IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NANOKA TATYANA KRUGER, Appellant.	No. 41820-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Nanoka T. Kruger guilty of possession of methamphetamine. Kruger appeals her conviction, arguing that the trial court denied her a fair trial by allowing the State to cross-examine her about a prior experience with law enforcement. She also contends that she received ineffective assistance of counsel when her attorney failed to request a limiting instruction concerning the prior experience evidence. Kruger raises additional issues in a pro se statement of additional grounds. Finding no error, we affirm.

Facts

When Kitsap County Deputy Sheriff Benjamin Herrin responded to a report of a woman smashing car windows with a crowbar, he found Kruger, who matched the woman's description, in the middle of the street. She was pacing back and forth and yelling. After identifying himself as a deputy, Herrin asked her to come toward him while keeping her hands visible, but Kruger

backed away and put her hands behind her head.

Deputy Troy Graunke then arrived at the scene. When Kruger continued to resist instructions to come forward, the deputies handcuffed her. Kruger stated that she was afraid of law enforcement and was not sure who the deputies were, even though both patrol cars had their overhead lights on and the deputies had identified themselves. Kruger appeared to be under the influence of alcohol or narcotics.

Deputy Herrin then patted Kruger down for weapons. When he asked whether she had anything on her person that could create a safety issue, Kruger reached around and put her fingers into her front pocket. When she pulled her hand out, a baggie fell from her pocket to the ground.

The baggie contained a white powder that resembled methamphetamine. The deputies arrested Kruger, and the State charged her by amended information with possessing methamphetamine.

Before trial, defense counsel moved to exclude evidence from State witnesses about Kruger's prior convictions for reckless driving and negligent driving. The State did not object to excluding such evidence from its case-in-chief, and the trial court granted the motion.

The deputies then testified to the facts cited above, adding that a post-arrest investigation revealed that Kruger had smashed her own car windows before they arrived on the scene. A forensic scientist testified that the baggie that fell from Kruger's pocket contained methamphetamine.

Kruger testified in her own defense and explained that she had been arguing with her boyfriend about her cars and was having a "large emotional outburst" when the deputies arrived. Report of Proceedings (RP) (Dec. 28, 2010) at 63. When defense counsel asked whether she

approached the officers or let them come to her, Kruger replied as follows:

> When they had identified themselves as officers, and it had sunk in, I knew at some point we would have to make contact. I wasn't interested in fleeing; however, I was still frightened, just overall in a state of fright. I had a previous experience that made me nervous with police officers as far as my safety went, so that's not -- I am not going to go into that, but I didn't believe that they were out to get me or to harm me. I just didn't -- at that time my frame of mind.

RP (Dec. 28, 2010) at 69. She added that the baggie of methamphetamine found on the ground did not come from her; she did not know where it came from.

The State subsequently cross-examined Kruger about her behavior toward the officers and about her prior experience with law enforcement:

> Q Prior to this day, you said that you had a bad experience once with law enforcement.
> A Yes.
> Q When was that? How long ago?
> A Um --

RP (Dec. 28, 2010) at 87. Before she could answer, defense counsel objected and the court held a sidebar conference. The prosecuting attorney then asked Kruger when her prior experience with law enforcement occurred, whether it involved the same officers, and whether she told the officers that she was afraid because of that experience. She replied that it had occurred within the last two years with different officers and that she told the deputies only that she was afraid.

After the parties rested, the trial court made a record of the sidebar:

> It had to do with how far the state would be able to get into . . . Ms. Kruger's bad experience with the police. [Defense counsel] was concerned as to the number of those and whether or not it might lead to her arrest for the [driving while under the influence (DUI)]. [The prosecuting attorney] indicated that the door had been opened because she indicated she had -- Ms. Kruger had been afraid of the police based upon prior experience. I limited it to the one prior experience in terms of the inquiry.

RP (Dec. 28, 2010) at 107-08. The parties agreed that this was a fair statement of the sidebar.

The jury found Kruger guilty as charged, and she now appeals her conviction.

Discussion

Admission of Prior Experience Evidence

Kruger contends that the trial court denied her a fair trial by allowing the State to cross-examine her about a prior contact with law enforcement. More specifically, she argues that her testimony about her prior experience amounted to "prior bad act" evidence that was erroneously admitted under ER 404(b).[1]

Kruger raises this issue for the first time on appeal. An issue raised for the first time on appeal will not be reviewed by the appellate court unless the claimed error is a manifest error affecting a constitutional right. RAP 2.5(a). Evidentiary errors under ER 404(b) are not of constitutional magnitude. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Thus, where a defendant does not object at trial to the admission of evidence on the basis of ER 404(b), she may not assert on appeal that the trial court erred by admitting such evidence. *State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035 (2008).

Coupled with this rule is the principle that a party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). As the trial court's explanation of the sidebar revealed, defense counsel's objection to the State's cross-examination was based on her concern that it would

[1] ER 404(b) provides:

> **Other Crimes, Wrongs, or Acts**. 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.

reveal Kruger's prior DUI arrest and multiple prior encounters with law enforcement. The trial court limited the State's inquiry accordingly, and Kruger cannot now complain that this ruling violated ER 404(b).

Furthermore, we observe that Kruger "opened the door" to the cross-examination at issue. *See State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (introduction of inadmissible evidence opens the door to cross-examination that normally would be improper), *review denied*, 129 Wn.2d 1007 (1996). This is not a case where the State exceeded the scope of Kruger's initial admission; the trial court limited the State to asking when the prior experience occurred, whether it involved the same deputies, and whether she cited it in explaining her fear. *Cf. Avendano-Lopez*, 79 Wn. App. at 715-16 (defendant's passing reference to his release from jail did not "open the floodgates" to questions about prior heroin sales, and those questions constituted misconduct).

In short, Kruger cannot now claim error under ER 404(b), and we see no abuse of discretion in the trial court's ruling concerning the scope of the State's cross-examination.

Ineffective Assistance of Counsel

Kruger makes the related argument that her attorney's failure to request a limiting instruction concerning the ER 404(b) evidence constituted ineffective assistance of counsel. *See State v. Russell*, 171 Wn.2d 118, 123, 249 P.3d 604 (2011) (upon request, trial court must give limiting instruction following admission of evidence under ER 404(b)). Because ER 404(b) was not addressed below, there was no reason for counsel to request a limiting instruction pursuant to the rule, and we find no deficiency. Consequently, Kruger's claim of ineffective assistance of counsel fails. *See State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (to demonstrate

ineffective assistance of counsel, defendant must show both that counsel's performance was deficient and that the deficiency was prejudicial).

Statement of additional grounds

In her pro se brief, Kruger argues that the testimony of Deputies Herrin and Graunke contradicted their initial written reports and that the State repressed evidence that their testimony was inaccurate. Defense counsel was free to cross-examine the deputies about any discrepancies between their reports and their testimony, however, and the fact that such discrepancies existed does not entitle Kruger to relief. The record does not support Kruger's additional claim that the State suppressed evidence of the deputies' inaccuracies.

Nor does the record support her claim that potential defense witnesses were afraid to testify for fear of retaliation by local authorities. If Kruger has evidence to support these claims, she must file a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 338 n.5, 899 P.2d 1251 (1995).

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

PENOYAR, J.

JOHANSON, A.C.J.