IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DERRICK LANG HUNTER, Appellant.	No. 39329-8-II UNPUBLISHED OPINION

Van Deren, J. — Derrick Hunter[1] appeals his convictions on three counts of unlawful issuance of a bank check and two counts of second degree theft. He argues that (1) the trial court erred when it admitted evidence under ER 404(b) that the bank sent notices about problematic deposit slips and about freezing and closing his checking account and (2) sufficient evidence does not establish that he had knowledge of his account balance or that he had the requisite intent to commit the crimes. We affirm.

FACTS

Hunter met Jamerika Haynes at Tacoma Community College (TCC) in April, 2006.

[1] Hunter used the alias "Darrick Hunter" when he testified at trial. Report of Proceedings (RP) at 102. Jamerika Haynes testified that his name was spelled with an "A" on his checks, but that she "knew him as D[e]rrick with an 'E.'" RP at 64-65.

Haynes testified that Hunter said she could be a model and told about a modeling service that paid individuals to participate in an online modeling survey. Haynes completed the survey, but did not receive the necessary confirmation number for payment, so Hunter offered to write her a check for $900.

In April, Hunter wrote three checks[2] to Haynes, one for $900 and two for $450 each. Haynes further testified that she kept $100 of the $900 check[3] and gave the remaining $800 to Hunter. She gave Hunter the full amount of the two $450 checks that he had asked her to cash. Haynes's bank, Bank of America, accepted Hunter's checks but held Haynes responsible for the funds when Wells Fargo did not honor them because it had closed Hunter's account on August 8, 2003. Haynes reported the bad checks to the police and the State charged Hunter with three counts of unlawful issuance of a bank check and two counts of second degree theft.

At trial, Haynes and Wells Fargo and Bank of America representatives testified for the State. Hunter moved for dismissal after the State rested, arguing that the State did not offer sufficient evidence to support the intent and knowledge elements of the charged crimes because the State did not prove that he knew his Wells Fargo account was closed. After the trial court denied Hunter's motion, he testified.

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[2] Haynes testified that Hunter had showed her $400 in cash and an American Express gold card before he wrote her the checks.

[3] The detective who interviewed Haynes testified that Haynes said she kept $600 of the $900 check. The memo line on each of the checks said "'college,'" but Haynes testified that Hunter did not give her the checks for college; according to Haynes, she only told Hunter that a modeling career would help her pay for college. RP at 74. But the detective testified that Haynes said the money from the first check was for college. Consequently, the State did not charge Hunter with theft related to the $900 check.

According to Hunter, he met Haynes at TCC in March and they talked about modeling.[4] They spent time together and began dating. Hunter testified that he did not give Haynes money to complete the online profile but wrote the checks because she asked him to give her money for college and rent. Hunter also testified that (1) he wrote the $900 check but did not give it to Haynes because he wanted to verify that he had enough money in his account and (2) he wrote the two $450 checks to Haynes because he lost the $900 check but that he told her not to deposit those checks until he could verify his account balance. Hunter further testified that he left town and, while he was away, Haynes called him to ask for the money; when Hunter returned he discovered that she had cashed all three checks and that she was angry because Wells Fargo did not honor the checks.

According to Hunter, he did not know that Wells Fargo had closed his only checking account in 2003. Instead, Hunter testified that he learned of the account's closure only after he had written the three checks to Haynes and after Haynes's bank charged her account for the checks. Hunter also testified that from July 2003 until spring 2005 he was in the county jail for probation violations, which presumably would have prevented him from receiving the account closure notices from Wells Fargo.

After Hunter testified, the State recalled the Wells Fargo representative to testify in greater depth about problems with Hunter's checking account.[5] The bank's representative

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[4] Hunter testified that he just helped people complete online profiles in the hopes that by acting as a middle man he might receive a commission or referral fee, a hope that had not yet come to fruition.

[5] The State sought to introduce the evidence under ER 404(b) to show that Hunter knew his checking account had problems and that he knew the bank had frozen and then closed the

testified that, after Hunter opened the checking account on June 12, 2003, (1) he incorrectly listed the amount of a check deposited on June 17 at an automated teller machine (ATM) and that a notice would have automatically been sent to him notifying him of this error; (2) he made another incorrectly entered ATM deposit on June 24 and another notice would have been sent; (3) he made a third incorrectly entered ATM deposit on June 30; (4) he also deposited an empty envelope on June 30, which would have caused the bank to freeze his account and send a notice; (5) the bank closed the account and charged his Wells Fargo credit card account for the balance due based on insufficient funds in his account, additional actions that would have generated notices to Hunter; and (6) Hunter never contacted the bank about any of these notices or the charge to his credit card that he paid. The bank's representative acknowledged that the deposits could have been due to mistakes and that the bank did not know whether Hunter actually received the automatically generated notices.

The jury convicted Hunter of all five counts. He appeals.

ANALYSIS

I. Admission of Evidence About Hunter's Checking Account

Hunter contends that the trial court abused its discretion when it admitted evidence that he had made purportedly incorrect deposits and that Wells Fargo had closed his checking account in 2003. In particular, he contends that the prejudice of appearing to be involved in a common scheme or plan outweighs the evidence's relevance to his knowledge about his checking account balance and his intent to issue unlawful checks or to commit theft.

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account.

A trial court has wide discretion in admitting evidence and balancing the value of evidence and its prejudicial effect; we review evidentiary rulings for an abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997); *State v. Lillard*, 122 Wn. App. 422, 431, 93 P.3d 969 (2004). "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court 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. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009); *see Brown*, 132 Wn.2d at 572.

Evidence to prove bad character or nefarious propensity is inadmissible. ER 404(b). But it may be admissible for a variety of other reasons, including knowledge.[6] ER 404(b). A trial court may admit evidence of knowledge under ER 404(b) where it is relevant to establish intent, knowledge, or another required element of the charged crime. *State v. Essex*, 57 Wn. App. 411, 418-19, 788 P.2d 589 (1990); *see State v. Stanton*, 68 Wn. App. 855, 862-63 & n.3, 845 P.2d 1365 (1993); *see, e.g.*, *State v. Greathouse*, 113 Wn. App. 889, 918-19, 56 P.3d 569 (2002); *State v. Toennis*, 52 Wn. App. 176, 186-87, 758 P.2d 539 (1988); *State v. Fletcher*, 30 Wn. App. 58, 61-62, 631 P.2d 1026 (1981). The exception for admission of evidence of knowledge may also overlap with ER 404(b)'s exception allowing admission of evidence to show an absence of accident or mistake or to rebut such a claim. *See State v. Norlin*, 134 Wn.2d 570, 576, 581-82,

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[6] ER 404(b) provides:

> 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.

951 P.2d 1131 (1998); *State v. Gatalski*, 40 Wn. App. 601, 607-09, 699 P.2d 804 (1985), *abrogated on other grounds by State v. Falco*, 59 Wn. App. 354, 357 & n.1, 796 P.2d 796 (1990); *see, e.g.*, *State v. White*, 43 Wn. App. 580, 587-88, 718 P.2d 841 (1986).

Before admitting evidence of an act under any of the ER 404(b) exceptions, the trial court must (1) find that a preponderance of the evidence shows the acts occurred,(2) state for what purpose the evidence is being admitted, (3) find the evidence is relevant for that purpose, and (4) balance the probative value of the evidence against any unfair effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Here, the trial court considered these factors before allowing the jury to hear the evidence about the deposit slips and the subsequent closure of Hunter's checking account.

First, the trial court heard the proposed testimony in an offer of proof and found that the State had met its burden to show that the acts occurred. Second, the trial court noted that the State offered the testimony "to show notice [to] the defendant of the closure, notice of the overdraws and the fact that the defendant did, perhaps contrary to his testimony or contrary to the inferences that could be drawn from his testimony, use this account at some point."[7] Report of Proceedings (RP) at 143. Third, the trial court ruled that the evidence was "relevant to the issue of intent." RP at 142. And fourth, the trial court balanced the probative value against potential prejudice: "[T]he fact that this is the exact same type of activity that's being alleged here, . . .

[7] Contrary to Hunter's assertion on appeal, the State did not offer the evidence about the checking account to show that Hunter's behavior constituted a bad act in his dealings with Wells Fargo or that the State sought to admit the evidence under ER 404(b) to show a common scheme or plan. *See State v. Lough*, 125 Wn.2d 847, 861-62, 889 P.2d 487 (1995).

which is the issue regarding closure and a direct contradiction of the testimony or inferences that could be drawn from the testimony[,] outweighs the prejudicial effect." RP at 143.

The trial court ruled that the evidence could be admitted with the understanding that the bank official would not be questioned about other checks overdrawn on the account. We hold that evidence of the deposit errors and notices Wells Fargo sent to Hunter about the checking account falls under the ER 404(b) exception to show Hunter's knowledge of the checking account closure. The evidence was highly relevant to whether Hunter could have known Wells Fargo had closed his account. And the trial court had broad discretion in balancing whether this evidence was more probative than prejudicial. *See State v. Giedd*, 43 Wn. App. 787, 790, 719 P.2d 946 (1986). The trial court did not abuse its discretion when it determined that this evidence was more probative than prejudicial and when it admitted the bank's evidence.

II. Sufficiency of the Evidence

Hunter also argues that the evidence was insufficient to support his convictions. He contends that the State did not prove beyond a reasonable doubt that he intended to defraud Haynes or that he knew his checking account was closed. Hunter also contends that sufficient evidence does not support his theft conviction because the State did not prove beyond a reasonable doubt that he intended to deprive Haynes of her property.

When considering sufficiency issues, we view "the evidence in the light most favorable to the State" to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). "A claim of insufficiency admits the truth of the State's evidence and all inferences that

reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618, P.2d 99 (1980). Facts, such as intent, may be inferred where "plainly indicated as a matter of logical probability" and the finder of fact "determine[s] what conclusions reasonably follow" from the circumstantial evidence in a case. *Delmarter*, 94 Wn.2d at 638; *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). We "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The trial court instructed the jury that the State had to prove the following elements of unlawful issuance of a bank check beyond a reasonable doubt:

> (1) That . . . the defendant did make or deliver a check or draft to another person;
> (2) That said check or draft was in an amount greater than $250; and
> (3) That at the time of such making or delivery the defendant knew that he did not have sufficient funds in or credit with the bank or depository to meet the check or draft in full upon its presentation[;]
> (4) That the defendant was acting with intent to defraud; and
> (5) That the acts occurred in the State of Washington.

Clerk's Papers (CP) at 53-55. The jury instructions also informed the jury that in order to find the elements of second degree theft beyond a reasonable doubt it had to find:

> (1) That . . . the defendant by color or aid of deception, obtained control over property of another[;]
> (2) That the property or services . . . exceeded $250.00 in value;
> (3) That the defendant intended to deprive the other person of the property or services[;] and
> (4) That the acts occurred in the State of Washington.

CP at 60-61.

Division One of this court has held that sufficient evidence supported similar charges, even though the defendant testified that he believed that his account remained open. *State v. Schapiro*, 28 Wn. App. 860, 862, 868, 626 P.2d 546 (1981). In *Schapiro*, the State introduced evidence that a business partner told Schapiro that the corporate bank account had been closed, Schapiro had earlier requested that the bank send him the account statements, and the last account statement would have shown a zero balance. 28 Wn. App. at 862. Given this evidence contradicting Schapiro's testimony, the court held:

> [A]ny rational trier of fact could have found that Schapiro knew that the [corporate] account was closed when he purchased the merchandise in April 1979. Knowledge that the account was closed, or intent to defraud, was the only issue at trial. The prosecution introduced sufficient evidence to prove Schapiro's knowledge beyond a reasonable doubt. The conflict in testimony was a matter for the trial court to resolve.

Schapiro, 28 Wn. App. at 868. Similarly, Division One has also held that sufficient evidence supported the elements of intent to defraud and knowledge of insufficient funds where a defendant "was sent overdraft notices from the bank for each of his dishonored checks, was contacted numerous times by creditors regarding his [not sufficient checks], and was sent bank statements showing his negative balances." *State v. Ben-Neth*, 34 Wn. App. 600, 606, 663 P.2d 156 (1983).

Here, the State presented evidence that, in the two months Hunter had the Wells Fargo checking account: (1) Hunter made several deposits with problems that resulted in his checking account being frozen; (2) Wells Fargo sent Hunter notice about these deposit problems and that it

had frozen his account; (3) Wells Fargo sent Hunter a warning that it would close his overdrawn checking account; (4) Wells Fargo closed Hunter's checking account and sent him notice; (5) Wells Fargo charged the balance due from the checking account to a credit card that Hunter had with Wells Fargo; (6) Hunter paid the credit card bill that included the charges for insufficient funds in his checking account; and (7) Hunter never contacted Wells Fargo about the notices or contested the charge on his credit card.

Although Hunter testified to the contrary, his testimony merely raised a question of credibility for the jury to resolve. *See Thomas*, 150 Wn.2d at 874-75. Based on the evidence presented and taken in the light most favorable to the State, any rational trier of fact could infer that Hunter knew Wells Fargo would not honor the checks he wrote to Haynes. Given the jury's ability to infer knowledge from the testimony about his checking account, a jury could also infer that he intended to defraud Haynes and intended to deprive Haynes of her property by color and aid of deception.[8]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We affirm.

Van Deren, J.

I concur:

[8] Although the evidence did not conclusively prove Hunter's knowledge, a jury could infer knowledge that would, thus, support finding the intent elements of the crimes. *See Stanton*, 68 Wn. App. at 862, 866-67.

Hunt, J.

I concur in the result only:

Quinn-Brintnall, P.J.