

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-213

JANUARY TERM, 2007

|                  |   |                                |
|------------------|---|--------------------------------|
| State of Vermont | } | APPEALED FROM:                 |
|                  | } |                                |
|                  | } |                                |
| v.               | } | District Court of Vermont,     |
|                  | } | Unit No. 3, Washington Circuit |
| Devon Fraser     | } |                                |
|                  | } | DOCKET NO. 753-7-05 Wncr       |

Trial Judge: Walter M. Morris

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction of possessing heroin, arguing that the trial court erred by admitting evidence of prior bad acts and denying his motion for a mistrial. We affirm.

Defendant was arrested on July 8, 2005 following a prearranged Araid@ on the home of a police informant, who had told officers that several persons were planning to distribute heroin and cocaine from his house that evening. After obtaining a warrant, police searched the premises, which was occupied by the

informant, defendant, and his two companions. The police did not find any contraband in the house, but discovered several bags of heroin in the glove compartment of a car registered to the girlfriend of one of the men present at the house with defendant. Police also discovered, in a camper on the premises, materials commonly used for heroin distribution. Defendant was arrested and charged with possession of heroin.

On the morning of defendant=s trial, the trial court granted defendant=s motion in limine with respect to evidence concerning his alleged drug dealing in Chittenden County before July 7, 2005, ruling that the prejudicial impact of such evidence substantially outweighed its probative value. The court also Ainitially@ excluded evidence of defendant=s pattern and practice of having others possess unlawful drugs for him in connection with his drug-distribution schemes, but stated that the State could renew its motion with respect to this evidence in response to any defense evidence concerning the constructive possession of drugs. Finally, the court denied the motion in limine with respect to evidence of drug dealing on July 7, 2005 and continuing into the next day, ruling that it was indicative of a course of conduct, and thus its probative value outweighed any potential prejudice to defendant. The court did not rule on defendant=s request to exclude evidence of his prior conviction for possession of a weapon. Following the trial, during which defendant raised several objections to testimony and sought a mistrial, the jury convicted him of the charged offense.

Defendant first argues on appeal that the trial court disregarded the law of Vermont and its own ruling on his motion in limine by admitting evidence regarding his prior drug dealing and his prior conviction for possessing a weapon. We find no basis for reversing defendant=s conviction. During cross-examination of a federal agent who had helped execute the search warrant, defense counsel elicited the agent=s acknowledgment that his primary involvement in the case was to seize firearms, but that he had not found any firearms during the search and had not been informed prior to the search that there would be firearms present. On redirect, the State attempted to rehabilitate the agent=s testimony by showing that he expected the case to involve firearms. Noting that defense counsel had asked about guns, the prosecutor asked the agent what he had known about defendant=s involvement with guns. The agent replied that a prior search warrant executed in Burlington at an address linked to defendant had yielded a holster, that the informant had indicated defendant intended to trade drugs for a firearm, and that a followup investigation had shown a prior conviction for a firearms violation.

Defense counsel objected and sought a mistrial, but the court overruled the objection, stating that defense counsel had invited this testimony by attempting to impeach the agent with respect to his involvement in the case. After another objection by defense counsel, the court clarified that it was allowing evidence of the holster, but that it would not allow any further testimony regarding the prior conviction.

On appeal, defendant contends that the court erroneously allowed the highly prejudicial testimony to rebut defendant's claim that the officer knew nothing about who owned the heroin found in the glove compartment of the vehicle parked at the site of the search. We reject this argument because its factual premise is incorrect. The trial court explicitly allowed the challenged testimony because defendant had invited its admission by seeking to impeach the agent regarding his involvement in the case. Defendant does not address this reasoning, and we find no abuse of discretion as to admission of the testimony for this purpose. Defendant directly broached the topic of guns to emphasize the absence of firearms at the scene of the search and to raise questions concerning the credibility of the agent and the propriety of the presence of federal agents at the scene. Under these circumstances, the court did not abuse its discretion in allowing the witness to explain why he was involved in the case. Cf. State v. Chambers, 144 Vt. 377, 380 (1984) (once the defendant opened the door by attempting to impeach the State's witness, it was permissible for the State to follow up that questioning by clarifying the statements used for impeachment on redirect examination). Any prejudice to defendant resulting from the agent's testimony on redirect examination was outweighed by the need to rehabilitate the witness and to present a complete picture of the agent's involvement in the case so as not to mislead the jury. Because we find no error in the admission of the agent's testimony, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. See State v. Desautels, 2006 VT 84, ¶ 18 (the trial court's denial of a motion for a mistrial will be upheld unless the court totally withheld its discretion or exercised it on clearly untenable or unreasonable grounds).

Defendant contends, however, that the prosecutor continued to elicit prejudicial testimony regarding his prior bad acts, this time from a Barre City police officer who participated in the search, to create an image of him as a gun-toting African-American drug dealer. Defendant cites two instances. In the first instance, the prosecutor asked the officer on direct examination about the significance of fireworks seized at the scene of the

search. The officer responded that they were to be Aused in a transaction for heroin between . . . ,@ but before he could finish his sentence defense counsel objected, and the court let the answer stand without further response. In the second instance, the prosecutor asked the officer how he came to discover the identity of defendant and his two companions. The officer responded that their identification was confirmed when their fingerprints were sent to an FBI laboratory, which identified defendant and one of his companions, but not the other one because he did not have a criminal record. Defense counsel approached the bench and stated that while he could not object because of how the questions were posed, he was concerned that the prosecutor was attempting to elicit responses that would inform the jury of defendant=s criminal record. The prosecutor stated that the witness=s answer was nonresponsive. The court warned the prosecutor, struck the witness=s response from the record, and told the jury to disregard it.

Defendant contends that the cumulative effect of the officer=s testimony, in addition to the testimony elicited from the federal agent, deprived him of a fair trial and required the court to grant a mistrial. We find this argument unavailing. First, we have upheld the admission of the federal agent=s testimony on redirect. Second, defendant did not seek a mistrial or even object on the grounds raised on appeal with respect to the officer=s testimony. Third, the trial court did not allow the officer to finish his testimony regarding the first instance and gave the jury a curative instruction regarding the second instance. See State v. Mears, 170 Vt. 336, 346 (2000) (A[T]he court=s >immediate and unequivocal= curative instruction was sufficient to cure any potential prejudice.@ (quoting State v. LaBounty, 168 Vt. 129, 140 (1998))). Under these circumstances, we find no basis for overturning defendant=s conviction.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice