91218-1

Supreme Court No. _____
(COA No. 72363-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHANDRA WITT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Chandra Witt, petitioner here and appellant below, asks this Court to accept review pursuant to RAP 13.4(b) of the Court of Appeals decision terminating review dated November 10, 2014, a copy of which is attached as Appendix A.[1]

B. ISSUE PRESENTED FOR REVIEW

In order for evidence of other misconduct to be admissible, the trial court must determine whether the evidence is relevant to a material issue, identify the purpose for which the evidence is being introduced, and balance the probative value of the evidence against the danger of unfair prejudice. At a trial for trafficking in stolen property, the court allowed testimony that Ms. Witt delivered a controlled substance to another person after concluding that this evidence was relevant to whether Ms. Witt knew the copper pipes were stolen. The trial court also determined that this evidence was part of the res gestae of the

[1] The Court of Appeals Order Denying Motion for Reconsideration dated December 15, 2014 is attached as Appendix B.

alleged crime. Did the trial court abuse its discretion when admitting this evidence of other misconduct?

C. STATEMENT OF THE CASE

Even though Ms. Witt was not charged with possession or delivery of a controlled substance, the trial court permitted the jury to hear testimony that Ms. Witt delivered methamphetamine during her trial for trafficking in stolen property in the first degree. 5/7/13 RP 9-12, 94. Ms. Witt was interviewed by Sergeant Sydney Strong of the Hoquiam Police Department during his investigation concerning stolen copper pipes that had been sold to Butcher's Scrap Metal. 5/7/13 RP 74, 93. Ms. Witt told Sergeant Strong that she received the pipes from an individual in exchange for $20 worth of methamphetamine. 5/7/13 RP 8.

Defense counsel objected to the admission of any testimony about methamphetamine, arguing that it would be unfairly prejudicial. 5/7/13 RP 9-10. The trial court ruled that the exchange of methamphetamine was circumstantial evidence of knowledge that the copper pipes were stolen. 5/7/13 RP 11. The trial court also concluded that the methamphetamine was part of the res gestae of the trafficking in stolen property charge. 5/7/13 RP 11. Finally, the trial court

concluded that the evidence was "very relevant" and not unfairly prejudicial. 5/7/13 RP 11, 14.

The jury heard testimony from Sergeant Strong that Ms. Witt paid for the copper pipes with methamphetamine. 5/7/13 RP 94. The prosecuting attorney emphasized the exchange of methamphetamine in closing and rebuttal arguments five separate times. 5/7/13 129, 130, 136, 137-8. The jury returned a guilty verdict on the lesser included offense of trafficking in stolen property in the second degree. 5/8/13 RP 142; CP 32. The Court of Appeals affirmed Ms. Witt's conviction and determined that the trial court had not abused its discretion in finding the contested evidence relevant or in admitting it under the res gestae exception. Slip Op. at 8.

D. ARGUMENT

The trial court's admission of Ms. Witt's statement to law enforcement that she delivered methamphetamine in exchange for the copper pipes was manifestly unreasonable.

Evidence that is not relevant is not admissible. ER 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Although relevant, evidence may be excluded if its probative

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. Relevant evidence may also be excluded by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Id.*

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show propensity. ER 404(b). Evidence of other misconduct may be admissible for other purposes, such as proof of motive, intent, knowledge, identity, or absence of mistake or accident. *Id.* Evidence of prior crimes, wrongs, or acts is presumptively inadmissible. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). A defendant's statement regarding previous criminal activity is not admissible unless it also satisfies the standards of ER 404(b). *State v. Thamert*, 45 Wn. App. 143, 150-51, 723 P.2d 1204 (1986), *abrogated on other grounds by State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001); *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998)).

Before a trial court may admit evidence of other crimes or misconduct, it must (1) find by a preponderance of the evidence that the misconduct occurred; (2) determine whether the evidence is relevant to a material issue; (3) state on the record the purpose for which the

evidence is being introduced; and (4) balance the probative value of the evidence against the danger of unfair prejudice. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. *State v. Foxhaven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). As explained below, the trial court's admission of evidence that Ms. Witt delivered a controlled substance was manifestly unreasonable because it was irrelevant and substantially more prejudicial than probative. The error is prejudicial and merits reversal.

1. Ms. Witt's statement that she delivered methamphetamine in exchange for the copper pipes was not relevant.

The trial court determined that Ms. Witt's statement was admissible to establish knowledge of "what's going on as far as this

being an illegal transaction and a possession of something that was stolen." 5/7/13 RP 11. The trial court further reasoned that normal transactions of selling property, such as at a garage sale, do not involve the sale of methamphetamine. 5/7/13 RP 11. The trial court concluded that Ms. Witt's statement that she traded methamphetamine for the copper pipes was circumstantial evidence of knowledge that the pipes were stolen. 5/7/13 RP 11.

The trial court erred with regard to the second prong of the ER 404(b) analysis, which requires the evidence to be relevant to a material issue. *Dennison*, 115 Wn.2d at 628. The nature of the consideration exchanged for the copper pipes is not relevant to whether or not Ms. Witt knew that the copper pipes were stolen. Whether Ms. Witt paid cash, drugs, or received the copper pipes as a gift does not make the fact of consequence (i.e., knowledge that the pipes were stolen) more or less probable.

ER 404(b) is designed to prevent the suggestion that a defendant is guilty because he or she is a criminal type person who would be likely to commit the crime charged. *Foxhaven*, 161 Wn.2d at 175. Evidence of a criminal defendant's previous misconduct is not admissible for any of the purposes set forth in ER 404(b) if the matter

which the evidence tends to prove is not a disputed issue. *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). Evidence of another crime is not relevant to the crime charged unless the fact for which the evidence is to be admitted is of consequence to the outcome and the evidence tends to make the existence of that fact more or less probable. *Id.* at 363.

Here, the consideration given in exchange for the copper pipes does not establish any fact or disputed issue in the trial. Rather, this evidence notified the jury that not only was Ms. Witt accused of trafficking in stolen property, but she was also an admitted drug dealer. This evidence was susceptible to misuse by the jury, who could simply conclude that Ms. Witt is a criminal type person and thus more likely to have committed the trafficking charge submitted to the jury for verdict. This evidence failed to meet the requirements of ER 401 and the second prong of the ER 404(b) analysis and therefore the trial court erred in allowing its admission.

2. Even if the delivery of methamphetamine had some minimal probative value, it was greatly outweighed by the unfair prejudicial effect.

The admission of this evidence also violates the fourth prong of the ER 404(b) test, which requires the probative value of the evidence

to outweigh its prejudicial effect. *Dennison*, 115 Wn.2d at 628. This is an ER 403 analysis built into the ER 404(b) test. Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury and which creates an undue tendency to suggest a decision on an improper basis. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

In doubtful cases the scale should be tipped in favor of the defendant and exclusion of evidence. *Smith*, 106 Wn.2d at 776 (citing *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)). If the evidence is overly inflammatory in comparison with alternative methods of proving the same facts, a trial court's decision to admit such evidence may be overturned. *State v. Bouchard*, 31 Wn. App. 381, 386, 639 P.2d 761 (1982), *abrogated on other grounds by State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009).

Here, in balancing the probative value against the prejudicial effect, the trial court stated:

> I recognize I have to do somewhat of a balancing, but the balancing is whether it's relevant. I believe it's very relevant as to what was going on on this particular day in question by her own statement, according to this Number 21, and she signed it.

5/7/13 RP 11-12. The trial court later went on to conclude:

> I just think it's – the relevance is not outweighed by unfair prejudice. It's a situation where this is relevant material in the statement and the rule talks only about matters that are unfairly prejudicial. And I recognize there's always some prejudice when you engage in criminal conduct, but this was part of the actual transaction by the defendant's own statements to the officer.

5/7/13 RP 14.

The probative value of the evidence that Ms. Witt delivered methamphetamine has been previously discussed. For purposes of balancing the prejudicial effect against this minimal value, the trial court failed to consider the alternative methods of proving knowledge to avoid the overly inflammatory impact of informing the jury that Ms. Witt delivered methamphetamine. During trial, the State elicited testimony that Ms. Witt explained to law enforcement that she assumed the copper pipes were stolen. 5/7/13 RP 94. Specifically, the testimony of Sergeant Strong was as follows:

> Q. Did you ask her whether or not she knew or believe that she knew it was stolen?
>
> A. She said that she figured it did, because he does that sort of thing.

5/7/13 RP 94. The trial court failed to account for this alternative method of proving the same fact (i.e., knowledge) when conducting its

balancing test. Additionally, while the trial court made a conclusory comment that the prejudicial nature of the evidence does not outweigh its relevance, the trial court undertook no meaningful analysis of the prejudicial effect created by informing the jury that Ms. Witt was an admitted drug dealer.

Because the delivery of methamphetamine had minimal probative value, especially in light of the other evidence presented at trial, and because this evidence is particularly susceptible to misuse, the potential for unfair prejudice significantly outweighed its probative value and thus the trial court should have excluded it.

3. Ms. Witt's statement does not fall within the res gestae of the trafficking charge because it does not give immediate context or complete a necessary part of the story.

Under the res gestae or "same transaction" exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story or provide the immediate context for events close in both time and place to the charged crime. *State v. Warren*, 134 Wn. App. 44, 62, 138 P.3d 1081 (2006); *State v. Lilliard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004). Evidence of other activity constituting an unbroken sequence of events leading to the crime charged is admissible if it is necessary to provide the jury with the entire story of what transpired.

State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1982). Each crime must be a link in the chain and each must be like a piece in a mosaic, which is necessarily admitted in order that a complete picture be depicted for the jury. *Id.* Like other ER 404(b) evidence, res gestae evidence must be relevant for a purpose other than showing propensity and must not be unduly prejudicial. *State v. Lane*, 125 Wn.2d 825, 834, 889 P.2d 929 (1995).

In *State v. Tickler*, 106 Wn. App. 727, 25 P.3d 445 (2001), the defendant's conviction was reversed because the prejudicial effect of evidence admitted under ER 404(b) outweighed its probative value. *Id.* at 734-35. The defendant was prosecuted for possession of a stolen credit card and the trial court allowed evidence of other stolen items found on the defendant unrelated to the stolen credit card. *Id.* at 733. The State argued that this evidence was admissible under res gestae because it was so connected in time, place, and circumstances that it was necessary for the jury's understanding. *Id.* The court rejected this argument, reasoning that the defendant's possession of other allegedly stolen items was not an inseparable part of his possession of the stolen credit card and concluded that permitting the jury to hear this

superfluous information was highly prejudicial and merited reversal. *Id.* at 734.

Similarly, it was superfluous for the trial court to inform the jury that the consideration given by Ms. Witt to obtain the copper pipes was an illegal controlled substance. The exchange of methamphetamine is not an inseparable part of the transaction and was not necessary to provide context of the charged crime of trafficking in stolen property. Evidence admitted under the res gestae exception must be relevant and must not be unduly prejudicial. *Lane*, 125 Wn.2d at 834. As previously discussed, this evidence had minimal if any probative value and was extremely prejudicial in its nature. The jury could understand the context of the crime charged without hearing this evidence. The delivery of methamphetamine is not a "piece in the mosaic" necessary for the complete picture. The trial court erred in admitting this evidence under the res gestae exception of ER 404(b).

4. The admission of Ms. Witt's statement that she delivered methamphetamine was prejudicial error.

The admission of evidence informing the jury that Ms. Witt delivered methamphetamine was manifestly unreasonable and constitutes prejudicial error. Error is prejudicial if there is a reasonable

probability that the outcome of the trial would have been materially affected had the error not occurred. *Tharp*, 96 Wn.2d at 599. Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is required. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

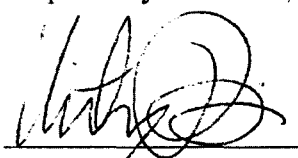
In closing and rebuttal argument, the prosecuting attorney continually emphasized the exchange of methamphetamine. 5/7/13 129, 130, 136, 137-8. At one point, the prosecuting attorney argued, "Look at how they do their business. It's not cash. Paid for it with drugs, $20 sack of meth for the pipe." 5/7/13 RP 130. Jurors can easily slide across ER 404(b)'s slippery boundary between proper consideration of evidence and improper consideration of propensity. *See United States v. Powell*, 652 F.3d 702, 707 (7th Cir. 2011). Evidence of drug dealing was not minor in its significance, as evidenced by the prosecutor's repeated reference to the methamphetamine in his closing arguments. Admission of this evidence constitutes prejudicial error requiring reversal of Ms. Witt's conviction.

E. CONCLUSION

Based on the foregoing, Petitioner Chandra Witt respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 13th day of January, 2015.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHANDRA M. WITT, Appellant.	No. 72363-4-I DIVISION ONE UNPUBLISHED OPINION FILED: November 10, 2014

LEACH, J. — Chandra Witt appeals her conviction for trafficking in stolen property in the second degree. She argues that the trial court should not have admitted her statement to police that she traded methamphetamine for stolen copper tubing because it was not relevant. She also contends that the court erred by imposing legal financial obligations (LFOs) without considering her ability to pay. Witt assigns error to the trial court's failure to advise her orally of the loss of her right to possess a firearm, which the State concedes. And in a statement of additional grounds, Witt alleges ineffective assistance of counsel. Because the trial court did not abuse its discretion in admitting Witt's statement and the allegations in her statement of additional grounds have no merit, we affirm Witt's conviction. But we remand for a resentencing hearing for the trial court to consider Witt's ability to pay LFOs and to advise her orally of the loss of her firearm rights.

Background

On June 20, 2012, an employee at the Department of Licensing (DOL) offices in the city of Hoquiam discovered that copper tubing from the building's air conditioning system had been cut and removed from the outside of the building. Sergeant Sydney Strong of the Hoquiam Police Department responded to the employee's 911 call. The following day, Strong recovered about 14 feet of tubing that had been sold to Butcher's Scrap & Metal, a business located less than a mile from the DOL offices. Strong also obtained the receipt for the transaction. The driver's license recorded at the time of sale identified the seller as Anna Owens-Pierce.

Strong brought the tubing back to the DOL building, accompanied by a local technician specializing in heating, air conditioning, and refrigeration. The technician identified the tubing as refrigeration tubing and confirmed that it came from the DOL building by aligning pieces of it with stubs left at the building.

Several days later, Strong obtained a warrant to search Chandra Witt's apartment and placed Witt under arrest. In an oral statement to Strong, Witt acknowledged receiving copper pipe at her apartment from Rick Cottrell. She told Strong that she believed the pipe was stolen because Cottrell "does that sort of thing." She signed a written statement, in which she admitted giving Cottrell "about a $20.00 sack of meth" for the copper pipe, which she "assumed" was stolen "because he wouldn't get it anywhere else." Witt stated that she "was going to scrap" the pipe, but that after she returned from a brief absence, the

pipe was gone, as was Michelle Hinkle, an acquaintance to whom Witt said she gave "a little bit of meth" that day in exchange for some housekeeping.

The State charged Witt with trafficking in stolen property in the first degree. In her written statement, Witt also acknowledged selling "small amounts of meth" and keeping marijuana for her personal use. The court redacted this portion of the statement from the version the jury received but admitted the rest of the statement, including Witt's description of trading drugs for the pipe, as "relevant as to the knowledge of what's going on as far as this being an illegal transaction and a possession of something that was stolen."

At trial, Hinkle, who was convicted for her own involvement with Owens-Pierce in the sale of the pipe, testified for the State. She stated that Witt gave her the pipe as payment for the housekeeping work. Two witnesses testified for the defense. A jury was unable to reach a unanimous verdict on the charged offense[1] but found Witt guilty of the lesser included offense of trafficking in stolen property in the second degree.[2]

The judgment and sentence imposed a mandatory $500 victim assessment and $100 DNA (deoxyribonucleic acid) collection fee, as well as $200 in court costs, $500 for court-appointed attorney fees, and $72 in restitution to Butcher's Scrap & Metal. At sentencing, there was no discussion about Witt's current or likely future ability to pay LFOs. And on Witt's judgment and sentence

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[1] RCW 9A.82.050 ("knowingly traffics in stolen property").
[2] RCW 9A.82.055 ("recklessly traffics in stolen property").

form, the court did not check any of the boxes that would indicate its findings about Witt's ability to pay. The judgment and sentence notifies Witt in writing of the loss of her right to own or possess a firearm. But at sentencing, the court did not orally advise Witt of her loss of this right.

Witt appeals.

Analysis

ER 404(b)

First, Witt challenges the trial court's admission of her statement to police that she obtained the copper pipe in exchange for methamphetamine. She argues that this evidence was not relevant and that its unfairly prejudicial effect "greatly outweighed" its "minimal probative value." She argues further that her statements do not fall within the res gestae of the trafficking charge because they "do[ ] not give immediate context or complete a necessary part of the story." She argues that the admission of this evidence violated ER 404(b) and constituted a prejudicial abuse of discretion.

"We review the trial court's interpretation of ER 404(b) de novo as a matter of law."[3] We then review a trial court's ruling on the admissibility of ER 404(b) evidence for abuse of discretion and will reverse only if the court's exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons.[4]

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[3] State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).
[4] State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

ER 404(b) prohibits evidence of other crimes, wrongs, or acts to prove character and show action in conformity with it.[5] However, this evidence may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[6] The res gestae or "same transaction" exception to ER 404(b) allows evidence of other crimes or acts to "complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime."[7] Before admitting this evidence, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is offered, (3) determine if the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.[8]

In a preliminary hearing, the prosecutor offered Witt's postarrest statement, arguing that Witt's admission that methamphetamine was the currency for the transaction was "all part and parcel of the sale of the copper pipe and I think it goes as part of the res gestae. And . . . I think that reflects upon a person's knowledge that the property was stolen." Defense counsel requested that "that specific drug not be mentioned" as unduly prejudicial. Both parties agreed to the redaction of the two final paragraphs of Witt's statement, where

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[5] ER 404(b); State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001).

[6] ER 404(b).

[7] State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004).

[8] In re Det. of Coe, 175 Wn.2d 482, 493, 286 P.3d 29 (2012).

she admitted to selling methamphetamine on other occasions and possessing marijuana.

The court agreed with the State's ER 404(b) res gestae and knowledge arguments:

> [I]t is part of the res gestae. In fact, it's actually the compensation that was allegedly paid for the bucket of piping that's at issue in this case. . . . It shows knowledge to some extent by circumstantial evidence.
>
> I recognize I have to do somewhat of a balancing, but the balancing is whether it's relevant. I believe it's very relevant as to what was going on on this particular day in question, by her own statement, according to this [exhibit], and she signed it.

Defense counsel also opposed admitting the portion of the statement where Witt said she gave Michelle Hinkle "a little bit of meth" for helping with cooking and housekeeping that day. This conflicted with Hinkle's testimony that Witt paid her with the copper pipe. The court concluded, "I'm going to leave that part in. I believe it does go to this whole transaction and the time frame." But the court ordered the redaction of the two final paragraphs of the statement, as the parties agreed. And the court made a final statement about its balancing:

> I just think it's—the relevance is not outweighed by unfair prejudice. It's a situation where this is relevant material in the statement and the rule talks about only matters that are unfairly prejudicial. And I recognize there's always some prejudice when you engage in criminal conduct, but this was part of the actual transaction by the defendant's own statements to the officer.

Citing United States v. Carrasco,[9] the State argues that the circumstances of the transaction "all reflect upon [Witt's] guilty knowledge." In Carrasco, the

[9] 257 F.3d 1045 (9th Cir. 2001).

court ruled that the defendant's possession of drug paraphernalia was relevant to prove the charged crime of knowing possession of a firearm.[10] But as Witt notes in a reply brief, the court's holding in Carrasco and similar cases depends on "the nexus between the drug trafficking evidence and the firearm and ammunition" because "'[f]irearms are known tools of the trade of narcotics dealing.'"[11] We agree with Witt that any nexus between narcotics and trafficking in stolen property is more attenuated than the nexus between drug trafficking evidence and firearms. The State's analogy to Carrasco and related cases to prove knowledge is imperfect at best.

But according to Witt's own sworn statement, the exchange of dubiously sourced copper pipe for drugs "provide[s] the immediate context for events close in both time and place to the charged crime."[12] We will uphold a trial court's admission of evidence under ER 404(b) if the record supports one of its cited bases.[13] Here, the record shows that the trial court conducted a proper inquiry before admitting the evidence. The court found by a preponderance of the evidence that the transaction occurred, which was not unreasonable given that Witt made the statement. The court identified res gestae as the purpose for

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[10] Carrasco, 257 F.3d at 1049.

[11] Carrasco, 257 F.3d at 1048-49 (quoting United States v. Butcher, 926 F.2d 811, 816 (9th Cir. 1991)); see also United States v. Crespo de Llano, 838 F.2d 1006, 1018 (9th Cir. 1987) (firearms can be relevant to show involvement in narcotics trade); United States v. Simon, 767 F.2d 524, 527 (8th Cir. 1985) (firearms are known "tools of the trade" of narcotics dealing because of dangers inherent in that activity).

[12] Lillard, 122 Wn. App. at 432.

[13] State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

which the evidence was offered, determined that the evidence was relevant to prove an element of the crime of trafficking in stolen property, and weighed the probative value of the evidence against its prejudicial effect. The court redacted portions of Witt's statement that referred to unrelated and possibly unfairly prejudicial possession and sale of drugs. The court conducted its balancing on the record.

"The decision to admit evidence of other crimes or misconduct lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion."[14] The trial court did not abuse its discretion in finding the contested evidence relevant or in admitting it under the res gestae exception.

LFOs

Witt also challenges the trial court's imposition of LFOs of $500 for court-appointed attorney fees and $200 for court costs.[15] She argues that the court must consider her ability to pay before imposing these nonmandatory fees. We agree.

"Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence."[16] While the $500 victim assessment fee and $100 DNA collection fee are statutorily

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[14] State v. Brown, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997) (footnote omitted); see also State v. Lane, 125 Wn.2d 825, 835, 889 P.2d 929 (1995).

[15] Witt does not challenge the statutorily mandated victim penalty assessment and DNA collection fees, for which courts are not required to consider a defendant's ability to pay. RCW 7.68.035(1)(a); RCW 43.43.7541; State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013). Nor does she challenge the $72 in restitution imposed under RCW 9.94A.753.

[16] RCW 9.94A.760(1).

mandated, the imposition of court costs and appointed attorney fees is discretionary.[17] A trial court may order a convicted defendant to pay costs for appointed counsel,[18] and RCW 10.01.160(2) allows the recoupment of court costs "specially incurred by the state in prosecuting the defendant." A defendant may petition the court at any time for remission or modification of the payments on the basis of manifest hardship,[19] but "[b]ecause this determination is clearly somewhat 'speculative,' the time to examine a defendant's ability to pay is when the government seeks to collect the obligation."[20] Before imposing any discretionary costs, however, the court "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."[21]

Here, because nothing in the record reflects that the State has attempted to collect LFOs from Witt, the issue of whether the LFOs are justified is not yet ripe for review. We note also that Witt challenges the LFOs for the first time on appeal after requesting in her presentence report that the court impose $200 in court costs and attorney fees "as the court deems proper." Her appeal of the LFOs may therefore be barred either by RAP 2.5(a) or the invited error

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[17] RCW 7.68.035(1)(a); RCW 43.43.7541; RCW 9.94A.760.

[18] State v. Barklind, 87 Wn.2d 814, 817-19, 557 P.2d 314 (1976); State v. Smits, 152 Wn. App. 514, 520-21, 216 P.3d 1097 (2009).

[19] RCW 10.01.160(4); State v. Baldwin, 63 Wn. App. 303, 310-11, 818 P.2d 1116, 837 P.2d 646 (1991).

[20] Smits, 152 Wn. App. at 523-24 (citing Baldwin, 63 Wn. App. at 310-11).

[21] RCW 10.01.160(3).

doctrine.[22] As a threshold matter, however, we must decide if the trial court complied with its statutory duty under RCW 10.01.160(3) when it imposed the LFOs.

Witt's judgment and sentence contains boilerplate language, stating, "The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change." The form then allows the court to check a box to indicate its findings, either that "[t]he defendant has the ability or likely future ability to pay the legal financial obligations imposed herein" or "[t]he following extraordinary circumstances exist that make restitution inappropriate."[23]

Here, the trial court did not check either box to indicate its findings. And because there was no discussion at sentencing of Witt's ability to pay, we cannot look to the court's oral ruling to supplement its written findings.[24] We presume that the court considered Witt's presentence report, in which she either requested costs or left them to the court's discretion, arguably implying an ability to pay. But this presumption, without more, is not sufficient to show that the court

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[22] Under the invited error doctrine, a party may not set up an 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).

[23] The court may also find that "[t]he defendant has the present means to pay costs of incarceration," which is not at issue here.

[24] See State v. Hinds, 85 Wn. App. 474, 486, 936 P.2d 1135 (1997) (an oral decision may supplement written findings to the extent the oral decision does not conflict with the written findings).

complied with its statutory duty to consider Witt's financial resources and whether she is or will be able to pay the imposed LFOs.

In a statement of additional authorities, the State directs our attention to State v. Duncan,[25] in which Division Three of this court declined to address for the first time on appeal a challenge to a trial court's LFO order. A decision on this issue is also forthcoming from our Supreme Court in State v. Blazina,[26] for which the court heard oral argument earlier this year. But Duncan and Blazina involve a different question than the one presented here. Those cases ask if a defendant may challenge for the first time on appeal a trial court's LFO order that is allegedly based on unsupported findings.[27] Witt's case, by contrast, does not involve unsupported findings. The trial court made no findings. The record does not show that the court considered Witt's ability to pay. Therefore, we conclude that the trial court exceeded its statutory authority by imposing LFOs without "tak[ing] account of [Witt's] financial resources . . . and the nature of the burden that payment of costs will impose," as RCW 10.01.160(3) requires.[28] We vacate the order imposing LFOs and remand for a resentencing hearing on this issue.

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[25] 180 Wn. App. 245, 254-55, 327 P.3d 699 (2014), petition for review filed, No. 90188-1 (Wash. Apr. 30, 2014).

[26] 174 Wn. App. 906, 301 P.3d 492, review granted, 178 Wn.2d 1010 (2013).

[27] Duncan, 180 Wn. App. at 249; Blazina, 174 Wn. App. at 911.

[28] See State v. Moen, 129 Wn.2d 535, 546-48, 919 P.2d 69 (1996) (reversing an untimely restitution order as exceeding the trial court's statutory authority).

Notification of Loss of Firearm Rights

The State concedes that the trial court did not notify Witt upon conviction "orally and in writing" that she may not possess a firearm, as required by RCW 9.41.047(1)(a). While the judgment and sentence contained this written notice, the court did not orally advise Witt of her loss of firearm rights.

RCW 9.41.047(1)(a) "'requires the convicting court to provide oral and written notice. The statute is unequivocal in its mandate.'"[29] We accept the State's concession and remand to the trial court for a resentencing hearing consistent with the requirements of RCW 9.41.047(1)(a).

Statement of Additional Grounds

In a statement of additional grounds, Witt contends that she was "not given adequate coun[sel] for [her] defense." We review ineffective assistance of counsel claims de novo.[30] To establish such a claim, Witt must show (1) defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced her: that there is a reasonable possibility that but for counsel's deficient performance, the outcome of her trial would have been different.[31] Our scrutiny of defense counsel's performance is highly deferential, and we employ a strong presumption

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[29] State v. Breitung, 173 Wn.2d 393, 403, 267 P.3d 1012 (2011) (quoting State v. Minor, 162 Wn.2d 796, 803, 174 P.3d 1162 (2008)).

[30] In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

[31] State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

of reasonableness.[32] "To rebut this presumption, the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'"[33] Failure on either prong of the test defeats an ineffective assistance of counsel claim.[34]

Witt alleges first that she received ineffective assistance because her attorney called only two witnesses from a list she gave him and did not call "the most important witness." But "'[t]he decision whether to call a witness is ordinarily a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel.'"[35] The record here does not demonstrate otherwise. Defense counsel may have had good reason not to call a witness whose statement conflicted with Witt's own sworn statement to police. This argument fails.

Witt also contends that defense counsel "refused to ask[ ] questions that I wrote down as the trial went on." Because matters of trial strategy or tactics do not establish deficient performance and this claim relies largely upon facts or evidence outside this record, we reject this argument.

Next, Witt asserts that defense counsel failed to impeach Michelle Hinkle. But the trial record shows that during cross-examination, counsel confronted

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[32] Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

[33] State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting Reichenbach, 153 Wn.2d at 130).

[34] Strickland, 466 U.S. at 697.

[35] State v. Statler, 160 Wn. App. 622, 636, 248 P.3d 165 (2011) (quoting State v. Kolesnik, 146 Wn. App. 790, 812, 192 P.3d 937 (2008)).

Hinkle with several past crimes of dishonesty. Counsel also cross-examined each of the State's other witnesses.

The law affords trial counsel wide latitude in the choice of tactics.[36] Witt does not demonstrate that in choosing tactics, defense counsel did not "do everything in his power to tell her side of the story." Because she establishes neither deficient performance nor prejudice, Witt's claim of ineffective assistance fails.

Conclusion

Because the trial court did not abuse its discretion in admitting ER 404(b) evidence and Witt's claims in her statement of additional grounds have no merit, we affirm her conviction for trafficking in stolen property in the second degree. But because the trial court did not consider Witt's ability to pay LFOs and did not orally advise her of the loss of her right to possess a firearm, we vacate the order imposing LFOs and remand to the trial court for a resentencing hearing on these issues.

Leach, J.

WE CONCUR:

Cox, J.

[36] In re Pers. Restraint of Stenson, 142 Wn.2d 710, 736, 16 P.3d 1 (2001).

APPENDIX B

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHANDRA M. WITT, Appellant.	No. 72363-4-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, State of Washington, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 15th day of December, 2014.

FOR THE COURT:

Leach, J.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72363-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Gerald Fuller, DPA
[gfuller@co.grays-harbor.wa.us]
Grays Harbor County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 14, 2015

WASHINGTON APPELLATE PROJECT

January 14, 2015 - 4:09 PM

Transmittal Letter

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Court of Appeals Case Number: 72363-4

Party Respresented: PETITIONER
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