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Court of Appeals
Division I
State of Washington

COA NO. 73402-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

DENISE RUD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglass A. North, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erroneously admitted evidence of uncharged crimes under ER 404(b).

Issue Pertaining to Assignment of Error

Whether the court committed reversible error in admitting evidence of other stolen items for which appellant was not charged under ER 404(b) where the evidence was inadmissible to show res gestae, intent, knowledge or accident, undue prejudice outweighed any probative value, and the jury likely viewed evidence of the other thefts as evidence of appellant's propensity to commit the charged identity theft crimes?

B. STATEMENT OF THE CASE

1. Pre-trial

The State charged Denise Rud by amended information with one count of possessing a stolen vehicle and 11 counts of second degree identity theft. CP 14-18. The named victims for the identity theft counts were Dale Forrest (count 2), Michael Fretz (count 3), Lorraine Curtis (count 4), Evelyn Martin (count 5), Mary Highfill (count 6), Laura Honhart (count 7), Jennifer Karman (count 8), Fenglin Zhu (count 9), Nancy Adelson (count 10), Nagaswapna Bhamidipati (count 11) and Elizabeth Laramore (count 12). Id.

The State moved in limine under ER 404(b) to admit evidence of stolen items for which Rud was not on trial. CP 243-44; RP¹ 29-32. Two search warrants were executed on the vehicles Rud occupied and police found personal and financial information belonging to charged victims. RP 29. Police also found numerous items containing personal and financial information of others who were not victims of the charged crimes. RP 29-30. The State thought the jurors needed to know these items were located in areas that Rud had access to. RP 30-31. It argued the evidence of uncharged crimes was admissible under ER 404(b) to show res gestae, intent to commit a crime, and that Rud "was not mistakenly in possession of the items that are charged." RP 29-31; CP 243-44.

Defense counsel objected to the admission of evidence pertaining to uncharged crimes: "On a more basic level, I mean the problem with character evidence, and it is character evidence, it is saying since you've committed so many more crimes that we're not even charging, you likely committed the ones that were charged. That's propensity evidence 101. I mean that's exactly what it is. And it's not relevant. There are stolen items she's accused to have possessed, and there's some that she . . . isn't. And if

¹ The verbatim report of proceedings is referenced as follows: RP – five consecutively paginated volumes consisting of 2/23/15, 2/24/15, 2/25/15, 3/2/15, 3/3/15, 3/4/5, 3/5/15, 3/9/15, 3/12/15 and 4/20/15.

she wasn't accused of possessing it with intent to defraud, I don't think that it should come in." RP 32-33.

The court thought the challenged evidence was relevant because it was "probative of the fact that it wasn't just an accidental crime." RP 33. Counsel responded "It is items in a car that Ms. Rud was unaware of. And it's not mistake. It is knowledge. But the charged counts should stand on their own." RP 33. The court admitted evidence pertaining to uncharged victims, ruling as follows: "It's clearly relevant to proving the fact that this is not a mistake, to prove intent, to have these items of identification. And it's clearly — the probative value outweighs the prejudicial effect. But the probative value is significant when we're trying to show intent, and to rebut any claim of accident or mistake in having those items of, you know, identification or access devices that belongs to somebody else in either, you know, a make-up bag or a knapsack or whatever that otherwise appears to have Ms. Rud's possessions in it." RP 33.

2. Trial

a. The Ford Taurus

In the early morning hours of July 18, 2013, a Redmond police officer stopped a Ford Taurus driven by Rud after observing traffic infractions. RP 684-90. The officer also saw an altered temporary license tag on the car. RP 687-89. Rud told the officer that she borrowed the car

from a friend named Greg Solvang.² RP 691. The officer learned from dispatch that the car was stolen.³ RP 692.

Upon obtaining a search warrant for the car, officers recovered various forms of personal identification and financial information belonging to a number of people, including Martin, Curtis (Martin's mother), Fretz and Forrest. RP 274-75, 287, 347-50, 368, 370-73; Ex. 20. These items were found in the car in different backpacks and bags. RP 275, 278, 355; Ex. 6. Identification and personal information belonging to Michael Collins, an uncharged victim, was in a duffle bag. RP 349-50; Ex. 20. Police also recovered items of identification belonging to Rud under her maiden name of Oppelt⁴ and Trevor Bresnahan. RP 350-59, 366-68. Pawn slips in the names of several people known by Rud were also found. RP 353, 362-66, 676, 785-86; Ex. 20.

b. The Chevy Cavalier

On July 25, King County Sheriff deputies saw a Chevy Cavalier being driven recklessly at a high rate of speed. RP 503-06, 636-38, 643-

² Rud later admitted this was not true. RP 815-16.

³ The car, belonging to victim Coulter, was stolen on July 8, 2013. RP 576-77, 581.

⁴ Rud's full name is Denise Oppelt Rud. RP 760. Oppelt is her married name and Rud is her maiden name. RP 760.

44. The driver, later identified as Bresnahan, led officers on a chase before stopping. RP 505-08, 533. Rud was in the backseat.⁵ RP 509-10.

Bresnahan told police he had been out prowling and Rud had nothing to do with it. RP 534-36. A Home Depot card belonging to Kim Tran was found in Bresnahan's pocket. RP 538, 614-15; Ex. 39. There were a bunch of bags in the car. RP 559-62, 596-97; Ex. 26, 38.

Officers later searched the car. RP 551-52. A bank check belonging to Kim Tran, an uncharged victim, was in a bag on the front passenger floor. RP 599-600; Ex. 38. Identification and personal documents belonging to Olivia Bates, an uncharged victim, was found in a backpack. RP 600-03; Ex. 38.

Adelson's purse and credit card were in the trunk. RP 620. Wallets inside a red Dior bag were also in the trunk. RP 562-63, 605-07. Bhamidipati's checkbook was in a black wallet. RP 607. The driver's license of Han Kim, an uncharged victim, was in same wallet. RP 608, 619-20. A piece of mail addressed to Rud was in the red Dior bag. RP 623.

⁵ One officer believed Rud, who was sitting up, pretended to have just awakened upon contact. RP 510-11, 522, 541-42. Another officer saw Rud lying in the backseat of the vehicle, looking out the window at him during the pursuit. RP 644.

A second wallet (small black tri-fold with magnetic closure) contained Rud's credit card, photos of Rud and Bresnahan, and items belonging to Karman, Highfill, Honhart, Martin, and Laramore. RP 609-11.

A third wallet⁶ (red) contained items belonging to Bhamidipati, Karman, Laramore, Zhu, uncharged victim Tracy McCullen (Sears credit card, Lane Bryant credit card, credit union card, liquor control card (RP 612, 620-21, 625)), uncharged victim Ernest Knotts (Lane Bryant card, RP 611, 622, 626)), and uncharged victim Han Kim (social security card, RP 611-12).

A bag on the front passenger side⁷ contained loyalty cards belonging to Zhu (RP 619-20), the driver's license of uncharged victim Han Kim (RP 619-20, 622), and a blank check with the account and business name of uncharged victim Pickle Time Deli. RP 620, 625-26.

c. Rud interrogation (police version)

On October 1, Officer McAdam interrogated Rud at the Redmond Police Department. RP 381. McAdam had equipment available to record the interview but did not use it. RP 389, 473. The following is McAdam's version of what Rud said.

⁶ RP 611-12, 621-22; Ex. 39 (photos of wallet contents).

⁷ RP 559, 619-20.

According to McAdam, Rud told him that she suspected the car she was driving on July 18 was stolen.⁸ RP 427-29. Bresnahan, her boyfriend, had shown up with the car a few days earlier and told her that he got it from a friend, but treated the car as his own and no one came calling to get it back. RP 427. She acknowledged it looked like the temporary tag was altered. RP 429.⁹ On the night she was pulled over, Bresnahan had been driving the car but parked it and left after the two got into an argument. RP 432-34. He never came back so she eventually drove off. RP 434. She denied dropping him off so that he could prowl cars. RP 435.

McAdam showed Rud some items belonging to Curtis, Martin, Forrest, and Fretz that were found in the Taurus. RP 423, 435-40; Ex. 19. Rud said she gathered them up when her mother kicked them out of house. RP 437-38, 441-42. She knew Bresnahan stole these items while he was out car prowling. RP 440-41. She was not present when the property was stolen. RP 459. Rud denied personally using the items. RP 441. She said she was too chicken to use checks and credit cards belonging to others, but that she "may have" or "maybe" or "would" or "could" have given them to

⁸ Rud also wrote down answers to some questions. RP 388, 447. She wrote she did not know the Ford Taurus was stolen; Bresnahan had the keys. RP 456.

⁹ Rud denied saying this at trial. RP 814.

other people to use. RP 441, 479, 491-92.¹⁰ The quoted language in the preceding sentence represents the officer's paraphrase; they are not direct quotations from Rud and he could not remember her exact phrasing. RP 441-42, 478-79.

McAdam told her Lorraine Curtis's driver's license and social security card had been found in Rud's wallet, when in actuality they were found elsewhere in the car. RP 435-36, 439.¹¹ Rud said she located the items in Bresnahan's belongings and was going to mail them back to the victim. RP 437.¹² She then said they were part of a large group of credit cards and documents that she gathered up and put into bags when her mother kicked her and Bresnahan out of the house. RP 437-38.¹³ In response to written questions about where she got the items associated with Curtis, Martin, and Fretz, she referred to Bresnahan. RP 458-59.

Regarding the July 25 car chase, Rud said she fell asleep while Bresnahan was driving and woke up during the police pursuit. RP 453. Regarding the stolen property found in the Chevy Cavalier, she wrote

¹⁰ Rud denied saying this at trial. RP 820.

¹¹ At trial, the officer said this was a mistake and did not try to intentionally trick her, but she did not contradict statement or seem surprised. RP 436-38. Rud testified that she was surprised about being told Curtis's card was in her wallet, and never said she was not surprised. RP 811.

¹² Rud denied saying this at trial. RP 811-12.

¹³ Rud denied saying this at trial. RP 820-21.

Bresnahan had been doing car prowls, but denied taking part in them herself. RP 454.

Rud wrote "Catherine and Angela" in response to a written question of who used stolen access devices at various establishments. RP 451. On September 4, Rud was seen with her friend, Angela Scarborough, at Rud's residence. RP 377-78, 705, 708. Scarborough was a suspect in using Bhamidipati's stolen credit cards. RP 378. Officer Overman, who was present at the interview, did not write a report but took notes. RP 669-70. According to his notes, Rud remembered going to Home Depot with Scarborough, but was not sure about card use. RP 678-79.¹⁴

d. Rud's defense

Rud testified in her own defense. She started dating Bresnahan in July 2013, shortly before the events at issue took place. RP 761. She did not know he was prowling cars at the time. RP 762. She did not see credit cards or pieces of identification among Bresnahan's belongings at her grandmother's house before being kicked out. RP 765-66. The plaid bag in the Taurus was hers. RP 772 (Ex. 6, picture 11). She did not put

¹⁴ Overman's notes also indicate (1) Bresnahan was mixing her stuff in other backpacks (RP 672, 680); (2) she found IDs in Bresnahan's bag at her grandma's house (RP 673); (3) she put "the stuff" aside because she was going to send it back to the people, but did not (RP 673); and (4) upon being shown copies of checks, said something to the effect that she would have passed the checks along. RP 674. Overman did not know the exact context of each statement. RP 679.

anything into the car besides her plaid bag. RP 773. Bresnahan put the other things in the trunk. RP 773.

On July 25, she had chest pains and asked Bresnahan to take her to the hospital. RP 777-78. She fell asleep in the back seat. RP 778. She woke up during the car chase. RP 778. She asked Bresnahan why they were being chased and he told her had been prowling cars. RP 780. She told police the stuff in the car was not there when she fell asleep. RP 779. She has a heart condition that makes her a heavy sleeper. RP 760.

She had never seen the stolen property before Officer McAdam showed it to her. RP 784. She denied saying anything about passing cards or checks on to others. RP 785. She denied possessing stolen property with intent to use it for fraudulent activity or to steal. RP 786.

Bresnahan testified on behalf of the defense. RP 726. He pled guilty to offenses related to July 25, 2013. RP 728. He testified that he went car prowling that day. RP 734. He was high on meth. RP 736. Rud was asleep when he put the stolen items in the car. RP 749. He put some items in Rud's purse so that he would not get into trouble if pulled over. RP 735. He identified the red Dior bag as Rud's purse in which he stuffed things. RP 735, 750. Rud woke up during the chase. RP 736.

e. Testimony from charged victims

The following victims in the charged counts reported their cars were prowled and items taken: Forrest on July 10, 2013 (RP 304-09); Martin on July 11, 2013 (RP 236-44); Fretz on July 11/12, 2013 (RP 571-73); Honhart in June/July 2013, which included her mother Highfill's items (RP 588-93), Bhamidipati on July 17 (RP 405, 408-11); Zhu on July 19 (RP 295-302); and Adelson on July 25 (RP 393-98).

A check from Martin's checkbook had been made out to a pizza place and signed, but was still in the checkbook when recovered. RP 252-53. Forrest's Home Depot card was used to make an unauthorized purchase on July 11. RP 310. Fraudulent activity on Bhamidipati's credit card took place on July 17-19. RP 407, 415-16.

3. Outcome

The jury returned guilty verdicts on eight counts of identity theft (counts 4, 5, 6, 7, 8, 9, 11, 12) and was unable to reach a verdict on the remaining counts. CP 81-92. The court imposed a prison-based Drug Offender Sentencing Alternative consisting of 25 months confinement and 25 months community custody. CP 103. Rud appeals. CP 121.

C. ARGUMENT

1. THE COURT'S WRONGFUL ADMISSION OF EVIDENCE OF UNCHARGED CRIMES UNDER ER 404(b) UNFAIRLY INFLUENCED THE OUTCOME OF THE CASE.

The jury heard and saw evidence that Rud possessed stolen items belonging to seven others for which she was not charged. Reversal is required because the evidence was not admissible to show *res gestae*, intent, knowledge or absence of mistake under ER 404(b), any probative value was outweighed by its prejudicial force, and the jury likely viewed evidence of other thefts as evidence of Rud's propensity to commit the charged crimes.

a. Standard of review

Interpretation of an evidentiary rule is a question of law reviewed *de novo*. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). When the trial court correctly interprets the rule and properly analyzes the ER 404(b) issue, the trial court's decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. Foxhoven, 161 Wn.2d at 174; State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). A trial court abuses its discretion when applies the wrong legal standard, bases its ruling on an erroneous view of the law, or otherwise fails to adhere to the

requirements of an evidentiary rule. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); Foxhoven, 161 Wn.2d at 174.

b. ER 404(b) overview

ER 404(b) covers evidence of uncharged crimes. Dawkins, 71 Wn. App. at 908. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).¹⁵ "ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

Evidence of other misconduct is prejudicial because jurors may convict on the basis that the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Evidence of prior misconduct "*may*, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." Gresham, 173 Wn.2d at 420. "ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation,

¹⁵ ER 404(b) provides "[e]vidence 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."

but in conjunction with other rules of evidence, in particular ER 402 and 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982).

"A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Doubtful cases should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334. When determining admissibility under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. Foxhoven, 161 Wn.2d at 175. "The trial court must also give a limiting instruction to the jury if the evidence is admitted." State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

c. The ER 404(b) evidence at issue: seven uncharged crimes.

In arguing the pre-trial motion, the prosecutor referred to pre-trial exhibits 1 and 2 as what the State was planning to offer into evidence regarding uncharged victims. RP 30. Those pre-trial exhibits contain

identification/financial documents belonging to Michael Collins, Kim Tran and Olivia Bates. Ex. 1-PT, 2-PT.¹⁶

Collins was singled out for special emphasis at trial. The prosecutor elicited Officer McAdam's testimony that he asked Rud about the burglary of Collins's residence during which two guns were stolen. RP 442. Rud said Bresnahan and a man named AJ committed the burglary. RP 442-43. They dropped her off to visit a friend and then picked her up later. RP 443. Later that day, she overheard them talking about guns and that AJ wanted to keep one of them. RP 444. A written question asked about how she got the items associated with Collins, to which she did not respond. RP 456. She denied being present when the Collins burglary occurred. RP 457. During cross-examination, the prosecutor asked Bresnahan if Rud knew that he broke into Collins's home in the summer of 2013. RP 753. Bresnahan pled "the Fifth." RP 753.

Evidence pertaining to Collins, Tran and Bates is not the only ER 404(b) evidence at issue here. Evidence of additional uncharged victims was admitted at trial. A wallet recovered from the Chevy Cavalier contained items belonging to Tracy McCullen (Sears credit card, Lane

¹⁶ The photographic evidence pertaining to Bates and Tran in pre-trial Exhibit 1 was admitted as part of Exhibit 38 at trial. RP 599-603. The photographic evidence pertaining to Collins in pre-trial Exhibit 2 was admitted as part of Exhibit 20 at trial. RP 349-50.

Bryant credit card, credit union card, liquor control card, RP 612, 620-21, 625), Ernest Knotts (Lane Bryant card, RP 611, 622, 626)), and Han Kim (social security card, RP 611-12). A bag in the Chevy contained the driver's license of Han Kim (RP 619-20, 622), and a blank check with the account and business name of Pickle Time Deli. RP 620, 625-26. An additional four uncharged victims are thus at issue.

Defense counsel was not required to make further objection at trial to the additional ER 404(b) evidence covering McCullen, Knotts, Kim and Pickle Time Deli to preserve the error for appeal.

The party who loses a motion in limine is deemed to have a standing objection where a judge has made a final ruling on the motion unless the trial court indicates that further objections at trial are required when making its ruling. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). Here, the trial court did not give any inkling that further objections were required. The State made a general motion to admit evidence pertaining to uncharged victims and the defense objected. CP 243-44; RP 32-33. The trial court made a blanket ruling that all such evidence would be admissible. RP 33. Under these circumstances, defense counsel's pre-trial objection covers all of the uncharged victim evidence being challenged on appeal.

Alternatively, an objection is not needed to preserve an error for review where such an objection would be futile given the trial court's earlier overruling of the same objection. State v. McCreven, 170 Wn. App. 444, 473, 284 P.3d 793 (2012) (citing State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996) (where no corrective purpose would be served by raising a proper objection at trial, the lack of objection should not preclude appellate review)); State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996) (failure to object may be excused where it would have been a useless endeavor). A renewal of the objection pertaining to evidence of additional uncharged victims not disclosed by the State during the pre-trial hearing would have been futile in light of the trial court's pre-trial ruling admitting the same kind of ER 404(b) evidence without qualification.

d. Evidence of uncharged crimes was not admissible to show res gestae.

The State invoked res gestae as a basis to admit evidence that items belonging to uncharged victims were found in the vehicles occupied by Rud. RP 29-31; CP 243-44. The res gestae purpose permits the admission of evidence of other crimes or misconduct where it is "a link in the chain of an unbroken sequence of events surrounding the charged offense . . . in order that a complete picture be depicted for the jury." State v. Brown,

132 Wn.2d 529, 571, 940 P.2d 546 (1997) (quoting State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)). Contrary to the State's argument, evidence that stolen items belonging to others were among the items for which Rud stood trial was inadmissible under a res gestae theory.

State v. Trickler, 106 Wn. App. 727, 25 P.3d 445 (2001) illustrates the problem. In that case, the State charged Trickler with possession of a stolen credit card belonging to Ms. Nunez. Trickler, 106 Wn. App. at 729. During a search of Trickler's vehicle, police found the credit card belonging to Nunez. Id. at 730. Police also recovered several items of stolen property belonging to Trickler's landlord, Mr. Wiley, a pocketknife belonging to the landlord's son, and stolen checkbooks and identification cards belonging to others. Id. at 729-30, 733. The trial court admitted evidence that these other stolen items were found in Trickler's car. Id. The State claimed it was necessary to introduce all the above evidence under a res gestae theory, maintaining the discovery of the other allegedly stolen evidence was so connected in time, place, and circumstances that it was necessary for the jury to hear exactly how the police discovered Nunez's stolen credit card. Id. at 734.

The Court of Appeals rejected the State's argument. First, the State did not show Trickler's possession of other stolen items "was an inseparable part of his possession of the stolen credit card, which is the

tést commonly used in this state." Id. "Furthermore, the jury's knowledge of the superfluous information was highly prejudicial to Mr. Trickler. ER 404(b) is meant to prohibit the State from attempting to use evidence of bad acts in order to prove the propensity of the defendant to commit the same type of bad act. In theory, the State probably introduced evidence of the allegedly stolen evidence (for which Mr. Trickler was not charged) in order to give the jury a complete picture of the events leading to the discovery of the stolen credit card. In practice, however, by allowing the jury to consider evidence that Mr. Trickler was in possession of a plethora of other allegedly stolen items *in order for the State to prove that Mr. Trickler must have known that the credit card was also stolen*, the court violated the purpose of ER 404(b). After hearing the witnesses' testimony and seeing evidence of 16 pieces of stolen property, the jury was left to conclude that Mr. Trickler is a thief." Id. (emphasis added).

As in Trickler, the State did not show Rud's uncharged acts were "a link in the chain of an unbroken sequence of events surrounding the charged offense." Brown, 132 Wn.2d at 571. With the exception of the Collins burglary, the State failed to show when items related to uncharged victims were stolen or even if they were used so it cannot be said possession of those items were part of an unbroken sequence of events surrounding the charged offenses. For all we know those other items may

have been stolen under different circumstances long before the items forming the basis for the charges were stolen. The Collins burglary, meanwhile, was singular. Testimony from charged victims indicates their items were taken during car prowls, not burglaries. RP 236-44, 295-302, 304-09, 393-98, 405-11, 571-73, 588-93. "The burden of demonstrating a proper purpose is on the proponent of the evidence." Gresham, 173 Wn.2d at 420. Evidence that Rud possessed other items of stolen property from other people does not qualify as res gestae because the State did not show such possession was an inseparable part of the charged crimes. Nor did the State show these other thefts were part of the same criminal transaction as the charged offenses.

Evidence admitted under a res gestae rationale must be necessary to depict a complete picture for the jury. Tharp, 96 Wn.2d at 594. The jury would have still heard the complete story related to the charged offenses in the absence of evidence that other stolen items were in the cars. Evidence of other stolen items added nothing to the picture besides a sense of propensity. Like Trickler, the gratuitous evidence in Rud's case was highly prejudicial and outweighed any probative value it may have theoretically had. Allowing the jury to consider evidence that Rud was in possession of a plethora of other stolen items in order to show Rud must

have known about the items related to the charged offenses left the jury to conclude that Rud is a thief. Trickler, 106 Wn. App. at 734.

e. Evidence of uncharged crimes was not admissible to show intent, knowledge or lack of accident or mistake.

The defense was that "Ms. Rud didn't know that this property was stolen, that the property was there, and she certainly didn't intend to do anything bad with it." RP 901. Specifically, the State did not prove Rud knew about the stolen property in the cars. RP 901-02. The defense theory articulated in closing argument is consistent with counsel's pre-trial argument that "It is items in a car that Ms. Rud was unaware of. And it's not mistake. It is knowledge. But the charged counts should stand on their own." RP 33. The judge admitted the challenged evidence to show "intent" and lack of accident or mistake in having the items that formed the basis for the charged crimes. RP 33.

Turning first to "intent," the crime of identity theft contains an intent element: "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, *with the intent to commit, or to aid or abet, any crime.*" RCW 9.35.020(1). What was never explained is how possession of stolen items belonging to uncharged victims shows Rud intended to commit a crime with the items belonging to the charged victims. Aside from a propensity

theory, evidence of other stolen items does not make it more likely that Rud intended to use the stolen items belonging to the charged victims to commit a crime.

To justify the admission of ER 404(b) evidence under an "intent" theory, "there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged offense. That a prior act 'goes to intent' is not a 'magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].'" Wade, 98 Wn. App. at 334 (quoting Saltarelli, 98 Wn.2d at 364).

The inquiry here is whether it is legally appropriate to infer from Rud's possession of other stolen items that she knew she possessed the stolen items for which she was charged and intended to use them to commit a crime. "[T]he nature of this inference as at least a three-step process because 'an act is not evidential of another act'; there must be an intermediate step in the inference process that does not turn on propensity. '[I]t cannot be argued: Because A did an act last year, therefore he probably did the act X as now charged.'" Wade, 98 Wn. App. at 335 (quoting Wigmore on Evidence § 192, at 1857).

"When the State seeks to prove the element of criminal intent by introducing evidence of past similar bad acts, the State is essentially

asking the fact-finder to make the following inference: Because the defendant was convicted of the same crime in the past, thus having then possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current case." Wade, 98 Wn. App. at 335.

Rud was never convicted in any relation to the stolen items belonging to the uncharged victims in this case. As a result, there has been no determination that she knowingly possessed these items with intent to use them. Unlike Wade, the State in Rud's case essentially asked the fact-finder to draw this inference: even though Rud has never been convicted in relation to these other stolen items, she must have knowingly possessed them with the intent to commit a crime, and therefore again possessed the same intent while committing the charged crimes. That is a stretch beyond Wade. There is no predicate conviction that established the mens rea in relation to the other crimes.

In any event, "before prior acts can be admitted to show intent, the prior acts 'must have some additional relevancy beyond mere propensity.'" Id. at 336 (quoting State v. Holmes, 43 Wn. App. 397, 400-01, 717 P.2d 766 (1986)). "This additional relevancy turns on the facts of the prior acts

themselves and not upon the fact that the same person committed each of the acts. Otherwise, the only relevance between the prior acts and the current act is the inference that once a criminal always a criminal." Wade, 98 Wn. App. at 336.

In Wade, the trial court admitted evidence of Wade's prior sales of cocaine to prove intent to sell the cocaine in his possession as charged. Id. at 333. Even though all three instances occurred in the same neighborhood, within a fourteen month period, and involved similar quantities of the same drug, the underlying facts were not similar enough to create a logical theory of the defendant's intent other than propensity. Id. at 332-33, 336. Rather, the State's theory was, since Wade possessed drugs with the intent to deliver them in the past, he must have possessed the drugs with the same intent to deliver now. Id. at 336. Thus, the evidence of Wade's past convictions was inadmissible propensity evidence that the State could not use to establish Wade's intent in its current case. Id.

The State's proposed theory of intent or knowledge in Rud's case is in substance no different from the one rejected in Wade. The State's theory was that since Rud possessed other stolen items for which she was not charged, she must have knowingly possessed the stolen items for which she was charged with the intent to commit a crime with them. That

is propensity evidence in the absence of some additional factual similarity between the charged and uncharged crimes.

"Use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant. To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves." Wade, 98 Wn. App. at 335. Additional relevancy cannot turn upon the fact that the same person committed each of the acts. Id. at 336. But here, the State presented very little information regarding the facts of the uncharged crimes. The State did not show Rud used any of the uncharged items to commit a crime. It did not establish similarity among the facts of the acts themselves beyond the bare commonality of having access to the stolen items. The one uncharged crime that was addressed in some detail — the Collins burglary — has no similarity to how items for the charged crimes came to be possessed because the items pertaining to the latter were taken during car prowls. And the evidence shows Rud did not participate in the Collins burglary. RP 457.

For these reasons, the trial court erred in admitting evidence of uncharged crimes to show intent. The court abused its discretion in basing its ruling on an erroneous view of the law and in failing to adhere to the

requirement of the evidentiary rule. Quismundo, 164 Wn.2d at 504; Foxhoven, 161 Wn.2d at 174.

The court also admitted the evidence to show lack of accident. RP 33. Evidence of prior acts may be admissible to rebut the defense of accident. State v. Baker, 89 Wn. App. 726, 735, 950 P.2d 486 (1997). But "[t]he rule is essentially a variation on the rule that prior misconduct may be admissible to prove intent and to rebut a material assertion by a party." Karl B. Tegland, 5 Wash. Prac., Evidence Law and Practice § 404.21 (5th ed. 2007). In this case, the lack of accident theory is in substance no different than rebutting Rud's claim that she lacked knowledge that the stolen items were in the cars she occupied. The disputed issue was whether she knowingly possessed them. RP 32-33.

State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001) is instructive. Pogue was convicted of cocaine possession. Pogue, 104 Wn. App. at 981. His defense was that he did not know there were any drugs in the car he was driving when police stopped him for a traffic violation. Id. at 981-82. The trial court admitted evidence of Pogue's admission that he possessed cocaine in the past on the ground that it was relevant to rebut Pogue's unwitting possession defense. Id. at 982. The Court of Appeals held evidence of past possession was inadmissible under ER 404(b) because it had no relevancy apart from propensity. Id. It rejected the trial

court reasoning that Pogue's assertion of the defense of unwitting possession raised the issue of knowledge, and therefore the evidence was probative for a non-propensity reason, that is, to demonstrate his knowledge about cocaine. Id. at 985. Pogue's defense was that he did not know the bag of cocaine was in the car on the day he was stopped. Id. "The only logical relevance of his prior possession is through a propensity argument: because he knowingly possessed cocaine in the past, it is more likely that he knowingly possessed it on the day of the charged incident." Id.

Similarly, the challenged evidence had no tendency to show that Rud knew there were other stolen items in the cars — the items which formed the basis for the charged crimes — based on a theory other than propensity. The court's reasoning boils down to this premise: because Rud possessed the uncharged items, she was more likely to have knowingly possessed the charged items. That is a propensity theory.

A trial court abuses its discretion if it does not follow ER 404(b)'s requirements in admitting evidence of past crimes. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). The court misapplied the law and thereby abused its discretion in ruling the prior misconduct evidence was admissible to show absence of mistake. Quismundo, 164 Wn.2d at 504; Foxhoven, 161 Wn.2d at 174.

Further, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. This is part of the ER 404(b) analysis as well. Saltarelli, 98 Wn.2d at 361-62. As in Trickler, the evidence was unfairly prejudicial: by allowing the jury to consider evidence that Rud was in possession of a plethora of other stolen items in order for the State to prove that she must have knowingly (non-accidentally) possessed the charged items with intent to commit a crime, the court violated the purpose of ER 404(b). Trickler, 106 Wn. App. at 734.

f. The error was not harmless.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The evidence cannot be considered overwhelming since the jury hung on 3 of the 11 identity theft counts.¹⁷ CP 81-92. The strength or

¹⁷ During deliberations, the presiding juror asked "Can we give a decision on some counts and some counts report that we can't come to a unanimous decision?" CP 93.

lack thereof on the counts for which Rud was convicted is roughly equal to those on which the jury could not reach a verdict.

The testimony of the officers regarding Rud's alleged admission to passing checks or credit cards on to others at first blush appears highly damaging,¹⁸ but it appears the jury did not uncritically accept that testimony because it did not reach a verdict on some counts, including Fretz and Forrest. That is particularly significant because McAdams showed the Fretz and Forrest items to Rud during the interrogation and maintained she recognized those items as stolen by Bresnahan. RP 423, 435-40; Ex. 19. Yet the jury did not convict on those counts. Rud, for her part, denied telling the officers that she passed checks along to others, denied taking part in Bresnahan's car prowls, and denied knowingly possessing the stolen items or any intention to use them to commit a crime. RP 784-86. The State's case had its flaws and weaknesses, as shown by the fact that it was unable to obtain convictions on all counts.

But the State did obtain convictions on a majority of the counts. So the question becomes whether there is a reasonable probability that admission of evidence of the uncharged crimes involving seven other victims influenced the jury in returning the guilty verdicts. "ER 404 is intended to prevent application by jurors of the common assumption that

¹⁸ RP 441, 479, 491-92, 674.

'since he did it once, he did it again.'" State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). The court gave no limiting instruction to the jury in Rud's case. In the absence of a limiting instruction, the jury was free to consider the uncharged crimes as evidence of Rud's propensity to commit the charged crimes. The character trait at issue here is Rud's propensity to steal and commit identity theft crimes. The rule against propensity evidence was made to prevent the admission of the evidence at issue here.

The State described its pre-trial ER 404(b) motion as "one of the most important motions from the State's perspective for this trial." RP 29. The State's closing argument bears this out. In addressing Rud's claim that she was unaware that she possessed the items for which she stood trial, the State argued the jury should consider where the items for the charged victims were found and also "the items for victims that are uncharged. You saw throughout the course of this trial items that contained personal and financial information belonging to numerous victims." RP 877. The State successfully fought to get the ER 404(b) evidence before the jury and exhorted the jury to convict Rud on the basis of that evidence. The State cannot credibly claim on appeal that the evidence was of so little importance that there is no reasonable probability that it contributed to the

verdict. The convictions should be reversed because the error was not harmless.

D. CONCLUSION

For the reasons set forth, Rud requests reversal of the convictions.

DATED this 30th day of October 2015

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 734702-4-I
)	
DENISE RUD,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF OCOTBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DENISE RUD
DOC NO. 760322
WASHINGTON CORRECTIONS CENTER FOR WOMEN
9601 BUJACHIC ROAD NW
GIG HARBOR, WA 9833

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF OCTOBER 2015.

X *Patrick Mayovsky*