No. 48362-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

SHANE MARTIN JONES,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-00342-1
The Honorable Jerry Costello, Judge

OPENING BRIEF OF APPELLANT

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I. SUMMARY OF THE CASE

On January 1, 2015, surveillance video captured a man entering a fenced lot of the Olympic Pharmacy warehouse, and removing tools and medical equipment from a van parked inside. On January 2, 2015, surveillance video captured a man shoplifting items from an Albertsons grocery store. Later on January 2, 2015, Shane Jones was arrested after witnesses believed they saw him breaking into a parked car. Jones was wearing clothing similar to the man seen in both the Olympic Pharmacy video and the Albertsons video. Jones was charged in connection with the Olympic Pharmacy incident. At trial the State was permitted to introduce the Albertsons video and testimony of an Albertsons employee describing the uncharged shoplifting incident, in order to establish the identity of the Olympic Pharmacy burglar. Jones' ER 404(b) objections were overruled, and the jury convicted Jones of burglary and theft.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting the State's motion to admit prior bad act testimony that should have been excluded under ER 404(b).

2. The trial court erred by finding that the evidence concerning

an uncharged theft at an Albertsons grocery store was admissible under ER 404(b) to establish the identity of the person who committed the theft charged in this case.

3. Any future request by the State for appellate costs should be denied.

III. Issues Pertaining To The Assignments Of Error

1. Did the trial court commit reversible error when it admitted evidence concerning an uncharged theft at an Albertsons grocery store in order to establish the identity of the person who committed the theft charged in this case, where there was insufficient proof that Shane Jones committed the theft at Albertsons? (Assignments of Error 1 & 2)

2. If the State substantially prevails on appeal and makes a request for costs, should this court decline to impose appellate costs because Shane Jones does not have the ability to pay costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 3)

IV. Statement Of The Case

A. Procedural History

The State charged Shane Martin Jones with one count of

second degree burglary (RCW 9A.52.030) and one count of second degree theft (RCW 9A.56.020, .040). (CP 5-6) Jones successfully moved to suppress items possibly taken from Olympic Pharmacy, which were found in his possession when he was arrested on an unrelated matter the day after the burglary. (CP 24-45; 10/19/15 RP 21-23)[1] But the court admitted, over Jones' objection, testimonial and video evidence of a third incident showing an individual, whom the State asserted was Jones, shoplifting from an Albertsons grocery store the day after the charged burglary. (10/19/15 RP 27-38, 100-09)

The jury found Jones guilty on both charges. (10/26/15 RP 356; CP 108-09) The trial court imposed a standard range sentence totaling 68 months. (12/03/15 RP 381-82; CP 130) The court also considered Jones' financial situation, and found that he is not in a position to repay discretionary legal financial obligations (LFOs), and so ordered Jones to pay only mandatory LFOs. (12/03/15 RP 382; CP 129) This appeal timely follows. (CP 121)

B. SUBSTANTIVE FACTS

Dylan Parrish works as a mobile mechanic and repairs wheelchairs for Olympic Pharmacy in Gig Harbor. (10/21/15 RP

[1] The transcripts will be referred to by the date of the proceeding.

136) On January 5, 2015, Parrish returned to work after the New Year's holiday break. (10/21/15 RP 140) His work van was parked where he left it in the fully-fenced lot behind the pharmacy's warehouse. (10/21/15 RP 137, 140, 150-51) But as he approached the van, he noticed that several tools were on the ground beside the van. The inside of the van also appeared to have been ransacked. (10/21/15 RP 141-42) He was able to determine that a red and black tool box and its contents, some power tools, and a wheelchair programmer were missing. (10/21/15 RP 142-44)

Surveillance video from the afternoon and evening of January 1, 2015, showed a man climbing over the fence, taking items out of Parrish's van, and walking away from the property holding the stolen items. (10/21/15 RP 154, 161-66, 172-73, 175; Exh. P7-P9) The man appears to be wearing light colored pants and a dark jacket. (Exhs. P1, P2, P7-P9)

Pierce County Sheriff's Deputy Dan Wulick received a bulletin about the Olympic robbery, and thought he recognized the suspect as Shane Jones. (10/21/15 RP 188-89)

On January 2, 2015, Albertsons grocery store manager Jamie Smith observed a man acting suspiciously. (10/22/15 RP

223-24) He was wearing khaki colored pants, a blue jacket and had a hood over his head. (10/22/15 RP 224) She watched as the man walked out of the store pushing a full grocery cart without paying for the items in the cart. (10/22/15 RP 225) She followed him outside, and saw him put the items into the back of a truck. He then got into the passenger seat and the truck drove away. (10/22/15 RP 225-26) She made a note of the license plate and called the police. (10/22/15 RP 227) Responding Officer Dan Welch ran the license plate, and found that the truck was registered to Aaron Jones, the brother of Shane Jones. (10/22/15 RP 214, 216) Surveillance video from the Albertsons captured the incident, and was played for the jury. (10/22/15 RP 217, 221, 228; Exh. P17A)

Pierce County Deputy Dave Plummer and a citizen named Mavis MacFarland had contact with Shane Jones regarding a separate incident later that same day. (10/26/15 RP 268-69, 273-74) MacFarland testified that Jones was wearing light colored pants and a heavy plaid shirt, similar to what the man in the Olympic Pharmacy surveillance video was wearing. (10/26/15 RP 274-75)

Gig Harbor police officer Michael Cabacungan was aware

that Jones was a suspect in the Olympic Pharmacy incident. (10/22/15 RP 274-75) He happened to see Jones on the afternoon of January 26, 2015, but when Cabacungan turned his patrol car around to make contact with Jones, he was gone. (10/22/15 RP 244-45) He went to a nearby residence where he was told Jones might be, and found Jones hiding under a bed inside the home. (10/22/15 RP 246)

Officer Cabacungan later showed Jones still photographs from the Olympic Pharmacy surveillance video, and Jones said, "That's not me, but I want to make a deal." (10/22/15 RP 247-48) Jones insisted that he was not the man shown in the surveillance video. (10/22/15 RP 247-48)

V. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT SHOULD HAVE EXCLUDED EVIDENCE CONCERNING AN UNCHARGED THEFT AT AN ALBERTSONS GROCERY STORE BECAUSE THE EVIDENCE DID NOT SUFFICIENTLY ESTABLISH JONES' IDENTITY AND IT WAS OVERLY PREJUDICIAL

A defendant must only be tried for those offenses actually charged. Accordingly, under ER 404(b), "evidence of other crimes, wrongs, or acts by the defendant are not admissible to show that it is likely the defendant committed the alleged crime, acted in conformity with the prior bad acts when committing the crime, or

had a propensity to commit the crime." State v. Wilson, 144 Wn. App. 166, 175, 181 P.3d 887 (2008) (citing State v. Lough, 125 Wn.2d 847, 852-53, 889 P.2d 487 (1995)).

Such evidence "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). Before admitting evidence of prior misconduct under ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for admitting the evidence; (3) determine the relevance of the evidence to prove an element of the charged crime; and (4) weigh the probative value against its prejudicial effect. State v. Gresham, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). The trial court must also find by a preponderance of the evidence that the defendant committed the uncharged acts the State seeks to use against him or her. State v. Stein, 140 Wn. App. 43, 66 fn.19, 165 P.3d 16 (2007) (citing State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002)).

The State's burden to demonstrate admissibility is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003). And a trial court's decision to admit or exclude

evidence is reviewed for an abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980). A trial court abuses its discretion when its decision is manifestly unreasonable, or 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).

In this case, the trial court allowed the State to present the testimony of the Albertsons manager and to play the video recording from Albertsons surveillance cameras detailing an alleged theft incident on January 2, 2015. The State asserted that Jones was the thief seen on the video because the suspect wore clothing similar to clothing Jones was seen wearing later that day, and because the suspect was seen entering a car registered to Jones' brother. (10/19/15 RP 27-33) The State asserted the evidence was necessary to establish the identity of the thief seen on the Olympic Pharmacy video, who was also wearing similar clothing. (10/19/15 RP 28-29) Over defense objection, the trial court admitted the evidence but agreed to give a limiting instruction. (10/19/15 RP 36-38, 103-05, 107-09; 10/21/15 RP 212-13)

The trial court abused its discretion when it admitted the evidence because there is insufficient proof that Jones committed the uncharged theft and because the probative value of the

evidence of the theft was far outweighed by its prejudicial impact.

First, the State failed to present the evidence necessary to establish that the man in the Albertsons video was Jones. The man's face is not visible in the video, and the Albertsons manager testified that she was unable to see the suspect's face. (Exh. 17A; 10/22/15 RP 227) Similar clothing worn a day later, and an association with Jones' brother, is simply not enough to establish by a preponderance of the evidence that Jones is the man in the video.

Even if there was sufficient proof that Jones was the Albertsons suspect, there was no probative value whatsoever in the fact of the theft. There was no need for the jury to hear that the man in the video and the man seen getting into Aaron Jones' car was a suspected thief. The evidence could have easily been sanitized without any prejudice to the State.

Evidence and testimony that the man in the video committed a theft was especially prejudicial in this case because Jones was also facing a theft charge. It is well recognized that evidence of a defendant's prior criminal history is highly prejudicial because it tends to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. State v. Calegar,

133 Wn.2d 718, 724, 947 P.2d 235 (1997); State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997). Reference to prior crimes has extraordinary potential to mislead a jury into believing it is being told that the defendant is a "bad" person and is therefore guilty of the charged crime. State v. Newton, 109 Wn.2d 69, 76, 743 P.2d 254 (1987).

Furthermore, the potential for prejudice is even higher where the prior act is for an offense that is identical to a current charge. *See* State v. Pam, 98 Wn.2d 748, 761-62, 659 P.2d 454 (1983). That is due to "'the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." As a general guide, those convictions which are for the same crime should be admitted sparingly[.]'" Newton, 109 Wn.2d at 77 (quoting Gordon v. United States, 383 F.2d 936, 940 (D.C.Cir.1967)). Accordingly, the fact that the prior crime was also a theft tends to imply to the jury that Jones has a propensity to commit thefts, and therefore must have acted in conformity with that propensity and committed the burglary and theft at Olympic Pharmacy.

The trial court erred when it allowed the State to present testimonial and video evidence of the Albertsons theft and to argue that Jones was the thief. The prejudice from this error could not be

cured by the limiting instruction, and Jones' convictions must be reversed.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED[2]

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the "substantially prevailing party" on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is "a matter of discretion for the appellate court," which may "decline to order costs at all," even if there is a "substantially prevailing party." Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that

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[2] Recently, in State v. Sinclair, Division 1 concluded "that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Jones is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1's interpretation of RAP 14.2.

imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the "substantially prevailing party" on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal "is permissive," so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the "substantially prevailing party" on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Jones' case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Jones owns no property or assets, has no savings, and has no job and no income. (CP 162-63; 12/03/15 RP 378) Jones will be incarcerated for over five years, and owes at least $800.00 in previously ordered LFOs. (CP 129, 130, 132) In fact, the trial court specifically found that Jones did not have the ability to repay trial costs and declined to order any non-mandatory LFOs. (CP 129, 130; 12/03/15 RP 378, 382) There was no evidence below, and no evidence on appeal, that Jones has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Jones is indigent and

entitled to appellate review at public expense. (CP 122-23) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

> The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016); see also State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) ("if someone

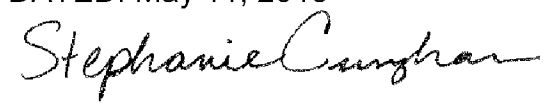
does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Jones' financial situation has improved or is likely to improve. Jones is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

VI. CONCLUSION

The State did not establish that Jones is the man who committed the Albertson's theft, and therefore did not meet the standard for admission under ER 404(b). The evidence was also extremely prejudicial, and the trial court abused its discretion when it allowed the State to admit the evidence. Accordingly, this Court should reverse Jones' convictions and remand his case for a new trial. This court should also decline any future request to impose appellate costs.

DATED: May 11, 2016



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CERTIFICATE OF MAILING

I certify that on 05/11/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Shane M. Jones, DOC# 787767, Monroe Correctional Complex-TRU, PO Box 777, Monroe, WA 982724.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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