

NO. 42080-5-II

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

STATE OF WASHINGTON, Respondent,

v.

KELVIN D. NASH, Appellant.

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

The Honorable Ronald Culpepper, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erroneously admitted detailed evidence of a prior conviction in violation of ER 404(b).
2. Nash's due process rights were violated because the evidence was insufficient to prove Nash possessed property that exceeded \$250 in value.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court erred by permitting the State to introduce inadmissible ER 404b evidence where the defense did not open the door to the evidence, the prejudicial effect of the evidence far outweighed its minimal probative value, and the State was using the inadmissible evidence to argue Nash's actions in this case were in conformity.
2. There was insufficient evidence to support the conviction for possession of stolen property in the second degree because there was no evidence of the fair market value of the used conference telephone.

C. STATEMENT OF THE CASE

On March 11, 2010, Kelvin Nash was found inside a public building on the UW Tacoma campus at around 9 p.m. RP2 61. The building was open to the public until 10 p.m. RP2b 16-17. Mr. Nash was just inside a professor's office in the building.¹ RP2 82-83. He told security officers and later the police that he had entered the building to use the bathroom, but had heard suspicious noises from the direction of the offices. RP2 84, RP2b 15, RP3 35-36. He said he entered the office to investigate, and that was where he was found by security. RP2 84, RP3 35-36. Nothing was stolen from the office. RP2b 34. Mr. Nash was not in possession of any stolen property at the time of his arrest. RP2b 5.

When confronted by security, Mr. Nash explained his presence, but the security officers did not believe him and when Mr. Nash said he wanted to leave, the security guard physically blocked his exit. RP2 102-103. A struggle ensued in which one of the officers suffered an injury to his eye—a fractured eye socket. RP2 105-8, RP2b 93.

¹ The occupant of the faculty office, Professor Bonnie Decker, testified that her office was not open to the general public, but that she has been known to forget to lock up the office at night. RP3 53.

The police arrived secured Mr. Nash in handcuffs. RP3 17-18. When asked for his name, Mr. Nash gave the officer the name he goes by, Kevin Luciano, rather than his legal name, Kelvin Nash. RP3 32-33, RP4 61. When the second officer arrived, Mr. Nash gave him his legal name. RP3 18.

Nash's former girlfriend, Wendy Rupnow, testified that while they were dating, sometime around April of 2009, Nash gave her a DVD player as a gift. RP3 60-61, 74. Rupnow said she gave the DVD player back to Nash when she saw it had a UW inventory code sticker on it. RP3 60-61, 64. Rupnow did not call the police about the incident. RP3 61-62. Nash told her he had purchased the DVD player from the school. RP3 63.

Rupnow said that after she and Nash had ended their relationship, she found a conference telephone with a UW sticker in her storage locker. RP3 66-68. Rupnow reported the phone to the police. RP3 70. She told police that she thought the phone was stolen and thought Nash had stolen it.² RP3 72-73.

A UW Tacoma employee testified that the conference telephone had been missing since November of 2008, but was not

² Nash refuted Rupnow's testimony, stating that he had not placed the telephone in the storage unit. RP3 162.

reported stolen until after it was recovered. RP3 100, 103-4. The employee testified that he was told that the initial cost of the phone was purportedly \$750, with a replacement cost of \$757.19. RP3 112, 116.

Nash testified in his own defense. He said on March 11, 2010, he was walking from the YMCA to meet a friend at the Starbucks on the UW Tacoma campus when he entered the science building to use the restroom. RP3 134-7. On his way to the restroom, he heard a suspicious noise from the side hallway and decided to investigate. RP3 139. From the hallway, he saw an open door to a dark office and entered. RP3 139. He said he knew he was in an area not open to the public. RP4 35. Immediately upon entering, he heard a noise behind him and turned to find Bailey, the security officer, behind him. RP3 144. He explained to Bailey why he was there, but when he saw he was not believed, he decided to make a call on his cell phone. RP3 147. The cell signal was blocked, so he moved out into the hall for a better signal. RP3 147. Bailey then attempted to restrain him from leaving. RP3 149.

Nash, believing Bailey had no right to detain him, pushed past Bailey, who then grabbed Nash in a bear hug around the middle. RP3 150. A struggle ensued between Nash, Bailey, and the

other security guard, Wilk. RP3 151. Nash did not intentionally hit anyone, but rather was only attempting to get free from the physical restraint. RP3 155-56.

The State then moved the court for permission to bring in details of the 2006 burglary,³ arguing that when Nash told his story on the stand of investigating the noise in the office, he opened the door to this excluded evidence. RP3 189-90. The court ruled that the excluded ER 404(b) evidence of the 2006 burglary was now admissible to show Nash's intent to steal, absence of mistake, and common scheme or plan on this occasion. RP4 18, CP 31-32.

The State was then permitted to inquire of Nash into the details of the prior burglary conviction, over the defense's continuing objection. RP4 67. Nash testified that he was found on October 6, 2006, sleeping in the North Seattle Community College daycare center in the middle of the night. RP4 67. His clothes were in the daycare's dryer. RP4 67. He was asked if he had attempted to flee after asking to use the bathroom. RP4 68-72. He was asked if he was in possession of a stolen laptop from the school. RP4 70. On cross-examination, Nash testified that he had entered the

³ Only the fact of the conviction had been entered, not the facts. RP4 170.

school on that occasion to sleep; that he had used a janitor's keycard to enter; and that he had stolen a visa and employee identification card. RP4 86. He admitted that it was not good judgment. RP4 86.

Nash was convicted of burglary in the first degree, assault in the second degree, possession of stolen property in the second degree and the misdemeanor giving of a false statement to a police officer. RP4 203-4. He was sentenced in the standard range. CP 105-109. This appeal timely follows.

D. ARGUMENT

1. THE TRIAL COURT ERRED BY PERMITTING THE STATE TO INTRODUCE INADMISSIBLE ER 404B EVIDENCE WHERE THE DEFENSE DID NOT OPEN THE DOOR TO THE EVIDENCE, THE PREJUDICIAL EFFECT OF THE EVIDENCE FAR OUTWEIGHED ITS MINIMAL PROBATIVE VALUE, AND THE STATE WAS USING THE INADMISSIBLE EVIDENCE TO ARGUE NASH'S ACTIONS IN THIS CASE WERE IN CONFORMITY.

ER 404(b) prohibits evidence of other crimes or bad acts "to prove the character of a person in order to show action in conformity therewith." ER 404(b); *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). The rule permits the admission of such evidence in only limited circumstances to show identity, motive, intent, preparation, plan, knowledge, absence of mistake or

accident, opportunity, or alternative means by which a crime could have been committed. *State v. Lord*, 117 Wn.2d 829, 872 n. 11, 822 P.2d 177 (1991). A trial court “must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003).

Before admitting evidence of other wrongs under ER 404(b), the trial court must: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charges, and (4) weigh the probative value against the prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In doubtful cases, the evidence should be excluded. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Decisions to admit evidence under ER 404(b) are reviewed for abuse of discretion. *State v. Dennison*, 115 Wn.2d 609, 627–28, 801 P.2d 193 (1990). Discretion is abused if it is exercised on untenable grounds or for untenable reasons, or if no reasonable judge would rule as the trial judge did. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), *State v. Nelson*, 108 Wn.2d 491, 504–05, 740 P.2d 835 (1987).

In this case, the court erroneously permitted the State to bring in evidence of an uncharged incident allegedly involving a DVD player that might have belonged to the UW Tacoma, a prior 2006 conviction for burglary at North Seattle Community College, as well as the facts relating to the possession of stolen property charge. The primary reason given by the court for the admission of the prior bad act evidence was to prove Nash's intent to commit a crime in the current burglary charge. RP1 59-60, 70.

The State did have to prove that Nash entered or remained unlawfully in the professor's office with the intent to commit a crime. RCW 9A.52.020. However, The trial court initially rejected the State's argument that the 2006 conviction was admissible to show intent and ruled the evidence would be suppressed unless the defendant opened the door when testifying. RP1 78. The trial court initially ruled that testimony regarding the uncharged DVD player incident and the possession of stolen property charge was admissible under ER 404(b). RP1 78-79. The defendant's motion to sever the possession of stolen property charge from the trial was also denied based on the trial court's conclusion that the evidence was admissible in the trial under ER 404(b). RP1 49-60, 64-65.

Then, after Nash's testimony on direct, the State argued the door had been "opened" to the suppressed evidence. CP 31-32, RP3 189-90. The oral ruling limited the evidence to the purpose of proving intent, but the written ruling states that the evidence was admissible to show intent, common scheme or plan, or absence of mistake. CP 31-32, RP4 18. Limiting instructions were given to the jury for the prior conviction, and as to the separate charges.⁴ RP4 103, CP 47, 48.

Nash did not "open the door" to inadmissible ER 404b evidence because he did not place his character at issue. "The long-standing rule in this state is that a criminal defendant who places his character in issue by testifying as to his own past good behavior, may be cross-examined as to specific acts of misconduct unrelated to the crime charged." *State v. Brush*, 32 Wn.App. 445, 448, 648 P.2d 897 (1982). Nash did not "open the door" to the admission of prior convictions because he did not place his character in issue. He did not assert that he had never committed a crime or that he was not the sort of person who would commit a crime. Nash's testimony was completely consistent with the prior

⁴ Defense counsel rejected a proposed instruction on the DVD player, fearing that an instruction would only draw attention to the incident in the jury's mind and compound the error. RP4 103, 128.

testimony of the security officers and the police officers in Nash's explanation for his presence in the office—that he had been in the building to use the restroom, heard a suspicious noise, and went to investigate. There was nothing new or surprising in his testimony and it did not place his character at issue. Therefore, it was error for the court to use Nash's testimony as a basis for reversing the suppression order for the prior 2006 burglary conviction.

The trial court also erred by finding that the evidence was admissible to show a "common scheme or plan." A defendant's prior acts are admissible to demonstrate a common scheme or plan for purposes of ER 404(b) where the evidence seeking to be admitted demonstrates the defendant committed: (1) markedly similar acts; (2) against similar victims; (3) under similar circumstances. See *State v. Carleton*, 82 Wn.App. 680, 683, 919 P.2d 128 (1996) (citing *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995)). Such evidence of prior conduct must demonstrate "such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." *Lough*, 125 Wn.2d at 860. In other words, the prior conduct must be similar to the current crime charged in significant

respects that one would naturally explain the similarities not as merely coincidental, but as conduct directed by design. *Lough*, 125 Wn.2d at 860. The State conceded to the trial court that the prior Burglary at North Seattle Community College was not similar enough to this crime to be a “signature.” RP1 73. In fact, the only similarity between the prior burglary and the charges here was a school was involved. The method of entry and circumstances surrounding the prior crime were completely dissimilar to the current event. There is nothing here to indicate a “common scheme or plan” and the trial court erred in ruling the evidence relevant or admissible on this basis.

The evidence was not admissible to show “absence of mistake.” Absence of mistake or accident is never a material issue unless it is first raised by the defendant. *State v. Ramirez*, 46 Wn.App. 223, 228, 730 P.2d 98 (1986). Evidence of unrelated crimes offered to rebut absence of mistake or accident must directly negate such a defense. *Id.* Nash never testified nor argued that he mistakenly entered the office. He consistently said that he knew the office was not generally open to the public, but he had entered to investigate a suspicious sound, not with the intent to commit a

crime. Therefore, it was error to permit the introduction of the evidence to show “absence of mistake.”

The introduction of prior bad act evidence—the facts of the 2006 burglary convictions, allegedly stolen DVD player incident, and possession of stolen property (conference telephone)—were more prejudicial than probative. The State was already permitted to introduce the existence of Nash’s prior 2006 burglary conviction under ER 609, but through the court’s ruling that the facts of the prior conviction became admissible after Nash’s testimony, the State was permitted to introduce the facts of that crime, which were far more prejudicial than probative of Nash’s intent. The State was able to introduce evidence that:

- Nash was found on October 6, 2006, sleeping in the North Seattle Community College daycare center in the middle of the night. RP4 67.
- Nash was in his underwear--his clothes were in the daycare’s dryer. RP4 67.
- Nash attempted to flee after asking to use the bathroom. RP4 68-72.
- Nash was in possession of a stolen laptop from the school, a visa and a master key. RP4 70.

Add to that the admission of testimony regarding an uncharged incident only witnessed and alleged by Nash's ex-girlfriend regarding a DVD player that was not even proved stolen, and the possession of stolen property from a totally different incident, and the minimal probative value is far outweighed by the obvious prejudice of having the jury told repeatedly that Nash has stolen in the past, is a thief, and therefore must be guilty on this occasion.

Moreover, the prejudice of the evidence was increased when the State used that evidence in closing to argue Nash's actions in the current incident were in conformity with his prior criminal convictions. Attempting to slide the argument in by couching it in terms of "intent" and "absence of mistake," the prosecutor is really arguing to the jury that because Nash had been convicted of stealing from North Seattle Community College in 2006, he must have been guilty in this case as well, stating:

When the defendant was found in North Seattle Community College, he was in a building, he fled the building, and he had stolen property on him. You could take that into consideration when you decide what intent the defendant had when he was in Professor Becker's office.

Additionally, the second part of this is the accident or mistake. The testimony from Officer Clark is clear that the defendant said the reason I was in that office is I was looking for the bathroom and I thought it was

the bathroom and I got inside. So if there's any thought that he entered the office by accident or mistake, I submit the defendant told so many different stories as to why he was in the office, you can take that into consideration.

Look at the prior possession at North Seattle Community College, possession of property stolen from the school. He had a credit card, a faculty ID card, master key, and a laptop computer. Common sense, ladies and gentlemen. You're all reasonable people.

RP4 144.

The trial court's errors were prejudicial and require reversal of Nash's conviction for burglary in the first degree. An erroneous ruling under ER 404(b) requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Wilson*, 144 Wn.App. 166, 177-78, 181, P.3d 887 (2008). The State used the details of the 2006 crime to paint a very prejudicial picture of Nash that goes far beyond possible probative evidence. The fact that Nash was found in his underwear in a daycare center, that he attempted to flee—all of these facts are not probative to the current charges, but were used to paint Nash in a bad light for the jury. And then the State used the evidence to argue to the jury beyond the limited purpose of establishing intent—arguing that Nash had stolen from a school before and that therefore the jury should use “common sense” to determine what he was doing on this occasion.

This is precisely the purpose ER 404(b) is meant to prohibit.

Consequently, even the limiting instruction could not eliminate the impact of this evidence on the outcome of the trial. Therefore, the conviction must be reversed.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE BECAUSE THERE WAS NO EVIDENCE OF THE FAIR MARKET VALUE OF THE USED CONFERENCE TELEPHONE.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

To prove Nash guilty of the crime of possession of stolen property in the second degree in this case, the State was required to prove that he knowingly possessed stolen property of a value exceeding \$250. CP 72, 77. "Value" means the market value of the property "at the time and in the approximate area of the act." CP 75. Market value is an objective standard and consists of the

price a well-informed buyer would pay to a well-informed seller.

State v. Longshore, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000).

In this case, Nash was alleged to have possessed a stolen conference telephone. The only evidence of the value of the telephone came from a UW Tacoma employee, who testified that he had been told by another employee that the initial cost of the used telephone was purportedly \$750, with a replacement cost of \$757.19. RP3 112, 116. No evidence other than the employee's opinion was given regarding the value of the phone when stolen. RP3 111, 112, 116. There was no evidence as to the value of the phone in a used condition, the age of the phone, or its actual replacement value other than the unsubstantiated hearsay related by the employee.

While evidence of the price paid is entitled to weight in determining the value of an item the trier of fact must also consider evidence of the changes in the property's condition that would affect its market value at the time it was stolen. *Longshore*, 141 Wn.2d at 430; *State v. Hermann*, 138 Wn. App. 596, 158 P.3d 96, 99 (2007) (*citing State v. Melrose*, 2 Wn. App. 824, 831, 470 P.2d 552 (1970)). In *State v. Morley*, 119, Wn.App. 939, 83 P.3d 1023 (2004), the case involved the theft of a used generator. Evidence

of retail price is sufficient to establish value *only* if it has been recently established at a nearby place. *Longshore*, 141 Wn.2d at 430. Therefore, if the property is used, the State must produce evidence of the market value of the used property at the time of the theft, which it did not do in this case. The dubious hearsay evidence introduced here of the original purchase price of the used conference telephone is not sufficient evidence of the fair market value of the stolen property. Therefore, the second degree possession of stolen property conviction must be reversed.

E. CONCLUSION

The trial court violated ER 404(b) by erroneously ruling that the State was permitted to introduce evidence of Nash's prior acts where this evidence was more prejudicial than probative and was not relevant to material issues in the case. This evidence more than likely materially affected the jury's verdict on the burglary charge because it painted Nash as a habitual thief who must therefore have acted in conformity on this occasion as well. Therefore, Nash's conviction for burglary in the first degree must be reversed.

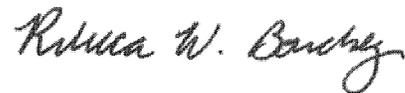
Moreover, the State failed to provide sufficient evidence of an element of possession of stolen property in that it failed to prove

the replacement value of the property exceeded \$250. Therefore,
due process requires that this conviction be reversed.

DATED: December 6, 2011

Respectfully submitted,

NIELSEN, BROMAN & KOCH



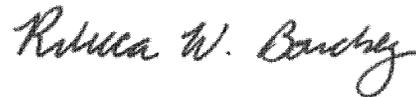
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