

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 27859-0-III

Respondent,

)

)

) **Division Three**

v.

)

)

JESSE GEORGE FISCHER,

) **UNPUBLISHED OPINION**

)

Appellant.

)

)

Kulik, C.J. — A jury found Jesse Fischer guilty of two counts of delivery of a controlled substance, methamphetamine. The counts corresponded to two controlled drug buys in which Jessica Steele, working as a confidential informant, bought methamphetamine from Mr. Fischer. At trial, Ms. Steele stated that she knew Mr. Fischer because she had previously bought drugs from him. Mr. Fischer immediately moved for a mistrial, which the trial court denied. Mr. Fischer appeals, contending the evidence of prior bad acts was irrelevant and highly prejudicial and, therefore, the trial court erred by denying a mistrial.

We conclude that the trial court erred by admitting the evidence of prior bad acts

but that the admission did not so prejudice Mr. Fischer that a new trial was required. Therefore, we affirm the trial court's denial of a new trial and the convictions.

FACTS

During the State's prosecution and conviction of Jessica Steele for theft, she agreed to work with the police as a confidential informant. Spokane County Detective Russell Dowdy agreed to pay Ms. Steele approximately \$75 per controlled drug buy.

Ms. Steele suggested Jesse Fischer to Detective Dowdy as a person from whom she could make a controlled drug buy. Ms. Steele showed Detective Dowdy the location of Mr. Fischer's house on Bridgeport Avenue.

In March 2007, Ms. Steele stayed in Mr. Fischer's garage for a few nights at a time. She also kept some of her possessions in his garage.

When Ms. Steele made a controlled buy, the police strip searched her before and after the buy, and gave her money to make the buy. Detective Dowdy drove Ms. Steele to and from the controlled buy location in an unmarked police car.

On March 22, Ms. Steele made a controlled buy from Mr. Fischer at the Bridgeport residence. She went into the garage, bought methamphetamine, and then returned to Detective Dowdy's vehicle where she gave him the drugs and \$10 in change from the buy money.

On March 27, Detective Dowdy set up another controlled buy, following the same procedure described above. For this buy, Detective Dowdy obtained a wire authorization, and Ms. Steele wore a recording device. Ms. Steele again obtained methamphetamine. She gave the methamphetamine and the remaining \$70 from the buy money to Detective Dowdy.

Mr. Fischer was charged with two counts of delivery of a controlled substance. At trial, Detective Dowdy testified that during both controlled drug buys, he kept the Bridgeport house under surveillance. During the March 27 controlled buy, Detective Dowdy testified that he saw Mr. Fischer walk out of the house and get into a car, where he appeared to dig through the jockey box and then return to the house.

Ms. Steele identified Mr. Fischer at trial. The prosecutor then asked how Ms. Steele knew Mr. Fischer. Ms. Steele stated, "From my husband. We used to do drugs and we bought some from Jesse." Report of Proceedings (RP) at 84. Defense counsel immediately moved for a mistrial, asserting that Ms. Steele's statement was highly prejudicial to Mr. Fischer and, if the defense had realized Ms. Steele was going to make that statement, defense counsel would have made an ER 404(b) motion in limine. The prosecutor asserted that Ms. Steele's statement supported why she named Mr. Fischer as a potential target for a controlled buy. The court noted that admission of evidence under

ER 404(b) requires a balancing test and found that the probative value of the evidence outweighed its potential prejudicial effect. The trial court denied the defense's motion for a mistrial.

Later, Ms. Steele again stated that she had previously been in Mr. Fischer's garage to buy drugs. In closing arguments, the prosecutor reminded the jury, "She told you that she and her fiancé/husband, Ryan Steele, had done drugs and bought drugs from the defendant. It is not conceivable to think that of all the people she could have picked on she somehow is going to show up on somebody's doorstep she doesn't know. . . . And when she decides that she is going to work with Detective Dowdy, it makes sense that she is going to give up people that she knows she can buy from and not just pick people out of a hat." RP at 197.

The jury found Mr. Fischer guilty of two counts of delivery of a controlled substance, methamphetamine.

Mr. Fischer appeals, contending the evidence of prior bad acts was irrelevant and highly prejudicial and, therefore, the trial court erred by denying a mistrial.

In his statement of additional grounds for review, Mr. Fischer asserts five additional errors.

ANALYSIS

This court reviews the denial of a mistrial for an abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). “A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law.” *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

The trial court’s decision to deny a mistrial will not be overturned unless there is a substantial likelihood that the jury’s verdict was affected by the alleged error. *Rodriguez*, 146 Wn.2d at 269-70. The trial court should order a mistrial only if the defendant is so prejudiced that nothing short of a new trial can remedy the error. *Id.* at 270 (quoting *State v. Kwan Fai Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994)).

Mr. Fischer asserts that the trial court erred by denying a mistrial after Ms. Steele stated that she knew Mr. Fischer because she had previously bought drugs from him. Mr. Fischer further contends that admitting evidence in error of law is an abuse of discretion.

The State asserts that Mr. Fischer’s latter contention was rejected in *Lopez-Stayer v. Pitts*, 122 Wn. App. 45, 93 P.3d 904 (2004). In *Lopez-Stayer*, the court did not reject the idea that an error of law is an abuse of discretion; rather, the court disagreed with the

appellant's assertion that the trial court committed an error of law. *Id.* at 51. Therefore, this court's inquiry is whether an error of law occurred here, such that the trial court abused its discretion.

All relevant evidence is admissible unless its probative value is substantially outweighed by its prejudicial effect. ER 401; ER 403. However, evidence of prior bad acts is not admissible to show conformity therewith but may be admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. ER 404(b).

The State asserts that this list is not exclusive based on *State v. Grant*, 83 Wn. App. 98, 920 P.2d 609 (1996). In *Grant*, the court allowed evidence of Mark Grant's prior crimes to allow the jury to properly assess the credibility of a witness. In allowing evidence of prior bad acts for a reason outside the ER 404(b) list, the court stated, "[i]f [evidence is] admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged." *Grant*, 83 Wn. App. at 105 (quoting *State v. Powell*, 126 Wn.2d 244, 258-59, 893 P.2d 615 (1995)).

Here, the State argued at trial that the evidence was relevant to show why Ms. Steele named Mr. Fischer as a potential target for a controlled buy. While Ms. Steele's

statement may be relevant to show why she named Mr. Fischer, evidence of prior bad acts is not admissible except in narrow circumstances. The reasoning behind naming a particular person as the target of a controlled drug buy is not reflected in any of the named categories under ER 404(b). Thus, we look to whether the evidence is relevant to an essential element of the crime charged.

Mr. Fischer was charged with delivery of a controlled substance. The reason that Ms. Steele suggested Mr. Fischer as a target has no bearing on whether Mr. Fischer delivered a controlled substance. Ms. Steele's statement was not necessary to prove any element of Mr. Fischer's crime. The trial court erred by admitting Ms. Steele's statement.

We then address whether the trial court erred by denying a mistrial. A trial court grants a mistrial only if there is a substantial likelihood that the jury's verdict was affected. Stated another way, the trial court grants a new trial if the defendant is so prejudiced by the error that a new trial is the only way to ensure the defendant receives a fair trial. *Rodriguez*, 146 Wn.2d at 270.

Here, Ms. Steele suggested Mr. Fischer as a target to Detective Dowdy. A reasonable juror can infer that Ms. Steele must have had prior, drug-related contacts with Mr. Fischer; otherwise, she would not have suggested him to Detective Dowdy. Furthermore, Ms. Steele was not referring to prior convictions, which would have been

more prejudicial than Ms. Steele's unsupported statement. Although the trial court erred by admitting Ms. Steele's statement, it did engage in the ER 403 balancing test on the record and found that the evidence's probative value outweighed its prejudicial effect. The trial court did not err in this regard. Mr. Fischer was the target of two controlled buys that were closely monitored by the police. The State had ample evidence to convince a jury of Mr. Fischer's guilt. Ms. Steele's statement likely did not have much effect, if any, on the jury, in the face of all of the remaining evidence. Mr. Fischer was not so prejudiced that he was denied a fair trial.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

In his statement of additional grounds for review, Mr. Fischer asserts error as follows: (1) ineffective assistance of counsel, (2) prosecutorial misconduct, (3) insufficient evidence, (4) inconsistencies in Detective Dowdy's and Ms. Steele's testimonies, and (5) failure to satisfy the *Aguilar-Spinelli* test.¹

Ineffective Assistance of Counsel. Mr. Fischer asserts that he received ineffective assistance of counsel because (1) his attorney failed to secure the testimony of three character witnesses who were unavailable for trial due to years of continuances, and

¹ *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), *abrogated by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), *but adhered to by State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984).

(2) his attorney failed to properly follow up when Mr. Fischer gave his attorney the name of a person who stated he had sold drugs to Ms. Steele while Mr. Fischer was away from the house.

To prove a claim of ineffective assistance of counsel, the claimant must show (1) that counsel's performance "fell below an objective standard of reasonableness," and (2) that the defendant was prejudiced by counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There is a strong presumption that counsel is effective, and Mr. Fischer must show that no legitimate tactical reason existed for his counsel's alleged misconduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

Decisions regarding the strategy of a case are tactical decisions for an attorney to determine. An attorney's decision to present a witness at trial is generally a tactical decision. *State v. Warnick*, 121 Wn. App. 737, 746, 90 P.3d 1105 (2004). Mr. Fischer cannot show that his attorney's actions fell below an objective standard of reasonableness because he did not call Mr. Fischer's three character witnesses.

Mr. Fischer's contention that his counsel was ineffective for failure to investigate the case properly is not mentioned anywhere in the record. This court does not review

matters outside the trial court record. The appropriate method for a defendant to raise issues that require evidence outside the record is through a personal restraint petition.

McFarland, 127 Wn.2d at 335.

Prosecutorial Misconduct. Mr. Fischer asserts that the prosecutor overheard his mother talking in the hall outside the courtroom in between the prosecutor's closing argument and rebuttal closing argument. As a result of hearing Mr. Fischer's mother, Mr. Fischer asserts that the prosecutor stated Mr. Fischer's mother let him stay at her house because his brother died from drugs. Mr. Fischer contends that this was prosecutorial misconduct because it was not brought up at trial and was highly prejudicial. However, Mr. Fischer's brother's drug-related death was discussed at trial by Honore Burcalow, as well as Mr. Fischer himself. Mr. Fischer fails to state how the prosecutor's restatement of testimony already in evidence is prejudicial. Furthermore, the report of proceedings does not reflect a recess between the prosecutor's closing argument and rebuttal closing argument such that the prosecutor would have been in the hall to overhear Mr. Fischer's mother. Mr. Fischer's contention is unpersuasive.

Insufficient Evidence. Mr. Fischer asserts the State presented insufficient evidence to support his conviction because (1) the jury should have found reasonable doubt, (2) the State's main evidence was Ms. Steele's testimony, while Mr. Fischer had evidence he

was not home, and (3) Ms. Steele's belongings were in Mr. Fischer's garage.

The test for sufficiency of the evidence is whether, when all reasonable inferences are drawn in favor of the State, any rational trier of fact could find guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When an appellant asserts insufficient evidence, he or she admits the truth of the State's evidence, as well as all reasonable inferences that can be drawn from that evidence. *Id.* To convict Mr. Fischer, the State's evidence must show that Mr. Fischer delivered a controlled substance.

First, Mr. Fischer asserts that the jury did not follow instructions because the jury convicted him even though there was reasonable doubt. Mr. Fischer contends that Ms. Steele could have had drugs hidden in her belongings in his garage, or that one of the other people at his residence could have sold drugs to her. Furthermore, Mr. Fischer asserts that his son's attendance records prove he was dropping his son off at school when Ms. Steele was buying drugs from his residence.

Ms. Steele testified that she bought drugs from Mr. Fischer on both March 22 and March 27. Various police officers testified that they watched the house while Ms. Steele made the controlled buys. The jury is the sole judge of witness credibility. *State v. Smith*, 31 Wn. App. 226, 228, 640 P.2d 25 (1982). Here, the jury determined that Ms.

Steele was more credible than Mr. Fischer. Based on Ms. Steele's testimony that she bought methamphetamine from Mr. Fischer twice, a reasonable juror could find guilt beyond a reasonable doubt.

Second, Mr. Fischer asserts that he was convicted solely on Ms. Steele's word, even though he presented the jury with his son's school attendance records to prove he was not home. Again, the jury determines witness credibility and a rational juror, who believed Ms. Steele's testimony, could find Mr. Fischer guilty of delivering a controlled substance twice.

Third, Mr. Fischer contends that the police did not properly search Ms. Steele and her belongings before using her as a confidential informant. Ms. Steele kept some of her belongings in Mr. Fischer's garage, and Mr. Fischer asserts that she could have obtained the drugs from her own belongings and not from him. While Mr. Fischer's assertion is a possibility, this contention is also ultimately resolved by witness credibility. The jury believed Ms. Steele and the police officers; the jury did not believe Mr. Fischer.

Lastly, Mr. Fischer asserts that his character was assaulted at trial and that Ms. Steele's character was assumed to be better than his; thus, the jury found her more believable. It is unclear exactly what Mr. Fischer is asserting as trial court error, but character evidence cannot be introduced to show conformity therewith on a particular

occasion. ER 404(a). Thus, the lack of evidence regarding Ms. Steele's character could not be error because character evidence is generally not admissible.

The State provided sufficient evidence to convict Mr. Fischer of two counts of delivery of a controlled substance.

Inconsistent Testimony. Mr. Fischer asserts that the trial court erred by failing to address inconsistencies in Ms. Steele's and Detective Dowdy's testimonies. At trial, Ms. Steele could not recall portions of the March 27 controlled buy. Similarly, Mr. Fischer asserts that Detective Dowdy's recollection of seeing Mr. Fischer exit the house and enter a car, where he appeared to dig through a jockey box, was not consistent. It is unclear how Mr. Fischer is asserting Detective Dowdy's testimony was inconsistent because Detective Dowdy does not change his testimony within the trial. The trial court is not permitted to comment on evidence. Const. art. IV, § 16. Thus, not only did the trial court act appropriately by not commenting on the evidence, it would have been error for the trial court to address any inconsistencies in witness testimony.

Aguilar-Spinelli. Mr. Fischer asserts that Ms. Steele's information failed to satisfy the *Aguilar-Spinelli* test because, he claims, Ms. Steele needed money so she went to the police and set him up. The *Aguilar-Spinelli* test is employed when the police use a confidential informant's information to establish probable cause. The first prong seeks to

evaluate the trustworthiness of the informant's conclusions by examining the underlying circumstances and the sources of the informant's knowledge. *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984). The second prong seeks to evaluate the veracity of the informant. *Id.* at 437.

The basis of knowledge prong is satisfied if the informant relays information of a crime he or she has witnessed firsthand. *Id.* Here, Ms. Steele bought methamphetamine firsthand from Mr. Fischer; therefore, the basis of knowledge prong is satisfied.

Commonly, the veracity prong is satisfied by showing that the informant provided accurate information to the police in the past. *Id.* Ms. Steele was introduced to Detective Dowdy by another detective. Detective Dowdy paid Ms. Steele for each controlled buy. Ms. Steele worked with Detective Dowdy for approximately two months. At trial, the defense did not assert that Ms. Steele had not provided accurate information to the police. Because Ms. Steele participated in controlled drug buys for two months, it is reasonable to assume that she was a trustworthy confidential informant. Ms. Steele's information as a confidential informant satisfies the *Aguilar-Spinelli* test.

We affirm the convictions.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to

No. 27859-0-III
State v. Fischer

RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Brown, J.