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State of Nebraska, appellee, v. Euelaunda L. Payne-McCoy, appellant.

818 N.W.2d 608

Filed August 17, 2012. No. S-11-530.

1. **Criminal Law: Judgments: Appeal and Error.** An appellate court will affirm a trial court's ruling that the defendant committed an uncharged extrinsic crime or bad act if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found with a firm conviction the essential elements of the uncharged crime.
2. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2010), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
4. **Rules of Evidence: Proof.** Under Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Cum. Supp. 2010), before a court can admit evidence of an extrinsic act in a criminal case, the State must prove by clear and convincing evidence, outside the presence of the jury, that the defendant committed the extrinsic act.
5. **Evidence: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
6. **Rules of Evidence: Other Acts.** Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010).
7. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.
8. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
9. **Evidence: Other Acts.** Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.
10. **Criminal Law: Words and Phrases.** Motive is defined as that which leads or tempts the mind to indulge in a criminal act.

11. **Rules of Evidence.** Evidence that is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), may be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), if its probative value is substantially outweighed by the danger of unfair prejudice.
12. **Evidence.** The probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the fact from the ultimate issue of the case.
13. **Evidence: Words and Phrases.** Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.
14. **Trial: Evidence.** Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court.
15. **Trial: Evidence: Jury Instructions.** In any situation in which a limiting instruction was given at the time evidence was introduced, NJI2d Crim. 5.3 must be given at closing if requested.
16. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded for a new trial.

Thomas C. Riley, Douglas County Public Defender, Scott C. Sladek, John L. Jedlicka, and Jessica P. Clark for appellant.

Jon Bruning, Attorney General, and Carrie A. Thober for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Euelaunda L. Payne-McCoy was charged with one count of possession of crack cocaine with intent to deliver and one count of criminal conspiracy. The conspiracy charge, as instructed, was that Payne-McCoy allegedly conspired with Lawrence Carbon to distribute crack cocaine. At trial, evidence of previous drug deals between a confidential informant and Payne-McCoy was admitted with a limiting instruction informing the jury that it could consider the evidence only for the purpose of identifying Payne-McCoy or to establish motive or intent. At the close of the case, the trial court denied defense counsel's oral motion to give the jury a written instruction on

the limited use of evidence of Payne-McCoy's prior bad acts. The jury convicted Payne-McCoy on both counts, and the court sentenced her to consecutive terms of 4 to 8 years' imprisonment. Payne-McCoy appeals. For the reasons set forth herein, we reverse the judgments of conviction and remand the cause for a new trial.

SCOPE OF REVIEW

[1] We will affirm a trial court's ruling that the defendant committed an uncharged extrinsic crime or bad act if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found with a firm conviction the essential elements of the uncharged crime. *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

[2] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2010), and the trial court's decision will not be reversed absent an abuse of discretion. *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

[3] Whether jury instructions given by a trial court are correct is a question of law. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *Id*.

FACTS

In October 2008, Douglas Cook worked for the Omaha Police Department doing controlled buys of narcotics. Through an acquaintance, Cook had met a woman called Green Eyes, who was later identified as Payne-McCoy. At trial, Cook testified that he had known Payne-McCoy for over a year and had purchased crack cocaine from her over 20 times before October 2008.

Cook did not deal with Payne-McCoy except to purchase crack cocaine. Cook would call her cellular telephone and ask whether he could "meet up." She would usually ask what "street" Cook was going to, which meant what dollar value

of crack cocaine he wanted to purchase. For example, "30th Street" meant buying $30 of crack cocaine. Cook's deals with Payne-McCoy were always arranged using this code. After Cook called Payne-McCoy and talked about the amount of crack cocaine to be purchased, a meeting place would be arranged, usually selected by her. The meeting location varied from purchase to purchase, but Payne-McCoy would personally deliver the crack cocaine to Cook.

On October 24, 2008, Cook met police officers in order to arrange a controlled purchase of crack cocaine from Payne-McCoy. Cook called her, using the telephone number he had always used to contact her. Payne-McCoy answered the telephone and asked to what "street" Cook was going. Using the code, Cook indicated he wanted to purchase $30 of crack cocaine. She told Cook to go to the University of Nebraska Medical Center (UNMC). Cook was to call her once he arrived at UNMC. Officers kept Cook under surveillance as he drove to UNMC.

When Cook reached the vicinity of UNMC, he again called Payne-McCoy's telephone number. This time, a male voice, unknown to Cook, answered the telephone. The man, later identified as Carbon, directed Cook to a meeting place near UNMC. Cook drove where he was directed, and a white Cadillac pulled up behind his car. Carbon was the only person in the Cadillac. He exited the Cadillac and walked to the driver's side of Cook's car. Carbon handed Cook the crack cocaine, and Cook handed him $30. Cook did not recognize Carbon, but he recognized the Cadillac as Payne-McCoy's because she had driven the car to previous drug deals. Cook had given the police her license plate number. Cook did not see Payne-McCoy on October 24, 2008.

Shortly after the drug deal, the Cadillac, which was registered to Payne-McCoy, was stopped by Omaha police. The driver was identified as Carbon. He was driving on a suspended license, and marijuana was found in the Cadillac.

The next day, October 25, 2008, Payne-McCoy reported her white Cadillac stolen. An officer later spoke to Payne-McCoy. She and Carbon, who was her boyfriend, had driven to a pancake feed in separate vehicles, and when they left, she gave

Carbon the keys to the Cadillac so he could get new tires. When Payne-McCoy went home, the side door of her house was open and Carbon's clothes were gone. The Cadillac was later recovered in Louisiana.

Payne-McCoy was charged with one count of possession of crack cocaine with intent to deliver and one count of criminal conspiracy. The instruction given to the jury regarding the conspiracy charge allowed the jury to consider whether Payne-McCoy conspired with Carbon to sell the crack cocaine to Cook. The jury was instructed as to the conspiracy that it had to find beyond a reasonable doubt that Payne-McCoy, or another person with whom she conspired (Carbon), agreed to arrange to deliver crack cocaine to Cook in exchange for money or agreed to deliver crack cocaine to Cook at UNMC or that Carbon delivered the crack cocaine and received $30 in exchange.

Prior to trial, the State filed a notice of its intent to offer evidence of Payne-McCoy's prior drug sales to Cook. The trial court held a rule 404 evidence hearing. Cook was the only person to testify, and he identified Payne-McCoy as the person he knew as Green Eyes. He testified that he had purchased drugs from Payne-McCoy over an 8- to 9-month period and as to the manner in which the drug deals were arranged. The court found that the State had proved by clear and convincing evidence that the prior bad acts were committed by Payne-McCoy. It specifically found that the evidence offered satisfied the requirements of rule 404(2) and that Payne-McCoy's prior bad acts were offered to show her *plan*, *knowledge*, and *identity*.

At trial, before Cook could testify how he knew Payne-McCoy, defense counsel raised a rule 404 objection. The objection was overruled, and the court cautioned the jury that the information was to be used solely to show *identity*, *motive*, or *intent*. Later, when the prosecutor asked a police officer if he knew whether Cook had purchased drugs from Payne-McCoy before October 24, 2008, defense counsel again objected on the basis of rule 404. The objection was overruled, and the jury was again instructed on *identity*, *motive*, or *intent*.

During the jury instruction conference at the end of the trial, defense counsel made an oral motion requesting a

written instruction regarding the limited purpose of the rule 404 evidence. The trial court refused to give the instruction. It concluded that it had already instructed the jury on the rule 404 issue when the evidence was received and that further instruction would highlight Payne-McCoy's prior bad acts and make it more difficult for the jury to correctly consider that evidence.

The jury found Payne-McCoy guilty of both counts. The trial court sentenced her to 4 to 8 years' imprisonment on each count, with the sentences to run consecutively. She received credit for 1 day served. Payne-McCoy appealed. We moved the case to our docket pursuant to our authority to regulate the dockets of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

On appeal, Payne-McCoy assigns, restated, that (1) the State did not meet its burden of proof at the rule 404 hearing, (2) the prior bad acts evidence was not relevant for any permissible purpose under rule 404, (3) the prior bad acts evidence was more prejudicial than probative even if it was admissible under rule 404, (4) the trial court erred in refusing to give jury instructions orally requested by Payne-McCoy, and (5) her sentences should have been ordered to run concurrently rather than consecutively.

ANALYSIS

Sufficiency of Evidence to Prove Prior Bad Acts

We first consider whether the evidence offered by the State was sufficient to prove by clear and convincing evidence that Payne-McCoy committed the prior bad acts. Payne-McCoy claims that the trial court erred by admitting evidence of her past drug deals with Cook because the State failed to prove by clear and convincing evidence that Payne-McCoy committed the prior criminal acts. We will affirm a trial court's ruling that the defendant committed an uncharged extrinsic crime or bad act if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found with a

firm conviction the essential elements of the uncharged crime. *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

At the rule 404 hearing, Cook testified that he had met Payne-McCoy about 8 or 9 months before October 24, 2008, through a mutual acquaintance. When they met, Cook did not know Payne-McCoy's real name, but knew her as Green Eyes. He had made multiple contacts with Payne-McCoy, all of which were to purchase crack cocaine. Payne-McCoy was present at the hearing, and Cook identified her as the person he knew as Green Eyes.

Cook's testimony established the similarities between the crime charged of possession of crack cocaine with intent to deliver and the prior bad acts. On every prior occasion, Cook called Payne-McCoy at the same telephone number. On each occasion, a code was used to establish the amount of crack cocaine Cook wanted to purchase. Payne-McCoy would direct him to a specific location, and the purchase was then completed.

[4] Under rule 404(3), before a court can admit evidence of an extrinsic act in a criminal case, the State must prove by clear and convincing evidence, outside the presence of the jury, that the defendant committed the extrinsic act. See *State v. Kofoed, supra*.

[5] Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Id.*; *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

Cook's testimony could produce a firm belief or conviction in the trier of fact that the prior bad acts were committed by Payne-McCoy. See *State v. Kofoed, supra*. Viewing the evidence presented by the State in a light most favorable to the prosecution, the court could have found the evidence was sufficient to prove by clear and convincing evidence that Payne-McCoy committed the prior uncharged crimes or bad acts.

Relevance of Rule 404
Prior Bad Acts

Payne-McCoy next argues that the prior bad acts were not relevant for any permissible reason under rule 404. The trial

court found that the evidence satisfied the requirements of rule 404(2) and that the evidence was offered for the purpose of proving Payne-McCoy's *plan*, *knowledge*, and *identity*.

[6,7] Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2). *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012). Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity. *Id*.

[8] An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *State v. Torres, supra*.

[9] The State had the burden to prove that the evidence was independently relevant for a proper purpose. Payne-McCoy did not deliver the crack cocaine to Cook, as she had done previously. Carbon delivered it, and therefore, the prior bad acts were relevant to prove the identity of the person who committed the crime charged. Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011). For example, previous sexual assaults were admissible to show identity in *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000), when the prior sexual assaults were similar to the charged crime and, with one exception, the victims had been featured in press articles indicating they were likely to be living alone.

Payne-McCoy's prior bad acts were overwhelmingly similar to the crime charged of possession with intent to deliver. They bore the same signature and were independently relevant.

On October 24, 2008, Cook called Payne-McCoy and was directed to UNMC. Once there, he called for further instructions. Carbon answered and directed Cook to a meeting place. In prior purchases, Cook had always received the crack cocaine from Payne-McCoy. Because Carbon, and not Payne-McCoy, delivered the crack cocaine to Cook, the identity of the perpetrator was an issue in the trial. See *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

The State sustained its burden to show by clear and convincing evidence that the rule 404 evidence was independently relevant for the purpose of identifying Payne-McCoy as the perpetrator of the charged crime of possession of crack cocaine with intent to deliver. We conclude that the evidence was relevant to establish Payne-McCoy's identity and that the trial court did not abuse its discretion in its admission of the rule 404 evidence to show identity of the perpetrator.

However, it was an abuse of discretion to admit the prior bad acts as proof of motive or intent. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and the evidence. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

[10] Payne-McCoy's prior drug deals with Cook were not admissible to show motive. Motive is defined as that which leads or tempts the mind to indulge in a criminal act. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011). For example, in *Collins*, evidence of a relationship between the defendant and two drug dealers was admissible to show the defendant's motive to kill the two drug dealers so he could take a shipment of cocaine, sell it, and avoid splitting the profits. Payne-McCoy's prior drug sales to Cook do not explain her motive to sell crack cocaine to Cook on October 24, 2008, except on the logic that she sold drugs to him before, so she sold to him again. Such thinking "is precisely what rule 404(2) is designed to prevent." See *State v. Collins*, 281 Neb. at 945, 799 N.W.2d at 709. Therefore, it was an abuse of discretion to admit the prior bad acts evidence to show motive.

Evidence of Payne-McCoy's prior drug sales to Cook was not admissible to show intent. Prior bad acts are not admissible

to show intent unless intent is at issue in the case. See *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012). In *Torres*, there was no question the crimes were intentional; the question was who committed them. Similarly, in the case at bar, there is no question that if Payne-McCoy was the person who committed the crimes, they were committed intentionally. Therefore, intent was not at issue, and evidence of Payne-McCoy's previous drug sales to Cook was not admissible to show intent. See *id*. The court abused its discretion in permitting the State to use Payne-McCoy's prior drug sales to Cook to show intent.

Probative Value Versus Unfair Prejudice

[11,12] We next consider whether the probative value of the evidence to show identity was substantially outweighed by the danger of unfair prejudice to Payne-McCoy. Evidence that is admissible under rule 404(2) may be excluded under rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). "The probative value of the evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the fact from the ultimate issue of the case." *State v. Pullens*, 281 Neb. 828, 858, 800 N.W.2d 202, 227-28 (2011). Accord *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[13,14] Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party. *State v. Pullens, supra*. Only evidence tending to suggest a decision on an improper basis is unfairly prejudicial. *Id*. Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. See *id*. Balancing the probative value of evidence against the danger of unfair prejudice is also within the discretion of the trial court. *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

Having determined that there was sufficient evidence to prove Payne-McCoy's prior bad acts and that the evidence was relevant to prove the identity of Payne-McCoy as the person

who committed the acts charged, we consider whether the evidence was unfairly prejudicial. The prior bad acts evidence was highly probative of the identity of the perpetrator; in fact, the State's case against Payne-McCoy may depend upon its admission.

The question is whether such evidence was unfairly prejudicial. There were overwhelming similarities between the prior bad acts and the crime charged in the case at bar. The trial court cautioned the jury as to the limited use of such evidence to prove identification. Therefore, we conclude that the probative value of the prior bad acts to show identity was not substantially outweighed by their prejudicial value and that Payne-McCoy was not unfairly prejudiced by the admission of such evidence.

Refusal to Give Written Instruction to Jury

Payne-McCoy alleges the trial court should have given a written instruction at the close of the evidence regarding the proper use of evidence of her prior acts. During the jury instruction conference, defense counsel made an oral motion to add a rule 404 instruction. Defense counsel stated:

> [D]ue to the fact that . . . jurors are not lawyers and don't necessarily have the same legal training, I think that for the purposes of . . . making it clear for them what 404 is and . . . the purpose[s for which] they can [use] the evidence . . . that they heard yesterday, I think, Judge, as a safety precaution it would be appropriate to have some sort of instruction to the jury reminding them what the Court . . . said to them yesterday regarding that particular testimony.

The trial court refused to give the requested instruction, stating that it had adequately instructed the jurors on rule 404 when the prior bad acts evidence was admitted. The court concluded that additional instruction would emphasize the prior bad acts and make it harder for the jury to properly use the evidence. It determined that once it had adequately instructed the jury on rule 404 evidence during the trial, it was not required to give an additional instruction.

[15] The court's refusal to give a written instruction on the limited use of rule 404 evidence was an abuse of discretion. Instructing the jury on rule 404 evidence during trial did not *eliminate* the court's duty to give, if requested, a written instruction on the limited purpose of the evidence; it *created* that duty. This court has made it clear that in criminal cases, "[i]n any situation in which a limiting instruction was given at the time evidence was introduced, NJI2d Crim. 5.3 must be given at closing if requested." *State v. Carter*, 246 Neb. 953, 967, 524 N.W.2d 763, 774 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997). Accord *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006). In addition, this court has specifically held that in reviewing the admissibility of other crimes evidence under rule 404(2), we will consider whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. See, *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012); *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

NJI2d Crim. 5.3A sets forth in general terms the required written instruction: "During this trial I called your attention to some evidence that was received for specified limited purposes; you must consider that evidence only for those limited purposes and for no other." The court should identify the evidence received and the limited purpose for which the jury may consider such evidence. A written instruction, if given properly, acts as a permanent reference to guide the jury during its consideration of evidence received. Oral instructions given during trial that limit the use of certain evidence for a particular purpose may be misinterpreted by the jury, especially in a lengthy trial that requires the jury to examine the evidence and to resolve numerous questions of fact. If given a proper written instruction, the jury may refer to the instruction when considering the limited use of the evidence relevant to that instruction. See, generally, Susan R. Schwaiger, Note, *The Submission of Written Instructions and Statutory Language to New York Criminal Juries*, 56 Brook. L. Rev. 1353 (1991).

Rule 404 instructions given during the course of the trial limiting the use of certain evidence received may also be confused with instructions that limit the use of other evidence for a different purpose. For example, some evidence may be limited to the proof of motive or opportunity, while other evidence may be limited by rule 404(2) to show the identity of the perpetrator. Preventing such confusion supports the giving of proper written instructions as a permanent reference for the jury regarding the limited use of the evidence received for a particular limited purpose.

The trial court's refusal to give NJI2d Crim. 5.3 on the limited use of the prior acts to prove identity was unfairly prejudicial to Payne-McCoy. None of the witnesses for the State saw her participate in the controlled buy on October 24, 2008. A man, Carbon, driving Payne-McCoy's car delivered the crack cocaine to Cook. The next day, Payne-McCoy reported that her car had been stolen.

Without the written instruction, the jury may have considered Payne-McCoy's previous criminal acts as evidence that she acted in conformity therewith and sold crack cocaine to Cook on October 24, 2008. This "is precisely what rule 404(2) is designed to prevent." *State v. Collins*, 281 Neb. 927, 945, 799 N.W.2d 693, 709 (2011). The trial court had a duty to give a written instruction to the jury on the proper limited use of evidence of Payne-McCoy's prior bad acts. Its failure to do so was an abuse of its discretion.

The failure to properly limit the use of the prior bad acts evidence involving Payne-McCoy and the refusal to give the jury a written instruction on the limited use of this evidence were reversible error. We cannot conclude the convictions were surely unattributable to such error.

Double Jeopardy

[16] Having found reversible error, we are required to determine whether all of the evidence admitted by the district court was sufficient to sustain Payne-McCoy's convictions. The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

The evidence admitted showed that Cook telephoned Payne-McCoy and arranged for the purchase of $30 of crack cocaine. There was evidence of Payne-McCoy's prior dealings with Cook which was overwhelmingly similar to the crime charged of possession with intent to deliver. There was sufficient evidence that Payne-McCoy conspired with Carbon to complete the sale of the crack cocaine to Cook and that Carbon used Payne-McCoy's car to complete the sale. Thus, all the evidence, whether properly admitted or not, was sufficient to sustain a guilty verdict of the crimes charged, and the Double Jeopardy Clause does not bar retrial.

CONCLUSION

The trial court admitted evidence of Payne-McCoy's prior sales of crack cocaine to Cook for the purpose of showing identity, motive, or intent. The evidence was admissible to show identity, but it was reversible error and an abuse of discretion for the court to admit the prior bad acts evidence to show motive or intent. During the jury instruction conference, the court denied an oral motion to instruct the jury on the limited use of this evidence. It was reversible error and an abuse of discretion to not give NJI2d Crim. 5.3 following Payne-McCoy's request.

Because the sum of all the evidence, whether erroneously admitted or not, was sufficient to sustain the convictions, we reverse the judgments of conviction and remand the cause for a new trial. We need not address any of Payne-McCoy's other alleged errors.

The judgments of conviction are reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CONNOLLY, J., concurring.

I concur in the majority's judgment. I write separately for two reasons. First, I disagree with the majority opinion's analytical framework for reviewing the admissibility of the other crimes evidence to prove Payne-McCoy's identity as the seller in the charged drug transaction and its reasoning for concluding that the evidence was admissible for this purpose. Second, although I agree that the court improperly admitted

the evidence to show motive or intent, I believe that the error requires harmless error analysis.

ADMITTING EVIDENCE TO PROVE IDENTITY

Generally, when rule 404(2)[1] evidence is introduced to prove the defendant's identity as the perpetrator, we have analyzed whether the other crimes are so similar that the trial judge could conclude that they bear the same signature.[2] But I disagree with statements in the majority opinion that the charged crime was overwhelmingly similar to the uncharged transactions because in the previous transactions, Cook had always received drugs from Payne-McCoy. Payne-McCoy did not deliver the drugs on October 24, 2008. So her past role in making deliveries is a difference, not a similarity, between the charged transaction and the uncharged transactions.

But showing that the same signature was present in both crimes is not the only method of showing the defendant's identity in the charged crime through evidence of other crimes.[3] Specifically, in some circumstances, courts have admitted a witness' testimony of a defendant's other sales to show how the witness could identify the defendant as the seller in the charged transaction.[4]

It is true that legal commentators have criticized courts for admitting evidence of a defendant's previous crimes when the prosecution only uses the other crimes to bolster the witness' credibility that he or she knew the defendant because of these criminal contacts. Commentators have argued that a court can allow a witness to testify that he or she knew the defendant without admitting the witness' highly prejudicial testimony about the nature of the contacts.[5] And evidence of a defendant's

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[1] Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010).

[2] See, e.g., *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

[3] See, e.g., 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5246 (1978 & Supp. 2012).

[4] See, *United States v. Aguirre*, 716 F.2d 293 (5th Cir. 1983); 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 3:07 (rev. ed. 2001).

[5] See, e.g., 1 Imwinkelried, *supra* note 4; 22 Wright & Graham, *supra* note 3.

previous drug transactions usually presents a danger that jurors will find guilt by reasoning that "'once a drug-dealer, always a drug dealer.'"[6]

So if Payne-McCoy had delivered the drugs herself, then I believe that evidence of her previous transactions with Cook would be inadmissible to show that Cook was a reliable witness who could identify her. But a court must consider the admissibility of evidence in the light of the factual context and trial issues. And the issue was not whether Cook could identify Payne-McCoy. Here, Payne-McCoy's identity as the seller was genuinely at issue because Carbon delivered the drugs in Payne-McCoy's vehicle, but she claimed that someone had stolen her vehicle. In addition, she did not tell Cook that she would sell drugs to him on the charged occasion, nor did she deliver drugs to him. So the issue was *how* Cook knew that he had arranged a drug buy from Payne-McCoy absent her presence during the actual exchange.

Of course, a defendant's past involvement in drug activities does not necessarily establish his or her identity as the seller in a charged transaction. "In evaluating other acts evidence in criminal prosecutions, the other act must be so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused."[7] To be independently relevant, the State must show a defendant's previous drug transactions are sufficiently linked to the charged transaction in a manner that does not depend solely upon establishing the defendant's character as a drug dealer.[8] Here, the State satisfied that requirement by showing two unique factors common to all the transactions: (1) Payne-McCoy's unique pattern of dealing with Cook up to, and including, the charged transaction; and (2) Cook's consistent use of her personal telephone number to initiate drug buys.

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[6] David P. Leonard, The New Wigmore: Evidence of Other Misconduct and Similar Events § 12.3 at 696 (Richard D. Friedman ed., 2009).

[7] *State v. Trotter*, 262 Neb. 443, 459, 632 N.W.2d 325, 339 (2001).

[8] See, *U.S. v. McBride*, 676 F.3d 385 (4th Cir. 2012); *U.S. v. Bell*, 516 F.3d 432 (6th Cir. 2008).

Cook testified that he had called the same telephone number each time that he arranged a drug buy from Payne-McCoy and that he had used the same street code to indicate the amount of drugs that he wanted to purchase. So under this evidence, jurors could reason that Payne-McCoy was the seller in the charged crime without relying on propensity reasoning.

Even apart from Cook's use of the same telephone number to initiate each transaction, Payne-McCoy's method of determining the amount of the drug purchase was unique enough that a person could conclude that same person had sold Cook drugs on every occasion. This conclusion did not require the jurors to reason that because Payne-McCoy had sold drugs in the past, she had likely done so in the charged transaction. Because the jurors could find the evidence relevant without relying on propensity reasoning, I agree that the independent relevance requirement under rule 404(2) was satisfied.

But in reviewing the court's admission of rule 404(2) evidence for abuse of discretion, independent relevance is not all that we require. As the majority opinion states, in reviewing a court's admission of rule 404(2) evidence for abuse of discretion, we will consider (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.[9] I believe that the majority opinion takes an improper analytical shortcut by effectively ignoring the third component of the abuse-of-discretion inquiry on the specific issue of identity.

I believe that this case illustrates a court could abuse its discretion in admitting rule 404(2) evidence for one purpose but not in admitting it for another purpose. And whether the error is harmless will often depend on considerations different than whether the court abused its discretion in admitting the

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[9] See *Glazebrook, supra* note 2.

evidence. Our harmless error analysis is not the same as our abuse-of-discretion inquiry.

Returning to the balancing component of the abuse-of-discretion inquiry under rule 404(2), the State had a substantial need to present this evidence. It had to show that Payne-McCoy was the seller, despite her stolen vehicle report and her absence when Cook and Carbon exchanged the money and drugs. The State had no other evidence to establish that Payne-McCoy was the actual seller and linked to a conspiracy to distribute the drugs. In addition, because the rule 404(2) evidence was independently relevant, I believe that the risk of unfair prejudice to Payne-McCoy was minimized. Therefore, I agree that the evidence's potential for unfair prejudice did not substantially outweigh its probative value for proving her identity as the seller.[10]

Under the jury instruction component, I believe that the court abused its discretion in admitting this evidence to prove Payne-McCoy's identity without giving the requested limiting instruction to the jury at the close of evidence. It is true that the court informed the jurors during trial that they could consider the rule 404(2) evidence solely for identifying Payne-McCoy or as evidence of Payne-McCoy's motive or intent. But a proper limiting instruction to guide the jury's deliberations is a crucial safeguard against unfair prejudice in the admission of rule 404(2) evidence.[11] "The limiting instruction is required because even though another proper purpose may exist for the admission of evidence under rule 404(2), there is always the danger that the jury will draw the forbidden inference of propensity."[12]

The lack of a limiting instruction is particularly important here because the court admitted the rule 404(2) evidence to show Payne-McCoy's identity as the perpetrator. Proving a defendant's identity as the perpetrator necessarily involves

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[10] See Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

[11] See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999), citing *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988).

[12] See *State v. McManus*, 257 Neb. 1, 9, 594 N.W.2d 623, 629 (1999).

an inference about Payne-McCoy's conduct. So when the State offers rule 404(2) evidence to prove identity, trial courts should vigilantly ensure that the theory of relevance does not require an inference about the defendant's character.[13] But from the court's admonition during trial, jurors would not have understood that they should not use the prior bad acts to determine whether Payne-McCoy acted in conformity with a bad character. The court specifically instructed the jurors that they could consider the evidence for determining Payne-McCoy's identity, motive, or intent. And the evidence was relevant to motive or intent only through propensity reasoning. So the court's admonition during trial ran counter to rule 404(2)'s requirement that other crimes evidence not be considered to determine that Payne-McCoy "acted in conformity therewith."[14]

Finally, I agree with the majority opinion that after a lengthy trial, jurors are likely to forget even a court's proper admonitions about rule 404(2) evidence when it was received. To avoid this, trial courts should ensure that limiting instructions are repeated in writing for the jury's deliberations.

ADMISSION OF PREVIOUS TRANSACTIONS TO PROVE MOTIVE OR INTENT WAS NOT HARMLESS ERROR

I agree with the majority opinion that the court improperly admitted evidence of Payne-McCoy's previous transactions with Cook to prove her motive or intent. But I believe that when we conclude that a trial court improperly admitted evidence of a defendant's uncharged crimes, the next step should be harmless error analysis.

An erroneous admission of evidence is prejudicial to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[15] So once we determined that the court erred in admitting evidence of Payne-McCoy's extrinsic crimes under rule 404(2), we need not

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[13] See 22 Wright & Graham, *supra* note 3.

[14] See § 27-404(2).

[15] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

analyze whether its potential for unfair prejudice outweighed its probative value.[16] Obviously, if we conclude that the court erred in admitting the evidence, a rule 403 analysis is unnecessary, except for determining whether Payne-McCoy was prejudiced by the error. Regarding the jury instructions, we are primarily interested in whether the court corrected its erroneous admissibility ruling or its earlier admonition to jurors about the purpose for which they could consider the evidence. But if the trial court instructed the jury that it could consider the evidence for the very purposes that we have concluded were improper under rule 404(2), then the court's instruction only compounded the error.[17]

So instead of considering the rule 403 component and the jury instruction component, we must conduct a harmless error analysis.[18] The majority opinion concludes that the evidence was not admissible to prove motive because the evidence was relevant for this purpose only through propensity reasoning. I agree.

Similarly, jurors likely used straight propensity reasoning to find the evidence relevant to proving Payne-McCoy's intent to sell drugs, i.e., that she intended to sell drugs because she had done this in the past. Alternatively, jurors could have reasoned that she intended to commit the act that would accomplish the goal implied by her motive—to get money from selling drugs.[19] But because using the evidence to infer her motive depended on propensity reasoning, determining that she intended to accomplish the goal implied by her motive also depended on propensity reasoning. In either case, the jurors could only determine that Payne-McCoy intended to sell drugs by reasoning that she acted in conformity with the bad character trait that the State established through evidence of her previous crimes.

Obviously, then, under rule 403, the potential for unfair prejudice was unacceptably high when the jury considered

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[16] See *Sanchez, supra* note 11.

[17] See *Bell, supra* note 8.

[18] See *Sanchez, supra* note 11.

[19] See 22 Wright & Graham, *supra* note 3, § 5240.

the evidence for motive or intent. And the court specifically admonished the jury that it should consider the evidence for these purposes. No final written instruction corrected its instruction during trial.

Because the jurors could find the evidence of the previous transactions relevant to motive or intent only by relying on propensity reasoning, I believe that the court's error could be harmless only if other evidence overwhelmingly established Payne-McCoy's guilt.[20] Instead, however, the rule 404(2) evidence was the State's strongest evidence of Payne-McCoy's guilt. So I do not believe that the error was harmless.

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[20] See, *U.S. v. Davis*, 547 F.3d 520 (6th Cir. 2008); *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

State of Nebraska, appellee, v. Leodan Alarcon-Chavez, appellant.

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1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
3. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
4. **Trial: Prosecuting Attorneys.** Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.
5. **Trial: Prosecuting Attorneys: Juries.** Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and