

FILED

MAR 22 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

31264-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JERRY WAYNE CLARK, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
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I.

ISSUES PRESENTED

- A. Did the trial court err in admitting the defendant's prior second degree theft conviction under ER 609(a)(2) and ER 609(b)?
- B. Assuming, *arguendo*, that the trial court did erroneously admit the prior conviction, was the error harmless?
- C. Is appellant precluded from claiming instructional error by court rule and case law?
- D. Assuming, *arguendo*, that defendant did preserve the issue for appeal, did the trial court improperly instruct the jury?

II.

STATEMENT OF THE CASE

The respondent accepts the appellant's statement for purposes of this appeal only.

III.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN ADMITTING THE DEFENDANT'S PRIOR CONVICTION FOR SECOND DEGREE THEFT UNDER ER 609(a)(2).

The defendant claims that the trial court erred when it admitted his prior second degree theft conviction for impeachment purposes under Evidence Rule ("ER") 609(a)(1). Initially, it is important to note that the trial court actually admitted the prior conviction under ER 609(a)(2) rather than (a)(1) because second degree theft is a crime of dishonesty.

ER 609(a) provides, in pertinent part:

For the purpose of attacking the credibility of a witness in a criminal...case, evidence that the witness has been convicted of a crime *shall* be admitted if elicited from the witness or established by public record...but only if the crime... (2) involved dishonesty or false statement...

ER 609(a)(2) (Emphasis added).

The Supreme Court has held that crimes of theft, *per se* involve dishonesty. *State v. Ray*, 116 Wn.2d 531, 545-546, 806 P.2d 1220 (1991). Defendant does not contest that second degree theft, a felony, is a crime of dishonesty.

Defendant does contend that the trial court erred by not completing a thorough balancing of the prejudicial impact versus the probative value

of admitting the prior conviction. The Supreme Court resolved this issue when it ruled that “crimes of theft involve dishonesty and are *per se* admissible for impeachment purposes under ER 609(a)(2). *State v. Ray*, 116 Wn.2d at 545.

Defendant argues that the trial court must complete the balancing of prejudice versus probative value according to the factors set out in *State v. Alexis*, 95 Wn.2d 15, 621 P.2d 1269 (1980), before it may admit a prior conviction into evidence. A careful reading of the *Alexis* decision and its progeny reveals that the focus of that line of cases is ER 609(a)(1), not ER 609(b). Additionally, the “*Alexis* factors” were proffered by the Supreme Court as permissive, not mandatory, considerations. *Alexis*, 95 Wn.2d at 19. In *State v. Gomez*, 75 Wn. App. 648, 651, 880 P.2d 65 (1994), the Court specifically held that the trial court had to balance the *Alexis* factors to determine whether the probative value of the prior conviction was greater than its prejudicial effect before a prior conviction could be properly admitted for impeachment under ER 609(a)(1). As noted, here, the trial court admitted the defendant’s prior conviction under ER 609(a)(2).

The defendant has blurred the very clear distinction between ER 609(a)(1) and ER 609(a)(2). ER 609(a)(2) establishes the *per se* admissibility of crimes of dishonesty, whether misdemeanor or felony.

“ER 609(a)(2) differs significantly from ER 609(a)(1) because, if the conviction offered for impeachment purposes is within the scope of ER 609(a)(2), it is automatically admissible for impeachment purposes; the trial court does not engage in a balancing of probative value against prejudicial effect.” *State v. Brown*, 113 Wn.2d 520, 533, 782 P.2d 1013, 787 P.2d 906 (1989).

The defendant claims the trial court erred in not engaging in a complete balancing of prejudice versus probative value of admitting defendant’s prior theft felony conviction into evidence. As noted, the trial court has no discretion “...[I]f a prior conviction involves a crime of ‘dishonesty or false statement’, it is automatically admissible under ER 609(a)(2). The trial judge *has no discretion* and the rule applies regardless of whether the prior conviction was for a felony or misdemeanor offense.” *State v. Jones*, 101 Wn.2d 113, 117-18, 677 P.2d 131 (1984) (*overruled other grounds State v. Brown*, 113 Wash.2d 520, 782 P.2d 1013 (1989)) (emphasis added). Accordingly, the trial court committed no error in admitting the prior conviction of second degree theft under ER 609(a)(2).

Nevertheless ER 609(b) requires the trial court to engage in the balancing test as follows, in pertinent part:

Evidence of a prior conviction under this rule is not admissible if a period of time of more than 10 years has elapsed since the date of the conviction or of the release of the witness from confinement...unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

ER 609(b). Here, the record reflects the process the trial court followed in determining whether to admit defendant's prior felony theft conviction. RP 8-10.

In *Alexis*, the Court suggested that the trial court might consider the following factors as part of its balancing of probative value versus prejudice: (1) the length of defendant's criminal record, (2) the remoteness of the prior conviction, (3) the nature of the prior crime, (4) the age of defendant, (5) the centrality of the credibility issue, and (6) the impeachment value of the prior conviction. *Id.*, 95 Wn.2d at 19.

Applying the *Alexis* factors to defendant's prior conviction inferentially, the trial court noted that defendant's prior felony theft conviction was for a crime of dishonesty committed 14 years earlier which is covered by *Alexis* factors (2), (3), (4), and (6). RP 9. The trial court considered *Alexis* factors (1) and (2) when it noted that defendant had been convicted of other crimes since his second degree theft conviction 14 years earlier. RP 9. The trial court next applied *Alexis* factors (3), (5) and (6) when it observed that the focus in balancing prejudice and probative

value in cases like this one is the nature of the offense and to what degree credibility is an important or central factor in the case. RP 9. The trial court specifically noted that in this case defendant was denying participation in both the assault and the eluding. RP 9. The trial court applied *Alexis* factors (5) and (6) when it observed that the lack of forensic evidence in this case made the evaluation of credibility and accuracy of the witnesses the focal point of the evidence. RP 10. The trial court concluded that the nature of this case supported admissibility of defendant's prior felony theft conviction for purposes of impeachment as a factor for the jury to consider in evaluating the evidence in the case. RP 10.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). That standard is well-recognized. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). The court's ruling regarding admissibility may be affirmed on any grounds adequately supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). A trial court abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). Clearly, the record evinces a

sufficient basis to validate the admission of the defendant's prior conviction based upon the trial court's exercise of discretion.

B. ASSUMING, *ARGUENDO*, THAT THE TRIAL COURT DID ERR IN ADMITTING THE DEFENDANT'S PRIOR CONVICTION FOR THEFT, THE ERROR WAS HARMLESS.

Assuming, *arguendo* that the trial court erred in admitting the prior conviction, the error was clearly harmless. The standard of review for allegations of error in application of ER 609 was set forth in *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991).

The same non-constitutional harmless error standard that applies to ER 404 rulings also applies to ER 609(a) rulings. A ruling under ER 609 is not reversible error ' . . . unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'

Id. at 546 (citing *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). Here, the trial court instructed the jury that the prior conviction was to be used solely for the purpose of evaluating credibility. RP 260. A jury is presumed to follow the court's instructions. *State v. Guizzotti*, 60 Wn. App. 289, 296, 803 P.2d 808, *review denied*, 116 Wn.2d 1026 (1991). The record reflects that the admission of defendant's prior conviction did not prejudice the jury's evaluation of his credibility since

the jury acquitted him of the second degree assault charge. Accordingly, defendant has not satisfied the threshold burden of proving that the outcome of the trial would have been materially affected by such an error if it had occurred.

C. DEFENDANT IS PRECLUDED FROM CLAIMING INSTRUCTIONAL ERROR BY COURT RULE AND CASE LAW.

Initially, it should be noted that the defendant neither objected to nor took exception to the instructions as proffered by the trial court. Rule of Appellate Procedure (“RAP”) 2.5(a) provides that appellate courts will not entertain issues not raised before the trial court. The rule promotes the policy of encouraging the efficient use of judicial resources by Appellate Courts refusing to sanction a party’s failure to note an error at trial which the trial court, if afforded the chance, might have been able to correct. The timely objection to the trial court would thus avoid an appeal based upon said error and the possibility of a new trial. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Here, defendant made no such objection to the trial court, yet now seeks to avoid the consequences of his choice by claiming that the error is of constitutional magnitude.

D. ASSUMING, *ARGUENDO*, THAT DEFENDANT DID PRESERVE THE ISSUE FOR APPEAL, THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.

Defendant contends on appeal that the instructions *directed* the jury to convict the defendant. Nevertheless, it is reasonable to infer that defendant did not object at trial to the court's jury instructions because the instructions were a proper advisement of the law to be applied to this case. Defendant's tactical choice does not elevate the claimed error to one of constitutional magnitude.

The rules from which trial courts draw guidance to conduct error-free trials impose a specific, affirmative requirement upon the parties with regard to jury instructions. CrR 6.15(c) mandates that timely and well stated objections be made to instructions given or refused in order that the trial court may have the opportunity to correct any error. Defendant's contention that the trial court committed an instructional error must first overcome the procedural barriers.

It is well-established that instructional errors may only be raised for the first time on appeal when such errors are of a "manifest" constitutional nature to avoid serious injustice to the accused. *State v. Scott*, 110 Wn.2d at 686. Defendant contends that the trial court committed such a "manifest" error in instructing the jury. However, defendant takes issue only with the

part of the instruction for the eluding charge that advises the jury that: if its finds from the evidence that all of the elements have been proved beyond a reasonable doubt, then it is the jury's duty to return a verdict of guilty.¹ Defendant's argument does not acknowledge that the very next paragraph of the subject instruction directs that the jury has a "duty to return a verdict of not guilty" if it has a reasonable doubt regarding any one of the listed elements. RP 258. No matter how defendant seeks to interpret the language of the elements instruction, there is a condition precedent to the jury having any "duty" to convict whatsoever, that is, finding that the listed elements have been proved beyond a reasonable doubt.

Defendant proffers that this Court should return to the form of jury instruction that was accepted in pre-Constitutional, territorial Washington. Specifically, that the trial court instructs the jury that it "should" or "may" find defendant guilty if the State proved its case. *Leonard v. Territory*, 2 Wash.Terr. 381, 7 P. 872 (1885). Defendant assures this Court that returning to the common law practice that a jury's responsibility is described in terms of "should" or "may" would not judicially institutionalize jury nullification in our system; rather, it would merely ensure that the jury is free

¹ Notably defendant does not take issue with the trial court's elements instruction for the assault charge that included the exact same language regarding the jury's "duty" once it has found the condition precedent has been satisfied by proof beyond a reasonable doubt.

to render appropriate verdicts, including verdicts notwithstanding the evidence.

The dangers of such a system are precisely why it is no longer utilized. If a jury can acquit notwithstanding the evidence, then a jury can just as easily convict. The mere possibility of the trial court not detecting such a verdict is why our system of justice is structured as it exists today. Caution should be our guiding principle whenever we analyze how to advise a jury of how to fulfill its responsibilities lest we find ourselves no longer living as a society based upon the rule of law.

Defendant contends that this Court wrongly decided this very issue in its decision rendered in *State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319 (1998). Defendant argues that this Court subsequently exacerbated this wrong decision in rendering its decisions in *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024, 980 P.2d 1285 (1999); and *State v. Brown*, 130 Wn. App. 767, 124 P.3d 663 (2005). *State v. Meggyesy* and *State v. Bonisisio* held that altering the instructions to advise the jury that it “may” convict was the equivalent of notifying, and thus sanctioning, the jury of its power to acquit notwithstanding the evidence. *State v. Meggyesy*, 90 Wn. App. at 700-01; *State v. Bonisisio*, 92 Wn. App. at 794.

Defendant attempts to distinguish his case from *Meggyesy* and *Bonisisio* arguing that in those cases the challenges were that the instructions were unconstitutional, whereas, herein, defendant is contending that the instruction was misleading. This argument was previously presented to this Court in *State v. Brown*, 130 Wn. App. 767, 124 P.3d 663 (2005), and rejected. In *State v. Brown*, this Court noted that its decision in *Meggyesy* held that instructing the jury it had a “duty” to convict if it found the elements were proved beyond a reasonable doubt did not misstate the law. *Meggyesy*, 90 Wn. App. at 700-01. And in *Bonisisio*, 92 Wn. App. at 794, this Court held that the trial court did not err in instructing the jury that it had a duty to convict if it found that the State had proved all the elements beyond a reasonable doubt.

The purpose of instructions is to provide the jury with the law to be applied to the facts found in a specific case. *State v. Borrero*, 147 Wn.2d 353, 362, 58 P.3d 245 (2002). In *State v. Brown*, this Court held that jury nullification is not an applicable law to be applied in any case. *Brown*, 130 Wn. App. at 771.

The State respectfully disagrees with defendant’s perspective and asks the Court to find no such error occurred. The constitutional error exception is not intended to afford defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.

Id. at 687. Finally, the *Scott* Court noted that the exception does not help a defendant when the asserted error is harmless beyond a reasonable doubt. *Id.*, at 687, citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Accordingly, the State respectfully submits that no error was committed instructing the jury.

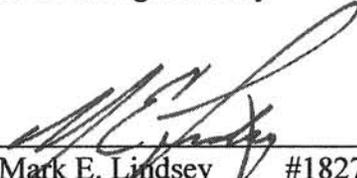
IV.

CONCLUSION

For the reasons stated the defendant's conviction should be affirmed.

Dated this 22nd day of March, 2013.

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