

NO. 73402-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DENISE RUD,

Appellant.

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Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS A. NORTH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Rud was stopped by police on two occasions in a car with stolen property, including many items of identification and financial information of other people. She was charged with eleven counts of identity theft relating to eleven victims. Did the trial court properly exercise its discretion in admitting evidence relating to items of identification and financial information of other individuals also found in the cars, as res gestae evidence and because it was relevant to prove Rud's intent and to rebut her claims of accident or mistake?

2. If the trial court erred in admitting this evidence, was that error harmless in light of the jury's verdicts, convictions on eight counts on which the evidence was overwhelming, and the jury's inability to reach verdicts on the remaining three counts?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Denise Rud was charged with eleven counts of identity theft in the second degree and one count of possession of a stolen vehicle. CP 14-18. Each count involved a separate victim. Id. The Honorable Douglass North presided over a jury trial. RP

1.¹ The jury found Rud guilty on eight counts of identity theft; it was unable to reach a verdict on the remaining counts. CP 81-92.

Based on Rud's offender score of fourteen, her standard sentence range was 43-57 months on each count. CP 100-01, 107-08. The court imposed a prison-based drug-offender sentencing alternative, consisting of concurrent sentences on each count of 25 months of confinement and 25 months of community custody. CP 100-110.

2. SUBSTANTIVE FACTS

The relevant facts in this case revolve around two events in July of 2013. Each time, defendant Rud was in a car stopped by police and stolen property was recovered from the car. In each instance the stolen property included a large number of credit cards, identification cards, and other financial information.

Shortly after midnight on July 18, 2013, Rud was driving a Ford Taurus and was stopped for traffic violations by a Redmond police officer. RP 684-85. Rud had a suspended driver's license and no registration for the car. RP 690, 770. She claimed that she had borrowed the car from a friend named Greg Solvang. RP 691.

¹ The Report of Proceedings is in 5 volumes consecutively paginated and are referred to in this brief simply by page number.

The officer learned that the car had been reported stolen and Redmond police impounded it. RP 269, 692. There was a radio scanner tuned to a frequency used by the Snohomish County Sheriff's Office on the driver's visor. RP 279.

The owner of the Taurus, Kason Coulter, confirmed that it had been stolen on July 8, 2013. RP 273, 576-77. Coulter told police that the radio scanner and most of the other property in the car was not his. RP 271, 279, 581-84. That extraneous property was seized by Redmond Officer Smith. RP 271. Redmond police obtained a search warrant for the containers (bags and backpacks) that had been in the Taurus. RP 274, 338-40. When the warrant was executed, police discovered personal identification and financial information belonging to a number of individuals. RP 347; Ex. 20.

Inside the Taurus was a duffel bag (DS-2) that held photographic equipment and many documents with identification information for Michael Collins. RP 348-50. Another backpack (DS-3), which was plaid, included identification cards and documents with defendant Rud's name (Rud testified that her married name was Denise Oppelt). RP 351-54, 760; Ex. 20. There

were multiple other bags in the car from which no items identifiable as belonging to a particular person were seized. RP 350, 355.

In another backpack (DS-5), police found a social security card, prescription bottle, Department of Corrections document, and casino receipt with Trevor Bresnahan's name, a photograph of Rud, a pellet gun, two wigs, and gloves. RP 355-57. Bresnahan was Rud's boyfriend. RP 727, 760-61. There was a shoulder bag (DS-7) in the Taurus that contained multiple credit cards in Rud's name (Oppelt), toiletries, makeup, and jewelry. RP 358-62. That purse contained hair clips of the same style as those attached to one of the wigs found in DS-5. RP 361; Ex. 20. The purse contained 11 pawn slips for jewelry pieces and one handheld computer, in the name of three people that Rud identified as acquaintances of hers. RP 362-66, 785-86. The purse also contained a bill from Sherlock Self Storage addressed to Kelsey Martin. RP 367.

Another small black bag (DS-11) in the Taurus contained credit cards and identification documents for Michael Fretz, and identification cards of Dale Forrest. RP 370-72. This bag also had an identification card of Lorraine Curtis and many items, including credit cards and checks, belonging to Evelyn and Barry Martin. RP

372-73. The address of the Martins was the same address as on the bill to Kelsey Martin in DS-7. Ex. 20, photos 96, 121.

Four of the charges of identity theft related to victims whose identification, credit cards, or other financial information was recovered in these bags found in the Taurus: Count 2 (Dale Forrest), Count 3 (Michael Fretz), Count 4 (Lorraine Curtis), and Count 5 (Evelyn Martin – items recovered in both cars). CP 14-16.

One week later, about 12:30 a.m. on July 25, 2013, King County Sheriff's deputies tried to make a traffic stop on a Chevrolet Cavalier in a neighborhood off East Lake Sammamish Parkway. RP 631-32, 636, 642. The car sped off and the police began a high-speed pursuit. RP 504-08; 643-46. After several miles, the Cavalier pulled over and stopped. RP 505-08. Trevor Bresnahan was the driver. RP 532-33. He admitted he had been using methamphetamine and he had just done "a little car prowling." RP 533. Bresnahan was carrying a credit card belonging to Kim H. Tran. RP 538. The car was a 2-door coupe. RP 557. Rud was in the back seat. RP 522-23.

Police obtained a search warrant for the car, which was full or property. RP 549-52, 559. When the warrant was executed, police discovered purses, bags, backpacks, and boxes, in the front

of the car and in the trunk, with personal identification and financial information belonging to a number of individuals. RP 558-68, 597-623; Ex. 26, 38.

There was a large red Dior handbag in the trunk of the Cavalier. RP 561-62. Bresnahan identified it as Rud's bag. RP 735, 750. In it were three wallets: a tri-fold wallet with magnetic closure, a red Salvatore wallet, and a smaller black wallet. RP 606. The items in the small black wallet included a checkbook of Nagaswapna Bhamidipati, a driver's license of Han Kim, and a blank check of the business Pickle Time Deli. RP 607-08, 622. The items in the tri-fold wallet included: pictures of Bresnahan and Rud together; credit cards in Rud's name (Oppelt); a credit card of Jennifer Karman; a debit card of Mary Highfill; two credit cards and a social security card of Laura Honhart; credit card, social security card and driver's license of Evelyn Martin; and a Costco cash card of Nancy Larrimore. RP 608-10.

The items in the third wallet in the Dior bag, the red Salvatore wallet, included: a checkbook and driver's license of Bhamidipati; seven checks written to Jennifer Karman; a Lane Bryant card of Ernest Knotts; an American Express card of Nancy Larrimore; a social security card of Han Kim; a driver's license, U.S.

residency card and Chinese identification card of Fenglin Zhu; a driver's license, two credit cards and a Washington Liquor Control of Tracy McCallum. RP 611-12, 620-22; Ex. 39. The Dior bag also contained mail addressed to Rud (Denise Oppelt) in Everett, toiletries, a flash drive, and a small iPod.

A Jansport backpack containing identification cards and other items with the name Olivia Bates also was found in the Cavalier. RP 601-02.

Eight of the charges of identity theft related to victims whose identification, credit cards, or other financial information was recovered in these bags: Count 5 (Evelyn Martin – items recovered in both cars); Count 6 (Mary Highfill), Count 7 (Laura Honhart), Count 8 (Jennifer Karman), Count 9 (Fenglin Zhu), Count 10 (Nancy Adelson), Count 11 (Nagaswapna Bhamidipati), and Count 12 (Nancy Larrimore). CP 15-18.

Rud was arrested on October 1, 2013, and interviewed by Redmond Officer McAdam, with Officer Overman observing and taking notes. RP 381-89, 669, 672. Rud told McAdam that the night she was stopped in the Taurus she had been riding with Bresnahan. RP 432. When Bresnahan had gotten out of the car and did not return, she drove off. RP 433-34. Rud was aware

Bresnahan had broken into cars before. RP 433. She said Bresnahan had told her he had borrowed the car but she had begun to suspect it was stolen because of the length of time that he kept it and because he treated it as his own. RP 427. Shown the identification cards of Lorraine Curtis, Rud said that she had found them in Bresnahan's belongings and was going to mail them back. RP 435-37. Then she changed her explanation, saying they were on the floor of her room with a lot of other credit cards, passports, and other documents, and when she and Bresnahan were kicked out of the house, she put it in bags. RP 437-38, 441. Rud said she knew these items were stolen. RP 441. She said she was "too chicken" to use them herself but would give them to other people to use. RP 441, 491-92. The interview was lengthy. RP 423-460. In answer to a written question of where she got Curtis's cards, Rud wrote, "out of a bag of Trevor's." RP 458. Her written response as to where she got the Martins' items was "Trevor." RP 458.

At trial, Rud testified that she had made none of the statements that Officers McAdam and Overman reported. RP 784, 809-17. She testified that she drove off in the Taurus because she was frightened of a car that was circling. RP 769. Rud said the bags with stolen property in the Taurus were Bresnahan's. RP

772-73. She testified that the night of the second stop she drove around with Bresnahan; they went to a casino and then she fell asleep in the back seat. RP 777-78. The next thing she knew she was in a high-speed police pursuit, and during that pursuit Bresnahan told her he had been car prowling. RP 778-80. She said she had never possessed stolen property with intent to use it for fraud or to steal. RP 786. She admitted she had been convicted of multiple prior thefts and a prior forgery. RP 760, 820-21. Rud said she knew Bresnahan had been to prison, but thought he was a changed man and did not know anything about car prowls until October 1, 2013. RP 780, 784.

Trevor Bresnahan testified as a defense witness, stating that he was living in his Cavalier on July 24, and dating Rud. RP 727-28. He was with her daily and had a methamphetamine habit and gambled almost every day; Rud saw him using methamphetamine before July 24 and often went gambling with him. RP 742, 838-39. He testified that he was with Rud on July 24, and that he used methamphetamine twice that day. RP 728-30, 745-46. He said that after they went gambling that night, Rud got in the back seat and slept the entire time he prowled 20 cars and brought the property back to the Cavalier in multiple trips. RP 734-36.

Bresnahan said that he put credit cards in Rud's purse that night so he would not get in trouble if he was stopped by police. RP 735.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN ADMITTING RELEVANT FACTS THAT WERE PART OF THE RES GESTAE OF THESE CRIMES.

Rud contends that the trial court violated ER 404(b) in granting the State's request to present evidence of all items containing personal and financial information that were located in the Taurus and the Cavalier. That claim should be rejected. The evidence was properly admitted as res gestae evidence of the crimes charged, and was probative of Rud's mental state, which was a material issue in this case. The trial court applied an ER 404(b) analysis and concluded that the evidence was admissible because it was relevant to proving intent and to rebut a claim of accident or mistake, and it had substantial probative value that outweighed any prejudicial effect. RP 33. Rud has not established that this was an abuse of discretion.

ER 404(b) provides:

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

To admit evidence of other bad acts, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove a material issue, and (4) weigh the probative value against the danger of unfair prejudice. State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997); State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

A trial court's ruling on admissibility of prior bad acts under ER 404(b) "will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did." State v. Mason, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007) (citing State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

The State informed the trial court that it intended to offer “evidence of all items containing personal and financial information belonging to other individuals located” in the two cars when the search warrants were executed. CP 243. The State asserted that the evidence was admissible to demonstrate Rud’s knowledge that she possessed the charged items, to show her intent to commit a crime with the personal and financial information, to rebut a claim of accident or mistake, and as res gestae evidence to paint a complete picture of the crimes. CP 243; RP 29-32.

Rud objected. RP 32-33. He argued that the evidence was not relevant to rebut a defense of mistake because the defense theory was not mistake, it was lack of knowledge. CP 33. The State does not contend that any further objection was required to preserve Rud’s objection to items in the cars that contained identification and financial information belonging to other persons.

Rud never objected to admission of the portion of Officer McAdam’s interview in which he asked Rud about the burglary of Michael Collins’ home. RP 442-44. In that portion of the interview, Rud described her knowledge about a burglary that others committed while she was not present. RP 442-44. At trial, Rud did not suggest that this evidence was inadmissible on any basis, and

did not identify it as evidence of prior bad acts of Rud that should be analyzed under ER 404(b). Any objection to that testimony on evidentiary grounds has not been preserved. A claim of error may be raised for the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The trial court ruled that the other items located in the cars were admissible, finding the evidence was “clearly relevant to proving the fact that this is not a mistake, to prove intent, to have these items of identification.” RP 33. The court concluded that the probative value was significant and outweighed the prejudicial effect. RP 33. It observed that the evidence tended to rebut any claim of accident or mistake in having identification or access devices belonging to other people in a bag or backpack that also had Rud’s possessions in it. RP 33. Rud has not established that this ruling was an abuse of discretion.

When evidence of other bad acts is admitted, the defendant is entitled to a limiting instruction upon request. State v. Gresham, 173 Wn.2d 405, 423, 269 P.3d 207 (2012). Rud asserts that a limiting instruction must be given in every case, quoting a sentence of dictum in State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d

1090 (2014). App. Br. at 14. The court in Gunderson cited State v. Foxhoven² for this proposition, but the Supreme Court has rejected that statement in Foxhoven as dictum and emphasized that it is contrary to the court's prior holdings. State v. Russell, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011)(citing, inter alia, State v. Noyes, 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966)). Russell reaffirmed that a trial court has no duty to give an ER 404(b) limiting instruction sua sponte. 171 Wn.2d at 123-24. The need to give a limiting instruction was not an issue in Gunderson, and its dictum on that point cannot be understood as reversing the court's own recent holding in Russell. Rud did not request a limiting instruction in this case. CP 24-29. None was given.

a. The Items Were Proper Res Gestae Evidence.

The other items of identification and financial information in the cars were admissible as res gestae evidence, as they were part of the same event, occurred at exactly the same time and place as the charged crimes, and the evidence was necessary to present a complete picture of the events. The trial court did not explicitly rule

² 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

on this theory. RP 33. The theory was presented by the State, however, and the trial court's admission of the evidence may be affirmed on any basis presented in the record. CP 243; RP 29-30; State v. Michielli, 132 Wn. 2d 229, 242-43, 937 P.2d 587 (1997).

The Supreme Court has recognized that a proper basis for admitting evidence of other bad acts is that the evidence at issue is evidence of res gestae. State v. Lane, 125 Wn.2d 825, 831-32, 889 P.2d 929 (1995). Evidence of other crimes is "admissible to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." Id. at 831 (quoting State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591 (1981)) (internal quotations omitted). Division Two of the Court of Appeals has held that res gestae evidence should not be analyzed as an exception to ER 404(b), instead holding it should be analyzed for its relevance and prejudice under ER 402 and ER 403, the rules regarding relevance and balancing probative value against unfair prejudice that are applicable to all evidence. State v. Grier, 168 Wn. App. 635, 644, 278 P.3d 225 (2012). Under either analysis, these items were admissible to establish the circumstances of Rud's possession of the stolen identification and financial information.

A person commits identity theft in the second degree when he or she “knowingly obtain[s], possess[es], use[s], or transfer[s] a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1), (3). The State was required to prove two mental states: knowledge (knowingly obtained, possessed, or transferred) and intent (to commit or to aid in the commission of a crime). CP 68-78.

The evidence at issue concerned the immediate circumstances surrounding these crimes and was important to present the entire context of Rud's possession of stolen identification documents and financial information. That context was relevant to prove Rud's knowledge that she was in possession of stolen items and that she intended to use them to commit or aid the commission of a crime. Rud told the police she knew the credit cards, identification cards, and financial information that comprised the charged crimes were in the Taurus, but she just gathered them up and put them in bags when she and Bresnahan were kicked out of her grandmother's home. RP 437-38, 441. She said she knew Bresnahan had been prowling cars after she was stopped in the Taurus, but slept through events the evening the Cavalier was

stopped. RP 453-54. Rud denied making those statement to the police and testified that she did not possess the cards in either car, that she did not know Bresnahan had been prowling cars at any point until he told her during the high-speed pursuit. RP 784, 809-17, 772-73, 777-80, 784. Bresnahan testified that he and Rud were together daily, that she knew he had a methamphetamine habit, and they gambled together. RP 742, 838-39. Bresnahan testified that he committed about 20 car prowls the night of July 25, but that Rud slept through all of his trips back to the car with stolen property, and the loading of the property into the two-door Cavalier's passenger compartment and trunk. RP 734-36. Bresnahan said that he had put the credit cards in Rud's red Dior bag the night of July 25 so that he would not get caught with them if they were stopped. RP 735.

Based on these statements of Rud and Bresnahan, both mental states required to prove identity theft were at issue. Rud lists seven individuals not named as victims in the charged counts, whose credit cards, checks, or other personal information was in the cars and was admitted. As to three of those persons, Michael Collins, Kim Tran, and Olivia Bates, the evidence was not specifically tied to Rud, and the State did not argue that she

personally possessed them. These items were not evidence of misconduct of Rud, but were evidence relevant to show the entire mosaic of the events. As the State noted when arguing the admissibility of the evidence as *res gestae*, some of the evidence admitted would be in common areas or associated with Bresnahan, not Rud. RP 31. For example, the items associated with Olivia Bates were all in one backpack with Bates name on it and had not been separated from each other, or put into wallets with documents of other victims; from this it can be inferred that the pack was put in the car directly from a theft, perhaps a theft that day (July 24). RP 601-02. The items belonging to Collins were all in a bag in the front passenger area of the Taurus. RP 348-50. The items belonging to Kim Tran were in Bresnahan's pocket and in a bag in the front of the Cavalier. RP 53, 600. Admission of these items was not unfairly prejudicial to Rud.

As to the remaining four individuals (one of them a business) named in documents Rud identifies as improperly admitted, the items of identification or financial information admitted had been located in at least one of the wallets in the red Dior bag that was in Rud's purse: Han Kim, Tracy McCallam, Ernest Knotts, and Pickle Time Deli. RP 607-08, 611-12, 620-22. The State agrees that

these items are evidence of misconduct by Rud. The location of these items in these wallets was highly probative of her knowing possession of stolen information and her intent to use that information for criminal activity.

Rud argues that the State was required to show how the items from these uncharged victims were stolen in order to show they were part of an unbroken sequence of events surrounding the charged crimes. However, the possession of the items from uncharged victims was part of the same events as the charged crimes and thus was part of the immediate context of the crimes.

Rud misplaces her reliance on State v. Trickler, 106 Wn. App. 727, 25 P.3d 445 (2001). In that case, a landlord had evicted his tenant, the defendant, and reported that property stolen from him was in the defendant's car. Id. at 729. During a consensual search of the car, some property of the landlord was found, which the defendant said must have been loaded by mistake. Id. at 730. A credit card belonging to a third person was found in a briefcase in the car – it was the crime charged. Id. at 730, 733. The trial court admitted evidence regarding other suspected thefts by the defendant (the landlord's testimony that a seat from a car, an antique safe, tools, and surgical equipment were missing), items of

stolen property the landlord's son found in the car (a pocketknife, other equipment), and items of stolen property police found in the car (stolen checkbooks and identification cards): a total of 16 other items. Id. at 733. The appellate court found that the record did not establish that the trial court balanced the probative value of that evidence against its unfair prejudicial effect and so the appellate court undertook that balancing itself. Id. The appellate court concluded that the events were not inseparable and that the evidence was highly prejudicial, as it simply tended to prove that the defendant was a thief. Id. at 734.

In contrast to Trickler, the trial court in this case did perform its balancing on the record, and this court should review that decision only for an abuse of discretion. The facts of Trickler also are distinguishable from this case. Here, almost all of the uncharged items were found in the Cavalier on July 25, and they did not establish that Rud is a thief, but the items and their location in the car tended to prove that the items had been stolen on a prior occasion, or had been sorted based on their intended use, which rebutted Rud's defense that Bresnahan put them in the car as he prowled cars that night, while she was asleep in the back seat.

Further, in Trickler, there was no argument that the other acts proved were relevant to prove intent and knowledge, only as res gestae. As argued in the next section of this brief, the items in this case also were admissible to prove both of these mental states, which were material to the charges and to the defense presented.

b. The Items Were Properly Admitted To Prove Intent And Rebut The Claim of Accident Or Mistake.

The trial court identified the purpose of the evidence of items belonging to uncharged victim as proof of intent and relevant to rebut a claim of accident or mistake. RP 33. Both are proper purposes for admission of other bad acts under ER 404(b), explicitly listed in that rule. Rud does not dispute that the court correctly identified that these were the purposes for which the evidence was offered.

Evidence of related thefts or possession of stolen property may be properly admitted to prove a defendant's mental state on a charged theft-related crime. E.g., United States v. Holliman, 291 F.3d 498, 501-02 (8th Cir. 2002) (proof of uncharged thefts properly admitted under Federal Evidence Rule 404(b) as res gestae of charge of conspiracy to transport stolen vehicles and to prove plan

or scheme element of that crime); State v. Lillard, 122 Wn. App. 422, 431-32, 93 P.3d 969 (2004) (evidence of a number of other thefts properly admitted as to charge of possession of stolen property, to rebut defendant's argument that he did not know the items were stolen); State v. Walker, 75 Wn. App. 101, 108-10, 879 P.2d 957 (1994) (evidence that defendant stole tools from victim properly admitted to prove his intent to steal the same victim's car, although only the car theft was charged.)

Knowledge and intent were material elements in this case: the State was required to prove Rud knowingly obtained or possessed the charged items and that she intended to use them to commit (or aid or abet) crimes. RCW 9.35.020(1); CP 68-78. The defense was contesting both of these elements. RP 894, 897-98, 900-02. In closing, Rud emphasized that the State must prove, as to each item, that Rud knew of the item and intended to use it illegally. RP 897-98. The State argued that where the various charged and uncharged items were located was evidence that they were in Rud's possession, that she knowingly possessed them, and that she intended to use them. RP 30-32.

In the trial court, Rud did not dispute that the evidence of uncharged items tended to prove these elements, she argued only

that they should not be admitted because they were not charged. RP 32-33. When the court asked whether it was relevant to a claim of accidental possession, Rud responded that the defense was not mistake, it was lack of knowledge; she did not dispute that the evidence was probative of lack of accident. RP 33. On appeal, Rud concedes that a "lack of accident theory is in substance no different than rebutting Rud's claim that she lacked knowledge that the stolen items were in the cars she occupied." App. Br. at 26. Neither the trial court nor trial defense counsel had any difficulty in understanding how the location of the uncharged items was relevant to her claim that she did not know the stolen items were in the cars.

There are at least four ways in which the uncharged items were probative of the mental states that are elements of identity theft. First, the separation of an individual victim's items into multiple locations in the Cavalier rebut Rud's story that the items came from car prowls committed by Bresnahan while Rud was asleep, which was supported by Bresnahan's testimony that the items found in Rud's bag in the Cavalier were items he stole in car prowls that night while Rud was sleeping and he stuffed them in her bag (the red Dior bag) without her knowledge. RP 453-54; 735,

749-50. For example, items with personal information for uncharged victim Han Kim were found in different places: in the tri-fold wallet in the Dior bag in the trunk, and in the red wallet in the Dior bag. RP 607-08, RP 611-12. Items of charged victim Bhamidipati were in two different wallets in the Dior bag, and her theft was before July 19. RP 406, 607, 611. Some items of the Martin family were in the tri-fold wallet on July 25, and some were in the Taurus on July 18, the theft was July 11 (RP 236, 367, 372-73, 608-10). The sorting of these items into separate locations is circumstantial evidence that either they were stolen previously and stowed for later use, or Rud was sorting the items as Bresnahan brought them back to the car. These facts also lend support to the theory that the cards were in Rud's bag before July 25. There were items of additional charged victims in the Dior bag, tucked into wallets, although those items were stolen days or weeks earlier: Highfill item in tri-fold wallet on July 25, theft was early July (RP 588-89, 608-10); Honhart items in tri-fold wallet on July 25, theft was early July (RP 588-89, 608-10).

Second, the location of many items of personal and financial information in the three wallets in Rud's Dior bag indicates that Rud intended to use them (or aid others) in criminal activity. The tri-fold

wallet was highly probative, because it included a credit card with Rud's name on it and photographs of Rud with Bresnahan. RP 778-80. The tri-fold wallet also held a driver's license of uncharged victim Tran and financial and identification items of charged victims Evelyn Martin, Highfill, Honhart, Karman, and Laramore. RP 608-10. The red wallet in the Dior bag included financial and identification items of uncharged victims McCallum, Knotts, and Kim. RP 611-12. It also included financial and identification items of charged victims Karman, Zhu, Bhamidipati, and Laramore. RP 611-12. The inclusion of items from multiple charged and uncharged victims in multiple wallets indicates that the items were being preserved and stored for future use.

Third, Rud collection and retention of financial and identification items of all of these charged and uncharged victims indicates that she intended to use those items for criminal activity. Thus, the nature of the property she retained that belonged to uncharged victims was relevant to her intent.

Fourth, that there were items from multiple victims (charged and uncharged) in each wallet rebuts the claim that Rud was unaware they were there, and the more items, the stronger that inference becomes. The inclusion of multiple victims in Rud's

wallets, including the separation of items from particular victims into different wallets rebuts the theory that the charged stolen items were thrown into the bag just to be taken out of the house, as Rud initially told the police. RP 437-38, 441.

The trial court did not abuse his discretion in concluding that the evidence of financial and identification information of uncharged victims was relevant and probative.

c. Any Error Was Harmless.

Even if the court's ruling as to the evidence relating to items belonging to uncharged victims was error, it was harmless. Evidentiary error is reversible only if "within reasonable possibilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

Exclusion of the evidence of the items of uncharged victims would not have materially affected the jury's guilty verdicts. There were nine counts of identity theft involving financial information and identification information belonging to female victims. The jury convicted Rud of all of those counts with the exception of Count 10,

which related to victim Adelson. As to seven counts on which the jury convicted, the victim's financial or identification information was found in wallets, along with other victims' information, in Rud's Dior bag.³ There was a shoulder bag (DS-7) in the Taurus that contained credit cards in Rud's name (Oppelt), toiletries, and hair clips of the same style as those attached to one of the wigs found in DS-5. RP 358-62; Ex. 20. As to Count 4, related to Lorraine Curtis, Rud admitted possessing that driver's license, knowing it was stolen. RP 435-38. Rud told police that although she would not use stolen credit cards or checks herself, she would pass them to other people to use. RP 491-92. The evidence was overwhelming that Rud was holding items with the intent to use them (or aid others in using them) in criminal activity.

In contrast, the jury hung as to Count 10, relating to Nancy Adelson: Adelson's car was prowled on July 25, the night the Cavalier was stopped, and none of Adelson's identification or financial information was in Rud's Dior bag. RP 398. The remaining two identity theft counts on which the jury hung were counts relating to male victims whose information was found in the Taurus on July 18 (Forrest and Fretz). RP 370-72. The jury's

³ Count 5 (Martin), Count 6 (Highfill), Count 7 (Honhart), Count 8 (Karman), Count 9 (Zhu), Count 11 (Bhamidipati), Count 12 (Laramore).

inability to reach a verdict on these counts does not impeach their eight guilty verdicts. If anything, the inability to reach a verdict on the remaining counts indicates that the jury did not conclude that because Rud possessed financial or identification information of multiple additional persons, she must be guilty of all charges of identity theft.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Rud's convictions and sentence.

DATED this 22nd day of January, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Casey Grannis, containing a copy of the Brief Of Respondent, in State v. Denise Rud, Cause No. 73402-4-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

01-22-16
Date