

No. 98591-0

NO. 78704-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

LYNELL DENHAM,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE JUDGE HELEN HALPERT

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

The defendant committed an elaborate jewelry store heist and subsequently pawned some of the 600 pieces of stolen jewelry. He raises the following issues:

1. Did the affidavits for search warrants of the defendant's home and cellphone records provide sufficient facts to lead a reasonable person to conclude evidence of the defendant's criminal activity would be found at his home and in his cellphone records?

2. Prior to committing the current crimes the defendant gave a statement to detectives who were investigating a number of sophisticated commercial burglaries. Did the trial court correctly rule that the defendant's statement was admissible to show he had the knowledge and expertise to commit the charged burglary?

3. Can the defendant avail himself of the cumulative error doctrine?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

By way of a bench trial, the defendant was found guilty of second-degree burglary and first-degree trafficking in stolen property. CP 1-2, 319-25. With an offender score of 26 on the

burglary charge and 16 on the trafficking charge, the defendant received a term of confinement of 78 months. CP 332-40.

## **2. SUBSTANTIVE FACTS**

Frank Mallinak owns Mallinak Design Jewelers located in a strip mall in Kirkland. 6RP<sup>1</sup> 317-19. His jewelry store has an elaborate and comprehensive security system; with motion detectors strategically placed throughout and magnetic contact detectors attached to each door that trip an alarm if a door is opened. 6RP 322.

At the back of the store is a utility room that contains phone and electrical lines for the strip mall. 6RP 326, 334. The utility room has two doors. One is a steel door that exits into the alley and cannot be opened without a key. 6RP 334-37. The other is a solid wood door that leads from the utility room into the store. 6RP 339, 347. Along with a magnetic contact detector, there is a steel bar across the middle of the door to prevent anyone from prying the door open from the utility room. 6RP 339.

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP—2/13/18, 2RP—2/14/18, 3RP—2/20/18, 4RP—3/5/18, 5RP—3/16/18, 6RP—3/22/18, 7RP—3/28/18, 8RP—3/29/18, 9RP—4/2/18, 10RP—4/3/18, 11RP—4/12/18, 12RP—4/16/18, 13RP—6/15/18, and 14RP—7/19/18.

Mallinak's safe where he keeps his most expensive jewelry is the highest rated safe in the industry. 6RP 322. The safe has two separate locks, is five feet tall, and weighs 3000 pounds. 6RP 332, 381-82. The safe has an electromagnetic proximity detector, meaning that a person cannot get near the safe without triggering an alarm. 6RP 322, 329. The safe door also has a contact detector that triggers an alarm if opened. 6RP 329. Mallinak's entire alarm system is monitored in real time, with a cellular backup system in case the phone lines are cut. 6RP 322.

On Monday November 14, 2016, Mallinak arrived at work only to discover that over the weekend someone had bypassed his entire security system, drilled out his safe, and stolen over 600 pieces of jewelry and stones valued at over \$300,000. 6RP 320; 9RP 787.

In the days prior to the weekend Mallinak had found the door leading into the alley unlocked – the first time that had occurred in the eight years Mallinak had been at that location. 6RP 335-36. Someone had also tampered with the door lock and it had to be replaced by a locksmith. 6RP 336-39. But the burglar had not gained access through the back door to commit the burglary, rather, access was made via the roof. 6RP 359.

There were shoe scuff marks on the side of the building where the burglar had scaled the building via utility pipes attached to the wall. 6RP 360. On the roof is an access hatch that leads into the utility room, padlocked on the inside to prevent entry. 6RP 359; 9RP 787-88. The padlock had been removed, indicating that someone had gained access to the utility room prior to the weekend and removed it -- likely when the door lock was tampered with and replaced. 6RP 359.

The door that exits into the alley was still locked. 6RP 356. Superglue had been injected into the lock; likely to prevent anyone from entering while the burglar spent time disabling the alarm system and breaking into Mallinak's safe. 6RP 356.

Once in the utility room the burglar still had to gain access to the store. To do this, the burglar took a power saw and cut the wood door into the store in half just below the steel bar on the inside of the door. 6RP 343-44; 9RP 787. This allowed the burglar to bypass the steel bar and the magnetic contact detector attached to the top of the door. Id.

Once inside the store the burglar located and cut all the wires to the alarm system. 6RP 341-42, 351. The burglar also disabled the two alarms attached to the safe. 6RP 379-83; 9RP

789. The burglar then used a high-powered drill to drill two holes into the safe, dislodged the safe's dial, and defeat the safe's two locking mechanisms. Id. The safe was cleaned out of some 600 pieces of jewelry and loose stones. 6RP 384; 10RP 792.

One of the pieces stolen was a 5.29 carat diamond valued at over \$30,000. 6RP 363; 9RP 793. The diamond had a serial number laser-etched into the stone and a GIA (Gemological Institute of America) certificate that described the stone in detail. 6RP 363-64. Another item stolen was a large distinctive aquamarine stone on a platinum necklace chain. 6RP 417.

On November 14, the same day Mallinak discovered he had been burglarized, the defendant pawned a number of gold jewelry clasps taken in the burglary to Topkick Jewelry and Loan for \$300. 7RP 461; 9RP 838, 842. On November 28, he pawned a diamond ring taken in the burglary to Topkick for \$60. 7RP 462-63; 9RP 838, 842. He also tried to pawn a gold necklace for \$2,000 to Topkick. 7RP 464-65.

On November 15, the defendant sold the 5.29 carat GIA certified diamond to Andy Le of Thien Phuoc Jewelry for \$29,000 in cash and gold. 9RP 701-17; 8RP 569-74; 10RP 954-55. He told Le his father was ill and he needed the money. 9RP 703. The

defendant came back a second time and tried to sell Le more jewelry, telling Le that his family was in the jewelry business. 9RP 719. Le noticed that the defendant was wearing a distinctive aquamarine necklace. 9RP 719-20.

On November 17, the defendant bought a Range Rover from All Right Auto. 9RP 685-86. He came in wearing a lot of jewelry. 9RP 689. He put down \$9,000 in cash for the vehicle. 9RP 686.

On November 21, the defendant pawned a sapphire ring and wedding band set taken in the burglary to Porcello's Jewelry for \$2,500. 7RP 481-84; 9RP 831. The defendant told the buyer that the jewelry was from his mother who had recently passed away. 7RP 485. Two days later the defendant traded a Rolex watch from some jewelry that he said was for his father. 7RP 487. He subsequently called Porcello's to inquire about selling some loose diamonds and sapphires. 7RP 487-88.

In early December the defendant reported to his community corrections officer. 9RP 765-66. He was driving the Range Rover and wearing a gold chained necklace with a large stone. 9RP 767-69. Asked where he obtained the necklace and vehicle, the defendant told his CCO that his family had come into some money. 9RP 768.

On December 29, police searched the defendant's Tacoma home and found two brand-new headlamps, a want ad for a power drill, a box for a power drill, wire crimpers, want ads for places to obtain money for jewelry, cutting oil used when drilling into metal, schematics for various safes and locking mechanisms, a camera tool that allows a person to put a camera lens through a drilled hole, and a number of books on electrical wiring. 10RP 926-46. The plastic caps on the headlamps were similar to a plastic cap found on the floor in Mallinak's Jewelry. 10RP 928-31.

Detectives also obtained the phone records for two cellphones used by the defendant. 8RP 603, 659; 10RP 856-62, 963, 968. While the defendant lives in Tacoma, over the weekend of the burglary his cellphone hit off the cell tower in the parking lot of the Mallinak's Kirkland store three times; once at 11:53 p.m. on Friday November 11<sup>th</sup>, once at 2:22 p.m. on Saturday November 12, and again at 2:42 p.m. on November 12. 8RP 628-42, 9RP 766.

On October 9, 2017, the defendant was charged with burglary and trafficking. CP 1-9. In a letter dated October 10, 2017, the defendant wrote to Mallinak. Trial Exhibit 10. In the letter the defendant professed that he had purchased jewelry in good

faith from a Ukrainian vendor that included items stolen in the burglary. Id. He instructed Mallinak to ask that all charges against him be dropped, whereupon he believed he could recover some of the stolen jewelry. Id.

The defendant did not testify. Additional facts are included in the sections below they pertain.

**C. ARGUMENT**

**1. THE WARRANT AFFIDAVITS PROVIDED SUFFICIENT FACTS FOR THE COURT TO ISSUE SEARCH WARRANTS FOR THE DEFENDANT'S HOME AND CELLPHONE RECORDS**

Detectives obtained a search warrant to search the defendant's home and a search warrant to obtain his cellphone records. The defendant asserts there was an insufficient nexus between his burglary and trafficking activities and his residence and cellphone, and thus, the search warrants should not have issued and the evidence obtained should have been suppressed. This claim has no merit. The facts in the warrant affidavits (CP 417-29) showed a clear nexus between the places to be searched and the defendant's criminal activity.

A search warrant may issue upon a determination of probable cause. State v. Clark, 143 Wn.2d 731, 747, 24 P.3d 1006

(2001). Probable cause exists if the supporting affidavit sets forth facts sufficient to establish a “reasonable inference” that the defendant is probably involved in criminal activity and evidence of the crime can be found at the place to be searched. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). “It is only the probability of criminal activity, not a prima facie showing of it; that governs probable cause.” State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

A warrant affidavit is evaluated “in a common sense manner, rather than hypertechnically.” State v. Lyons, 174 Wn.2d 354, 360, 275 P.3d 314 (2012). The issuing judge’s determination of probable cause is given great deference and is reviewed under an abuse of discretion standard. Maddox, 152 Wn.2d at 509. All doubts must be resolved in favor of the warrant’s validity. Id.

**a. The Defendant’s Home**

When it comes to the place to be searched, the affidavit must provide facts that would lead a reasonable person to believe evidence of criminal activity would be found at the location to be searched. Cole, 128 Wn.2d at 286. This nexus may not rely solely on an officer’s generalized conclusory statements. For example, in State v. Thein, the Court rejected conclusory language about the

general habits of drugs dealers; specifically, that drug dealers will always keep evidence of their criminal activity in their homes. 138 Wn.2d 133, 148-49, 977 P.2d 582 (1999). This type of “blanket inference” is insufficient. Id.

This is not to say that an officer’s experience should be ignored. Rather, it is the experience of police officers under the particular facts of the case, along with common sense, that inform a court whether the proper inferences can reasonably be drawn from the particular facts of a case. Id. In other words, “the facts stated, the inferences to be drawn, and the specificity required *must fall within the ambit of reasonableness.*” Id. (emphasis added).

While a general assertion that all drug dealers keep evidence of their criminal activities in their homes is insufficient, conclusions can be drawn about where evidence of other types of crimes might be found. For example, the Supreme Court in Thein cited with approval the conclusion reached in State v. Herzog, 73 Wn. App. 34, 56, 867 P.2d 648, rev. denied, 124 Wn.2d 1022 (1994). Thein, 138 Wn.2d at 149 n.4.

Herzog was suspected of having committed a number of rapes. Three victims described the suspect as wearing a striped polo shirt and carrying a towel. A warrant was obtained to search

Herzog's home for the shirt and towel even though that is not where the rapes occurred. The court noted that unlike narcotics that are inherently incriminating and thus might not be kept in a person's home, personal items are another matter.

We do not find it unreasonable to infer these items were in the possession of the defendant at his home. These were personal items of continuing utility and were not inherently incriminating. Under specific circumstances it may be reasonable to infer such items will likely be kept where the person lives.

Thein, at 149 n.4. The Court also cited with approval State v. Condon, 72 Wn. App. 638, 865 P.2d 521 (1993), rev. denied, 123 Wn.2d 1031 (1994). Thein, at 149 n.4.

Condon was accused of shooting and killing a man at the man's home. Police served a warrant to search Condon's home and discovered the murder weapon. Condon argued that the affidavit did not contain sufficient facts establishing that the murder weapon would be found at his residence, "as opposed to somewhere else." Condon, 72 Wn. App. at 644. The court upheld the warrant, citing the history of cases holding "that when the object of a search is a weapon used to commit a crime, it is reasonable to infer that the weapon is located at the perpetrator's residence, especially in cases where the perpetrator is unaware that police

have connected him to the crime.” Id. See also Wayne R. LaFave, Search and Seizure § 3.7(d), at 381-85 (3d ed. 1996) (“Where the object of the search is a weapon used in the crime or clothing worn at the time of the crime, the inference that the items are at the offender’s residence is especially compelling, at least in those cases where the perpetrator is unaware that the victim has been able to identify him to police”).

Even more likely to be kept in a suspect’s home are valuable items taken in a burglary or items used in committing a burglary.

[B]ecause stolen property is not inherently incriminating in the same way as narcotics and because it is usually not as readily concealable in other possible hiding places as a small stash of drugs, courts have been more willing to assume that such property will be found at the residence of the thief, burglar or robber.

Wayne R. LaFave, Search and Seizure § 3.7(d), at 381-84 (5<sup>th</sup> ed. 2012).

Factors the issuing judge considers in determining if it is reasonable to search a suspect’s home include the value of the items stolen, the ability to conceal the items, whether the suspect had the opportunity to return home after committing the burglary or theft, whether the suspect was aware he was a suspect, and whether the items sought by the warrant are everyday items used

by the perpetrator to commit the crime but otherwise having no criminal value. Id.<sup>2</sup>

Here, the defendant does not contest that the affidavit contained sufficient facts to believe he committed the burglary of Mallinak Design Jewelers, that he stole 600 pieces of jewelry and loose stones valued at some \$300,000, and that he trafficked a 5.29ct diamond and other items stolen in the burglary. What he asserts is that it was not reasonable to infer that any of the remaining 500 plus stolen jewelry pieces, or any of the tools used

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<sup>2</sup> LaFave cited a number of examples: See *State v. Ricci*, 472 A.2d 291 (R.I.1984) (defendant trying to sell stolen earrings provided probable cause to search the defendant's jewelry business even though the attempted sale occurred elsewhere: His store was the likely location to hide the large quantity of stolen jewelry still missing); *United States v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991) (where some of the fruits of a jewelry store robbery were found in Blakeney's car, there was probable cause to search his home for the rest of the jewelry, given the "likelihood" that it was "concealed in an accessible, yet private location"); *United States v. Jackson*, 756 F.2d 703 (9th Cir. 1985) (It was "a reasonable inference that Jackson might keep stolen currency in his apartment from a bank robbery two months earlier"); *People v. Carrington*, 47 Cal.4th 145, 211 P.3d 617 (2009) ("When property has been stolen by a defendant and has not yet been recovered, a fair probability exists that the property will be found at the defendant's home"); *State v. Gathercole*, 553 N.W.2d 569 (Iowa 1996), overruled on other grounds by *State v. Williams*, 895 N.W.2d 856 (Iowa 2017) ("it is reasonable to infer that stolen property would be found at a defendant's residence"); *State v. Flom*, 285 N.W.2d 476 (Minn.1979) (probable cause to search defendant's house for items believed to have been taken in home burglary, as "the normal place defendant would be expected to keep such items would be at his house"); *State v. Cooley*, 46 Ohio St.3d 20, 544 N.E.2d 895 (1989) (defendant "was trying to sell the jewelry," which "indicates that he placed some value on it, and would have wanted to keep it someplace safe and accessible"); *State v. Henderson*, 341 Or. 219, 142 P.3d 58 (2006) (the stolen property defendant received, two valuable diamond rings, "were nonperishable items of high value that would be easy to conceal, that retain their value, and that some people might find attractive to keep for personal use," and thus probable cause rings in defendant's residence).

to commit the burglary, would be found at his residence -- as opposed to somewhere else. He equates his situation to that of a drug dealer and the general habit conclusory language disapproved of in Thein.

The defendant's situation was far different from that of a drug dealer. The 600 pieces of jewelry he stole were extremely valuable and not inherently criminal. Thus, the jewelry would be more likely hidden close at hand in a safe but concealed location. Importantly as well, the defendant brought power tools with him to commit the burglary -- at a minimum a power drill and a power saw, along with other tools such as wire cutters. These are innocuous household items not directly traceable to his criminal acts and thus likely to be retained and kept in the defendant's home.

Further, at the time the warrant was issued, the defendant did not know the police were on to him and were obtaining a warrant. Thus, there was every reason to believe the tools the defendant used, the remaining jewelry, and other evidence of the burglary and trafficking (for example, paperwork from his sale of stolen jewelry) would be at his home. What was required was a finding that there was a reasonable inference items from the

defendant's criminal activity would be found at his home. That inference clearly existed here.

**b. The Defendant's Phone Records**

Although the search warrant for the defendant's home authorized the obtaining of his two cellphones, no cellphones were recovered. CP 430-32, 437. Thus, an addendum to the warrant affidavit was written and a second search warrant issued. CP 434-50. The warrant allowed detectives to obtain the defendant's cellphone provider records. The defendant asserts there was no reasonable inference that evidence of his criminal activity would be found in his cellphone records. This claim has no merit.

To begin, the defendant's citation to cellphone search cases and computer search cases is misguided. For example, the defendant states that "[c]ell phones contain 'a digital record of nearly every aspect of their owners' lives—from the mundane to the intimate.'" Def. br. at 19 (citing Riley v. California, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014)). And that because of the "vast amount of private information available on cell phones" judges must "be especially cognizant of privacy risks when drafting and executing search warrants for electronic evidence." Def. br. at 19-20 (citing United States v. Schesso, 730 F.3d 1040 (9th Cir. 2013)).

It is true that electronic devices such as cellphones and computers may contain a plethora of personal and private information about a suspect. It is also true that when an electronic device is seized via a search warrant all of that information contained on the device is in the hands of law enforcement. However no electronic devices were seized in this case. What was sought and obtained were the defendant's cellphone records from MetroPCS and T-Mobile. CP 435, 443-44. The content of his cellphones was never in the possession of law enforcement. The records merely showed who the subscriber was, facts regarding the sending and receiving of text messages and phone calls -- for example, time made, length of call, incoming or outgoing, etc., and the location of the cellphone when calls or texts were sent or received. See 10RP 853-66.

The warrant affidavits show that the defendant provided his probation officer with the phone number of his two cellphones. CP 423, 436. The affidavits show that he used those phones in selling stolen jewelry to Porcello's Jewelers, Topkick Pawnshop, and to Andy Le at Thien Phuoc Jewelry. CP 420-21, 423, 436. Thus, it is a reasonable inference that the phone records would provide subscriber information, i.e., that the phones belonged to the

defendant, and that he used the phones in trafficking stolen property.

In addition, as stated in the affidavit and commonly known, most adults in America possess a cellphone, and being mobile devices, people carry their phones with them. CP 424, 438-39. The burglary of Mallinak's Jewelry occurred over the weekend of November 11 through November 14. CP 418-19. It is a reasonable inference that the defendant had his cellphone with him and that his phone records would provide proof that he was in the area of the jewelry store at the time of the burglary.

All that was required to issue the warrant was a reasonable inference that evidence would be found in the defendant's cellphone record. A reasonable inference clearly existed here, and the detectives were in fact correct. The trial court did not err in rejecting the defendant's motion to find the warrants invalid.

**2. THE DEFENDANT'S STATEMENT SHOWING HE POSSESSED THE KNOWLEDGE TO PULL OFF AN ELABORATE BURGLARY WAS PROPERLY ADMITTED**

The defendant was previously convicted of a number of burglaries. CP 156-318;<sup>3</sup> CP 338. When he was being

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<sup>3</sup> CP 156-318 are court documents showing the defendant's many prior burglary convictions. The document and convictions were *not* admitted at trial. They

investigated for those burglaries, he was interviewed by detectives. CP 396. The interview was audio and video recorded. CP 396.<sup>4</sup> In the interview the defendant discussed the knowledge and skill he possessed in committing commercial burglaries successfully and undetected. CP 396; Trial Exhibits 41 & 42. The trial court ruled that the interview was admissible for the single purpose of showing that the defendant possessed the “sophisticated knowledge” to pull off an elaborate burglary, including the ability to bypass alarm systems and various electronics. 3RP 225-28. The court ruled that the actual prior convictions were not admissible. 3RP 226. The defendant asserts that the trial court’s ER 404(b) ruling was an abuse of discretion.

ER 404(b) allows for the admission of “other crimes, wrongs, or acts” to prove such things as “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). At the same time, ER 404(b) prohibits the admission of other crimes, wrongs or acts to show that the defendant acted in conformity with his character to commit such

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were admitted for sentencing purposes only. See CP 156. They are cited herein to provide this Court with an understanding of the actions that occurred at trial.

<sup>4</sup> The interview is contained on two CDs admitted at trial as exhibits 41 & 42. Alas, there is no transcript of the CDs.

crimes, i.e., propensity evidence. State v. Gresham, 173 Wn.2d 405, 427, 269 P.3d 207 (2012).<sup>5</sup>

To admit evidence of a person's prior bad acts, 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 an issue in the case, and (4) weigh the probative value against the prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The decision to admit prior bad act evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). An abuse of discretion exists only when the reviewing court concludes that no reasonable person would have taken the position adopted by the trial court. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Where reasonable persons could take differing views

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<sup>5</sup> It is questionable whether the issue was properly analyzed under ER 404(b) as a prior bad act. What was admitted was the defendant's statement and nothing more. Arguably the issue should have been analyzed under ER 403. ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." In any event, the evidence was admissible under either rule. See State v. Mutchler, 53 Wn. App. 899, 901, 771 P.2d 1168, rev. denied, 113 Wn.2d 1002 (1989) (The admission of evidence will be upheld if it is admissible for any proper purpose, even if the basis relied upon by the trial court was improper).

regarding the propriety of the trial court's actions, the trial court has not abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

The defendant asserts that ER 404(b) evidence is generally only admissible if it is relevant to prove an element of the charged crime, and that because knowledge is not an element of burglary, his interview was not admissible to prove knowledge. Def. br. at 31. This is incorrect.

To begin, the admission of ER 404(b) evidence is not limited evidence that directly goes to proving an element of the charged crime. The list of purposes for admissibility of ER 404(b) evidence is non-exhaustive. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The rule simply contemplates that evidence of other misconduct will be admitted if (1) the evidence sought to be admitted is relevant and necessary to a material issue, and (2) the probative value of the evidence outweighs its potential for prejudice. Powell, 126 Wn.2d at 258. Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. Id. at 259.

For example, motive is not an element of murder, but courts have historically admitted prior acts of violence in murder cases to

prove motive, and thus, that it was more likely the defendant committed the crime. See, e.g., State v. Americk, 42 Wn.2d 504, 256 P.2d 278 (1953) (in prosecution for placing a bomb in his ex-wife's car, evidence of prior assaults during the marriage admitted to show intent and motive); State v. Neslund, 50 Wn. App. 531, 545, 559, 749 P.2d 725, rev. denied, 110 Wn.2d 1025 (1988) (prior quarrels is evidence of motive). Other examples include evidence of flight, concealment, or using a false name to avoid arrest; each act is relevant because it demonstrates a consciousness of guilt. See State v. Bruton, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965); State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971); State v. Freeburg, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001).

Here, the defendant's interview was not admitted to prove knowledge as an element of burglary. Rather, the evidence was relevant<sup>6</sup> because it showed he possessed the sophisticated knowledge necessary to have pulled off the charged crime, that he knew how to bypass sophisticated electronic alarm systems, enter commercial buildings undetected, break into safes, etc. Viewed

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<sup>6</sup> "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The threshold to admit relevant evidence is very low. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Even minimally relevant evidence is admissible. Id.

another way, if evidence showed that the defendant lacked a certain intelligence level, the evidence would have been relevant to show that it was unlikely he possessed the sophisticated knowledge necessary to have committed the charged burglary.

The trial court was required to and did identify the purpose for the admission of the detective's interview of the defendant. The court also found that the interview was relevant and not particularly prejudicial. See harmless error paragraph below. The defendant cannot show that the trial court abused its discretion, that no reasonable person would have taken the position adopted by the trial court. Powell, 126 Wn.2d at 258.

Even if error is found in the admission of the interview, reversal is not required if the error was harmless. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). An evidentiary error will be found harmless unless the defendant can show that "within reasonable probabilities," but for the error, the outcome of the trial would have been different. Id. at 780. To determine the probable outcome, the reviewing court must focus on the evidence that remains after excluding the tainted evidence. State v. Thamert, 45 Wn. App. 143, 151, 723 P.2d 1204, rev. denied, 107 Wn.2d 1014 (1986).

What makes ER 404(b) evidence potentially prejudicial is that a jury may use the evidence to infer that a defendant had a propensity to commit the charged crime based on the defendant's prior bad acts. State v. Baker, 162 Wn. App. 468, 472-73, 259 P.3d 270, rev. denied, 173 Wn.2d 1004 (2011). But this was a bench trial and the trial court was fully versed in the rules of evidence and aware of the potential prejudice. The court specifically stated that it was "perfectly capable" of determining the proper use of the evidence and that "[u]nder no circumstances" would it consider the ER 404(b) evidence to show the defendant had a "propensity" to commit the charged crime. 3RP 226.

It is generally presumed on appeal that a trial judge in a bench trial, knowing the applicable rules of evidence, will not consider matters for an improper purpose. See State v. Jenkins, 53 Wn. App. 228, 231, 766 P.2d 499, rev. denied, 112 Wn.2d 1016 (1989) ("In a bench trial, there is even a more 'liberal practice in the admission of evidence' on the theory that the court will disregard inadmissible matters") (quoting State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970)). Here it is beyond a presumption, the trial court explicitly identified that potential prejudice and explicitly indicated it would not consider the evidence for that purpose. In fact, in the trial court's

findings of fact, the court referred to the interview and stated that it showed the defendant's "specific knowledge of how to commit burglaries without being detected, as well as his knowledge of electronics, alarm systems, and safes." CP 322 (finding of fact # 32). The court added that the evidence was "considered for knowledge, not for propensity." Id. Thus, the defendant cannot show that any error was prejudicial.<sup>7</sup>

### **3. THERE IS NO CUMULATIVE ERROR**

The defendant contends that the cumulative effect of multiple trial errors warrants a new trial, even if they do not justify a reversal individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It is axiomatic, however, that to seek reversal pursuant to the "accumulated error" doctrine, a defendant must establish the presence of multiple trial errors *and*

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<sup>7</sup> At trial, defense counsel conceded that the defendant's interview was admissible for purposes of proving knowledge but inadmissible for other purposes, particularly as propensity evidence. 2RP 206. On appeal, to combat waiver, the defendant raises a claim of ineffective assistance of counsel pertaining to his trial counsel's concession. Because the State believes the defendant cannot prove error or prejudice in regards to the trial court's evidentiary decision, the State will not address the ineffective assistance of counsel claim.

that the accumulated prejudice affected the verdict. As discussed above, there was no error.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 29 day of May, 2019.

Respectfully submitted,

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