IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Marvin Brown, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080771-CA F I L E D (February 25, 2010) 2010 UT App 48

Fourth District, Provo Department, 071403063
The Honorable Fred D. Howard

Attorneys: Margaret P. Lindsay, Spanish Fork, for Appellant
Mark L. Shurtleff and Laura B. Dupaix, Salt Lake City, for Appellee

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Before Judges Davis, Thorne, and Greenwood.[1]

THORNE, Judge:

Marvin Brown appeals from his conviction of retail theft, a third degree felony, see Utah Code Ann. § 76-6-602 (2008); see also id. § 76-6-412. Brown argues that the district court erred when it allowed the State to introduce evidence of a prior conviction of retail theft under rule 404(b) of the Utah Rules of Evidence, see Utah R. Evid. 404(b), to demonstrate Brown's intent, plan, and lack of mistake or accident. We affirm.

Rule 404(b) governs the admissibility of evidence of prior crimes, wrongs, and bad acts and prohibits its use "to prove the character of a person in order to show action in conformity therewith." See id. Such evidence may, however, be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See id.

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[1]The Honorable Pamela T. Greenwood, Senior Judge, sat by special assignment pursuant to Utah Code section 78A-3-102 (2008) and rule 11-201(6) of the Utah Rules of Judicial Administration.

Before admitting evidence under rule 404(b), the district court must undertake a three-step process:

> First, the trial court must . . . determine whether the bad acts evidence is being offered for a proper, noncharacter purpose, such as one of those specifically listed in rule 404(b). In contrast, if the trial court concludes that the bad acts evidence is being offered only to show the defendant's propensity to commit crime, then it is inadmissible and must be excluded at that point. If the purpose is deemed proper, the court must [next] determine whether the bad acts evidence meets the requirements of rule 402, which permits admission of only relevant evidence. Last, the court must analyze the evidence in light of rule 403 to assess whether its probative value is substantially outweighed by the risk of unfair prejudice to the defendant.

State v. Marchet, 2009 UT App 262, ¶ 29, 219 P.3d 75 (omission and alteration in original) (citations and internal quotation marks omitted), cert. denied, No. 20090817 (Utah December 10, 2009). "[W]e review a trial court's decision to admit evidence under rule 404(b) of the Utah Rules of Evidence under an abuse of discretion standard." Id. ¶ 19 (alteration in original) (internal quotation marks omitted).

Here, adopting the State's arguments, the district court determined that Brown's prior conviction was being offered to demonstrate his intent, his plan, and the absence of accident or mistake on his part. As to relevance, the district court found that Brown's prior act of retail theft was "remarkably similar [to the charged incident] as far as trickery and deception"--the prior incident involved Brown switching a return sticker from one item to another, while in the charged incident Brown used a receipt and a paid item to conceal his possession of other unpaid merchandise. Accordingly, the district court found the prior conviction relevant to show that Brown had the intent to steal, that he was employing a plan of deception to effectuate that intent, and that his actions were not the result of a mistake or accident. The district court further determined that while the prior conviction was prejudicial, it was "extremely probative" because "it's a tough case" and "[t]here is no other better evidence."

Brown challenges the district court's ruling on appeal. It is undisputed, however, that proof of intent, plan, and absence

of accident or mistake are proper noncharacter purposes identified in rule 404(b). See Utah R. Evid. 404(b). Further, we agree with the State's argument to the district court that Brown's prior act of employing deception or trickery to conceal retail theft makes it more likely that he had the intention to steal in this case and that his attempted removal of unpaid merchandise from the store was no accident or mistake. Cf. State v. Northcutt, 2008 UT App 357, ¶ 9, 195 P.3d 499 (holding that, under the circumstances, evidence of similar acts of violence against a prior spouse constituted "relevant evidence under rule 402 because it had a tendency to make the absence of mistake and thus [the defendant's] intent to kill more probable").

As to the potential for unfair prejudice under rule 403, see Utah R. Evid. 403, it appears that the district court largely considered the appropriate factors, generally known as the Shickles factors, see State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988), before admitting Brown's prior conviction.

> When conducting a rule 403 review of prior misconduct evidence, trial courts should consider several factors, including the strength of the evidence as to the commission of the other crime [or misconduct], the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence will rouse the jury to overmastering hostility.

Northcutt, 2008 UT App 357, ¶ 10 (alteration in original) (internal quotation marks omitted). Here, the district court adopted the State's arguments that the two incidents were remarkably similar, that the need for the evidence was great, and that there was no other, better evidence. While the district court did not expressly consider the other three Shickles factors, Brown's prior act clearly occurred, as it resulted in a criminal conviction. Further, the district court inquired about the dates of the incidents and was informed by the State that they occurred in November 2006 and June 2007, about seven months apart. Finally, we note that Brown's prior conviction of simple retail theft is not the sort of crime that would produce overmastering hostility in a jury. Under these circumstances, we will not disturb the district court's ruling that Brown's prior conviction was not so unfairly prejudicial as to outweigh its probative value.

Brown has failed to demonstrate that the district court exceeded the bounds of its discretion when it admitted evidence

of his prior act of retail theft. Accordingly, we affirm Brown's conviction.

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William A. Thorne Jr., Judge

WE CONCUR:

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James Z. Davis,
Presiding Judge

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Pamela T. Greenwood,
Senior Judge