some merchandise have a tag that trips an alarm; the needle-nose pliers remove those tags. 3RP 59-61.

explained that the area between K-Mart and the restaurant has a "ton of foliage," and that they "could have searched for two days and never found a gun." 3RP 41.

Berhan-Abdu testified.⁷ He said that he went to K-Mart "to steal the watch." 4RP 57. He explained that he had previously (twice) stolen watches from K-Mart — sometimes he used pliers to rip open the cases and other times he used his hands. 4RP 58, 68, 71-72. On this occasion, he put pillows in a shopping cart, broke the cases with pliers, and put some watches in his pocket. 4RP 59-60.

Berhan-Abdu stated that after he left K-Mart, a man (Steiner) approached him. 4RP 61, 68. He insisted that he did not know Steiner, "I didn't even realize that he's [a] security guard." 4RP 61, 68. Berhan-Abdu claimed that Steiner attacked him; he used the "F word . . . like he was going to fight me." 4RP 61, 68. Berhan-Abdu asked Steiner, "What do you need, man?" 4RP 61. Steiner did not respond, he just "took off back [to K-Mart]." 4RP 61.

Although Berhan-Abdu admitted that he stole watches from K-Mart — not just on this occasion, but before — he steadfastly

⁷ Berhan-Abdu, an East African (Eritrean) immigrant, testified with the assistance of an interpreter. 4RP 56-57.

denied that he had a gun or threatened Steiner with a gun or any threat of force at all. 4RP 65-66, 68, 71-72.

C. ARGUMENT

1. BERHAN-ABDU WAIVED AN ER 404(b) EVIDENTIARY HEARING. MOREOVER, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE PRIOR ACTS.

Appellate counsel builds a 28-page argument premised on contentions that lack candor. See RPC 3.3. He claims that trial counsel insisted upon a pretrial evidentiary hearing to determine the admissibility of Berhan-Abdu's prior behavior at K-Mart; yet, trial counsel accepted the State's offer of proof and thereby waived such a hearing. See Br. of Appellant at 10 (citing 1/8/08 (sic) RP at 36-37 for the proposition that "the State's offer of proof was inadequate").⁸ Consequently, this Court should decline to review this claim.

Appellate counsel also contends that defense counsel conceded theft *pretrial*, but denied the force element of robbery; thus, he claims that there was no proper basis upon which to admit

⁸ At the cited pages, trial counsel did not contest the State's offer of proof; rather, he argued that the prejudice outweighed the probative value.

the prior acts. See Br. of Appellant at 24,⁹ at 25 (no citation to the record), at 26 (no citation to the record), at 28 (no citation to the record), at 32 (no citation to the record). Yet, a review of the record (documents cited by appellate counsel, as well as a document to which counsel fails to cite) contradicts his assertion. See CP 102 (defense is "general denial").

Finally, appellate counsel fails to disclose to this Court that *after* trial began, the defense embraced the prior incidents; they morphed into the peg upon which the defense hung its theory, that Berhan-Abdu is a thief, not a robber. See generally 4RP 113-17, 120-21. Counsel emphasized Berhan-Abdu's *modus operandi* during cross-examination of the State's witnesses, and his mantra in closing argument was that, based on his client's *modus operandi* (repeatedly employing the same tactics to steal watches, but never while armed with a gun), the jury should find Berhan-Abdu guilty of only theft in the third degree. See, e.g., 3RP 73, 76; 4RP 40, 113-14, 116-17, 120-21. This Court should reject these claims.

⁹ Appellant, at page 24 of his brief, refers to the defense trial memorandum (but gives no cite). In any event, the trial memorandum does not support his contention, as will be discussed later in this brief at § C.1.b, *infra*.

a. Counsel Waived A Pretrial Hearing.

Berhan-Abdu claims that the trial court abused its discretion by failing to hold a pretrial evidentiary hearing to determine whether alleged prior behavior occurred. This claim is without merit. Trial counsel accepted the State's offer of proof and did not contest the occurrence of the prior behavior. Accordingly, this Court should decline to address this claim.

When the State seeks to admit evidence of a defendant's prior wrongs or acts, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudice. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). The trial court is in the best position to determine whether, based on an offer of proof, it can determine whether a prior act or acts probably occurred. Id. at 295. Accordingly, the decision whether to conduct such a hearing is within the sound discretion of the trial court. Id.

In this case, the trial court followed the approved procedure. See 1RP 38-41. Defense counsel recognized that the decision to

conduct an evidentiary hearing is discretionary. See CP 7. Initially, counsel believed that, in order to establish Berhan-Abdu's prior acts, the court might need to conduct a hearing at which counsel could "voir dire" Mr. Steiner, the LPO. 1RP 31. The trial court asked counsel whether his request to voir dire Steiner was "[a]s opposed to an offer of proof?" 1RP 31. Counsel responded, "If the State can give me an offer of proof, I may accept that as an alternative to testimony by Mr. Steiner." 1RP 31-32.

Based on the Certification for Determination of Probable Cause (CP 2), the joint interview with Steiner, and the facts summarized in the deputy prosecutor's trial memorandum (CP 88-90), the prosecutor made an offer of proof. 1RP 29-30, 33-34. The offer of proof was consistent with Steiner's testimony. Compare 1RP 29-30, 33-34 with 4RP 18-19, 40. And, to a large extent, the offer of proof was consistent with Berhan-Abdu's testimony (although he minimized the number of prior incidents). Compare 1RP 29-30, 33-34 and CP 2 with 4RP 58-60, 68, 71-72.

After the proffer, the court asked defense counsel if he had anything further. Counsel responded, "I have nothing else, Your Honor." 1RP 38. Yet, if counsel still believed that an evidentiary hearing was required, it was incumbent upon him, at a minimum, to

make an offer of proof as to what evidence he would present in rebuttal. See Kilgore, 147 Wn.2d at 297 (Chambers, J., concurring) (absent an offer of proof that would rebut the State's proffer, the defendant is not entitled to an evidentiary hearing). Consequently, counsel waived a pretrial hearing and this Court should decline to address this claim.

Contrary to the claim on appeal, after the State made its offer of proof, defense counsel did not maintain his request to voir dire Steiner. Rather, counsel focused on the probative value of the evidence versus its prejudicial effect. See 1RP 36. Under that circumstance, an evidentiary hearing is not required. See Kilgore, 147 Wn.2d at 295-96 (Chambers, J., concurring) (an accused is not entitled to an evidentiary hearing when he challenges the probative value versus the prejudicial effect, as opposed to challenging the existence of the prior acts). For this additional reason, the trial court did not abuse its discretion by determining that an evidentiary hearing was unnecessary.

b. The Trial Court Admitted The Prior Acts Evidence For Non-Propensity Purposes.

Even if the Court reviews the claim, it should affirm the trial court because the State's proffer permitted the trial court to determine by a preponderance of the evidence that the prior acts occurred, and because substantial evidence supports the court's finding.¹⁰ See State v. Kilgore, 107 Wn. App. 160, 188, 26 P.3d 308 (2001), aff'd, 147 Wn.2d 288 (2002) (an appellate court will uphold a trial court's finding that the prior acts occurred if substantial evidence in the record supports it).

Under ER 404(b), evidence of prior acts is inadmissible to show action in conformity therewith. Such evidence may be admissible, however, "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

Evidence of other crimes is relevant on the issue of identity only if the method employed in the commission of both crimes is "so unique" that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged. State v. Russell, 125 Wn.2d 24, 66-67,

¹⁰ 1RP 41 (court's finding that the acts occurred); see 4RP 18-19, 40, 58-60, 68, 71-72 (substantial evidence supported proffer).

882 P.2d 747 (1994). A prior act "is not admissible for this purpose merely because it is similar, but only if it bears such a high degree of similarity as to mark it as the handiwork of the accused." State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984) (quoting United States v. Goodwin, 492 F.2d 1141, 1154 (5th Cir.1974)). "[T]he device used must be so unusual and distinctive as to be like a signature." Russell, 125 Wn.2d at 67. The more distinctive the prior acts, "the higher the probability that the defendant committed the crime, and thus the greater relevance." State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002).

Two factors that may contribute to similarity are geographic or temporal proximity. Id. Whether the prior acts were similar enough to the charged crime to warrant admission is generally left to the discretion of the trial court. State v. Foxhoven, 161 Wn.2d 168, 177, 163 P.3d 786 (2007).

i. Identity.

The trial court admitted evidence of Berhan-Abdu's prior acts for identity – a purpose "separate and apart for (*sic*) showing conformity." 1RP 39. The shared features of the prior acts with the charged offense include: (1) geographic proximity (the acts all

occurred at the same K-Mart); (2) temporal proximity (approximately eight instances occurred over an 8-month time frame);¹¹ (3) the use of a shopping cart; (4) the use of pillows or towels to conceal the destruction of the watch cases; (5) the use of needle-nose pliers – some, but not all, of the time – to break open the cases; (6) the theft or attempted theft of only watches; and (7) Berhan-Abdu's failure to ever make a purchase. See, e.g., 1RP 29-30, 37-38. As Steiner said, "He pretty much did the same thing every time he came in. He didn't change it up much." 4RP 19.

Even if any one or more of the similar features is not individually unique, the appearance of many of the same features and the concomitant absence of dissimilar features can create a sufficient inference that they are not coincidental.¹² See Thang, 145 Wn.2d at 644 (citing State v. Jenkins, 53 Wn. App. 228, 237, 766 P.2d 499 (1989) ("holding that while pipe wrench burglaries, brown Camaros and ground floor entries are not individually

¹¹ Steiner started working at K-Mart in September or October 2007 and left his employment there in July 2008. 4RP 10-11.

¹² The charged crime had the possible dissimilarity of Berhan-Abdu's having armed himself with what appeared to be a firearm. It is unknown whether Berhan-Abdu was armed in any of the prior occurrences but simply had no provocation to display the apparent weapon (such as Steiner chasing him, as he did in the charged offense).

unique, they create striking similarities when taken together, sufficient for a signature-like crime"). These shared features, when taken together, are so unusual and distinctive as to be signature-like. Indeed, it was the defendant's *modus operandi* that served as the basis for defense counsel's exhortation to the jury that it should find his client guilty of only theft in the third degree.¹³ See 4RP 113-17, 120-21. Thus, the trial court did not abuse its discretion in admitting the prior acts evidence for identity.¹⁴

Appellate counsel claims that trial counsel conceded theft *pretrial*; he contends, therefore, that the trial court erred by admitting the evidence for identity because it was not a disputed element. This claim is contradicted by the record. There was no pretrial concession of theft. In fact, defense counsel did not concede theft pretrial, even after the prosecutor said: "I think if there was a stipulation that the defendant committed the theft but didn't commit the robbery, we'd have a different inquiry. But

¹³ Even Steiner said that Berhan-Abdu "had never been violent [before]." 4RP 25.

¹⁴ Although the trial court never used the terms "signature-like" or *modus operandi*, it is clear from the context of the total discussion that both parties were in agreement that the prior acts were very similar, if not identical (except for possibly the firearm), to the charged act. The State, therefore, disagrees with appellate counsel's assertion that, "The Court rejected the State's claim of similarity of the incidents. . . ." Br. of Appellant at 28.

general denial puts into issue all elements, including identity."

1RP 30. This Court should reject this claim.

ii. Context.

In addition, the trial court admitted the evidence to provide context for the jury. 4RP 39-40. That is, without knowing the prior dynamics between Steiner and Berhan-Abdu, the jury would be left to speculate why Steiner approached a man who merely seemed to be shopping for linens, and why a man engaged in the seemingly innocuous task of pushing a cart with pillows and towels "just takes off out of the store." 1RP 39-40. The court said,

I think it's admissible to demonstrate why Mr. Steiner took what otherwise seems like inappropriate action in approaching the defendant. Just pushing a shopping cart around with towels and pillows in it, there's nothing inappropriate about that. And, otherwise, we have evidence that the loss prevention officer is approaching a customer for no apparent reason. So I think it's admissible for that rationale.

1RP 39. The court explained that, while "[e]vidence of flight is admissible to show consciousness of guilt," in this particular case, "absent some evidence to explain why he took a powder when [Steiner] approached him, it doesn't make any sense." 1RP 40.

Providing context was also a proper non-propensity purpose for which to admit the evidence. See State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952) (the list of purposes for which evidence of other crimes or misconduct may be admitted is not exclusive), overruled on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).

iii. Common scheme or plan.

Finally, even if the trial court admitted ER 404(b) evidence on improper grounds, this Court may affirm the admission of the evidence if it is admissible for a different purpose under ER 404(b). See State v. Jackson, 102 Wn.2d 689, 694-95, 689 P.2d 76 (1984); see also State v. Carter, 127 Wn.2d 836, 841, 904 P.2d 290 (1995) (appellate court has duty to affirm trial court on any ground supported by the record). Here, as the deputy prosecutor at trial suggested, the evidence constituted a common scheme or plan. See 1RP 28-30.

Under ER 404(b), to establish a common scheme or plan, the evidence of prior conduct must demonstrate "such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime

and the prior misconduct are the individual manifestations." Lough, 125 Wn.2d at 860. The exception may arise "when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." Id. at 855. Lough does not require that "the evidence of common features [of the crime] show a unique method of committing the crime," as required when prior misconduct is used to prove identity. State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003). But, rather, common scheme or plan is established by evidence that the defendant committed "markedly similar acts of misconduct against similar victims under similar circumstances." Lough, at 856 (quoting People v. Ewoldt, 7 Cal. 4th 380, 399, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994)).

Here, even if the Court doesn't find that the similarities were so unique or signature-like that the evidence was admissible for identity, the evidence certainly constituted markedly similar acts against similar victims under similar circumstances. For this alternative reason, the trial court should be affirmed.

c. The Probative Value Outweighed The Prejudicial Effect.

Berhan-Abdu contends that the trial court failed, in any meaningful way, to balance on the record the probative value of the evidence against its prejudicial effect. This Court should reject the claim. The trial court said, "I also find that the probative value is not substantially outweighed by the danger of unfair prejudice. I think it's appropriately admissible." 1RP 40. If the Court finds that the trial court's balancing is inadequate, the Court may nevertheless affirm. See Kilgore, 147 Wn.2d at 294 (failure to balance the probative value of evidence against its prejudicial effect is harmless if the appellate court can perform the balancing based on its review of the record) (citing State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996)).

d. Harmless Error.

Finally, appellate counsel claims that the alleged error in admitting the evidence was not harmless: "[I]t surely affected the jury's deliberation." Br. of Appellant at 32. The State disagrees. Defense counsel implored the jury to convict his client of only theft based on his non-violent *modus operandi*. The defense mantra was, in essence, "My client is a thief, not a robber." Given that the

jury convicted Berhan-Abdu of robbery — and not theft — it is likely that the prior acts did not affect the jury's deliberations at all.

This Court should affirm Berhan-Abdu's conviction.¹⁵

2. AS TRIAL COUNSEL CONCEDED, THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY ON THE LESSER CRIME OF ROBBERY IN THE SECOND DEGREE.

Berhan-Abdu argues that the trial court erred in refusing to give his proposed instruction on the lesser-degree crime of robbery in the second degree. More specifically, Berhan-Abdu argues that there was evidence in the record from which the jury could have found that he committed this lesser crime instead of robbery in the first degree as charged. Br. of Appellant at 34, 37-41.

This claim should be rejected for two reasons. First, after trial counsel realized that the trial evidence did not support his request for a lesser offense instruction, he did not except to the trial court's refusal to give the instruction. Thus, trial counsel waived appellate review of this issue. Second, as the trial court found, this

¹⁵ Appellate counsel also provides the black-letter law on when erroneous evidentiary rulings violate due process. See Br. of Appellant at 33. However, it is unclear whether counsel is asserting that the trial court's ruling was "arbitrary or so prejudicial" that Berhan-Abdu's right to due process was actually violated. Br. of Appellant at 33 (citing *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995)). Because the State believes that the trial court's evidentiary ruling was correct, it will not respond to any implied due process violation.

case presented the jury with only two possible verdicts: a conviction of robbery in the first degree or of theft in the third degree. On the one hand, Steiner testified that as Berhan-Abdu fled K-Mart with the stolen watches, he displayed what appeared to be a firearm and threatened Steiner, "Don't fuck with me." On the other hand, Berhan-Abdu testified that he had stolen the watches, but he flatly denied using or threatening to use any force. Based on this record, the trial court correctly refused Berhan-Abdu's proposed instructions on second-degree robbery — a point conceded by trial counsel. This Court should affirm.

The trial court properly instructs a jury on an inferior degree offense when "(1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense." State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting State v. Peterson, 122 Wn.2d 885, 891, 948 P.2d 381 (1997)) (internal quotation marks omitted); see also

RCW 10.61.006.¹⁶ Robbery in the second degree is an inferior degree offense of robbery in the first degree. State v. Wheeler, 22 Wn. App. 792, 797, 593 P.2d 550, 554 (1979). Therefore, as the trial court recognized, the only issue in this case was whether the facts established that the defendant committed only the inferior offense. See 4RP 75-78.

The factual inquiry is satisfied "when substantial evidence in the record supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense." Fernandez-Medina, 141 Wn.2d at 461. In making this determination, the evidence should be examined in the light most favorable to the party requesting the instruction. Id. at 455-56. However, "the evidence must affirmatively establish the defendant's theory of the case -- it is not enough that the jury might disbelieve the evidence pointing to guilt." Id. at 456. Put another way, the evidence must establish a basis that "would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing Beck v. Alabama,

¹⁶ "[T]he defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information."

447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)).

Although the evidence supporting a lesser offense need not be offered by the defendant, there still must be some evidence in the record to support a finding that only the lesser crime was committed. State v. McClam, 69 Wn. App. 885, 889-90, 850 P.2d 1377, review denied, 122 Wn.2d 1021 (1993).

A trial court's refusal to give an instruction on factual grounds is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

a. Waiver.

As a preliminary matter, this Court should decline to review this issue because trial counsel did not take exception to the trial court's refusal to instruct the jury on the inferior degree offense of robbery in the second degree. Therefore, counsel waived appellate review of this issue. See State v. Carter, 4 Wn. App. 103, 113, 480 P.2d 794, review denied, 79 Wn.2d 1001 (1971); see also CrR 6.15.

In this case, Berhan-Abdu proposed instructions on the inferior degree offense of robbery in the second degree. CP 17, 18. In support of these instructions, Berhan-Abdu initially argued that the jury could find that he intended to commit theft (per his testimony), but could also disbelieve the State's evidence that he had displayed what appeared to be a firearm. 4RP 75. As the trial court found, however, there was no affirmative evidence from which the jury could have found that Berhan-Abdu committed only second-degree robbery. 4RP 75-76. After some discussion, trial counsel conceded that, "based on the testimony that has come out," robbery in the second degree "would not be a lesser included [offense]." 4RP 77. Therefore this Court should decline to review this issue.

Appellate counsel contends that "an ungenerous reader" might view trial counsel's "somewhat cryptic response" to the trial court's inquiry of whether the factual prong was met as a waiver of the request for a lesser included offense instruction. Br. of Appellant at 42. However, it is not a lack of charity, but, rather, a

fair statement of the facts, that leads to the indubitable conclusion of waiver.¹⁷

b. Berhan-Abdu Failed To Satisfy The Factual Prong.

Even if this Court reviews the issue, the trial court exercised sound discretion by refusing to instruct the jury on the inferior degree offense of robbery in the second degree. The only direct evidence before the jury regarding Berhan-Abdu's use of force came from Steiner. Steiner testified that as Berhan-Abdu fled K-Mart with the stolen watches, he screamed that he had a gun, lifted his shirt, and displayed what appeared to be the butt of a firearm tucked inside the waistband of his pants. 4RP 25. Steiner said that he immediately stopped chasing Berhan-Abdu, who threatened, "Yeah, don't fuck with me. Don't fuck with me." 4RP 26.

¹⁷ Because Berhan-Abdu was not entitled to an instruction on second-degree robbery as an inferior offense, a point recognized by trial counsel, counsel's decision not to except to the trial court's refusal to give such an instruction did not constitute ineffective assistance of counsel. See State v. Adams, 138 Wn. App. 36, 49, 155 P.3d 989 (2007) (to establish ineffective assistance, appellate court would have to find, among other things, that defendant was entitled to the instruction). Trial counsel did not "cave," as counsel on appeal suggests. See Br. of Appellant at 44. Rather, trial counsel recognized – and honored – his duty of candor to the tribunal. See RPC 3.3.

Berhan-Abdu, on the other hand, categorically denied that he had used *any* force. Berhan-Abdu denied that he knew Steiner was a security or loss prevention officer. 4RP 61, 68-69.

Berhan-Abdu denied that he had a gun. 4RP 65. Berhan-Abdu denied that he threatened Steiner with a gun. 4RP 65.

Berhan-Abdu denied that he had pulled up his shirt and shown Steiner a gun, stating, "I didn't have a gun." 4RP 65-66. In fact, Berhan-Abdu claimed that Steiner "attacked" him by yelling at him for "like a second," after which both men ran away. 4RP 68-69.

Based on this record, the trial court properly exercised its discretion in finding that there was no factual basis to instruct the jury on the lesser offense of second-degree robbery. The use of force described by Steiner was limited to Berhan-Abdu's display of what appeared to be a firearm while in flight with the stolen watches. On the other hand, Berhan-Abdu categorically denied that he knew who Steiner was or that he had taken the watches by the use or threatened use of an apparent firearm. Therefore, the jury had no evidence from which to conclude that Berhan-Abdu had committed only an unarmed robbery. As noted above, "the evidence [supporting the lesser] must affirmatively establish the defendant's theory of the case -- it is not enough that the jury might

disbelieve the evidence pointing to guilt." Fernandez-Medina, 141 Wn.2d at 456. Since Berhan-Abdu admitting stealing the watches, there was no evidence from which the jury could do anything other than find him guilty of first-degree robbery or third-degree theft. See State v. Bowerman, 115 Wn.2d 794, 807, 802 P.2d 116 (1990). This Court should reject Berhan-Abdu's claim.

D. CONCLUSION

For the reasons stated above, this Court should affirm Berhan-Abdu's conviction for robbery in the first degree.

DATED this 16th day of October, 2009.

Respectfully submitted,

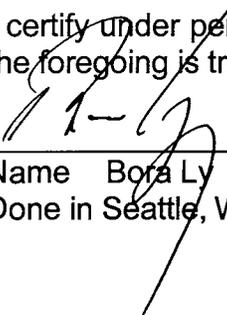
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
RANDI J. AUSTELL, WSBA #28166
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ABDU MOHAMMED BERHAN-ABDU, Cause No. 62772-4-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name Bora Ly
Done in Seattle, Washington

10-16-2009
Date