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PIERCE COUNTY

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NO. 40911-9-II

STATE OF WASHINGTON
BY: *JW*

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID GLENN HOLCOMB,

Appellant.

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

The Honorable Rosanne Buckner

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in allowing irrelevant and prejudicial propensity evidence prohibited under ER 404(b) denying appellant his constitutional right to a fair trial.

Issue Pertaining to Assignment of Error

Is reversal required where the trial court erred in allowing irrelevant and prejudicial propensity evidence prohibited under ER 404(b) and the error was not harmless because there is a reasonable probability that the outcome of the trial would have differed had the error not occurred?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On October 20, 2009, the State charged appellant, David Glenn Holcomb, as an accomplice, with one count of burglary in the second degree. CP 1. The State amended the information on March 17, 2010, charging Holcomb with one count of burglary in the second degree and two counts of bail jumping. CP 14-15; 1RP 3-4. Following a trial before the Honorable Rosanne Buckner, a jury found Holcomb guilty of burglary in the second degree, guilty of bail jumping as charged in count two, and

¹ There are three volumes of verbatim report of proceedings: 1RP - 03/17/10; 2RP - 06/17/10, 06/21/10, 06/22/10; 3RP - 06/23/10, 06/24/10, 06/28/10.

not guilty of bail jumping as charged in count three. CP 77-79, Supp CP ___ (Verdict Form B, 06/24/10); 3RP 287-89, 307-08. On June 28, 2010, the court sentenced Holcomb to 22 months in confinement. CP 88-89; 3RP 316-17.

2. Substantive Facts²

Christopher Muir worked as a security officer for Chinook Landing Marina owned by the Puyallup Indian Tribe. There are three “vacant or abandoned” buildings on the marina, two were homes and one was a machine shop. 2RP 51-52. Muir testified that at about 4:30 in the afternoon on October 19, 2009, he noticed a blue pickup truck in the parking lot and three men “looking around.” 2RP 52-53. The truck was not parked in a stall and the men were acting suspiciously, which prompted Muir to call tribal police using a security phone. 2RP 52-53, 56, 58. The tribal police arrived within five to ten minutes and told Muir they had everything under control. 2RP 59, 68-69. Muir identified Holcomb in the courtroom as one of the men that he saw. 2RP 54.

Officers Ryan Sales and Douglas Johns were dispatched to the marina to investigate “individuals in a building on the property.” 2RP 12-13. Sales testified that a truck was “suspiciously parked” in the middle of

² In accordance with RAP 10.3(a)(4), facts pertaining to the bail jumping charges are not included because they are not relevant to the issues presented for review.

the parking lot, not in a stall. 2RP 15-16. There were three buildings “spaced in a row along Marine View Drive,” so they did not know which building the individuals were in. 2RP 17. As they approached building number two, an old machine shop, they heard “sounds of people or things being moved around, metal being manipulated, rustling around in there.” 2RP 18-20. Sales could not see anyone in the building or what they were doing. 2RP 45. The doors to the building were locked or boarded up but there was a hole on the side of building which created an entrance. 2RP 26-27. Sales pounded on the wall of the building and Johns yelled, “Police, come on out.” 2RP 28. Holcomb crawled out of the hole first and he was detained in handcuffs. Then two others came out after him. 2RP 28-29. No trespassing signs were posted on the property. 2RP 21-23. The old machine shop had equipment and tools made of metal which could be sold to scrap yards for recycling. 2RP 29-31.

Officer Johns testified that when Sales knocked on the side of the building, he looked inside the hole with his flashlight and saw “their heads turned towards the knock.” 2RP 77. Johns identified themselves as police and ordered the men to come out. 2RP 77-78. When Johns looked further through the hole, he noticed a bucket containing metals at the entrance of the hole. 2RP 78-79. No trespassing signs were posted on the building

which was boarded up. 2RP 76-77. Johns identified Holcomb in the courtroom as one of the men that came out of the building. 2RP 80.

Holcomb testified that on October 19, 2009, he and his two friends, Jeffrey and Allen, were visiting his father who lives on Marine View Drive. 2RP 153. Before retirement, his father worked for 35 years as a maintenance machinist. During their visit, his father told them about an old machine shop located at the nearby marina, which caught Holcomb's interest, "I have always been fascinated with machines and especially when he told me that they were run by leather belts. I couldn't fathom a machine run by a leather belt." 2RP 154-55. They drove down to the marina to look around and saw "Keep Out" signs but went in the machine shop to explore. 2RP 155, 160-62. Holcomb saw old machines, equipment, stacks of five-gallon buckets, and nuts and bolts among the debris. 2RP 163-64. As they were making their way through the building, they heard banging and the police ordering them to come out. 2RP 165. They said they were just looking around, but the police arrested all three of them and transported them to the jail. 2RP 165.

Holcomb explained that he has "always been the type to explore."

2RP 165. Defense counsel followed up with further questions:

Q. At the time that you went in there, did you have any kind of intention to take any items that you may have found?

A. No, sir.

Q. There is cool stuff in old buildings. If you found some cool stuff, were you going to take it?

A. No. We had no use for it. I mean, what were we going to do with machinist stuff. We really didn't know anything about except my father was a machinist.

2RP 166.

Holcomb acknowledged that he pled guilty to attempted burglary in the second degree on April 21, 2005. 2RP 175-76.

Out of the presence of the jury, the State argued that in light of Holcomb's testimony that they did not intend to take anything, the State should be permitted to cross-examine him about his prior conviction for attempted burglary and his codefendant's guilty plea for the purpose of proving intent under 404(b). 2RP 190-94, 196-98. Defense counsel argued that the fact that Holcomb had a prior conviction for burglary was elicited because it is a crime of dishonesty and therefore admissible under ER 609, but any further evidence would constitute impermissible propensity evidence. 2RP 194-96. The trial court granted the State's motion, ruling that Holcomb made intent an issue by testifying about his intent and the intent of his codefendants. 2RP 198. Defense counsel asked for a clarification on the scope of the court's ruling, arguing that going into the specific details would be highly prejudicial, outweighing

any probative value. 2RP 198-200. The court disagreed, finding that “those areas are more probative than prejudicial under these circumstances because of his testimony.” 2RP 200.

In response to questions by the State during cross-examination, Holcomb acknowledged that his prior conviction for attempted burglary “involved an allegation of intent to take metal” and that his friend Alan pled guilty to burglary in the second degree, admitting “that his intent for being inside that building was to take items.” 2RP 205-08.

C. ARGUMENT

THE TRIAL COURT ERRED IN ALLOWING
IRRELEVANT AND PREJUDICIAL PROPENSITY
EVIDENCE PROHIBITED UNDER ER 404(b)
DEPRIVING HOLCOMB OF HIS CONSTITUTIONAL
RIGHT TO A FAIR TRIAL.

Reversal is required where the trial court erred in allowing irrelevant and prejudicial propensity evidence prohibited under ER 404(b) and the error was not harmless because there is a reasonable probability that the outcome would have differed had the error not occurred.

Appellate courts review the trial court’s interpretation of ER 404(b) de novo as a matter of law. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009)(citing State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)). If the trial court interprets ER 404(b) correctly, the appellate court reviews the trial court’s ruling to admit or exclude evidence of misconduct

for an abuse of discretion. Id. A trial court abuses its discretion where it fails to abide by the rule's requirements. Id.

The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined. To that end, ER 404(b) forbids evidence of prior acts that tend to prove a defendant's propensity to commit a crime, but allows its admission for other limited purposes:

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.

ER 404(b); State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999).

ER 404(b) is read in conjunction with ER 403 which requires the trial court to exercise its discretion in excluding relevant evidence that would be unfairly prejudicial.³ Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence that misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. Fisher, 165 Wn. 2d at 745. Doubtful cases should

³ ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

In State v. Wade, the juvenile court found Wade guilty of possession of a controlled substance with intent to deliver. Wade appealed, arguing that the trial court erred in admitting evidence of past offenses under ER 404(b) to prove intent in the current charge. Wade, 98 Wn. App. at 331-32. This Court observed that when the State seeks to prove intent by introducing past similar bad acts, the State is essentially asking the jury to infer that “[b]ecause the defendant was convicted of the same crime in the past, thus having then possessed the requisite intent, the defendant therefore again possessed the same intent while committing the crime charged. If prior bad acts establish intent in this manner, a defendant may be convicted on mere propensity to act rather than on the merits of the current crime.” Id. at 335. Citing State v. Holmes, 43 Wn. App. 397, 400-01, 717 P.2d 766 (1986)(before prior acts can be admitted to show intent, the prior acts “must have some additional relevancy beyond mere propensity”), this Court reasoned that the “additional relevancy turns on the facts of the prior acts themselves and not upon the fact that the same person committed each of the acts.” Id. at 335-36. This Court noted that otherwise, “the only relevance between the prior acts and the current act is the inference that once a criminal always a criminal. It is the facts of the

prior acts, not the propensity of the actor, that establish the permissive inference admissible under ER 404(b).” Id. at 336.

Concluding that the facts of the charged offense differed significantly from the facts of the previous offenses where Wade was trafficking and selling drugs, this Court determined that the only reasonable inference to be drawn from Wade’s prior bad acts is that “[b]ecause the previous convictions are for the same type of crime, including the requisite intent, Wade was predisposed to have that same intent on the current occasion.” Id. at 336-37. This Court reversed, holding that the trial court erred in admitting evidence of Wade’s prior bad acts to prove intent. Id. at 337, 342.

Here, the State moved to admit evidence of Holcomb’s prior guilty plea to burglary in the second degree and his codefendant’s guilty plea to burglary in the second degree to prove intent under ER 404(b). 3RP 190-91. When the court asked if the State “had some case law,” the State cited State v. Medrano, 80 Wn. App. 108, 906 P.2d 982 (1995) and summarized the case. 3RP 192-94, 196-98. Defense counsel argued that Medrano was distinguishable from this case, but over his objection, the court granted the State’s motion:

THE COURT: Thank you, Counsel. I will grant the state’s motion on the issue of intent with respect to the attempted burglary from 2005 since the defendant by his own

testimony put into evidence his intent with regard to these allegations and also because he did refer to, again, what would we do with these items, which raises his comment on what his codefendants intended to do as well. That would be proper cross-examination and not unduly prejudicial.

3RP 194-96, 198.

Following the court's ruling, the State resumed cross-examination about Holcomb's testimony that he and his friends, Alan and Jeff, had no use for anything in the old machine shop:

Q. Now, when you made that -- when you testified yesterday what were we going to do with that, would it surprise you or were you aware that Alan had pled guilty to burglary in the second degree?

A. Yes, I knew that.

.....

Q. (By Ms. Hauger) Would it surprise you to learn that when Alan entered that plea of guilty to burglary in the second degree arising from that incident when the three of you were in that building that he indicated that the intent of being in that building was to take items from inside?

A. It would not surprise me, no.

Q. Now, we talked a little bit yesterday, and you admitted, that in 2005 you had also pled guilty to attempted burglary in the second degree?

A. Yes, ma'am.

Q. And you were aware at the time that you entered your plea that that crime involves intent to commit -

- that you unlawfully enter a building and it involves an intent to commit a crime against property or person inside?

A. Yes, ma'am.

Q. The same intent involved in this case?

A. Yes, ma'am.

Q. And that incident back in 2005 also involved an allegation of intent to take metal?

A. Yes, ma'am.

3RP 206-08.

The trial court erred in relying on State v. Medrano to grant the State's motion because Medrano is clearly distinguishable. Medrano was charged with residential burglary which requires proof of intent. At trial, he admitted burglarizing the home, but asserted that drugs and alcohol diminished his capacity and prevented him from forming the necessary intent to commit the crime. Medrano, 80 Wn. App. at 110-11. A doctor testified for the State that Medrano was not suffering from diminished capacity at the time of the burglary, basing his opinion partly on Medrano's prior convictions for burglary and theft. Following his conviction, Medrano appealed, arguing that the trial court erred in allowing the doctor to refer to his prior convictions. Id. at 111.

Division Three of this Court held that the prior convictions were relevant under ER 404(b) and ER 703 and that the doctor's reference to the convictions was not prejudicial because Medrano himself admitted to the convictions before the doctor's testimony. Id. at 112-13. Unlike in Medrano, the trial court here allowed highly prejudicial evidence beyond Holcomb's acknowledgment that he pled guilty to attempted burglary in the second degree in 2005. The court allowed the evidence based on its misapprehension of the Medrano Court's holding that the trial court did not err in allowing the doctor's "casual reference" to Medrano's admission of his prior convictions. Id. at 113-14.

Furthermore, the trial court allowed the impermissible propensity evidence contrary to Wade, where this Court concluded that before prior acts can be admitted to show intent, the prior acts must have some additional relevancy beyond mere propensity and that "additional relevancy turns on the facts of the prior acts themselves and not upon the fact that the same person committed each of the acts." Wade, 98 Wn. App. at 336. The record reflects that the limited facts the trial court considered were that Holcomb entered an *Alford* plea to attempted burglary in the second degree which involved the theft of metal. 3RP 198-202. Under this Court's holding in Wade, the scant facts relied upon by the trial court failed to provide the "additional relevancy" necessary to allow evidence of

prior bad acts to show intent. Consequently, as this Court concluded in Wade, “the only relevance between the prior acts and the current act is the inference that once a criminal always a criminal.” Id. Under ER 404(b), “prior misconduct is not admissible to show that a defendant is a ‘criminal type,’ and is thus likely to have committed the crime for which he or she is presently charged.” State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

As a result of the trial court’s erroneous ruling, the jury was instructed that it “may consider evidence that the defendant has been convicted of the crime of Attempted Burglary Second Degree only in deciding what weight or credibility to give to the defendant’s testimony or intent and for no other purpose.” CP 62 (Emphasis added). During closing argument, the State drew the jury’s attention to the instruction, emphasizing that it could consider Holcomb’s prior conviction to infer intent:

You have another instruction that tells you that there is something else that you can consider in determining what the defendant’s intent was. You have an instruction that tells you that the evidence came out that the defendant had been convicted of attempted burglary in the second degree in 2005. And you can consider for two purposes. One of them, you weigh that, along with everything else that’s been presented, in determining how much weight or credibility you give the defendant’s testimony. Consider it in determining whether or not you believe his testimony, along with the other factors that the judge outlined for you.

You can also consider it in determining what the defendant's intent was. The defendant acknowledged that it is an offense, a crime, that involves the same intent as the one charged in this case, the burglary in the second degree. It's going to be up to you to determine how much weight you put in that previous conviction. But those are the two purposes that you can consider it for. You don't have to crawl up inside his mind in order to determine what the intent was.

3RP 244 (Emphasis added).

Evidentiary errors under ER 404 are not of constitutional magnitude and are harmless unless there is a reasonable probability that the outcome of the trial would have differed had the error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The record substantiates that the trial court's error was not harmless because it allowed highly prejudicial evidence beyond Holcomb's acknowledgment of his guilty plea to burglary in the second degree and instructed the jury that it could consider the conviction to determine intent, which permitted the State to shore up its case by directing the jury's attention to the instruction in closing argument. But for the trial court's error, the outcome of the trial would have differed because the State would have failed to prove intent beyond a reasonable doubt.⁴

⁴ A person commits the crime of burglary in the second degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein. CP 58.

“That a prior act goes to intent is not a magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].” Wade, 8 Wn. App. at 334-35 (citing State v. Saltarelli, 98 Wn.2d 358, 364, 655 P.2d 697 (1982)). Reversal is required because the trial court erred in allowing further evidence about Holcomb’s prior conviction, including the fact that it involved the theft of metals and allowing irrelevant and highly prejudicial evidence of a codefendant’s guilty plea. The trial court’s error was based on its misinterpretation of ER 404(b) and therefore it erred as a matter of law. Fisher, 165 Wn.2d at 745.

D. CONCLUSION

For the reasons stated, this Court should reverse the burglary in the second degree conviction because the trial court erred in allowing irrelevant and prejudicial propensity evidence prohibited under ER 404(b) denying Mr. Holcomb his constitutional right to a fair trial.

DATED this 21st day of March, 2011.

Respectfully submitted,


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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and David Glenn Holcomb, DOC # 789564, Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, Washington, 99362.

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

DATED this 21st day of March 2011, in Kent, Washington.


VALERIE MARUSHIGE

Attorney at Law
WSBA No. 25851

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KENT, WA