

NO. 73105-0-1

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

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STATE OF WASHINGTON,

Respondent,

v.

TODD A. PEREZ,

Appellant.

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BRIEF OF RESPONDENT

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MARK K. ROE  
Prosecuting Attorney

MARA J. ROZZANO  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## **I. ISSUES**

(1) Did the court properly leave to the defendant's discretion whether to introduce his prior convictions as 'crimes of dishonesty' or to name them?

(2) Did the court comment on the evidence by giving a jury instruction that accurately stated a legal determination?

(3) Did the court properly reject a proposed jury instruction that, based on the evidence presented at trial, would have confused the jury?

## **II. STATEMENT OF THE CASE**

### **A. THE CRIME.**

The defendant had previously been convicted of incest, an offense that required him to register as a sex offender. This information was conveyed to the jury by a stipulation stating the defendant had previously been convicted of a sex offense that required him to register with the county sheriff or the county of his residence. From 1997 to 2014, the defendant registered five times with the Snohomish County Sheriff's Office at a fixed address. The defendant registered a sixth time on May 12, 2014. That time, he completed a change of address form indicating he was homeless or transient. The defendant was given a packet of information

explaining that he would need to complete a "homeless form" every week with the exact locations he was staying each night. The defendant was to return the completed form and pick up a new one every Tuesday at the Sheriff's Office in Everett. 1 RP 26-27, 42, 69, 74-75, 133.

As instructed, the defendant returned the next day, Tuesday May 13, 2014, to turn in his "homeless form". That was the last time he registered with the Snohomish County Sheriff's Office. 1 RP 49, 111, 113.

On August 26, 2014, the defendant was contacted in Marysville by Detective Bartl. The defendant explained to Det. Bartl that he had an alcohol problem and did not remember where he had been since May 13<sup>th</sup>. 1 RP 76, 107-109, 111.

At trial, the defendant initially testified to hitchhiking to eastern Washington with the purpose of gaining entry to community college. On cross-examination, he changed his story a number of times, indicating instead of community college, he was trying to get into a treatment program. He claimed he had hitchhiked everywhere for 2 months but then indicated he had received a bus voucher from the treatment center. When confronted on cross-examination, the defendant claimed the bus voucher would only

take him so far, and then he had to hitchhike. The defendant explained that he was never in Snohomish County long enough to go to the Sheriff's Office to register as homeless, but also that he was never in any one county for three days or more so he didn't have to register anywhere else. Although the defendant claimed he went to the Snohomish County Sheriff's Office on May 20 and 27, 2014 with the intent to register, he admitted that he did not turn in his form. The defendant admitted that he did not register or even go to the Snohomish County Sheriff's Office at all on June 3, 10, 17, 24, 2014 or July 1, 2014. 1 RP 127-30, 139-41, 143.

The defendant had denied on direct having received the large packet explaining his registration requirements testified to by the deputies. During cross-examination, the defendant corrected the prosecutor, saying the three-day grace period for registration appeared in two different places in the large packet. When the prosecutor asked if he did receive the large packet, the defendant again denied receiving it. 1 RP 123-24, 137.

#### **B. DEFENDANT'S PRIOR CONVICTIONS.**

During motions in limine, the parties discussed the defendant's prior convictions for second degree robbery, first degree possession of stolen property, third degree theft, and

making a false statement. The defendant's attorney asked to clarify that the State only intended to refer to the convictions as crimes of dishonesty and not specify the charges. The court did not rule on the motion at that time. The next day, prior to the defendant testifying, counsel raised the issue again. She said that "we've established that there were four prior what we would consider crimes of dishonesty that would be allowed to impeach Mr. Perez with and there's no dispute about that." She went on to say that, after thinking about it, she wanted the State to be prohibited from referring to them as "crimes of dishonesty." The prosecutor responded with concern that this would create an appellate issue if the defendant did not state clearly on the record that this was a tactical decision. Naming prior offenses such as robbery and making a false statement has in the past been found to be more prejudicial than referring to them as crimes of dishonesty. The defendant did not state that the decision was tactical. The court denied the defendant's motion, saying that the purpose for admitting these prior convictions was to alert the jury that these particular crimes go to the defendant's credibility and that these particular crimes are ones of dishonesty or fraud. 1 RP 7, 94-95, 98-99.

The defendant testified. On direct, his attorney asked him "You've been convicted of four other charges which are considered crimes of dishonesty?" The defendant answered "yes." 1 RP 120. At no time did the defendant or his attorney attempt to name the offenses. The prosecutor did not question the defendant about his prior convictions. 1 RP 119-130; 131-143.

In closing argument, the State focused its argument on the defendant admission in his testimony that he knew he had to register every week as homeless. He claimed to have done so for four weeks, then just stopped doing it. The prosecutor argued that based on the defendant's testimony, he was guilty. 1 RP 148-150, 153, 164.

On December 9, 2014, the jury convicted the defendant of one count of failure to register as charged. 1 CP 39.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT DID NOT ERR WHEN IT LEFT TO THE DEFENDANT'S DISCRETION WHETHER TO INTRODUCE HIS PRIOR CONVICTIONS AS 'CRIMES OF DISHONESTY' OR TO NAME THEM.**

The Supreme Court has said that "as it is generally the nature of the prior felony which renders it probative of veracity", courts should not admit unnamed felonies under ER 609(a)(1) unless they can articulate how unnamng the felony still renders it

probative. State v. Hardy, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997). The same comment logically applies under ER 609(a)(2). “Arguably, [the defendant’s] proposal to identify his prior felonies to the jury simply as crimes of dishonesty would have been sufficient to render them probative on the issue of his veracity.” State v. Teal, 117 Wn. App. 831, 844, 73 P.3d 402, 410 (2003) aff’d, 152 Wn.2d 333, 96 P.3d 974 (2004).

In the present case, the defendant argues that the court has found that “[o]ther defendants may prefer that the felony be named so that the jury does not speculate that the prior conviction is something even worse.” Defendant’s Brief at 6, citing State v. King, 75 Wn. App. 899, 909, 878 P.2d 466 (1994). After deciding King, this court went on to say, “[a]dmission of felonies as unnamed is a device that often lessens the prejudicial impact of admitting prior convictions, and we disagree with [the defendant] that to do so is an abuse of discretion.” State v. Gomez, 75 Wn. App. 648, 655, 880 P.2d 65, 69 (1994).

In the present case, the court did not prohibit the defendant from naming his prior felonies but indicated that he would leave up to them how they were presented. 1 RP 99. If the defendant had felt the jury knowing the nature of the prior convictions would

prevent speculation, and therefore reduce their prejudicial effect, it was in his power to name them. He did not do so, but instead only indicated that he had been convicted of four crimes of dishonesty. 1 RP 120.

**B. THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT ACCURATELY STATED A LEGAL DETERMINATION WAS NOT A COMMENT ON THE EVIDENCE.**

Alleged instructional errors are reviewed under the de novo standard of review. State v. Woods, 143 Wn.2d 561, 590, 23 P.3d 1046, 1064 (2001). We review challenged jury instructions de novo, examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portions in the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). "A jury instruction that does no more than accurately state the law pertaining to an issue, however, does not constitute an impermissible comment on the evidence by the trial judge." State v. Brush, \_\_\_ Wn.2d \_\_\_, 353 P.3d 213 (2015). A "crime of dishonesty" is a legal term of art, derived from ER 609(a)(2). Whether a particular crime constitutes a crime of dishonesty is a legal determination made by a court, by looking to legal precedent interpreting ER 609(a)(2). The court

instructed the jury: "You may consider evidence that the defendant has been convicted of a crime of dishonesty only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose." 1 CP 51 (Jury Instruction 8). The defendant's prior unnamed convictions are only relevant to the jury for purposes of impeachment because they are by legal definition, crimes of dishonesty. This instruction was an accurate statement of the law pertaining to the issue and not a comment on the evidence.

In the present case, the jury was presented with a number of different prior convictions of the defendant. In addition to the crimes of dishonesty, the jury received a stipulation that the defendant had been previously convicted of a sex offense that required him to register with the county sheriff or the county of his residence. This stipulation satisfied an element of the crime. The defendant was aware that the court would have to instruct the jury with regard to the different classes of prior convictions. The court would have to distinguish between the prior conviction that satisfied an element of the crime and those admitted for impeachment. By only referring to those convictions that were admitted for impeachment purposes as crimes of dishonesty, the defendant established the only relevant way the court could distinguish those convictions from the other.

The defendant has effectively waived any objection to the court instructing the jury with regard to the "crimes of dishonesty."

**C. THE TRIAL COURT CORRECTLY REJECTED THE DEFENDANT'S PROPOSED JURY INSTRUCTION THAT, BASED ON THE EVIDENCE PRESENTED AT TRIAL, WOULD HAVE CONFUSED THE JURY.**

Jury instructions are improper if they mislead the jury, or if they do not properly inform the jury of the applicable law. State v. Ehrhardt, 167 Wn. App. 934, 939, 276 P.3d 332, 335 (2012). In the present case, had the court given the defendant's proposed 'more neutral' limiting instruction which referred to a 'non-sex offense crime' this likely would have confused or misled the jury. 2 CP 70. The evidence before the jury was that the defendant had been convicted of a prior sex offense that required him to register and four crimes of dishonesty. At no time was the jury provided with testimony that would allow them to determine that the four crimes of dishonesty were "non-sex offense crimes." Had the court used the defendant's proposed instruction, the jury may have been misled as to how it consider the crimes of dishonesty. It was not a comment on the evidence. It was a clear and accurate statement of the law of the case that would not mislead the jury.

**IV. CONCLUSION**

For the reasons stated above, the State respectfully requests this Court to affirm defendant's conviction.

Respectfully submitted on August 28, 2015.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By: *Steph A Fine #10932*  
MARA J. ROZZANO, WSBA #22248  
Deputy Prosecuting Attorney  
Attorney for Respondent

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DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 28<sup>th</sup> day of August, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Jared B. Steed, Nielsen, Broman & Koch, [steedj@nwattorney.net](mailto:steedj@nwattorney.net) and [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net).

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

Dated this 28<sup>th</sup> day of August, 2015, at the Snohomish County Office.



Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office