

NO. 36430-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

CATRINA MARIE SCARPA, Appellant

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DIVISION II
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FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE BARBARA D. JOHNSON
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-02357-9

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

The State accepts the statement of the case as set forth by the Appellant. Where additional information is needed, it will be supplied in the argument portion of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

First Assignment of Error raised by the Defendant is a claim of ineffective assistance of counsel because the defense proposed an incorrect unwitting possession instruction. Specifically, the claim is that the Defendant offered an unwitting possession of drug instruction that did not comport with the evidence.

The Defendant's proposed Jury Instructions (CP 4) contained an unwitting possession instruction. That instruction was used by the Trial Court in its Court's Instructions to the Jury (CP 9). That instruction reads as follows:

Instruction 10

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was

possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

-(Court's Instructions to the Jury, No. 10 (CP 9))

The Defendant, when she testified, discussed with the jury the purchasing of a little metal box at a Goodwill store. She told the jury that she purchased it primarily because of the picture on the front of the box (RP 76). She indicated that she noted inside that there was some dust or what looked like dust to her (RP 76 L 22-24). She told the jury that she did not look at it very closely and didn't think too much of it. She further told the jury that when she purchased it she put the box in her purse and basically forgot about it. She told the jury that she hadn't used the box or it hadn't been taken out of her purse. (RP 77). She told the jury that even though she knows what methamphetamine looks like, she did not place any of it in the box (RP 78).

To establish ineffective assistance of counsel, the defendant must show that: (1) her counsel's performance was deficient, and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defendant must overcome a strong presumption that her counsel's representation was adequate and effective. State v. McFarland, 127

Wn.2d 322, 335, 899 P.2d 1251 (1995). To show prejudice, the defendant must establish that there is a reasonable probability that, except for counsel unprofessional errors, the result of the proceeding would have been different. McFarland, 127 Wn.2d at 335.

Jury Instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and, when read as a whole, properly inform the trier of fact of the applicable law. State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005).

Counsel on appeal cites no case law to the effect that using one prong of an unwitting possession is inappropriate under various circumstances. In fact, when the evidence in this case is reviewed, it is obvious that the Defendant is claiming that she did not know the nature of the substance in the little metal box. That is what she testified to in front of the jury. This particular Jury Instruction was not misleading and allowed the defense the opportunity to argue unwitting possession. The State submits that there is absolutely no showing here of ineffective assistance of counsel. The jury was properly informed on the unwitting possession claim by the defense which allowed them the opportunity to argue this to the jury and the proper burden was explained to the jury in the court's instructions. A defendant must affirmatively prove prejudice in a claim of ineffective assistance of counsel, not simply show that the

errors had some conceivable effect on the outcome. Strickland, 466 U.S. at 693. There simply has been no showing of ineffective assistance of counsel.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the Defendant is a claim that the Court improperly admitted evidence that she had possessed marijuana and that she used methamphetamine in the past.

When the Defendant was stopped, she had in her purse two containers. One of them had marijuana and the other had a trace amount of methamphetamine. This matter was raised by the defense in Motion in Limine prior to the start of the trial. The defense attorney argued that the allowing of the question of the methamphetamine would be more prejudicial than probative of any of the issues in the case. He specifically indicated that there was no specific time frame associated with her use of methamphetamine and that it was more of character evidence than prior bad acts (RP 15-16).

The Court heard additional comments from the prosecution but then decided to reserve on this issue until the Court had an opportunity to review case law concerning these issues in light of the fact that the defense was an unwitting possession (RP 17 L 7-22).

The defense also raised the question of the marijuana and raised the fact that the defendant had just pled guilty that morning (before the start of the trial) to the Possession of Marijuana and therefore it had no relevance or probative value in the case. Again, the Court heard from both sides and determined that it had some relevance because of the nature of the defense that was being submitted.

The Court: Thank you. Well, I'll deny the motion to limit with respect to that portion of the evidence. The evidence is very intertwined in the issue of knowledge and statements to the officer, as really under that category that's also been referred to as *res gestae*, an inseparable part of a crime charged, that the statements and the possession of those items in her purse are probative to the jury's question of whether there was knowledge of the substance. So it would be very difficult to evaluate the factual circumstances without being aware of that circumstance as well and the similarity that's argued with respect to that.

So it does give an area of argument, and it will be up to the jury as to what conclusion, if any, they reach from that. But it does appear to me that the probative value is connected to the crime itself and would not be possible to exclude that from consideration.

-(RP 19 L 19-25, RP 20 L 1-10)

When the question then was raised with the parties again, after the Defendant had testified, the Court limited the testimony of the investigating officer and kept it extremely narrow. (RP 87-88). When the officer then testified, the entire extent of the questioning concerning this

was an answer to one question about an additional statement that she had made to the officer after being advised of Miranda and the Detective Tyler responded as follows:

A. Post Miranda, I asked her if she had done meth in the past, and she said yes.

-(RP 89 L. 1-2)

It's also interesting to note that this is in line with the Prosecution's cross-examination of the Defendant when she testified. She maintained that the purse belonged to her (RP 78, L 21-23). She also indicated that the containers in the purse belonged to her and that one was made out of wood and the other was made out of metal (RP 79). She indicated that the marijuana that was contained in the wood container belonged to her and that she knows what methamphetamine looks like (RP 79). As the Court had indicated, this is all part of the res gestae and that she is claiming unwitting possession of, apparently, one of the boxes containing illicit substances, but not disavowing her possession of the other container.

Before evidence of other crimes, wrongs, or acts can be admitted over proper objection, the Trial Court must determine that it is logically relevant to a material issue before the jury and that its probative value outweighs its potential for prejudice. (ER 401); (ER 403); State v. Kelly,

102 Wn.2d 188, 198, 685 P.2d 564 (1984); State v. Saltarelli, 98 Wn.2d 358, 361-363, 655 P.2d 697 (1982). In determining whether evidence is logically relevant, the Trial Court must find that it has a tendency to make more or less probable the existence of a fact that is of consequence to the action, ER 401; Saltarelli, 98 Wn.2d at 363. In weighing probative value against prejudicial effect, the Trial Court must exercise its discretion, and its decision will be overturned only for abuse of discretion. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

ER 404(b) evidence of other crimes, wrongs, or acts deals specifically with other purposes for admissibility which may include absence of mistake or accident. Clearly, a claim of unwitting possession would fit into this type of classification. Evidence of prior bad acts is not admissible to show propensity to commit a crime, but may be admissible for one of these other purposes. State v. Trickler, 106 Wn. App. 727, 732-734, 25 P.3d 445 (2001). In Trickler, one of the areas of interest and concern was providing the jury with a complete story of the events surrounding the crime which is normally referred to as transaction evidence or res gestae. Under the res gestae or same transaction exception to ER 404(b), evidence of other crimes is admissible to complete the story of the crime on trial by providing its immediate context of happenings

near in time and place. State v. Fish, 99 Wn. App. 86, 94, 992 P.2d 505 (1999); State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

In our situation, although the Trial Court did not expressly conduct a balancing analysis on the record in admitting the evidence, it was reviewed in some detail by the Court along with review of case law. A trial court's failure to balance on the record is harmless error if the Appellate Court can determine from the record that the trial court would have admitted the evidence had it performed the balancing test, or if excluding the evidence would not have changed the trial's outcome. State v. Carleton, 82 Wn. App. 680, 686-687, 919 P.2d 128 (1996). In our situation, the evidence supported the Trial Court's characterization of the possession of the methamphetamine as being closely connected with the underlying facts and certainly had a direct bearing and impact on the affirmative defense of unwitting possession. The evidence completed the story of the crime on trial and allowed the jury to get the full flavor of what was being alleged. As the Court's comments previously set forth in this brief indicate, the Court found that there was a logical relevance to the testimony and the issue of unwitting possession. This became an essential element of the crime which needed the additional information provided to help flesh out the entire circumstances for a jury. To not allow this would leave the jury in the dark as to many of the factual elements of the

testimony. Although the evidence was prejudicial, it was also extremely probative of the issues that the jury had to decide. The State submits that there is nothing to indicate that the Trial Court abused its discretion in ruling in this fashion.

Finally, the Trial Court did not give a limiting instruction because the parties did not want to emphasize this testimony.

THE COURT: And I will note we discussed briefly whether some limiting instruction might be given with respect to the 404(b) issue that has been raised throughout the trial. And it was determined that it would bring more emphasis to it than limiting it. So have decided to proceed as we've indicated in this final set.

-(RP 91 L 8-13)

That final comment by the Trial Court before the jury was instructed is extremely probative. The 404(b) evidence had been discussed throughout the trial, between the Court and counsel, and that it was decided not to bring emphasis onto this particular point. This is also in line with how limited this particular information was that the jury received. The State submits that there has been no showing of abuse of discretion by the Trial Court.

IV. CONCLUSION

The Trial Court should be affirmed in all respects.

DATED this 28 day of March, 2008.

Respectfully submitted:

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