

2015 WL 581792 (Mo.App. W.D.) (Appellate Brief)
Missouri Court of Appeals, Western District.

STATE OF MISSOURI, Respondent,

v.

Michael D. HOLIWAY, Appellant.

No. WD77393.

January 30, 2015.

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit, Division 15
The Honorable Robert M. Schieber, Judge
1316-CR01691-01

Appellant's Brief

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***5 JURISDICTIONAL STATEMENT**

This is a direct appeal. Michael Holiway was convicted after a jury trial in Jackson County Circuit of **financial exploitation** of the **elderly**, §570.145, RSMo (Supp. 2012). On March 14, 2014, the trial court sentenced Mr. Holiway to 15 years imprisonment. On March 18, 2014, Mr. Holiway timely filed a notice of appeal.

This appeal does not involve any matter reserved for the Missouri Supreme Court's exclusive appellate jurisdiction; therefore, jurisdiction lies in the Missouri Court of Appeals/Western District. *Mo. Const., Art. V, §3; §477.070, RSMo (2000)*.

***6 STATEMENT OF FACTS**

In Fall, 2011, Supreen Holiway was 79 years old and lived at the Swope Parkway Estates retirement community in Jackson County, Missouri (Tr242, 244, 307-308, 311).¹ She retired in 1975 after working for the Internal Revenue Service (Tr248, 308, 327).

Supreen Holiway did not suffer from any mental difficulties, but her physical ailments limited what she could do outside her home (Tr245, 312). She suffered from **rheumatoid arthritis**, **diabetes**, and severe tremors (Tr245, 312-313). She did not drive and used a walker to get around her home (Tr245, 313). Her family took care of her by doing such things as helping her pay bills by writing checks, picking up prescriptions, and grocery shopping (Tr248, 251, 312, 316). If Supreen Holiway wanted spending cash, she would tell her family to get \$20-\$40 cash back from the grocery shopping (Tr252-253). It was hard for her to get out of her home, so she wouldn't go directly to the bank and get cash (Tr253, 313).

Supreen Holiway's daughter, Karen Holiway, was the primary caretaker, until Karen suffered a **stroke** in 2010 (Tr243, 248-249, 309-310). After that, Supreen Holiway was cared for by her granddaughter, Kimberly Goodwin, and, on occasion, Kimberly's sister, Stephanie (Tr242, 248-249, 255, 265, 310, 312-313). In Fall, 2011 Supreen Holiway's grandson, Michael Holiway began taking care of her (Tr245-246, 250, 265, 10-312, 324).

Supreen Holiway banked at Mazuma Credit Union (Tr251, 313). She had an ***7 ATM²**/debit card for her bank account but only used it herself to pay for copays at the doctor's office (Tr253-254, 315). In Fall, 2011, the only other persons with access to Supreen Holiway's debit card and the card's PIN³ were Kimberly, Stephanie, and Mr. Holiway (Tr254, 325). Supreen Holiway would give them the debit card to buy things for her, such as her medications or groceries (Tr317-318, 325).

Supreen Holiway's caretaker - usually Kimberly or Mr. Holiway - would walk up to the complex's entrance and get her mail out of her mailbox (Tr255-256, 319). She would always go through her mail and review her bank statements (Tr254, 317-318).

In late November/early December, 2011, Supreen Holiway called Kimberly at work (Tr256-257). She was very upset and said, "Kim, I received a call from Mazuma. My money is gone" (Tr256-257). Kimberly asked her grandmother to let her see her October and November bank statements, and Supreen Holiway said that she hadn't been receiving bank statements lately (Tr257, 318). With her grandmother's permission, Kimberly went to Mazuma and got bank statements from her grandmother's account for six months (Tr257).

There were changes in Supreen Holiway's bank account beginning in late September, 2011: online purchases and ATM withdrawals (Tr259-260). Supreen Holiway said that she never made these withdrawals (Tr260). Kimberly asked who *8 Supreen Holiway had been giving her debit card to, and Supreen Holiway said she'd given it to Mr. Holiway (Tr260). With her grandmother's permission, Kimberly made a police report and told the police about the pertinent dates and the ATM transactions (Tr262).

Mazuma Credit Union records of Supreen Holiway's account showed the following ATM withdrawals,⁴ all done at the Blue Parkway Branch at 4001 Blue Parkway, Kansas City, Jackson County, Missouri:

- October 21, 2011: \$300 and \$100;
- October 22, 2011: \$500;
- October 24, 2011: \$500;
- October 25, 2011: \$500;
- October 26, 2011: \$500;
- October 28, 2011: \$500;
- October 31, 2011: \$200 and \$300;
- November 2, 2011: \$500;
- November 4, 2011: \$500;
- November 5, 2011: \$500;
- November 6, 2011: \$500;
- *9 ● November 7, 2011: \$500;
- November 8, 2011: \$500;
- November 9, 2011: \$500;

- November 10, 2011: \$500;
- November 12, 2011: \$500;
- November 13, 2011: \$100, \$100, \$100, \$100, and \$100;
- November 14, 2011: \$500;
- November 16, 2011: \$500; and
- November 19, 2011: \$500.

(Tr273-276). These withdrawals totaled \$9,900 (Tr276-277). Mazuma Credit Union records for Supreen Holiway's account corresponded with video footage from ATMs of Mr. Holiway making 14 of the 20 withdrawals in question (Tr263-264, 277, 283-285, 287-297, 322-323).

After the loss of this money, Supreen Holiway did not know how she would pay for bills, rent, food, or medications (Tr299). She was unable to afford her previous lifestyle (Tr301). The money in her account was the money Supreen Holiway had saved up for retirement (Tr323).

The state charged Mr. Holiway with **financial exploitation** of the **elderly**, §570.145, RSMo (Supp. 2012) (LF1, 3-4, 22-24, 94). A jury trial was held on February 3 and 5, 2014 (Tr1-5, LF34, 93-97).

Mr. Holiway filed a pre-trial motion in limine to exclude evidence of prejudicial *10 uncharged misconduct (LF4, 25-26, 35-36). Mr. Holiway asked the trial court to exclude evidence of Mr. Holiway's use of Supreen Holiway's debit card for unauthorized purchases through various online retailers as evidence of uncharged misconduct (Tr213-214, LF25-26, 35-36). The trial court denied this motion, over the defense's objection (Tr214, LF36).

At trial, Kimberly Goodwin and Supreen Holiway testified, over the defense's objection, about the online purchases (Tr258-262, 319, 321). Supreen Holiway also testified that she never gave Mr. Holiway her debit card in order to make ATM withdrawals (TTr317, 328).

The jury found Mr. Holiway guilty as charged (Tr360, LF3, 5, 92, 94, 97, 106, A2).

On February 28, 2015, Mr. Holiway timely filed a motion for new trial (Tr361, LF5). On March 14, 2014, the trial court denied Mr. Holiway's motion for new trial and sentenced him to 15 years imprisonment (Tr386, LF3, 5-6, 106-107, A2-A3). On March 18, 2014, Mr. Holiway timely filed a notice of appeal (LF6).

***11 POINT RELIED ON**

The trial court erred and abused its discretion by admitting the testimony of Kimberly Goodwin and Supreen Holiway about Michael Holiway using Supreen Holiway's debit card and making unauthorized purchases from online retailers, in that this evidence of uncharged bad acts was not logically relevant, because it had no legitimate tendency to establish directly Mr. Holiway's guilt for using Supreen Holiway's debit card to make unauthorized ATM withdrawals from Supreen Holiway's bank account; and this evidence of uncharged bad acts was not legally relevant, because its probative value outweighed its prejudicial effect - it was nothing more than the state blatantly and inappropriately putting before the jury Mr. Holiway's propensity as thief, thus violating Mr. Holiway's rights to due process, fair trial, and being tried only for the charged crime, U.S. Const., Amends. V, VI, XIV; Mo. Const., Art. I, §§, 17, 18(a).

State v. Henderson, 105 S.W.3d 491 (Mo. App., W.D. 2003);

State v. Ellison, 239 S.W.3d 603 (Mo. banc 2007);

Old Chief v. United States, 519 U.S. 172 (1997);

State v. Williams, 976 S.W.2d 1 (Mo. App., W.D. 1998);

U.S. Const., Amends. V, VI, XIV;

Mo. Const., Art. I, §§10, 17, 18(a);

§570.145, RSMo;

Rules 29.11, 30.20;

Merriam-Webster's Collegiate Dictionary, 10th Ed. (2002).

*12 ARGUMENTS

The trial court erred and abused its discretion by admitting the testimony of Kimberly Goodwin and Supreen Holiway about Michael Holiway using Supreen Holiway's debit card and making unauthorized purchases from online retailers, in that this evidence of uncharged bad acts was not logically relevant, because it had no legitimate tendency to establish directly Mr. Holiway's guilt for using Supreen Holiway's debit card to make unauthorized ATM withdrawals from Supreen Holiway's bank account; and this evidence of uncharged bad acts was not legally relevant, because its probative value outweighed its prejudicial effect - it was nothing more than the state blatantly and inappropriately putting before the jury Mr. Holiway's propensity as thief, thus violating Mr. Holiway's rights to due process, fair trial, and being tried only for the charged crime, U.S. Const., Amends. V, VI, XIV; Mo. Const., Art. I, §§10, 17, 18(a).

Facts

The state charged Mr. Holiway with **financial exploitation** of the **elderly**, §570.145, RSMo (Supp. 2012) (LF1, 3-4, 22-24). Specifically, the state charged that between October 21, 2011 and November 19, 2011:

- Supreen Holiway 60 years old or older; and

- Mr. Holiway misrepresented that he was using Supreen Holiway's debit card to purchase medication and groceries, which use constituted a material fact of the terms of an agreement with Mr. Holiway; and

- *13 ● Mr. Holiway knowingly obtained control of U.S. currency, which was Supreen Holiway's property and had a value of at least \$1,000; and

- Mr. Holiway did so with the intent to permanently deprive Supreen Holiway of the possession of that property; and

- Thereby, Mr. Holiway benefited, and Supreen Holiway was detrimentally affected.

(LF23).

Mr. Holiway filed a pre-trial motion in limine to exclude evidence of prejudicial uncharged misconduct (LF4, 25-26, 35-36). Mr. Holiway asked the trial court to exclude evidence of Mr. Holiway's use of Supreen Holiway's debit card for unauthorized purchases through various online retailers as evidence of uncharged misconduct (Tr213-214, LF25-26, 35-36). The trial court denied this motion, over the defense's objection (Tr214, LF36). The trial court stated:

I think it's all part of the sequence of events that led to these charges and part of the same set of circumstances. I think they are part and parcel of each other. As a matter of fact, from what I know of the evidence, this came to you because of the ATM use of the credit cards. So because of that I'm going to overrule the objection with regard to that motion in limine.

(Tr214).

At trial, Kimberly Goodwin testified on direct examination by the state about the *14 online purchases:

Q. All right. So you are going through the statements, you get to the late September statement, and you start seeing some purchases online.

A. Some purchases online that I was - I thought it was pretty odd. And I was sitting next - we were sitting next to each other, and I said - knowing my grandmother, she doesn't have a computer - knowing she doesn't have internet access. She is scared of the internet. She - you know, I just found it odd. And so I started asking her about these purchases and she was like, "I don't know what that is."

So October comes, we start seeing more purchases online...

Q....So you said the internet purchase were kind of a flag for you because that is not something your grandma normally did.

A. Yeah.

Q. Why did the ATM withdrawals raise a flag to you?

A. It raised a flag, because she doesn't withdraw money that way. She never told us, Hey go to the ATM and get me \$40....

Q. All right. So at this point you have got the internet purchases kind of raised a flag for you, the ATM purchases.

A. Yes.

Q. As you're going through the bank statements and looking around your grandma's house, is there anything else that kind of raises an alarm for you?

*15 A. I'll say a day or two later UPS dropped off some packages. And I'm like, "Granny, did you order something?" She said, "No." Okay. So I open up the packages, it was maybe about two or three. I know one was from Wal-Mart and that I was able to get back.

Q....Who were the packages addressed to?

A. They were addressed to Michael Holiway at her address.

Q. Let me ask you a different question. Did those packages, at least based on what you were able to look at, did they correspond with some of the online purchases that you saw?

A. Yes, they did.

(Tr259-261).

On direct examination by the state, Supreen Holiway testified:

Q. And after you got the statements that were missing, what did you see?

A. I saw quite a few items that I don't buy. I know I don't purchase, and it was too many...

Q....So you are looking through your statement and you see a bunch of purchases and not stuff that you would buy; is that right?

A. That I would not buy.

Q. And did you recognize any of those purchases?

A. I would recognize a lot of them maybe would be tape or buying movies or parts, cars.

*16 Q. Okay. Were there also so ATM withdrawals of actual cash from your statements that you saw?

A. Yes.

Q. Was that a lot of money to you, the cash that was missing?

A. Oh, yes. \$500 at a time. And very often so close together sometimes during the same day.

Q. And you testified earlier you never used the ATM; is that right?

A. No, I would never go use the ATM.

Q. And you would never take out an amount like \$500?

A. Oh, no.

(Tr319, 322).

Standard of Review

Defense counsel objected to the testimony Kimberly Goodwin and Supreen Holiway about these online purchases (Tr258-259, 319-320). In Mr. Holiway's new trial motion, defense counsel raised this issue of improper admission of this evidence (LF99-100). Because defense counsel objected timely and included the claim in the new trial motion, it is preserved for appellate review. Rule 29.11(d).⁵

The standard of review for the admission of evidence is abuse of discretion. *State *17 v. Reed*, 282 S.W.3d 835, 837 (Mo. banc 2009). "This standard gives the trial court broad leeway in choosing to admit evidence; therefore, an exercise of this discretion will not be disturbed unless it 'is clearly against the logic of the circumstances.'" *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. banc 2006). The decision to admit evidence is an abuse of discretion where it "is so unreasonable and arbitrary that the ruling

shocks the sense of justice and indicates a lack of careful deliberate consideration.” *State v. Williams*, 976 S.W.2d 1, 2 (Mo. App., W.D. 1998), quoting *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). An abuse of discretion in admitting improper evidence, however, warrants a new trial only if the admission prejudiced the defendant with reasonable probability that the evidence altered the trial's outcome. *State v. Henderson*, 105 S.W.3d 491, 497 (Mo. App., W.D. 2003).

Discussion

A defendant has the right to be tried only for the offenses with which he is charged. *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998); Mo. Const., Art. I, §17. Missouri courts have long maintained this prohibition against admission of evidence of other crimes. *State v. Ellison*, 239 S.W.3d 603, 606 (Mo. banc 2007).

This rule [prohibiting the admission of evidence of crimes other than the one of which the defendant stands accused], so universally recognized, and so firmly established in all English-speaking lands, is rooted in that jealous regard for liberty of the individual which has distinguished our *18 jurisprudence from all others, at least from the birth of the Magna Charta.⁶

Id. at 606, fn. 2, quoting *State v. Spray*, 74 S.W. 846, 848, 851 (Mo. 1903).

Evidence of uncharged misconduct is admissible only if it is logically and legally relevant to establishing the defendant's guilt of the crime for which he is on trial. *State v. Burns*, 978 S.W.2d at 761. Evidence is logically relevant if it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial. *Id.* Evidence is legally relevant if its probative value outweighs its prejudicial effect. *Id.*

Evidence of uncharged misconduct is admissible if it tends to establish motive, intent, identity,⁷ the absence of mistake or accident, or a common scheme or plan. *Id.*; *State v. Bernard*, 849 S.W.2d 10, 16-17 (Mo. banc 1993). Also, evidence of the circumstances surrounding the offense charged is admissible. *Id.*; *State v. Wacaser*, 794 S.W.2d 190, 194 (Mo. banc 1990); *State v. Manley*, 223 S.W.3d 887, 892 (Mo. App., W.D. 2007). The state is allowed to present evidence that “paint[s] a complete picture of the crime charged and need not sift and separate the evidence.” *Id.*; *19 *State v. Morrow*, 968 S.W.2d 100, 107 (Mo. banc 1998); *State v. Henderson*, 826 S.W.3d 371, 374 (Mo. App., E.D. 1992); *State v. Coutee*, 879 S.W.2d 762, 767 (Mo. App., S.D. 1994) (“[T]he so-called ‘complete story’ or res gestae exception provides for the admission of evidence necessary to provide a complete and coherent picture of the crime charged, the events leading up to it, or the circumstances surrounding it.”).

Evidence that diverts the jury's attention or causes “prejudice wholly disproportionate” to its logical relevance should be excluded. *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984). Because of the dangerous and misleading nature of evidence of uncharged misconduct, courts must subject the evidence to rigid scrutiny and should admit such evidence only when there is a strict necessity. *State v. Henderson*, 105 S.W.3d at 496; *State v. Pennington*, 24 S.W.3d 185, 190 (Mo. App., W.D. 2000). “This is because such evidence may cause a jury to convict a defendant on the basis of perceived propensities rather than on the basis of substantial and competent evidence.” *State v. Henderson*, 105 S.W.3d at 496.

Evidence of uncharged misconduct is not admissible to demonstrate that a defendant has a propensity to commit crimes. *State v. Bernard*, 849 S.W.2d at 16. The criteria of logical and legal relevance are not intended as a loophole for evading the general ban on propensity evidence. *State v. Ellison*, 239 S.W.2d at 607. A finding of legal and logical relevance will never provide a basis for the admission of prior criminal acts evidence for the purpose of demonstrating a defendant's propensity. *Id.* (emphasis in the original).

A question must be answered: Whether the evidence tends “to lure the fact finder *20 into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997). ‘Unfair prejudice’ within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional

one.” *Id.* “Such improper grounds certainly include...generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily).” *Id.*, at 180-81. “Although... ‘propensity evidence’ is relevant, the risk that a jury will convict for crimes other than those charged - or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment - creates a prejudicial effect that outweighs ordinary relevance.” *Id.*, at 181.

The testimony from Kimberly Goodwin and Supreen Holiway about the online purchases was evidence of uncharged misconduct and was inadmissible, because it was neither logically relevant nor legally relevant to establishing Mr. Holiway's guilt of the charged crime. *State v. Burns* 978 S.W.2d at 761. Evidence of the online purchases was not logically relevant, because it had no legitimate tendency to establish directly Mr. Holiway's guilt for misrepresenting that he was using Supreen Holiway's debit card to purchase medication and groceries; that he knowingly obtained control of U.S. currency, which was Supreen Holiway's property and had a value of at least \$1,000; and he did so with the intent to permanently deprive Supreen Holiway of the possession of that U.S. currency (LF23). *Id.* Evidence of the online was not legally relevant, because its prejudicial effect outweighed its probative value; it was nothing more than the state *21 blatantly and inappropriately putting before the jury Mr. Holiway's propensity as a thief. *Id.*

Evidence of uncharged misconduct is not admissible to demonstrate that a defendant has a propensity to commit crimes. *State v. Bernard*, 849 S.W.2d at 16; *State v. Ellison*, 239 S.W.3d at 607. A finding of legal and logical relevance will never provide a basis for the admission of prior criminal acts evidence for the purpose of demonstrating a defendant's propensity. *Id.* (emphasis in the original). The decision of this trial court to admit evidence of the online purchases was an abuse of the trial court's discretion, because the introduction of such classic propensity evidence, under the loophole of logical and legal relevance, is unreasonable, arbitrary, shocking to the sense of justice, and indicative of a lack of careful deliberate consideration. *State v. Williams*, 976 S.W.2d at 2; *State v. Ellison*, 239 S.W.3d at 607.

The trial court admitted this evidence under the complete picture exception (Tr214). *See, State v. Manley*, 223 S.W.3d at 892. The trial court erred. First, the evidence was not the key to finding out that Supreen Holiway's bank account had been bled dry. By their own admission, Kimberly Goodwin and Supreen Holiway suspected unauthorized activity by the nearly \$10,000 worth of ATM withdrawals in less than one month (Tr260-261, 322). Second, the trial court forgot that despite an exception to the general rule of prohibition of this evidence, evidence that diverts the jury's attention or causes “prejudice wholly disproportionate” to its logical relevance, such as the evidence at issue here, should be excluded. *State v. Taylor*, 663 S.W.2d at 239. The trial court forgot to consider the dangerous and misleading nature of this evidence, subject the *22 evidence to rigid scrutiny, and, consequently, exclude the evidence because there was no strict necessity to admit it. *State v. Henderson*, 105 S.W.3d at 496; *State v. Pennington*, 24 S.W.3d at 190. “This is because such evidence may cause a jury to convict a defendant on the basis of perceived propensities rather than on the basis of substantial and competent evidence.” *State v. Henderson*, 105 S.W.3d at 496.

This evidence was a thinly-veiled attempt by the state to sneak in the true character of this evidence - propensity. *State v. Ellison*, 239 S.W.2d at 607. The evidence of the online purchases “lure[d] the fact finder into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. United States*, 519 U.S. at 180 (1997). Thus, the trial court should have excluded the testimony of Kimberly Goodwin and Supreen Holiway about the online purchases. As this Court has previously held:

The truth is the insidious combination indulged by the State is the antithesis of what the well-established rules of evidence seek to achieve - to allay any inference or supposition that “once a criminal always a criminal”. When evidence of separate and distinct crimes offered by the State goes beyond the perimeters just mentioned, it is prejudicial. Otherwise, the pervasive logic underlying the established rules of evidence is flawed. If admission of such evidence is not prejudicial, rules of evidence prohibiting its admission are unjustified. One would be hard put to champion a contrary argument.

State v. Shepard, 654 S.W.2d 97, 101 (Mo. App., W.D. 1983).

***23 Conclusion**

The trial court erred in admitting the testimony of Kimberly Goodwin and Supreen Holiway regarding the uncharged acts of online purchases and, consequently, violated Mr. Holiway's rights to due process, fair trial, and being tried only for the charged crime. *U.S. Const, Amends. V, VI, XIV; Mo. Const, Art. I, §§10, 17, 18(a)*. Mr. Holiway, therefore, respectfully requests that this Court reverse his conviction and sentence and remand for a new trial.

***24 CONCLUSION**

Based on the Argument, supra, this Court should reverse Michael Holiway's conviction and sentence and remand for a new trial.

Footnotes

- 1 The record on appeal consists of a legal file (LF) and a trial transcript (Tr).
- 2 Automatic teller machine. *Merriam-Webster's Collegiate Dictionary*, 10th Ed. (2002).
- 3 Personal identification number. *Merriam-Webster's Collegiate Dictionary*, 10th Ed. (2002).
- 4 The maximum daily amount that can be withdrawn from a Mazuma ATM was \$500 (Tr276). To make an ATM withdrawal, a person needs not only the account's debit card but also the PIN (Tr278-279). An ATM shuts down after 3 incorrect PIN entries (Tr279).
- 5 Should this Court find the claim to be unpreserved, Mr. Holiway requests plain error review. Rule 30.20.
- 6 The Magna Carta (Charta) was a document constituting a fundamental guarantee of rights and privileges created in England in 1215. *Merriam-Webster's Collegiate Dictionary*, 10th Ed. (2002).
- 7 This Court held that evidence offered under the identity exception must meet the same test for admission as that offered under the signature *modus operandi* exception; i.e., that the offenses are so similar and unique as to constitute the signature of the accused. *State v. Henderson*, 105 S.W.3d at 496.