IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Richard Galbreath, Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060900-CA F I L E D (January 4, 2008) 2008 UT App 2

Eighth District, Duchesne Department, 051800180
The Honorable John R. Anderson

Attorneys: Julie George, Salt Lake City, for Appellant
Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City, for Appellee

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Before Judges Greenwood, McHugh, and Orme.

GREENWOOD, Presiding Judge:

Defendant Richard Galbreath appeals two convictions for distribution of a controlled substance, see Utah Code Ann. § 58-37-8(1)(a)(ii) (2002). We affirm.

Defendant was convicted by two separate juries of distributing methamphetamine and marijuana on two occasions to an undercover informant. Defendant claims that in both trials the trial court violated rule 404(b) of the Utah Rules of Evidence by allowing evidence that Defendant had sold drugs on prior occasions.

Rule 404(b) of the Utah Rules of Evidence states:

> 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 . . . .

Utah R. Evid. 404(b). "Utah courts have recognized that Rule 404(b) is an inclusionary rule. That is, Rule 404(b) . . . allows admission of relevant evidence other than to show merely

the general disposition of the defendant." State v. Ramirez, 924 P.2d 366, 369 (Utah Ct. App. 1996) (citations and internal quotation marks omitted).

We agree with the State that in Defendant's first trial he used his past drug history as the crux of his defense. His trial counsel stated at closing argument: "We testified that [Defendant] has worked very hard for his sobriety and to overcome the problems that put him in drug court, and that he knew . . . that dealing drugs would put that all at jeopardy." Because Defendant's embrace of his drug history was "a consciously chosen trial strategy," State v. Morgan, 813 P.2d 1207, 1211 (Utah Ct. App. 1991), the trial court did not err in admitting evidence about that drug history.[1]

In Defendant's second trial, in which he did not take the stand, we also believe the trial court did not violate rule 404(b) of the Utah Rules of Evidence. Evidence regarding Defendant's past involvement with drugs was admissible under the exception to rule 404(b) allowing prior bad acts evidence to establish Defendant's intent in meeting with the informant. See Utah R. Evid. 404(b). The bad acts evidence rebutted Defendant's claim that the informant fabricated his story. Defendant claimed that he did not provide the informant with drugs and that he was likely set up by the informant. This argument puts at issue the intent of Defendant in meeting with the informant and the credibility of both Defendant and the informant. See State v. Bradley, 2002 UT App 348, ¶ 24, 57 P.3d 1139 (allowing evidence introduced of a prior similar act to show a pattern of similar behavior).[2]

Defendant next contends that in both trials there was insufficient evidence to convict him because there were no recordings, reliable eye witness verifications, or other corroborative evidence, other than the testimony of the informant and the police officers. "We reverse a jury verdict only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable such that reasonable minds must have

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1. For the same reason, we deny Defendant's claim that his defense counsel was ineffective. Given the strength of the evidence against Defendant, defense counsel's argument that Defendant was a changed man with too much to lose to sell drugs did not "f[a]ll below an objective standard of reasonable professional judgment." See State v. Bullock, 791 P.2d 155, 159 (Utah 1989).

2. To the extent, if any, that Defendant argues lack of relevancy under rule 402 or unfair prejudice under rule 403, he has not adequately briefed those issues and we therefore decline to address them. See Utah R. App. P. 24(a)(9).

entertained a reasonable doubt that the defendant committed the crime . . . ." State v. Dunn, 850 P.2d 1201, 1212 (Utah 1993). Here, the informant and three police officers testified that the informant arrived at a meeting with Defendant carrying money but no drugs, and he left the meeting with drugs but no money. In light of the consistency of the testimony to this effect, the jury must not "have entertained a reasonable doubt that the defendant committed the crime." Id. Therefore we believe there was sufficient evidence to convict Defendant.

Defendant's next argument on appeal is that in his second trial, the trial court abused its discretion by denying his request that his girlfriend be allowed to testify as a rebuttal witness regarding ownership of the car driven by the person who met with the informant. We "will overturn a trial court ruling excluding a proffered witness if the appellant demonstrates that the trial court has overreached the broad discretion granted it and thereby affected the appellant's substantial rights." Gerbich v. Numed Inc., 1999 UT 37, ¶ 16, 977 P.2d 1205.

The trial court did not allow Defendant's girlfriend to testify, in part, because she was present in the courtroom throughout the trial. However, the trial court stated that Defendant could call a representative from the Department of Motor Vehicles to testify regarding the car registration. Defendant declined to do so. Therefore, Defendant waived the right to claim on appeal that he should have been allowed to present testimony regarding ownership of the car. Further, any error regarding the decision to exclude the girlfriend's testimony was harmless because Defendant was identified primarily by the testimony of the informant and the police officers who searched the informant both before and after he met with Defendant. The ownership of the car was not a significant identifying factor leading to Defendant's conviction.

Affirmed.

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Pamela T. Greenwood,
Presiding Judge

WE CONCUR:

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Carolyn B. McHugh, Judge

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Gregory K. Orme, Judge