IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALEXANDER PAUL TISHCHENKO, Appellant.	No. 38471-0-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Alexander Paul Tishchenko guilty of one count of delivering methamphetamine within 1,000 feet of a school bus route stop. On appeal, Tishchenko argues that evidence of prior drug transactions that he allegedly had with the confidential informant who was involved in the controlled buy that led to the charges was not admissible under ER 404(b). In addition, he argues that the trial court erred by failing to issue a limiting instruction, sua sponte, to the jury, or, in the alternative, that his defense counsel was ineffective for failing to request a limiting instruction. Tishchenko additionally contends that he was denied a fair trial under the cumulative error doctrine. Finally, in his statement of additional grounds (SAG),[1] Tishchenko argues that his defense counsel was ineffective for allegedly failing to

[1] RAP 10.10.

investigate a miscalculation of his offender score in a plea agreement that the State offered sometime before Tishchenko decided to go to trial. We affirm.

FACTS

Sometime before December 20, 2007, Vancouver police officers arrested Hassam Hamadeh for processing a large quantity of methamphetamine. Vancouver Police Officer Leonard Gabriel promised Hamadeh favorable treatment by law enforcement authorities if he acted as a confidential informant against Tishchenko. Hamadeh agreed to participate in a controlled methamphetamine purchase involving Tishchenko.

On December 20, 2007, Hamadeh called Tishchenko[2] to ask if Tishchenko would sell him methamphetamine. Officer Gabriel was listening in on this telephone conversation, and he recognized Tishchenko's voice on the other end of the line. Hamadeh asked Tishchenko to meet him in a Safeway parking lot to complete the drug transaction. Tishchenko agreed.

After the telephone call, Officer Gabriel searched Hamadeh to ensure he possessed no drugs, weapons, or money. Vancouver Police Department officers provided Hamadeh with $50—two $20 bills and one $10 bill—to make the controlled buy from Tishchenko. Vancouver Police Officer Dustin Nicholson then drove Hamadeh to the designated Safeway parking lot in an undercover police car. There were several other police cars, marked and unmarked, positioned throughout the parking lot for the entirety of the controlled buy.

Soon after they arrived at Safeway, Tishchenko's black BMW pulled into the parking lot. Hamadeh got out of the undercover car and walked toward the passenger's side of Tishchenko's car. As he did this, Sarah Carpenter got out of Tishchenko's front passenger seat and moved to

[2] Hamadeh testified that he recognized Tishchenko's voice on the phone.

the back seat of the car. Hamadeh took her place in the BMW's front passenger seat.

The BMW's windows were very dark, preventing the officers from observing the interactions inside the car. According to Hamadeh, he purchased a $20 bag of methamphetamine from Tishchenko, who used Carpenter as an intermediary in the transaction.[3] The only specific conversation that Hamadeh could remember having with Tishchenko in the car was negotiating the price of the methamphetamine from the original offer price of $50 to the final sale price of $20. Hamadeh used a $20 bill that the officers had supplied to make the purchase.

After completing the transaction, Hamadeh exited Tishchenko's car and walked back to the undercover police car. He handed Officer Nicholson the remaining $30 and a baggie of a substance that later tested positive for methamphetamine. Nicholson searched Hamadeh and found no other money or contraband on him. The officers had a clear view of Hamadeh from the moment he made the telephone call to Tishchenko to the time he returned to the police car after completing the transaction, except for the 30 to 60 seconds that Hamadeh was inside of Tishchenko's dark-windowed BMW.

Within one minute from the time Hamadeh returned to the undercover police car with the methamphetamine, other police officers in marked cars stopped Tishchenko. They arrested Tishchenko and Carpenter. During the course of the arrest, the officers searched Tishchenko's car, but they were unable to recover the $20 bill that Hamadeh had supposedly used to purchase the methamphetamine. Carpenter said that she believed the money and drugs were stashed in hidden compartments of the car. The officers were unable to recover any money or drugs from

[3] Hamadeh testified that, from the backseat of the car, Carpenter handed him $20 worth of methamphetamine and he laid the $20 on the console, next to the gear shift.

those areas. The officers took both Tishchenko and Carpenter into the police station for questioning.

During questioning, Tishchenko maintained that the police officers had the wrong guy. When the officers informed Tishchenko that the buy money that Hamadeh had used to purchase the methamphetamine had been photocopied, he replied, "Yeah, it's not me. Show me the money. (Indiscernible and inaudible) show me the buy money." 3-A Report of Proceedings (RP) at 182-83. Meanwhile, Carpenter was being questioned in a different area of the police station. The questioning officer allowed Carpenter to use the restroom at the police station before she was thoroughly searched. The police officers never recovered the buy money.

In an amended information,[4] the State charged Tishchenko with one count each of unlawful delivery of methamphetamine, intimidating a witness, bribing a witness, and tampering with a witness. The delivery charge included an enhancement that the delivery occurred within 1,000 feet of a school bus route stop.

Before trial, Tishchenko said that he intended to introduce evidence of Hamadeh's prior bad acts, including drug dealing and drug use. In addition, he filed a motion in limine, seeking to prohibit the State from introducing evidence of any uncharged drug transactions involving Tishchenko. The State objected, arguing that prior drug transactions between Hamadeh and Tishchenko were relevant and admissible under ER 404(b).

After hearing argument from both parties, the trial court conducted an ER 404(b) analysis and denied Tishchenko's motion. In doing so, it found that the prior drug transactions were

[4] The State originally charged Tishchenko on September 9, 2008, with one count of unlawful delivery of methamphetamine with an enhancement that the delivery occurred within 1,000 feet of a school bus route stop.

relevant and admissible to show a common scheme or plan. The trial court further found that, although prejudicial, the evidence's probative value was greater. Finally, the trial court indicated in its oral and written ruling that Tishchenko was entitled to submit limiting instructions on the ER 404(b) evidence.

The parties proceeded to trial. During trial, Hamadeh testified that Tishchenko had sold him methamphetamine over 20 times in the same way that he did at the December 20, 2007 incident. Tishchenko did not object to this testimony at trial. During cross-examination, Tishchenko elicited testimony that Hamadeh had a history of using and dealing drugs. In addition, Tishchenko elicited testimony that Hamadeh agreed to act as a confidential informant in the controlled buy with Tishchenko to avoid a lengthy prison sentence.

A jury convicted Tishchenko on one count of unlawful delivery of methamphetamine, including the school bus route stop enhancement. At sentencing, the parties agreed that Tishchenko's offender score was 4, making the standard range 20 to 60 months confinement. Including the 24-month school bus route stop enhancement, Tishchenko's range was 44 to 84 months confinement. The trial court sentenced Tishchenko to 64 months confinement. Tishchenko appeals.

ANALYSIS

Tishchenko contends that the trial court's admission of testimony about alleged prior drug transactions with Hamadeh was improper under ER 404(b). He further contends that the trial court erred by failing to give a limiting instruction for the testimony at issue. Alternatively, Tishchenko argues that his counsel was ineffective for failing to request a limiting instruction. And finally, Tishchenko argues that cumulative error deprived him of his constitutional right to

fair trial. We disagree with all these contentions.

Standard of Review

We review a trial court's evidentiary rulings for an abuse of discretion. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

A party may not raise an issue for the first time on appeal unless it amounts to "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Evidentiary errors under ER 404(b) are not of constitutional magnitude and are harmless unless the outcome of the trial would have differed had the error not occurred. *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1999).

Preservation of ER 404(b) Issue for Appeal

As an initial matter, the State argues that Tishchenko failed to preserve the ER 404(b) issue relating to alleged prior drug transactions because he did not object at trial. To preserve an issue, a party must bring a specific objection at trial to allow the trial court "an opportunity to correct any error." *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). For appeals arising from a trial court's rulings on motions in limine, a waiver of the right to appeal depends on whether the trial court made a final ruling. If the trial court makes a final ruling, "the losing party is deemed to have a standing objection . . . '[u]nless the trial court indicates that further objections at trial are required.'" *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (alteration in original) (quoting *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989));

Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 91, 549 P.2d 483 (1976).[5] If the ruling is tentative, "'the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.'" *Powell*, 126 Wn.2d at 256 (quoting *Koloske*, 100 Wn.2d at 896).

Here, before trial, Tishchenko made a motion in limine, seeking to prohibit the State from introducing evidence of any drug transactions involving Tishchenko, including past transactions he allegedly had had with Hamadeh. The State objected to Tishchenko's motion. After argument and discussion, the trial court denied Tishchenko's motion orally and in a written order. The trial court specifically ruled that the State may introduce or attempt to introduce evidence of prior uncharged drug transactions between Tishchenko and Hamadeh. It also noted that Tishchenko may submit limiting instructions on such evidence. The trial court's ruling against Tishchenko was final. *See Powell*, 126 Wn.2d at 256. Accordingly, Tishchenko sufficiently preserved the issue of whether the trial court erred when it allowed evidence regarding his alleged prior drug transactions with Hamadeh. *See Powell*, 126 Wn.2d at 256.

Admission of Prior Misconduct Evidence

Tishchenko contends that the trial court erred when it admitted evidence relating to Tishchenko's alleged prior uncharged drug transactions with Hamadeh. We disagree.

"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." ER 404(b). Such propensity evidence is

[5] "Although orders on motions in limine are sometimes characterized as tentative and advisory, it has been held that, when the trial court enters a pretrial order regarding the admissibility of evidence, and the order appears to be a final ruling and on a complete record, the fact that defendant does not renew his objection to the ruling at trial does not preclude review by the appellate court." 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.5, author's cmts. at 230 (6th ed. 2004).

not prohibited because it is irrelevant; rather, "'it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.'" *State v. Herzog*, 73 Wn. App. 34, 49, 867 P.2d 648 (quoting *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948)), *review denied*, 124 Wn.2d 1022 (1994). Evidence of other wrongs or acts "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). The trial court must presume that evidence of prior bad acts is inadmissible and decide in favor of the accused when the case is close. *See State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008). Before admitting evidence under an exception to ER 404(b), "the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect." *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996).

A. Preponderance of Evidence that Prior Bad Acts Occurred

Tishchenko first argues that the trial court failed to explicitly find by a preponderance of evidence that the alleged prior uncharged drug transactions occurred.

When determining whether evidence is admissible under ER 404(b), a trial court may rely on a narrative offer of proof by the attorney offering the evidence, explaining what the evidence will show if admitted. *State v. Kilgore*, 147 Wn.2d 288, 294-95, 53 P.3d 974 (2002). Where the trial court does not make an explicit finding on the record, we make those determinations based

on the entire record before us. *See Kilgore*, 147 Wn.2d at 294-95.

Here, the record supports the trial court's implicit finding that the prior uncharged drug transactions likely occurred between Tishchenko and Hamadeh. During the pretrial hearing, the State explained that Hamadeh would testify that he had bought drugs from Tishchenko on several occasions before the December 20, 2007 incident. The State noted that Hamadeh discussed these prior drug transactions during an interview in which both parties were present. Significantly, Tishchenko did not dispute the State's narrative offer of proof. He simply argued that Hamadeh's expected testimony would be more prejudicial than probative. And after the State's offer of proof, the trial court proceeded to perform the requisite ER 404(b) balancing test to determine whether that evidence was admissible. The record sufficiently supports the trial court's implicit finding that the State's offer of proof that the prior drug transactions between Tishchenko and Hamadeh likely occurred. *See Kilgore*, 147 Wn.2d at 294-95.

B. Proper Admission of Evidence

Next, Tishchenko argues that the only relevant purpose for admitting the challenged evidence was to show that he had a propensity to commit the charged crime. The State defends the trial court's admission of the challenged evidence to show a common scheme or plan. We hold that the trial court erred when it determined the evidence was admissible to show a common scheme or plan. Nevertheless, we hold that the error was harmless because the evidence was admissible to establish identity and absence of mistake.

The common scheme or plan exception is generally used when the occurrence of the crime or intent is at issue. *State v. Foxhoven*, 161 Wn.2d 168, 179, 163 P.3d 786 (2007) (citing *DeVincentis*, 150 Wn.2d at 21; *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995)). As

our Supreme Court opined, "The existence of a common scheme or plan, for ER 404(b) purposes, is relevant only to the extent that it shows the charged crime happened." *Foxhoven*, 161 Wn.2d at 179 (citing *Lough*, 125 Wn.2d at 861-62). There was no question that a crime occurred in this case; Hamadeh had the methamphetamine.

There was, however, a question as to who committed the crime. The central issue at trial was whether Tishchenko sold the methamphetamine to Hamadeh during the controlled buy.

Here, Hamadeh's testimony about his prior transactions with Tishchenko was admissible to show identity of the seller—that it was Tishchenko not Carpenter. On prior occasions, Hamadeh had called Tishchenko's telephone number, had spoken to Tishchenko, and had arranged a place to meet Tishchenko where he would enter Tishchenko's car to purchase drugs from Tishchenko. In addition, Officer Gabriel identified Tishchenko's voice when Hamadeh called the number at which he (Hamadeh) had previously reached Tishchenko to arrange drug transactions. Gabriel listened to the conversation, identified Tishchenko's voice on the telephone, and heard Tishchenko agree to sell Hamadeh methamphetamine at a specific time and place.

Furthermore, evidence of Hamadeh's prior drug transactions with Tishchenko was admissible to rebut Tishchenko's claim that the police officers arrested the "wrong guy." 3-A RP at 91; *see State v. Hubbard*, 27 Wn. App. 61, 64, 615 P.2d 1325 (1980) ("[e]vidence of prior unlawful acts, similar to the one with which the defendant is charged, is admissible to rebut defendant's denial of a predisposition to commit crime").

Because we find that the challenged evidence was independently admissible to show identity or, more accurately, the absence of mistaken identity, we hold that the trial court did not abuse its discretion by admitting it. *See Foxhoven*, 161 Wn.2d at 179 (admission of evidence

under ER 404(b) exception is harmless when the evidence is properly admitted under a different exception). Moreover, we reject Tishchenko's contention that the evidence of his prior drug transactions with Hamadeh was unfairly prejudicial.[6] We note that there is no reasonable probability that Hamadeh's brief testimony that he had prior drug transactions with Tishchenko changed the outcome of the trial. He knew Tishchenko's phone number and Tishchenko agreed over the phone to meet at Safeway to sell Hamadeh drugs; he obviously had had such a client/supplier history. Hamadeh testified at length that he used drugs extensively up until about two weeks before the trial. Tishchenko has failed to demonstrate that the trial court abused its discretion in admitting the evidence. *See Foxhoven*, 161 Wn.2d at 179; *Neff*, 152 Wn.2d at 91; *Wade*, 138 Wn.2d at 464.

C. Limiting Instruction

Likewise, we reject Tishchenko's contention that the trial court erred by failing to instruct the jury on the proper purpose of evidence of his prior drug transactions with Hamadeh. If evidence of other crimes, wrongs, or acts is admitted under ER 404(b), the trial court must give, "upon request," a limiting instruction to the jury. ER 105; *Foxhoven*, 161 Wn.2d at 175. But a trial court does not have a duty to give a limiting instruction sua sponte. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997); *State v. Noyes*, 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966), *cert. denied*, 386 U.S. 968 (1967). Moreover, "[i]n the absence of either a violation of a

[6] Hamadeh also testified that he agreed to act as a confidential informant in order to receive favorable treatment from law enforcement. In addition, several police officers provided ample testimony regarding their first-hand recollections of the December 20, 2007 incident. In the context of the two-day trial, it is highly unlikely that Hamadeh's brief testimony setting forth the number of prior drug transactions that he had had with Tishchenko changed the trial outcome. *State v. Carleton*, 82 Wn. App. 680, 686, 919 P.2d 128 (1996) (quoting *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984)).

constitutional right or a request to instruct there can be no error assigned on appeal for failure to give an instruction." *State v. Scott*, 93 Wn.2d 7, 14, 604 P.2d 943, *cert. denied*, 446 U.S. 920 (1980).

Tishchenko did not request a limiting instruction. Therefore, the trial court did not err by failing to provide one. *Myers*, 133 Wn.2d at 36; *Scott*, 93 Wn.2d at 14; *Noyes*, 69 Wn.2d at 446-47.

Ineffective Assistance of Counsel

Tishchenko alternatively contends that he was denied his right to effective assistance because defense counsel failed to request a limiting instruction on the proper purpose of the ER 404(b) evidence. We disagree.

Washington adopted the *Strickland* two-part test for evaluating claims of ineffective assistance of counsel. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Under *Strickland*, a defendant must show that defense counsel's performance was deficient and that prejudice resulted from that deficiency. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). "A failure to establish either element of the test defeats the ineffective assistance of counsel claim." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

We engage a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335. This presumption will be rebutted only by a clear showing of incompetence. *State v. Varga*, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). Further, Tishchenko bears the burden of showing that there were no conceivable legitimate strategic or tactical reasons explaining

counsel's performance. *McFarland*, 127 Wn.2d at 336. If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, we will not find it ineffective. *Davis*, 152 Wn.2d at 673.

As noted above, when a trial court admits evidence of other wrongs under ER 404(b), it must give the jury a limiting instruction if a party requests one. *See Foxhoven*, 161 Wn.2d at 175; *Myers*, 133 Wn.2d at 36. Where a party fails to request a limiting instruction, Washington courts have consistently held that such a failure can be presumed to be a legitimate tactical decision designed to avoid reemphasizing damaging evidence. *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27, *review denied*, 155 Wn.2d 1018 (2005).

In this case, we are persuaded that Tishchenko's counsel made a legitimate tactical decision not to request a limiting instruction. The record reveals that Tishchenko's defense strategy was to discredit Hamadeh as a witness. To ask the trial court to give a limiting instruction would have undermined this trial strategy by excluding the use of Hamadeh's testimony that he was a chronic, illicit drug abuser in determining his credibility. *McFarland*, 127 Wn.2d at 336; *Price*, 126 Wn. App at 649.

Statement of Additional Grounds

In his SAG, Tishchenko alleges that his counsel was ineffective during plea negotiations for failing to inform him that at some point between its initial plea offer and trial, the State clarified that Tishchenko's proper standard range was 20 to 60 months confinement based on an offender score of 4. The initial plea offer was for 90 months confinement based on an offender score of 8.[7]

[7] The copy of the plea offer attached to Tishchenko's SAG is not dated. At the time the State offered the plea, Tishchenko was represented by a different attorney than the attorney who

Tishchenko suggests that his counsel's alleged failure to investigate the accuracy of the offender score in the plea offer constitutes ineffective assistance of counsel. But we cannot resolve the merits of this issue on the record before us. If Tishchenko wishes to bring a claim of ineffective assistance of counsel based on matters outside the appellate record, he must do so by means of a personal restraint petition. *McFarland*, 127 Wn.2d at 335, 338 n.5.

Cumulative Error

Finally, Tishchenko argues that cumulative error denied him his right to a fair trial. The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible errors materially affects the trial outcome. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Because Tishchenko has shown no error, the doctrine does not apply here.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, J.

VAN DEREN, C.J.

represented him at trial.