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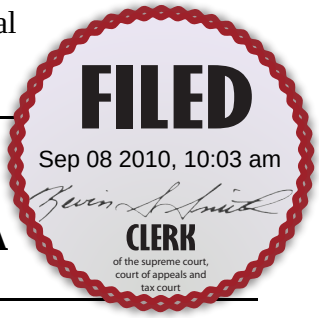


# IN THE COURT OF APPEALS OF INDIANA

JACK M. ESTES, II,
Appellant-Defendant,
vs.
STATE OF INDIANA,
Appellee-Plaintiff.

No. 29A02-1003-CR-320

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0612-FB-256

**September 8, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Jack M. Estes, II, appeals his conviction for Dealing in a Schedule III Controlled Substance,[1] a class B felony. Estes argues that the trial court abused its discretion in admitting evidence that he had portrayed himself as a medical doctor. Specifically, Estes claims that this evidence was not relevant, that its prejudicial impact substantially outweighed its probative value, and that it was inadmissible character evidence. Finding no reversible error, we affirm the judgment of the trial court.

## FACTS

Upon the death of his nephew, Paul, in September 2006, Brad Bartrom called many of the contacts stored in Paul's cell phone to notify them of the wake and funeral arrangements. One person he contacted was stored in Paul's cell phone as "Dr. Jack," and Brad subsequently learned that this was Estes.

Over the course of several phone conversations with Estes, Brad concluded that Estes was a good friend of Paul's and that Estes was aware of how close Paul was with his mother, Deborah Cox. Estes asked Brad how Deborah was coping with her son's death, and when Brad replied that she was not doing well and was having trouble sleeping, Estes responded that he would be willing to write Deborah a prescription for drugs to help her sleep. This prompted Brad to become uneasy and suspicious, and he contacted the Carmel Police Department, informing them that Estes was offering to write a prescription without

[1] Ind. Code § 35-48-4-2(a)(1).

examining her. As a result, Brad was put in touch with Detective Sean Brady of the Hamilton County Drug Task Force.

Through the conversations with Estes, Brad also learned that Paul had purchased a vehicle from Estes that was still in a repair shop at the time of Paul's death. Estes had previously agreed with Paul to pay for the cost of the repair. In November 2006, Estes contacted Brad regarding payment for the vehicle repairs and the drugs to help Deborah. Since they were unable to meet at that time, Estes contacted Brad again to meet on December 15, 2006, where he would bring Brad a check and the drugs. This phone conversation arranging the meeting was recorded.

Detective Brady initiated a controlled "buy/bust" operation, and after Estes handed Brad the check and a handful of loose pills for Deborah, he was arrested at the scene of the transaction. The pills were subsequently found to contain hydrocodone, a Schedule III controlled substance. Further, during this meeting with Brad, Estes: (1) stated that these were all the pills that he had available but that he could provide more; (2) advised Brad to tell Deborah to be careful with the pills since he had not seen her chart; and (3) explained some possible side-effects. During his interview the same day, Estes admitted delivering the pills to Brad and knowing that they were controlled substances. In addition, he informed Detective Brady that he had a Ph.D.

The State charged Estes with class B felony dealing in a schedule III controlled substance and class D felony possession of a controlled substance. The State ultimately elected not to prosecute Estes on the possession charge. Before trial, Estes filed a motion in

limine to prohibit the State or its witnesses from referencing him as a "doctor," but it was denied by the trial court. Several times during trial, Estes objected when witnesses made reference to "Dr. Jack" or other information that tended to show he posed as a medical doctor, but the trial court overruled all objections. On May 12, 2009, the jury found Estes guilty of class B felony dealing in a schedule III controlled substance. The trial court later sentenced Estes to ten years imprisonment, to be served consecutive to a sentence he was serving in a separate cause. Estes now appeals.

## DISCUSSION AND DECISION

Estes contends that the trial court erred in admitting evidence that he portrayed himself as a medical doctor. He first argues that this evidence is irrelevant. Next, he argues that even if relevant, the evidence should have been excluded because its probative value is outweighed by its prejudicial effect. Finally, he contends that the evidence is inadmissible character evidence.

A pretrial ruling on a motion in limine does not determine the ultimate admissibility of the evidence; that determination is made by the trial court in the context of the trial itself. Clausen v. State, 622 N.E.2d 925, 927 (Ind. 1993). After a motion in limine is denied, objections at trial to the admission of evidence are required to preserve claims of error for appellate review. Raess v. Doescher, 883 N.E.2d 790, 796-97 (Ind. 2008).

The admissibility of evidence is within the sound discretion of the trial court and is afforded great deference on appeal. Hauk v. State, 729 N.E.2d 994, 1001 (Ind. 2000). We review the trial court's decision to admit evidence for an abuse of discretion. Whiteside v.

State, 853 N.E.2d 1021, 1025 (Ind. Ct. App. 2006). An abuse of discretion occurs if the trial court's decision to admit the evidence is clearly against the logic and effect of the facts and circumstances before the court. Sallee v. State, 777 N.E.2d 1204, 1210 (Ind. Ct. App. 2002). Errors in the admission of evidence are considered harmless, however, unless they affect the substantial rights of a party. Whiteside, 852 N.E.2d at 1025.

First, Estes contends that the trial court erred when it allowed allegedly irrelevant testimony by Brad, the State's main witness, evidencing that Estes had portrayed himself as a medical doctor. Estes objected four times at trial: (1) when Brad testified that he came into contact with Estes when he examined his nephew Paul's cell phone contacts and found the name "Dr. Jack"; (2) when Brad made reference to "Dr. Jack" during his testimony when discussing the vehicle Paul purchased from Estes; (3) when Brad testified that Estes advised him during their phone conversation that he could write Deborah a prescription; and (4) when Brad testified that during their December 15, 2006, face-to-face meeting, Estes warned that Deborah should be careful since "I've not seen her chart and she's not my patient . . . ." Tr. p. 124, 126, 128, 132.

Evidence is relevant, and thus generally admissible, 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 probable than it would be without the evidence." Ind. Evidence Rule 401, 402. When faced with a 401 question, we "must determine whether the evidence tends to prove or disprove a material fact in the case or sheds any light on the guilt or innocence of the accused." Brown v. State, 747 N.E.2d 66, 68 (Ind. Ct. App. 2001).

On appeal, Estes maintains that this testimony is irrelevant. We disagree. Brad's testimony illustrates the events that led up to the controlled drug buy: how Estes was discovered in Paul's cell phone contact list and how Estes initiated the drug deal, as the dealer, and then subsequently contacted Brad to follow through with it. Brad's caution and suspicion toward Estes was not prompted until he volunteered over the phone to write Deborah a prescription when he heard she was not sleeping well. Brad then contacted the police because he knew drugs were being offered in an improper manner. Brad's testimony reiterates that Estes knew he was doing something improper at the time of the transaction, medical doctor or not, when Estes warned, "I've not seen her chart and she's not my patient . . . ." Tr. p. 132. Further, this testimony evidences what took place while completing the drug transaction. Thus, we find this evidence to be relevant.

Estes next argues that even if the evidence is relevant, it still should have been excluded under Indiana Rules of Evidence 403, which states that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury…" Ind. Evidence Rule 403. Specifically, Estes contends that the prejudicial effect of the testimonial evidence that Brad found the name "Dr. Jack" in Paul's cell phone contact list and to Brad referencing him as "Dr. Jack" would substantially outweigh any probative value of the information. He claims that he is painted from the outset of Brad's testimony as "Dr. Jack." Estes contends that further testimonial evidence—that Estes told Brad on the phone that he could write Deborah a prescription and that during their face-to-face meeting Estes admitted to Brad "I've not seen

her chart and she's not my patient . . . ."—has small probative value when compared to its prejudicial impact on the jury because it could persuade the jury by illegitimate means and lead the jury to decide a verdict on a basis other than what was charged. Tr. p. 132. He reiterates several times that he was not charged with practicing medicine without a license in the case at bar.

We disagree with Estes's contention. Whatever limited prejudicial effect may have accompanied this evidence is substantially outweighed by its probative value. As noted above, Brad's testimony was necessary to explain to the jury the underlying events and interactions between Brad and Estes. These details are an inextricable part of the story. Therefore, we decline to find error for this reason.

Finally, Estes argues that this evidence is inadmissible under Evidence Rule 404(b), which states as follows:

> 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, intent, preparation, plan, knowledge, identity, or absence of making or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Ind. Evidence Rule 404(b).

The standard for assessing the admissibility of 404(b) evidence is: (1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue

other than the defendant's propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. Hicks v. State, 690 N.E.2d 215, 221 (Ind. 1997). When inquiring into relevance, the court may consider any factor it would ordinarily consider under Rule 402, which may include the similarity and proximity in time of the prior bad act to the charged conduct, and will presumably typically include tying the act to the defendant. Id. This rule is designed to prevent the jury from assessing a defendant's present guilt on the basis of his past propensities. Id.

Rule 404 does not bar evidence of uncharged acts that are "intrinsic" to the charged offense, however. Wages v. State, 863 N.E.2d 408, 411 (Ind. Ct. App. 2007). "'Evidence of happenings near in time and place that complete the story of the crime is admissible even if it tends to establish the commission of other crimes not included among those being prosecuted.'" Id. (quoting Bocko v. State, 769 N.E.2d 658, 664-65 (Ind. Ct. App. 2002)).

Here, two of the four portions of Brad's testimony that Estes disputes simply do not constitute that which is necessary for Rule 404(b) to be applicable: other crimes, wrongs, or acts. Estes is merely designated in Paul's cell phone contact list as "Dr. Jack" and Brad simply referred to him as "Dr. Jack," which could be considered nothing more than a nickname. As the State points out, it is not unheard of to be coined with such a nickname. Under these circumstances, Estes has failed to demonstrate that this testimony is inadmissible character evidence pursuant to Rule 404(b).

With respect to the two other portions of Brad's testimony that Estes disputes—that Estes told Brad on the phone that he could write Deborah a prescription and that during their face-to-face meeting Estes admitted to Brad "I've not seen her chart and she's not my patient . . . ." —this evidence was properly admitted because it is intrinsic to the crime for which Estes was charged and therefore is not prohibited by Rule 404(b). Tr. p. 132. In other words, it cannot be said that the only apparent purpose of this evidence is to prove that Estes is a person who commits crimes. Instead, this testimony constitutes evidence of occurrences near in time and place that complete the story of the crime in the case at bar. Therefore, we find no error on this basis.

In any event, we note that even if the trial court had erred in admitting portions of Brad's testimony, any alleged error did not prejudicially contribute to Estes's conviction and, therefore, is harmless. Whiteside, 852 N.E.2d at 1025. Estes delivered the pills during a controlled buy and was arrested immediately at the scene of the transaction. Tr. pp. 95-99, 131-33. Further, he admitted to the police that he delivered the pills to Brad. Id. at 103. With such overwhelming evidence of Estes's guilt, any error is deemed harmless.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.