

67805-1

67805-1

NO. 67805-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SCOTT BOLTON,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 MAY 29 PM 3:44

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Convictions for crimes of dishonesty within the ten-year time limit are per se admissible under ER 609(a)(2), unlike convictions offered under ER 609(a)(1) and ER 609(b). Did the trial court properly overrule Bolton's objection to the number of convictions offered under ER 609(a)(2), without conducting an ER 403 analysis?

2. Alternatively, if the trial court has the discretion to apply ER 403 to evidence offered under ER 609(a)(2), was the court's failure to exercise such discretion harmless because the evidence of Bolton's guilt was overwhelming?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Scott Bolton by amended information with burglary in the second degree (count 1) and theft in the third degree (count 2). CP 132-33. A jury found Bolton guilty as charged. CP 202-03. The court imposed a prison-based DOSA<sup>1</sup> on the

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<sup>1</sup> Drug Offender Sentencing Alternative, RCW 9.94A.660.

burglary, consecutive to a 12-month jail sentence on the misdemeanor theft. CP 238-49. Bolton appeals. CP 296.

## **2. SUBSTANTIVE FACTS**

On January 4, 2011, Bolton stole several packages of meat from the Safeway on Market Street in Seattle's Ballard neighborhood and was apprehended by loss prevention officers. 2RP 36-43, 54-56.<sup>2</sup> The loss prevention officers issued a trespass notice to Bolton, forbidding him to enter any Safeway store for a period of one year. 3RP 56. On January 24, 2011, loss prevention officers apprehended Bolton after he stole merchandise from the Safeway on 15<sup>th</sup> Avenue NW in Ballard. 2RP 29-40.

At trial, the State gave notice that it intended to offer Bolton's theft convictions occurring within ten years as impeachment under ER 609, if he testified. 1RP 25-26. Bolton acknowledged that the convictions were per se admissible under ER 609, but objected to the number of convictions being offered under ER 403. 1RP 29. The court overruled Bolton's objection. 1RP 29.

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<sup>2</sup> The State adopts Bolton's method of citation to the four volumes of the Report of Proceedings.

[Rule] 403 certainly comes in when I start balancing out convictions outside the ten-year period or I'm balancing convictions that are not for crimes of dishonesty. Then I have discretion to decide the relative value. But when it is per se admissible, it's my judgment [sic]. I have no discretion. It is admissible.

1RP 2.

The trial judge invited Bolton to provide him with authority to the contrary and stated that he would reconsider his ruling if case law supported Bolton's position. 1RP 29.

Bolton testified and the State cross-examined him about 14 theft convictions committed within ten years of the charged crimes. 3RP 96-98. Bolton admitted that he shoplifted to resell the merchandise, but claimed that he did not understand that Safeway's trespass notice applied to all of their stores. 3RP 71-81.

**C. ARGUMENT**

- 1. ER 609(a)(2) NEITHER REQUIRES NOR ALLOWS A BALANCING TEST UNDER ER 403; THEREFORE, THE TRIAL COURT PROPERLY ADMITTED ALL OF BOLTON'S THEFT CONVICTIONS WITHIN THE APPLICABLE TEN-YEAR PERIOD.**

The admissibility of evidence is reviewed for an abuse of discretion. State v. Griswold, 98 Wn. App. 817, 991 P.2d 657

(2000). A trial court abuses its discretion only if its decision is manifestly unreasonable or if it exercises its discretion on untenable grounds or for untenable reasons. State v. Vermillion, 112 Wn. App. 844, 51 P.3d 188 (2002).

Here, Bolton claims that the trial court failed to exercise its discretion to perform an ER 403 balancing test on prior theft convictions offered under ER 609(a)(2) to limit the number of convictions the State could offer. Bolton's claim must be rejected because a balancing test is required only for convictions offered under ER 609(a)(1) or ER 609(b), but convictions offered under ER 609(a)(2) are per se admissible.

Evidence Rule 609 governs the admissibility of prior convictions for the purpose of attacking the credibility of a witness. Such evidence

[S]hall be admitted...only if the crime (1) was punishable by death or imprisonment in excess of 1 year...and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

ER 609(a).

Evidence Rule 609(b) provides a ten-year time limit for the admissibility; however, the trial court has the discretion to admit

convictions outside the ten-year period if it determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Thus, a trial court is always required to balance on the record when a conviction is punishable by death or imprisonment in excess of one year or more than ten years old, regardless of whether the conviction involves dishonesty or false statement. But, a trial court is neither permitted nor required to balance when a conviction that involves dishonesty or false statement is not more than ten years old. State v. Russell, 104 Wn. App. 422, 434, 16 P.3d 664 (2001), citing State v. Brown, 113 Wn.2d 520, 547, 782 P.2d 1013, 787 P.2d 906 (1989) (convictions within the scope of ER 609(a)(2) are automatically admissible; the trial court does not balance probative value against prejudicial effect); State v. Jones, 101 Wn.2d 113, 117, 677 P.2d 131 (1984) *overruled on other grounds* by Brown, 113 Wn.2d 520 (convictions for crimes of “dishonesty or false statement” are automatically admissible under ER 609(a)(2); the trial judge has no discretion); State v. Newton, 109 Wn.2d 69, 79, 743 P.2d 254 (1987) (once a crime has been

determined to contain elements of dishonesty, the trial court is left without discretion to balance its prejudicial effect).

Here, the trial court correctly interpreted the rule as providing no discretion to apply the ER 403 balancing test to Bolton's convictions offered under ER 609(a)(2).

Nonetheless, although Bolton concedes that his convictions were automatically admissible under ER 609(a)(2), he claims that they remain subject to a separate, discretionary inquiry under ER 403, which would allow the trial court to exclude some of the convictions as cumulative.

Bolton relies on Carson v. Fine, but that case is inapplicable. 123 Wn.2d 206, 867 P.2d 610 (1994). In Carson, the supreme court considered the applicability of a balancing test to the admissibility of a physician's testimony in a medical malpractice case, ultimately rejecting the multi-factored test proposed by the Court of Appeals. Id. at 221-23. Although the court compared the purposes of the balancing tests in ER 403, ER 404(b), and ER 609(a)(1), it did not examine ER 609(a)(2), much less suggest that a discretionary ER 403 balancing test applies to that rule. Bolton's argument must be rejected.

Bolton further claims that the trial court abused its discretion by opining that it had no discretion to perform an ER 403 balancing test. However, that argument is foreclosed by the case law cited above, and by the plain language of the rule itself. Rules of court should generally be construed in the same manner as statutes. State v. McIntyre, 92 Wn.2d 620, 622, 600 P.2d 1009 (1979). The word "shall" in a statute is presumptively imperative and operates to create a duty, and thus imposes a mandatory requirement unless a contrary legislative intent is apparent. State v. Martin, 137 Wn.2d 149, 154, 969 P.2d 450 (1999). The word "shall" in the first sentence of ER 609 operates to make the evidence per se admissible, subject to the balancing requirement in ER 609(a)(1) and ER 609(b). Had the rule makers intended to require a balancing test as a condition of admission for all convictions offered for impeachment, they would not have omitted from ER 609(a)(2) the explicit balancing requirement found in ER 609(a)(1) and ER 609(b). This Court should decline Bolton's invitation to impute discretion where none exists.

Moreover, contrary to Bolton's assertion, the trial judge did not categorically refuse to consider Bolton's motion or argument. Cf. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Rule 403 is an extraordinary remedy; the burden is on the party seeking to exclude the evidence to show that the probative value is substantially outweighed by the undesirable characteristics. Carson, 123 Wn.2d at 225. The trial judge gave Bolton an opportunity to meet his burden by asking him to provide some authority for the applicability of ER 403 to ER 609(a)(2), which Bolton never did. The trial court has considerable discretion in administering ER 403; therefore, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. Id. at 226 (citations omitted). Given the mandatory language of ER 609 and the absence of any authority to the contrary, the trial court did not abuse its discretion and Bolton's convictions should be affirmed.

**2. ANY ERROR WAS HARMLESS.**

Even if the trial judge had the discretion to limit the number of convictions the State could offer for impeachment, any error was harmless because the State's evidence was overwhelming. For each incident, two loss prevention officers testified that they saw Bolton stealing from their respective stores; Bolton confessed to stealing the merchandise, and photographs of the stolen items

were admitted. 2RP 23-29, 48-53; 3RP 37-43, 54-56. The loss prevention officers read the trespass notice (which had Bolton's photo affixed to it) to Bolton in the January 4 theft. 3RP 56. When arrested on January 24, Bolton confessed that he had shoplifted and that he was aware of the trespass notice. 2RP 59. Thus, the outcome would not have been different if the trial court had excluded some of the convictions as cumulative.

**D. CONCLUSION**

Based on the foregoing, the State respectfully asks this Court to affirm Bolton's convictions.

DATED this 27 day of May, 2012.

Respectfully submitted,

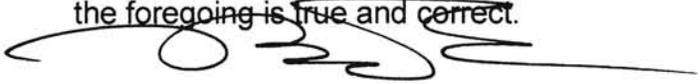
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. SCOTT BOLTON, Cause No. 67085-1-I, in the Court of Appeals, Division I, for the State of Washington. 67805-1

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Name  
Done in Seattle, Washington

05/29/12  
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Date