

Case No. 66817-0-1

COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent-Plaintiff

v.

WILLIAM FINDLEY, Appellant-Defendant

APPELLANT'S AMENDED BRIEF

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19 other uncharged purported instances of Theft in the Second Degree [**RCW 9A.56.040(1)(a)** and **RCW 9A.56.020(1)(c)**]?

No. 2 Did the trial court abuse its discretion by admitting alleged evidence of 19 other uncharged purported instances of Theft in the Second Degree [**RCW 9A.56.040(1)(a)** and **RCW 9A.56.020(1)(c)**]?

No. 3 Should the conviction of Findley for the 20 charged counts of Theft in the Second Degree [**RCW 9A.56.040(1)(a)** and **RCW 9A.56.020(1)(c)**] be reversed and returned for a new trial?

II. STATEMENT OF THE CASE

On October 26, 2010 a jury convicted Appellant William Findley (hereafter Findley) of committing 20 counts of Theft in the Second Degree in violation of **RCW 9A.56.040(1)(a)** and **RCW 9A.56.020(1)(c)**¹. On February 11, 2011 the Honorable

¹ **RCW 9A.56.040(1)(a)**: A person is guilty of theft in the second degree if he or she commits theft of property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value

RCW 9A.56.020(1)(c): ‘Theft’ means. . . [t]o appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services

Jim Rogers, King County Superior Court, sentenced Findley to prison for 22 months, which was the low end of the standard range. RP 02/11/2011 at p.130. Findley posted an appeal bond of \$2,500 and has remained out of custody pending the appeal.² RP 02/11/2011 at p. 131.

Findley worked as a financial specialist in the King County Jail. His responsibilities focused on programs involving work education release (hereafter WER) and electronic home detention (hereafter EHD). Among his myriad of duties, he collected, recorded and deposited money paid by the inmates, their employers or the family and friends of the inmates for room and board or the costs of supervision through WER and EHD.

The State alleged in the information that Findley during a period from February 8, 2007 to August 6, 2007 perpetrated a “check-for-cash” embezzlement scheme by manipulating the entries in the deposit slips. The State averred Findley arranged the checks from the multiple sources (**e.g.**, inmates, employers or

² Findley suffered a stroke the day after his sentencing and has continued to experience serious medical problems. Surgery is scheduled for early September 2011.

family) to equal the amount of cash he wanted to steal. The State claimed the cash amounts were relatively small (**e.g.**, under \$500). The total loss of the charged counts was \$10,356.25.

The State further maintained Findley on 19 other uncharged occasions between October 17, 2006 and May 8, 2007 had stolen money using the same scheme. The State argued evidence of those other instances was admissible under **ER 404(b)**. RP 10/13/2010 at pp. 10 – 15. The defense objected to any reference to the other alleged instances. RP 10/13/2010 pp 10-15. The trial court overruled the defense's objection. RP 10/13/2010 p. 15. The trial court reasoned the alleged evidence of the 19 other purported instances of Theft in the Second Degree was admissible as evidence of a continuing plan or absence of an accident or mistake. RP 10/13/2010 p. 15. The trial court specified the defense did not have to object further to the admissibility of the 19 other instances unless the defense had additional reasons. RP 10/13/2010 p. 42.

At Findley's sentencing the State requested the Court to order Findley to pay restitution in the amount of the charged counts (\$10,356.25). RP 02/11/2011 at p. 127 The Court entered a restitution order in that amount. The State did not ask for restitution for the uncharged counts.

IV. ARGUMENT

A. The trial court erred in its interpretation and application of ER404(b) by admitting alleged evidence of 19 other purported instances of Theft in the Second Degree.

An appellate court reviews the correct interpretation of an evidentiary rule *de novo* as a question of law. *State v. Devinentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). If the trial court interpreted the rule correctly, the trial court's decision to admit or exclude evidence is reviewed by the appellate court for an abuse of discretion. *Id.*

ER 404(b) provides as follows:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in

order to show action 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.

In deciding the admissibility of evidence under **ER 404(b)** the trial court must first determine whether the alleged misconduct has been proven by a preponderance of the evidence. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). If there is sufficient proof, then the court must follow a three-part analysis. First, the trial court must identify the purpose for which the evidence will be admitted. *State v. Saltarelli*, 98 Wn.2d 358, 361-362, 655 P.2d 697 (1982).

Second, the evidence must be materially relevant under **ER 401** and **ER 402** and necessary to prove an essential ingredient of the crime charged. *Id.* **ER 401** defines “relevant evidence” as follows: “. . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The literal breadth of **ER 402**

(“[a]ll relevant evidence is admissible”) is constrained by the requirements of **ER 403**. For this second component of the analysis to be satisfied, the purpose for admitting the evidence must be of consequence to the action and make the existence of the identified fact more probable. *State v. Denison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).

Third, pursuant to **ER 403**, the trial court must balance the probative value of the evidence against the unfair prejudicial effect the evidence may have upon the finder-of-fact. *State v. Saltarelli, supra*, 98 Wn.2d at 362 – 366. “Because substantial prejudicial effect is inherent in **ER 404(b)** evidence, uncharged offenses are admissible only if they have substantial probative value. *State v. Lough, supra*, 125 Wn.2d at 863.

ER 403 restrains a trial court as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

The results of an analysis under **ER 404(b)** are dependant largely on the unique facts of the case. *State v. Lough, supra*, 125 Wn.2d at 856. In the instant case the State charged Findley with 20 counts of Theft in the Second Degree and focused its theory on the 20 counts as part of a common scheme or plan. The State essentially argued to the trial court that, despite the already charged 20 counts, the State needed alleged evidence of the other 19 purported instances to secure its successful prosecution. RP 10/13/2010 pp. 10-15.

The trial court erred in its conclusion that the alleged evidence of the other 19 purposed instances of theft in the second degree was admissible.

Even though the issue of **ER 404(b)** concerned a conviction for Rape of a Child in the Second Degree, the Supreme Court's analysis in *State v. Devinentis, supra*, 150 Wn.2d at 23, is instructive. The gravamen of the analysis was whether the trial court had balanced properly the probative value against the prejudicial effect of the admission of another

child's testimony. Among the analytical factors for which the Supreme Court commended the trial court were the age of the victim, the need for the evidence, the secrecy surrounding sex abuse offenses, the vulnerability of the victims, the absence of physical proof of the crime, the degree of public opprobrium associated with the accusation and the general lack of confidence in the ability of a jury to assess the credibility of child witnesses.

Id.

None of these considerations or concerns was at play in the prosecution of Findley.

The introduction of the other 19 alleged instances was not only a patent common-sense example of unfair prejudice but also a violation of the legal intertwining between **ER 403** and **ER 404(b)**. Given the State's theory for pursuing the 20 counts, there was no probative value in the 19 other alleged instances. The undeniable consequence of the trial court's decision to admit evidence of the other alleged 19 instances was unfair prejudice to Findley.

B. The trial court abused its discretion by admitting alleged evidence of 19 other uncharged purported instances of Theft in the Second Degree.

Doubtful cases should be resolved in favor of the defendant. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). According to the State's theory, the 20 charged counts were interlocked with each other. Given the obvious prejudicial value of 19 other uncharged purported instances, the evidentiary necessity or value of those other times was doubtful at least and harmful for certain to Findley.

The court in *State v. Lough, supra*, 125 Wn.2d at 862, explained as follows:

Evidence of prior misconduct is not admissible merely because it is relevant. Even when **ER 404(b)** evidence is admitted for a proper purpose and is relevant to a material issue in the case, the trial court must still weigh the probative value against its prejudicial effect. Evidence of prior misconduct is likely to be highly prejudicial and should be admitted only for a proper

purpose and then only when its probative value clearly outweighs its prejudicial effect.

A trial court must determine whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors.

State v. Saltarelli, supra, 98 Wn.2d at 361.

Findley was already charged with 20 counts of Theft in the Second Degree.³ Each count echoed each other count in the allegation that Findley had committed the “check-for-cash” embezzlement scheme. The charged counts spanned a period from February 8, 2007 to August 6, 2007.

The uncharged incidents encompassed a period from October 17, 2006 to May 8, 2007, which enlarged the charging period by nearly four months and overlapped four months in the charging period. The State alleged these uncharged incidents were identical, individually and in the pattern, as the charged counts.

³ Two other charged counts (6 and 9) were dismissed by the State at the beginning of the trial.

The uncharged counts had no probative value. The sole purpose of the uncharged incidents was to inflame or incite the jury. None of the *uncharged* incidents made the “checks-for-cash” scheme underlying any or all of the 20 charged counts more probable than any of the 19 *charged* counts bolstered the remaining other *charged* count.

The admission of the 19 uncharged incidents was the human equivalent of a referee allowing one person in front of a crowd to stomp on another person 19 more times, even though the other person already was attempting to avoid being kicked 20 times.

The inescapable practical consequence of the admission of the 19 other uncharged alleged incidents was unfair prejudice to Findley contrary to **ER 404(b)**, **ER 403** and case law.

The trial court abused its discretion by admitting the alleged evidence of the 19 purported additional uncharged instances that Findley had committed Theft in the Second Degree.

The trial court's limiting instruction to the jury was a legal placebo rather than a cure. RP 10/13/2010 pp. 40 -- 42.

C. Findley's conviction of the 20 charged counts should be reversed.

Under the unique circumstances of Findley's case, the appellate court cannot conclude beyond a reasonable doubt the admission of the alleged evidence of the other 19 purported instances was harmless error. *State v. Evans*, 154 Wn.2d 438, 453-454, 114 P.3d 627 (2005). *See also State v. Smith, supra*, 106 Wn.2d at 780 (error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected).

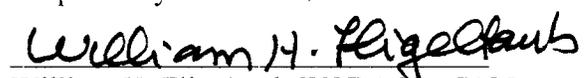
V. CONCLUSION

The trial court erred in admitting evidence of the 19 uncharged instances of alleged misconduct. The trial court's error was not harmless. Because of the trial court's error, Findley's convictions of the 20 counts of Theft in the Second

Degree should be overturned and the case remanded for a new trial.

Dated this 6th day of August 2011.

Respectfully submitted,



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WILLIAM FINDLEY,

Appellant-Defendant.

I certify that on the 6th day of September 2011 I caused a true and correct copy of the Appellant's Amended Brief to be served on the following in the manner indicated below:

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