COA No. 31037-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER GEORGE NICHOLS,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutes

Rules

I. ASSIGNMENTS OF ERROR

A. The court erred by admitting evidence of an unrelated murder in which Christopher George Nichols was not involved.

B. Because it failed to actually consider the defense's request for an exceptional sentence downward, the court erred by sentencing Mr. Nichols to a standard range sentence of 1530 months in prison on his convictions for nine counts of first degree unlawful possession of a firearm, nine counts of theft of a firearm, one count of residential burglary, one count of first degree trafficking in stolen property, and one count of theft of a motor vehicle.

Issues Pertaining to Assignments of Error

1. Did the court err by admitting evidence of an unrelated murder under the res gestae exception to ER 404(b)'s prohibition against admissibility of other crimes, wrongs, or acts to prove a person's character in order to show action in conformity therewith? (Assignment of Error A).

2. Did the court err by not giving a limiting instruction to the jury on the ER 404(b) evidence? (Assignment of Error A).

3. Did the court commit reversible error when it sentenced Mr. Nichols to a standard range sentence of 1530 months in prison

without actually considering the defense's request for an exceptional sentence downward? (Assignment of Error B).

II. STATEMENT OF THE CASE

Mr. Nichols was charged by amended information with nine counts of first degree unlawful possession of a firearm, nine counts of theft of a firearm, one count of residential burglary, one count of theft of a motor vehicle, one count of first degree trafficking in stolen property, and nine counts of theft of a firearm. (CP 218). The charges arose out of one incident involving the burglary of a residence, the taking of a safe that happened to contain firearms, the taking of a motor vehicle to transport the safe, and finally the distribution of some of those firearms. (CP 312).

In pretrial motions in limine, Mr. Nichols asked that the State not be allowed to introduce evidence of a murder in which he was not involved, but where he supposedly came into contact with witnesses who were implicated in the killing of Gordon Feist. (6/11/12 RP 127-29). Under the res gestae exception to ER 404(b), the court allowed the evidence. (6/11/12 RP 131-32).

Robert Hannigan lived at 3924 Braden Road in Stevens County, halfway between Gifford and Addy. (6/12/12 RP 198). He had 55 acres with a locked gate and a fence all around the

property. (*Id.* at 199). There were three locks on the gate; the key was under a rock. (*Id.* at 200). In 2010, Mr. Hannigan had carpenter Verle Wade, along with his helper, Eric Booth, build a porch and deck. (*Id.* at 201). They started work on September 16, 2010, and finished October 8, 2010. (*Id.* at 202). The two men had full access to the house. (*Id.*).

From June 20, 2011, to June 28, 2011, Mr. Hannigan was in the Tri-Cities. (6/12/12 RP 203). When he came home, he saw his Honda Fit was gone and the screens were off the house. (*Id.*). The police were contacted and deputies and a detective showed up. (*Id.* at 206). Among the items that were gone were guns, a gun safe, jewelry boxes, knives, and the Honda Fit. (*Id.* at 206-221). The safe contained 23 firearms. (*Id.* at 222). $10,000 in ammunition was also taken. (*Id.* at 223-24).

Eric Booth was in prison for murder. (6/12/12 RP 231). He had worked on Mr. Hannigan's deck for about a month a couple of years earlier. (*Id.* at 232). About a year after the deck was built, Mr. Booth went back to the Hannigan home. (*Id.* at 233). Mr. Nichols was with him and they were going to burglarize the house. (*Id.*). Mr. Booth drove there and hopped the gate. (*Id.* at 234). They checked the windows and wore gloves. (*Id.*). Mr. Nichols

went through a window at the back of the house and opened the front door for Mr. Booth, where they took out the safe, jewelry, and ammunition. (*Id.* at 235). They dumped the stuff on a hillside. (*Id.* at 236). They took them away from the Hannigan house by taking the Honda. (*Id.*). A dolly was used to move the gun safe to the car. (*Id.*).

Mr. Nichols drove the car. They cut the locks and bolt at the gate and drove to Old Dominion. (6/12/12 RP 237-38). The two dropped the stuff at Old Dominion and the car at Cole Road/Cole Mountain. (*Id.* at 238-39). Mr. Nichols pushed the Honda down the hill. (*Id.* at 239). They went back to Mr. Nichols' home, where the gun safe was opened. (*Id.* at 235-40). Mr. Booth said he was not present and arrived after the gun safe was opened and the guns pulled out. (*Id.* at 240).

Jesse Fellman-Shimmin and Mr. Nichols were there with Mr. Booth. (6/12/12 RP 240). Some guns were in Mr. Nichols' truck and others were buried in black garbage bags. (*Id.*). Mr. Booth testified he was not around when the guns were put into the bags. (*Id.* at 241). Mr. Fellman-Shimmin got two guns – a Tec-9 and a pistol. (*Id.*). Mr. Booth did not get any guns as Mr. Nichols took them. (*Id.*).

Both men shot the guns. (6/12/12 RP 24). Mr. Booth said Mr. Fellman-Shimmin also shot guns at this particular location, a house. (*Id.* at 243-44). The guns and ammo were in a storage container at the house. (*Id.* at 244). They scrapped Mr. Hannigan's belt buckles and went to Spokane to go to Pacific Steel and some pawn shops. (*Id.* at 244-45). Mr. Booth said Mr. Nichols pawned for just over a $100 a couple of rings that he recognized from the Hannigan home. (*Id.* at 245-47).

Mr. Booth further testified that he did a job for Gordon Feist. (6/12/12 RP 247). On July 17, 2011, he went back to the Feist home with Collette Pierce and Jesse Fellman-Shimmin to commit a burglary. (*Id.* at 248). They went there with no plan. (*Id.* at 248, 318). Mr. Fellman-Shimmin drove and parked about a mile down the road from the Feist home. (*Id.* at 248-49). The three walked to the house and Ms. Pierce told Mr. Feist they ran out of gas while looking for a friend. (*Id.* at 249). He was going to give them gas, but decided to drive them down to their car. (*Id.* at 250). Mr. Feist drove a 4-wheeler with a bed on the back. (*Id.*). Ms. Pierce sat in the middle, Mr. Booth was on the passenger side, and Mr. Fellman-Shimmin was in the back. (*Id.*). Mr. Feist had a gun on him and, for some reason, Mr. Booth thought he was going to get shot. (*Id.*

at 251). Mr. Booth shot twice and killed Mr. Feist with a .22 derringer that had been taken from the Hannigan home. (*Id.* at 251-52). After he was shot, Mr. Feist ran into a telephone pole, whereupon the three passengers went back to their car. (*Id.* at 252).

They cleaned up and Mr. Fellman-Shimmin started driving back. (6/12/12 RP 253). They saw a car approaching so they went to Rocky Lake. (*Id.* at 253). They started a campfire and Mr. Nichols arrived. (*Id.*). He drove back to the Feist home to see if anybody had showed up. (*Id.* at 254). After coming up with a story about getting in a dirt bike wreck with Mr. Fellman-Shimmin and Ms. Pierce, Mr. Booth ended up telling police everything that happened. (*Id.* at 254-56).

Mr. Booth testified he got a plea deal for the murder of Mr. and the Hannigan burglary. (6/12/12 RP 292). Mr. Fellman-Shimmin also got a plea deal for the murder and was sentenced to 20 years. (*Id.* at 305). He pleaded guilty to second degree murder. (*Id.* at 334).

Mr. Nichols contacted Mr. Fellman-Shimmin in mid-June 2011 to break into a safe he had from a burglary he and Eric Booth had committed. (6/12/12 RP 307-08). Ammunition was in the back

of Mr. Nichols' truck and the safe was hidden in some bushes. (*Id.* at 310-11). The assault rifles and pistols were more valuable. (*Id.* at 312). Many guns were in the safe; the valuable ones were put into the back of Mr. Nichols' truck except for one pistol and one rifle. (*Id.* at 312-13). The less valuable guns were buried. (*Id.* at 313-14). They waited for Mr. Booth to show up. (*Id.* at 314). Mr. Nichols wanted to sell the guns. (*Id.* at 315). The guns were kept in a storage container at his girlfriend's house. (*Id.* at 316).

On July 17, 2011, the Feist murder occurred. (6/12/12 RP 318). Mr. Feist had a gun in his hand and Mr. Booth shot him. (*Id.* at 322-25). Mr. Fellman-Shimmin called Mr. Nichols after the murder and told him they needed help. (*Id.* at 328). He came and had a pistol taken from the Hannigan burlgary. (*Id.* at 328-29). Mr. Fellman-Shimmin threw his guns out of the car and into the bushes. (*Id.* at 332).

Collette Pierce got 15 years for second degree murder. (6/12/12 RP 378) She knew Mr. Nichols; Mr. Booth was her best friend in the world. (*Id.* at 379-80). She was present on July 17, 2011, when she, Mr. Fellman-Shimmin, and Mr. Booth hatched a plan for a burglary/robbery of the Feist home. (*Id.* at 386). Mr. Booth knew there were two safes in the shop containing guns, gold

coins, and money. (*Id.* at 387). But someone was home, which they did not expect. (*Id.* at 387-88). While Mr. Feist was driving them to their car, Mr. Booth shot him. (*Id.* at 390).

Afterwards, they went to Rocky Lake where Mr. Nichols met them. (6/12/12 RP 391-92). Ms. Pierce wanted him to take Mr. Booth to the hospital because his face was messed up. (*Id.* at 392). The only people at the murder were Mr. Booth, Mr. Fellman-Shimmin, and Ms. Pierce. (*Id.* at 404). Mr. Nichols only showed up afterwards at Rocky Lake. (*Id.*).

The supervisor of loan associates at Pawn One in Spokane testified that on July 6, 2011, there was a pawn transaction for two rings where Mr. Nichols signed the contract. (6/13/12 RP 435-440). The price was $135. (*Id.* at 440).

Jay Pratt was cutting firewood on Cole Road on July 14, 2011, when he saw a black car over the embankment. (6/13/12 RP 553-54). It was a secluded area and Mr. Pratt called an officer. (*Id.* at 555).

Shawn Merrill lived on Old Dominion Road, where he had a small engine business and a gun shop. (6/13/12 RP 562). He found a gun safe on his property on July 19, 2011. (*Id.* at 563). The safe was pried open. (*Id.* at 564-65). Mr. Merrill also found

some knives, scabbards, wooden boxes, and jewelry around and under the brush. (*Id.* at 566).

Crystal Fellman-Shimmin, Jesse's sister, said he was arrested in the middle or end of July 2011. (6/13/12 RP 577). Before the arrest, Jesse gave her three guns (a rifle and two handguns) to put underneath the house and to try to get them back where they came from. (*Id.* at 578-79). She called Mr. Nichols, one of the people Jesse told her was the source of the guns. (*Id.* at 579). Mr. Nichols said he threw the guns into the river. (*Id.*). She did not see him do it, though. (*Id.*).

Detective Michael Hannigan investigated the Hannigan burglary. (6/13/12 RP 602). The Honda Fit was found some 20 miles away from where it was taken. (*Id.* at 609). The detective was involved in finding the gun safe at Old Dominion Road and found a buried bag of firearms . (*Id.* at 615, 620). He was also involved in the Feist murder investigation. (*Id.* at 611).

Detective Gilmore went to see Mr. Booth after a community corrections officer saw him with facial injuries consistent with the crash of the 4-wheeler. (6/13/12 RP 622-23). The detective arrested Mr. Booth, who resisted throughout. (*Id.* at 626). He was in custody on July 20, 2011. (6/14/12 RP 647). On July 26 or 27,

Mr. Booth wanted to talk. (*Id.* at 647). Out of these interviews, the detective eventually got a search warrant for the home of Mr. Nichols' girlfriend. (*Id.* at 655). Firearms and ammunition were the only items tied to the Hannigan burglary. (*Id.* at 667).

Mr. Fellman-Shimmin was arrested the same day as Mr. Booth. (6/14/12 RP 681-82). Consistent with the investigation, Detective Gilmore thought Mr. Booth murdered Mr. Feist and was involved in the Hannigan burglary. (*Id.* at 687). Ms. Pierce was arrested on July 27, 2011, and was later charged with murder. (*Id.* at 692). She had no connection with the Hannigan burglary. (*Id.* at 693).

Detective Gilmore had contact with Mr. Nichols on July 26, 2011. (6/14/12 RP 670). Mr. Nichols said he was not involved in any burglaries, homicides, or pawns. (*Id.* at 671).

The jury found Mr. Nichols guilty of nine counts of first degree unlawful possession of a firearm, nine counts of theft of a firearm, one count of residential burglary, one count of theft of a motor vehicle, and one count of first degree trafficking in stolen property. (6/15/12 RP 873-877; CP 277-297; CP 327-340). Mr. Nichols waived speedy sentencing. (6/15/12 RP 883).

At sentencing, it was not disputed that Mr. Nichols' offender score was 9+. (7/31/12 RP 891). In imposing sentence, the court stated:

> I am painfully aware that you are a human being and you don't have a history of violence. And I can tell you that I had no idea at the time of trial that the – the ultimate sentencing range was anywhere near this. And like your attorney, I guess, I had that initial look and said, "This just can't be," that folks who are charged with and ultimately plead guilty to murder would end Up with the sentences they did compared to the range that we look at here.
>
> And your attorney reminds me of that, and he asks me to look at the purpose of the Sentencing Reform Act to determine whether the range here is clearly excessive. And there's a nonexclusive list of policy goals. He first talks about proportionality, seriousness of offense, and your – and your history.
>
> And he mentions in his briefing, that "Well, there might not have been guns in this safe and had there not been guns it would have been a different story." And to that extent it's true. But as I think about that, you've been in prison, you have this criminal history. You are very well aware that anything having to do with guns is kryptonite; I mean, you're to keep away. And yet the safe was clearly a target. There was also jewelry and other items, and had it been just jewelry and other items we wouldn't be having this discussion today. But you targeted a safe with a pretty good idea, I think, that it might have weapons in it, weapons that could be fenced, sold, to generate money for other purposes.
>
> And I thought about that. And that seemed to

me to be precisely the reason why the legislature would pass 9.41.040(6), the – hard time for armed crime statute. But it's just that. It's the risk of firearms finding their way into a criminal population, into the hands of people [who] have demonstrated that they can't own or possess weapons responsibly.

So while we talk about seriousness of the offense and criminal history, felons who are stealing and possessing guns, by legislative fiat, present an unacceptable risk of safety – risk to the public and public safety.

[Defense counsel] then says, "Well, you know, what is essentially a life sentence or the possibility of life sentence doesn't provide respect for the law by providing a just punishment." Yet in *State v. Murphy*, a case cited by the state, there's a quote: "It's the province of the legislature if it chooses, not the appellate court or a superior court, to ameliorate any undue harshness arising from . . .consecutive sentences for multiple firearm counts."

The idea there is that it's – the way that the court promotes respect for the law is to abide by the law, and to enforce the law, not to make the law. And here, to a large degree, your attorney – who is ever – ever representing you zealously – suggests that I overlook the very clear language of two statutes in particular, 9.94A.589 and 9.41.040, which both make it mandatory that there be consecutive sentences. And I think [the deputy prosecutor's] right: were the court to impose anything other than consecutive sentences that it would be reversible error.

. . . And as someone who knows, you can't be around weapons, you know, you opened the safe, you distributed the weapons, and ultimately one of the weapons that was involved in this – in this burglary, whether or not it was in the safe or not,

resulted – or was used to commit a murder.

There has to be just punishment recognizing that's what happened, but I – I again look – look past that, I don't make too much of that, and rather just look at the offense here, where it's very clear that Mr. Booth didn't have the ability to plan or execute an offense like this, that you had spent, you know, nearly the last decade in jail or prison, you knew that you weren't supposed to have weapons, you targeted a gun safe. It's had [sic] to say that that – that didn't put you on notice that you knew there were going to be guns involved, and you knew that there were significant punishments for guns involved but you made that choice.

. . . And it does seem harsh. I am the first to admit that.

. . . And therefore, as we look to the – the counts, on Counts 1 through 9 of unlawful possession of a firearm in the first degree, with a standard range of 86 to 116 months, with nine counts, I'll sentence you to 90 months on each count, to run consecutive. That's 810 months.

On Counts 13 through 21 the standard range is 77 to 102 months. Nine counts, I'll sentence you to 80 months on each count to run consecutive. And that creates 1530 months, 125 years or so.
And I recognize it's a life sentence. I – I have been painfully aware of that and thinking about it since I understood that this is what the range looked at – or, was – was calculated at.

And again, I don't feel I have a choice. And I think it's, in this case, also appropriate.

With regard to the residential burglary, with your history of burglary I think it's appropriate to impose a sentence of 84 months to run concurrently with each of the other two sentence [sic].

> For theft of a motor vehicle, a mid-range sentence of 50 months, again to run concurrent with the other sentences.
>
> For trafficking in stolen property a sentence of 80 months, towards the top of the range, also to run concurrent. And that's based on this history of theft.
>
> Again, I'm aware that there's no violent offenses in your history. And I'm aware that those who were convicted of the worst violent offense are looking at significantly less time than you. And I – I've thought about it. I don't like it.
>
> Nevertheless, this is my duty. It's my duty to uphold the law. And the legislature has determined that this is the appropriate – appropriate type of sentencing in cases like this, and it is therefore my – my obligation to follow the law as the legislature directs it.
>
> So that will be the sentence of the court. (7/31/12 RP 909-15).

This appeal follows. (CP 345).

III. ARGUMENT

A. The court erred by admitting evidence of an unrelated murder under the res gestae exception to ER 404(b)'s prohibition against admissibility of other crimes, wrongs, or acts to prove a person's character in order to show action in conformity with it.

ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not

> admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Mr. Nichols made a pretrial motion in limine to prohibit "the State from making any reference to the contact that allegedly occurred with Christopher Nichols, Jesse Fellman-Shimmin, Eric Booth, or Collette Pierce on the night of the Feist murder or any other reference to any alleged involvement in the crime." (CP 199). The court denied the motion and permitted evidence of the Feist murder:

> . . . [T]hat's how it appears to me, is more of a – a res gestae thing. I mean, certainly, the defense is able to cross examine each of these witnesses about, of course, their alleged involvement, or their bias, prejudice, ability to perceive, I mean, the kind of standard impeachment issues. And how do we un-ring that bell?
>
> I don't know that it's possible to preclude the state from making any reference to that contact without – really limiting the state in presenting its case, such as it is.
>
> So, I don't think I can – I can grant that motion in limine. I will listen closely to be sure that it kind of meets with this entire res gestae idea, but otherwise I – I don't think the state can be precluded from – from testimony that would implicate Mr. Nichols in what they're charging him with through these witnesses, who just happen to have been involved

in this other activity.

> And maybe, there's, you know, a limiting instruction of some sort. I don't think there is, but I think it has to be something that relies on cross examination perhaps to develop, as far as those witnesses and their credibility.
>
> So I say no, I guess, because I see this as a res gestae issue. (6/11/12 RP 131-32).

By making this ruling, the court allowed the State to present evidence of a murder committed by Eric Booth, where Mr. Nichols was admittedly not even present and had no involvement. (6/12/12 RP 248, 251-52, 322-25, 386, 391-92, 404). The court erred.

In addition to the exceptions identified in ER 404(b), the Washington courts have recognized a "res gestae" or "same transaction" exception where "evidence of other crimes is admissible 'to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd* 96 Wn.2d 591, 637 P.2d 961 (1981) (quoting *McCormick's Evidence* § 190, at 448 (Edward W. Cleary gen. ed., 2d ed. 1972)). ER 404(b) admissibility requires a two-part analysis where (1) the evidence sought to be admitted must be relevant to a material issue; and (2) the probative value of the evidence must outweigh its potential for

prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The trial court must identify on the record the purposes for which it admits evidence under an ER 404(b) analysis. *Saltarelli*, 98 Wn.2d at 362.

Once the trial court has found res gestae evidence relevant for a purpose other than showing propensity and not unduly prejudicial, that evidence is admissible under the res gestae exception to ER 404(b), so long as the State has shown by a preponderance of the evidence that the uncharged crimes occurred and were committed by the accused. *Tharp*, 96 Wn.2d at 593-94. The res gestae exception does not apply because the Feist murder was not committed by the accused, Mr. Nichols. *State v. Lane*, 125 Wn.2d 825, 834, 889 P.2d 929 (1995).

Moreover, the trial court did not indicate on the record the analysis required under ER 404(b) as (1) it simply stated that evidence of the murder was admissible under the res gestae exception; and (2) it failed to articulate at all whether the probative value of the evidence outweighed the potential for prejudice. (6/11/12 RP 131-32). Indeed, the court only recognized the potential for prejudice as reflected in its comment on the propriety of a limiting instruction. (*Id.* at 132). There was no reasoning as to

the probative value of the evidence since the court's focus was entirely on its "really limiting" the State's ability to present the case by precluding any reference to the Feist murder. (*Id.* at 131). This focus was misplaced and overlooked the predicate for the res gestae exception that Mr. Nichols committed the murder. *Tharp*, 96 Wn.2d at 593-94.

In *Tharp*, the defendant was charged with second degree murder. Over objection, the court admitted evidence of a series of uncharged crimes committed prior to and after the murder. The Court of Appeals held the admission of these other crimes was proper under the res gestae exception:

> The jury was entitled to know the whole story. The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character. 27 Wn. App. at 205.

The Supreme Court affirmed:

> [T]he uncharged crimes were an unbroken sequence of incidents tied to Tharp, all of which were necessary to be placed before the jury in order that it have the entire story of what transpired on that particular evening. Each crime was a link in the chain leading up to the murder and the flight therefrom. Each offense was a piece of the mosaic necessarily admitted in order that a complete picture be depicted

for the jury. *Tharp*, 96 Wn.2d at 594.

It is important that in order for the testimony to be relevant under the res gestae exception, the conduct must take place in the immediate timeframe of the offenses charged. *See State v. Thompson*, 47 Wn. App. 1, 12, 733 P.2d 584, *review denied*, 108 Wn.2d 1014 (1987).

The Feist murder, however, was neither committed in the immediate timeframe of the offenses with which Mr. Nichols was charged nor was he even involved in the murder. The Hannigan burglary occurred between June 20 and 28, 2011. (6/12/12 RP 203). The Feist murder took place on July 17, 2011. (6/12/12 RP 248, 252). The amended information alleged each of the 21 offenses with which Mr. Nichols was charged occurred between June 19 and July 6, 2011. (CP 218-227). A murder taking place 11 days later committed by someone other than Mr. Nichols and in which he had no involvement cannot be admitted under the res gestae exception to ER 404(b). He did not commit the murder; the murder was not part of a series of connected offenses where he was involved; and the murder was not in the immediate timeframe of the offenses with which he was charged. *Tharp*, 96 Wn.2d at 594; *Thompson*, 47 Wn. App. at 12.

The admission of evidence is reviewed under the abuse of discretion standard. *Lane*, 125 Wn.2d at 835. An abuse of discretion occurs when the court's decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 27, 482 P.2d 775 (1971). A court can also abuse its discretion by making a decision based on an incorrect legal analysis or other error of law. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Here, the trial court based its admission of evidence of the Feist murder on an incorrect legal analysis under ER 404(b) and the requirements of the res gestae exception. *Tharp*, 96 Wn.2d at 593-94; *Thompson*, 47 Wn. App. at 12.

The Feist murder was not committed by Mr. Nichols or was he involved in the burglary plan for the Feist home that started the sequence of events for the killing. The final charging document alleged the offenses by Mr. Nichols were complete, at the latest, by July 6, 2011, when the rings were pawned. (6/11/12 RP 151). The State amended the information just before trial to modify the dates the alleged offenses were committed, that is, June 19 to July 6 as "those are the dates that [Mr. Hannigan] was gone, and then the rings wound up in the pawn shop on July 6th." (*Id.*). The reason for

the res gestae exception is to explain parts of the whole story which otherwise would remain unexplained. *State v. Mutchler*, 53 Wn. App. 898, 901-03, 771 P.2d 1168, *review denied*, 113 Wn.2d 1002 (1989). But the story of the burglary, taking of a motor vehicle, and trafficking in stolen property was complete without evidence of the Feist murder. The court abused its discretion by admitting that evidence. *Id.* Its admission was highly prejudicial to Mr. Nichols as he was essentially convicted of the murder, a crime unrelated to him, rather than the offenses with which he was charged. Mr. Nichols is entitled to a new trial. *See State v. Trickler*, 106 Wn. 727, 733-34, 25 P.3d 445 (2001).

Furthermore, the trial court recognized that perhaps a limiting instruction should be given. (6/11/12 RP 132). It was correct. When ER 404(b) evidence is admitted, the trial court must give a limiting instruction to the jury specifying how the evidence may be used. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). But none was given here. Although generally not required to give such an instruction sua sponte, the trial court should do so when, as here, it stated on the record that one should be given. *See State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011); *State v. Yarbrough*, 151 Wn. App. 66, 90-91, 210 P.3d 1029

(2009). In these particular circumstances, the court erred by not giving a limiting instruction and a new trial is warranted on that ground as well. *Foxhoven*, 161 Wn.2d at 175.

B. The court erred by sentencing Mr. Nichols to 1530 months in prison when it refused to consider imposing an exceptional sentence downward as requested by the defense.

As stated at sentencing, the trial court believed it had no discretion to do anything other than to order that the sentences for the nine unlawful possession of a firearm and the nine theft of a firearm counts be served consecutively:

> And here, to a large degree, your attorney, who is ever – ever representing you zealously – suggests that I overlook the very clear language of two statutes in particular, 9.94A.589 and 9.41.040, which both make it mandatory that there be consecutive sentences. And I think the [deputy prosecutor's] right: were the court to impose anything other than consecutive sentences that it would be reversible error. (7/31/12 RP 911).

RCW 9.94A.589 states in relevant part:

> (1) (a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current

offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. . .

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

RCW 9.41.040(6) and (7) provide:

(6) Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or

> both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.
>
> (7) Each firearm unlawfully possessed under this section shall be a separate offense.

These statutes do provide for consecutive sentences as the trial court ordered. And both counsel agreed that the nine unlawful possession of a firearm counts were the same criminal conduct and the nine nine theft of a firearm counts were the same criminal conduct. (7/31/12 RP 899). On the other hand, defense counsel stated that whether the residential burglary was the same criminal conduct as the theft charges was really up to the court and did not have a substantial impact on sentencing. (*Id.*). Defense counsel provided the court with a sentencing memorandum detailing the grounds supporting an exceptional sentence downward. (CP 312-19). Counsel further argued:

> We're asking the court to consider this – basically to fashion a remedy that in essence gives a sentence that is consistent with giving a standard range of 97 or something within that 116-month range on the unlawful possessions, and the 77 to 102 on the theft of a firearm. Those have to run consecutive. And in my calculation that would come somewhere in the area of about 180 months, which would be the15 years that we're talking about in this particular case.
>
> The other offenses I believe have to run concurrent

regardless of whether you consider them to be the same criminal conduct or not.
We have suggested to the court to consider an exceptional sentence in this case for a number of reasons. We threw out the concept of cruel and unusual punishment as a matter of kind of food for thought, I guess. And I think the question is whether or not, as counsel would argue for the state, that – this is an appropriate sentence, 123 years for a burglary. Because that's what we're really dealing with here, is one burglary that involved a gun safe – safe that ended up having a number of guns in it. If there was a misstatement, I think that the facts are clear that there were somewhere between 21 and 22 or 23 guns. I think that's what the testimony was.

We have an individual who has a criminal history, But not one – not one violent offense in all those prior offenses, nor in the offenses that he's charged with in this particular case. . .

The proportionate sentence that we're talking about in regards to – to the defendant in this case, and kind of in an extraneous way other co-defendants in this kind of – all that was talked about at the time of the offense, we know that Mr. Booth, by his own admission, committed this burglary. The jury decided that Mr. Nichols did it with him. And we know that he, Ms. – Mr. Fellman-Shimmin and Ms. – Ms. Pierce went and committed a cold-blooded murder, basically. And the court is aware of the sentences they received in this particular case, which kind of points out kind of the – the bottom line of all of this, that Mr. Booth, you know, has no responsibility for this burglary whatsoever and received a sentence of 26-1/2 years. Mr. Fellman-Shimmin, 25 years, with a criminal history that's every bit if not worse than my client's in regards to this, a 25-year sentence, and a 15-year sentence for Ms. Pierce.

> And so, we ask the court to consider the concept of proportionality. . . And I would submit that sentencing someone to 123 years or to a life sentence for a property crime under these circumstances I really don't think, and you look at it in comparison to what people who then took this property and murdered someone with, is really – can be seen in reality as a fair and appropriate sentence.
>
> . . . We've asked that the court consider as an exceptional sentence running them concurrently. Or the court could give an exceptional sentence, depending on however the court fashioned to deem it, you know, giving a year on each offense, giving more on one, less on another; it's within the discretion of the court to give a sentence that we feel would be appropriate under the circumstances. (7/31/12 RP 899-905).

It is clear from the court's comments at sentencing that it did not at all consider giving Mr. Nichols the exceptional sentence downward requested by the defense as there is no mention of such a departure whatsoever. Indeed, the court determined it would be reversible error to do anything but run all 18 firearms counts consecutively pursuant to RCW 9.94A.589(1)(c) and RCW 9.41.040(6). But instead it committed reversible error by refusing to consider an exceptional sentence as it had the obligation to do. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Although no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the

trial court to consider such a sentence and to have it actually considered. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). In *State v. Murphy*, 98 Wn. App. 42, 50, 988 P.2d 1018 (1999), *review denied*, 140 Wn.2d 1018 (2000), the case relied on by the trial court as mandating consecutive sentences for Mr. Nichols, the Court of Appeals expressly recognized that an exceptional sentence could be imposed despite the consecutive sentence standard. Yet, the trial court did not even mention, much less actually consider, Mr. Nichols' request. The failure to consider an exceptional sentence is reversible error. *Grayson*, 154 Wn.2d at 342.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Nichols respectfully urges this court to reverse his convictions and remand for new trial or, in the alternative, to remand for resentencing.

DATED this 9th day of July, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 9, 2013, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Christopher George Nichols, # 873304, Clallam Bay C. C., 1830 Eagle Crest Way, Clallam Bay, WA 98326; and by email, as agreed by counsel, on Timothy Rasmussen at trasmussen@co.stevens.wa.us and Lech Radzimski at lradzimski@co.stevens.wa.us .

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