

Original

No. 35708-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CALVIN D. OTT,

Appellant.

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SUPERIOR COURT  
THURSTON COUNTY  
WASHINGTON

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

The Honorable Chris Wickham, Judge  
Cause No. 06-1-01397-1

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court was correct in initially finding that the evidence of Trooper Nelson was inadmissible unless the defendant opened the door.

2. Whether the trial court erred in admitting the testimony of Trooper Nelson after the defendant, on direct examination, denied that he had thrown anything from his car and made reference to the drug-detecting dog which Trooper Nelson brought to the scene of the arrest.

B. STATEMENT OF THE CASE.

1. Substantive facts.

The State accepts the appellant's statement of the substantive facts.

2. Procedural facts.

Mr. Ott has divided his recitation of the posture of this case into "procedural facts" and "procedural history". Together these give a complete recitation of the procedure.

C. ARGUMENT

1. Standard of review.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. ". . . "[A]n abuse of discretion occurs when no

drug-sniffing dog and a trooper with extensive training and experience in investigating drug-related crimes recognized it as one or another of two possible illegal drugs. (RP 75-92). The trial court found that the evidence of the pill bottles alone would not support a conviction (RP 71), but there is no authority for the proposition that a piece of evidence is relevant or admissible only if it alone would support a conviction. The State is required to prove every element of the crime beyond a reasonable doubt, not every piece of evidence.

Washington courts have recognized the reliability of trained drug-sniffing dogs. In State v. Gross, 57 Wn. App. 549, 551, 789 P.2d 317 (1990), (overruled on other grounds, State v. Thein, 138 Wn.2d, 977 P.2d 582 (1999)), the court rejected arguments that drug-sniffing dogs were unreliable. Citing to federal cases, the court included this language:

While canine-conducted narcotics searches may have encountered some judicial skepticism in the past, the technique is now sufficiently well-established to make a formal recitation of a police dog's *curriculum vitae* unnecessary in the context of ordinary warrant applications. *United States v. Trayer*, 701 F. Supp. 250, 256, (D.D.C. 1988)(quoting *United States v. Watson*, 551 F. Supp. 1123, 1127, D.D.C. 1982). See also *United States v. Sentovich*, 667 F.2d 834, 838 n.8 (11<sup>th</sup> Cir. 1982)("training of a dog is alone sufficient to prove reliability").

If a drug-sniffing dog is reliable enough that evidence obtained from the use of such a dog is sufficient basis for a search warrant, it logically follows that the evidence is reliable enough to make it admissible at trial.

In State v. Louks, 98 Wn.2d 563, 566, 656 P.2d 480 (1983), a tracking dog was used to locate a burglary suspect. There was no other evidence to connect the suspect to the burglary, and the Supreme Court reversed his conviction, holding that dog tracking evidence alone is insufficient to sustain a conviction. However, it also held that the evidence was admissible:

Although there is a division of authority, we believe dog tracking evidence should be admissible where a proper foundation is made showing the qualifications of the dog and handler. We concur and adopt those conditions precedent to admissibility spelled out by the Court of Appeals in State v. Socolof, 28 Wn. App. 407, 411, 623 P.2d 733 (1981);

- (1) the handler was qualified by training and experience to use the dog, (2) the dog was adequately trained in tracking humans, (3) the dog has, in actual cases, been found by experience to be reliable in pursuing human track, (4) the dog was placed on track where circumstances indicated the guilty party to have been, and (5) the trail had not become so stale or contaminated as to be beyond the dog's competency to follow.

(Cites omitted.) We believe, however, that dog tracking evidence must be supported by corroborating evidence.

Louks, *supra*, at 566. Based upon Gross, *supra*, the same credibility is given to drug-sniffing dogs as to human-tracking dogs. The only one of the five elements establishing the credentials of the dog that is missing in this case is prior experience, but Tigger had just that day successfully finished his training (RP 77) and had obviously been successful enough in training to be put to work.

Here the jury also heard extensive testimony about the training of his handler. (RP 89) The jury was told the residue in the pill bottles was of sufficient quantity to conduct a field test (RP 83) although they were not told the results of the test, and it was clear the substance had not been tested at the crime lab. There was little to no chance that the jury was misled about the nature of the evidence. They could make what they wished with the facts, but that is true with any evidence. It has nothing to do with admissibility.

b. The evidence is relevant to corroborate the testimony of Trooper Gregerson.

In his brief, at page 7, Ott argues that the court was incorrect in reasoning that the testimony of Trooper Nelson would assist the

jury in corroborating or not corroborating the testimony of Trooper Nelson. This statement makes sense only if he intended to say that it was Trooper Gregerson's testimony that was being corroborated. He does not explain why it is improper for the State to corroborate the testimony of one of its witnesses.

The State disagrees that the only relevance of the testimony was to show propensity to commit similar acts. It may have helped the jury decide which witness to believe. Trooper Gregerson testified that he saw Ott throw an object, later determined to be methamphetamine, out of the passenger window of his car, and that when he contacted Ott a moment later, the passenger window was rolled down. (RP 32, 37) Mr. Ott testified that a woman in a car ahead of him threw the object, and that his window was rolled up. (RP 60-62) Although admittedly the version told by Mr. Ott of the woman in the phantom car didn't make any sense, the jury is entitled to whatever other relevant evidence exists to assist them in making a credibility determination.

c. Trooper Nelson qualified as an expert witness and his testimony was admissible as such.

Trooper Nelson was sufficiently qualified as an expert witness to testify regarding the nature of the residue found in the pill bottles. An expert may offer opinion testimony. ER 702.

Expert testimony is admissible under ER 702 if the witness qualified as an expert and if the expert testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue . . .” . . . The decision to admit expert testimony will be reversed only for an abuse of discretion. . . . If the reasons for admitting or excluding the opinion evidence are “fairly debatable”, the trial court’s exercise of discretion will not be reversed on appeal. (Cite omitted.)

State v. Simon, 64 Wn. App. 948, 963; 831 P. 2d 139 (1991). An expert witness need not possess any particular academic credentials; expertise can come from practical experience. Further, expert testimony is admissible only if it is helpful to the trier of fact, Simon, *supra*, at 963-64. “. . . [A]n expert witness does not have to be a ‘rocket scientist’; in the appropriate context, ‘[p]ractical experience is sufficient to qualify a witness as an expert.’” (Cite omitted.) McPherson, *supra*, at 762. In McPherson, a detective had testified regarding his background and experience in investigating drug crimes, and about typical methamphetamine production; in her appeal Ms. McPherson complained that the detective did not have a college degree and so should not have been allowed to testify as an expert. The court held that his

“specialized training and practical experience” went to the weight, not the admissibility, of his testimony. McPherson, *supra*, at 762.

Opinion testimony is not inadmissible even if it speaks to an ultimate issue to be decided by the jury, as long as the witness does not express an opinion as to the guilt of the defendant. State v. Cruz, 77 Wn. App. 811, 814, 894 P.2d 573 (1995). Here Trooper Nelson related the facts, but did not express an opinion on anything other than the identity of the substance in the bottles.

d. Evidence of the pill bottles was admissible under a “res gestae” or “same transaction” analysis.

Evidence of another crime that is relevant for a purpose other than showing propensity and is not unduly prejudicial is admissible under ER 404(b) so long as the State proves by a preponderance of the evidence that the other crime occurred and was committed by the defendant. There is no requirement that the evidence be admissible for any purpose except *res gestae*. State v. Lane, 125 Wn.2d 825, 834, 889 P.2d 929 (1995).

. . . [O]ur courts have previously recognized a “*res gestae*” or “same transaction” exception, in which “evidence of other crimes is admissible ‘to complete the story of the crime on trial by proving its immediate context of happenings near in time and place.’” (Cites omitted).

Lane, supra, at 831. See also State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995). The State's burden of proof of the other crimes is preponderance of the evidence. State v. Tharp, 96 Wn.2d 591, 593, 637 P.2d 961 (1981).

In this case, the jury was entitled to have the entire picture of the situation as it happened. Evidence of the residue in the pill bottles was prejudicial—it tended to show that Ott was more likely to be the person who threw the methamphetamine out the car window than a phantom driver in a car seen by nobody but him—but not unduly so. It merely tended to show the truth about him.

3. Even if the court had been correct in its ruling, Calvin Ott opened the door to the admission of the evidence of the pill bottle found in his car by the drug-detecting dog.

Before trial, Ott's counsel moved in limine to exclude evidence of the pill bottles and its contents. The trial court granted the motion, finding "marginal relevance" but substantial prejudice under the rather odd theory that the jury might be uncertain of the contents of the substance thrown from the vehicle, which was tested at the crime lab, but convict on the basis of the untested substance in the pill bottle. (RP 8) The court went on, however, to find that the evidence of the pill bottles would become more relevant if Ott presented evidence contradicting the eyewitness

account of the article thrown from the car window. Ott clearly did that when he testified. (RP 60, 66-67)

It is apparent that the court weighed the probative value against the potential prejudice, as required by ER 403 and case law as cited by Mr. Ott. By testifying about an unknown woman in a car that apparently no one else saw, he opened the door to the testimony regarding the pill bottles containing residue.

Ott argues that the court mischaracterized his statement—“called a dog, sniffing dog”—when it said that he “testified that there was a drug-sniffing dog on the scene”. Appellant’s Brief, p. 6. The implication certainly is that the dog was at the scene, and it is difficult to imagine any other interpretation one could make of Ott’s statement. If the dog had not been at the scene, how would Ott have known about it? It seems unlikely that he would have overheard a radio transmission or telephone call, since he testified that there was little contact with the officers. They did not ask for his license or proof of insurance, question him, read him his *Miranda* warnings, or do anything but put him in the back of the patrol car. (RP 61-62) The jury certainly would have been left with the impression that the dog was there at the scene. In any event, the court had found that the prejudice-relevance balance would

change if Ott contradicted the testimony of the trooper that the baggie came from Ott's car, and thus it was not solely his reference to the dog that triggered the court's ruling allowing the challenged evidence.

"Otherwise inadmissible evidence is admissible on cross-examination if the witness 'opens the door' during direct examination and the evidence is relevant to some issue at trial. State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). Stockton does, as Mr. Ott also argues, hold that a "passing reference to a prohibited topic during direct does not open the door for cross-examination about prior misconduct." Stockton, *supra*, at 40. However, in this case, even if the reference to the dog was "passing", that is not the only testimony that triggered the admissibility of the pill bottles. When Ott disputed the trooper's testimony that he had thrown the object from the car, he caused the situation that the judge had previously ruled would allow the state to present the evidence. (RP 9) Mr. Ott not only opened the door, he propped it open.

It is also worth noting that the evidence of the pill bottles is not probative of *prior* bad acts, but of *concurrent* bad acts. In other words, the possession of the bottles with their residue was part of

the same scenario resulting in the charge for which the defendant was being tried, and the only reason the evidence was initially excluded appears to be because it had not been tested by the state crime lab, although the court was not clear on that point. (RP 8-9)

4. The trial court did not err in denying Ott's motion for a mistrial.

The trial court did not commit error in permitting the disputed evidence, and thus was correct that there was no ground for a mistrial. (RP 95)

Even if the evidence had been admitted in error, Ott has failed to establish that he was prejudiced. “. . . [B]efore a verdict will be overturned because a jury considered evidence not properly before it, the defendant must show that he has reasonable grounds to believe he has been prejudiced.” State v. Sivens, 138 Wn. App.52, 62, 155 P.3d 982 (2007). “A trial court's error in admitting evidence is not prejudicial unless, within a reasonable probability, the outcome of the trial would have been materially affected had the error not occurred.” (Cites omitted.) State v. Smith, 67 Wn. App. 838, 842, 841 P.2d 76 (1992).

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In considering whether a trial irregularity warrants a new trial, the court must consider (1) the seriousness

of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The appropriate inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that Post did not receive a fair trial. (Cite omitted.)

State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, *amended by* 837 P.2d 599 (1992).

In Mr. Ott's case, the evidence admitted without objection proved that Ott was driving a car and that a state trooper signaled him to pull over because he had committed a traffic infraction. Before doing so, he threw an object from the passenger window of his car. The trooper noted the landing spot of the object, and recovered a clean plastic bag with a crystalline object in it lying on top of the grass. Other debris in the area was dusty. After contacting Ott, the trooper saw that the passenger window of his car was rolled down. The object in the bag was tested at the state crime lab and was proven to be methamphetamine. Apart from the evidence of the residue in the pill bottles, there was sufficient evidence to convict the defendant of unlawful possession of methamphetamine. Considering all the evidence, there was no taint that prevented a fair trial.

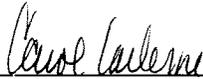
D. CONCLUSION

The evidence of the drug residue in the pill bottles should have been admissible in the State's case-in-chief. Therefore, it's admission during the State's rebuttal was not in error. It was further not in error because it was relevant, probative, not unduly prejudicial, and assisted the trier of fact in understanding the totality of the circumstances of the case and in assessing witness credibility.

Even if the trial court was correct in initially excluding the evidence, Mr. Ott opened the door during his testimony.

The State respectfully asks this court to affirm Calvin Ott's conviction for unlawful possession of a controlled substance—methamphetamine.

Respectfully submitted this 20<sup>th</sup> of August, 2007.



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