

NO. 36430-1-II
Clark County No. 06-1-02357-9

STATE OF WASHINGTON,

Respondent,

vs.

CATRINA MARIE SCARPA

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

I. MS. SCARPA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

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C. STATEMENT OF THE CASE

1. FACTUAL HISTORY

On December 12, 2006 Catrina Scarpa was driving her car in Vancouver, Washington when it was stopped by Officer Tyler of the Vancouver Police Department because she had no front license plate. Trial RP, 32-33. Officer Tyler discovered that Ms. Scarpa had suspended license and arrested her. Trial RP 21, 34. During a search of her car incident to arrest Officer Tyler searched Ms. Scarpa's purse and found two containers inside. Trial RP 34. There was a metal container and a wooden container. Trial RP 36. The wooden container contained marijuana and

the metal container contained an extremely small amount of methamphetamine residue. Trial RP 36, 54. Ms. Scarpa admitted to knowingly possessing the marijuana. Trial RP 39.

Ms. Scarpa had purchased the metal container a few days before her arrest at a Goodwill Store. Trial RP 75. She maintained that she did not closely inspect the metal box, having selected it because the picture on top of the box appealed to her, and she didn't notice the residue inside of it beyond the fact that it appeared dusty. Trial RP 76. She put the metal box in her purse after purchasing it and said it remained there until Officer Tyler removed it. Trial RP 77. She consistently maintained that she was not aware she was in possession of methamphetamine. Trial RP 78.

2. PROCEDURAL HISTORY

The Clark County Prosecuting Attorney charged Catrina Marie Scarpa with count I: Possession of Methamphetamine, count II: Possession of Marijuana, and count III: Driving While License Suspended in the Third Degree. CP 1. Prior to trial, Ms. Scarpa pled guilty to counts II and III. CP 23-26. Ms. Scarpa stipulated that her statements to Officer Tyler were admissible from a CrR 3.5 standpoint, but objected to the admission of her statement to Officer Tyler that she used methamphetamine in the past on the basis it would violated ER 404 (b). Trial RP 12, 15. Officer

Tyler did not pin down any particular time frame as to when this past methamphetamine use occurred. Trial RP 16.

The court indicated that it was, preliminarily, prepared to allow admission of the statement, relying upon *State v. Wolohan*, 23 Wn.App. 813, 598 P.2d 421 (1979), which held that in a prosecution for possession of marijuana, the State was properly allowed to cross-examine the defendant about his previous use of marijuana where he raised the defense that he didn't know the item he was in possession of was marijuana. Trial RP 17.

Ms. Scarpa also moved to exclude evidence that she was in possession of marijuana and her statements about the marijuana on the basis that it would allow the State to portray her as a drug user and that it was more prejudicial than probative. Trial RP 18. The State responded that her possession of marijuana was relevant to the question of whether she knowingly possessed methamphetamine. Trial RP 18. The court agreed, ruling that her possession of marijuana was admissible under the principle of "res gestae," and that her possession of the marijuana was "probative to the jury's question of whether there was knowledge of the substance. So it would be difficult to evaluate the factual circumstances without being aware of that circumstance as well and the similarity that's argued with respect to that." Trial RP 19, 20.

During Officer Tyler's testimony, the State sought to admit Ms. Scarpa's statement that she used methamphetamine in the past. Trial RP 35. The court ruled that the State would only be allowed to admit this statement in its rebuttal case, and only if she presented the anticipated unwitting possession defense. Trial RP 36. Officer Tyler testified that he found marijuana during the search incident to arrest and that she admitted to knowing possession of the marijuana. Trial RP 36, 39.

Ms. Scarpa's defense was that she possessed the methamphetamine residue found in the metal box from Goodwill unwittingly because she did not know it was there. Trial RP 74-78. She did not assert that she knowingly possessed a substance without knowing that the substance was methamphetamine (the other of the two types of unwitting possession). Trial RP 74-78. Ms. Scarpa testified that she knows what methamphetamine looks like. Trial RP 78.

Over Ms. Scarpa's objection, the court allowed the State to elicit testimony in rebuttal from Officer Tyler that Ms. Scarpa admitted to using methamphetamine in the past. Trial RP 88. The State argued this testimony was relevant because Ms. Scarpa was raising the defense of unwitting possession. Trial RP 86. Defense counsel clarified that the unwitting possession defense Ms. Scarpa was asserting was not that she knowingly possessed a substance without knowing the substance was

methamphetamine, but that she possessed the substance without knowing it was there. Trial RP 86. Under this type of unwitting possession, defense counsel argued, it was not necessary for the State to establish that she knew how to identify methamphetamine. Trial RP 86. Further, she admitted on direct examination that she knew what methamphetamine looked like, so the proposed testimony that she used methamphetamine in the past was not relevant to any question before the jury. Trial RP 86. Also, defense counsel objected to this testimony because there was no time frame offered for when this past methamphetamine use occurred. Trial RP 15-16. The court ruled the statement was admissible “for the reason stated previously.” Trial RP 88. Officer Tyler then testified in rebuttal that he asked Ms. Scarpa “if she had done meth in the past” and she replied “yes.” Trial RP 89.

Defense counsel proposed the following unwitting possession instruction based upon WPIC 52.01:

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. CP 7.

The court gave defense counsel's proposed instruction on unwitting possession, numbered as instruction number 10. CP 20. The State argued in closing that Ms. Scarpa's past use of methamphetamine combined with her possession of marijuana proved that she knowingly possessed methamphetamine. Trial RP 102, 103, 104, 111, 112, 113, 114.

The jury returned a verdict of guilty. CP 22. Ms. Scarpa was given a standard range sentence. CP 31. This timely appeal followed. CP 51.

D. ARGUMENT

I. MS. SCARPA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY PROPOSED AN INCORRECT UNWITTING POSSESSION INSTRUCTION.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision

will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There are two types of unwitting possession, both of which are found in WPIC 52.01. The first type, found in the first set of brackets in the first paragraph of WPIC 52.01, addresses situations where a person possesses a controlled substance, either actually or constructively, without knowing it is there. This instruction states, in the first paragraph:

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 that the substance was in [his] [her] possession.

The second type, found in the second set of brackets, addresses situations where the person does not deny knowledge that he possessed a particular item, but denies he knew the item was a controlled substance (for example, knowingly possessing a white powder substance and believing it is powdered sugar when it is actually cocaine). This instruction states, in the first paragraph:

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.

WPIC 52.01. Even a cursory review of the record in Ms. Scarpa's case reveals that she was raising the former defense, not the latter.

Ms. Scarpa's defense was as follows: She purchased a metal box at Goodwill three days before her arrest, having chosen it because she liked the picture on the top of the box. When she purchased it, she gave the interior of the box only a cursory examination and saw what she assumed was dust. She knows what methamphetamine looks like and her assumption that the substance was dust was based on the fact that she barely looked at it, not because she does not know what methamphetamine looks like. Her defense was not "I didn't know the nature of the substance," but "I didn't know it was there (because I failed to adequately look)."

Unlike the prosecutor, who appeared wholeheartedly unaware that there are two different types of unwitting possession, defense counsel reasonably articulated his position that Ms. Scarpa's defense was that she didn't know methamphetamine was in the box, not that she cannot identify methamphetamine (assuming she took the time to look). Trial RP 86. As such, it is baffling that defense counsel, having perused the WPICs and selected the unwitting possession instruction, would have decided against the one that applied to his client's case and selected the one that destroyed her case. After all, once defense counsel elicited testimony from Ms. Scarpa that she knew what methamphetamine looked like, there was no

way the jury would have (or could have) acquitted her on the basis that she doesn't know the nature of the substance of methamphetamine.

It was objectively unreasonable and deficient for counsel to have proposed the incorrect unwitting possession, particularly where that instruction precluded the jury from finding unwitting possession based on the defendant's own testimony (that she knows what methamphetamine looks like). Counsel's deficient performance prejudiced Ms. Scarpa because the State's evidence in this case (absent the improper introduction of the marijuana evidence and her past use of methamphetamine, argued below) was not strong. Further, it is by no means unreasonable to conclude that an item for sale at Goodwill would reach the sales floor having not been thoroughly cleaned. It is very likely that had the jury been properly instructed on unwitting possession, and not been exposed to improper propensity evidence, the result of the trial would have been different.

II. MS. SCARPA WAS DENIED A FAIR TRIAL WHEN THE TRIAL COURT ADMITTED EVIDENCE THAT SHE POSSESSED MARIJUANA AND THAT SHE USED METHAMPHETAMINE IN THE PAST.

a. Past Use of Methamphetamine

Over Ms. Scarpa's objection, the court allowed Officer Tyler to testify that Ms. Scarpa used methamphetamine in the past. The court

relied upon *State v. Wolohan*, *infra*, to hold that past drug use is always relevant when a defendant raises the defense of unwitting possession. However, *Wolohan's* holding was not nearly as broad as the court imagined. In *Wolohan*, the court held that questioning the defendant about his past use of marijuana, in a prosecution for possession of marijuana, was permissible because the defendant argued that he was not aware that the substance he was in possession of was marijuana. *Wolohan* at 821.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be reversed absent manifest abuse of that discretion. *State v. Stubsoen*, 48 Wn.App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). ER 404 (b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

This rule forbids evidence of other bad acts that tend to prove a defendant's propensity to commit a crime. To determine the admissibility of other bad acts under ER 404 (b) the trial court must engage in a three-part analysis. *State v. Saltarelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982). First, the court must identify the purpose for which the evidence is to be admitted. Second, the evidence must tend to make the existence of

the identified fact more or less probable. Third, the court must balance the probative value of the evidence against its prejudicial effect. *Saltarelli* at 362-63; *State v. Wade*, 138 Wn.2d 460, 463, 979 P.2d 850 (1999). To avoid error, the trial court must identify the purpose of the evidence and conduct the balancing test on the record. *Wade* at 463.

Here, the court did not follow the *Saltarelli* requirements. When Ms. Scarpa first brought her motion to exclude this evidence, the court responded that she believed there was a case, *State v. Wolohan*, that allowed evidence of prior drug use, no matter how attenuated, in *any* case where a defendant was raising unwitting possession (irrespective of the type of unwitting possession). Trial RP 17. The court did not weigh the probative value of this evidence against the prejudicial impact, did not state how past drug use, without any evidence about when in the past it occurred, was relevant to any material issue before the jury beyond it being evidence of propensity, and did not state the purpose for its admission beyond her incorrect assumption that *Wolohan* allows evidence of past drug use even in cases where the defendant does not allege she did not know the nature of the substance. Trial RP 17. Then, when the motion to exclude was renewed by Ms. Scarpa, the trial court denied the motion based on the reasons already given. Trial RP 88. This does not

comply with the *Saltarelli* requirements and it was error for the court to admit this evidence because it was not relevant.

This evidence was not relevant because Ms. Scarpa never claimed she could not identify methamphetamine. Ignorance of the nature of the substance was not her defense. Her defense was that she didn't know it was there because she failed to closely inspect the box and incorrectly concluded the item was dusty. Further, the probative value of this evidence was questionable in light of the fact that "in the past" offers no time frame for when this drug use occurred. It could have been twenty days ago or twenty years ago. This evidence was patently presented as propensity evidence, and the prosecutor used it as such in closing argument. Prior bad acts involving a drug that are removed in time from the offense at hand are relevant only to show propensity when the defendant admits that she knows what the drug is, but says she was not aware that the drug was in her actual or constructive possession.

The erroneous admission of ER 404 (b) evidence requires reversal if there was a reasonable that the error materially affected the outcome of the trial. *State v. Halstein*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The error will be deemed harmless if the evidence is outweighed by the overall, overwhelming evidence of guilt. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Here, there was not overwhelming

evidence of guilt. The methamphetamine in question was a miniscule amount of residue, found in a container purchased at a second-hand store. The State obviously recognized the weakness of its case or it would not have been so adamant that the court introduce evidence that demonstrated an obvious propensity to commit the crime, i.e. “once a drug user, always a drug user.” Absent the improper propensity evidence of her past use of methamphetamine and her concurrent possession of marijuana, it is unlikely she would have been convicted for possessing an unquestionably tiny amount of methamphetamine found in a container purchased three days earlier at Goodwill.

b. Possession of marijuana

For the reasons stated earlier and adopted here, the court did not follow the requirements of *Saltarelli* in admitting Ms. Scarpa’s admission to knowingly possessing marijuana. The court, likely recognizing that even if *Wolohan* allowed for the blanket admission of evidence of past drug use in every case where the defendant raises unwitting possession (which it doesn’t), it certainly would not allow for the admission of evidence of use of a *different* drug. Indeed, how could possession of marijuana possibly be relevant to show knowledge of the presence of, or the nature of the substance of, methamphetamine? It is, of course, totally irrelevant except to show that Ms. Scarpa is a drug user, and drug users

(know matter what the drug) are more likely to possess methamphetamine than a non-drug user who purchases a box at Goodwill store that contained methamphetamine residue. It is difficult to imagine a more obvious case of propensity evidence than a case where evidence of marijuana possession is used to show knowing possession of methamphetamine. Marijuana and methamphetamine look nothing alike.

In admitting this evidence, the court simply said it was “res gestae” evidence and it was necessary to show her knowledge of the nature of the substance of methamphetamine (which wasn’t even her defense) and therefore admissible. The court made no attempt to weigh the probative value of this evidence against its extreme prejudicial effect. The marijuana evidence, as used in Ms. Scarpa’s case was a classic violation of the prohibition of ER 404 (b), which is not using evidence of other bad acts to show “propensity, proclivity, predisposition or inclination” to commit a similar crime. *State v. Harris*, 36 Wn.App. 746, 751, 677 P.2d 202 (1984).

The trial court manifestly abused its discretion in admitting this evidence and this error was not harmless. As argued above, the State’s case was not strong and Ms. Scarpa’s defense was viable. The evidence of her past drug use and her possession of marijuana told the jury she was untrustworthy and of poor character because she is a drug user, and had a

propensity to possess drugs of any type. The admission of this evidence ensured her conviction. The prosecutor certainly recognized this or he would not have made it such a prominent topic in his closing argument. It cannot be said that the erroneous admission of this evidence did not materially affect the outcome of this trial. Ms. Scarpa's conviction should be reversed and her case remanded for a new trial.

E. CONCLUSION

Ms. Scarpa's conviction should be reversed and her case remanded for a new trial.

RESPECTFULLY SUBMITTED this 25th day of January, 2008.



ANNE M. CRUSER, WSBA#27944
Attorney for Ms. Scarpa

APPENDIX

**RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT;
EXCEPTIONS; OTHER CRIMES**

(a) **Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

STATE OF WASHINGTON,)	Court of Appeals No. 36430-1-II
)	Clark County No. 06-1-02357-9
Respondent,)	
)	AFFIDAVIT OF MAILING
vs.)	
)	
CATRINA MARIE SCARPA,)	
)	
Appellant.)	

ANNE M. CRUSER, being sworn on oath, states that on the 25th day of January 2008, affiant placed a properly stamped envelope in the mails of the United States addressed to:

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Clark County Prosecuting Attorney
P.O. Box 5000
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Ms. Catrina Marie Scarpa
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and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) REPORT OF PROCEEDINGS (TO MR. CURTIS)
- (3) RAP 10.10 (TO MS. SCARPA)
- (4) AFFIDAVIT OF MAILING

Dated this 25th day of January 2008,


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: January 25th, 2008, Kalama, WA

Signature: Anne M. Cruser