

IN THE UTAH COURT OF APPEALS

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Orem City,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20061028-CA
v.)	
)	F I L E D
Kevin Winterose,)	(October 12, 2007)
)	
Defendant and Appellant.)	2007 UT App 330

Fourth District, Orem Department, 061200700
The Honorable John C. Backlund

Attorneys: Sheldon R. Carter, Provo, for Appellant
 Andrew F. Peterson, Orem, for Appellee

Before Judges Bench, Greenwood, and Orme.

GREENWOOD, Associate Presiding Judge:

Defendant Kevin Winterose appeals his conviction for retail theft on the basis that the trial court should not have allowed evidence of prior bad acts under rule 404(b) of the Utah Rules of Evidence. See Utah R. Evid. 404(b). We affirm.

In response to Orem City's (the City) motion in limine to admit evidence of prior bad acts, the trial court ruled that the evidence could be admitted only if Defendant first raised a defense of mistake or inadvertence. Consistent with the trial court's ruling, the City did not attempt to introduce any evidence of prior bad acts during its case in chief. After the City rested, defense counsel asked Defendant, "You never accidentally took any other merchandise?" Defendant responded, "No, never in my life, no." Outside of the presence of the jury, the City then informed the trial court it intended to introduce evidence of a prior theft of shoes at the same store. The trial court commented that Defendant had "opened the door" to the prior bad acts evidence by eliciting the quoted testimony. We agree.¹

1. The trial court also allowed the evidence under rule 404(b).

Defendant's testimony that he had never before accidentally taken merchandise went to his credibility. By testifying that he had never taken merchandise from a store without paying for it, Defendant opened the door to allow the City to introduce evidence to impeach Defendant's testimony. Such evidence "may not be excludable . . . when the responsibility for its introduction may be traced to the defendant." State v. Barney, 681 P.2d 1230, 1231 (Utah 1984); see also State v. Colwell, 2000 UT 8, ¶ 33, 994 P.2d 177 (stating prosecution may inquire about prior bad acts where the defendant's own testimony refers to the same). "Evidence for the purpose of impeaching credibility may be admissible even if it introduces evidence of a prior bad act." State v. Houskeeper, 2002 UT 118, ¶ 28, 62 P.3d 444. Indeed, evidence of prior criminal activity, even if inadmissible under rule 404(b), may become admissible when the defendant "himself opened the door to its introduction." State v. Ramos, 882 P.2d 149, 154 (Utah Ct. App. 1994). In this instance, Defendant clearly opened the door to evidence impeaching his testimony that he had not previously shoplifted merchandise. Consequently, we need not determine if the evidence of prior bad acts was also admissible under rule 404(b).

Affirmed.

Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:

Russell W. Bench,
Presiding Judge

Gregory K. Orme, Judge