IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

State of Washington
Appellant

v.

DAVID W. MAXWELL
Respondent

42877-6-II

On Appeal from the Kitsap County Superior Court

Cause No. 11-1-00250-9

The Honorable Russell W. Harman

APPELLANT'S BRIEF

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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error.

1. The court erroneously admitted propensity evidence contrary to ER 404(b).

2. The evidence was insufficient to prove the statutory elements of "criminal profiteering.

3. The evidence was insufficient to prove the essential elements of the predicate crime of theft.

B. Issues Pertaining to Assignments of Error.

1. Did the court misconstrue ER 609(a)(2) and fail to notice the implications of ER 404(b), resulting in the erroneous admission of impermissible propensity evidence?

2. Was the evidence sufficient to prove the elements of "criminal profiteering" where the sole predicate crime of which Appellant was found guilty was third degree theft?

3. Was the evidence sufficient to prove the theft element that Appellant acted knowingly?

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III. STATEMENT OF THE CASE:

The State charged Appellant, David W. Maxwell with seven counts of trafficking in stolen property based on scrap metal collected and sold by Maxwell in the course of his salvaging business.[1] CP 17-20.

Maxwell was in the business of salvaging metal. RP 131. He could sell copper-nickel and other non-ferrous alloys for several dollars a pound. RP 61, 81. Steel, by contrast, contains iron and is worth mere pennies per pound. RP 81. Maxwell had a regular collection route consisting of commercial clients, including all the Bremerton car lots. RP 133-34. He would take all the scrap metal, regardless of value, as a service to his clients. RP 141-42. If a client withdrew permission, as began to happen as the value of scrap metal increased, Maxwell stopped removing their scrap. RP 142.

In 2009, Vigor Marine took over premises on Ida Street that had been on Maxwell's route for several years. Maxwell had visited the Ida Street location hundreds of times over the past five years. RP 138, 143. He had stopped there once or twice a week, 52 weeks a year, since 2005.

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[1] RCW 9A.82.050(1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

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RP 137-38. Like the previous owner, Vigor Marine deposited scrap metal in dumpster-style bins in the parking lot, not inside the security fence. RP 137, 138.

Maxwell did not know the name of the company. RP 145. He was not interested in names. RP 164. He just referred to it as "the place on Ida Street" before and after the change of ownership. RP 140-41. No-one ever asked him to stop taking metal from Ida Street. RP 147.

Maxwell had seen dumpsters bearing the mark of scrap metal buyer Navy City Metals at other locations in Bremerton, and never took metal from those dumpsters. He had never seen a Navy City dumpster at Ida Street. RP 146-47.

When contacted by the police, Maxwell admitted taking metal from Ida Street, but told the investigating officers he had been doing so with permission for five years. RP 144, 146, 151. Maxwell knew the Ida Street dumpster was illuminated at night and that it was monitored by a security camera which was in plain view right above it. RP 69-70, 147-48.

Maxwell usually sold metal from Ida Street to Navy City. RP 149. That is what he did with the metal at issue here. RP 150. Maxwell was well-known at Navy City, where he was a regular and had a business license on file. RP 136. Navy City maintained complete records and

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issued receipts of every transaction bearing the seller's full legal name and address. RP 150.

On the morning of March 3, 2011, Vigor Marine warehouse manager Arthur Morken III arrived to find six pieces of copper-nickel piping missing from the back of a pick-up that had been parked outside the fence next to the scrap metal dumpster. RP 59-60. He located the piping at Navy City and called the police. RP 62, 63.

Investigators discovered that Maxwell had sold metal to Navy Marine on a total of seven recent occasions. The total value of the metal he sold was close to $3,000. RP 162. He freely admitted having taken metal from the Ida Street dumpster on all seven occasions and also from the pick-up truck on March 3. RP 144, 146, 151.

He was charged and tried by jury on seven counts of trafficking in stolen property in violation of RCW 9A.82.050(1). CP 17-20.

The trial court denied a defense motion for a directed verdict at the close of the State's case. RP 102, 104. The jury acquitted Maxwell on Counts I – VI, involving solely metal taken from the dumpster. CP 55-56. They found him guilty of Count VII, which alleged the additional taking from the truck. CP 56.

Maxwell received a standard range sentence of 22 months. He appeals. CP 68.

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IV. ARGUMENT

1. THE COURT ERRONEOUSLY ADMITTED PROPENSITY EVIDENCE, CONTRARY TO ER 404(b) AND ER 609(a)(2).

Evidence of other crimes, wrongs, or acts may not be admitted to prove the character of a person in order to show action in conformity therewith. ER 404(b). Before evidence of prior crimes, wrongs or acts may be admitted, the trial court must determine that the evidence (1) is logically relevant to a material issue before the jury, and (2) if relevant, that its probative value outweighs its potential for prejudice. See *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668 (1984). The trial court must analyze the admissibility of the evidence on the record. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

The State moved in limine for a ruling on the admissibility of convictions for impeachment pursuant to ER 609. CP 15. The defense did not object to the jury being informed of a 2010 attempted burglary 2nd conviction, since it involved a crime of dishonesty. RP 11. The State agreed not to go into the facts of that case unless Maxwell opened the door. The court so ruled. RP 11.

At trial, defense counsel was careful not to open that door. RP 130-150, 155. Specifically, Maxwell was not asked on direct whether he had ever taken metal without permission. RP 153. On cross, however, the

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prosecutor asked that question. RP 152-53. Defense counsel objected that the State was trying to open its own door by inducing Maxwell to deny ever having taken metal without permission, so the prosecutor could then impeach him with the facts underlying the 2010 offense. RP 153.

The prosecutor argued that it could be implied from the general nature of the direct examination that Maxwell claimed it was his practice always to ask permission. RP 153-54. The court ruled that its order in limine allowed underlying facts from 2010 only for impeachment. RP 156. But the court ruled that "the global direct examination" created the general impression that Maxwell always was careful not to take metal without permission. RP 156. Therefore, the court overruled the objection, and the question came in as substantive evidence. RP 156.

The prosecutor asked Maxwell if, in 2010, he had gone any place without permission to take metal. Maxwell said, "Yes." RP 159.

This was not a legitimate ER 609 inquiry. Rather, it implicates the propensity prohibition of ER 404(b) by essentially telling the jury not that Maxwell had a previous conviction for a crime of dishonesty, but rather that he had previously engaged in the very conduct of which he presently stood accused. This was impermissible and extremely prejudicial.

It is well-established that jurors either cannot understand or will not follow the court's instruction to use a defendant's prior crimes solely

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for impeachment purposes. They "almost universally" infer that the defendant likely is guilty of the crimes of which he currently is accused. *State v. Newton*, 109 Wn.2d 69, 74, 743 P.2d 254 (1987). Here, moreover, the court's limiting instruction was defective.

First, the court did not give the instruction contemporaneously with the problematic evidence. Instead, the court included it in the in the jury instructions. Second, the limiting instruction did not correspond to the evidence. The jury was told:

> Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.

Instr. 7, CP 38. This is a perfectly serviceable ER 609(a)(2) instruction.[2]

But the prosecutor did not simply introduce evidence that Maxwell had been convicted of a crime of dishonesty when he put his credibility at issue by taking the stand. The defense had no objection to that. RP 11. Rather, the State shoe-horned into the record the <u>facts</u> underlying the 2010 conviction, which was precisely what the court had ruled in limine it could not do. The question had no other purpose than to elicit that Maxwell had committed the same crime before. It was improper character evidence

[2] For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime ... (2) involved dishonesty... . ER 609(a)(2).

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because the jury likely regarded it as evidence of Maxwell's propensity to take metal without permission. To the extent the court reversed its earlier ruling and failed to recognize the propensity implications of the prosecutor's cross-examination, it was error.

Such evidence is inherently prejudicial. Moreover, Since the jury acquitted Maxwell on six of the seven charges, we may fairly assume they found the evidence for conviction marginal, at best. Therefore, the Court cannot conclude beyond a reasonable doubt that this error did not affect the verdict. Reversal is required if it is within reasonable probabilities that the outcome of the trial was materially affected. *State v. Korum*, 157 Wn.2d 614, 647, 141 P.3d 13 (2006). It is sufficient that a single juror was persuaded to convict based on the erroneous admission of this blatant propensity evidence. *See*, *PRP of Stenson*, 2012 WL 1638035, Slip Op. 83606-0 at 9.

The remedy is to reverse and remand for a new trial.

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2. THE STATE FAILED AS A MATTER OF LAW TO ESTABLISH THE ESSENTIAL ELEMENTS OF CRIMINAL PROFITEERING.

Summary of the Argument: The State charged Maxwell under an act entitled "the criminal profiteering act" Chapter 9A.82 RCW. "Criminal profiteering" is limited to acts committed for financial gain that are chargeable as one of the predicate felonies enumerated in RCW 9A.82.010(4). *State v. Munson*, 120 Wn. App. 103, 106, 83 P.3d 1057, 1059 (2004). That is," criminal profiteering" requires proof of conduct constituting a felony under another criminal statute. RCW 9A.82.010(4).

Here, the predicate felony is theft. Conviction on all seven counts would have resulted in an aggregate value of close to $3,000.00. RP 162. The jury acquitted Maxwell of Counts I – VI, however, and the value alleged in Count VII, was only $616.00. CP 54-55; RP 162. By definition theft of property valued at less than $750 constitutes third degree theft, a gross misdemeanor, not a felony. Therefore, the evidence is insufficient as a matter of law to convict Maxwell of an offense under the criminal profiteering act.

The Criminal Profiteering Act: This Court has held that the title of a legislative enactment defines "the scope and purpose of the law." *State v. Thomas*, 103 Wn. App. 800, 807, 14 P.3d 854 (2000), *review denied*, 143 Wn.2d 1022 (2001).

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To dispel any doubt as to its purpose, the legislature states its intent in the preamble to chapter 9A.82. The purpose of the act is to reenact Washington prior laws "relating to criminal profiteering[.]" Preamble to Chapter 9A.82 RCW, citing Laws, 2001, c 222 § 1. The purpose of this and the prior racketeering act[3] was to combat sophisticated elements of organized crime. *State v. Harris*, ___ Wn. App. ___, 272 P.3d 299, 308 (2012), citing *Thomas*, 103 Wn. App. at 805. The legislature did not intend to target individuals eking out a meagre living. Rather it "intended additional punishment for the societal harm of leading organized crime, a punishment separate and distinct from any underlying predicate crimes." *Harris*, 272 P.3d at 309.

The current criminal profiteering act added new crimes aimed at conduct associated with organized crime. It also removed from the definitions of crimes constituting criminal profiteering any crimes that were not felonies under Washington law. *Harris*, 272 P.3d at 308, citing *Thomas*, 103 Wn. App. at 805. Significantly, 3rd degree theft was not included in the definition of "racketeering" even under the old act. Former RCW 9A.82.010(14)(e) & (16)(e) (1999).

The title of a statute can be general or restrictive. *Thomas*, 103 Wn. App. at 807. This Court has held that, if the title is restrictive, the act

[3] Former Ch. 9A.82 RCW, LAWS OF 1985, ch. 455, § 1. *See Harris*, 272 P.3d at 309, n. 20.

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may not be interpreted as encompassing elements not indicated by the title. *Thomas*, 103 Wn. App. at 808. The title of chapter 9A.82 RCW is as restrictive as it gets: Criminal Profiteering Act (Formerly Racketeering.) RCW 9A.82.001.

To avoid confusion, the Act includes a definition of criminal profiteering, an essential element of which is proof of a felony punishable by imprisonment for more than one year. RCW 9A.82.010(4). The legislature includes examples of qualifying felonies, including those constituting theft. RCW 9A.82.010(4)(e). Third degree theft is not a predicate offence of criminal profiteering. Specifically, the predicate theft offenses are limited to the felony thefts defined in RCW 9A.56.030, 9A.56.040, 9A.56.060, 9A.56.080, and 9A.56.083. RCW 9A.82.010(4)(e). Third degree theft is defined in RCW 9A.56.050(1) and is a gross misdemeanor. RCW 9A.56.050(2). Gross misdemeanors are not punishable by imprisonment for more than one year. RCW 9.92.020.[4]

Here, in Count VII, the State alleged and offered evidence that Maxwell collected piping worth no more than $616.00. RP 162. Taking property worth less than $750 is third degree theft. RCW

[4] Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for a maximum term fixed by the court of up to three hundred sixty-four days, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine. RCW 9.92.020.

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9A.56.050(1)(a). Third degree theft is a gross misdemeanor. misdemeanor, not a felony. RCW 9A.56.050(2). Accordingly, it is not a predicate crime for criminal profiteering.

The remedy is to reverse the conviction and dismiss the prosecution with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

3. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MAXWELL KNEW HE WAS STEALING.

The State has the burden to prove every element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

In reviewing a challenge to the sufficiency of the evidence to sustain a conviction, the Court views the evidence in the light most favorable to the State. *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003). The relevant question is "whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." *Id.*, citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A sufficiency challenge necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

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The defense moved for a directed verdict at the close of the State's case. RP 102. For the purposes of the directed verdict motion, the court viewed the evidence in the light most favorable to the State and concluded that the jury could find that the circumstances supported a finding that Maxwell knew the metal was stolen. RP 104. This was error.

To find Maxwell guilty of Count VII. the jury had to find beyond a reasonable doubt that he acted "knowingly." To-Convict Instruction, CP 51. The jurors were instructed that Maxwell did not have to prove the existence of reasonable doubt, but that reasonable doubt could arise from the lack of evidence. Instr. 3, CP 34. And they were instructed to consider only such circumstantial evidence from which their "common sense and experience" permitted them reasonably to infer the existence of a material element. *Id.*

The material element was acting knowingly. CP 51. The jury was instructed that to act knowingly means to have "information that would lead a reasonable person in the same situation to believe that a fact exists[.]" Instr. 10, CP 41. The nature of the evidence that was lacking was such as to cause any reasonable juror to entertain a reasonable doubt on the essential element that Maxwell acted "knowingly," and the circumstantial evidence was such as to preclude a reasonable inference

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that Maxwell was in possession of information from which he should have deduced that the piping in the truck was not being discarded.

The jury acquitted Maxwell of all charges involving the scrap metal he removed from the dumpster in the parking lot outside Vigor Marine's fence. CP 54-55. That means the jury must have found that he had (or believed he had) permission to remove metal from the dumpster.

Therefore, in order to convict on Count VII, the jury must have found beyond a reasonable doubt that, on the occasion when Vigor Marine left identical piping both in the dumpster and in the open bed of a pick-up parked next to the dumpster, Maxwell had information from which he could have known that only the piping in the dumpster was intended as scrap, not the piping in the truck. The record does not support this.

Warehouse manager Arthur Morken testified that Vigor Marine took over the Ida Street facility in 2009. RP 54-55. He said they put up two 10 x 14 signs. RP 56. No dimensions are cited, either by Morken or by the prosecutor in closing. RP 192. No photographs were taken, and the signs were removed a couple of weeks before trial. RP 56. Accordingly, the jury could only speculate whether the signs were 10 by 14 feet or 10 x 14 inches. Inches seems more likely, since Vigor Marine's business was construction and maintenance of large navy vessels which would not involve advertising to passers-by. RP 56, 57. Moreover, the

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State offered no evidence calling into doubt Maxwell's perfectly plausible claim that, for the purposes of his business, he was not concerned with the name of the companies he collected from.

Morken thought Navy City Metals provided collection bins for scrap metal. RP 58. Maxwell had seen clearly marked Navy City collection bins at other locations. RP 146. But he testified that all the bins at Ida Street were unmarked. RP 138. Morken did not say the Vigor Marine bins were marked with a Navy City logo or other identifying marks, and again no photographs were offered. *Id.* Levi Taylor, the buyer for Navy City Metals, had been buying scrap metal from Maxwell for years. RP 81-82. He had never had any reason to be suspicious of Maxwell during their long relationship. RP 84.

The sum total of the State's evidence was that Morken did not specifically give Maxwell permission to take the piping. RP 61. And that, on the night of March 3, when the piping was collected from the truck, Maxwell and his partner visited Ida Street at 12:30 in the morning. RP 104. But the State did not refute Maxwell's perfectly plausible testimony that many places tossed all their waste into the same dumpster, so that Maxwell had to go through the dumpster to retrieve the metal and that most of his commercial clients preferred him to do this after hours, not while customers were present; or Maxwell's explanation that he was out

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later than usual on March 3, after an evening at the local casino. RP 135, 165, 169.

On March 3, 2011, Morken arrived to find six pieces of copper-nickel piping missing from the back of the pick-up. RP 59-60.

Morken and one of the police witnesses testified that they had seen security video which the jury did not see because the images could only be viewed on-screen and there was no way to download, print or save. RP 65, 70, 93. The camera retained only four days' worth of "grainy" images. RP 70. Morken said the video showed two unidentified people removing pipe from truck. RP 65. This was immaterial, because Maxwell did not deny that he took metal from the truck. RP 92, 94, 100.

The fatal defect in the State's case is Morken's testimony that, instead of securing the valuable copper-nickel piping intended for current projects, his boss decided to keep it outside the fence in a junky-looking bin disguised as a dumpster. RP 71. The idea was that it would be safe because no thief would suspect the contents had any value. RP 71. The boss did not testify.

This in itself is sufficient to defeat the knowledge element. Accepting the State's evidence as true, valuable metal was deliberately left outside the fence in circumstances calculated to deceive a reasonable person into thinking it had no value and that the owner did not care what

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happened to it. Maxwell testified that he was deceived, and the record contains nothing to refute that.

The material evidence, both the direct and circumstantial, is entirely consistent with Maxwell's having acted in the good faith belief that all of the piping left unsecured in and around the scrap dumpster was available for collection.

V. CONCLUSION

For the foregoing reasons, the Court should reverse Mr. Maxwell's conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted, this 4th day of June, 2012.

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