

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

THOMAS MICHAEL QUACKENBUSH,

Appellant.

No. 41364-7-II

UNPUBLISHED OPINION

Johanson, J. — A jury convicted Thomas Michael Quackenbush of attempting to elude a pursuing police vehicle. He appeals his conviction arguing that the trial court erroneously admitted character evidence regarding his prior drug use. We reverse because a reasonable probability exists that the trial court’s improper admission of drug use to assess Quackenbush’s credibility materially affected his trial’s outcome.

FACTS

On May 29, 2010, the Washington State Patrol conducted a seat belt emphasis operation in Pierce County. Trooper Albert Havenner testified that he noticed the driver of a blue 1983 Chevrolet Monte Carlo—a white male in his mid-20s, with dark, short hair and a goatee—was not wearing his seat belt. Trooper Havenner briefly made eye contact with the driver before performing a U-turn to follow and attempt to stop the vehicle. Trooper Havenner recorded the Monte Carlo’s license plate number. As the trooper followed, the Monte Carlo sped up, cut in front of cars waiting to turn, and forced oncoming traffic to stop to avoid colliding with it.

Trooper Havenner activated his overhead emergency lights to try to stop the Monte Carlo.

The Monte Carlo's driver did not stop; instead, he turned onto State Route 512. Trooper Havenner activated his emergency siren. And again, rather than stopping for Trooper Havenner, the driver of the Monte Carlo accelerated to 80 mph and weaved "in and out of traffic" before abruptly cutting across two lanes of traffic to exit State Route 512. VRP (Oct. 7, 2010 PM) at 31. Eventually, three state troopers pursued the Monte Carlo. But, given their public safety concerns arising from the Monte Carlo's erratic driving and high speed, the troopers terminated their pursuit after the Monte Carlo sped through yet another red light.

The following day, while patrolling an area five minutes away from where troopers had chased the Monte Carlo the day before, Pierce County Sheriff's Deputy Chad Dickerson noticed the same blue 1983 Monte Carlo. Deputy Dickerson observed that the car's description and license plate matched those Trooper Havenner recorded the day before. Deputy Dickerson pulled in behind the Monte Carlo; activated his overhead lights; and contacted the driver, the vehicle's lone occupant, who provided Deputy Dickerson his Washington identification card. Deputy Dickerson learned that the driver was Thomas Michael Quackenbush. Deputy Dickerson asked Quackenbush if he had any outstanding warrants, and Quackenbush responded, "No." VRP (Oct. 7, 2010 PM) at 51. While Deputy Dickerson checked Quackenbush's warrant status in his patrol car, Quackenbush exited the Monte Carlo and fled. Deputy Dickerson pursued on foot and eventually caught Quackenbush and arrested him on the outstanding warrant. Deputy Dickerson advised Quackenbush of his rights and asked him, "Did you run because you had warrants?" VRP (Oct. 7, 2010 PM) at 57. Quackenbush responded, "Yes." VRP (Oct. 7, 2010 PM) at 57.

Deputy Dickerson then asked Quackenbush why he ran from the state patrol the day before; and, Quackenbush responded, “I didn’t run from [the] state patrol.” VRP (Oct. 7, 2010 PM) at 58.

By the time Deputy Dickerson returned to his patrol vehicle, Deputy Patrick Dosremedios had arrived at the scene. Deputies Dickerson and Dosremedios placed Quackenbush in Deputy Dosremedios’s patrol car for transport to the Fife jail. At trial Deputy Dosremedios testified that, on their way to the Fife jail, Quackenbush complained that he was not feeling well. He stated that he might need to go to the hospital, that he was thirsty, and that he was having difficulty breathing. To try to diagnose potential medical conditions, Deputy Dosremedios asked Quackenbush if he was on any drugs. Quackenbush responded, “[N]o.” VRP (Oct. 7, 2010 PM) at 66. Shortly thereafter, Quackenbush began vomiting in the back of the patrol car. Deputy Dosremedios testified that, “I asked him again if anything was going on, how he was feeling? He complained of the same things. He advised me that he had used drugs prior to my contact with him.” VRP (Oct. 7, 2010 PM) at 67. Deputy Dosremedios then added:

We got to the jail, took the subject out of the vehicle, brought him into the sally port. He was continuous—or continuing to throw up. I gave him a garbage can.

Tacoma fire came. They did their assessment of him. They determined that he needed to go to the hospital and transported him to St. Francis in Federal Way.

VRP (Oct. 7, 2010 PM) at 67.

On June 1, Trooper Havenner learned that sheriff’s deputies had arrested Quackenbush and that he had been driving the same Monte Carlo he had chased just days earlier. Trooper Havenner viewed an identifying photograph and Department of Licensing photograph of

Quackenbush and recognized him as the man he observed driving the Monte Carlo on May 29. In an amended information, the State charged Quackenbush with one count of attempting to elude a pursuing police vehicle¹ for the May 29 chase involving the state patrol.

Before trial, Quackenbush moved to exclude from trial, as irrelevant, his statements regarding his drug use. After a hearing at which Deputies Dickerson and Dosremedios testified, the court determined that Quackenbush's statements to Deputy Dosremedios were not part of a custodial interrogation designed to elicit incriminating responses. The court stated that Quackenbush's statement regarding his drug use would be admissible solely for the purpose of assessing Quackenbush's credibility. The State stipulated that it would instruct Deputy Dosremedios to limit his testimony so as not to specify which drug Quackenbush admitted to consuming or the timeframe in which Quackenbush consumed it. The court suggested Quackenbush may want to submit limiting instructions that the jury may only use his statements to assess his credibility.² Quackenbush declined to submit limiting instructions.

Trooper Havenner testified that, following Quackenbush's arrest, he viewed photographs of Quackenbush and "[a]bsolutely" determined "there was no doubt in my mind that Thomas Quackenbush was driving the Chevy that I was chasing [on May 29]." VRP (Oct. 7, 2010 PM) at 38. On cross-examination, Trooper Havenner admitted that, in his written report, he did not describe the driver as having a goatee, nor did he note the tattoo on his neck. Quackenbush did

¹ Former RCW 46.61.024(1) (2003).

² The trial court also found that Quackenbush's statements may be relevant as indicia of guilt. But, the trial court admitted the evidence "solely" for purposes of assessing Quackenbush's credibility. VRP (Oct. 6, 2010) at 40. Therefore, we confine our analysis to assuming that the trial court admitted the evidence strictly for assessing Quackenbush's credibility.

not call any witnesses or testify on his own behalf.

During closing argument, the State drew attention to Quackenbush's statements regarding his drug use:

They transported the defendant to the Fife Jail when he says that he is starting to feel ill. In order to assess his medical condition, the deputy asked him, "Well, do you have drugs in your system?" What does the defendant say? "No." He starts to throw up. It is clear that something is going on. The defendant then says, "Well, yeah, I did. I had drugs in my system."

So when you look at, no warrant, yeah, I have a warrant; no drugs, yes, I did. I used—I have drugs in my system, then you get to determine is the defendant credible when he says, I'm not the guy that ran from WSP the day before.

VRP (Oct. 7, 2010 PM) at 81-82.

The jury convicted Quackenbush for attempting to elude a pursuing police vehicle. Quackenbush appeals.

ANALYSIS

I. Admission of Quackenbush's Statements for Credibility Purposes

Quackenbush claims that the trial court applied the wrong standard of law and abused its discretion in admitting his statements about his drug use at trial.³ He claims that the State improperly argued to the jury that because he lied about using drugs, he must have lied about eluding police, a violation of ER 404(a). The State responds that Quackenbush's statements were relevant to assess Quackenbush's credibility under ER 404(b). Quackenbush correctly argues that evidence bearing on his credibility should be analyzed under ER 404(a); and, such character

³ The State first argues that Quackenbush's statements were not subject to exclusion under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Quackenbush, however, did not brief this issue and appears to have abandoned that claim. Therefore, we will not address the issue. See *State v. Wheaton*, 121 Wn.2d 347, 365, 850 P.2d 507 (1993).

evidence may not be admitted for purposes of proving he lied about eluding the state patrol. *See* ER 404(a) (stating that a court may not admit character evidence for the purpose of proving action in conformity therewith on a particular occasion).

We review a trial court's decision to admit evidence of other crimes or misconduct for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). A trial court abuses its discretion when its ruling was based on untenable grounds or made for untenable reasons. *State v. Cronin*, 142 Wn.2d 568, 585, 14 P.3d 752 (2000). A trial court bases a discretionary decision on untenable grounds or makes it for untenable reasons if it rests on facts unsupported in the record or applies the wrong legal standard. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

Evidence of drug use can be prejudicial. *State v. Crane*, 116 Wn.2d 315, 333, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991). And, drug use is not probative of truthfulness as it has little to do with a witness's credibility. *State v. Stockton*, 91 Wn. App. 35, 42, 955 P.2d 805 (1998). Evidence of drug use is admissible to impeach a witness if there is a reasonable inference that the witness was under the influence of drugs either at the time of the incident or at the time she or he testified at trial. *State v. Tigano*, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992). But, evidence of drug use on other occasions is generally inadmissible because it is impermissibly prejudicial. *Tigano*, 63 Wn. App. at 344-45.

Under ER 404(a), 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. ER 404(a). Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove

character or conformity therewith, but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). But, a trial court must perform a four-part analysis before admitting ER 404(b) evidence. It must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *State v. Gresham*, 173 Wn.2d 405, 421 P.3d 207 (2012). Should the trial court fail to balance on the record, we need not reverse, provided the trial court carefully set forth its reasons for admission. *State v. Hepton*, 113 Wn. App. 673, 688, 54 P.3d 233 (2002), *review denied*, 149 Wn.2d 1018 (2003). The list of other admissible purposes for which a defendant's prior misconduct may be introduced, under ER 404(b), is not exclusive. *State v. Grant*, 83 Wn. App. 98, 105, 920 P.2d 609 (1996) (allowing evidence of defendant's prior assaults to assess credibility of domestic violence victim).

State v. Chase, 59 Wn. App. 501, 799 P.2d 272 (1990), offers us some guidance. *Chase* involved a burglary in which Chase argued that the trial court erred by admitting the false name he provided to police when police first contacted him. *Chase*, 59 Wn. App. at 507. We stated that the evidence of Chase's false name was relevant, under ER 401, for three reasons. First, the evidence connected Chase to the crime scene because his false name was linked to him in other ways. *Chase*, 59 Wn. App. at 507. Second, evidence of the false name tended to show consciousness of guilt and furthered inferences of identity and criminal intent. *Chase*, 59 Wn. App. at 507. Third, the evidence showed that Chase, being one who would lie, was of bad

character and thus more likely to have committed the burglary. *Chase*, 59 Wn. App. at 507. We held that the third reason violated ER 404(a), and we reasoned that the trial court, when faced with evidence that may be used both properly and improperly, must weigh its probative value versus potential for prejudice. *Chase*, 59 Wn. App. at 507. We deferred to the trial court's judgment and held that it did not abuse its discretion in admitting the evidence. *Chase*, 59 Wn. App. at 507-08.

Unlike *Chase*, the State here did not admit Quackenbush's statements to show his consciousness of guilt for eluding police, or for placing him at the crime scene. Instead, the trial court admitted the evidence solely for assessing Quackenbush's credibility. Like *Chase*, here the trial court admitted Quackenbush's drug-related statements for credibility purposes to show nothing more than he, as one who lies, was of bad character and was lying when he said he did not elude the day before. Like *Chase*, here the trial court erred in admitting the evidence for assessing credibility. But unlike *Chase*, the trial court did not have other, valid reasons for admitting the evidence, and the trial court erred in admitting Quackenbush's statements solely for assessing his credibility. Therefore, the trial court abused its discretion in admitting Quackenbush's drug-related statements.

The State also argues that the trial court properly balanced, under ER 404(b), whether to admit Quackenbush's statements regarding his drug use. Indeed, after hearing witness testimony and arguments, the court performed what appeared to be an ER 404(b) analysis and admitted the statements.

Even assuming ER 404(b) is the proper rule under which to determine whether to admit

Quackenbush's statements, the trial court needed to make four findings. First, the trial court must find by a preponderance of the evidence that the misconduct occurred. *Gresham*, 173 Wn.2d at 421. Here, neither party disputed—and the trial court found—that Quackenbush made statements to Deputy Dosremedios regarding his drug use.

Second, the trial court must identify the purpose for which the evidence is sought to be introduced. *Gresham*, 173 Wn.2d at 421. The trial court stated on the record that the court was admitting Quackenbush's statements "solely for the purpose of assessing the credibility of the defendant and not for purposes of whether or not he had consumed . . . any meth or any other drugs for that matter." VRP (Oct. 6, 2010) at 40. But, credibility is not one of the listed purposes for admission of ER 404(b) evidence. *See* ER 404(b) (listing "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."). Consequently, the trial court's purpose for admitting the Quackenbush's statements will not satisfy the second prong of the ER 404(b) test.

Third, the court must determine whether Quackenbush's statements were relevant to prove an element of his eluding charge. *Gresham*, 173 Wn.2d at 421. The trial court stated that the statements were relevant because they were offered to assess Quackenbush's credibility.⁴ As Quackenbush's defense centered on a theory of misidentification and general denial, the court apparently reasoned his credibility was, therefore, relevant in proving Quackenbush attempted to elude a pursuing police vehicle, contrary to state law. But, while credibility is always relevant in evaluating evidence, Quackenbush's statements still do not appear relevant to prove any element

⁴ Relevant evidence tends to make the existence of any fact more probative than not. ER 401.

of the eluding charge; therefore, the State’s argument—and trial court’s justification—for admitting Quackenbush’s statements does not appear to satisfy the third prong of the ER 404(b) analysis.

Fourth, the trial court must find that the probative value of the evidence outweighs the risk of undue prejudice after weighing the probative value against risk of undue prejudice on the record. *Gresham*, 173 Wn.2d at 421. But, the court did not actually weigh the probative value against the potential for undue prejudice. It stated that Quackenbush’s statements were “not relevant to this trial whether or not he had consumed any meth or any other drugs for that matter.” VRP (Oct. 6, 2010) at 40. And the court reasoned they were relevant “solely for the purpose of assessing the credibility of the defendant and not for purposes of whether or not he had consumed [drugs].” VRP (Oct. 6, 2010) at 40. Even though the trial court suggested a limiting instruction and placed limits on the drug-related testimony, the trial court never balanced the probative value of these statements against the danger of unfair prejudice resulting from the jury learning that Quackenbush was so sick from drugs he had to be hospitalized. Therefore, the trial court did not satisfy the fourth prong of the ER 404(b) analysis test. *See Gresham*, 173 Wn.2d at 421.

Ultimately, the trial court (1) found that Quackenbush made statements about drug use; (2) stated the purpose of admitting his statements was to assess Quackenbush’s credibility, a purpose not listed among the proper purposes in ER 404(b); (3) determined the statements had relevance in assessing Quackenbush’s credibility, but not any specific element of his eluding charge; and, (4) found probative value in the statements, without balancing on the record the

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probative value against the risk of unfair prejudice.

Ultimately, the trial court should have applied ER 404(a), rather than ER 404(b), but even under ER 404(b) it should have precluded the State from admitting evidence of Quackenbush's statements regarding his drug use.

II. Res Gestae

The State also argues that the evidence of drug use was admissible under res gestae. Under res gestae, evidence of collateral crimes or other bad acts is admissible “[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff’d*, 96 Wn.2d 591, 637 P.2d 961 (1981).

For res gestae to apply, though, Quackenbush’s statements that he did not and then that he did consume drugs would have to “complete the story of the crime on trial”—here the crime of felony eluding. *Tharp*, 27 Wn. App. at 204. Quackenbush’s denial and then immediate admission that he used drugs has no connection to and therefore does not “complete the story” of the crime of eluding. For that reason, res gestae does not apply.

III. Not Harmless Error

The erroneous admission of evidence is harmless, and does not require reversal, absent a reasonable probability that the error materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Specifically, when a trial court improperly admits evidence of prior bad acts, and that evidence alters the outcome of the trial, the error is not harmless. *See State v. Wade*, 98 Wn. App. 328, 338, 989 P.2d 576 (1999) (holding not harmless error when trial court admitted evidence of past drug convictions in a prosecution for possession of cocaine with intent to deliver).

The erroneous admission of Quackenbush’s post-crime drug use to assess Quackenbush’s credibility was not harmless error. The State’s evidence of guilt was not overwhelming. On May

29, Trooper Havenner observed for two to three seconds and made eye contact with the Monte Carlo's driver and described the driver as "a white male probably in his mid-20s, dark hair, short hair, kind of a goatee," similar to Quackenbush's description. VRP (Oct. 7, 2010) at 25. On cross-examination, however, Trooper Havenner admitted that he failed to include the driver's goatee or tattoo in his report. Trooper Havenner testified that he had "no doubt in [his] mind" that Quackenbush was the man he chased on May 29, 2010. VRP (Oct. 7, 2010) at 38. However, Quackenbush denied eluding the troopers the previous day. While consideration of the potential biases might favor the State's version of events here, this credibility contest does not overwhelmingly favor the State.

The remaining evidence is also not conclusive. The next day, Deputy Dickerson identified Quackenbush driving the blue 1983 Monte Carlo with the same license plate number that had eluded troopers the day before; and, he stopped the Monte Carlo just five minutes away from where troopers had chased it the day before. But, the Monte Carlo was not registered to Quackenbush and was instead registered to his girlfriend. Thus, we must consider the effect of the improper evidence in a case where the jury's credibility determinations are critical.

The jury heard Deputy Dosremedios testify that Quackenbush admitted to consuming drugs at some point prior to his contact with authorities and that his resulting sickness was so severe he was "continuing to throw up." VRP (Oct. 7, 2010 PM) at 67. Deputy Dosremedios also testified that Quackenbush's drug-induced sickness required the fire department's assistance and ultimately also required his transport to the hospital. During closing argument, the State drew attention to Quackenbush's statements regarding his drug use:

They transported the defendant to the Fife Jail when he says that he is starting to feel ill. In order to assess his medical condition, the deputy asked him, “Well, do you have drugs in your system?” What does the defendant say? “No.” He starts to throw up. It is clear that something is going on. The defendant then says, “Well, yeah, I did. I had drugs in my system.”

So when you look at, no warrant, yeah, I have a warrant; no drugs, yes, I did. I used—I have drugs in my system, then you get to determine is the defendant credible when he says, I’m not the guy that ran from WSP the day before.

VRP (Oct. 7, 2010 PM) at 81-82.

Considering all of the evidence and argument in this credibility-driven case, we conclude that there is a reasonable probability that the trial court’s improper admission of drug use to assess Quackenbush’s credibility materially affected the outcome of Quackenbush’s trial.

We reverse.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Penoyar, C.J.

Hunt, J. (dissenting) — I respectfully dissent from the majority’s holding that the trial court’s admission of Quackenbush’s statements about his prior drug use was reversible error. I would hold that the error was harmless. I would affirm.

When inadmissible evidence is received at trial, the question becomes whether the erroneous admission was harmless. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The error is harmless unless, within reasonable probabilities, the admission materially affected the outcome of the trial. *State v. Sublett*, 156 Wn. App. 160, 196, 231 P.3d 231, *review granted*, 170 Wn.2d 1016 (2010). Here, the majority does not show how the drug evidence was reasonably likely to have affected the jury’s verdict in a material way, especially in light of the other overwhelming evidence of Quackenbush’s guilt.

For example, Trooper Havenner, who had been specifically looking at drivers to check for seatbelt compliance that day, testified that he had a good view of the eluding driver, whom he described as “a white male probably in his mid-20s, dark hair, short hair, kind of a goatee.” Verbatim Report of Proceedings (VRP) (Oct. 7, 2010 PM) at 22, 25. The two even made eye contact. And there was absolutely “no doubt in [Trooper Havenner’s] mind that Thomas Quackenbush was driving the Chevy that [he] was chasing.”⁵ VRP (Oct. 7, 2010 PM) at 38.

Based on this strong independent evidence of Quackenbush’s guilt, I respectfully submit the majority (1) ignores the rules that post-conviction appellate courts view the evidence in the

⁵ Havenner also identified Quackenbush as the driver from photographs. Havenner further testified about the erratic driving, saying the driver was “driving so erratically and having run that red light at such a high speed, we went ahead and decided to terminate the pursuit to try to avoid any kind of further accidents.” VRP (Oct. 7, 2010 PM) at 35.

light most favorable to the State and defer to the jury in matters of witness credibility;⁶ and (2) speculates that the relatively insignificant mention of Quackenbush's drug use casts doubt on the jury's verdict. The majority disregards these well-settled rules by minimizing Trooper Havenner's solid, unrefuted eyewitness identification of Quackenbush as the driver and, instead, second-guessing the jury's implicit finding this experienced trooper's testimony credible.

I would hold that admission of Quackenbush's acknowledged drug use did not prejudice him and, therefore, any error was harmless. *See e.g., State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). I would affirm.

Hunt, J.

⁶ *State v. O'Neal*, 126 Wn. App. 395, 412, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500 (2007); *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).