

COURT OF APPEALS
DIVISION II
03 JUL -6 AM '99
STATE OF WASHINGTON
DEPUTY

NO. 38471-0-II

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

STATE OF WASHINGTON, Respondent

v.

ALEXANDER PAUL TISHCHENKO, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROGER A. BENNETT
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-1-01497-5

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL W. VAUGHN, WSBA #27145
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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I. STATEMENT OF FACTS

The defendant in this case was convicted of Delivery of Methamphetamine. The defendant sold a police informant a \$20 baggie of methamphetamine. (RP 192-95). This happened in the defendant's car. (RP 192-93). This was arranged by a telephone call. (RP 190). Vancouver Police Officer Leonard Gabriel was listening in on the telephone conversation while this was arranged. (RP 191). Officer Gabriel prompted the informant to meet with the defendant in a specific Safeway store parking lot. (RP 191). Officer Gabriel recognized the defendant's voice. (RP 150).

Police took the informant to that location. (RP 192). Sometime after the informant arrived at the Safeway parking lot with police, the defendant drove up in his car and parked. (RP 192). The informant went to the defendant's car, got in, and sat in the front passenger seat. The defendant was in the driver's seat. (RP 192-93). A female, named Sarah, who was in the car with the defendant, moved from the front seat to the back seat of the defendant's car. (RP 193). The informant then purchased a \$20 baggie of methamphetamine from the defendant, who used "Sarah" as an intermediary in the transaction. (RP 194-95). The only specific conversation that the informant could remember having with the defendant was negotiating the price of the baggie from an original offering price of

\$50 to a final sale price of \$20. (RP 193-95). The informant used \$20 of the buy money provided to him by police to purchase the methamphetamine. (RP 193-95). The informant returned to police and handed them the methamphetamine he had purchased from the defendant. (RP 197).

Officers Leonard Gabriel and Dustin Nicholson testified that prior to purchasing methamphetamine from the defendant, the police informant was thoroughly searched and had no drugs, money or contraband on him. (RP 152, 260). The police kept the informant within their sight constantly so that he could not get any money or drugs on him. (RP 155, 261). The police had an unobstructed view of the parking lot where the drug transaction took place. (RP 152-55). The police had selected that location for that very reason. (RP 154). The informant was provided with \$50 of photocopied buy money—two \$20 bills and one \$10 bill. (RP 155). The police informant and the defendant's vehicle were under constant visual surveillance while the informant went to and from the defendant's car. (RP 154-55, 263-64). The police were stationed approximately thirty yards from where the defendant parked his vehicle. (RP 263). The informant was in the defendant's vehicle for 30 to 60 seconds. (RP 160, 264). The informant returned from the defendant's car and gave the methamphetamine he had just purchased to Vancouver Police Officer

Dustin Nicholson. (RP 264-65). The police, driving police cars, stopped the defendant's car and arrested him within one minute of the time the informant returned with the purchased methamphetamine. (RP 265-66).

The defendant and the female who was present in the defendant's car were arrested. The car, a black BMW, was registered in the defendant's name. (RP 163). A search of the defendant and his car were conducted, but the \$20 bill used to purchase the methamphetamine was not found. (RP 174). The female who was arrested with the defendant told police that she believed there were hidden compartments in the vehicle where she thought drugs might be hidden. (RP 175). Police were unable to find additional drugs in those areas. (RP 175). The female was allowed to use the restroom at the police station and was not thoroughly searched before doing so. (RP 176-77).

When questioned by police, the defendant was told why he had been arrested, what had taken place with the drug transaction in question, that it had occurred under the observation of multiple police officers and the defendant was asked if he wished to tell police what happened. (RP 182). The defendant responded by telling the police they had the wrong guy. (RP 182). The police then told the defendant that the buy money used in the drug deal had been photocopied. The defendant responded,

“Yeah, it’s not me. Show me the money. (Inaudible) show me the buy money.” (RP 182-83).

The defendant, during motions in limine, indicated his intent to introduce evidence of prior bad acts by the police informant—that he was a drug dealer and drug user prior to the date of the incident at trial, while simultaneously asking the court to exclude evidence that the informant had previously purchased drugs from the defendant. (RP 64-70). The Court conducted an analysis under ER 404(b) and ruled that evidence of prior drug transactions between the defendant and the police informant was admissible. (RP 71-75). At trial, the police informant testified that the defendant had sold him methamphetamine over 20 times previously, and that the transactions were arranged in the same way—via a phone call to the defendant and a purchase from inside the same car the defendant was arrested in, on the date in question. (RP 195-196).

II. ARGUMENT

- A. THE DEFENDANT DID NOT SPECIFICALLY PRESERVE ANY OBJECTION UNDER ER 404(B). THE COURT CONDUCTED AN ANALYSIS UNDER ER 404(B) DURING MOTIONS IN LIMINE WHEN THE DEFENDANT ANNOUNCED HIS INTENT TO INTRODUCE EVIDENCE OF THE INFORMANT’S PRIOR DRUG TRANSACTIONS WHILE AT THE SAME TIME ASKING THE COURT TO EXCLUDE ANY EVIDENCE OF DRUGS PURCHASED BY THE

INFORMANT FROM THE DEFENDANT. AFTER THIS EQUIVOCAL REQUEST, DURING TESTIMONY AT TRIAL, THE DEFENDANT DID NOT OBJECT TO EVIDENCE OF PRIOR DRUG TRANSACTIONS BETWEEN HIMSELF AND THE INFORMANT.

The defendant, during motions in limine, indicated his intent to introduce evidence of prior bad acts by the police informant—that he was a drug dealer and drug user prior to the date of the incident at trial, while simultaneously asking the court to exclude evidence that the informant had previously purchased drugs from the defendant. (RP 64-70). The Court conducted an analysis under ER 404(b) and ruled that evidence of prior drug transactions between the defendant and the police informant was admissible. (RP 71-75). At trial, the police informant testified that the defendant had sold him methamphetamine over 20 times previously, and that the transactions were arranged the same way—via a phone call to the defendant and a purchase from inside the same car the defendant was arrested in, on the date in question. (RP 195-196). The defendant did not object to the admission of this evidence. (RP 195-96).

While the defendant made reference to “prior bad acts” during his motion in limine, at no time did he cite to ER 404(b). (RP 73). More importantly though, he did not object during trial when this evidence was presented to the jury. This distinction is critical when viewed in light of the defendant’s stated desire during motions in limine that he wished to

introduce evidence to the jury that the police informant had been a drug dealer and user in the past while excluding evidence that some of these transactions involved the defendant. This is a case of the defendant wishing to have his cake and eat it too. His motion in limine, to the extent it sought to exclude ER 404(b) evidence, was equivocal, at best. His failure to object when this evidence was presented to the jury demonstrates he sought to benefit, rather than object to its introduction. The defendant's lack of objection, or at best, equivocal objection under ER 404(b), is insufficient to preserve his claim on appeal.

Errors predicated on ER 404(b) are not of constitutional magnitude and therefore may not be raised for the first time on appeal. RAP 2.5(a); State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

Review of the trial court's decision to admit evidence of prior bad acts is based on an abuse of discretion standard. State v. Barragan, 102 Wn. App. 754, 758, 9 P.3d 942 (2000). In this case, the trial court was never asked to specifically exercise its discretion to determine the admissibility of the evidence under ER 404(b). Instead, the trial court undertook its own analysis of the proposed testimony, using an ER 404(b) standard, after the defendant indicated his desire to introduce some prior bad acts of the State's witness while excluding others. This equivocal request does not amount to an objection. This is buttressed by the fact that

when the evidence was presented during the testimony of one of the State's witnesses, the defendant made no objection. Absent a request that the trial court exercise its discretion—a clearly stated objection to specific evidence--this court has nothing to review.

B. EVEN IF THE CLAIMED EVIDENCE WAS PROPERLY OBJECTED TO UNDER ER 404(B), IT WAS NONETHELESS PROPERLY ADMITTED UNDER THE COMMON SCHEME OR PLAN EXCEPTION TO ER 404(B).

Whether to admit evidence of a defendant's prior "bad acts" under ER 404(b) lies within the trial court's sound discretion. State v. Suttle, 61 Wn. App. 703, 710, 812 P.2d 119 (1991). A court abuses its discretion when it makes a decision on unreasonable or untenable grounds. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The reviewing court will review a trial court's ruling under ER 404(b) for manifest abuse of discretion, and will not overturn the decision unless "no reasonable judge would have ruled as the trial court did." State v. Mason, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007), *cert. denied*, 128 S. Ct. 2430, 171 L. Ed. 2d 235 (2008).

In order to admit evidence of prior bad acts under the common plan or scheme exception, the prior acts must be (1) proved by a preponderance of the evidence, (2) admitted for the purpose of showing a

common plan or scheme, (3) relevant to prove an element of the crime charged, and (4) more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

Here, the court heard evidence from the police informant that he had purchased drugs on previous occasions from the defendant, using the same method of arranging the drug purchase, and that the drugs were delivered by the defendant using the same vehicle as on the date in question. (RP 196). The trial court had adequate grounds on which to find the informant's testimony credible by a preponderance of the evidence. The court explicitly stated that the evidence was admitted by the trial court in order to prove a common plan or scheme. (RP 72). The court explicitly stated that the proposed evidence was relevant to prove an element of the crime charged—that the defendant was in fact the person who delivered the drugs to the defendant (or as the court put it, "it's relevant to explain why this transaction occurred between these two people as opposed to two strangers, for example, or two people who aren't involved in this.")—this being essentially the only contested element at trial. (RP 72). Finally, the trial court explicitly stated that it had balanced the evidence and found it to be more probative than prejudicial. (RP 72). The record demonstrates the trial court made the necessary findings and

conducted a weighing of the evidence that should not be disturbed on appeal.

Evidence of past acts may be admissible to show a common scheme or plan where the prior acts demonstrate a single plan used repeatedly to commit separate but very similar crimes. State v. DeVincentis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003). The past act and charged act must be substantially similar to be relevant and, therefore, admissible under this exception. *Id.* at 20. This means that the similarity must be clearly more than coincidental; it must indicate conduct created by design. Lough, 125 Wn.2d at 860. This court reviews the trial court's determination of the relevance of prior acts for abuse of discretion. State v. Krause, 82 Wn. App. 688, 695, 919 P.2d 123 (1996). "In so doing, [the reviewing court considers] bases mentioned by the trial court as well as other proper bases on which the trial court's admission of evidence may be sustained." State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009) (citing State v. Powell, 126 Wn.2d at 259 (citing State v. Markle, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992); Pannell v. Thompson, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979)).

Other acts are admissible to prove a crime if there is "such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the

prior misconduct are the individual manifestations.” State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

Here, the evidence demonstrates precisely the sort of evidence demanded by Lough and DeVincentis: the past acts demonstrate a single plan—to sell drugs to the police informant—used repeatedly, to commit separate but very similar crimes. The past and charged acts are more than coincidentally similar; they involve the same drug buyer, the same drug seller, the same method of arranging the drug deal and the same method of executing the drug deal. They are, as required by Lough, a general plan, and the charged and uncharged acts are individual manifestations.

“In those cases where, from the record as a whole, the reviewing court can decide issues of admissibility without the aid of an articulated balancing process on the record, the court should do so. In such cases, the trial court's failure to state the reasons for its ruling on the record becomes harmless error because it does not affect the admissibility of the evidence in question or impede effective appellate review of the trial court's decision. To send a case back for a retrial under such circumstances would be pointless...Likewise, the trial court in State v. Thomas, 35 Wn. App. 598, 668 P.2d 1294 (1983) failed to balance the admissibility of ER 404(b) evidence on the record. After noting the omission, the reviewing court went on to conduct its own balancing, determining that

the probative value of the evidence was outweighed by its prejudicial effect, but that the admission of the evidence was harmless error.

Thomas, at 607-09.” State v. Gogolin, 45 Wn. App. 640, 645-46, 727 P.2d 683 (1986) citing State v. Tharp, 96 Wn.2d 591, 600, 637 P.2d 961 (1981).

Unlike many Washington cases involving common scheme or plan evidence where our courts have admitted evidence of past crimes committed over many years and committed against separate victims, the acts here represent a buyer/seller relationship that existed between the defendant and the informant. Unlike evidence related to separate victims over long time lines, there was virtually no danger of the evidence in this case being used improperly as propensity evidence. Instead, the acts are part and parcel of the same drug dealing activity that was occurring between the defendant and the informant.

C. EVEN IF THE CLAIMED ER 404(B) EVIDENCE WAS NOT ADMISSIBLE UNDER THE COMMON SCHEME OR PLAN EXCEPTION, HARMLESS ERROR APPLIES BECAUSE IT WAS ADMISSIBLE UNDER THE RES GESTAE., MOTIVE, IDENTITY AND ABSENCE OF MISTAKE EXCEPTIONS TO ER 404(B).

"It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory,

although different from that indicated in the decision of the trial judge." State v. Norlin, 134 Wn.2d 570; 951 P.2d 1131, 1136-37 (1998), citing Cheney v. City of Mountlake Terrace, 87 Wn.2d 338, 552 P.2d 184 (1976).

Our courts recognize 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.'" State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (quoting State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980)). The evidence is admissible to complete a picture for the jury "where another offense constitutes a 'link in the chain' of an unbroken sequence of events surrounding the charged offense" State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997).

In State v. Jordan, 79 Wn.2d 480, 487 P.2d 617 (1971), the court found no error in admission of evidence that when the defendant was apprehended for unlawful possession of a narcotic, he was found with needle marks on his arms and drug paraphernalia nearby. Rejected was his argument that such testimony and exhibits placed him on trial for crimes not charged. The court held that evidence of criminal acts which are inseparable parts of the whole deed is admissible.

Similarly, in State v. Battle, 16 Wn. App. 66, 553 P.2d 1367 (1976) (testimony that 67 worthless checks totaling nearly \$12,000 were written by defendant; objection was made on the basis that the defendant was not charged with crimes relating to those 67 checks), the court said, “Mere similarity between other criminal misconduct and the crimes charged would not in itself have justified the admission of this evidence.... But where, as here, a distinctive means was employed in committing the other offenses and the crimes charged... **or where the criminal acts were inseparable from a whole criminal scheme**, ... evidence of the other criminal misconduct is relevant and admissible. Battle at 69-70, (emphasis added).

Unlike evidence that a person has committed a similar crime in the past—normally with different individuals involved—the evidence in this case relates to an ongoing commercial relationship between the informant and defendant--as drug dealer and customer. The jury was entitled to hear that this relationship existed to have a complete picture of the offense. The crime alleged in this case did not occur in a vacuum. It happened in the context of buyer and seller. By analogy, in a property dispute, we would not keep the jury from knowing that a landlord/tenant relationship exists. In a mortgage foreclosure case we would not keep the jury from knowing a borrower/lender relationship exists. And in a racketeering case,

we would not prevent a jury from knowing an ongoing criminal enterprise exists.

The proffered defense offered by the defendant—that he was not involved in any drug transaction with the informant makes it necessary for the jury to know that there was no mistake by police, that the informant could properly identify the defendant, that the defendant had an ongoing financial motive to commit the crime, and that the drug transaction at issue was part of a larger criminal scheme—an ongoing series of sales of drugs by the defendant to the police informant.

D. EVEN IF THE CLAIMED ER 404(B) EVIDENCE WAS IMPROPERLY ADMITTED HARMLESS ERROR APPLIES BECAUSE ALL ELEMENTS OF THE OFFENSE WERE TESTIFIED TO BY THE PRIMARY WITNESS AND CORROBORATED BY POLICE WITNESSES.

The erroneous admission of ER 404(b) evidence is not an issue of constitutional magnitude. As a result, any error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. State v. Jackson, *supra*; State v. Rogers, 83 Wn.2d 553, 520 P.2d 159 (1974); State v. Craig, 82 Wn.2d 777, 514 P.2d 151 (1973).

In this case, the police informant testified that he made a phone call where he arranged to purchase methamphetamine from the defendant in a Safeway parking lot. (RP 190). Vancouver Police Officer Leonard Gabriel was listening in on the telephone conversation while this was arranged. (RP 191). Officer Gabriel prompted the informant to meet with the defendant in a specific Safeway store parking lot. (RP 191). Police took the informant to that location. (RP 192). Sometime after the informant arrived at the Safeway parking lot with police, the defendant drove up in his car and parked. (RP 192). The informant went to the defendant's car, got in, and sat in the front passenger seat. The defendant was in the driver's seat. (RP 192-93). A female, named Sarah, who was in the car with the defendant, moved from the front seat to the back seat of the defendant's car. (RP 193). The informant then purchased a \$20 baggie of methamphetamine from the defendant, who used "Sarah" as an intermediary in the transaction. (RP 194-95). The only conversation the informant had with the defendant was negotiating the price of the baggie from an original offering price of \$50 to a final sale price of \$20. (RP 193-95). The informant used \$20 of the buy money provided to him by police to purchase the methamphetamine. (RP 193-95). The informant returned to police and handed them the methamphetamine he had purchased from the defendant. (RP 197).

More importantly, two police officers testified that prior to purchasing methamphetamine from the defendant, the police informant was thoroughly searched and had no drugs, money or contraband on him. (RP 152, 260). The police kept the informant within their sight constantly so that he could not get any money or drugs on him. (RP 155, 261). The police had an unobstructed view of the parking lot where the drug transaction took place. (RP at 152-55). The police had selected that location for that very reason. (RP 154). The informant was provided with \$50 of photocopied buy money—two \$20 bills and one \$10 bill. (RP 155). The police informant and the defendant's vehicle were under constant visual surveillance while the informant went to and from the defendant's car. (RP 154-55, 263-64). The police were stationed approximately thirty yards from where the defendant parked his vehicle. (RP 263). The informant was in the defendant's vehicle for 30 to 60 seconds. (RP 160, 264). The informant returned from the defendant's car and gave the methamphetamine he had just purchased to Vancouver Police Officer Dustin Nicholson. (RP 264-65). The police, driving police cars, stopped the defendant's car and arrested him within one minute of the time the informant returned with the purchased methamphetamine. (RP 265-66).

Quite simply, the jury was presented with evidence that the informant who had no drugs on him when he went to the defendant's car, had drugs on him when he returned. The jury had no logical choice but to conclude the informant obtained the methamphetamine in the defendant's vehicle.

The defendant and the female who was present in the defendant's car were arrested. The car, a black BMW, was registered in the defendant's name. (RP 163). A search of the defendant and his car were conducted, but the \$20 bill used to purchase the methamphetamine was not found. (RP 174). The female who was arrested with the defendant told police that she believed there were hidden compartments in the vehicle where she thought drugs might be hidden. (RP 175). Police were unable to find additional drugs in those areas. (RP 175). The female was allowed to use the restroom at the police station and was not thoroughly searched before doing so. (RP 176-77).

When questioned by police, the defendant was told why he had been arrested, what had taken place with the drug transaction in question, that it had occurred under the observation of multiple police officers and the defendant was asked if he wished to tell police what happened. (RP 182). The defendant responded by telling the police they had the wrong guy. (RP 182). The police then told the defendant that the buy money

used in the drug deal had been photocopied. The defendant responded, “Yeah, it’s not me. Show me the money. (Inaudible) show me the buy money.” (RP 182-83).

The jury had little choice from the defendant’s admission but to conclude he knew the actual location of the buy money or he would not have challenged police on their assertion.

When all these facts are taken together, there is no way the outcome of the trial could have been affected had the admission of evidence that the informant had previously bought drugs from his drug dealer—the defendant—been excluded. The jury was presented with facts that a controlled purchase of methamphetamine took place while under visual surveillance of police who had thoroughly searched the informant beforehand. Coupled with the defendant revealing that he knew the police had not recovered the buy money—a statement inconsistent with his defense that he had not been involved—the jury had no choice but to find the defendant guilty.

The admission of evidence that the informant had previously purchased methamphetamine from the defendant is harmless error. This is particularly so in the context of this case where the jury was already implicitly aware that the informant, in exchange for favorable consideration for police, was setting up a sting involving his dealer. Put

another way, the jury knew the informant and defendant were alleged to be drug user and drug dealer. The fact that the informant specified how many times he had purchased from the defendant only served to clarify information the jury was already implicitly aware of.

III. CONCLUSION

The defendant, during his motions in limine, made an equivocal objection to evidence of prior drug deals between the informant and the defendant and did not object when this testimony was put before the jury. This evidence was in some ways harmful to the defendant but also helped him in an attempt to undercut the informant's credibility. The record does not reflect that this issue was objected to when presented to the jury and properly preserved for appeal. The evidence, even if properly objected to, was admissible under a number of exceptions to ER 404(b). The record of the trial court's findings, though sparse, is sufficient to show that the court properly analyzed, weighed, and admitted the evidence, as required under ER 404(b). Even if the evidence was improperly admitted, overwhelming evidence of the defendant's guilt was presented, and the evidence that the drug deal that occurred involving the defendant was unaffected by evidence of an existing relationship between the defendant and the

informant. Neither cumulative error nor ineffective assistance of counsel claims apply to this case as no prejudicial error has been shown.

DATED this 30 day of June, 2009.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL W. VAUGHN, WSBA#27145
Deputy Prosecuting Attorney

