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NO. 67805-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

REC'D  
 APR 13 2012  
 King County Prosecutor  
 Appellate Unit

STATE OF WASHINGTON,  
 Respondent,  
 v.  
 SCOTT BOLTON,  
 Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT  
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The court erred in admitting unnecessarily cumulative evidence of fourteen prior offenses.

Issue Pertaining to Assignment of Error

ER 609 permits impeachment with prior crimes of dishonesty. However, under ER 403, unnecessarily cumulative evidence may be excluded. Did the court err in ruling it had no choice but to admit all fourteen of appellant's prior thefts regardless of their cumulative nature?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Scott Bolton with one count of second-degree burglary and one count of third-degree theft. CP 132-33. The jury found Bolton guilty and the court imposed 364 days on the theft charge followed by a prison-based drug offender sentencing alternative (DOSA) for the burglary. CP 202-03, 241, 248.

2. Substantive Facts

Bolton admitted he stole several items from the Safeway supermarket on 85<sup>th</sup> Street in Seattle's Ballard neighborhood on January 24, 2011 and from the Safeway on Market Street on January 4, 2011. 3RP<sup>1</sup> 80-81, 98. He also admitted that after the January 4, 2011 incident at the

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<sup>1</sup> There are four volumes of Verbatim Report of Proceedings referenced as follows: 1RP – July 12, 2011; 2RP – July 13, 2011; 3RP – July 14, 2011; 4RP – July 26, 2011.

Market Safeway, he was told not to come back to that store. 3RP 108. The trespass notice states he is no longer welcome on any property owned by the Safeway chain. 3RP 100. But Bolton testified he knew he could not leave until he signed the trespass notice, and wanting to leave, he signed it without reading it. 3RP 78-79. He denied knowing he was trespassed from all Safeway stores. 3RP 73-75.

The State sought to cross-examine Bolton about his prior theft convictions, and the court ruled this evidence was admissible over defense objection. 1RP 25-32. Thus, on cross-examination by the prosecutor, Bolton admitted he had a conviction for first-degree theft in 2001, a conviction for second-degree theft in 2001, a conviction for attempted theft in 2005, three convictions for theft in Seattle municipal court in 2010, one theft conviction in Edmonds municipal court in 2010, one in Seattle in 2008, three in Seattle in 2007, and three in Seattle in 2006. 3RP 96-97. All told, the State elicited evidence of no less than 14 prior convictions.

The court ruled these convictions were per se admissible under ER 609 because they were crimes of dishonesty committed in the last ten years. 1RP 26. Defense counsel argued this was just piling on, that it was unnecessarily cumulative to present so many. 1RP 27. The court rejected this argument on the grounds that ER 609 makes the convictions per se admissible, with no limits on the quantity. 1RP 27-28. The court rejected

defense counsel's argument that convictions admitted for impeachment under ER 609 remain subject to ER 403's limitation on presenting unnecessarily cumulative evidence. 1RP 28-30.

C. ARGUMENT

THE COURT FAILED TO EXERCISE ITS DISCRETION UNDER ER 403 TO EXCLUDE SOME OF BOLTON'S PRIOR CONVICTIONS AS UNNECESSARILY CUMULATIVE.

The State admitted no less than 14 of Bolton's prior convictions involving dishonesty. 3RP 96-97. The court refused to even consider whether the quantity amounted to "needless presentation of cumulative evidence" under ER 403 because each conviction individually was automatically admissible under ER 609. 1RP 27-30. Because the inquiry under ER 403 and ER 609 are entirely different, this was error.

a. Admissibility Under ER 609 Does Not Preclude a Challenge under ER 403.

Evidence Rule 609(a) provides that two types of prior convictions are admissible to impeach the credibility of a witness. The first category includes crimes punishable by death or imprisonment in excess of one year. This category is limited to those offenses for which "the court determines that the probative value of admitting this evidence outweighs the prejudice." ER 609. The second category includes crimes that "involved dishonesty or false statement, regardless of the punishment." ER 609. This category of offenses does not require a finding by the court that the probative value

outweighs the prejudice. ER 609. Instead, convictions involving dishonesty within the past ten years are automatically admissible under ER 609. State v. Newton, 109 Wn.2d 69, 79, 743 P.2d 254 (1987).

But admissibility under ER 609 and admissibility under ER 403 are entirely different questions. Even convictions that are automatically admissible under ER 609 remain open to challenge under ER 403. See Carson v. Fine, 123 Wn.2d 206, 222-23, 867 P.2d 610 (1994).

The inquiry under ER 609 pertains to relevance. Id. Prior convictions are admissible to impeach a witness when they are relevant to the witness' credibility. Id. Convictions involving dishonesty, so long as they occurred within the last 10 years, are deemed automatically admissible under ER 609, that is, automatically and per se relevant to credibility. ER 609; Newton, 109 Wn.2d at 79.

The inquiry under ER 403, however, is entirely different. Carson, 123 Wn.2d at 222-23. ER 403 assumes the evidence is relevant. Id.; ER 403 (“Although relevant, evidence may be excluded. . .”). It provides that certain evidence, even if relevant, may nonetheless be excluded based on other important considerations such as the danger of unfair prejudice, misleading the jury, or “needless presentation of cumulative evidence.” ER 403. Thus, even if convictions may be per se relevant to credibility, they may still cause unfair prejudice in some other way or may be needlessly

cumulative. Convictions of dishonesty that are automatically admissible under ER 609 may nonetheless be excluded under the entirely different considerations of ER 403.

b. The Court Failed to Exercise Its Discretion in Ruling on Bolton’s Objection to Admitting Fourteen Prior Convictions as Needlessly Cumulative.

The failure to exercise discretion is an abuse of discretion. See State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court’s refusal to even consider exceptional sentence is abuse of discretion and reversible error). A court abuses its discretion when it fails to exercise that discretion under a mistaken belief that it has none. State v. McGill, 112 Wn. App. 95, 100-01, 47 P.3d 173 (2002). In McGill, the trial court refused to exercise its discretion to impose an exceptional sentence “because it erroneously believed it lacked the authority to do so.” Id. at 100. The court reversed and remanded for the court to “exercise its principled discretion.” Id. at 101.

As in McGill, the court here erroneously believed it lacked authority to exclude any of Bolton’s 14 prior convictions. 1RP 27-30. However, it had that authority under ER 403, as discussed above. Based on its misapprehension of the law, the court failed to exercise its discretion in weighing the needless presentation of cumulative evidence. That failure was an abuse of discretion.

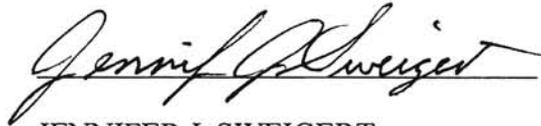
D. CONCLUSION

For the foregoing reasons, Bolton requests this Court reverse his convictions.

DATED this 13<sup>th</sup> day of April, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert". The signature is written in black ink and is positioned above the printed name.

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Attorney for Appellant

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Respondent,	)	
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SCOTT BOLTON,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12<sup>TH</sup> DAY OF APRIL 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SCOTT BOLTON  
DOC NO. 971543  
OLYMPIC CORRECTIONS CENTER  
11235 HOH MAINLINE ROAD  
FORKS, WA 98331

**SIGNED** IN SEATTLE WASHINGTON, THIS 12<sup>TH</sup> DAY OF APRIL 2012.

x *Patrick Mayovsky*

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