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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-427

JUNE TERM, 2007

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windham Circuit
Cynthia M. Guyette	}	
	}	DOCKET NO. 218-2-05 WmCr
		Trial Judge: Katherine A. Hayes

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

Defendant appeals her conviction following a jury trial for fraudulently obtaining a prescription in violation of 18 V.S.A. § 4223(a). In particular, defendant challenges the district court's decision to admit evidence of prior bad acts under Vermont Rule of Evidence 404(b). We affirm.

Defendant suffers from chronic back pain. Treatment for her condition includes the prescription pain medications Percocet and Oxycontin. The charge in this case stemmed from defendant's actions related to filling prescriptions for these medications in December 2004.

The facts underlying the charge of prescription fraud were hotly contested at trial. According to defendant, she suffered a bout of severe back pain on December 15, 2004. Because her regular doctor was unavailable that day, she sought a prescription from another doctor to cover the next few days until her regular doctor was available. Defendant claims she asked for only a small amount of Percocet, but when she went to fill the prescription at Walgreen's, the pharmacy gave her 120 Percocet tablets, stating that this was the amount the prescription called for. By contrast, the prescription for Oxycontin was for only 12 tablets.

On December 17, 2004, defendant called her regular doctor and left a message with the receptionist requesting a refill of her Oxycontin prescription. In her notes, however, the receptionist indicated that defendant had requested refills for both Oxycontin and Percocet. Defendant's doctor wrote the prescriptions, but when defendant sought to have them filled at a Brooks pharmacy on December 20, 2004, the pharmacist refused the Percocet prescription and notified police. Defendant claimed that she thought she had been given only one prescription—for Oxycontin—and did not realize the Percocet prescription was also included. Defendant's effort to have the second prescription for Percocet filled on December 20 was the basis for the charge of prescription fraud.

According to the State, the prescription defendant received on December 15, 2004, was for 20 Percocet only, but defendant added a "1" in front of that number, thereby altering the prescription amount. Further, the State maintained that defendant did, in fact, request a second Percocet prescription from her regular doctor on December 17, 2004, and did so fraudulently in that she did not reveal to her doctor that she had received 120 Percocet tablets only two days before.

The State initially based its charge against defendant on the allegation that she altered the amount of Percocet ordered on the December 15, 2004 prescription. The original prescription could not be located, however, and was therefore not susceptible to forensic analysis. Accordingly, the State subsequently added a charge based on defendant's efforts to obtain a second Percocet prescription on December 17, 2004, and dropped the charge based on the allegedly altered December 15, 2004 prescription.

Nonetheless, shortly before trial the State gave notice of its intent to use evidence of defendant's actions with regard to the December 15, 2004 prescription under V.R.E. 404(b). That rule prohibits the introduction of evidence of prior bad acts by a defendant "to prove the character of a person in order to show that [s]he acted in conformity therewith." Id. Such evidence, however, "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id.

Due to the inherently prejudicial nature of such evidence, before it may be properly admitted the State must demonstrate that the probative value of the evidence outweighs any danger of undue prejudice. See V.R.E. 403 (permitting exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice"). As we explained in State v. Shippee, "Rules 403 and 404(b) go hand in glove because 404(b) describes a particular form of evidence that might create the unfair prejudice anticipated under Rule 403." 2003 VT 106, ¶ 11 (mem.) (citations and quotations omitted).

Under Vermont Rule of Criminal Procedure 26(c), the State is required to provide a defendant with notice of its intent to seek admission of prior-bad-acts evidence under Rule 404(b). This allows the defendant an opportunity to file a motion in limine seeking to exclude the evidence. Here, although the State filed a Rule 26(c) motion, defendant neither filed a motion in limine nor objected when the evidence was introduced at trial. At the close of all the evidence, the district court gave the following limiting instruction to the jury:

> There's been evidence in this case with respect to another prescription or other prescriptions that were obtained and procured on [an] earlier date, that is December 15th, and some evidence with respect to . . . alteration or changing of that prescription. Those events are not the basis for the charges that she is now here on trial [for]. They're merely before you to show you the context in which the events of December 17th and December 20th, the context in which those events occurred as background information, if you will, and the events of December 15th cannot be the basis of a finding of guilt with respect to those particular prescriptions and obtaining of

the drugs involved.

Again, defendant did not object to this instruction or file a post-trial motion based on the admission of the prior-bad-acts evidence.[1]

On appeal, defendant argues that the district court nonetheless erred in admitting the prior bad acts evidence—that is, evidence related to defendant's alleged alteration of the December 15, 2004 Percocet prescription. In particular, defendant points out that she conceded that she had obtained 120 Percocet on December 15, and that other aspects of the events on December 15 are not probative. According to defendant, because the prior-bad-acts evidence had no probative value and was inherently unfairly prejudicial, it should have been excluded.

"We review a trial court's decision to admit evidence of uncharged conduct pursuant to V.R.E. 404(b) to determine whether the evidence was relevant and material to the cause of action, and if so, whether its admission was so prejudicial as to outweigh its probative value." State v. Anderson, 2005 VT 17, ¶ 7, 178 Vt. 467 (mem.) (citation and quotation omitted). Typically, the district court's decision is measured against this standard for an abuse of discretion, see id., but where, as here, there was no objection to preserve the issue, we review for plain error only. See State v. Burgess, 2007 VT 18, ¶ 8 (applying plain-error standard where defendant did not object to admission of prior bad acts evidence at trial). "Plain error exists only in exceptional circumstances where a failure to recognize error would result in a miscarriage of justice, or where there is glaring error so grave and serious that it strikes at the very heart of the defendant's constitutional rights." State v. Pelican, 160 Vt. 536, 538 (1993) (quotation omitted).

Defendant maintains, based on the district court's limiting instruction to the jury, that the prior-bad-acts evidence was admitted under a "context" theory; that is, its probative value arose from the fact that it provided necessary background for understanding the charged conduct. On this basis, defendant argues that this Court has limited the application of the "context" rationale to the crimes of domestic violence and certain sexual-assault cases. In fact, because the admission of the evidence was never tested, the State was never required to articulate a clear theory of probative value, nor was any theory ruled upon by the district court. See Shippee, 2003 VT 106, ¶ 10 ("One of the primary purposes behind [the] rule requiring specific objections is to sufficiently alert the trial court to the theory behind the objection so that the judge can rule intelligently and quickly."). Nonetheless, it is clear from review of the trial transcript that the evidence of defendant's actions with respect to the December 15, 2004 prescription did more than establish that she had 120 Percocet pills in her possession as of December 17, 2004. Rather, that evidence explained the disparity between the doctor's understanding of what defendant had received—20 Percocet pills—and what defendant had

[1] Defendant contends that her attorney's statement during opening argument was equivalent to an objection and sufficient to preserve the issue. The statement was vague and did not pose an objection either in form or substance. Most importantly, the statement was insufficient to prompt the court to make a ruling on the admissibility of the evidence. Cf. Shippee, 2003 VT 106, ¶ 12 (holding that objection to prior-bad-acts evidence as "propensity" evidence was "sufficiently specific to alert the trial court to defendant's theory behind the objection and to preserve the objection for our review").

received in reality—120 Percocet pills. In other words, the prior-bad-acts evidence demonstrated that defendant possessed relevant knowledge that she did not share with her doctor when seeking a refill of her prescription. This was essential to establishing the element of knowledge on defendant's part when she sought the prescription refill on December 17. See State v. Welch, 160 Vt. 70, 88 (1992) (concluding that crime of prescription fraud includes implied element of knowledge and intent). "We have explained that Rule 404(b) allows evidence of uncharged misconduct for any purpose other than proving the defendant's bad character." State v. Lipka, 174 Vt. 377, 391 (2002) (citation and quotation omitted). A valid purpose other than establishing bad character is evident here.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice