

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 62448-2-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
LARRY THEOPLIOUS KEMP,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: November 30, 2009
_____)	

AGID, J. -- A jury found Larry Kemp guilty of attempted residential burglary – domestic violence and domestic violence misdemeanor violation of a court order. On appeal, Kemp contends the trial court abused its discretion by admitting evidence that he attempted to create a false alibi under ER 404(b) because that evidence was unfairly prejudicial. Kemp also asserts that his trial counsel was ineffective for failing to request a limiting instruction for that evidence. In his statement of additional grounds, he contends that there is insufficient evidence to support his conviction for attempted residential burglary. We conclude that the trial court properly admitted the evidence related to Kemp’s false alibi to show consciousness of guilt, trial counsel had a legitimate tactical reason to not request a limiting instruction, and the evidence is

sufficient to support Kemp's conviction for attempted residential burglary. Accordingly, we affirm.

FACTS

Larry Kemp and Jessie Buchanan dated off and on for about seven years and have a son together. Their relationship ended in 2005. In 2007, Buchanan obtained a protection order against Kemp. The protection order, which expired on June 4, 2008, prohibited Kemp from coming within 500 feet of Buchanan's apartment.

On December 17, 2007, at approximately 4:00 a.m., Buchanan heard scratching and scraping noises outside her apartment window. Buchanan went to the window, pulled up the blinds, and saw Kemp attempting to open the corner of the window. She yelled at him to leave, and Kemp ran away. Buchanan called 911.

At that time, Kemp shared a house with Phillip Mack and Teresa Cross. Kemp asked Mack and Cross to sign letters saying that he was at home on the night of December 17. The letter Kemp asked Mack to sign stated that on December 17, Mack and Kemp watched TV at home until 3:48 a.m., then Mack saw Kemp put clothes in the washing machine and go to bed at 3:57 a.m. The letter Kemp asked Cross to sign stated that she also saw Kemp put clothes in the washing machine and go to bed at 3:57 a.m. and that Kemp was sleeping in his room when Cross went to bed at 4:10 a.m. Mack and Cross both signed the letters, though later Cross could not remember doing so. Kemp told them to ignore any calls from attorneys.

The State charged Kemp with attempted residential burglary – domestic violence and domestic violence misdemeanor violation of a court order.

Kemp asked the court for an ER 404(b) evidentiary hearing to discuss whether to exclude the evidence of the statements signed by Cross and Mack. The court found that the statements were relevant to show Kemp's consciousness of guilt. The court also stated that it was up to the jury to determine which witnesses were more credible.

At trial, Buchanan testified that on December 17, she saw Kemp attempting to open her window. Mack and Cross both testified that the statements they signed were not true. Mack testified that on December 17, he went to bed at approximately 2:30 a.m. and did not see Kemp again that night. Mack said that he signed the letter to help Kemp because they were friends. Cross testified that on December 17, she went to bed at approximately 2:30 a.m., but could not fall asleep. At approximately 3 a.m., Cross heard a car start, looked out the window, and saw Kemp driving away. Cross then went to sleep. Cross could not remember signing the letter, but recognized her signature on it. Officer Dale Lee Rock, Jr., testified that he responded to Buchanan's 911 call, he took Buchanan's statement, and he saw several scratches around Buchanan's window.

The defense theory was that Kemp was a credible witness and Buchanan, Mack, and Cross were not credible. Kemp testified that on December 17, at 3:48 a.m., he was at home. Kemp said that Mack and Cross voluntarily signed the statements.

The jury found Kemp guilty as charged.

DISCUSSION

Kemp asserts that the trial court abused its discretion by admitting the statements that Mack and Cross signed and by admitting testimony by Mack and Cross

that Kemp told them to ignore phone calls from lawyers. Kemp contends that this evidence was inadmissible under ER 404(b) as evidence of bad acts to prove his bad character. Kemp also contends that the trial court abused its discretion by admitting this evidence without weighing on the record the probative value of the evidence against its prejudicial effect.

We review a trial court's decision to admit evidence under ER 404(b) for abuse of discretion.¹ The court abuses its discretion if its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."²

Under ER 404(b), "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."³ Before the trial court can admit the evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the State seeks to introduce the evidence, (3) determine whether the evidence is relevant to prove an element of the charged crime, and (4) weigh the probative value of the evidence against its prejudicial effect.

Where, as here, the trial court does not specifically weigh probative value against prejudicial effect, we will decide the issue if the record as a whole is sufficient to permit meaningful review.⁴ The record in this case is sufficient. The court admitted

¹ State v. Burkins, 94 Wn. App. 677, 687, 973 P.2d 15, review denied, 138 Wn.2d 1014 (1999).

² State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

³ ER 404(b).

⁴ State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000).

the evidence of the statements by Cross and Mack and their testimony to show Kemp's consciousness of guilt. Evidence of flight, resistance to arrest, or concealment is admissible if it allows "a reasonable inference of consciousness of guilt of the charged crime."⁵ When Kemp asked his housemates to sign statements saying that he was at home on the night of the attempted burglary and told them not to talk to lawyers, he exhibited a consciousness of his guilt. There is no other reasonable explanation for his actions, and he offered none.

We also reject Kemp's argument that this evidence was unfairly prejudicial. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.⁶ Evidence is unfairly prejudicial if it is likely to arouse an emotional response in the jury instead of a rational decision.⁷ The evidence that Kemp tried to create a false alibi was not likely to arouse an emotional response in the jury. It is more likely that the jury would use this evidence to come to the rational decision that Kemp was conscious of his guilt of attempted residential burglary. We conclude the court did not abuse its discretion in admitting the evidence under ER 404(b).

Kemp also asserts that the trial court should have given a limiting instruction for the ER 404(b) evidence. He acknowledges both that defense counsel did not request a limiting instruction and the legal rule that defense counsel's failure to request a limiting instruction prevents us from reviewing the alleged error.⁸ But he asserts that his trial

⁵ State v. Freeburg, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001).

⁶ ER 403.

⁷ State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

⁸ State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447, review denied, 121 Wn.2d 1024 (1993).

counsel was ineffective for failing to request a limiting instruction.

To show ineffective assistance of counsel, Kemp must demonstrate that defense counsel's representation fell below an objective standard of reasonableness.⁹ We will not find ineffective assistance of counsel if the attorney's actions were based on trial tactics or the defense theory of the case.¹⁰

Kemp has failed to show that his attorney's actions fell below an objective standard of reasonableness. "[F]ailure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence."¹¹ Here, part of the defense theory was that Kemp was a credible witness and Cross and Mack were not credible. Defense counsel relied on the fact that Cross and Mack signed the statements and then later testified that they were untrue to make this argument. In light of this argument, it would have been detrimental to the defense to request a limiting instruction saying the statements were only admissible to show consciousness of guilt. In addition, such an instruction would have reemphasized the evidence that Kemp was conscious of guilt. Because Kemp's attorney's actions were based on the defense theory of the case, we reject Kemp's argument that his trial counsel was ineffective.

In his statement of additional grounds, Kemp submitted a variety of documents that he believes will show he is "innocent of the crime that I was wrongfully charged with by the court." Kemp states that the evidence did not prove he committed residential burglary. We read Kemp's statement of additional grounds as a challenge

⁹ State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

¹⁰ State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

¹¹ State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009).

to the sufficiency of the evidence for his conviction of attempted residential burglary and conclude that there was sufficient evidence to support his conviction.

When reviewing a challenge to the sufficiency of the evidence, we must determine, considering the evidence in the light most favorable to the prosecution, whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”¹² We assume the truth of the prosecution's evidence and all inferences that the trier of fact could reasonably draw from it.¹³ We defer to the trier of fact to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses.¹⁴

Here, consistent with the statutory definition, the court instructed the jury, “A person commits the crime of residential burglary when he or she unlawfully enters a dwelling with intent to commit a crime against a person or property therein.” In the “to convict” instruction for attempted residential burglary, the court instructed the jury,

To convict the defendant of the crime of attempted residential burglary, as charged in count I each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 17, 2007, the defendant did an act which was a substantial step toward the commission of residential burglary;
- (2) That the act was done with the intent to commit residential burglary; and
- (3) That the acts occurred in the State of Washington.

At trial, Buchanan testified that on December 17, at approximately 4:00 a.m., in

¹² State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

¹³ State v. Wilson, 71 Wn. App. 880, 891, 863 P.2d 116 (1993), rev'd in part on other grounds, 125 Wn.2d 212, 883 P.2d 320 (1994).

¹⁴ State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998).

violation of a protection order, Kemp attempted to open her apartment window.

Buchanan also testified that when Kemp saw her, he ran away. Viewing this evidence in the light most favorable to the State, we conclude that the jury could have found the

essential elements of attempted residential burglary beyond a reasonable doubt.

We affirm.

Ajid, J.

WE CONCUR:

Leach, J.

Schindler, CT