

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CACR 07-379

DECEMBER 19, 2007

RUBEN MARMOLEJO
APPELLANT

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[NO. CR-06-420-1]

V.

HONORABLE WILLIAM A. STOREY,
JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant Ruben Marmolejo was charged with possession of methamphetamine with intent to deliver, with the crime alleged to have occurred on January 31, 2006. After a jury trial, he was convicted of the lesser-included offense of possession of methamphetamine, and was sentenced to ten years in prison. Mr. Marmolejo's sole argument on appeal is that the trial court erred in admitting evidence of his subsequent bad acts, which consisted of three methamphetamine sales. We affirm.

Officer Gene Johnson of the Springdale Police Department was patrolling on January 31, 2006, when he stopped a car for speeding. Tonya Dawson was the driver. Mr. Marmolejo was a passenger in the car, and he was arrested on an outstanding warrant. While appellant was being booked at the police station, the police found two bags containing

a total of 8.6 grams of methamphetamine in one of his socks. Mr. Marmolejo also possessed \$1376 in cash.

Over appellant's objection, the State was permitted to elicit testimony about subsequent methamphetamine transactions that occurred after appellant was released on bail. Officer Justin Ingram testified that he used a confidential informant who bought 0.86 grams of methamphetamine from Mr. Marmolejo for \$80 on April 14, 2006. On April 27, 2006, Officer Ingram used another informant who purchased 0.7 grams from Mr. Marmolejo for \$100. Officer Andy Lee testified that he was involved in substantial drug buy on February 16, 2006, when he was working undercover and negotiated a deal with appellant and a man named Cody Poole. According to Officer Lee, the appellant controlled the drug deal and sold him 58 grams of methamphetamine in exchange for \$2300.

Tonya Dawson also testified for the State. She stated that she is currently in prison, and that in January 2006 she was working as a drug dealer. She stated that she "sold lots of drugs" for appellant and also bought drugs from him daily. According to Ms. Dawson, both she and Mr. Marmolejo were heavy drug users at that time.

Mr. Marmolejo testified on his own behalf, and he admitted to possession of the methamphetamine that the police found on his person on January 31, 2006. However, he stated that he was addicted to methamphetamine and was a heavy user, and that the drugs were only intended for personal use. Mr. Marmolejo denied any intention to sell the drugs.

On appeal, Mr. Marmolejo argues that the trial court abused its discretion in allowing testimony about his three subsequent methamphetamine deliveries. Arkansas Rule of Evidence 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 that he acted 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.

Mr. Marmolejo argues that evidence of the other drug sales was inadmissible under Rule 404(b) because the evidence impermissibly established nothing more than the fact that he was a criminal.

Mr. Marmolejo further relies on *Price v. State*, 268 Ark. 535, 597 S.W.2d 598 (1980), where the supreme court held that once the independent relevancy of other-crimes evidence is established under Rule 404(b), it logically follows that the evidence should be scrutinized under Rule 403, which provides:

Although 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Mr. Marmolejo contends that whatever probative value the evidence of the other deliveries might have had, the prejudice was substantially greater. He posits that no jury could reasonably be expected to fairly evaluate the evidence in a possession with intent to deliver case after it was told that the defendant had been arrested for involvement in three subsequent drug deliveries - all within three months of his arrest for the current charge. Mr.

Marmolejo notes that while the jury found him not guilty of possession with intent to deliver, it did convict him of possession of methamphetamine and sentenced him to the maximum ten-year sentence for that offense. He asserts that this result was premised on conduct that was not proven nor directly related to the case at issue, and requests that we reverse and remand for a new trial.

Generally, evidence of other crimes, wrongs, or acts is not admissible merely to prove the bad character of the defendant and to show that his actions conformed to that character. *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1996). However, if the evidence is relevant to the main issue of the case, in the sense of tending to prove some material point rather than to prove the defendant is a criminal, the evidence may be admissible with a proper cautionary instruction by the trial court. *Lindsey v. State*, 319 Ark. 132, 890 S.W.2d 584 (1994).

In several supreme court cases, the supreme court has recognized that when a defendant is legitimately charged with possession with intent to deliver, evidence of prior drug sales, if not too remote in time, is admissible to show intent. *See Owens, supra*; *Scroggins v. State*, 312 Ark. 107, 848 S.W.2d 400 (1993); *Holloway v. State*, 293 Ark. 438, 738 S.W.2d 796 (1987); *Lincoln v. State*, 285 Ark. 107, 685 S.W.2d 166 (1985). The same is true where the evidence pertains to drug sales that occurred subsequent to, rather than prior to, the charged incident. *See Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997). Pursuant to the rationale articulated in the above line of cases, the subsequent methamphetamine deliveries in the present case, all of which occurred within three months of the charged offense, were relevant to show Mr. Marmolejo's intent regarding his

possession of the 8.6 grams of methamphetamine. Moreover, the trial court properly gave the following cautionary instruction to the jury:

Evidence of other alleged crimes, wrongs or acts of Ruben Marmolejo may not be considered by you to prove the character of Ruben Marmolejo in order to show that he acted in conformity therewith. This evidence is not to be considered to establish a particular trait of character that he may have nor is it to be considered to show that he acted similarly or accordingly on the day of the incident in question. This evidence is merely offered as evidence of motive, opportunity, intent, preparation, plan knowledge, identity or absence of mistake or accident. Whether any other crime or alleged wrong may have been committed is for you to determine.

A trial court is accorded broad discretion in ruling on Rule 404(b) questions. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994). In light of the foregoing, we find no abuse of discretion in admitting testimony regarding the subsequent methamphetamine sales. A trial court is likewise entitled to great discretion in ruling on issues arising under Ark. R. Evid. 403. *Owens, supra*. We are convinced that, although the objectionable testimony was detrimental to Mr. Marmolejo, its probative value was not outweighed by the danger of unfair prejudice. *See id.*

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.