

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MELCHESTER PHILLIPS, JR.,

Appellant.

No. 41807-0

UNPUBLISHED OPINION

Worswick, C.J. — Melchester Phillips Jr. appeals his convictions for residential burglary and trafficking in stolen property. On appeal, Phillips argues that (1) the trial court misinterpreted ER 404(b) and thereby erroneously admitted highly prejudicial evidence that Phillips assaulted an 11-year-old boy and (2) his attorney provided ineffective assistance of counsel because he failed to propose a limiting instruction for this evidence. We affirm.

FACTS

Howard Gore and several roommates rented a four-bedroom house on South Sprague Street in Tacoma for two years. The property was fully fenced, with four-to-six-foot fencing, and had three garages. One of those garages was attached to the house and opened to an alleyway off of Sprague Street. While Gore lived in the Sprague Street house, the automatic, roll-up door to the attached garage was broken and, thus, was always open. But the metal door leading from the attached garage into the house was in good repair and had a dead bolt.

Although Gore stopped living in the house in 2009, he continued to lease the house and to

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store his property there. Then, on July 4, 2010, Gore rented a U-Haul truck and spent the day moving his belongings out of the house. While Gore worked on moving his things out of the house on July 4, his next door neighbor, Shiela Brooks, overheard Phillips asking another neighbor one or two different times whether Gore had left yet.

Gore did not finish moving out of the house on July 4. Around seven in the evening, Gore locked the house's windows, locked and bolted all of the doors, including the door from the attached garage into the house, secured the U-Haul, and left for the day. There was no one inside the house when Gore left.

When Gore returned to finish moving his possessions out of the Sprague Street house on the morning of July 5, he discovered that the attached garage was ransacked and the door leading from the garage into the house was destroyed. The door into the house from the attached garage looked as if someone kicked it open; the deadbolt was destroyed and the door itself was fractured and open. Gore immediately called the police to report the burglary. Gore later determined that several items were missing, including a piano keyboard, a hand sander, a router, and a weed eater.

While investigating the burglary, police discovered that Ronald Carter, one of Gore's roommates in the Sprague Street house, confronted Phillips about the burglary a week after it happened. Specifically, Carter asked Phillips about the missing piano keyboard. Phillips told Carter that he had that keyboard and offered to sell it back to Carter, but Carter declined.

Investigating officers also discovered that, on July 5, 2010, Phillips pawned a piano keyboard, a hand sander, a router, and a weed eater at two local pawn shops. Both of those pawn shops required government-issued photo identification from all people who pawned items. Both

pawn shops required people who pawned items to sign the pawn receipt. In addition to providing both pawn shops with his photo identification, Phillips also signed the pawn receipts from both shops with his full name.

Detectives then contacted Phillips. The detectives introduced themselves to Phillips and told him that they were with the burglary unit. Before the detectives gave Phillips any specific information, Phillips responded, “[O]h, this is about that burglary at . . . South Sprague [Street].” Report of Proceedings (RP) at 240-41. The detectives then arrested Phillips and read him his *Miranda*¹ rights. Phillips agreed to speak with the detectives and told them that he knew some of the people who lived there but said that they moved out around July 4.

Although Phillips said that Carter gave him a class ring from the Sprague Street house that he pawned, Phillips denied pawning anything else from the house. In response to the detectives’ questions, Phillips admitted pawning a piano keyboard, a weed eater, and a router. But Phillips claimed that someone named “Showtime” gave him the keyboard, someone named “Leonard” gave him the weed eater, and someone named “Randy” gave him the router. RP at 247. Nonetheless, officers accompanied Gore to both of the pawn shops where Phillips pawned those items and Gore positively identified his piano keyboard, router, and weed eater.

The State charged Phillips with residential burglary and two counts of trafficking in stolen property, one count for each of the two pawn shops where Phillips pawned items from Gore’s house. At trial, Brooks, Carter, staff from both pawn shops, and police officers and detectives testified as described above.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

In addition, 11-year-old Gary Robinson testified. Robinson had known Phillips for several years and the two of them would occasionally hang out and play basketball at the park. On July 4, Robinson ran into Phillips at a friend's house near Gore's Sprague Street home. Robinson and Phillips left the friend's house and walked to Gore's house. When they got there, they walked into the house through the door from the attached garage and found that the door was "open, but . . . crooked [l]ike it had been kicked open." RP at 107. Although he stated the door was open, Robinson acknowledged that neither he nor Phillips had permission to enter the house.

At Gore's house, Phillips started going through boxes and instructed Robinson to stand watch at the windows and alert Phillips if he saw any police. Phillips used a flashlight instead of turning on lights inside the house. Robinson took a heater and some fireworks that Phillips had found in the house and Phillips took the power tools and piano keyboard. Then, after Robinson saw a police car drive by outside the house, he and Phillips ran away, with Phillips carrying everything but the heater and the fireworks.

Robinson further testified that he went with Phillips to two local pawn shops on July 5 and pawned the power tools and the keyboard. Then, after pawning those items, Phillips took Robinson out to eat, but Phillips did not give Robinson any money from the pawned items. A few days after they pawned the items taken from Gore's house, officers contacted Robinson for an interview. Robinson told the officers about his and Phillips's involvement in burgling Gore's house.

At trial, the State asked Robinson if "anything . . . happened between [him] and [Phillips] after [they] went into [Gore's] house?" RP at 115. Phillips objected based on ER 404(b),

arguing that, because he was not charged with witness tampering or witness intimidation, such evidence was both irrelevant and inadmissible evidence of a prior bad act.

The State made an offer of proof that it anticipated Robinson would testify that Phillips “picked him up around his neck and . . . called him a snitch.” RP at 116. Consequently, the State argued that this evidence was relevant to show Phillips’s consciousness of guilt and explained any reluctance on Robinson’s part in coming forward. In response to the State’s offer of proof, Phillips argued that the State’s proffered testimony introduced evidence of a prior bad act, “basically assault of a child in the second degree,” to show Phillips’s character and propensity to act in conformity with his character. RP at 118-19. Phillips further argued that Robinson’s expected testimony did not fall within any ER 404(b) exception.

Phillips then asked the trial court to require the State to make an offer of proof. But because the State already had made an offer of proof, the State interpreted this as Phillips’s request for an evidentiary hearing. Phillips then stated that he would rather leave that determination to the court’s preference. The trial court did not hold an evidentiary hearing; instead, it proceeded based on the State’s offer of proof.

The trial court acknowledged that the proffered evidence “is prejudicial because it is [ER] 404(b) evidence; however, it has relevance because it shows . . . Phillips[’s] . . . consciousness of guilt.” RP at 120-21. The trial court further stated:

The question is whether the prejudicial nature . . . substantially outweighs the probative value, and the answer is no. And the reason is . . . because [Robinson] . . . already testified that he and . . . Phillips went into the home and he was there when . . . Phillips was removing items from the home. And he went with . . . Phillips afterwards to two pawn shops to try and pawn the items taken from the home

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RP at 121. Thus, the trial court overruled Phillips's objection.

Robinson then testified that a week or two weeks after he spoke with the officers, Phillips saw Robinson at a friend's house, "grabbed [Robinson] by [the] neck and picked [him] up and . . . slammed [Robinson] on [a] table." RP at 122-23. Phillips then said that he heard Robinson had "snitched on him." RP at 123. In shock and crying, Robinson denied snitching on Phillips.

Phillips's counsel did not propose a limiting instruction regarding the purposes for which the jury could consider Robinson's testimony that Phillips picked him up by the neck and called him a snitch. In response to the trial court's inquiry whether there was "anything else [they] needed to talk about on jury instructions," Phillips's counsel said "no." RP at 214.

The jury found Phillips guilty as charged. The court sentenced Phillips to 80 months of confinement. Phillips appeals his convictions.

ANALYSIS

I. Evidence of Conduct Showing Consciousness of Guilt

Phillips first argues that we must reverse his convictions because the trial court misinterpreted ER 404(b) and abused its discretion in admitting unfairly prejudicial evidence that he assaulted Robinson. We disagree.

A. *Standard of Review*

Whether a trial court correctly interpreted ER 404(b) is a question of law that we review de novo. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). However, where a trial court correctly interprets ER 404(b), we review a trial court's ruling admitting evidence of the defendant's other acts for an abuse of discretion. *Fisher*, 165 Wn.2d at 745; *State v. Stein*, 140 Wn. App. 43, 65, 165 P.3d 16 (2007). A trial court has broad discretion to weigh the probative

value of evidence against its prejudicial effect. *Stein*, 140 Wn. App. at 67. A trial court abuses its discretion if its exercise of discretion is manifestly unreasonable or based on untenable grounds.

Stein, 140 Wn. App. at 65.

B. *Evidence of Uncharged Crimes or Other Bad Acts*

Where the State wishes to admit evidence of a defendant's prior bad act or of a defendant's uncharged crime, the trial court must (1) find that the act or uncharged crime probably occurred by a preponderance of the evidence, (2) specify the purpose for which it is admitting that evidence, (3) determine that the evidence is relevant for that purpose, and (4) balance its probative value against its prejudicial effect. *Stein*, 140 Wn. App. at 65; *See also* ER 404(b).

1. *The Trial Court Properly Interpreted ER 404(b)*

As a threshold matter, Phillips argues that the trial court misinterpreted ER 404(b) and, consequently, that our review is de novo. *Fisher*, 165 Wn.2d at 745. Phillips claims that the trial court misinterpreted ER 404(b) in two ways: (1) by failing to find by a preponderance of the evidence that Phillips actually committed the other act and (2) by applying an incorrect test in balancing the evidence's probative value against its prejudice. We disagree.

First, Phillips argues that the trial court erroneously interpreted ER 404(b) because it did not explicitly find on the record by a preponderance of the evidence that he actually committed the misconduct. But the trial court admitted the evidence following the State's offer of proof and immediately after both Phillips and the State argued the issue. Phillips cites to *State v. Barragan*, 102 Wn. App. 754, 758, 9 P.3d 942 (2000), for the proposition that a trial court misinterprets ER

404(b) if it fails to explicitly find that the defendant committed the act by a preponderance of the evidence. But *Barragan* does not support that proposition.

Instead, at issue in *Barragan* was whether the trial court erred in admitting prior bad act evidence without first conducting an evidentiary hearing. 102 Wn. App. at 760. Because the defendant did not challenge the State's assertion that he engaged in the prior bad act, the *Barragan* court held that the trial court did not abuse its discretion by admitting the evidence without first holding an evidentiary hearing. 102 Wn. App. at 760. It follows that, where the defendant does not dispute that he or she committed the prior bad act, the trial court need not make an explicit finding that the act probably occurred.

Second, Phillips argues that the trial court applied an erroneous test in balancing the evidence's probative value against its prejudicial effect. Phillips cites *State v. Venegas*, 155 Wn. App. 507, 526, 228 P.3d 813 (2010), to support the proposition that contested evidence is more prejudicial than probative when it is cumulative and would add "little to the scale of existing evidence" of an element of a crime. He complains that the trial court erred by not employing the "test" announced in *Venegas*.

Phillips misinterprets *Venegas*. In that case, the trial court failed to conduct a balancing test, and we were required to conduct the balancing. *Venegas*, 155 Wn. App. at 526. What Phillips categorizes as our "test," is in reality our criticism of the trial court's failure to conduct a proper ER 404(b) analysis. See *Venegas*, 155 Wn. App. at 525-27. But, here, the record shows that the trial court conducted the correct test; that is, the trial court considered whether the evidence's probative value outweighed its prejudicial effect.

Thus, Phillips fails to show that the trial court misinterpreted ER 404(b). Because the trial court did not misinterpret ER 404(b), we review whether the trial court erred in admitting the evidence for an abuse of discretion. *Fisher*, 165 Wn.2d at 745.

2. *The Trial Court Did Not Abuse its Discretion in Admitting the ER 404(b) Evidence*

Phillips alternatively argues that the trial court abused its discretion in admitting Robinson's testimony that Phillips picked him up by the neck and called him a snitch. Phillips reiterates the same arguments discussed above, but here under a different guise. He claims that the trial court *abused its discretion* by: (1) failing to explicitly find by a preponderance of the evidence that the acts occurred and (2) improperly balancing the evidence's probative value against its prejudicial effect. We disagree.

a. *No Explicit Finding by a Preponderance of Evidence Required*

Before admitting evidence of uncharged crimes, a trial court must determine by a preponderance of the evidence that the defendant committed the uncharged acts. *Stein*, 140 Wn. App. at 65. As discussed above, Phillips did not contest the facts contained in the State's offer of proof. Instead, he implicitly agreed that he committed the conduct because he argued only that the evidence was more prejudicial than probative. Because whether Phillips committed the act was undisputed, the trial court did not abuse its discretion in admitting the evidence without entering explicit findings that Phillips probably committed the conduct in question.

Moreover, a trial court may properly determine that an alleged uncharged crime probably occurred based on the State's offer of proof and is not required to hold an evidentiary hearing. *Stein*, 140 Wn. App. at 66; *State v. Kilgore*, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002). If the

trial court decides to admit evidence under ER 404(b) immediately after both parties argue the issue and the record shows that the trial court agreed with one party over another, then we may excuse the trial court's lack of specific findings. *Stein*, 140 Wn. App. at 66.

For example, in *Stein*, the State made a detailed offer of proof, which the trial court concluded was sufficient for it to rule on the admissibility of the ER 404(b) evidence without an evidentiary hearing. 140 Wn. App. at 66. Then, even though the trial court did not explicitly find by a preponderance of the evidence that the defendant actually committed the uncharged crime, the trial court did refer to the State's offer of proof. *Stein*, 140 Wn. App. at 66. Thus, the trial court implied its finding that the other act occurred by referring to the State's offer of proof. *Stein*, 140 Wn. App. at 66.

Similarly here, the trial court found the evidence admissible immediately after hearing the State's offer of proof, considering argument from both sides, and hearing Phillips's concession that he would abide by the trial court's preference on holding an evidentiary hearing. *Stein*, 140 Wn. App. at 66. Even though the trial court did not explicitly find by a preponderance of the evidence on the record that Phillips picked Robinson up by the neck and called him a snitch, it implied as much. The record is sufficient to show that the trial court found by a preponderance of the evidence that Phillips committed the uncharged acts. Because the trial court admitted the evidence following argument and the State's unchallenged offer of proof, the trial court did not abuse its discretion in admitting the evidence without entering explicit findings that Phillips probably committed the conduct in question.

b. *Trial Court Conducted Proper ER 404(b) Analysis*

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In conducting an ER 404(b) analysis, the trial court must balance the proffered evidence's probative value against its prejudicial effect. *Stein*, 140 Wn. App. at 65. The probative value of evidence that a criminal defendant threatened a witness against him and called him a snitch outweighs the danger of its unfairly prejudicial effect. *State v. McGhee*, 57 Wn. App. 457, 461-62, 788 P.2d 603 (1990).

For example, in *McGhee*, the State sought to introduce evidence that McGhee called one of the State's witnesses against him a "snitch" while making threatening gestures. 57 Wn. App. at 461-62. The *McGhee* court held that because the State charged McGhee with planning robberies, rather than engaging in violent crime, the evidence did not suggest his guilt based on conduct in conformity with a violent character. 57 Wn. App. at 461-62. Instead, the *McGhee* court concluded that the evidence that McGhee threatened a witness against him and called him a snitch was "[m]ore plausibly . . . the conduct of one with guilty knowledge attempting to intimidate a witness [and] . . . the probative value outweigh[ed] the possibility of unfair prejudice." 57 Wn. App. at 462.

Here too, the trial court balanced the probative value of the evidence that Phillips assaulted Robinson and called him a snitch against its prejudicial effect. Based on this balancing, the trial court determined that the prejudicial nature of the evidence did not outweigh its probative value. It found that the State had produced evidence that Phillips removed items from Gore's house and later pawned those items. It considered the State's argument that evidence that Phillips assaulted Robinson and called him a snitch showed Phillips's consciousness of guilt. Accordingly, the probative value of Phillips's threatening and assaulting Robinson for snitching was highly

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probative of Phillips's consciousness of guilt and not unfairly prejudicial because the State had already introduced strong evidence against him.

The trial court did not abuse its discretion in admitting this ER 404(b) evidence. Thus, Phillips's evidentiary arguments fail.

II. Ineffective Assistance of Counsel

Phillips also argues that his counsel provided ineffective assistance by failing to request a limiting instruction regarding the purposes for which the jury could consider the State's ER 404(b) evidence. We disagree.

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. We start with a strong presumption of counsel's effectiveness. *State v. Gerds*, 136 Wn. App. 720, 726, 150 P.3d 627 (2007); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A person claiming ineffective assistance of counsel must show both that (1) counsel's deficient performance deprived the defendant of his or her constitutional right to counsel and (2) counsel's deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Prejudice occurs when, but for counsel's deficient performance, there is a reasonable probability that the outcome would have differed. *Reichenbach*, 153 Wn.2d at 130. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 697.

Moreover, where defense counsel does not request a limiting instruction on the jury's use of any ER 404(b) evidence, we presume that decision was counsel's trial strategy to avoid reemphasizing that damaging evidence. *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27 (2005); *State v. Yarbrough*, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009); *Barragan*, 102 Wn. App. at 762; *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). A criminal appellant challenging his or her trial counsel's effectiveness based on counsel's decision not to request a limiting instruction bears the burden of proving that there was no legitimate tactical reason for that decision. *Barragan*, 102 Wn. App. at 762; *See also McFarland*, 127 Wn.2d at 336.

Here, Phillips fails to rebut the presumption that his trial counsel had no legitimate tactical reason for not requesting a limiting instruction. Because it is reasonable trial strategy to avoid reemphasizing evidence showing Phillips in an unfavorable light to the jury and because Phillips fails to prove his counsel had no legitimate tactical reason for making that decision, Phillips cannot show that his counsel's performance was deficient. Phillips argues that *Price*, *Yarbrough*, *Barragan*, and *Donald* are distinguishable and not controlling because, unlike in those cases, here neither counsel nor the trial court discussed the possibility of a limiting instruction for the State's ER 404(b) evidence. But this distinction does not compel a different result because we presume Phillips's trial counsel made a tactical decision to avoid reemphasizing unflattering evidence by not requesting an ER 404(b) limiting instruction and Phillips fails to meet his burden of rebutting that presumption. *Barragan*, 102 Wn. App. at 762. Thus, Phillips fails to overcome the strong presumptions in favor of effective representation and trial strategy and, thus, fails to show deficient performance. Phillips's failure to show his counsel's performance was deficient is fatal

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to his ineffective assistance of counsel claim. Accordingly, we do not consider whether his counsel's performance prejudiced him. Phillips's argument fails.

Affirmed.

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.

Worswick, C.J.

We concur:

Hunt, J.

Johanson, J.