DIVISION ONE
FILED: 01/26/2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0205
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
VICTOR LEO TROTTIER,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-130160-001 DT

The Honorable Janet E. Barton, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals Section/Capital Litigation Section
And Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Victor Leo Trottier (Defendant) appeals his conviction and sentence for one count of possession or use of dangerous

drugs, a class 4 felony. Defendant argues he is entitled to a new trial because the trial judge allowed the State to ask him if he knew what methamphetamine looked like, in violation of Arizona Rule of Evidence 404(b).[1] For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On March 3, 2008, Phoenix Police Officer B. was on patrol when he noticed Defendant digging through a dumpster. After obtaining Defendant's driver's license, Officer B. discovered Defendant had an outstanding arrest warrant. Officer B. placed Defendant under arrest and performed a search of his person. In Defendant's "fifth pocket," the right front pants pocket, Officer B. found a small plastic baggie with a white solid substance in it. Defendant reacted by stating, "[t]hat's not mine," and "I don't know where that came from."

¶3 Subsequent testing revealed the white substance was eighty-eight milligrams of methamphetamine. The State filed a criminal complaint against Defendant, alleging one count of possession or use of dangerous drugs. Prior to trial, Defendant's counsel filed a motion in limine to preclude any reference to Defendant's admission of prior methamphetamine use. On the first day of trial, the court granted the motion, stating that any "relevancy it may have is substantially outweighed by

[1] Unless otherwise specified, hereafter, an Arizona Rule of Evidence is referred to as "Rule ___."

the danger of undue prejudice." However, the court stated it would allow the evidence should Defendant take the stand and open the door to its use for credibility purposes.

¶4 Defendant testified at trial. During the State's cross-examination of Defendant, the State requested a bench conference to inform the court it intended to ask Defendant "if he [knew] what methamphetamine generally [looked] like." Defendant's counsel objected on the ground that "[g]eneral knowledge of what methamphetamine is is not relevant" and that it would "open the door for more inadmissible evidence." Initially, the court sustained the objection. However, the court immediately reconsidered and noted that "the element of the crime they have to establish [is] that he knowingly possessed [the baggie] and that he knew it was methamphetamine."

¶5 The State then asked Defendant, "[y]ou know what methamphetamine looks like, don't you." Defendant responded by stating, "[y]es, I know what methamphetamine looks like." The trial court offered to give the jurors a "limiting instruction" regarding Defendant's testimony that "he knows what methamphetamine looks like." However, Defendant declined the offer.

¶6 The jury convicted Defendant of one count of possession or use of dangerous drugs. Pursuant to Arizona Revised Statutes (A.R.S.) section 13-702.02 (2001) the trial court found Defendant

had one prior felony conviction and sentenced Defendant to prison for a mitigated term of two years. Defendant filed a timely notice of appeal and we have jurisdiction pursuant to A.R.S. §§ 12-120.21.A.1 (2003), 13-4031 (2001), and -4033.A.1 (Supp. 2009).[2]

DISCUSSION

¶7 Defendant raises one issue on appeal: whether the trial court erroneously allowed the admission of "other act" evidence in violation of Rule 404(b). We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Tankersley*, 191 Ariz. 359, 369, ¶ 37, 956 P.2d 486, 496 (1998). Absent a clear abuse of discretion, we will not question a trial court's determination on the admissibility or relevance of evidence. *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997).

Rule 404(b) Prior Act Evidence

¶8 Defendant argues that his knowledge of "what methamphetamine looked like was evidence of another crime, wrong or act and must be precluded unless any of the Rule 404(b) exceptions apply." However, as the State points out, Defendant's testimony regarding his knowledge of what methamphetamine looks like does not fall within Rule 404(b).

[2] We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

¶9 We review the interpretation of court rules *de novo*. *Cranmer v. State*, 204 Ariz. 299, 301, ¶ 8, 63 P.3d 1036, 1038 (App. 2003). Additionally, we interpret court rules "in accordance with the intent of the drafters, and we look to the plain language of the . . . rule as the best indicator of that intent." *Fragoso v. Fell*, 210 Ariz. 427, 430, ¶ 7, 111 P.3d 1027, 1030 (App. 2005). "If the language is clear and unambiguous, we give effect to that language and do not employ other methods of . . . construction." *Id.*

¶10 Rule 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." (Emphasis added.) From the plain language of the rule, evidence of mere *knowledge* does not fall within the rule's prohibition. Ariz. R. Evid. 404(b). Rule 404(b) is limited only to evidence of "other crimes, wrongs, or acts." In this case, Defendant's *knowledge* of what methamphetamine looks like is not evidence of another crime, wrong, or act, and therefore does not trigger Rule 404(b) application.

¶11 Nevertheless, Defendant contends our decision in *State v. Torres* controls. 162 Ariz. 70, 781 P.2d 47 (App. 1989). In *Torres*, we reasoned that evidence of prior drug use was inadmissible where "the only relevance the evidence of prior drug use had . . . was the forbidden inference that because the

defendant had used [a drug] in the past, he was using it now." *Id.* at 73, 781 P.2d at 50. However, in *Torres*, the evidence in question was the defendant's statement that "he had used heroin at one time but was not presently doing so." *Id.* at 73, 781 P.2d at 50.

¶12 In this case, the challenged testimony was not evidence of prior use. It was simply an admission that Defendant knew what methamphetamine looks like. A defendant's admission of prior drug use is very different than an admission that he knows what a drug looks like. Defendant's own counsel drew this distinction during her closing argument: "many of us know what [drugs] look[] like." However, "[t]hat doesn't mean that we're using them. That doesn't mean that we have them." Accordingly, we conclude that both *Torres* and Rule 404(b) do not apply.

Rule 403 Relevancy

¶13 Alternatively, Defendant argues that "there must still be a showing that the probative value of the evidence substantially outweighs the danger of unfair prejudice." Defendant misstates Arizona Rule of Evidence 403. Rule 403 allows the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Defendant contends his "ability to recognize methamphetamine does not significantly aid the [State's] case except it signals the jury that he likely used methamphetamine in the past so he must

have known the small amount of the drug was in his watch pocket." Although the jury could infer prior use from this evidence, we find the danger of unfair prejudice was minimal at best. As we previously noted, Defendant's counsel aptly pointed out, "many of us know what [drugs] look[] like." However, "[t]hat doesn't mean that we're using them. That doesn't mean that we have them."

¶14 Moreover, Defendant's knowledge of what methamphetamine looks like was directly related to an essential element of the alleged crime. The trial court's instructions to the jury included the following:

> The crime of possession of a dangerous drug requires proof of the following: (1) The Defendant knowingly possessed a dangerous drug and (2) the substance was, in fact, a dangerous drug.
>
> "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that his or her conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.
>
> Methamphetamine constitutes a dangerous drug under Arizona law.

Therefore, to commit the alleged crime, Defendant had to "knowingly" possess the baggie and know or believe that the baggie contained methamphetamine. Defendant's counsel acknowledged this element in her closing argument. She stated that "[f]irst of all, [Defendant] must have knowingly had an item

in his pocket. . . . Secondly, he must know that [the] item in his pocket is methamphetamine."

¶15 In this case, Defendant's knowledge as to what methamphetamine looks like was highly probative, especially because the drug was found inside a "clear plastic" baggie. As a result, Defendant's knowledge of what the drug looks like became a central piece of evidence in establishing the elements of the crime.

¶16 We hold that any prejudice created by evidence of Defendant's knowledge of what methamphetamine looks like did not substantially outweigh the highly probative value the evidence had in establishing the elements of the alleged crime. Accordingly, the trial court did not abuse its discretion in allowing Defendant's testimony regarding his knowledge of what methamphetamine looks like.

CONCLUSION

¶17 For the reasons stated above, we affirm Defendant's conviction and sentence.

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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

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DIANE M. JOHNSEN, Judge

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JON W. THOMPSON, Judge