IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID GLENN HOLCOMB, Appellant.	No. 40911-9-II UNPUBLISHED OPINION

Worswick, A.C.J. — David Glenn Holcomb appeals his conviction for second degree burglary. Holcomb argues that (1) the trial court committed prejudicial error in allowing the State to cross-examine Holcomb under ER 404(b) about his prior conviction for attempted second degree burglary.[1] In a Statement of Additional Grounds (SAG), Holcomb argues (2) that the trial court violated his constitutional right to confront witnesses against him by allowing the State to ask Holcomb if he was surprised that his accomplice pleaded guilty when that accomplice did not testify at Holcomb's trial. We agree that the trial court abused its discretion in admitting evidence of Holcomb's prior conviction and we reverse and remand for a new trial.

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[1] Holcomb also argues that the trial court erred under ER 404(b) in allowing the State to ask whether Holcomb was surprised that his accomplice pleaded guilty to second degree burglary, admitting he intended to take metal out of the abandoned machine shop. But, evidence of Holcomb's friend's guilty plea does not fall under ER 404(b) at Holcomb's trial because it is not evidence of another crime, wrong, or act by *Holcomb*. The State moved to admit this evidence to impeach Holcomb's testimony. Because Holcomb's argument against the trial court's admission of his accomplice's guilty plea is limited to ER 404(b), which does not apply, and because it fails to address impeachment, Holcomb inadequately briefed this issue. Because this issue would not likely change this court's disposition of the appeal, we decline to address this narrow issue. *See State v. Donaghe*, 172 Wn.2d 253, 263, n.11, 256 P.3d 1171 (2011). Consequently, we do not address the State's "open-door" argument on appeal.

FACTS

On October 19, 2009, Holcomb and two of his friends visited Holcomb's father at his Marine View Drive home. Holcomb's father had a long career as a machinist and told Holcomb and his friends about an old machine shop just down Marine View Drive that had old machines that "were run by leather belts." 1 Report of Proceedings (RP) at 154. Holcomb had a lifelong interest in machines and "couldn't fathom a machine being run by a leather belt," so he and his friends decided to go have a look shortly before five o'clock in the evening. 1 RP at 15, 154-55.

Chinook Landing Marina is adjacent to Puyallup tribe trust land that has three abandoned buildings on it, two of which are abandoned homes and the third of which is an abandoned machine shop. Christopher Muir, the on-duty Chinook Landing Marina security officer noticed a blue pickup truck in the marina's overflow parking lot, near the abandoned machine shop, that was not parked in any of the designated parking stalls. Muir also noticed Holcomb and two other people near the pickup truck looking around "in a way of . . . making sure no one [was] looking at them." 1 RP at 53-55. Muir found their behavior suspicious and contacted Puyallup tribal police.

Two tribal police officers responded, Officer Ryan Sales and Officer Douglas Johns. Officer Sales testified that he thought the pickup truck was suspiciously parked because it was not parked in a designated parking stall; rather, it was parked in the middle of the otherwise empty parking lot. Because the officers were not sure if the truck's occupants entered any of the three abandoned buildings, Officers Sales and Johns began investigating all three. The officers heard metal clanging, as if it was being moved, from inside the abandoned machine shop. The shop had

several signs posted informing people that it was private property and prohibiting trespassing.

Because most of the shop was boarded up, a small hole on the side of the building was the only way in or out. The officers decided that it would be safest if Officer Sales knocked and yelled "police" from one side of the building while Officer Johns looked through the hole on the other side of the building. I RP at 24-25, 94. Just inside the hole, Officer Johns noticed buckets containing scraps of metal. When he looked through the hole, Officer Johns saw at least two people, one of whom was holding a piece of metal; Officer Johns ordered them to put their hands up and to exit the building. Holcomb, followed by his two friends, crawled out of the hole. The officers arrested all three men. The State charged Holcomb with second degree burglary.[2]

At trial, Holcomb testified that, even though he saw the posted "Danger, Keep Out—Stay Out" signs, he liked exploring, so he entered the machine shop. 1 RP at 161 Holcomb testified that he saw stacks of five-gallon buckets near the hole in the wall through which they entered and that the shop floor was covered with garbage, including metal scraps like nuts, bolts, screws, and washers.

Holcomb further testified that, in looking at the machines, his friends moved some things around but Holcomb stopped them, reminding them that they were just there to look around. On direct examination, Holcomb's attorney specifically inquired as to what Holcomb intended when he entered the machine shop, asking:

> Q: At the time that you went in there, did you have any kind of intention to take any items that you may have found?

[2] By amended information, the State also charged Holcomb with two counts of bail jumping. The jury found Holcomb guilty of one of those counts of bail jumping. Holcomb does not appeal his bail jumping conviction.

> A: No, sir.
> Q: There is cool stuff in old buildings. If you found some cool stuff, were you going to take it?
> A: No. We had no use for it. I mean, what were we going to do with machinist stuff[?] We really didn't know anything about [it] except that my father was a machinist.

1 RP at 166.

The State observed that Holcomb's defense to the second degree burglary charge was his lack of intent to commit a crime inside the shop. Because Holcomb testified that he only intended to look at the machines and did not intend to take anything out of the shop, the State moved to introduce evidence of Holcomb's 2005 conviction for attempted second degree burglary. The State sought to introduce this evidence because Holcomb's past conviction required the same intent as his current second degree burglary charge and both involved metal.

The State also argued that, by using the plural "we" instead of the singular "I" when testifying about his intent, Holcomb raised the issue of his friends' intent. Thus, the State sought to ask Holcomb on cross-examination if he was surprised that his friend, Alan Veselovec, pleaded guilty to second degree burglary based on his involvement in the abandoned machine shop. Because Veselovec wrote in his statement on plea of guilty that he entered the Chinook Landing Marina machine shop "with the intent to take property from within," the State wanted to ask Holcomb if Veselovec's stated intent surprised him to impeach Holcomb's testimony that they only intended to look around. 2 RP at 191-92.

The trial court granted the State's motion, allowing the State to question Holcomb on cross-examination about his 2005 attempted second degree burglary conviction and his

knowledge of Veselovec's guilty plea. In making this ruling, the trial court found that Holcomb's testimony put his intent and his friends' intent into evidence and that the evidence the State sought to introduce was "proper for cross-examination and not unduly prejudicial." 2 RP at 198. Despite Holcomb's continued argument that the undue prejudice of testimony on Holcomb's past conviction for attempted second degree burglary based on an attempted metal theft greatly outweighed its probative value, the trial court disagreed and found this evidence was more probative than prejudicial.

On cross-examination, Holcomb responded to the State's questions by acknowledging he pleaded guilty to attempted burglary in the second degree in 2005, that his 2005 conviction was based on allegations that Holcomb intended to take metal, and that his 2005 conviction required the same intent as his current second degree burglary charge.[3] Holcomb also acknowledged that he was not surprised that Veselovec pleaded guilty to second degree burglary based on Veselovec's involvement at the Chinook Landing Marina machine shop.

The jury found Holcomb guilty of second degree burglary and the trial court sentenced him to 22 months in prison. Holcomb appeals.

[3] Because Holcomb's 2005 conviction was based on an *Alford* plea, the trial court allowed Holcomb's attorney on redirect to elicit testimony that Holcomb neither admitted his guilt nor admitted that he attempted to steal metal. *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

ANALYSIS

I. ER 404(b) Evidence

A. *Standard of Review*

We review the trial court's decision to admit or deny ER 404(b) evidence for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. Johnson*, 159 Wn. App. 766, 773, 247 P.2d 11 (2011). By not following the requirements of ER 404(b) in admitting evidence of past crimes, a trial court abuses its discretion. *Fisher*, 165 Wn.2d at 745.

B. *Evidence of 2005 Conviction To Show Intent in 2009*

Holcomb argues that the trial court erred in allowing the State to introduce unduly prejudicial propensity evidence that Holcomb pleaded guilty to attempted second degree burglary in 2005, a crime also involving attempted metal theft, to show Holcomb's intent to steal metal in 2009. We agree.

Although evidence of past crimes or misconduct is not admissible to show a defendant's criminal propensity, such evidence may be admissible for other purposes, like showing a defendant's intent.[4] ER 404(b); *Fisher*, 165 Wn.2d at 744. However, even if evidence of a defendant's past crime would show intent, a trial court may not admit that evidence under ER

[4] ER 404(b) states:

> 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.

404(b) if that evidence is unfairly prejudicial.[5] *Fisher*, 165 Wn.2d at 745; ER 403.

We begin our analysis with a presumption that evidence of a defendant's past crimes is inadmissible and resolve doubts on whether to admit the evidence in the defendant's favor. *State v. Nelson*, 131 Wn. App. 108, 115, 125 P.3d 1008 (2006). Before a trial court may admit evidence of a defendant's past crime under ER 404(b), the trial court must (1) find that the past crime actually occurred by a preponderance of the evidence, (2) specify the purpose for which it is admitting the evidence, (3) find that the evidence is relevant to establish an element of the crime charged, and (4) weigh the evidence on the record to determine whether its probative value is outweighed by its prejudicial effect. *Fisher*, 165 Wn.2d at 745.

Where the State offers evidence of a defendant's past conviction to establish the defendant's intent in the current trial, the State must have a logical theory, other than criminal propensity, that links the past conviction with the defendant's intent to commit the current charged offense. *State v. Wade*, 98 Wn. App. 328, 334, 989 P.2d 576 (1999). A trial court errs if it admits evidence of a defendant's past conviction to show the defendant's intent to commit the current crime charged if the underlying facts do not show some additional relevancy. *Wade*, 98 Wn. App. at 335-36. For example, in *Wade*, the trial court admitted evidence of the defendant's two prior convictions for possessing drugs with intent to distribute as evidence of Wade's intent to distribute drugs in a subsequent trial. 98 Wn. App. at 332-33, 336. Even though all three

[5] ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

instances occurred in the same neighborhood, within a fourteen month period, and involved similar quantities of the same drug, we concluded that the underlying facts were not similar enough to create a logical theory of the defendant's intent other than propensity. *Wade*, 98 Wn. App. at 332-33, 336. Rather, the State's theory was, since Wade possessed drugs with the intent to deliver them in the past, he must have possessed the drugs with the same intent to deliver now. *Wade*, 98 Wn. App. at 336. Thus, the evidence of Wade's past convictions was inadmissible propensity evidence that the State could not use to establish Wade's intent in its current case. *Wade*, 98 Wn. App. at 336.

Here, the trial court allowed the State to show Holcomb's intent to steal metal from the Chinook Landing Marina's machine shop by cross-examining Holcomb about his 2005 conviction for attempted second degree burglary because it required the same intent as the current charge and both were based on an attempt to steal metal. The trial court found that this evidence was "proper for cross-examination and not unduly prejudicial." 2 RP at 198. However, Holcomb correctly relies on *Wade* in arguing that evidence that he pleaded guilty to attempted second degree burglary in 2005 based on an attempted theft of metal in no way establishes that he intended to steal metal from the abandoned machine shop in 2009. As in *Wade*, the only

possible inference from Holcomb's 2005 conviction is: Holcomb formed the intent to steal metal in 2005, so he must have formed the intent to steal metal in 2009.[6]

Moreover, the facts underlying Holcomb's 2005 conviction are even more attenuated than the facts insufficient to establish additional relevancy of the past offense in *Wade*. In *Wade*, all three offenses occurred within a fourteen month period, in the same neighborhood, with similar quantities of the same drug. 98 Wn. App. at 331-33. But we held that these strikingly similar facts were still not enough to show Wade intended to deliver drugs on the third occasion just because he intended to deliver drugs on the first two occasions. 98 Wn. App. at 336. Here, the only factual similarity between Holcomb's 2005 conviction and 2009 charge is that both involved intent to steal metal. Thus, as in *Wade*, the singular factual similarity between Holcomb's 2005 conviction and his 2009 charge is insufficient to allow evidence of Holcomb's 2005 conviction to show Holcomb's intent in 2009. Instead, the only possible inference from the evidence that Holcomb's 2005 conviction is, if Holcomb intended to steal metal in 2005, he must have intended to steal metal in 2009. This is inadmissible propensity evidence.

[6] The State argues that Division Three's *Medrano* case supports admitting evidence of Holcomb's 2005 conviction to show his intent in 2009. *See State v. Medrano*, 80 Wn. App. 108, 110-11, 906 P.2d 982 (1995). However, the State's reliance on *Medrano* is misplaced because that case specifically addressed a situation where the defendant claimed he did not have the requisite intent to commit the crime with which he was charged because he was suffering from alcohol and drug induced diminished capacity at the time of the crime. *Medrano*, 80 Wn. App. at110-11. Based on Medrano's diminished capacity defense, the trial court allowed an expert to testify that, in his opinion, Medrano was not suffering from diminished capacity at the time of the offense. *Medrano*, 80 Wn. App. at 113. The *Medrano* court held that, in forming his opinion that Medrano was not suffering from diminished capacity, the expert could rely on inadmissible evidence, including evidence of Medrano's past convictions. 80 Wn. App. at 113-14. Because neither diminished capacity nor expert testimony are at issue here, *Medrano* is not controlling.

A trial court abuses its discretion if it does not follow ER 404(b)'s requirements in admitting evidence of past crimes. *Fisher*, 165 Wn.2d at 745. Because ER 404(b) prohibits evidence of criminal propensity and requires additional relevance of a past conviction shown with factual similarities between a past conviction and a current charge to show intent, the trial court erred in allowing the State to show Holcomb's 2009 intent with his 2005 conviction because the factual similarities are negligible. Then, even under deferential abuse of discretion review, the trial court erred in granting the State's ER 404(b) motion.

Trial court errors admitting inadmissible evidence under ER 404(b) are not of constitutional magnitude and we review these errors to determine whether they were harmless. *State v. Thach*, 126 Wn. App. 297, 311, 106 P.3d 782 (2005). Admitting forbidden ER 404(b) evidence is not harmless if the outcome of the trial would have been different if the error had not occurred. *Thach*, 126 Wn. App. at 311. Where the State's evidence against the defendant is not overwhelming, admitting forbidden propensity evidence under ER 404(b) is not harmless because it deprives the defendant of the right to a fair trial and requires reversal. *State v. Wilson*, 144 Wn. App. 166, 178, 181 P.3d 887 (2008); *See also State v. Sanford*, 128 Wn. App. 280, 287-88, 115 P.3d 368 (2005).

Here, to convict Holcomb of second degree burglary as charged, the State had to prove beyond a reasonable doubt that Holcomb entered or remained unlawfully in a building on October 19, 2009 with the intent to commit a crime against a person or property therein. Holcomb's intent was the only element in dispute. Holcomb testified that he did not intend to take any metal from the machine shop; rather, he only intended to look around. The only evidence the State

offered to rebut Holcomb's testimony on his intent was the forbidden ER 404(b) propensity evidence. Therefore, absent the State's forbidden propensity evidence, the only evidence in the record regarding Holcomb's intent is his testimony that he did not intend to take anything from the machine shop. Accordingly, the trial court's ER 404(b) error was not harmless because the outcome of the trial reasonably would have differed absent the error. We reverse and remand.

II. Statement of Additional Grounds

In a SAG, Holcomb argues that the trial court violated his constitutional right to confront the witnesses against him when it allowed the State to ask Holcomb if he was surprised that Veselovec pleaded guilty to second degree burglary.[7] We disagree.

We review alleged violations of the confrontation clause de novo. *State v. McDaniel*, 155 Wn. App. 829, 839, 230 P.3d 245 (2010). The confrontation clause guarantees a criminal defendant the right to be confronted with the witnesses against him. *State v. Pugh*, 167 Wn.2d 825, 831, 225 P.3d 892 (2009); U.S. Const. amend. VI; Wash. Const. art. I, §22. The confrontation clause bars testimonial hearsay statements made against a criminal defendant by a witness who did not testify at trial unless that witness was unavailable to testify at trial and the defendant had a prior opportunity for cross-examination. *Pugh*, 167 Wn.2d at 831; *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Hearsay is an out-of-

[7] Whether Holcomb was surprised at the time of trial by Veselovec's guilty plea and Veselovec's statement on plea of guilty that he intended to steal metal from the machine shop is irrelevant to whether Holcomb entered the machine shop with the intent to steal metal. *See* ER 401; ER 402. Moreover, even if Holcomb's lack of surprise at trial to Veselovec's guilty plea and stated intent was relevant, its minimal probative value is substantially outweighed by the high level of unfair prejudice of the evidence. ER 403. Although Holcomb's trial counsel raised these arguments below, neither Holcomb nor his current counsel address them on appeal.

court statement offered for its truth. ER 801(c).

Here, Holcomb's confrontation clause argument fails because Veselovec did not make those statements against Holcomb. Granted, Veselovec's statements were made for prosecutorial purposes and qualify as testimonial, but Veselovec made them in his own prosecution and not against Holcomb. The confrontation clause only bars testimonial hearsay statements by a non-testifying witness made against the defendant. *See Pugh*, 167 Wn.2d at 831; *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009); *Crawford*, 541 U.S. at 59. Because the State did not seek to admit any out-of-court statements made by Veselovec for the purpose of prosecuting Holcomb, the confrontation clause does not apply.

Because the trial court abused its discretion in admitting evidence of Holcomb's prior conviction, we reverse and remand for a new trial.

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 in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Van Deren, J.

Johanson, J.