NO. 31037-0-III

IN THE COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent

v.

CHRISTOPHER GEORGE NICHOLS

Petitioner/Appellant

BRIEF OF RESPONDENT

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III. STATEMENT OF THE CASE

The Appellant was charged and ultimately found guilty after a jury trial of nine counts of unlawful possession of a firearm in the first degree, nine counts of theft of a firearm, one count of residential burglary, one count of theft of a motor vehicle, and one count of trafficking in stolen property in the first degree. RP at 873. Robert Hannigan testified that he lived at 3294 Bradeen Road in Stevens County Washington. RP at 198. The driveway leading to Mr. Hannigan's residence was blocked by a

locked gate. RP at 198. A key to this gate was located under a rock nearby. RP at 199. From June 20, 2011 to June 28, 2011 Mr. Hannigan was away from his home. RP at 203. When he returned to his home he discovered that it had been burglarized. RP at 203. He contacted law enforcement who responded. RP at 206. Walking around his home he noticed that the screens had been removed from the windows. RP at 204. Missing from his home was his vehicle, a Honda Fit. RP at 203. In addition to the vehicle, a gun safe was stolen along with $10,000 of ammunition, jewelry, knives, and other miscellaneous items. RP at 206-207. The gun safe contained 23 firearms. RP at 222.

Jason Herndon, who is an employee of Pawn 1 in Spokane, Washington, testified at the trial. RP at 435. Mr. Herndon testified that on July 6, 2012 the Appellant came into Pawn 1 and pawned two ladies rings. RP at 439. Mr. Herndon testified that the Appellant presented his drivers license at the time of the transaction. RP at 442. Mr. Herndon was also able to identify the Appellant when he testified at the trial. RP at 441. Robert Hannigan testified that the two rings that had been pawned were two of the rings that had been stolen from his home. RP at 207.

Stacy Taylor of Pacific Steel and Recycling of Spokane, WA also testified regarding procedures which are followed by her business whenever metal is sold for scrap. RP at 429. She also testified, and

through her testimony, a video was admitted into evidence. RP at 433. The video depicted Eric Booth and the Appellant scrapping metal at Pacific Steel and Recycling. Ex # 2. Eric Booth testified that he and the Appellant had scrapped belt buckles at Pacific Steel which had been stolen from Mr. Hannigan. RP at 245.

On July 14, 2012 Jay Pratt was cutting firewood on Cole Road located in Stevens County. RP at 553. While cutting firewood he observed a Honda Fit that had been pushed over an embankment. RP at 554. Upon finding the vehicle, he contacted Deputy Michael Swim with the Stevens County Sherriff's Office. RP at 555. Law enforcement officers were able to identify the vehicle as the one that was stolen from Mr. Hannigan. RP at 608.

On July 17, 2012 the Stevens County Sheriff's office responded to a call involving a utility vehicle crashing into a power pole. RP at 516. The Sheriff's office was able to identify the driver of the utility vehicle as Gordon Feist. RP at 620. It was later determined that prior to crashing his utility vehicle into the pole Mr. Feist was shot twice in the side of the head with a .22 caliber Derringer pistol. RP at 251. This pistol was one of firearms which was stolen from Mr. Hannigan. RP at 251. Given the damage to the utility vehicle law enforcement came to the conclusion that

one of the passengers in the utility vehicle would have suffered extensive injury to their face. RP at 621.

On July 19, 2012 Shawn Merrill was walking around a parcel of land on which he has a gun shop. RP at 563. While walking around the property he located a gun safe which had been pried open. RP at 564. Upon locating the gun safe, Mr. Merrill contacted law enforcement who responded to the location of the gun safe. RP at 565. The gun safe that Mr. Merrill had discovered had been stolen from Mr. Hannigan's residence. RP at 213 – 214. Mr. Merrill also testified that strewn around the gun safe he located jewelry boxes, knives, and scabbards. RP at 565 – 567. Near the gun safe law enforcement recovered several of Mr. Hannigan's firearms which had been wrapped in plastic and buried. RP at 619.

On July 20, 2012 Department of Corrections Officer Travis Hurst was conducting a home visit with one of his offenders. RP at 622. When he arrived at the residence, Eric Booth opened the door. RP at 622. CCO Hurst observed that Eric Booth had injuries on his face. RP at 622. Detective Michael Gilmore of the Stevens County Sheriff's office responded to the Booth residence and ultimately placed Mr. Booth under arrest for the murder of Gordon Feist. RP at 625. After Mr. Booth was under arrest Detective Gilmore returned to the Booth residence and

executed a search warrant. RP at 630. During the execution of the search warrant a Walther P-22 handgun was recovered and was identified as one of the firearms stolen from Mr. Hannigan's home. RP at 631.

On either July 26 or 27, 2012 Eric Booth, while incarcerated in the Stevens County Jail requested to speak with law enforcement officers. RP at 647. During that conversation he confessed to the murder of Gordon Feist. RP at 649. He also provided information which led to the recovery of the two rings which had been pawned by the Appellant and the items which had been scrapped at Pacific Steel. RP at 649.

Mr. Booth also provided a second interview. RP at 651. During this second interview Mr. Booth provided additional details regarding the homicide and also information regarding other criminal activities he had engaged in. RP at 651. Mr. Booth indicated that he and the Appellant were the ones that were responsible for the Hannigan burglary. RP at 233. Detective Gilmore was able to corroborate all of the information that Mr. Booth provided. RP at 652 – 653.

Mr. Booth indicated that he and the Appellant gained access to Mr. Hannigan's residence through a window. RP at 235. Once they had made entry into Mr. Hannigan's residence, Mr. Booth and the Appellant collected all of the items that they wanted to steal including the gun safe, and loaded them into Mr. Hannigan's car. RP at 236. The Appellant was

driving the vehicle which was loaded with the stolen guns and other items. RP at 238. After leaving Mr. Hannigan's residence the two drove to a location near Old Dominion Mountain and unloaded the gun safe and other items. RP at 238. The vehicle was then taken to Cole Road and pushed over an embankment. RP at 239. This was the location where Jay Pratt had discovered the vehicle. RP at 554.

Mr. Booth also testified that he was present when firearms were being removed from the gun safe after it had been opened. RP at 240. He indicated that both the Appellant and Jesse Fellman-Shimmin were present at that time. RP at 240. Mr. Booth indicated that some of the guns which were removed from the safe were wrapped in plastic and buried near the safe. RP at 240. It was these firearms that law enforcement discovered after Mr. Merrill had located the safe. RP at 619. Mr. Fellman-Shimmin was paid for helping open it with two firearms from the safe. RP at 242.

Mr. Booth described shooting the firearms which were removed from Mr. Hannigan's safe at various locations. RP at 242. One of those locations was the home of the Appellant's girlfriend. RP at 243. Mr. Booth described the home and indicated that there was a storage container behind the home. RP at 243. When asked what was stored in the storage container Mr. Booth indicated, "There was a lot of the guns and ammo and things like that." RP at 243.

Mr. Booth also testified that he and the Appellant went to Spokane in July. RP at 245. He indicated that the Appellant pawned two rings which had been stolen from Mr. Hannigan's home at a pawn shop. RP at 245. He also indicated that they scrapped belt buckles at Pacific Steel which had also been stolen from Mr. Hannigan's home. RP at 245.

Mr. Booth indicated that he, Jesse Fellman-Shimmin, and Collette Pierce decided to commit a burglary at a residence belonging to Gordon Feist. RP at 248. He indicated that they walked up to Mr. Feist's home and that Mr. Feist was home. RP at 249. They told Mr. Feist that they had run out of gas. RP at 249. Mr. Feist then offered to drive the three back to their car in his utility vehicle. RP at 249. Mr. Booth indicated that he was sitting in the passengers seat, that Collette Pierce was between him and Mr. Feist, and that Mr. Fellman-Shimmin was riding in the back. RP at 250. Mr. Booth testified that during the ride he became fearful that Mr. Feist would realize why they were really at his home and that Mr. Feist would shoot them with a gun he had on his person. RP at 250. Mr. Booth stated that he shot Mr. Feist in the side of the head with the .22 Derringer which he and the Appellant had stolen from Mr. Hannigan's home. RP at 251. Mr. Booth indicated that he lost the Derringer when the utility vehicle crashed into the power pole. RP at 252.

After Mr. Feist was shot, the three drove to Rocky Lake and started a campfire. RP at 252. While at Rocky Lake they contacted the Appellant, who drove out to meet them. RP at 253. While at Rocky Lake the three concocted a story to explain the injuries they had sustained from the utility vehicle crash which involved a motorcycle accident. RP at 254-255.

Mr. Booth entered in the plea agreement with the state. RP at 256 – 297. Mr. Booth agreed to testify against the Appellant in exchange for a sentencing recommendation. RP at 256 – 297. Mr. Booth was cross examined extensively by Appellant's attorney regarding the consideration he received in exchange for his testimony and false statements he made during the homicide investigation. RP at 256 – 297.

Jesse Fellman-Shimmin also testified at the Appellant's trial. RP at 306. Mr. Fellman-Shimmin indicated that he was contacted by the Appellant in the summer of 2012. RP at 308. The Appellant indicated that he had a gun safe that he needed help getting open. RP At 308. The Appellant told Mr. Fellman-Shimmin that he and Mr. Booth had stolen the gun safe in a recent burglary. RP At 308. Mr. Fellman-Shimmin indicated that he took two rock bars to help open the gun safe. RP at 309. He testified that the Appellant then took him out to where the gun safe was hidden. RP at 310. Mr. Fellman-Shimmin also observed a large quantity

of ammunition which the Appellant indicated was for the weapons that were in the safe. RP at 311. He further testified that they used the two rock bars he had brought with him to open the safe. RP at 311. Mr. Fellman-Shimmin indicated that he took two firearms as payment for helping open the safe. RP At 311. He also corroborated what Mr. Booth had testified about indicating that some of the guns were wrapped in plastic and buried. RP at 314.

Mr. Fellman-Shimmin also testified that he had shot guns at the Appellant's girlfriend's home and that weapons were stored in a storage container behind the home. RP at 316. Mr. Fellman-Shimmin was able to identify a backpack, Ex # 56, as a backpack that the Appellant carried handguns stolen from Mr. Hannigan's home in. RP at 317-318.

Mr. Fellman-Shimmin provided the same description of events that Mr. Booth provided with respect to the murder of Mr. Feist. RP at 318 – 324. Mr. Fellman-Shimmin also testified that after the homicide that he, Collette Pierce, and Eric Booth went to Rocky Lake. RP at 325. He testified that while at Rocky Lake they contacted the Appellant and he met them. RP at 328. Mr. Fellman-Shimmin also testified that while at Rocky Lake he observed the Appellant in possession of two firearms which had been stolen from Mr. Hannigan's home. RP at 330. The two guns were a Taurus Judge and an AK-47. RP at 330.

Mr. Fellman-Shimmin entered in the plea agreement with the state. RP at 397 – 415. Mr. Fellman-Shimmin agreed to testify against the Appellant in exchange for a sentencing recommendation. RP at 397 – 415. Mr. Fellman-Shimmin was cross examined extensively by Appellant's attorney regarding the consideration he received in exchange for his testimony and false statements he made during the homicide investigation. RP at 397 – 415.

Ms. Collette Pierce also entered into a plea agreement in exchange for testifying at the trial of the Appellant. RP at 378. She indicated that she was in a dating relationship with Jesse Fellman-Shimmin during 2012. RP at 380. Mr. Pierce described her recollection of the murder of Mr. Feist. RP at 385 – 392. Ms. Pierce, like Mr. Fellman-Shimmin and Mr. Booth testified that after Mr. Feist was shot they went out to Rocky Lake and were met by the Appellant. RP at 392. She also testified that the Appellant was in possession of two firearms at that time. RP at 392.

The Appellant's attorney cross examined Ms. Pierce extensively regarding the consideration she received in exchange for her testimony, and the inconsistent statements she had made to law enforcement regarding her involvement in the murder. RP at 397 – 415.

Based upon information which was provided by Eric Booth law enforcement obtained a search warrant for the residence of Victoria

Winter. RP at 655. Victoria Winter was the Appellant's girlfriend and was pregnant with his child at that time. RP at 655. When executing the search warrant at the residence law enforcement observed the storage container and area where both Mr. Booth and Mr. Fellman-Shimmin had said they had shot guns stolen from Mr. Hannigan. RP at 658. When the warrant was executed, multiple items were recovered that had been stolen from Mr. Hannigan's residence. RP at 658. In the storage container, law enforcement recovered ammunition. Ex # 53. RP at 658. This ammunition was identified by Mr. Hannigan as being his. RP at 225. In the upstairs bedroom, law enforcement recovered a backpack which was identified by Mr. Fellman-Shimmin as belonging to the Appellant. RP at 659 and 330. In the backpack, law enforcement located a Taurus Judge and a Browning 9mm handgun and more ammunition all which had been stolen from Mr. Hannigan's home. RP at 660.

Jim Luthy of the Washington State Patrol Crime lab analyzed the Browning and was able to identify a fingerprint that matched the Appellant. RP at 462. Also within the backpack was a black ski mask and cloth gloves. RP at 660. Outside of the residence, where Mr. Booth and Fellman-Shimmin had indicated they had shot firearms detectives recovered spent 454 Casull shell casings. RP at 665. Glen Davis of the Washington State Patrol was able to forensically analyze those casings and

determined that they had been shot by a firearm which was stolen from Mr. Hannigan's residence. RP at 546. Law enforcement also recovered a drivers license at this residence that belonged to the Appellant. RP at 662. The license indicated that the address where the search warrant was being executed was the Appellant's home address. RP at 663.

On August 18, 2012 the Appellant, while incarcerated in the Stevens County Jail, placed a call to his girlfriend Victoria Winter. RP at 710. The phone call was recorded consistent with Jail policies. RP at 708. The court admitted the phone call and played it for the jury. RP at 715, 717. The recording of the phone call was played for the jury. RP at 718. The jury heard the following:

FEMALE:	Hello?
OPERATOR:	You have a VAC collect call from--
MALE:	Chris.
OPERATOR:	--an inmate at -- (beep)
MALE:	Hello?
FEMALE:	Hi.
MALE:	How are you doing?
FEMALE:	Waiting for you to call.
MALE:	Yeah?
FEMALE:	Yeah.
MALE:	That's all you're doin'?
FEMALE:	Yep.
MALE:	What's wrong?

FEMALE: I came home last night with a whole bunch of cops in my house.

MALE: In 'em?

FEMALE: Huh?

MALE: In it?

FEMALE: Yep.

MALE: Yeah?

FEMALE: Uh-huh.

MALE: What happened?

FEMALE: What do you think?

MALE: Fuck!

FEMALE: Yep.

MALE: Goddam it!

FEMALE: Yeah. It wasn't a pretty sight for me. And Mr. Gilmore - is that his name?

MALE: Yeah.

FEMALE: It was bad. Bad, bad. As he was telling me to calm down and stuff, yelling, and I wasn't yelling, and I told I -- if he wanted to see me yell I would yell.

MALE: Fuck!

FEMALE: Anyways, I talked to your mom, obviously, 'cause your sisters came out and helped me clean my house. And -- your mom wants you to talk to your attorney and have -- and you sign a waiver so that your parents and Cheryl Taylor can have all the information.

MALE: Am I what?

FEMALE: All of your information, from your attorneys they have.

MALE:	Okay.
FEMALE:	So you're supposed to -- get a waiver and have it signed. They're gonna try to have -- get Steve Graham for you.
MALE:	It don't matter. Tell them to not even worry about it; I'm fucked now. Goddam it!

RP at 718 – 720

On June 11, 2012 the Appellant's trial commenced and his counsel filed "Defendant's Motions in Limine." CP # 55. Defendant's Motions in Limine 8 – 14 were as follows:

> 8. Prohibiting the State from making reference to the criminal history of Christopher Nichols;
>
> 9. Prohibiting the State from making reference to the fact that Christopher Nichols was in prison;
>
> 10. Prohibiting the State from making any reference to the fact that Christopher Nichols was a member of the prison gang called the "Northwest Boot Boys" or any reference to his numerous tattoos;
>
> 11. Prohibiting the State from making any reference to any prior bad acts including any uncharged or unproven crimes of Christopher Nichols, i.e. in reference to Mr. Nichols allegedly agree to harm the husband/boyfriend of a prior girlfriend names Amanda or any other use unrelated allegations;
>
> ...
>
> 14. Prohibiting the State from making any reference to the contact that allegedly occurred with Christopher Nichols, Jesse Fellman-Shimmin, Eric Booth, or Collette Piece on the nights of the Feist murder or any other reference to any alleged involvement in the crime.

In his motions in limine, trial counsel generically argued that:

> As to motions set forth in 8 through 14, said motions are based upon ER 401, 402, 403, and 404. The above stated issues outlined by the motions in limine are not relevant to the case at hand. In addition, any such evidence is extremely prejudicial and any probative value would be minimal compared to the extreme prejudice that would be generated by its admission. The only purpose for admitting such evidence would be to deflect the jury's attention from the facts and instead to focus on prejudice, bias, and passion. The admission of such evidence would confuse the issues, mislead the jury, and create undue delay and waste of time. Additionally, the evidence would be an improper attempt of attempt to admit improper character evidence.

On June 11, 2012, the trial court addressed the defendant's motions in limine. RP at 127. The court, when it arrived at the 14th motion the court inquired, "What's your thinking here, Mr. Maxey?" RP at 127. After summarizing the testimony in question trial counsel ultimately stated, "But all this commentary about the – about the Feist murder, and all these other things, *I don't think are particularly relevant.*" RP at 128 emphasis added. No further argument or alternative theories for exclusion of this information were offered by trial counsel. RP at 128.

On July 31, 2013 the Appellant was sentenced to a standard range sentence of 1530 months. RP at 887 – 920.

This appeal follows.

IV. ARGUMENT

A. THE APPELLANT DID NOT PREVIOUSLY RAISE AN ER 404(B) CHALLENGE PERTAINING TO THE EVIDENCE OF THE FEIST HOMICIDE AND IS THEREFORE BARRED FROM RAISING THIS CHALLENGE FOR THE FIRST TIME ON APPEAL.

1. THE APPELLANT FAILED TO PRESERVE THE ISSUE OF 404(B) AND ALSO INVITED THE ERROR BY ONLY HAVING THE COURT REVIEW THE EVIDENCE FROM A STANDPOINT OF RELEVANCY

The trial court properly admitted evidence regarding the murder of Mr. Feist in the trial against the Appellant. An appellate court reviews a trial court's evidentiary rulings for abuse of discretion. *E.g., State v. Powell,* 126 Wash.2d 244, 258, 893 P.2d 615 (1995); *Kappelman v. Lutz,* 167 Wash.2d 1, 6, 217 P.3d 286 (2009). The Appellant failed to make a challenge based on ER 404(b) regarding the murder of Mr. Feist. The Appellant only argued for exclusion of this evidence under a theory of relevancy. The Appellant's ER 404(b) argument is precluded pursuant to the invited error doctrine and should be precluded due to trial counsel's failure to preserve the issue for appeal.

The Appellant is precluded from raising an ER 404(b) challenge on appeal as this error was invited because the trial court was only asked to consider the evidence from a standpoint of relevancy. Under the invited

error doctrine, a criminal defendant may not set up error at trial and then complain of it on appeal. *In re Pers. Restraint of Thompson,* 141 Wn.2d 712, 723, 10 P.3d 380 (2000). The doctrine applies when counsel takes affirmative action that induces the trial court to take an action that party later challenges on appeal. Id. at 723-24.

Likewise, the appellant cannot raise an ER 404(b) challenge on appeal because he failed to preserve the issue. "Generally, to preserve error for consideration on appeal, the alleged error must be called to the trial court's attention." *State v. Wiley* 26 Wash.App. 422, 427, 613 P.2d 549, 553 (1980) citing *State v. Wicke*, 91 Wash.2d 638, 591 P.2d 452 (1979). As the Supreme Court of Washington reasoned in *Seattle v. Harclaon,* "It is the duty of counsel to call to the court's attention, either during the trial or in a motion for new trial, any error upon which appellate review may be predicated, in order to afford the court an opportunity to correct it." 56 Wash.2d 596, 597, 354 P.2d 928, 929 (1960). The court in *Harclaon* further opined, "Counsel cannot, in the trial of a case, remain silent as to claimed errors and later, if the verdict is adverse, urge his trial objections for the first time on appeal." *Id. citing Bingaman v. Seattle*, 139 Wash. 68, 74, 245 P. 411 (1926); *Keough v. Seattle Electric Co.*, 71 Wash. 466, 128 P. 1068 (1913), and cases cited; *Bodine v. Boyd*, 383 Pa.

525, 119 A.2d 274 (1956); *Weinrob v. Heintz*, 346 Ill.App. 30, 104 N.E.2d 534 (1952).

The Appellant argued that evidence regarding the Feist homicide be suppressed based only upon a theory of relevancy pursuant to ER 402. No mention of Rule 404(b) was made by the Appellant when the trial court addressed this issue. Trial counsel indicated he believed the State should be precluded from presenting that evidence because it was not relevant. RP at 127. Other motions, specifically Motions in Limine 8 thru 11, did address ER 404(b) considerations. With respect to those motions, the court and state acknowledged that the court would have to weigh the probative value of that evidence against its potential prejudice. RP at 126. ER 404(b) issues were raised by the Appellant with respect to other issues as well. RP at 114, 124, 125. Trial counsel neither cited nor discussed any rules of evidence in his written Motion in Limine # 14. The trial court was only requested by the Appellant to consider whether or not this evidence was relevant.

Had an ER 404(b) motion been made pertaining to this evidence the trial court would have been given the opportunity to conduct an ER 404(b) balancing test to determine if the probative value of the evidence outweighed the prejudice. However, this was not the motion that the Appellant made. Appellant only requested that the court review this issue

from a standpoint of relevancy. The evidence was clearly relevant and it was not an abuse of discretion for the court to admit it. The Derringer which was used to kill Mr. Feist was stolen from Mr. Hannigan. The fact that it had been in possession of Eric Booth, who committed the Hannigan burglary was relevant. It was also relevant for the jury to hear how this Derringer came to be found next to Mr. Feist after he had been shot. Likewise it was relevant for the jury to hear testimony from Collette Pierce, Eric Booth, and Jesse Fellman-Shimmin that the Appellant was in possession of the Taurus Judge and AK-47, stolen from Mr. Hannigan, shortly after they committed the homicide. The Appellant being in possession of those firearms was relevant to the jury's consideration regarding whether he was a felon who had previously stolen the firearms.

The Appellant invited this error based upon the fact the court was only asked to consider relevancy. The Appellant likewise failed to raise the issue and therefore failed to preserve the issue for appeal.

2. THE COURT'S USE OF THE TERM "RES GESTAE" DID NOT TRIGGER THE REQUIREMENT FOR 404(B) ANALYSIS.

The use the term "res gestae" by the trial court does not automatically trigger a requirement for ER 404(b) balancing test. The term "res gestae" has several distinct meanings in the law, some of which

are related to ER 404(b). *See, e.g., State v. Tharp,* 27 Wn.App. 198, 204, 616 P.2d 693 (1980), *aff'd,* 96 Wn.2d 591, 637 P.2d 961 (1981). However, it also has a more general meaning that encompasses the idea of "completing the picture." *Id.*

It is this more general meaning of "res gestae" that the trial court applied to this case when the Appellant made a motion to exclude evidence arguing that it was irrelevant. The Appellant asked the court to not admit evidence pertaining to the homicide as he believed it was not relevant. RP at 128. The court heard from the parties as to why this information should be suppressed. RP at 129 – 131. In ruling the evidence admissible the court held:

> And Mr. Maxey, that's -- that'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.

RP at 131

The trial court ruled that testimony regarding the homicide was relevant and analyzed the admissibility of this evidence from the standpoint of relevancy only. The court used the term "res gestae" in the sense that the evidence "completed the picture" of what had occurred. The court decided that the recovery of the Derringer by law enforcement, the appearance of the Appellant with the Taurus Judge and the AK-47 at Rocky Lake was all relevant evidence for the jury to hear. The court did not use the term "res gestae" in the context of ER 404(b) because it was not asked to look at this evidence from the standard of ER 404(b). The court was asked to determine if the information was relevant and the court properly determined that it was relevant. This evidence was part of the "res gestae" of the case, in that it completed the picture.

B. THE EVIDENCE WHICH WAS ADMITTED AT TRIAL REGARDING THE FEIST HOMICIDE DOES NOT FALL UNDER 404(B).

Evidence regarding the murder of Mr. Feist does not fall under ER 404(b) because the evidence related to the actions of Collette Pierce, Eric Booth, and Jesse Fellman-Shimmin; not of the Appellant. APPELLANT's reliance on ER 404(b) is misplaced as the evidence regarding the Feist

homicide does not fall under the type of evidence contemplated by ER 404(b). The rule states:

> 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.

ER 404(b) provides a criminal defendant with a basis to prevent a trier of fact from hearing about their past crimes. The purpose of ER 404(b) is to prevent the State from suggesting that a *defendant* is guilty because he or she is a criminal-type person who would be likely to commit the crime charged. *State v. Lough,* 125 Wash.2d 847, 859, 889 P.2d 487 (1995) [emphasis added].

The murder of Gordon Feist does not fall under ER 404(b) because the Appellant did not commit the offense. The Appellant correctly points out that, "The only people at the murder were Mr. Booth, Mr. Fellman-Shimmin, and Ms. Pierce. Mr. Nichols only showed up afterwards at Rocky Lake." *See* Brief of Appellant at 8. The Appellant's argument that the jury should not have heard testimony regarding the Feist homicide based on ER 404(b) is erroneous. The jury knew the Appellant had no involvement in the killing of Mr. Feist because the Appellant was not present when it occurred, those actions cannot be considered for

suppression under ER 404(b). The testimony of the witnesses about what occurred at Rocky Lake is not ER 404(b) evidence. The witnesses testified as to their observations of the Appellant in possession of firearms which constituted counts 8, 9, 15, and 21 in the information. This testimony was not "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"; rather these observations were direct evidence used to establish the Appellant's guilt of the offenses he was charged with.

C. IT WAS HARMLESS ERROR FOR THE COURT TO ALLOW THE JURY TO HEAR EVIDENCE REGARDING THE FEIST HOMICIDE

1. IF THE COURT FINDS ER 404(B) APPLICABLE ADIMISSION OF EVIDENCE REGARDING THE FEIST HOMICIDE WAS HARMLESS ERROR AS THE APPELLANT WOULD HAVE OPENED THE DOOR TO THAT EVIDENCE.

Assuming that evidence pertaining to the homicide falls under ER 404(b), admission of this evidence was harmless error as the Appellant would have opened the door to this evidence when cross examining Collette Pierce, Eric Booth, and Jesse Fellman-Shimmin. If Appellant's trial counsel had not cross examined them in the manner in which he did his performance would have been deemed ineffective.

A defendant or any other witness may be vigorously cross examined if they choose to testify. *State v. Graham*, 59 Wn. App. 418, 427, 798 P.2d 314 (1990) (citing *State v. Etheridge*, 74 Wn.2d 102, 113, 443 P.2d 536 (1968); *State v. Olson*, 30 Wn. App. 298, 300-01, 633 P.2d 927 (1981)). Thus, a defendant or witness may be cross examined upon material matters within the scope of his direct testimony. *Olson*, 30 Wn. App. at 301 (citing RCW 10.52.040; *State v. Robideau*, 70 Wn.2d 994, 425 P.2d 880 (1976); *State v. Gakin*, 24 Wn. App. 681, 603 P.2d 380 (1979), *review denied*, 93 Wn.2d1011 (1980)). The decision as to whether a particular topic is the proper subject of cross examination is within the sound discretion of the trial court. *Olson*, 30 Wn. App. at 301 (citing *State v. Etheridge*, 74 Wn.2d 102, 443 P.2d 536 (1968); *State v. Baylor*, 17 Wn. App. 616, 565 P.2d 99 (1977)). The trial court may, within its discretion, grant considerable latitude in cross examination; once a witness has testified as to a general subject on direct examination, the cross examination may develop and explore various phases of that subject. *Id.*

The Washington rule does not confine cross examination to the questions asked, but permits the cross examiner to explore and inquire into the subjects discussed on direct examination. *State v. Riconosciuto*, 12 Wn. App. 350, 354, 529 P.2d 1134 (1974). The trial courts decision to allow cross examination on a particular subject will be overturned on

appeal only upon a showing that the trial court abused its discretion. *Olson*, 30 Wn. App. at 301 (citing *State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1980)).

The classic explanation of the rationale supporting liberal admissibility of evidence under the "open door" policy is that:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.
>
> Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.
>
> *State v. Mak*, 105 Wn.2d 692, 711, 718 P.2d 407 (1986) (quoting *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

A portion of the evidence that was presented to the jury was testimony from Collette Pierce, Eric Booth, and Jesse Fellman-Shimmin. Their testimony consisted of instances in which they had either helped the Appellant acquire the firearms or witnessed him in possession of the firearms. While the investigation into the murder of Mr. Feist was pending all three were interviewed by law enforcement and provided extensive statements which were later proved to be false. All three resolved their cases through plea negotiations which involved an

agreement to testify against the Appellant. At trial, all three testified. Each was cross examined regarding the prior false statements they had made to law enforcement. The three witnesses were also cross examined regarding the fact that they received favorable resolutions in exchange for their agreement to testify against the Appellant. Had the court trial court suppressed evidence pertaining to the murder of Mr. Feist the door to that evidence would have been opened on cross examination. A failure to cross examine the three witnesses regarding prior inconsistent statements and plea agreements they had entered into would have been a serious error which would have called into question the reliability of the result of the trial. Had Appellant's trial counsel not cross examined them regarding these issues his performance would have been found to be ineffective.

2. IF THE COURT FINDS ER 404(B) APPLICABLE ADIMISSION OF EVIDENCE REGARDING THE FEIST HOMICIDE WAS HARMLESS ERROR GIVEN THE OVERWHELMING UNTAINTED EVIDENCE WHICH WAS PRESENTED.

Even if this court finds the evidence in question to fall under ER 404(b), and further finds that the court did not properly evaluate the probative value versus the prejudicial effect of the evidence, the admission of this evidence the error was harmless. The evidence surrounding the murder of Mr. Feist was only a small portion of the evidence the jury had

available to determine the Appellant's guilt of the charged offense. The outcome of the trial would have been no different.

In *State v. Tharp* the Supreme Court of Washington reviewed a claim that a trial court committed reversible error that evidence was admitted in violation of ER 404(b) and that the court failed to conduct a ER 404(b) weighing test. *See generally State v. Tharp* 96 Wash.2d 591, 637 P.2d 961 (1981). In *Tharp* the trial court admitted evidence pertaining to a series of both charged and uncharged criminal offenses which were attributed to Tharp. *Id* at 592, 637 P.2d at 961. In *Tharp* the jury also heard testimony that Tharp was temporarily released from serving a sentence for another offense that had been previously committed. *Id.* at 593, 637 P.2d at 961-962. The Court recognized that, "...before exercising its discretion to admit the prior conviction and the furlough status, the trial court should weigh the necessity for its admission against the prejudice that it may engender in the minds of the jury." *Id.* at 597, 637 P.2d at 964. However, in *Tharp* the trial court did not conduct a ER 404(b) balancing test. *Id.* at 598, 637 P.2d at 964. The record before the court indicated that the trial court simply accepted the State's contention that the evidence was necessary to show motive. *Id.* The Court found that the evidentiary rulings had been made in error; however they did not find that the admission constituted reversible error. *Id.* at 599, 637 P.2d at 965.

In addressing the magnitude of the trial court's error, the Supreme Court ultimately found that the error was harmless and upheld the conviction. *See Id.* In reviewing the impact of the error the Court applied, "...the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *Id. citing State v. Cunningham*, 93 Wash.2d 823, 613 P.2d 1139 (1980). The Supreme Court upheld Tharp's convictions after finding that even without the evidence, the outcome of the trial would have been the same. In reaching its conclusion the court held:

> We should avoid multiple trials and attendant uneconomic use of judicial resources when the new trial will inevitably arrive at the same result. We believe this to be such a case. Had the disputed evidence not been admitted, we are satisfied the verdict of the jury would have been the same. It is inconceivable to us that it could be otherwise. Sending this matter back for a new trial in order that there be handwriting analysis of the motel registration slip and a balancing of the need for the conviction and furlough status against the prejudice ensuing from their admission seems a useless act in these circumstances. Consequently, we hold the disputed evidentiary rulings were not prejudicial to appellant and they constitute harmless error.
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> *Id.* at 600, 637 P.2d at 966.

The Appellant argues that the evidence of the murder was highly prejudicial as he was essentially convicted of a murder which was not

committed by him. Nothing in the record supports this conclusion. No evidence was presented to the jury that suggested that the Appellant was guilty of the murder of Mr. Feist. The testimony of the witnesses was clear that he had no involvement in the killing of Mr. Feist. The jury heard that the three individuals that were responsible had been prosecuted and were serving sentences for the involvement in that murder.

Even without testimony regarding the murder, there was substantial evidence which the jury relied on to find the Appellant guilty of the offenses. The jury would have still heard from Eric Booth about how he and the Appellant went to Mr. Hannigan's residence loaded up the gun safe into Mr. Hannigan's car and removed it from the home. The jury would have also heard from Mr. Fellman-Shimmin about how he helped the Appellant open the safe and remove the firearms. The jury would have heard testimony from law enforcement officers that two of the firearms stolen from Mr. Hannigan's home were recovered from a backpack in the Appellant's home along with ammunition to the AK-47, and spent casing which were forensically matched to another stolen firearm. Jim Luthy from the Washington State Patrol crime lab would still have testified that he located the Appellant's fingerprint on a firearm stolen from Mr. Hannigan's residence. Pawn shop personnel would still have testified that the Appellant pawned items jewelry from Mr. Hannigan's residence. The

jury would have also seen video and heard testimony regarding the Appellant scraping other items at Pacific Steel that were stolen from Mr. Hannigan's residence. The jury would still have heard the recorded conversation between the Appellant and his girlfriend after the search warrant was executed at their home and stolen property was recovered. The outcome of the trial would not have been materially affected if the jury had not heard about the murder of Mr. Feist. The error was harmless. Reversing the Appellant's convictions would not be in the interests of judicial economy as a new trial would inevitably arrive at the same result.

D. THE COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT SENTENCED MR. NICHOLS TO 1530 MONTHS AS THIS WAS A STANDARD RANGE SENTENCE AND THE RECORD INDICATES THE COURT DID CONTEMPLATE THE EFFECTS OF AN EXCEPTIONAL SENTENCE

The trial court did not commit reversible error when it imposed a standard range sentence of 1530 months. RCW 9.94A.585(1) provides, "A sentence within the standard sentence range...for an offense shall not be appealed." The same statute also provides that, "A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state." RCW 9.91A.585(2). In order to justify the imposition of a sentence which is outside of the standard range the court

must find, "...considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. However, a court also commits error if the court refuses to exercise its discretion or denies an exceptional sentence for impermissible reasons. In addressing requests by defendants for sentences outside of the standard range the Division I Court of Appeals ruled:

> A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; *i.e.,* it takes the position that it will never impose a sentence below the standard range. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's race, sex or religion. Even in those instances, however, it is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence. Conversely, a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.
>
> *State v. Garcia-Martinez,* 88 Wash.App. 322, 330, 944 P.2d 1104, 1109 (1997)

The sentencing of felons who are convicted of stealing firearms is governed by RCW 9.94A.589(1)(c) and RCW 9.41.040(6). Both statutes require that sentences for Unlawful Possession of a Firearm and Theft of a Firearm be run consecutive to one another. The court has ruled that, "It is

the province of the Legislature, if it so chooses, not the appellate courts, to ameliorate any undue harshness arising from consecutive sentences for multiple firearm counts." *State v. Murphy* 98 Wash.App. 42, 49, 988 P.2d 1018, 1021 (1999).

The court did not commit error by imposing a standard range sentence. For purposes of sentencing, the court had been provided briefing by both the State and the Appellant. The State advocated for standard range sentences for all of the offenses with which the Appellant was charged. The Appellant advocated for an exceptional sentence below the standard range for the firearms offenses based upon his belief that a standard range was excessive given the conduct and the purposes of the Sentencing Reform Act.

At sentencing, after hearing from the parties, Judge Monasmith made the following observations:

> I am painfully aware that you are a human being and that you don't have a history of violence.
>
> ...
>
> 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 have demonstrated that they can't own or possess weapons responsibly.

So while we talk about seriousness of 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.

So, there's, you know, -- first of all my thinking about that.

Mr. Maxey 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" -- 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 Mr. Radzimski's right: were the court to impose anything other than consecutive sentences that it would be reversible error.
>
> RP at 909 - 911

The court did not commit reversible error with respect to the sentencing because the court considered imposing an exceptional sentence and in its discretion declined to do so. The court's statements at sentencing were not a categorical refusal to consider an exceptional sentence. Nor did the court did not rely on an impermissible basis to reject the Appellant's request for an exceptional sentence. It is clear from the record that Judge Monasmith reviewed the briefing that both parties had provided for purposes of sentencing. In addition to reviewing the briefing, it appears that the court also reviewed pertinent case law regarding the Hard Time for Armed Crime Act. After reviewing the Appellant's reasons for an exceptional sentence the court concluded that it would not be appropriate. The trial court concluded that the Appellant targeted and stole a gun safe so that he could acquire firearms. The court concluded that the legislature's reasons for requiring consecutive sentences for felons who steal guns was sound because of the risk that a

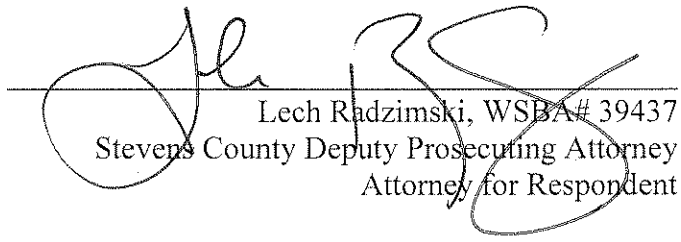
felon with a firearm poses. The court also considered the fact that imposing an exceptional sentence would likely be construed as reversible error. In the present, case the trial court considered the facts and concluded that there was no basis for an exceptional sentence. The trial court did not commit reversible error when it sentenced the Appellant to a standard range sentence.

V. CONCLUSION

Based upon the forgoing facts and authorities, the Respondent, State of Washington respectfully requests that this court deny the Appellant's request that his convictions be reversed or in the alternative remanded for sentencing.

Respectfully submitted this 23rd day of September, 2013

Tim Rasmussen, WSBA # 32105
Sevens County Prosecutor



Lech Radzimski, WSBA# 39437
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Attorney for Respondent

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, 500 N. Cedar St., Spokane, WA 99201-1905 and to Kenneth H. Kato, Attorney at Law, 1020 N. Washington St., Spokane, WA 99201-2237, and to Christopher G. Nichols, #873304, 1830 Eagle Crest Way, Clallam Bay, WA 98326, on October 23, 2013.

Michele Lembcke

Michele Lembcke, Legal Assistant
to Lech Radzimski