

NO. 42921-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

RONNIE DEAN STRODE, JR.,

Appellant.

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

The Honorable Marilyn Hahn, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1396
Longview, WA 98632
(360) 425-8155

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence that Mr. Strode had a straw with an alleged adhering unidentified residue in his pocket when Strode was arrested for possessing another person's prescription medication.

2. The trial court erred in admitting evidence that there was a mirror with alleged cut marks and an unidentified adhering substance in the car Mr. Strode was driving immediately before being arrested for possessing another person's prescription medication.

3. It was error under ER 404(b) to admit the straw and mirror evidence.

4. The admission of the straw and mirror evidence was such error that it denied Mr. Strode his constitutionally guaranteed right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in admitting evidence that Mr. Strode had a straw with an alleged adhering unidentified residue in his pocket when Strode was arrested for possessing another person's prescription medication?

2. Did the trial court err in admitting evidence that there was a mirror with alleged cut marks and an unidentified adhering substance in

the car Mr. Strode was driving immediately before being arrested for possessing another person's prescription medication?

3. Did the admission of the straw and mirror evidence deny Mr. Strode a fair trial?

C. STATEMENT OF THE CASE

Ronnie Strode was out of work and looking for a job. 2A¹ RP ("Report of Proceedings") at 287. Because he's working in the gaming industry, his job search naturally took him to Las Vegas. 2A RP at 287-88. Mr. Strode's girlfriend, Delia Schill, had a friend in Las Vegas who agreed to pick up Mr. Strode at the Las Vegas airport and drive him to an interview and to other places where Mr. Strode wanted to fill out applications. 2A at RP 266. The friend's name is Keith Cory. 2A RP at 266.

On May 13, 2011, Mr. Strode flew from Portland to Las Vegas where he met Cory. 2A RP at 287. Cory drove Mr. Strode from place to place. 2A RP at 287-90. Mr. Strode concluded his job search with time to spare before his return flight to Portland. 2A RP at 290. He and Cory went to a casino to gamble. 2A RP at 290. Cory emptied his pockets of various items he did not want to take into the casino. 2A RP at 290. He

¹ The number and/or letter appearing before "RP," in this instance "2A," refers to the volume of verbatim containing the specific page number.

put those in items in Mr. Strode's backpack, and they stowed the backpack in the very small trunk of Cory's car. 2A RP at 289-90.

Time got away from the two men. 2A RP at 290. They had to rush from the casino to get Mr. Strode to the airport on time. *Id.* In their haste, Cory failed to remove all his personal items from Mr. Strode's backpack. 2A RP at 291. Mr. Strode opened the backpack once he landed in Portland. 2A RP at 291-92. In the backpack, he discovered Cory's "man purse" and Cory's prescription bottle containing OxyContin.² 2A RP at 291-92.

Mr. Strode decided to stop and see his girlfriend at work on his drive home to Kelso. 2A RP at 294-95. Delia Schill worked at a casino in La Center. 2A RP at 263. During Schill's break, Mr. Strode told her how he unwittingly came into possession of Cory's OxyContin. 2A RP at 276-77, 295. Schill tried to call Cory but was unable to reach him. 2A RP at 276-77, 295. Mr. Strode decided that he would express mail the OxyContin back to Cory the next morning. 2A RP at 301.

After visiting with Schill, Mr. Strode continued on to Kelso. 2A RP at 296. He had borrowed Schill's car to get back and forth from the Portland airport. 2A RP at 267. In Kelso, the car caught the attention of

² Note that Trooper Lane testified that Keith Cory's prescription bottle said "Oxycontin" (2A RP at 196) but the parties stipulated that the Washington State Patrol Crime Lab tested a pill from the bottle and it contained "Oxycodone" (2A RP at 246).

Washington State Patrol Trooper Gary Lane. 2A RP at 191-92. Trooper Lane stopped Mr. Strode for a license plate violation and a cracked taillight. 2A RP at 191.

In his subsequent conversation with Trooper Lane, Mr. Strode admitted his driver's license was suspended. 1 RP³ at 8-9. Trooper Lane arrested Mr. Strode and searched Mr. Strode's person incident to the arrest. 2A RP at 194. Trooper Lane found four prescription containers on Mr. Strode's person. 2A RP at 195. Three were prescriptions for Mr. Strode and the fourth was in the name of Keith Cory of Las Vegas, Nevada. 2A RP at 195. Cory's prescription was for OxyContin. 2A RP at 196. Mr. Strode's prescriptions were for OxyContin and Oxycodone. 2A RP at 293, 313. All the containers in Mr. Strode's name were at least 75% full giving Mr. Strode at least 225 pills. 2A RP at 313. The container in Cory's name contained 89 of the 90 pills prescribed. 2A RP at 197-98.

During his search of Mr. Strode's person, Trooper Lane found a short straw in Mr. Strode's pocket. 2A RP at 200. Trooper Lane perceived white residue on the straw. 2A RP at 200. Mr. Strode gave Trooper Lane permission to search Schill's car. 2A RP at 200. Trooper Lane found Schill's mirror in the car. 2A RP at 202, 274. He described

³ The reason for the arrest was not admitted at trial.

the mirror as having cut marks and white residue on it. 2A RP at 202. Schill denied that there were either cut marks or residue on the mirror. 2A RP at 274-75, 283. Instead, she bought the mirror to make a perfume tray and had it in the car so she could take it to the craft store. 2A RP at 274-75. Mr. Strode said that the straw came from a Starbucks' sample drink he had at the airport. 2A RP at 302. He did not use the straw to snort drugs. 2A RP at 302. He also did not use the mirror to snort drugs. 2A RP at 303. Although Trooper Lane seized the straw, he did not seize the mirror. 2A RP at 204. The straw was unavailable for admission at trial. 2A RP at 204.

Mr. Strode was charged by an Amended Information with unlawful possessions of a controlled substance for having Cory's prescription OxyCodone in his possession.⁴ CP (Clerk's Papers) at 12, 45-46.

Prior to trial, Mr. Strode moved in limine to exclude any reference to the straw or the mirror. 1 RP at 126-141. He argued that both items were irrelevant to any issue before the court and highly prejudicial. *Id.* The prosecutor responded that the admission was relevant to refute Mr. Strode's anticipated defense that he unwittingly possessed Cory's OxyCodone. The prosecutor argued that during his arrest, Mr. Strode told

⁴ The original Information charged Mr. Strode with unlawful possession of OxyContin. The Amended Information on which Mr. Strode was tried alleged unlawful possession of Oxycodone. CP 1-2, 45-46.

Trooper Lane that although he had a prescription for OxyContin and Oxycodone, he took too many pills and was addicted to them. 1 RP at 131, 135-36. The prosecutor wanted to persuade the jury that drug addicts use straws and mirrors to snort illegal drugs and the straw and mirror would support Mr. Strode's statement to Trooper Lane that he was addicted to OxyContin and/or Oxycodone. 1 RP at 131, 135-36.

Without any explanation other than to call the evidence "relevant", the trial court allowed testimony about the straw and mirror. 1RP at 141.

Trooper Lane was the only State's witness. 2A RP at 184-246. Mr. Strode testified as did Delia Schill. 2A RP at 261-317. Mr. Cory did not testify as he had transportation problems and could not make it to court. 1 RP at 114-15. The parties stipulated that a pill from Cory's prescription bottle tested positive by the Washington State Patrol Crime Lab as Oxycodone. 2A RP at 247.

During his testimony, Mr. Strode denied telling Trooper Lane he was addicted to Oxycodone or OxyContin. 2A RP at 300. Instead, he explained to Trooper Lane that he had a degenerative spine condition, he'd used the medication since he was 17⁵, and his use was closely monitored by his doctor. 2A RP at 293.

⁵ Mr. Strode was 29 at the time of trial. 2A RP at 285.

The court did instruct the jury on the defense of unwitting possession of a controlled substance. CP 58.

In closing argument, the prosecutor used the straw and mirror evidence to characterize Mr. Strode as a desperate drug addict. 2B RP at 354, 357, 359, 379-80

The jury found Mr. Strode guilty. The court imposed a 21 day sentence. CP 71. Mr. Strode filed a timely notice of appeal. CP 78.

D. ARGUMENT

ALLOWING IN THE STRAW AND MIRROR BAD ACT EVIDENCE OVER MR. STRODE'S OBJECTION DENIED MR. STRODE A FAIR TRIAL.

Evidence of prior bad acts, including acts that are merely unpopular or disgraceful, is presumptively inadmissible. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Whether evidence of a defendant's other bad acts should be admitted at trial is governed by ER 404(b), which 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.

State v. Stanton, 68 Wn. App. 855, 860, 845 P.2d 1365 (1993).

[B]efore admitting evidence of other wrongs under ER 404(b), a trial court must (1) find that a preponderance of evidence shows that the misconduct occurred; (2) identify the purpose for which

the evidence is being introduced; (3) determine that the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. In doubtful cases, the evidence should be excluded.

State v. Baker, 89 Wn. App. 726, 731-32, 950 P.2d 486 (1997), *review denied*, 135 Wn.2d 1011(1998).

In weighing the admissibility of the evidence to determine whether the danger of unfair prejudice substantially outweighs probative value, a court considers (1) the importance of the fact that the evidence intends to prove, (2) the strength of inferences necessary to establish the fact, (3) whether the fact is disputed, (4) the availability of alternative means of proof, and (5) the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn. App. 620, 628, 736 P.2d 1079, *review denied*, 108 Wn.2d 1024 (1987).

Here the trial court only found that the straw and mirror evidence was “relevant.” The court did not articulate any weighing of probative value versus its potential for prejudice.

A trial court’s ruling under ER 404 (b) will not be disturbed absent a manifest abuse of discretion such that 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*, 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed. 235 (2008). A trial court abuses its discretion when its decision is

“manifestly unreasonable or based on untenable grounds.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002).

A court’s decision is manifestly unreasonable

[I]f it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Grandmaster Sheng-Yen Lu, 110 Wn. App. at 99.

“Evidence can be admitted under ER 404 (b) only if the trial court finds the evidence serves a legitimate purpose, *is relevant to prove an element of the crime charged*, and, on balance, the probative value of the evidence outweighs its prejudicial effect.” *State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003) (emphasis added), citing *Lough*, 125 Wn.2d at 853.

A person is guilty of possession of a controlled substance if he “possess[es] a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice.” RCW 69.50.4013. The State has the burden to prove two elements: the nature of the substance and the fact of possession. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004), *cert. denied*, 544 U.S. 922, 125 S.Ct. 1662, 161 L.Ed.2d 480 (2005).

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less than it would be without the evidence.” ER 401. Under ER 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

Probative evidence is “evidence that tends to prove or disprove a point in issue.” Black’s Law Dictionary (7th ed., 1999), p. 579. The probative value of evidence is directly linked to the relevance of the evidence: “To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value) and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality).” *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). Therefore, evidence that is not probative is not relevant.

The erroneous admission of ER 404 (b) evidence requires reversal if there was a reasonable likelihood 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, the trial court abused its discretion in admitting the straw and a mirror as evidence because the evidence of the straw and the mirror were not relevant to any issue to be decided by the jury. Before this evidence could be deemed relevant, the jury must, at a minimum, have been presented with evidence that the “residue” on the straw was crushed up Oxycodone. If not, how could it have been relevant to Mr. Strode’s alleged unlawful possession of Oxycodone pills? The bottle in question contained intact pills. Indeed, Cory’s prescription was for 90 pills and the bottle contained 89 pills. It was thus highly improbable, if not outright impossible, that the “residue” allegedly adorning the straw and mirror was residue from this lone Oxycodone pill.

This evidence did not refute Mr. Strode’s claim of unwitting possession. This evidence was not necessary for the State to rebut the affirmative defense. The reason the State sought admission of this evidence was because its theory of the case was as follows: The defendant is a drug addict, and he uses a straw and mirror to snort his drugs, therefore the defendant could not have been holding (unwittingly) the lawful prescription of another person because he is a drug addict and drug addicts can’t be in the possession of drugs they don’t intend to use. In

other words, Mr. Strode has poor character and on this occasion he acted in conformity with that character.

This reasoning is specious and nothing more than a propensity argument. Mr. Strode's story of why and how he came to possess the lawful Oxycodone prescription of his friend was both plausible and relatable to the jury. The State sensed this, which is why the State was so eager to introduce propensity evidence that would destroy Mr. Strode's ability to be viewed positively by the jury. This case was entirely about the credibility of Mr. Strode. The propensity evidence presented in this case is exactly the type of evidence ER 404(b) is designed to exclude.

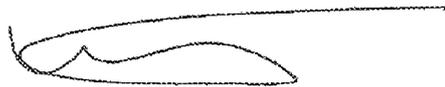
There is a reasonable probability that the jury would not have convicted Mr. Strode had they not been presented with this irrelevant character evidence. Mr. Strode's account of what occurred was both plausible and supported by the evidence. The evidence was that Mr. Strode had his own Oxycodone prescription, as well as an OxyContin prescription. He had three bottles of pills prescribed to him in his possession, numbering approximately 225 pills. Why would he need to take one pill from his friend's bottle? And how could one pill create enough residue to be scattered all over a straw and a mirror? With that much residue, nothing would have been left for Mr. Strode to consume.

The State's theory was a stretch, at best. Knowing that the jury would lose its ability to view the evidence rationally in the face of hearing about Mr. Strode's weakness of character in being a drug addict and in possession of drug paraphernalia, the State sought to exploit irrelevant and highly prejudicial evidence in order to obtain a conviction. There is a reasonable likelihood that without this evidence, the outcome of the trial would have been different. Mr. Strode's conviction should be reversed and he should be granted a new trial.

E. CONCLUSION

Because the trial court erred in admitting irrelevant and highly prejudicial testimony against Mr. Strode, Mr. Strode's possession of a controlled substance conviction should be reversed.

Respectfully submitted on June 29, 2012.



LISA E. TABBUT, WSBA #21344
Attorney for Ronnie Strode, Jr.

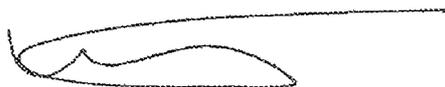
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed Appellant's Brief to: (1) Susan I. Baur, Cowlitz County Prosecutor's Office, at sasserm@co.cowlitz.wa.gov; (2) the Court of Appeals, Division II; and (4) I mailed it to Ronnie Dean Strode, Jr. at 111 Yelton Place, Longview, WA 98632.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed June 29, 2012, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Ronnie dean Strode, Jr.

COWLITZ COUNTY ASSIGNED COUNSEL

June 29, 2012 - 4:21 PM

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