

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellee,)		
)	Case No. 20071022-CA	
v.)		
)	F I L E D	
Rodney Jay Evans,)	(November 28, 2008)	
)		
Defendant and Appellant.)	<table border="1"><tr><td>2008 UT App 434</td></tr></table>	2008 UT App 434
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Fifth District, Cedar City Department, 061500578
The Honorable G. Michael Westfall

Attorneys: J. Bryan Jackson, Cedar City, for Appellant
Mark L. Shurtleff and Joanne C. Slotnik, Salt Lake
City, for Appellee

Before Judges Greenwood, Billings, and Davis.

DAVIS, Judge:

Defendant Rodney Jay Evans appeals his conviction on one count of retail theft. Evans first argues that the trial court erroneously allowed the admission of his prior felony conviction for drug possession. "Whether evidence is admissible is a question of law, which we review for correctness, incorporating a 'clearly erroneous' standard of review for subsidiary factual determinations." State v. Diaz, 859 P.2d 19, 23 (Utah Ct. App. 1993). Evans's argument relies on rule 404(b) of the Utah Rules of Evidence, which provides that evidence of other crimes "is not admissible to prove the character of a person in order to show action in conformity therewith." Utah R. Evid. 404(b). But the evidence of Evans's prior drug possession conviction was not admitted for the purpose of showing his character as a drug user or action in conformity with that of a drug user. Instead, the trial court allowed the evidence only to show Evans's motive to misrepresent, which is specifically allowed by rule 608, see id. R. 608(c) ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."). See generally State v. Allen, 2005 UT 11, ¶ 17, 108 P.3d 730 (stating that the list of

noncharacter purposes in rule 404(b) "is not exhaustive"). Further, evidence that Evans had been convicted of felony drug possession was allowable under rule 609 for impeachment purposes. See Utah R. Evid. 609(a)(1).¹ See generally State v. Tucker, 800 P.2d 819, 822 (Utah Ct. App. 1990) (holding that to ensure that the evidence of a past crime is used only for impeachment purposes, "generally, a Rule 609(a) inquiry should be limited to the nature of the crime, the date of the conviction and the punishment").² Thus, the trial court did not err in allowing the presentation of this evidence.

Evans makes a related argument that this evidentiary ruling forced his counsel to render ineffective assistance. This argument is misplaced. A claim of ineffective assistance of counsel requires a defendant to show "that counsel's performance was deficient," that is, "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984); accord Lafferty v. State, 2007 UT 73, ¶ 11, 175 P.3d 530. But Evans specifies no error on the part of his

¹Rule 609 specifically states that admission of prior crimes evidence against an accused will be permitted only "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Utah R. Evid. 609(a)(1). Although it is unclear from Evans's brief whether he is dissatisfied with the trial court's weighing of probative value and prejudicial effect, we choose to briefly touch on the issue. The evidence of Evans's prior conviction is relevant and probative to some degree in his capacity as a witness. And although the evidence is clearly prejudicial in some sense, its probative value outweighs the prejudicial effect as the term is used here. See generally State v. Slowe, 728 P.2d 110, 112-13 (Utah 1985) ("We are aware that what is probative is likely to be prejudicial if it has any evidentiary cutting edge at all. In view of that, the term 'prejudicial' should be construed to mean inflammatory in the sense that the jury may use the conviction against the defendant for purposes other than determining the defendant's credibility, and therefore would tend to induce the jury to render a verdict outside the relevant substantive evidence bearing on the material elements of the crime."). Therefore, the requirements of rule 609 were met.

²Of course, the noncharacter purposes of impeachment and showing motive to misrepresent in rules 608 and 609 are applicable only to witnesses and would not be reasons to allow admission if a defendant chose not to testify.

counsel, let alone the serious error that would be required for his claim. Rather, Evans simply laments that his counsel had "no choice" but "to mitigate damage by having [Evans] acknowledge his prior criminal history to explain it rather than allow the State the opportunity to . . . bring[] it out upon cross examination." Yet Evans effectively admits that under the circumstances, this was the best course of action. Thus, he does not point to any action by his counsel that "fell below an objective standard of reasonableness," Strickland, 466 U.S. at 688. Instead, Evans's true complaint is just a variant of his first argument--that the trial court should not have allowed admission of evidence of his prior conviction. It may be appropriate to argue that the effects of the trial court's evidentiary decision on counsel's trial strategy support a conclusion that the trial court's error, had there been one, was prejudicial; but the fact that Evans and his counsel were placed in a more difficult position through an evidentiary ruling does not mean that counsel's optimal performance under those resulting circumstances was constitutionally deficient performance.

Evans further argues that there was insufficient evidence to establish criminal responsibility under the accomplice liability statute, see Utah Code Ann. § 76-2-202 (2003), and that the trial court therefore should have granted his motion for a directed verdict. "We will uphold the trial court's decision if, upon reviewing the evidence and all inferences that can be reasonably drawn from it, we conclude that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." State v. Dibello, 780 P.2d 1221, 1225 (Utah 1989). Evans argues that he was merely present at the time of the theft and that the facts only support the inferences that he was either unaware of the plan to steal merchandise or that he abandoned the enterprise. We disagree. The facts that Evans helped to choose and load some expensive merchandise that he and his fiancée admittedly could not afford and then left to wait in the car could also support the reasonable inference that Evans was aware of and participating in the plan to steal the merchandise and simply left to wait in the car in order to facilitate a quick departure. Thus, there was evidence that could, depending on whom the jury chose to believe, support a jury determination that the accomplice liability requirements were met beyond a reasonable doubt. See generally Utah Code Ann. § 76-2-202 (providing that a person will be held criminally responsible for an offense if he, among other things,

"commands, encourages, or intentionally aids another person" in committing the offense).

Affirmed.

James Z. Davis, Judge

WE CONCUR:

Pamela T. Greenwood,
Presiding Judge

Judith M. Billings, Judge