

69629-7

69629-7

NO. 69629-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES DIXON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

The police found two small baggies containing different drugs in a trash can in an area of Everett known for drug trafficking. James Dixon was charged with possessing both baggies because the police thought he put something in the trash can, even though they did not see what he put in the garbage. To convince the jury that Dixon possessed these two baggies, the prosecution elicited evidence that Dixon had \$1255 in cash when he was arrested and the police labeled the money “unlawful drug proceeds.” The improper admission of evidence, which let the jury infer Dixon was a drug seller, denied Dixon his right to a fair trial.

B. ASSIGNMENT OF ERROR.

James Dixon was denied his right to a fair jury trial by the admission of unduly prejudicial evidence connecting him to uncharged criminal activity, contrary to ER 403 and ER 404(b), as well as the due process clauses of the state and federal constitutions and the inviolate right to a jury trial under Article I, sections 21 and 22.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

A person charged with a crime may not be convicted based on the insinuation that the accused committed other crimes. Over defense objection, the prosecution portrayed Dixon as a person involved in drug activity who carried the proceeds of drug sales even though he was charged with a single instance of possessing a small quantity of controlled substances. Did the court's admission of irrelevant evidence from which the jury would infer Dixon was a drug dealer affect the outcome of the case and deny him a fair trial?

D. STATEMENT OF THE CASE.

In the evening of May 3, 2012, several police officers were patrolling an area known for "open air drug activity" and saw James Dixon on the sidewalk. RP 34, 36.¹ When two officers approached Dixon, Dixon stuttered as if considering heading in the opposite direction but then walked toward Everett Police Officer Michael Drake. RP 37, 97-98, 110.

Dixon approached a trash can with his hands clenched. RP 99. Drake "didn't know if [Dixon] was holding something" even though he

¹ The trial transcripts are contained in a single volume referred to herein as "RP."

could see both of Dixon's hands. RP 99. Dixon's left hand touched the lip of the trashed can and "something" small appeared to drop from Dixon's hand. RP 104. Drake looked in the trash can with his flashlight but did not see anything noteworthy. RP 106, 114.

Fellow officer Duane Wantland took the lid off the trash can and looked inside with his flashlight. RP 68. The can was one-half or one-third full with garbage. RP 68. Wantland found one baggie that appeared to contain a controlled substance. RP 68. He continued looking through the trash can and after about one minute, he located another baggie containing a different type of controlled substance. RP 68. The two baggies were "very different styles" of packaging, and the second baggie was located in a different part of the trash can. RP 79, 87. One baggie contained 0.22 grams of methamphetamine and the other contained 0.31 grams of cocaine. RP 133.²

Dixon was charged with one count of possession of a controlled substance alleging that he possessed both baggies found in the trash

² As a point of comparison, a "U.S. nickel weighs exactly 5 grams." http://wiki.answers.com/Q/How_much_is_one_gram (last viewed April 17, 2013).

can. CP 57. Over defense objection, the prosecution offered evidence that at the time of his arrest, Dixon had \$1255 in cash in his pocket and this money was seized as “unlawful drug proceeds.” CP 54; RP 16-18, 76-78. Dixon was convicted of possessing the baggies and received a standard range sentence. CP 20, 28, 39.

E. ARGUMENT.

By introducing evidence that Dixon had a large sum of cash and labeling it “unlawful drug proceeds,” the State encouraged the jury to convict Dixon for impermissible reasons, thereby denying him a fair trial.

1. The right to a fair trial requires the court to exclude evidence that is far more prejudicial than probative.

The “constitutional floor” established by the Due Process Clause “clearly requires a fair trial in a fair tribunal” before an unbiased court. Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997); U.S. Const. amend. 14; Wash. Const. art. I, § 3, 21, 22. The right to a fair trial includes the right to be tried for only the offense charged. State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971). Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dowling v. United

States, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (improper evidentiary rulings deprive a defendant of due process where it is so unfair as to “violate[] fundamental conceptions of justice”).

It is impermissible to introduce evidence so the jury may infer the defendant was the “type” of person to commit crimes like the offense charged. State v. Gresham, 173 Wn.2d 405, 429, 269 P.3d 207 (2012). “There are no exceptions to this rule.” Id.

ER 404(b) bars the admission of prior acts that are unpopular, disgraceful, or even traits of personality; it is not limited to past criminal acts. State v. Everybodytalksabout, 145 Wn.2d 456, 466-68, 39 P.3d 294 (2002). Evidence of a person’s prior conduct “is inadmissible to show that the defendant is a dangerous person or a ‘criminal type.’” Id. at 466 (quoting State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)). Additionally, evidence of wrongful acts must be more probative than prejudicial. ER 403.

Acts that bear on the accused’s propensity to commit the charged crime or other offenses may be admitted into evidence only when it is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the accused’s propensity to commit certain acts, and (2) substantial

probative value outweighs its prejudicial effect. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)); ER 404(b). Doubtful cases should be resolved in favor of the defendant. Smith, 106 Wn.2d at 776; see State v. Freeburg, 105 Wn.App. 492, 498, 501, 20 P.3d 984 (2001) (“marginally probative” but undeniably prejudicial wrongful acts should not be admitted under ER 404(b)).

2. The money an accused person has at the time of arrest is not probative of simple possession of a controlled substance.

To establish simple possession of a controlled substance, the prosecution does not need to prove the accused’s knowledge of the substance or his intent to possess the items at issue. State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994); RCW 69.50.4013. Possession of a controlled substance is a strict liability offense that rests on whether a person has drugs in his or her custody or control. Id. at 798-800; see also State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994).

Dixon was charged with one count of simple possession of a controlled substance, based on the claim that he possessed two baggies of drugs before he was stopped by the police. CP 57. The prosecution’s theory was that Dixon dropped both baggies into a garbage can as he

walked toward the police. RP 99, 104, 114-15. The State needed to prove that even though the police did not clearly see Dixon holding the drugs, he must have been the person who put both baggies in the trash can.

Before trial, Dixon moved in limine to prevent the prosecution from introducing evidence that the police found over \$1200 in his possession after his arrest. CP 54; RP 15-18. Dixon cited State v. Trickler, 106 Wn.App. 727, 733-34, 25 P.3d 445 (2001), as support for his claim that his possession of a lot of cash would let the jury infer he was a “criminal” such as a drug dealer when he was not charged with such offenses and the money had no bearing on whether he was the person who put the two baggies in the trash can. RP 16-17. The prosecution claimed that the money was probative “in the sense that it is a link to drug activity” and served as “relevant evidence as to drug activity that is connected to him possessing drugs.” RP 17-18.

Although the court reviewed Trickler, it found the money and Dixon’s cellphone were admissible because they were “clearly linked” to Dixon and their probative value outweighed the prejudicial effect. RP 18. The court did not identify what the permissible inference would be. RP 18.

During trial, the prosecution introduced Dixon's possession of "\$1255 of U.S. currency." RP 72-73. Over defense objection, the prosecution further elicited testimony that this money "was seized" as "unlawful drug proceeds." RP 76, 78. A police officer explained that when currency is taken as "unlawful drug proceeds," it will be placed into a bank account for a civil case on the "seizure of drug proceeds" to be completed. RP 78. In her closing argument to the jury, the prosecutor emphasized that the police found not only two baggies of drugs, "but also \$1200 in cash. That's a lot of money. That's a lot [of] money to have in your pocket." RP 163.

It is well-established that when a person possesses a substantial amount of money in conjunction with even a small amount of drugs, that money tends to show the person intended to sell the substance or is involved in drug trafficking. State v. Redd, 51 Wn.App. 597, 605, 754 P.2d 1041 (1988); see also State v. Davis, 79 Wn.App. 591, 594, 904 P.2d 306 (1995) ("Certainly, an intent to deliver might be inferred from an exchange or possession of significant amounts of drugs or money."). In Redd, the court explained that "substantial amounts of cash" is "evidence of an on-going business" and will "point to an ongoing drug distribution operation." 51 Wn.App. at 605.

Yet Dixon was not charged with selling or intending to sell drugs. CP 57. The “connection to drug activity” which the prosecution claimed as the basis for the evidence’s relevance did not prove Dixon possessed the two baggies in the trash can but instead tended to show Dixon was a bad actor, a criminal type, and a drug dealer. Gresham, 173 Wn.2d at 429; see State v. Wade, 98 Wn.App. 328, 336, 989 P.2d 576, 580 (1999).

“A defendant must be tried for the offense charged in the indictment or information.” State v. Dinges, 48 Wn.2d 152, 154, 292 P.2d 361 (1956). Evidence of other bad acts or suspicious conduct is unduly prejudicial unless it is “relevant and necessary to prove an essential ingredient of the crime charged.” Id. (emphasis in original). In Dinges, the defendant was charged with illegally possessing narcotics, and the prosecution introduced evidence of a burglary that happened nearby, close in time to the defendant’s arrest. The State could not prove that the drugs were taken in the course of the burglary and the defendant was not charged with stealing the drugs. The Dinges Court ruled that “[t]estimony of the alleged burglary . . . establishes no essential ingredient of the crime of illegal possession of narcotics. Its admission in evidence, under these circumstances, was prejudicial to

appellant.” Id. Likewise, Dixon’s possession of \$1255 in cash “establishes no essential ingredient of the crime of illegal possession of narcotics.” There was not testimony that the money was in any way related to the drugs that he was accused of placing in the trash can, but as the prosecution argued, it was “a lot of money” for a person to carry and therefore implied he was involved in illegal activity for which he was not charged.

Furthermore, Dixon’s possession of over \$1200 in cash was not an inseparable part of the offense. In Trickler, the court explained that the events surrounding an arrest may be admissible as *res gestae* under ER 404(b), but those events must be inseparable from the charged offense. Otherwise, “the jury’s knowledge of the superfluous information was highly prejudicial” to the accused if it would encourage the jury to believe the accused person has the propensity to commit the charged crime or similar offenses. Id. at 734.

Even if “in theory,” the background information will give the jury a full picture of the incident, “in practice,” the court may violate the purpose of ER 404(b) by permitting the jury to learn about other potential legally irrelevant misconduct. Id. In Trickler, the prosecution introduced evidence of “allegedly stolen evidence (for which Mr.

Trickler was not charged) in order to give the jury a complete picture of the events leading to the discovery of the stolen credit card.” Id. But after learning of the other wrongful items the accused may have stolen, “the jury was left to conclude that Mr. Trickler is a thief. Under the specific facts of this case, we conclude the trial court abused its discretion when it admitted this evidence at trial.” Id. Dixon’s possession of \$1255 was not properly admitted as evidence of the “complete picture of events” or to prove his likely connection to drug trafficking.

3. The improperly admitted “drug proceeds” denied Dixon a fair trial.

“[U]ndeniably prejudicial” evidence with minimal probative value should not be admitted. Freeburg, 105 Wn.App. at 498. When evidence’s probative value is outweighed by its prejudicial effect, and the nature of the evidence would affect the outcome of the case, the defendant has been denied a fair jury trial. Id. at 501.

Here, the State had slim evidence of Dixon’s actual possession of the two baggies from the trash can, but it used the money in his pocket to create suspicions about uncharged crimes and imply he should be convicted because he was a criminal type. There was no

direct proof that Dixon possessed either or both baggies of drugs found in the trash can. CP 39, 57. The police did not see what was in Dixon's hand as he stepped closed to the trash can and never claimed that he had two objects inside his hand. RP 99, 104. Whatever might have been in his hand was so small that, even though the police officers were nearby and in a well-lit area, they could not tell what, if anything, Dixon had in his hand.

Moreover, the State charged Dixon with possessing both baggies, not simply one of the two. CP 39, 57. The baggies were not the same – they contained different drugs and had “completely different” packaging. RP 70, 87. One baggie was apparently visible on top of the trash can but the police had to dig around the trash can to locate the second baggie. RP 68, 86. These two different baggies were found in an area the police knew as an “open air drug market,” so Dixon was hardly the only potential drug possessor in the vicinity. RP 34, 39.

The evidence that Dixon also had \$1255 in cash, money that the police had presumptively labeled “unlawful drug proceeds” and the prosecution called suspicious, sent a clear message to the jury that Dixon was involved in drug activity beyond the isolated possession of these two small baggies. Where Dixon was only charged with simple

possession, the evidence portraying him as involved in drug trafficking encouraged the jury to conclude that because he had so much money, he was the type of person who would be involved in criminal activity, including profiting from drug sales.

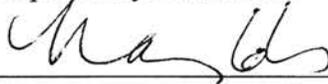
It was impermissible for the jury to convict Dixon based on the notion that having a lot of money made him likely to possess drugs. By introducing Dixon's possession of \$1255 when arrested, calling it "unlawful drug proceeds" and emphasizing that this is a lot of money to have, the prosecution urged the jury to convict Dixon based on the money in his pocket. In light of the ambiguous evidence that Dixon possessed the two very different baggies in the trash can, the State's use of money found in his pocket to encourage the jury to infer Dixon is a criminal type denied him a fair trial and requires reversal.

F. CONCLUSION.

For the reasons stated above, Mr. Dixon respectfully asks this Court to reverse his conviction for possession of a controlled substance and remand his case for further proceedings.

DATED this 22nd day of April 2013.

Respectfully submitted,



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DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 69629-7-I
)	
JAMES DIXON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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