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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38509-2011
	)	
v.	)	
	)	
DAWN M. HUMPHREY,	)	
	)	
Defendant-Appellant.	)	
	)	

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

HONORABLE FRED M. GIBLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Appellant Dawn Humphrey (hereinafter Ms. Humphrey and/or Appellant) appeals from convictions following a jury trial for the offenses of aiding and abetting burglary and aiding and abetting petit theft

Ms. Humphrey challenges the introduction of I.R.E. 404(b) (hereinafter 404(b)) evidence of other bad acts.

Statement of the Facts and Course of Proceedings

On January 7, 2010, Ms. Humphrey and her co-defendant Larry White entered an antique store called "The Price Tag" in Wallace, Idaho.[1] (R. p. 88.) Mr. White walked to the back of the store, and Ms. Humphrey started talking to Marcina Fogel, an employee who was located at the front of the store. (R. p. 88.) Ms. Humphrey began discussing a tea pot she had brought with her and tried to sell it to Ms. Fogel (who did not have the authority to buy it). (R. p. 88.)

Mr. White then emerged from the back of the store and left immediately without speaking to the store employees. (R. p. 89.) Ms. Humphrey left with him and they walked quickly to their vehicle. (R. p. 89.) An employee noticed something furry under Mr. White's jacket and he had his arm pressed against his jacket as though concealing some object. (R. p. 89.) Ms. Fogel checked the antique clothing section at the back of

[1] Appellant is here summarizing the facts as explained in the state's Memorandum in Opposition to Defendant's Motions to Dismiss and Suppress which is based on the preliminary hearing testimony, but the evidence at trial was substantially the same.

the store and discovered that a mannequin was bare and a fur stole was missing. (R. p. 89.)

The police were called and a short time later found the missing fur stole in the defendants' vehicle. (R. p. 89.)

At trial, co-defendant Larry White, who had apparently already pled guilty, testified on behalf of Mr. Humphrey. He said that their purpose of going to The Price Tag was to get an assessment of the teapot and was not to steal anything. (Tr. p. 281-282.) They did not discuss stealing anything from The Price Tag and he didn't want to steal anything when they went in, especially since Ms. Humphrey was very mad at him for stealing the teapot in the first place (more on this below). (Tr. p. 282.) Mr. Smith testified when he saw the mink stole, he just thought that she would like to have it and if he got it for her she wouldn't be angry at him for taking the teapot. (Tr. p. 283-284.) He also explained that he had suffered four strokes and receives social security and was overmedicating that day. (Tr. p. 284-285.)

Procedurally, Ms. Humphrey was charged by criminal complaint with aiding and abetting burglary and aiding and abetting petit theft. (R. p. 7.) After a preliminary hearing, Ms. Humphrey was bound over to the district court and an information was filed containing the same charges (R. p. 22, 26-27.)

The matter proceeded to trial where a jury found her guilty as charged. (R. p. 167.) The court sentenced Ms. Humphrey to 4 years with the first 1 ½ years fixed and retained jurisdiction. (R. p. 218.)

Appellant timely appeals. (R. p. 223.)

ISSUE

WHETHER THE COURT ERRED BY ADMITTING THE 404(b) EVIDENCE OF OTHER CRIMES

ARGUMENT

I.
THE COURT ERRED BY ADMITTING THE 404(b) EVIDENCE OF OTHER CRIMES

A. Standard of review.

The Idaho Court of Appeals explained the standard of review for this issue in *State v. Naranjo*, 267 P.3d 721 (Ct.App. 2011):

> Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's criminal propensity. I.R.E. 404(b); However, such evidence may be admissible for a purpose other than that prohibited by I.R.E. 404(b). In determining the admissibility of evidence of prior bad acts, the Idaho Supreme Court has utilized a two-tiered analysis. The first tier involves a two-part inquiry: (1) whether there is sufficient evidence to establish the prior bad acts as fact; and (2) whether the prior bad acts are relevant to a material disputed issue concerning the crime charged, other than propensity. Such evidence is relevant only if the jury can reasonably conclude the act occurred and the defendant was the actor. *Id.* We will treat the trial court's factual determination that a prior bad act has been established by sufficient evidence as we do all factual findings by a trial court. We defer to a trial court's factual findings if supported by substantial and competent evidence in the record. Whether evidence is relevant is an issue of law. Therefore, when considering admission of evidence of prior bad acts, we free review of the trial court's relevancy determination.
>
> The second tier in the analysis is the determination of whether the probative value of the evidence is substantially outweighed by unfair prejudice. When reviewing this tier we use an abuse of discretion standard. *Id.* When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason.

Id. at p. 725-726 (internal citations omitted).

B. The 404(b) evidence.

The state filed a Motion in Limine giving its notice of intent to introduce to elicit 404(b) evidence at trial. (R. p. 119.) The motion explained that employees of Wiggets Antique Market Place in Coeur d'Alene, Idaho, will testify that Ms. Humphrey and Mr. White entered their store together on January 5, 2010 (two days before the instant crime. (R. p. 119.) The employees will testify that Mr. Humphrey brought in an antique plate and offered it for sale (and it was purchased from her). (R. p. 119.) Mr. White proceeded into the interior of the store and then left the store and Ms. Humphrey left the store a short time later. (R. p. 120.) The employees will testify that after the defendants left they noticed that an antique teapot was missing. (R. p. 120.)

The motion continued by explaining that employees from "The Price Tag" will testify that it was the same teapot offered for sale two days later and that the police officer will testify he recovered the teapot from the defendants' vehicle. (R. p. 120.) Also, the state explained it will offer certified judgments showing that the defendant pled guilty to petit theft regarding the teapot from Wiggets in a Kootenai County case. (R. p. 120.)

An evidentiary hearing on the 404(b) motion was held. Defense counsel, who had just entered the case, requested the court not make a final ruling until he had a chance to contest the matter with his own affidavits and witnesses. (Tr. p. 73.) The court agreed to wait and allow the defense to present evidence at a later pre-trial conference. (Tr. p. 74.)

At that later pre-trial conference, defense counsel stated he was not resisting the 404(b). Since the court then made a comprehensive ruling admitting the evidence, it appears defense counsel meant that he was not actively resisting the motion by

presenting argument or evidence, as opposed to agreeing to allow the 404(b) evidence in.[2]

The court ruled as follows:

> And having considered it, I am going to allow the State to present the evidence that it has given notice of pursuant to Rule 404(b). I think that that evidence is relevant to prove motive, opportunity, intent, preparation, knowledge, identity and absence of mistake or accident, in addition to, to the extent it might not be incorporated within those lists of items, a modus operandi. So the State will be allowed to present that evidence.
>
> And I've certainly considered that—weighed the potential prejudice to the defendants in making that ruling, as I'm required to under Rule 403, and I think the relevance of the proposed testimony by far outweighs the potential prejudice to the defense. So I am going to allow the state to present that evidence.

Tr. 113, ln. 21—p. 114, ln. 11.

C. The court erred by admitting the 404(b) evidence.

Appellant asserts that the court erred in allowing into evidence, the 404(b) evidence regarding the theft of the teapot from Wiggets. Appellant takes no issue with the first part of the first tier of the inquiry, to wit, whether there was sufficient evidence that the other bad act actually happened. Nor is Appellant arguing that the court could not have found the evidence was relevant for some non-propensity purpose.

Rather, Appellant asserts that the problem is that the jury would not have considered the evidence for any reason other than propensity, regardless of whether the court could find a non-propensity related reason for its admission. Therefore, the

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[2] Defense counsel's odd phrasing again came up in trial when the court had to clarify what he was not resisting. (Tr. p. 256-257.) But Appellant asserts that regardless of what defense counsel meant, the 404(b) issue is reviewable as preserved error since the court made a ruling, which is the very point of the requirement that error be preserved.

court erred by declaring that the probative value of the evidence was not substantially outweighed by the unfair prejudice.

Obviously, the prior bad act evidence was propensity evidence even if it also had non-propensity relevance. Prior to the instant offense, the two defendants went into a store where according to the state's theory, Ms. Humphrey distracted the storekeeper by trying to sell an item while Mr. White stole something. In the instant case, the two defendants went into a store where according to the state's theory, Ms. Humphrey distracted the storekeeper by trying to sell an item while Mr. White stole something. To make matters far worse, the earlier stolen teapot was the item Mr. Humphrey was trying to sell.

It strains credulity to believe that the jury would or could have parsed out the different usages of the prior bad act evidence and considered it for only a proper purpose but not for an improper purpose. In other words, Appellant asserts that it cannot be seriously argued that the jury did not use the prior bad act evidence as propensity evidence, to wit, they did it before and so they did it again.

The danger of this sort of propensity evidence was explained in *State v. Grist*, 147 Idaho 49 (2009):

> The policy underlying the common law rule [prohibiting character evidence] was the protection of the criminal defendant. See WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE, § 5239, pp. 436-439. "The prejudicial effect of [character evidence] is that it induces the jury to believe the accused is more likely to have committed the crime on trial because he is a man of criminal character." *State v. Wrenn*, 99 Idaho 506, 510, 584 P.2d 1231, 1235 (1978). Character evidence, therefore, takes the jury away from their primary consideration of the guilt or innocence of the particular crime on trial. *Id.*

Id., at p. 52.

In this case, the prior bad act is the exactly the same crime as the instant offense. Thus, there is an extreme likelihood that once the jury learned they had done it before, that it would find them guilty without serious consideration of whether they did it again. In other words, it would take away the jury's primary consideration of the guilt or innocence of the instant offense.

Additionally, while the standard other bad acts instruction was given in this case, Appellant asserts that it was insufficient to prevent the prior bad act evidence from being used as propensity evidence. (R. p. 188.) In *State v. Stoddard*, 105 Idaho 533, 538 (Ct.App. 1983), the Court of Appeals explained that in a case involving the theft of one expensive sports car, the prejudice of introducing evidence of charges concerning the defendant's theft of a different expensive sports car was so great that the error could not have been cured by an instruction. In our case, it again cannot be seriously argued, excerpt by resort to legal fiction, that any instruction would prevent the jury from using the evidence in the way it would be used by anyone under any circumstance.

Appellant asserts that district court here did not come to its conclusion that the probative value was not substantially outweighed by the unfair prejudice by an exercise of reason. This is because it did not consider the power of propensity evidence and the extreme unlikelihood that the jury would consider it in any other way.

Finally, this is a preserved issue, an objection having been made below and the district court having ruled on the issue. In *State v. Perry*, 245 P.3d 961 (Idaho 2010), the Idaho Supreme Court explained:

> Idaho shall from this point forward employ the *Chapman* harmless error test to all objected-to error. A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such

an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt.

Id., 974.

Accordingly, unless the State meets its burden, the convictions must be reversed.

CONCLUSION

Ms. Humphrey requests this reverse and vacate her convictions for aiding and abetting burglary and aiding and abetting petit theft.

DATED this 27th day of March, 2012.

Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by the method as indicated below:

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Greg S. Silvey