

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	No. 67805-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
SCOTT CARROLL BOLTON,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: <u>January 22, 2013</u>
	)	
	)	

Cox, J. – Scott Bolton appeals his conviction for burglary in the second degree and theft in the third degree, arguing that the trial court failed to balance the probative versus prejudicial nature of admitting his prior theft convictions. ER 609(a)(2) permits a court to admit evidence of crimes of dishonesty committed within the last ten years without balancing whether the value of admitting the evidence is outweighed by prejudice. Accordingly, we hold that the court did not abuse its discretion in admitting evidence of Bolton’s prior crimes of dishonesty. We affirm.

In early January 2011, Bolton was apprehended by loss prevention officers while stealing several items from a Seattle Safeway. At that time, Bolton signed a trespass notice that forbade him from entering any Safeway store for one year.

Later that same month, Bolton was again caught stealing merchandise at the same Seattle Safeway. The State charged him with one count of second degree burglary and one count of third degree theft.

Bolton testified at his trial. During cross-examination, the State elicited testimony regarding his 14 prior convictions for theft or attempted theft despite defense objections.

The jury found Bolton guilty of both of the crimes charged. Bolton appeals.

### **EVIDENCE RULE 609**

Bolton argues that though ER 609(a)(2) does not provide for balancing the probative versus prejudicial nature of crimes of dishonesty committed within the past ten years, these convictions may still be excluded based on ER 403. We disagree.

We review a trial court's ruling on the admissibility of evidence for an abuse of discretion.<sup>1</sup> A trial court abuses its discretion if it acts on untenable grounds or for untenable reasons.<sup>2</sup> Where the trial court has discretion and fails to exercise it, it has abused its discretion.<sup>3</sup>

ER 609(a) establishes two categories of prior convictions committed

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<sup>1</sup> State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

<sup>2</sup> State v. Fualaau, 155 Wn. App. 347, 356, 228 P.3d 771, review denied, 169 Wn.2d 1023 (2010), cert. denied, \_\_\_ U.S. \_\_\_, 131 S. Ct. 1786, 179 L. Ed. 2d 657 (2011).

<sup>3</sup> State v. Flieger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998).

within the past 10 years that may be admitted to impeach the defendant's credibility as a witness.<sup>4</sup> ER 609(a)(2) states that, "[f]or the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if . . . the crime . . . (2) involved dishonesty or false statement, regardless of the punishment." In contrast, to admit crimes punishable by a year or more of imprisonment, the court must determine whether the "probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered."<sup>5</sup> Thus, as the plain words of ER 609(2) make clear, a defendant's crimes of dishonesty committed within the past ten years shall be admitted if the defendant testifies. "A trial court is ***neither permitted*** nor required to balance [the probative versus prejudicial nature of a past crime] when a conviction that involves dishonesty or false statement is not more than 10 years old."<sup>6</sup>

Here, the trial court did not abuse its discretion when it admitted evidence regarding Bolton's 14 prior theft convictions. Because all of these crimes occurred within the past ten years, the court properly looked to ER 609(a). And, because these convictions were for theft or attempted theft, they qualified as crimes of dishonesty.<sup>7</sup> Consequently, under ER 609(a)(2), the trial court was

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<sup>4</sup> State v. Jones, 101 Wn.2d 113, 117-18, 677 P.2d 131 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988).

<sup>5</sup> ER 609(a)(1).

<sup>6</sup> State v. Russell, 104 Wn. App. 422, 434, 16 P.3d 664 (2001) (emphasis added); see also Jones, 101 Wn.2d at 117-18.

**“neither permitted nor required”** to balance the prejudicial versus probative nature of admission of these crimes.<sup>8</sup> Consequently, the trial court did not abuse its discretion when it admitted evidence of Bolton’s past crimes.

Bolton acknowledges that under ER 609 crimes of dishonesty committed within the past ten years are automatically admissible. But, he argues that a trial court is still required to balance the prejudicial versus probative nature of this evidence under ER 403. We disagree.

ER 403 does provide that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.”<sup>9</sup> But, this rule of evidence does not undermine the plain words of ER 609, which states that a court **shall** admit evidence of crimes of dishonesty committed within the past ten years to impeach the defendant’s testimony.

Bolton relies on Carson v. Fine<sup>10</sup> to support his argument that the court abused its discretion by failing to apply ER 403 balancing to the admission of his prior convictions. This case is inapplicable and unpersuasive.

There, the supreme court examined whether a trial court was still required to balance admission of evidence under ER 403 where a party has waived her doctor-patient privilege.<sup>11</sup> In dicta, the court discussed the balancing test

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<sup>7</sup> State v. Ray, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991).

<sup>8</sup> Russell, 104 Wn. App. at 434 (emphasis added).

<sup>9</sup> ER 403.

<sup>10</sup> 123 Wn.2d 206, 867 P.2d 610 (1994).

<sup>11</sup> Id. at 216-17.

required under **ER 609(a)(1)** and ER 403.<sup>12</sup> It did **not** discuss the clear language of **ER 609(a)(2)** that directs the court to admit a defendant's past crimes of dishonesty. Thus, Carson is not helpful.

### STATEMENT OF ADDITIONAL GROUNDS

In his statement of additional grounds, Bolton raises several issues. His central argument appears to be that the State's witnesses committed perjury and that this misconduct requires reversal. Bolton also argues that the court, the prosecutor, and his attorney engaged in misconduct by suborning perjury from the State's witnesses.

Though Bolton cites to numerous places in the record he claims illustrate the perjury of the State's witnesses, none of these citations are helpful. Thus, there is no evidence of perjury, and consequently no evidence of judicial or prosecutorial misconduct. Accordingly, Bolton's argument fails.

Bolton's additional claims are not supported by the record or the authority on which Bolton relies and are without merit.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

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<sup>12</sup> Id. at 221-22.

Vuella J

Leach, C. J.