FILED: February 15, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

CHRISTOPHER RAY DIMMICK,
Defendant-Appellant.

Wasco County Circuit Court
0800248CR, 0900084CR

A143190 (Control)
A143666

John V. Kelly, Judge.

Argued and submitted on September 30, 2011.

Neil F. Byl, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Matthew J. Lysne, Assistant Attorney-in-Charge, Criminal Appeals, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solcitor General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

SCHUMAN, P. J.

Conviction on Count I in Case No. 0900084CR reversed and remanded; otherwise affirmed.

1 SCHUMAN, P. J.

2 Defendant appeals convictions of four counts of unlawful delivery of
3 methamphetamine, ORS 475.890, and three counts of unlawful possession of
4 methamphetamine, ORS 475.894. He argues that the trial court erred in failing to
5 suppress a backpack and its contents, which he alleges were unlawfully seized during a
6 traffic stop. According to defendant, although police had authority to tow his car after
7 discovering he had an expired insurance card, and therefore also had authority to conduct
8 an inventory, the inventory did not permit them to prevent him from taking the backpack
9 out of the car and carrying it away. He also argues that the trial court erred in denying his
10 motion to sever charges arising from stops that occurred in October and November 2008
11 and in granting the state's motion to consolidate the 2008 charges with other charges
12 arising from incidents in February and March 2009. We agree with defendant that the
13 backpack and the evidence found therein should have been suppressed and that one of the
14 convictions for delivery of methamphetamine--the only conviction to which the backpack
15 relates--must be reversed and remanded. Otherwise, we affirm.

16 We state the facts consistently with the trial court's findings, which are
17 supported by evidence in the record. *State v. Hall*, 339 Or 7, 10, 115 P3d 908 (2005).
18 On October 29, 2008, Officer Lundry lawfully stopped the car defendant was driving in
19 The Dalles. When asked to show proof of insurance, defendant produced an expired
20 insurance card and told Lundry that he had borrowed the vehicle from a friend. Lundry
21 confirmed that the insurance had expired and called dispatch to send a tow truck to

impound the vehicle pursuant to the city impound ordinance. Lundry then asked defendant if there were any drugs, weapons, or illegal contraband in the vehicle and, when defendant said that there were not, asked if he could search it. Defendant said that he could not. Lundry then advised defendant that he was impounding the vehicle and that he would be performing an inventory search of its contents; he asked defendant if there were any valuables in the car. Defendant responded that he "didn't really know what was in the car," and refused to answer any more questions. Lundry gave defendant a written citation and told him he was free to leave.

As he was getting out of the vehicle, defendant picked up a backpack from the backseat. Lundry asked him who the backpack belonged to. Defendant said, "It's my friend's." Lundry told defendant, "You're going to have to leave it then," because the vehicle would be inventoried pursuant to the impoundment. Defendant then said that the backpack was his. Lundry asked if he could open the backpack and look for identification to make sure that it belonged to defendant. Defendant sighed, dropped the backpack, and walked away. Lundry picked up the backpack, put it in his patrol car, and performed an inventory search of the vehicle. He found a digital scale and six small plastic baggies in the center console. The scale tested positive for cocaine residue, and the police forensic laboratory also identified traces of methamphetamine, but not a reportable amount.

Lundry subsequently obtained a search warrant for the backpack and searched it a few days later. Inside, he found seven glass methamphetamine pipes and a

small plastic baggie containing white residue. Although the baggie field-tested positive for amphetamines, no controlled substances were found on it. Defendant was subsequently charged in Wasco County with unlawful possession of methamphetamine.

Defendant moved to suppress the backpack and its contents. In opposition to the motion, the state argued that the seizure of the backpack was lawful because anything in a car that is being impounded is subject to seizure under the city's inventory policy. The trial court denied defendant's motion.

In the meantime, on November 18, 2008, defendant was stopped again while driving the same vehicle when police arrested defendant's passenger on a warrant. A search of the vehicle revealed a digital scale in the backseat, a methamphetamine pipe in the gear shift cover, and eleven baggies of methamphetamine in a locked magnetized box secured underneath the car. As a result, defendant was charged with unlawful delivery of methamphetamine and unlawful possession of methamphetamine.[1] These charges were set to be tried together with the case arising from the stop on October 29, 2008, described above.

Defendant moved to sever the cases, arguing that evidence in one case would serve as impermissible character evidence in the other, and that he therefore would be prejudiced if the cases were tried together. The trial court denied defendant's motion, stating, "I think that based on what's been represented to me to be the evidence during

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[1] Defendant also moved to suppress evidence found during the November 18, 2008, stop, which the trial court denied. Defendant does not assign error to that ruling.

1 this hearing, and also by reference to the motion to suppress, that the evidence is
2 sufficiently simple and distinct to mitigate the dangers created by joinder. So the motion
3 to sever is denied."

4 Before defendant was tried on any of those charges, he was arrested again
5 when he allegedly sold methamphetamine to an informant on February 15, 2009, and on
6 March 15, 2009. He was charged with three counts each of unlawful delivery of
7 methamphetamine and unlawful possession of methamphetamine, including a set of
8 charges arising from the October 29, 2008, incident that were re-indicted.[2] The state then
9 moved to consolidate the newly indicted case (based on the October 2008, February
10 2009, and March 2009 incidents) with the case involving the November 18, 2008, stop.
11 Defendant opposed the motion to consolidate, renewing his prior argument that trying the
12 cases together would be prejudicial because evidence of the controlled buys cases would
13 be used by the prosecution to create impermissible character-based inferences about
14 defendant's intent regarding the other charges. The court ruled in favor of the state.
15 Defendant was tried before a jury and convicted of four counts of unlawful delivery and
16 three counts of unlawful possession. Defendant now appeals.

17 Our review of the trial court's denial of defendant's pretrial suppression
18 motion is limited to issues of law. *Hall*, 339 Or at 10. On appeal, defendant argues that

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[2] Defendant was re-indicted with charges for unlawful delivery and possession of methamphetamine arising from the October 29, 2008, stop, and the original indictment (charge for possession only) was subsequently dismissed. The state apparently later dismissed the re-indicted possession charge (Count II) before trial.

1 the backpack was unlawfully seized because this court held in *State v. Sparks*, 228 Or
2 App 163, 167, 206 P3d 1197 (2009), that the inventory exception to the warrant
3 requirement alone cannot justify the seizure and search of portable closed containers that
4 an occupant carries out of a vehicle on his own person.

5 In response, the state first argues that the officer could seize the backpack
6 despite defendant's desire to take it out of the vehicle because, once Lundry had given
7 defendant notice that the vehicle was going to be impounded, the impounding authorities
8 had the exclusive right to possess the vehicle, and that right encompassed the right to
9 possess the vehicle's contents. In support of that argument, the state relies on ORS
10 809.720(1), which provides:

11 "A police officer who has probable cause to believe that a person, at
12 or just prior to the time the police officer stops the person, has committed
13 an offense described in this subsection may, without prior notice, order the
14 vehicle impounded until *a person with right to possession of the vehicle*
15 complies with the conditions for release or the vehicle is ordered released
16 by a hearings officer. This subsection applies to the following offenses:

17 "* * * * *

18 "(d) Driving uninsured in violation of ORS 806.010."

19 (Emphasis added). Suffice it to say that we see nothing in this statute that confers
20 exclusive possession of the vehicle on the impounding authority. Indeed, the italicized
21 language establishes the contrary proposition. And even if notice of impoundment
22 conferred all possessory interests in the vehicle on the impounders, the state's argument
23 that, as a necessary corollary, the impounders also have a possessory interest in the
24 contents of the vehicle superior to the vehicle's driver or owner cannot be sustained. That

argument relies on ORS 809.720(6), dealing with a towing company's right to foreclose a lien, and ORS 809.720(2), which deals with how police must provide notice of impoundment. Neither statute is relevant to the question of possessory interests in the contents of an impounded vehicle, not to mention a vehicle that has not yet been impounded but is about to be.

The state also argues that *Sparks* does not apply to this case because the officer did not search the backpack pursuant to an inventory policy; rather, he searched the backpack pursuant to a search warrant. We reject that argument. The first step in that rejection is our conclusion that the backpack was never lawfully seized pursuant to an inventory policy. In *Sparks*, we held that an officer's inventory search of the defendant's purse when it was outside the vehicle, on the defendant's person, was beyond the authority established by the city's impound and inventory policy and was therefore invalid. 228 Or App at 167. The defendant was a passenger in a vehicle that was stopped; the officer decided to impound the vehicle when he discovered that the driver had a suspended license. *Id.* at 165. The officer asked the defendant to step out of the vehicle, and she did so, taking her purse with her. *Id.* The officer asked for permission to search her purse, which she declined, and he then told her that he had to search it as part of the inventory of the automobile. *Id.* She still refused, and he took the purse and searched it anyway, on the ground that the inventory policy required him to search everything that was in the vehicle at the time that it was stopped. *Id.* We held that the search was unlawful because the inventory policy required that "[a]n inventory * * * be

made of the interior of the [impounded] vehicle," and the officer searched the defendant's purse when it was not in the "interior of the vehicle." *Id*. at 167. Further, we stated:

> "[E]ven if the policy could been construed to encompass a search of all containers that were in the interior of the vehicle when it was stopped, including portable closed containers that an occupant carries out of the vehicle on his or her person, the policy itself would violate Article I, section 9, of the Oregon Constitution. The vehicle inventory exception to the warrant requirement serves three purposes: to protect the vehicle owner's property while the vehicle is in police custody; to reduce the likelihood of false theft claims against the police; and, 'in the occasional case,' to protect police and others from danger, if there is a 'concrete basis in specific circumstances' to believe that danger exists, such as, for example, an explosive in the car. [*State v.*] *Atkinson*, 298 Or [1, 7-8, 688 P2d 832 (1984).] 'The scope of the inventory must be limited to that--an inventory.' *Id.* at 10. 'Inventorying' the contents of a purse that a vehicle's occupant removes from the vehicle serves none of the purposes justifying the exception to the warrant requirement--indeed, the purposes would be served by *encouraging* occupants to remove small containers--and no policy purporting to authorize such action is valid."

Sparks, 228 Or App at 167 (emphasis in original; footnote omitted).

In this case, The Dalles General Ordinance No. 03-1247, Section 1, authorizes police to order a vehicle towed and impounded whenever a traffic citation is issued and a driver is cited for driving while uninsured in violation of ORS 806.010.[3] General Ordinance No. 06-1271, in turn, authorizes officers to conduct inventories of the contents of impounded vehicles under the guidelines set forth in the The Dalles Police Procedure Manual, which provide, in part:

> "Every vehicle towed shall be inventoried. * * * All valuables in the vehicle shall be completely inventoried with a description of the valuables and an indication of the quantity of the valuables. * * * The inventory shall

[3] In addition, ORS 809.720(1)(d) authorizes police to impound a vehicle for the violation of driving uninsured.

1 be conducted as soon as practical and shall include the entire passenger
2 compartment, uncovered hatchback, unlocked glove boxes, and unlocked
3 trunk. The inventories of locked glove boxes and covered/locked
4 hatchbacks shall be conducted if keys are available or no unlocking
5 mechanisms are provided within the vehicle. The inventory is not a search
6 for evidence. Items should be scrutinized to the extent necessary to
7 complete the inventory. If, during the inventory, an officer locates a closed
8 and locked container which the officer has probable cause to believe
9 contains evidence or contraband, the officer shall seize the container, but
10 should not open or search the closed and locked container for evidence
11 without first obtaining a search warrant, or the owner's consent. Closed
12 containers that are likely to contain valuables should be opened and their
13 contents inventoried. Examples of types of containers that are likely to
14 contain valuables are: strong boxes, wallets, purses, credit card holders,
15 checkbooks, and briefcases. A property receipt for all items seized must be
16 completed. Contraband located during the inventory is retained as evidence
17 and forwarded to the property control officer."

18 Here, the city's impoundment ordinance authorized Lundry to seize the
19 vehicle defendant was driving. However, the impoundment policy does not address
20 Lundry's authority to seize portable closed containers located within the vehicle at the
21 time it was stopped. Nor does the policy specify that items present in the vehicle at the
22 time it was stopped must be inventoried. Rather, Lundry was left to exercise his
23 discretion to determine whether the backpack should have been seized as part of the
24 impoundment of the vehicle. Yet, an essential purpose of the limitation on police
25 inventories is to require the police to conduct the inventory "pursuant to a properly
26 authorized administrative program, designed and systematically administered so that the
27 inventory involves no exercise of discretion by the law enforcement person directing or
28 taking the inventory." *Atkinson*, 298 Or at 10. Because Lundry's seizure of the backpack
29 was an exercise of discretion to deviate from the express authority granted by the city's

1 impound and inventory ordinances, the seizure of the backpack was invalid.

2 Further, as we stated in *Sparks*, "inventorying" the contents of a closed
3 container that a vehicle's occupant removes from a vehicle serves none of the purposes
4 justifying the inventory exception to the warrant requirement. Rather, the purposes put
5 forward to justify that policy--protecting the vehicle owner's property while the vehicle is
6 in police custody, reducing the likelihood of false theft claims against the police, and "in
7 the occasional case," protecting the police and others from danger if there is a "concrete
8 basis in specific circumstances" to believe that danger exists--would be served by
9 *encouraging* occupants to remove small containers. *Sparks*, 228 Or App at 167 (quoting
10 *Atkinson*, 298 Or at 7-8) (emphasis in original).

11 For those reasons, the seizure of the backpack was not justified by the
12 impoundment of defendant's vehicle. Nor did the state provide any other lawful basis for
13 the seizure and consequent search.

14 The state, as noted above, contends that the backpack was not searched
15 pursuant to an inventory policy, but pursuant to warrant--that is, that the search warrant
16 rendered the prior illegal seizure so attenuated from the discovery of evidence that no
17 suppression was necessary. *Hall*, 339 Or at 25. We disagree. If a defendant meets the
18 burden of establishing a "factual nexus" between the unlawful police conduct and the
19 challenged evidence, then the burden of persuasion shifts to the state to prove that the
20 evidence was not tainted by the unlawful conduct. *Id.*; *accord* State v. Johnson, 335 Or
21 511, 520-21, 73 P3d 282 (2003).

1 Here, there is a factual nexus between the unlawful seizure and the
2 subsequent search warrant. The backpack would not have been in the police's possession
3 but for the unlawful seizure. Further, Lundry's statement that he patted down the exterior
4 of the backpack and felt objects that he believed to be glass methamphetamine pipes
5 would not have supported the affidavit for the warrant but for the unlawful seizure.
6 Therefore, the burden shifted to the state to show that the evidence was not tainted, and
7 the state failed to meet its burden because it did not argue that it would have been able to
8 obtain a warrant or search the backpack had it not already been in the state's possession.
9 Thus, the trial court erred in admitting evidence of the backpack at trial.
10 Evidentiary error does not require reversal unless it is prejudicial. OEC
11 103(1). We will therefore affirm a conviction despite evidentiary error if there is "little
12 likelihood that the particular error affected the verdict[.]" *State v. Davis*, 336 Or 19, 32,
13 77 P3d 1111 (2003). In making that determination, we consider the possible influence of
14 the error on the verdict that the jury rendered. *Id.* Defendant argues that the admission of
15 the backpack likely affected the verdict on his conviction for delivery of
16 methamphetamine, Count I, arising from the October 2008 stop; he does not argue that
17 the erroneous admission of the backpack and its contents prejudiced him with respect to
18 any of his other convictions. According to defendant, the other evidence of the presence
19 of methamphetamine discovered in the car that defendant was driving at the time of the
20 October 2008 stop was weak; the backpack and its contents were therefore a critical piece
21 of the state's case as to the delivery charge. Apart from the evidence of the backpack and

1 its contents, the evidence admitted at trial relevant to defendant's charge for unlawful
2 delivery of methamphetamine arising from the October 2008 stop consisted of six
3 baggies and a digital scale found in the center console of the car defendant was driving.
4 Although the scale tested positive for cocaine, no reportable amount of methamphetamine
5 was found. We therefore agree with defendant that the backpack and its contents
6 provided necessary corroborative evidence of defendant's intent to deliver
7 methamphetamine (as opposed to cocaine), and that the evidence found in the backpack
8 likely affected the verdict. We must therefore reverse and remand defendant's conviction
9 on Count I, unlawful delivery of methamphetamine.
10 We turn next to defendant's second and third combined assignments of
11 error, which concern defendant's remaining convictions. Defendant argues that the trial
12 court erred in denying his motion to sever the cases arising from the October and
13 November 2008 incidents, and it also erred in consolidating the November 2008 case
14 with the case involving the October 2008 and February and March 2009 incidents.
15 According to defendant, he was substantially prejudiced by those rulings in that he was
16 deprived of the protections of OEC 404(3), which prohibits the use of evidence of other
17 crimes, wrongs, or acts to show that a person acted in conformity therewith.
18 In response, the state argues that defendant failed to demonstrate that
19 joinder of the charges substantially prejudiced him. Defendant, the state contends, was
20 not prejudiced because evidence of the four incidents was cross-admissible in each case
21 under OEC 404(3) for purposes other than to show conformity with past acts--for

1 example, to prove defendant's knowledge or intent to possess or deliver

2 methamphetamine. Lastly, the state submits, the charges against defendant were

3 sufficiently simple and distinct because the counts arose from four discrete incidents that

4 occurred on four different days.

5 ORS 132.560(1)(b) allows the trial court to consolidate charging

6 instruments when the offenses are alleged to have been committed by the same person

7 and are either (1) "[o]f the same or similar character"; (2) "[b]ased on the same act or

8 transaction"; or (3) "[b]ased on two or more transactions connected together or

9 constituting parts of a common scheme or plan." *See* ORS 132.560(2) (allowing charging

10 instruments to be consolidated when the criteria provided in ORS 132.560(1)(b) are met).

11 However, if it appears "that the state or defendant is substantially prejudiced by a joinder

12 of offenses * * * the court may order an election or separate trials of counts or provide

13 whatever other relief justice requires." ORS 132.560(3).

14 We review for errors of law the trial court's determination that defendant

15 failed to demonstrate the existence of substantial prejudice under ORS 132.560(3). *State*

16 *v. Luers*, 211 Or App 34, 43, 153 P3d 688, *adh'd to as modified on recons*, 213 Or App

17 389, 160 P3d 1013 (2007). Whether the joinder of charges substantially prejudiced a

18 particular defendant involves a case-specific assessment of the charges and the facts

19 alleged to support them. *Id.* The mere assertion that evidence relating to some charges

20 will influence the jury's consideration of other charges is insufficient. *Id.* "Rather, the

21 court's analysis properly must focus on '*any* circumstance' that impairs the defendant's

1 right to a fair trial, such as, for example, a defendant's 'claim that joinder would deprive
2 him of protections in the Oregon Evidence Code against the admission of evidence.'" *Id.*
3 (quoting *State v. Miller*, 327 Or 622, 633, 969 P2d 1006 (1998) (emphasis in original)).
4 When evidence pertaining to the various charges would be mutually admissible in
5 separate trials or is sufficiently simple and distinct to mitigate the dangers created by
6 joinder, substantial prejudice has not been established. *Luers*, 211 Or App at 43-44.
7 Also relevant is the probable effectiveness of limiting instructions given to the jury by the
8 court. *Id.* at 44. The reviewing court must be able to determine from the record that the
9 trial court engaged in the required prejudice analysis. *Id.*
10 Here, the trial court consolidated the 2008 and 2009 charges under ORS
11 132.560(1)(b)(A) because they were "of a substantially similar character." Further, the
12 trial court concluded as to the 2008 charges that "the evidence is sufficiently simple and
13 distinct to mitigate the dangers created by joinder"; the court explained, "I don't think the
14 defendant is substantially prejudiced by their joinder and certainly not in a way that
15 cannot be cured by a jury instruction telling the jury to consider the evidence of each
16 incident separately."
17 We agree with the trial court that substantial prejudice to defendant was not
18 established. Even assuming that the evidence pertaining to the various charges would not
19 be mutually admissible in separate trials, the evidence was nonetheless sufficiently
20 simple and distinct to mitigate the dangers created by joinder. The charges against
21 defendant arose from four discrete incidents that occurred on four different days, and as

1 the trial court concluded, a jury instruction could cure any prejudice from admitting

2 evidence about the four incidents in one trial. Therefore, the trial court did not err in

3 denying defendant's motion to sever the 2008 cases and granting the state's motion to

4 consolidate the 2008 and 2009 cases.

5 Conviction on Count I in Case No. 0900084CR reversed and remanded;

6 otherwise affirmed.