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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36636-7-III

STATE OF WASHINGTON, Respondent,

v.

GLORIA ANN MERCER, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

In Gloria Mercer's trial for possessing a controlled substance, the State presented to the jury evidence of other controlled substances and paraphernalia associated with the passengers and for which Mercer was not charged. Because the evidence was not properly evaluated under ER 404(b), because its admission was prejudicial to Mercer's case, and because her trial counsel was ineffective for failing to object, retrial is required.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in admitting evidence of uncharged acts by Mercer's passengers without conducting an ER 404(b) analysis.

ASSIGNMENT OF ERROR NO. 2: Mercer's counsel rendered ineffective assistance by failing to object to the prejudicial admission of "other acts" of drug possession for which Mercer was not charged.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether evidence of other controlled substances and drug paraphernalia found in the possession of Mercer's passengers and for

which she was not charged was probative evidence when she was charged with possessing drug residue found on an item in her pocket.

ISSUE NO. 2: Whether the prejudicial effect of evidence that the passengers possessed controlled substances substantially outweighed any probative value of the evidence to prove that Mercer also possessed a controlled substance.

ISSUE NO. 3: Whether a legitimate trial strategy can be inferred for failing to object to the admission of prejudicial evidence subject to ER 404(b).

IV. STATEMENT OF THE CASE

A Colville police officer stopped a car Gloria Mercer was driving due to a defective taillight. RP 51, 55-56. Also in the car were Mercer's husband Bob Mercer and a passenger named Tanner Mitchell. RP 72. When police first approached the vehicle, one of the passengers got out and was ordered back into the car. RP 97.

The officer eventually learned that Mercer had bought the car a year before but had not transferred the title. RP 58, 98. He placed her under arrest for the violation and searched her incident to arrest. RP 58-

59, 97-98. The search produced a small pen-like device in her pocket that contained a burnt residue. RP 59-60, 90.

A K9 arrived during the contact and alerted to the vehicle. RP 99. During a subsequent search of the car, police found a loaded syringe inside a hidden compartment in the trunk. RP 63, 101. Bob Mercer claimed the syringe was his and was separately charged with possessing a controlled substance as a result. RP 75-76. A backpack in the passenger compartment was also found that contained drug paraphernalia. RP 81. The backpack was determined to belong to Mitchell. RP 83. Lastly, where the passenger had exited the car at the beginning of the contact, police found a glass meth pipe. RP 101.

The State charged Mercer with unlawfully possessing heroin. CP 1. Before trial, the parties discussed the evidence on the record. They agreed that the State would not elicit any comments from the police witnesses that the occupants of the car were known drug users. RP 26. The State did, however, indicate that it intended to elicit information about the stop. RP 26. The trial court inquired further and the following discussion was held:

THE COURT: Okay, well, again, I observe that the report from Ms. --, the written report, in the statement of probable cause relates to three items of you know, alleged evidence.

I think but one is applicable to Ms. Mercer, if I read it correctly.

MR. TYNDAL: That's -- that's correct, Your Honor, with regard to the initial probable cause. Item number one that was referenced in that report was sent to the lab. We have received a report on -- on that item as well. that item also contained heroin and we will be asking her information about that item as well.

THE COURT: Okay, I don't remember where that was --

MR. TYNDAL: It was a syringe found in the trunk.

THE COURT: Okay, but was there also controlled substances alleged or otherwise removed from either of the other occupants?

MR. TYNDAL: There was.

THE COURT: And what's the status of --

MR. TYNDAL: I don't intend to ask for information about the items that were in -- in a drug kit that was belonging to Mr. Mitchell.

THE COURT: Okay.

MR. TYNDAL: There may be information offered about a pipe that was found outside the car.

THE COURT: Okay and was that tested as well by the lab?

MR. TYNDAL: It was, Your Honor, but it was -- it's not charged in this case. The result there was methamphetamine. I don't intend to ask the lab about that. Just that the officers found a pipe on the ground next to the car while conducting the search.

THE COURT: And is that problematic for the defense at all?

MR. TRAGESER: No, it's not, Judge. The only thing that I -- I would like to say, if I may address the Court please, is that I know that Mr. Mercer indicated that he claimed

ownership of the needle in the trunk and the other items and that the straw that has been tested so to speak with heroin was found on my client's person. I understand that Mr. Mercer's claim of ownership does not preclude the State from necessarily moving forward and prosecuting my client for also being in possession of what was in the trunk in which she was driving. So, I understand that.

THE COURT: That could also be relevant to an unwitting possession charge as impeachment or --

MR. TYNDAL: Mm-hm.

RP 27-29.

Subsequently, the State called the arresting officers to testify about all of the items recovered, including the item in Mercer's pocket, the syringe in the trunk, the pipe found outside the car by the passenger side, and – contrary to the State's pretrial assertions that it would not elicit it – the drug paraphernalia found in the passenger's backpack. RP 59-60, 63, 81, 98-99, 101. It entered into evidence the item from Mercer's pocket, the glass pipe from the passenger side, and a vial containing the liquid extracted from the syringe. CP 42; RP 103-09. However, the first officer acknowledged on cross-examination that Mercer seemed surprised when he found the syringe in the trunk and that Mitchell was in possession of the backpack; consequently, Mercer's charge related to the item found in her pocket. RP 84. A crime lab analyst testified that the item from

Mercer's pocket contained a residual amount of heroin and the fluid from the syringe contained heroin and cocaine. RP 112-13, 118, 120.

Mercer testified on her own behalf at trial. RP 130. She told the jury that her daughter had gone to prison about a year ago for heroin. RP 132. On the day at issue, she was outside cleaning up her yard and found the item in the grass. RP 136. She was suspicious of the item because it was curled up and she had found similar things when she had previously searched her daughter's room, but she did not believe it still had drugs inside. RP 136-37. She put it in her pocket and then forgot about it. RP 136, 137. Later, Mitchell came over for a ride home. RP 137. Mercer explained that although she had gotten the car about a year ago, it had been in the shop to try to get it running and tested. RP 138-39. Although it was still having problems, she purchased a 3-day trip permit to take it to the shop to make sure it was fixed. RP 139. However, the permit did not take effect until the following day. RP 139. Mercer denied knowing that the syringe was in the trunk. RP 140.

Neither party requested, and the trial court did not give, a unanimity instruction indicating that the jury had to agree unanimously which item Mercer possessed that constituted the crime. CP 26-40. It did give an instruction on the defense of unwitting possession. CP 37. In its

closing argument, the State conceded that the jury did not need to consider whether Mercer possessed the syringe, effectively electing to proceed solely on the item found in her pocket. RP 160-61. However, it argued that the remaining items were circumstantial evidence of her possession, stating:

Through the testimony that was elicited by the defense and by the testimony that was provided by the witnesses, you heard talk about other drugs in the car. You heard talk about the passenger that they picked up and they were taking home and how he had drugs and may or may not be charged. How the other passenger, Ms. Mercer's husband, admitted to possessing this syringe that was found in the back and there was a pipe that was dropped. That sets the stage for this. Ms. Mercer is surrounded by drugs. Throughout the car, throughout the people in her life, if you include her daughter, and yet on that afternoon when she's cleaning up her yard, she picks this up. She's not sure exactly what it is or at least that's what she said, but then this gets kept. Everything else gets thrown away and discarded of. Wouldn't that be what she did with this if she really didn't know what it was and she had no use for it? And, does it make sense that she would have this in his pocket when she gets stopped by law enforcement? Everyone else in the car has got something. Ms. Mercer has this and she wants you to believe that she had no idea what it was and that it was just bad luck that it tested positive for heroin.

RP 159-60. Defense counsel did not object.

The jury found Mercer guilty as charged. CP 41, RP 179. The court sentenced her to 10 days in jail followed by 12 months of

community custody and assessed \$600 in mandatory legal financial obligations. CP 45, 46, 48; RP 193. Mercer now appeals. CP 56.

V. ARGUMENT

A person's guilt is to be determined from the strength of the evidence supporting the charge, not insinuations about character and propensity. Here, the State proceeded without objection to contend that Mercer knowingly possessed a controlled substance because her passengers did. Because this argument is impermissible, because her counsel should have objected, and because it taints the jury's verdict, the conviction should be reversed and the case remanded for retrial.

ER 404(b) provides, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, "other acts" evidence may be admissible for other purposes, so long as it is not proffered to show propensity and a limiting instruction is given to that effect. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). No limiting instruction was proffered in this case.

Before admitting evidence of unrelated wrongdoing, the trial court must determine, on the record, (1) that the act occurred by a preponderance of the evidence; (2) that there is a lawful purpose for

admitting the evidence; (3) whether the evidence is relevant to prove any of the charged elements; and (4) that the probative value outweighs the prejudicial effect. *Gresham*, 173 Wn.2d at 421. The burden is on the party proffering the evidence to establish its admissibility under the first three factors. *Id.* Erroneous admission of ER 404(b) evidence requires reversal if the error, within reasonable probability, materially affected the outcome. *State v. Acosta*, 123 Wn. App. 424, 438, 98 P.3d 503 (2004).

Here, no ER 404(b) analysis occurred on the record. When a trial court fails to make a record of its reasoning, the error may be harmless if the record as a whole is sufficient to permit appellate review. *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986). In cases where the court does not conduct ER 404(b) balancing on the record, the appellate court may independently determine that the prejudicial effect of the evidence outweighs its probative value and should resolve doubtful cases in favor of the defendant. *See State v. Trickler*, 106 Wn. App. 727, 733, 25 P.3d 445 (2001).

Since the trial court did not weigh the probative value of the evidence of other individuals in the car possessing drugs against its prejudicial effect, this court should do so independently. With respect to the drug-related items inside Mitchell's backpack and the pipe found

outside his door after he stepped out of the car, there is no conceivable probative value for introducing this evidence to the jury. Even the State appeared to concede pretrial that the evidence was not relevant and advised the court it would not elicit that information, but then did anyway. RP 28. After eliciting the information, the State then argued that it tended to show Mercer was “surrounded by drugs” and she must have known the nature of the item she picked up in her yard because “[e]veryone else in the car has got something.” RP 159-60. But nothing in the record shows that Mercer knew anybody else in the car possessed drugs or drug paraphernalia. Consequently, the State’s argument amounted to a claim of guilty character – that Mercer was guilty because she hung out with people who used drugs. This was clearly improper.

With respect to the syringe found in the trunk, the question of admissibility is a closer one. Pretrial, defense counsel correctly conceded that possession of the syringe could support the charge against Mercer even though her husband claimed it was his. RP 29. But the State charged Mercer with only a single count of possession, proffered no unanimity instruction requiring the jury to agree whether she had possessed the straw or the syringe as the basis for the charge, and waited until closing argument to argue to the jury that the basis was the item found in her pocket while the remaining items were “circumstantial

support of that.” CP 1, 26-37, RP 159. Neither was any limiting instruction proffered or given that would have restricted the jury to considering the syringe for a lawful, relevant purpose, rather than the propensity argument the State actually made – that because there was a syringe in the trunk, Mercer probably willfully possessed the residue on the item in her pocket. As a result, although the syringe potentially *could* have been introduced for a permissible purpose, the manner in which it was *actually* used violates the prohibition against using evidence of character to show action in conformity therewith on a particular occasion. ER 404(a).

By failing to object to the admission of evidence that the passengers possessed drugs or to the State’s use of that evidence to argue propensity and character, Mercer’s attorney failed to render effective assistance of counsel. Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee every criminal defendant the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel for a defendant is ineffective when his or her performance falls below an objective standard of reasonableness, and when counsel’s poor work prejudices the

defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To establish prejudice, a defendant must show that, but for the errors of counsel, the result would have been different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A defendant must establish both prongs; failure to show either prong will end the court's inquiry. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

Ineffective assistance of counsel claims are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995), *review denied*, 129 Wn.2d 1012 (1996). The threshold for deficient performance is high; a defendant must overcome “a strong presumption that counsel's performance was reasonable.” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). The presumption can be overcome by showing that trial counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and article I, section 22. *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992), *review denied*, 121 Wn.2d 1006 (1993).

If counsel's conduct can be construed as a legitimate trial strategy or tactic, performance is not deficient; however, the presumption of reasonable performance can be rebutted by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*,

171 Wn.2d at 33–34. In other words, while counsel’s tactical decisions are generally given deference, the tactic must be reasonable under the circumstances of the case. *See id.* at 34.

Here, it was not reasonable to acquiesce in the State presenting the jury with inflammatory evidence that other passengers in the car possessed drugs and arguing that Mercer was probably guilty because of the company she kept. Because the State’s use of the evidence violated ER 404(a) and because the evidence was not admissible under ER 404(b), a timely objection should have been sustained and the irrelevant evidence excluded. Moreover, under the circumstances of the case, the verdict probably would have been different had the State not been permitted to argue that Mercer’s possession of an unmeasurable amount of heroin residue on a crumpled straw-like item in her pocket was not unwitting because she was surrounded by individuals who possessed and used drugs. Guilt by association is not a permissible theory of prosecution in the United States and should not have been allowed in this instance. By failing to object, Mercer’s attorney failed to effectively shield her from inflammatory innuendo and require the State to rely solely on the strength of its evidence of guilt.

Accordingly, because the failure to object to the admission and improper use of unrelated and inflammatory evidence of drug possession by other individuals in the car was both unreasonable and prejudicial, it deprived Mercer of her constitutional right to an effective attorney. The conviction should, therefore, be reversed and the case remanded for a new trial.

VI. CONCLUSION

For the foregoing reasons, Mercer respectfully requests that the court REVERSE her conviction for possessing a controlled substance and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 9 day of August, 2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 19 day of August, 2019 in Kennewick, Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

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