

NO. 42080-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KELVIN D. NASH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper

No. 10-1-01114-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was evidence of defendant's expropriation of University of Washington property admissible for any relevant purpose when he failed to request a limiting instruction?
2. Has defendant failed to prove the trial court abused its discretion by admitting evidence of a prior burglary under ER 404(b) when it refuted his defense of mistake?
3. Did the State adduce sufficient evidence of value to prove possession of stolen property in the second degree when undisputed evidence placed the stolen property's value within the applicable statutory range?

B. STATEMENT OF THE CASE.

1. Procedure

Appellant, KELVIN DESHON NASH, ("defendant"), was charged by second amended information with first degree burglary, second degree assault, making a false statement to a public servant, and possession of stolen property in the second degree under Pierce County cause number 10-1-01114-7. CP 132-134.¹ The Honorable Ronald E. Culpepper

¹ Citations to the Clerk's papers beyond CP 131 reflect the estimated numbering of the State's supplemental designation.

presided over the trial. RP (Jan.7) 1. Defendant moved to sever the possession of stolen property count, which alleged he possessed a stolen University of Washington teleconference device prior to the alleged burglary. RP (Jan. 7) 7-8, 49, 51-52, 58, 64; CP 76 Instruction No. 35. The trial court denied defendant's motion to sever and defendant does not challenge that ruling on appeal. RP (Jan.7) 64; App.Br. 1.² The court found the teleconference device was cross-admissible as proof of defendant's intent to commit burglary when it similarly admitted evidence he previously possessed a University of Washington DVD player under ER 404(b). RP (Jan.7) 53-82; CP 31-32. The State also proffered evidence defendant committed a similar burglary at North Seattle Community College, but the court decided to exclude that evidence so long as defendant did not "open the door" to it at trial. RP (Jan. 7) 58, 64, 78-79; (Feb. 10) 12-14; CP 31-32. Evidence of the prior burglary was eventually admitted after defendant testified. RP (Feb. 10) 17-18, 26-27.

The jury found defendant guilty as charged. 80, 141, 142, 143. The court imposed sentence on April 29, 2011. CP 92; RP (Apr.29) 10. Defendant's offender score was thirteen as to his first degree burglary conviction, twelve as to his second degree assault conviction, and eight as to his possession of stolen property conviction. CP 92-104; RP (Apr. 29)

² Appellant's Brief ("App.Br.")

13. The State argued for an exceptional sentence on the basis that defendant's high offender score resulted in unpunished crimes. RP (Apr. 29) 14-17. The court imposed a standard range sentence of one hundred months. CP 92-104; RP (Apr. 29) 14-17. Defendant filed a timely notice of appeal. CP 110.

2. Facts

At approximately 8:50 p.m. on March 11, 2010, Campus Safety Sergeant Darren Bailey performed a security check of University of Washington science building in Tacoma. RP (Feb. 7) 41-42, 46 52-53, 61-62, 64-71; Ex. 1, 4-12. Sergeant Bailey entered a faculty area located in a dead-end corridor closed to the public at night. RP (Feb. 7) 67-68, 73; (Feb. 8) 66-68; Ex. 1-2, 4. Sergeant Bailey discovered the door to Professor Bonnie Becker's private office was open. RP (Feb. 7) 68-69, 79; (Feb. 8) 5; Ex. 10. The office was dark with the lights off, but there was a rustling sound within. RP (Feb. 7) 68-69, 74-76; (Feb. 8) 5. Sergeant Bailey called out for Professor Becker. RP (Feb. 7) 74-76. Sergeant Bailey saw the papers on Professor Becker's desk move as defendant rose from an adjacent chair wearing a backpack. RP (Feb. 7) 76, 81-83; (Feb. 8) 5.

Defendant provided inconsistent accounts of why he was in Professor Becker's office. RP (Feb. 7) 82-83; (Feb. 8) 67. He claimed to be looking for a restroom, but the restrooms were prominently identified in a central hallway open to the public. RP (Feb. 7) 70-73 (Feb. 8) 44, 65, 67; Ex. 1, 5. Defendant also claimed an unknown person ran by him when he entered the faculty area to investigate a noise. RP (Feb. 7) 64-69, 84-85; (Feb. 8) 67. Sergeant Bailey had not seen anyone in the building despite having been in the faculty area for several minutes. RP (Feb. 7) 64-69, 84-85; (Feb. 8) 67. Defendant admitted he was not a student. RP (Feb. 7) 91-92, 96. Defendant identified himself by the alias "Kevin J. Luciano" with a date of birth of 3/19/79 when his true name is Kelvin Nash and his date of birth is 3/14/80.³ RP (Feb. 8) 68, 122, 127; Ex. 25A. Defendant claimed he was the University of Washington's new "hip-hop instructor;" he was not a university employee. RP (Feb. 7) 96; (Feb. 8) 69; (Feb. 8) 88, 96. Sergeant Bailey told defendant that the police were en route. RP (Feb. 7) 101-102. Defendant rapidly moved toward the exit claiming he needed to make a phone call. RP (Feb. 7) 101-102; (Feb. 8) 46, 73, 75, 101-102, 112, 128. Sergeant Bailey instructed defendant to

³ Sergeant Bailey testified defendant identified himself to Officer Welk as "something Nash," but admitted he was too busy watching defendant's movements to specifically recall. RP (Feb. 7) 100.

stop. RP (Feb. 7) 102. Defendant repeatedly walked into Sergeant Bailey's outstretched hand before aggressively lunging at him with an arm drawn back as if to strike. RP (Feb. 7) 103-106; (Feb. 8) 77. Defendant attempted to apply a submission technique to Sergeant Bailey's wrist and kneed him twice in the chest. RP (Feb. 7) 107-109. Sergeant Bailey sustained minor injuries. RP (Feb. 7) 113-114, 116-117; Ex. 13-18. Defendant struck Campus Safety Officer Welk in the right eye with a closed fist when he attempted to intervene; the blow dislodged Officer Welk's glasses, cut the skin beneath his eye, and fractured his eye socket in three places. RP (Feb.8) 82, 84-86, 92-93; Ex. 19-21. Defendant continued fighting when Tacoma Police Officer Kevin Clark entered the struggle and directed him to stop resisting. RP (Feb. 7) 109, 111; (Feb. 8) 89, 123; (Feb. 9) 23, 30.

Defendant eventually identified himself to Officer Clark by the alias "Kevin D. Luciano." RP (Feb. 9) 26-27, 31-32, 38. Defendant claimed he was trying to use the restroom when the safety officers began "hassling" him. RP (Feb. 9) 34-35. Defendant said he mistook Professor Becker's office for a bathroom. RP (Feb. 9) 35, 41. Defendant then claimed he entered the office to investigate a noise that led him to believe a crime was in progress. RP (Feb. 9) 36, 46. Professor Becker testified

her office door is typically locked at night and confirmed defendant did not have permission to enter. RP (Feb. 9) 48, 50, 53-54.

The State presented evidence defendant expropriated University of Washington property prior to the alleged burglary. RP (Feb. 9) 56-83. Defendant's former girlfriend, Wendy Rupnow ("Rupnow"), testified defendant frequented the university campus. RP (Feb. 9) 59. Defendant attempted to give her a DVD player marked with a University of Washington inventory sticker around April 2009. RP(Feb. 9) 59-61, 74. In June, 2009, Rupnow found a University of Washington teleconference device inside a Puyallup storage unit she exclusively shared with defendant. RP (Feb. 9) 66-68; Ex. 28-31. Rupnow reported both items to the university and reported the teleconference device to the police. RP (Feb. 9) 62, 69-70. The University's Director of Information Technology testified the teleconference device went missing after a meeting in November, 2008, was worth about \$750.00 at the time and cost \$757.19 to replace. RP (Feb. 9) 110-112,116.

Defendant was the only defense witness called at trial. RP (Feb. 9) 130-190; (Feb. 10) 28-93. Defendant acknowledged prior convictions for robbery and burglary during his direct examination. RP (Feb. 9) 132-135. On cross-examination defendant explained the burglary was committed at North Seattle Community College when he stole from one of its buildings

at night. RP (Feb. 10) 84-85. Defendant then testified he entered the University of Washington Science building on the night of the charged offense to use the restroom. RP (Feb. 9) 136-137, 163. Defendant claimed he “naturally ... decided to investigate” Professor Becker’s office after hearing what sounded like rustling, a chair spinning, and a door closing. RP (Feb. 9) 138-139, 156; (Feb. 10) 37. Defendant explained he was being a “do-gooder” investigating a possible crime. RP (Feb. 9) 138-139; (Feb. 10) 74, 84-87. Defendant admitted he entered Professor Becker’s office without permission, that he pushed Sergeant Bailey, and “potentially struck” Officer Welk. RP (Feb. 9) 139, 144, 149-151, 155, 177, 179; (Feb 10) 35, 39-40, 65. Defendant acknowledged he provided the alias “Kevin Luciano” to police. RP (Feb. 9) 167-168; (Feb. 10) 61. Defendant also admitted he had a key to the storage unit where the stolen university teleconference device was found, yet maintained he was not responsible for putting it there. RP (Feb. 9) 160-162.

C. ARGUMENT.

1. IN THE ABSENCE OF A LIMITING INSTRUCTION DEFENDANT’S EXPROPRIATION OF UNIVERSITY PROPERTY WAS ADMISSIBLE FOR ANY RELEVANT PURPOSE.

“When error may be obviated by an instruction to the jury, the error is waived unless an instruction is requested.” *State v. Ramirez*, 62

Wn. App. 301, 305, 814 P.2d 227 (1991) (citing *State v. Barber*, 38 Wn. App. 758, 771, 689 P.2d 1099 (1984), *review denied*, 103 Wn.2d 1013 (1985); see also *State v. Newbern*, 95 Wn. App. 277, 295-296, 975 P.2d 1041, *review denied*, 138 Wn.2d 1018 (1999); *State v. Ellard*, 46 Wn. App. 242, 244, 730 P.2d 109 (1986), *review denied*, 108 Wn.2d 1011 (1987); see also *State v. Russell*, 171 Wn.2d 118, 249 P.3d 604 (2011); *State v. Dow*, 162 Wn. App. 324, 253 P.3d 476 (2011). The decision to forego a limiting instruction for evidence admitted under ER 404(b) may be a legitimate trial tactic to avoid reemphasizing damaging evidence. *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009) (citations omitted).

Evidence defendant expropriated a University of Washington DVD player and teleconference device was adduced over his objection pursuant ER 404(b). RP (Jan. 7) 51-55, 79. Unlike the DVD player, the teleconference device was independently admissible as the stolen property defendant was charged with unlawfully possessing in Count IV. RP (Jan. 7) 7-8, 49, 51-52, 58, 64-65; CP 76 Instruction No. 35, 132-134. The trial court ruled both items would be admissible under ER 404(b) as proof of defendant's intent to commit the charged burglary. RP (Jan. 7) 58, 64, 79-79; (Feb. 10) 12-14; CP 31-32.

The State proposed the following limiting instruction for the DVD player:

“Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony regarding the defendant’s previously possessing a DVD payer that had marking showing the DVD player belonged to the University of Washington—Tacoma. This evidence may be considered by you only for the purpose of determining if the defendant entered into the faculty suite area of the Science Building and/or Professor Becker’s private office with the intent to commit a crime. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.”

CP 139-140; RP (Feb. 10) 103. Defendant objected on the basis that a limiting instruction would unduly emphasize the evidence. RP (Feb. 10) 103-106; 127-128. The court refrained from issuing a limiting instruction over defendant’s objection. RP (Feb. 10) 107, 129; CP 139-140. Defendant did not request an instruction as to the teleconference device. CP 135-138; RP (Feb. 10) 101-125.

Defendant waived his right to appeal the use of the challenged evidence as proof of his intent to commit burglary. The teleconference device was the evidentiary basis for the possession of stolen property alleged in Count IV, so in the absence of a limiting instruction it was admissible as to any count for which it was relevant. *See State v. Bradford*, 60 Wn. App. 857, 862, 808 P.2d 174 (1991). The concern attending the DVD player is that the jurors might consider it beyond its limited purpose. That is precisely the type of error a properly worded limiting instruction would have prevented since jurors are presumed to follow their instructions. *See generally, State v. Bythrow*, 114 Wn.2d 713,

720-721, 790 P.2d 154 (1990); *Ramirez*, 62 Wn. App. at 305, 814 P.2d 227 (1991) (citing *State v. Grisby*, 97 Wn.2d 493, 400, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 4466 (1983)). Defendant nevertheless objected to a limiting instruction as to the DVD player and did not request one as to the teleconference device. RP (Jan. 7) 51-55, 79; (Feb. 10) 103-106; 127-128; CP 135-138. The record indicates defendant believed a limiting instruction would undermine his argument that both items were immaterial to the case by emphasizing the State's theory of their relevance. RP (Feb. 10) 161-163, 170-172, 176-177. Defendant's decision to forego limiting instructions was valid trial strategy. See *Yarbrough*, 151 Wn. App. at 90. The waiver accompanying that decision was not affected by the fact the strategy proved unsuccessful. Defendant's claim of error pertaining to evidence he expropriated university property was not preserved for review.

2. DEFENDANT FAILED TO PROVE THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE PROSECUTION TO PRESENT EVIDENCE HE BURGLARIZED NORTH SEATTLE COMMUNITY COLLEGE TO PROVE HIS INTENT TO BURGLARIZE THE UNIVERSITY OF WASHINGTON.

Evidence of similar crimes is admissible to prove intent and absence of mistake when its probative value outweighs its prejudicial

effect. ER 404(b);⁴ *State v. Bythrow*, 114 Wn.2d 713, 719, 790 P.2d 154 (1990); *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); *see also State v. Johnson*, 159 Wn. App. 766, 773, 247 P.3d 11 (2011); *State v. Young*, 158 Wn. App. 707, 243 P.3d 172 (2010); *State v. Medrano*, 80 Wn. App. 108, 113, 906 P.2d 982 (1995) (prior burglary admissible prove intent to commit subsequent burglary); *State v. Eastabrook*, 58 Wn. App. 805, 812-813, 795 P.2d 151 (1990);⁵ *State v. Donald*, 68 Wn. App. 543, 546-547, 844 P.2d 447 (1993);⁶ *State v. Toennis*, 52 Wn. App. 176, 186, 758 P.2d 539 (1988);⁷ *State v. Mercer*, 34 Wn. App. 654, 660, 663 P.2d 857 (1983)); *State v. Anderson*, 42 Wn. App. 659, 665, 713 P.2d 145 (1986); *State v. Evans*, 45 Wn. App. 611, 616, 726 P.2d 1009 (1986);⁸ *Ramirez*, 46 Wn. App. at 228; *State v. Potter*, 31 Wn. App. 883, 885, 645 P.2d 60 (1982);⁹ *State v. Hubbard*, 27 Wn. App. 61, 63, 615 P.2d 1325

⁴ ER 404(b) “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.”

⁵ *Eastabrook*, 58 Wn. App. at 812-813 (previous burglary properly admitted to prove intent in a separate burglary trial despite defense of mistaken identity).

⁶ *Donald*, 68 Wn. App. 543, 546-547 (evidence of previous visits to emergency room to fraudulently obtain prescription drugs more probative than prejudicial to prove intent to obtain controlled substances by fraud)

⁷ *Toennis*, 52 Wn. App. at 186 (evidence of previous mistreatment properly admitted to rebut claim victim was struck without the requisite mental state).

⁸ *Evans*, 45 Wn. App. at 616 (testimony Evans set fire to his home nine years before relevant to show he knowingly started a subsequent house fire).

⁹ *Potter*, 31 Wn. App. at 885 (similar incident that occurred twenty two months earlier properly admitted where reckless endangerment defendant claimed he drove without the requisite mental state).

(1980);¹⁰ *State v. Brown*, 30 Wn. App. 344, 347, 633 P.2d 1351 (1981). To admit evidence under ER 404(b) a 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 charged crime, and (4) weigh the probative value against the prejudicial effect.” *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) citing *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995).

Criminal intent is “[a] state of mind existing at the time a person commits an offense and may be shown by act, circumstances and inferences deducible therefrom.” See *State v. Powell*, 126 Wn.2d 244, 261, 893 P.2d 615 (1995) (citing Black’s Law Dictionary 810 (6th rev. ed. 1990) (citations omitted)). A defendant places intent at issue by pleading the act for which he or she is charged was done innocently. See *State v. Bythrow*, 114 Wn.2d at 719 (previous robbery admissible to rebut claim of coincidental presence at a subsequent robbery); *State v. Womac*, 130 Wn. App. 450, 456-457, 123 P.3d 528 (2005); *State v. Medrano*, 80 Wn. App. 108, 113; *Ramirez*, 46 Wn. App. at 223; *United States v. Johnson*, 27

¹⁰ *Hubbard*, 27 Wn. App. at 63 (prior drug sales properly admitted to rebut Hubbard’s claim he exchanged drugs for money without an intent to sell).

F.3d 1186 (6th Cir. 1994). A defendant also risks “opening the door” to otherwise inadmissible evidence when he or she insists on presenting a favored version of a charged offense. *See generally, State v. Hartzell*, 156 Wn. App. 918, 932, 237 P.3d 928 (2010); *State v. Gallagher*, 112 Wn. App. 601, 51 P.3d 100 (2002).

“To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves. Wigmore calls this the “abnormal factor” that ties the acts together. *State v. Wade*, 98 Wn. App. 328, 335, 989 P.2d 576 (1999) (*citing* John H. Wigmore on Evidence § 302). “Once this connection is established, then other reasonable inferences, such as intent ... can logically flow from introduction of the prior acts.” *Id*; *see also State v. Holmes*, 43 Wn. App. 397, 400-401, 717 P.2d 766 (1986). Evidence of any time lapse between a prior bad act and the present one affects weight rather than the admissibility of the evidence. *Evans*, 45 Wn. App. at 617 (time lapse of nine years between prior bad act and charged offense)(*citing State v. Bouchard*, 31 Wn. App. 381, 386, 639 P.2d 761, *review denied*, 97 Wn.2d 1021 (1982)). “In prosecuting specific intent crimes, prior acts evidence may often be the only method of proving intent.” *Johnson*, 27 F.3d at 1192 (*citing United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975)). “[Appellate courts] review the admission of evidence under ER 404(b) for an abuse of discretion. *Johnson*, 159 Wn. App. at 773 (*citing Foxhoven*,

161 Wn.2d at 174). “The trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds or reasons.”

Johnson, 159 Wn. App. at 773 (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

The trial court was presented evidence of defendant’s prior burglary of North Seattle Community College before and after defendant’s testimony at two hearings held outside the presence of the jury. RP (Jan. 7) 53-82; (Feb. 10) 14-27. At each hearing the State moved to admit evidence detailing defendant’s burglary of North Seattle Community College under ER 404(b) as evidence defendant intended to burglarize the University of Washington. RP (Jan.7) 53-82; (Feb. 10) 14-27. That evidence showed defendant entered a building at the North Seattle campus without permission at a time when it was closed to the public. RP (Jan.7) 53-82; (Feb. 10) 14-27. Defendant falsely informed the security officer that interrupted him that he had been admitted into the building by a member of the maintenance crew. RP (Feb. 10) 19. Defendant nervously paced around, feigned use of the restroom and ran for the exit. RP (Feb. 10) 20-21. Defendant was apprehended by the Seattle Police after struggling with security. RP (Feb.10) 21. Defendant possessed a master key to the building, a blank employee identification stolen from the president’s office, and a college credit card. RP (Jan. 7) 66, 72; (Feb.10) 21. Defendant’s backpack contained gloves and a stolen laptop computer. RP (Jan. 7) 70; (Feb. 10) 23. The court excluded evidence of the prior

burglary at the first hearing provided defendant refrained from “opening the door” to it at trial; the evidence was not presented in the State’s case-in-chief. RP (Jan. 7) 78; CP 31-32; (Feb. 9) 132.

Defendant testified after the State rested. RP (Feb. 9) 132.

Defendant testified regarding his prior convictions for robbery and burglary, depicting himself as a person unfairly mistrusted by others despite his efforts to overcome past mistakes. RP (Feb. 9) 132-135, 158-159, 169-170. Defendant then provided an innocent explanation for the incident at the University of Washington. RP (Feb. 9) 134-136.

Defendant claimed he entered the Science Building shortly after 8:15 p.m. to use the restroom. RP (Feb.9) 135, 137. Defendant averred he was a “do-gooder” who “naturally ... decided to investigate” noises he heard in Professor Becker’s office; he said his backpack was for the gym. RP (Feb. 9) 135, 138-139, 156. Defendant claimed the fight with the officers was the result of their overreaction to his innocent investigation. RP (Feb. 9) 144-145, 147-153, 155-156.

The trial court reconsidered the admissibility of the prior burglary and ruled defendant’s testimony had made it “more probative than prejudicial on the issue of [his] intent.” RP (Feb. 10) 17-18, 26-27. The State elicited details about that incident during cross-examination. RP (Feb.10) 84-86. The trial court issued the following limiting instruction to the jury:

“Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony regarding the defendant’s activities at North Seattle Community College. This evidence may be considered by you only for the purpose of determining if the defendant entered into the faculty suite area and/or Professor Becker’s private office with the intent to commit a crime. This evidence may also be considered by you only for the purpose of determining whether the defendant entered faculty suite area and/or Professor Becker’s private faculty office by accident or mistake. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.”

CP 47 Instruction No. 6.

Defendant’s claim he was mistaken as a burglar while innocently investigating a noise in Professor Becker’s Office put his intent at issue. RP (Feb. 9) 135, 138-139, 156. The information before the trial court when it ruled the challenged evidence was admissible directly refuted defendant’s claim of mistake by showing he had targeted the University of Washington for theft. RP (Jan. 7) 53-82; (Feb. 10) 14-27. The two burglaries were linked by remarkably common features that could not be fairly characterized as coincidence. RP (Jan. 7) 19, 66-72; (Feb. 7) 68-69, 76-79, 82-85, 100 -127; (Feb. 8) 5, 65-67; (Feb. 9) 26-27, 31-54; (Feb. 10) 14-27. In each burglary defendant unlawfully entered portions of college buildings after their hours of operation with a backpack before being interrupted by campus security and attempting escape through a ruse supplemented by force. RP (Jan. 7) 19, 66-72; (Feb. 7) 68-69, 76-79, 82-85, 100 -127; (Feb. 8) 5, 65-67; (Feb. 9) 26-27, 31-54; (Feb. 10) 20-23; *See*

also RP (Feb. 10) 84-85.¹¹ When defendant burglarized North Seattle Community College he stole a master key, blank college identification and credit card, each capable giving him future access to college property. RP (Jan. 7) 66, 72; (Feb.10) 21.¹² The stolen identification card was taken from president's desk. *Id.* At the University of Washington defendant was interrupted in the dark at Professor Becker's desk after Sergeant Bailey heard rustling and saw Professor Becker's papers moving about. RP (Feb. 7) 68-69, 74-76. The commonality between the two incidents gave rise to a reasonable inference defendant entered Professor Becker's office in search of a University of Washington access device. That inference was reinforced by defendant's intervening use of a fake name in a failed attempt to secure university employment that would be accompanied by a university identification card. RP (Feb. 7) 97; (Feb.9)

¹¹ The proffer showed defendant entered North Seattle Community College sometime before 7:20 a.m. Defendant's subsequent testimony reinforced the information the court had available to it during its ruling by showing defendant actually entered the building at 10:30 p.m. with a key he stole from a janitor's cart. RP(Feb. 10) 84-85. Citations beyond RP (Feb. 10) 27 refer to testimony defendant gave following the court's ruling. Defendant testified he decided to investigate Professor Becker's office because he believed the noise he heard was indicative of a crime in progress. RP (Feb. 10) 33-34. On redirect he explained he decided to investigate the potential theft because he "pride[s] [him]self on being a do-gooder," and that he is trying to "rectify" his less than "squeaky clean past[.]" RP (Feb. 10) 74, 84-85.

¹² This evidence also would have been admissible to prove a scheme to steal from college campuses. Evidence of markedly similar acts of misconduct against similar victims is admissible to prove common scheme or plan. *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995) (citing ER 404(b)); see also *State v. DeVincentis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003); *State v. Carleton*, 82 Wn. App. 680, 683-684, 919 P.2d 128 (1996). The appropriate relevance analysis for "common scheme" evidence "focuse[s] on the similarity between the prior acts and the charged crime rather than the uniqueness of the individual acts. *State v. DeVincentis*, 150 Wn.2d at 19 (citation omitted).

88, 92-96. Defendant betrayed his overarching criminal purpose in that effort when he used information obtained from it to trick the University of Washington officers that interrupted his burglary into believing he was a university employee. RP (Feb.7) 96-97, 100; (Feb. 8) 69. Defendant attempted a similar variation of that ruse during the North Seattle Community College burglary when he told the security officer that interrupted him that he was admitted into the building by college staff. RP (Feb. 10) 19.

The common features of the North Seattle Community College burglary shed light on defendant's intent to burglarize the University of Washington by placing his conduct context. Any potential for residual prejudice was neutralized when the trial court issued an appropriate limiting instruction. The trial court's ruling should be affirmed because defendant has failed to prove it was an abuse of discretion.¹³

¹³ The claimed error would be harmless if proved due to the persuasive evidence supporting the jury's verdict on each count. Errors on rulings concerning admission of other-crimes evidence are not of constitutional magnitude and do not result in automatic reversal. If error is found, the reviewing court must determine, within reasonable probability, whether the outcome of the trial would have been different but for the error. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984) (citing *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982)); *State v. Mezquia*, 129 Wn. App. 118, 118 P.3d 378 (2005), review denied, 163 Wn.2d 1046, 187 P.3d 751 (2008).

3. UNDISPUTED EVIDENCE PLACED THE
 STOLEN PROPERTY'S VALUE WITHIN
 THE APPLICABLE STATUTORY RANGE.

“The standard for determining the sufficiency of the evidence on appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trial of fact could have found guilt beyond a reasonable doubt.” *State v. Hermann*, 138 Wn. App. 596, 602, 158 P.3d 96 (2007) (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). “In challenging the sufficiency of the evidence, the appellant admits the truth of the State’s evidence and all inferences that can reasonably be drawn from it.” *Id.* (citing *State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280 (2002)). “Circumstantial and direct evidence have equal weight. *Id.* (citing *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004)). “The State bears the burden of proving all the elements of the crime charged beyond a reasonable doubt.” *Id.* (citing *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983)).

Under former RCW 9A.56.160(1)(a) the State was required to prove the stolen property was worth between \$250.00 and \$1,500.00 at the time of the offense. CP 74 Instruction No. 35, 132-134; 1995 Wash. Legis. Ch. 129 § 15. “Value” “is the market value of the property ... at the time and in the approximate area of the criminal act.” *State v. Longshore*, 141 Wn.2d 414, 429, 5 P.3d 1256 (2000) (citing RCW 9A.56.010(18)(a)).

In this state “Market value” is “defined as the price which a well-informed buyer would pay to a well-informed seller, where neither is obligated to enter into the transaction.” *Id.* (citing *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995); see also *State v. Morley*, 119 Wn. App. 939, 943, 83 P.3d 1023 (2004)).

“It is longstanding and well-established that a property owner may testify as to the property’s market value without being qualified as an expert....” *State v. McPhee*, 156 Wn. App. 44, 65, 230 P.3d 284 (2010), review denied, 169 Wn.2d 1028, 241 P.3d 413 (2011)¹⁴ (owner’s testimony as to cost combined with admission of the stolen property as evidence “more than sufficient” to prove value) (citing *State v. Hammond*, 6 Wn. App. 459, 461, 493 P.2d 1249 (1972)). “The owner of property is presumed to be familiar with its value by reason of inquiries, comparisons, purchases, and sale.” *Hammond*, 6 Wn. App. at 461, (citing *Wicklund v. Allraum*, 122 Wash. 546, 211 P. 760 (1922)). “In determining the value of an item, evidence of price paid is entitled to great weight. *Hermann*, 138 Wn. App. at 602 (citing *State v. Melrose*, 2 Wn. App. 824, 831, 470 P.2d 552 (1950)). “[R]eplacement cost is [also] a

¹⁴ *McPhee*, 156 Wn. App. at 65-66 (to prove second degree possession of stolen property owner’s testimony he traded two fishing permits worth \$1,500 to a sporting goods store owner in exchange for the stolen binoculars combined with the admission of those binoculars and some stolen “tusks” as evidence was “more than sufficient to meet the prima facie standard to send the case to the jury” where the State had to establish value between \$250 and \$1,500 at the time of the offense).

recognized factor to be considered in determining market value.”

Hammond, 6 Wn. App. at 462 (citations omitted). “The jury can consider changes in the property’s condition that would affect its market value ... Value need not be proven by direct evidence as the jury may draw reasonable inferences from the evidence.” *Id.* (internal citations omitted).

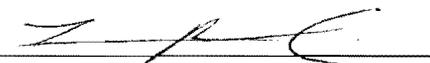
The teleconference device’s value was not disputed at trial. (Feb.9) 117-119. University of Washington’s Director of Information Technology testified the device was worth “about \$750[.00],” but more than \$250.00, at the time and cost \$757.19 to replace. RP (Feb. 9)110-117. This undisputed testimony established the device was worth roughly three times as much as the statutory minimum value of \$250.00 and half as much as the statutory maximum value of \$1,500.00. The device’s serviceable condition was established when the director testified it went missing after being used for university business in November, 2008, and was returned to university service when it was recovered in June, 2009. RP (Feb. 9) 110-117; RP (Feb. 9) 110-117. The admitted photographs enhanced the juror’s ability to evaluate the credibility of that testimony as well as to make their own determinations about the device’s condition. Ex. 28-31. Defendant’s claim the jury received insufficient evidence of value is not supported by the record.

D. CONCLUSION.

An appropriately instructed jury convicted defendant as charged after receiving factually sufficient evidence that was properly admitted by the trial court. The challenged evidentiary ruling and verdict should be affirmed.

DATED: February 10, 2012

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Certificate of Service:

The undersigned certifies that on this day she delivered by u-file U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/10/12 Johanson
Date Signature

PIERCE COUNTY PROSECUTOR

February 10, 2012 - 3:14 PM

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