

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36866

STATE OF IDAHO,)	2011 Unpublished Opinion No. 514
)	
Plaintiff-Respondent,)	Filed: June 9, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
PHILLIP D. FLIEGER,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

Judgment of conviction for three counts of possession of a controlled substance, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Phillip D. Flieger appeals from the judgment of conviction entered upon a jury verdict finding him guilty of three counts of possession of a controlled substance. He contends that the district court improperly admitted evidence of prior bad acts which were relevant only to show propensity and that the prosecutor committed prosecutorial misconduct by referencing Flieger’s post-*Miranda*¹ silence. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

A pickup driven by Flieger was stopped by a police officer for a traffic violation. A drug detection dog and handler arrived to assist in the stop, and the dog alerted to Flieger’s vehicle. After the dog alerted, Flieger consented to a search of his person and the officers found over five

¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

thousand dollars in cash and a motel key. The officers then conducted a search of the pickup and found pouches containing heroin, methamphetamine, cocaine, and drug paraphernalia. Flieger was arrested and charged with three counts of possession of a controlled substance with intent to deliver.

At the time of the stop, Flieger was on probation for possession of methamphetamine. Upon Flieger's arrest, his probation officer was informed that a motel key was found in Flieger's pocket. The probation officer went to the motel, conducted a search of the room, and found methamphetamine and drug paraphernalia. The probation officer also conducted a search of a vehicle parked at the motel, which belonged to Flieger's wife, but no drugs were found in the car. Flieger pled not guilty to the charges of possession of a controlled substance with intent to deliver. Flieger claimed that he had no knowledge of the drugs and that they had been left in his pickup by an individual who had borrowed it earlier in the day. Flieger claimed that he had a large amount of cash because he was going to buy a car for his wife. Flieger further asserted that he had rented the motel room because his house was being fumigated and because he and his wife needed to spend more time together away from their family.

Prior to trial, the state filed a notice of intent to introduce evidence of other acts pursuant to I.R.E. 404(b). Specifically, the state sought to admit evidence that: (1) Flieger had a prior conviction for possession of methamphetamine and was on probation at the time of his arrest; (2) Flieger rented the motel room (on this occasion and numerous prior occasions) and that methamphetamine and paraphernalia were found therein on the day of his arrest; (3) Flieger tested positive for methamphetamine use on the day of his arrest; and (4) in Flieger's previous possession of methamphetamine case, he claimed he had a large amount of cash because he was going to buy a car for his daughter. After conducting an I.R.E. 404(b) hearing, the district court ruled that the state could present evidence of Flieger's prior conviction and probation status, his methamphetamine use, and that drugs and paraphernalia were found in the motel room. The district court ruled that evidence Flieger rented a motel room was not a bad act within the meaning of I.R.E. 404(b) and was admissible. The district court also ruled evidence showing that, in his prior case, Flieger claimed to have a large amount of cash to be used for buying a car for his daughter was inadmissible because it would be unfairly prejudicial.

At trial the state presented evidence of Flieger's prior conviction, his probation status, and that Flieger rented a motel room in which drugs and paraphernalia were found. The state

also presented evidence that Flieger submitted to a urinalysis drug test on the day of his arrest, but did not present evidence of the results of the test. During trial, the prosecutor also elicited testimony regarding Flieger's post-*Miranda* silence. After a jury trial, Flieger was found guilty of three counts of possession of a controlled substance. I.C. § 37-2732(c)(1). Flieger appeals, arguing that the district court improperly admitted evidence of prior bad acts which were relevant only to show propensity and that the prosecutor committed prosecutorial misconduct by referencing Flieger's post-*Miranda* silence.

II.

ANALYSIS

A. Rule 404(b) Evidence

Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's criminal propensity. I.R.E. 404(b); *State v. Johnson*, 148 Idaho 664, 667, 227 P.3d 918, 921 (2010); *State v. Parmer*, 147 Idaho 210, 214, 207 P.2d 186, 190 (Ct. App. 2009). However, such evidence may be admissible for a purpose other than that prohibited by I.R.E. 404(b). *Parmer*, 147 Idaho 214, 207 P.3d at 190. Flieger argues that the district court erred by allowing the state to present testimony and other evidence that he committed prior bad acts which were relevant only to show propensity. Specifically, Flieger argues that the district court erred by admitting evidence that Flieger had a prior conviction for possession of methamphetamine and that he was on probation for that conviction, that Flieger rented a motel room where drugs and drug paraphernalia were found, and that Flieger tested positive for methamphetamine shortly after he was arrested.

1. Relevance

In determining the admissibility of evidence of prior bad acts, the Supreme Court has utilized a two-tiered analysis. The first tier involves a two-part inquiry: (1) whether there is sufficient evidence to establish the prior bad acts as fact; and (2) whether the prior bad acts are relevant to a material disputed issue concerning the crime charged, other than propensity. *State v. Grist*, 147 Idaho 49, 52, 205 P.3d 1185, 1188 (2009). Such evidence is relevant only if the jury can reasonably conclude the act occurred and the defendant was the actor. *Id.* We will treat the trial court's factual determination that a prior bad act has been established by sufficient evidence as we do all factual findings by a trial court. *Parmer*, 147 Idaho at 214, 207 P.3d at 190. We defer to a trial court's factual findings if supported by substantial and competent

evidence in the record. *State v. Porter*, 130 Idaho 772, 789, 948 P.2d 127, 144 (1997). In this case, Flieger does not challenge the existence of the prior bad act as an established fact. Accordingly, we address only the second part of the first tier--the relevancy determination. Whether evidence is relevant is an issue of law. *Johnson*, 148 Idaho at 667, 227 P.3d at 921; *Parmer*, 147 Idaho 214, 207 P.3d at 190. Therefore, when considering admission of evidence of prior bad acts, we exercise free review of the trial court's relevancy determination. *Id.* Whether evidence is relevant or not depends upon whether it has a tendency to make any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. I.R.E. 401.

First, Flieger argues that evidence of his prior conviction for possession of methamphetamine and his probation status was not relevant. Flieger's knowledge of and dominion over the controlled substances found in his vehicle was at issue at trial. Flieger pled not guilty to three counts of possession of a controlled substance with intent to deliver. In doing so, Flieger put in issue every material allegation of the information. *See* I.C. § 19-1715. Flieger also asserted that he did not know that drugs were present in his truck. Knowledge is a material element of the crime of possession of a controlled substance with intent to deliver. *State v. Ortiz*, 148 Idaho 38, 41, 218 P.3d 17, 20 (Ct. App. 2009). Flieger's prior conviction for possession of methamphetamine was relevant to show that he knew that the substances found in his pickup were controlled substances. *See United States v. Arambula-Ruiz*, 987 F.2d 599, 603 (9th Cir. 1993) (holding the defendant's prior conviction for possession of heroin with intent to distribute was relevant to a material element of the crime charged because it tended to show knowledge). In addition, Flieger's probation status was relevant because it provided foundation for the testimony of Flieger's probation officer. Evidence of Flieger's probation status, in conjunction with his frequent occupation of a motel room, was probative of his intent to deliver controlled substances. This evidence was central to the state's theory at trial that Flieger used the motel room as a means to sell drugs without being detected by his probation officer. Therefore, we conclude that the evidence of Flieger's prior conviction for possession of methamphetamine and his probation status was relevant.

Second, Flieger argues that evidence he rented a motel room on numerous occasions and that drugs were found in the motel room on the day of his arrest was not relevant. That Flieger rented a motel room on numerous occasions prior to and including the day of his arrest was not

an act evidencing Flieger's "character" within the meaning of I.R.E. 404(b). Therefore the district court did not err in admitting this evidence. In addition, evidence that drugs and paraphernalia were found in the motel room was relevant because it was probative of Flieger's intent to deliver controlled substances. This evidence supported the state's theory that Flieger was using the motel room to distribute controlled substances. It also helped to demonstrate that Flieger knew that the substances found in his pickup were controlled substances. Therefore, we conclude that evidence that Flieger rented a motel room in which drugs and paraphernalia were found was relevant.

Third, Flieger argues that evidence that he tested positive for methamphetamine was not relevant. The record reveals that, while the state introduced evidence at trial showing that Flieger submitted to a urinalysis test shortly after his arrest, the results of that test were not presented at trial. Therefore, we decline to further address this argument on appeal.

2. Unfair prejudice

Having determined that the evidence was relevant, we must also consider whether the evidence was unfairly prejudicial. The second tier in the analysis is the determination of whether the probative value of the evidence is substantially outweighed by unfair prejudice. *Grist*, 147 Idaho at 52, 205 P.3d at 1188. When reviewing this tier, we use an abuse of discretion standard. *Id.* When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

Flieger argues that the danger of unfair prejudice substantially outweighed the probative value of the evidence of his prior conviction for possession of methamphetamine and his probation status because it implied that he was predisposed to commit crimes like the ones charged. At trial, Flieger's probation officer testified that Flieger was on probation because he had been convicted of possession of methamphetamine. Flieger's probation status was used to provide context for the testimony of probation officers who conducted the search of the motel room. The record demonstrates that the state did not elicit unnecessary details regarding Flieger's prior conviction or his probation status and that the information which was presented to

the jury was not inflammatory. Therefore, the district court did not abuse its discretion in finding that the evidence of Flieger's prior conviction for methamphetamine and of his probation status for that crime was not unfairly prejudicial. Accordingly, we hold that the district court did not err in admitting this evidence at trial.

Flieger also asserts that the danger of unfair prejudice substantially outweighed the probative value of evidence that drugs and paraphernalia were found in his motel room because it portrayed him as a drug user who was predisposed to commit crimes like the ones charged. At trial, the state elicited testimony from Flieger's probation officer that drugs and paraphernalia were found in the motel room. The state did not elicit details regarding the evidence of drugs in the motel room and did not emphasize that Flieger was in possession of the drugs. The evidence was not presented in such a way as to be unduly inflammatory. Therefore, the district court did not abuse its discretion in finding that the evidence of drugs and paraphernalia found in the motel room was not unfairly prejudicial. Accordingly, we hold that the district court did not err in admitting evidence of Flieger's prior conviction for possession of methamphetamine, his probation status, or of drugs and paraphernalia found at the motel room.

B. Prosecutorial Misconduct

Flieger argues that the prosecutor committed misconduct at trial by eliciting testimony regarding his post-*Miranda* silence. During the trial, the prosecutor's direct examination of the arresting officer included the following exchange:

[PROSECUTOR]: Let's go back to the traffic stop. When you, after you found the substances in those bags and placed the defendant under arrest, did you advise him of his Miranda rights?
[OFFICER]: Yes.
[PROSECUTOR]: Where did you do that?
[OFFICER]: He was sitting in the back of my patrol vehicle.
[PROSECUTOR]: How did you do that?
[OFFICER]: I recited them to him.
[PROSECUTOR]: Did he indicate that he understood?
[OFFICER]: Yes.
[PROSECUTOR]: Did he agree to speak to you?
[OFFICER]: No.

While our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he or she is nevertheless expected and required to be fair.

State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). However, in reviewing allegations of prosecutorial misconduct we must keep in mind the realities of trial. *Id.* A fair trial is not necessarily a perfect trial. *Id.*

Flieger made no contemporaneous objection to the prosecutor's statements at trial. In *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010), the Idaho Supreme Court clarified the fundamental error doctrine as it applies to allegations of prosecutorial misconduct. If the alleged misconduct was not followed by a contemporaneous objection it is reviewed under Idaho's fundamental error doctrine. The *Perry* Court held that an appellate court should reverse for an unobjected-to error when the defendant persuades the court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) the error is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) the error affected the outcome of the trial proceedings. *Id.* at 226, 245 P.3d at 978.

The state concedes, and we agree, that the question posed by the prosecutor regarding Flieger's post-*Miranda* silence was improper. See *State v. Tucker*, 138 Idaho 296, 300, 62 P.3d 644, 648 (Ct. App. 2003) (officer's brief statement that, after receiving a *Miranda* warning, the defendant refused to say anything violated due process); *State v. Martinez*, 128 Idaho 104, 112, 910 P.2d 776, 784 (Ct. App. 1995) (officer's testimony that, after receiving a *Miranda* warning, defendant chose not to talk violated due process). Therefore, the alleged error violated Flieger's due process rights and was clear and obvious.

We must also consider, however, whether the error affected the outcome of the trial. In response to the prosecutor's question, the officer made reference to Flieger's post-*Miranda* silence in a narrative of the events. We note that the prosecutor did not pursue the officer's comment regarding Flieger's post-*Miranda* silence and did not attempt to draw attention to or exploit the officer's reference. Moreover, the passing remark, as part of a narrative of events, was not of such a nature that the jury would necessarily construe the officer's remark as a comment on Flieger's exercise of his right to remain silent. This situation is materially different from a situation in which the defendant's silence is commented on or exploited to bolster the prosecution's case. Also, the evidence against Flieger was overwhelming. Therefore, based on the record, we are convinced beyond a reasonable doubt that a jury would have found Flieger guilty of three counts of possession of a controlled substance even if the officer had not made the

passing reference about Flieger's silence. Accordingly, we determine that the officer's reference to Flieger's post-*Miranda* silence was harmless. *See Tucker*, 138 Idaho at 300, 62 P.3d at 648.

III.

CONCLUSION

We hold that the district court did not err in admitting evidence of Flieger's prior conviction for possession of methamphetamine, of his probation status, and that he rented a motel room and drugs were found therein. We also hold that the officer's comment on Flieger's post-*Miranda* silence at trial was harmless. Accordingly, Flieger's judgment of conviction for three counts of possession of a controlled substance is affirmed.

Judge LANSING and Judge GUTIERREZ, **CONCUR.**