State v. Milhouse

122 Wash.App. 1051 (2004) | Cited 0 times | Court of Appeals of Washington | August 3, 2004

Concurring: Elaine Houghton, Karen G. Seinfeld

UNPUBLISHED OPINION

A jury convicted Gerard L. Milhouse of one count of unlawful delivery of cocaine with a school bus route enhancement. On appeal, Milhouse claims that a police officer's opinion testimony, prosecutorial misconduct, and the ineffective assistance of his counsel require reversal of his conviction. Milhouse also filed a Statement of Additional Grounds (SAG)[1] in which he challenges pro se the sufficiency of the evidence, the adequacy of the charging document, the timeliness of his trial, the effectiveness of his counsel, and the propriety of his 48-month sentence. We affirm.

FACTS

James Josey was a paid informant in the 'Hard Rock Five.' Hard Rock Five was the name the Special Investigation Division (SID) of the Tacoma Police Department gave to an undercover operation designed to curtail, if not eliminate, rampant drug dealing in the mid-downtown and Hilltop region of Tacoma. Josey testified at trial that while working as a paid informant on May 23, 2002, he bought crack cocaine from Chris Fowler and Milhouse. The events were video- and audiotaped separately and Josey was under surveillance by several Tacoma police officers, including SID Officer Bart Hayes. Hayes regularly selected and 'managed' informants and was managing Josey during the Hard Rock Five operation.

At trial, Josey testified that he saw two men, Fowler and Milhouse, walking down Tacoma Avenue South at Fifteenth Street. He made eye contact with Fowler, and Fowler approached Josey's car and asked what he wanted. When Josey requested '{a} twenty,' Fowler left the car and returned to Milhouse, who was standing on the sidewalk some feet away. II Report of Proceedings (RP) at 130. Josey testified that he saw Milhouse place something in Fowler's left hand. Fowler then returned to Josey's car, got in, and sold Josey a rock of cocaine for $20. Josey gave audio and visual signals[2] to olice officers indicating that he had completed the buy, and he left to meet with police officers at a prearranged 'staging area' to give them the cocaine. II RP at 130.

Tacoma Police Officers Jason Brooks and Brian Garrison were in a marked police car nearby. After Josey signaled that he had completed a buy, Brooks and Garrison were directed to approach and identify Milhouse and Fowler for a future arrest.[3] Fowler and Milhouse were walking down the sidewalk. Fowler was carrying a paper bag with an open bottle of beer inside and the officers decided

to use the prohibition on the public consumption of alcohol[4] to stop and identify the men. The officers asked the two to stop; Fowler stopped, but Milhouse continued walking away. Officers identified and released Fowler and then followed Milhouse. As the officers pulled their car up to Milhouse, he sprinted away and jumped a six-foot fence. Brooks chased Milhouse on foot into a walkway in an apartment complex, where he subdued Milhouse at gunpoint. Garrison advised Milhouse of his right to remain silent.

Milhouse did not speak or identify himself until he was taken to the police station and was booked on a charge of obstructing.[5] He then identified himself.

The State charged Milhouse with unlawful delivery of cocaine within 1,000 feet of a school bus stop. A jury convicted Milhouse as charged, and the judge sentenced him to a standard range sentence of 48 months confinement.

ANALYSIS

On appeal, Milhouse alleges that his conviction must be reversed because Hayes improperly commented on the veracity of the paid informant and the prosecutor committed misconduct when questioning witnesses and making closing argument. But at trial, Milhouse did not object to Hayes's testimony or the State's alleged misconduct. Essentially, Milhouse argues that we must review these claims either because they are (a) manifest errors of constitutional magnitude or (b) because his trial counsel was ineffective for failing to object to the errors at trial. We disagree.

Neither Hayes's testimony regarding the informant selection process nor the prosecutor's questions and argument rise to the level of a manifest error of constitutional magnitude. More importantly, the belatedly challenged testimony is not manifestly erroneous and we are not convinced that a reasonably competent defense counsel would have objected. In addition, we are not convinced on this record that Milhouse was prejudiced by his trial counsel's tactical decision to focus his defense on Milhouse's innocent bystander testimony and to suggest that the police were merely mistaken in thinking he was associated with Fowler.

Improper Opinion Testimony

Milhouse argues that he was denied a fair trial when Hayes gave the following opinion testimony without objection:

{State:} How are confidential informants picked?

{Hayes:} Well, I can tell you how I pick them. I look at their background. I don't want anybody who assaults the police. I don't want anyone who's a dangerous, violent felon. I don't want anyone who is genuinely dishonest. I want someone who knows the drug culture, who is honest, and someone who I

can rely on.

{State:} Are all confidential informants who go through the process . . . to become confidential informants accepted?

{Hayes:} No.

{State:} Why not?

{Hayes:} . . . I want someone who's credible because I look at every case I do with an informant as ending up right here in court and I want a guy who can testify honestly, whose background is pretty good, where it can't be torn apart.

II RP at 85-86.

A party may assign evidentiary error on appeal only on the specific ground made at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) cert. denied, 475 U.S. 1020 (1986). The important purpose served by this rule is to give the trial court an opportunity to prevent or cure error. See State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). By failing to object to or moving to strike the allegedly erroneous evidence, Milhouse did not give the trial court an opportunity to remedy the defect and thus did not preserve the issue for our review.

On appeal, Milhouse seeks to avoid issue preservation requirements merely by asserting a constitutional basis for the alleged error: '{T}his issue is properly before the Court, because the issue is one of constitutional magnitude.' Br. of Appellant at 13. An unpreserved manifest constitutional error is reviewable on appeal. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). But RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal, especially considering that criminal law is so largely 'constitutionalized' that most claimed errors can be phrased in constitutional terms. State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992).

In order to reach an issue as a manifest constitutional error, we must first undertake a four-step analysis: We must (1) determine whether the error raises a constitutional issue and (2) determine whether the error is manifest.[6] If the error is manifest, we will (3) address the merits of the issue. Finally, if we determine that error was committed, we (4) apply a harmless error analysis. Lynn, 67 Wn. App. at 345; State v. Jones, 71 Wn. App. 798, 809-10, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994). Thus, the exception to the preservation requirement is actually a narrow one, affording review only of certain constitutional questions. Scott, 110 Wn.2d at 687 (quoting Comment (a), RAP 2.5, 86 Wn.2d 1152 (1976)). See also City of Seattle v. Heatley, 70 Wn. App. 573, 584, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994).

In Heatley, the defendant, citing State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985), contended that the admission of an opinion on a criminal defendant's guilt is a 'manifest error affecting a constitutional right' under RAP 2.5(a)(3) that may be raised for the first time on appeal. 70 Wn. App. at 583. Although the Heatley court had already determined that the challenged testimony was not an opinion on guilt, the court explicitly rejected its prior holding in Carlin that the admission of testimony that was allegedly an opinion on guilt was an error of constitutional magnitude that could automatically be raised for the first time on appeal. In overruling its prior reasoning, Division One stated:

In Carlin, a police officer testified without objection that a police dog had located the defendant by following a 'fresh guilt scent'. 40 Wn. App. at 700. On appeal, this court held that the 'expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial' by 'invading the province of the impartial fact finder.' 40 Wn. App. at 701-02 However, Carlin provides no analysis and cites no relevant authority for the proposition that this is the type of 'manifest error' contemplated by RAP 2.5(a)(3).

Moreover, the court in Carlin did not expressly decide that the 'fresh guilt scent' testimony actually constituted an opinion on the defendant's guilt. See Carlin, 40 Wn. App. at 703 (testimony 'arguably' was an improper opinion). Instead, the court held that even if the testimony was error, it was harmless beyond a reasonable doubt. Carlin, 40 Wn. App. at 705. This approach, which eschews analysis of whether the claimed error is 'truly of constitutional magnitude,' has been superseded by decisions . . . attempting to give meaning to the concept of a 'manifest' constitutional error that will be reviewed for the first time on appeal.

Heatley, 70 Wn. App. at 583-84 (footnotes omitted).

Our opinions are inconsistent on whether testimony expressing the witness's opinion about the veracity of another witness is a manifest error of constitutional magnitude that need not be preserved by objection. Compare State v. Mendoza-Solorio, 108 Wn. App. 823, 834-35, 33 P.3d 411 (2001) (assuming, without deciding, that the facts raised a manifest constitutional error but finding error harmless), with State v. Wilber, 55 Wn. App. 294, 298-99, 777 P.2d 36 (1989) (analyzing officers' testimony as to witness's credibility as improper expert opinion testimony under ER 702 and not of 'constitutional magnitude,' and stating that '{a}rguably, the officers' opinions are also, inferentially, opinions on the defendant's guilt. However, to take such an expansive view of the prohibition against opinion testimony on the guilt of a defendant is unnecessary.').

Recently, in State v. Dolan, 118 Wn. App 323, 73 P.3d 1011 (2003), after holding (1) that the defendant had been denied his right to present evidence of his accuser/girlfriend's bias and (2) that the police officer and case worker had improperly been allowed to express their baseless opinions that Dolan's girlfriend, the mother of the injured child, was not responsible for the child's injuries, we added:

{A} witness may not give, directly or by inference, an opinion on a defendant's guilt. {State v. Madison, 53 Wn. App. 754, 760, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989).} To do so is to violate the defendant's constitutional right to a jury trial and invade the fact-finding province of the jury. {State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion).}

Dolan, 118 Wn. App. at 329.

But in Madison, cited by Dolan, Division One found no manifest constitutional error and held that because the defense had failed to object to the statements of a caseworker indicating that she believed the alleged child rape victim's story, the issue was not preserved for appeal. 53 Wn. App. at 762-63.[7] And Demery, also cited in Dolan, involved officers' taped statements that, according to the plurality, did not even amount to 'testimony.' 144 Wn.2d at 765.

Here, Hayes's testimony did not comment directly on Milhouse's guilt. Nor was it a direct comment on the innocence of another suspect, as in Dolan.

The State asked Hayes to describe generally his criteria for selecting paid confidential informants. Hayes's testimony expressed his personal belief that he generally selected those who were not 'genuinely dishonest,' i.e., paid informants who would testify well: 'I don't want anyone who is genuinely dishonest. I want someone who knows the drug culture, who is honest, and someone I can rely on.' II RP at 85.

Hayes's personal feelings on his own proficiency in selecting informants are irrelevant, but his testimony is not improper in the sense that Milhouse suggests.[8] And as applied to Josey specifically, Hayes's belief is also cumulative of his admissible, proper testimony: that Josey worked as a paid informant for the Tacoma Police Department; conducted two reliability buys (suggesting that Josey's reliability was questioned); was paid $40 an hour to perform controlled buys (also suggesting that Josey's reliability/credibility had to be corroborated); and had worked with SID for eight months and participated in controlled buys that led to approximately 100 arrests. Hayes's improper testimony did not rise to the level of a manifest constitutional error affecting Millhouse's right to a fair trial.

It is up to the jury to determine the credibility of the witnesses and the reliability of their testimony. See e.g. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). But nothing in this record suggests that Hayes's testimony interfered with that function. Moreover, Milhouse's counsel did not object to the testimony and no manifest error of constitutional magnitude appears in the record. Thus, Milhouse did not preserve the issue for our review.

Prosecutorial Misconduct

Milhouse also contends that he is entitled to be retried because the prosecutor committed misconduct by (1) asking Hayes questions designed to bolster the informant's testimony, (2) asking

Milhouse questions regarding the credibility of the State's witnesses, (3) arguing that the jurors had to find the State's witnesses were lying in order to believe Milhouse, and (4) improperly drawing attention to Milhouse's exercise of his right to remain silent.

We review allegedly improper arguments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). Failure to object to an improper remark constitutes a waiver of error, unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). See e.g. State v. Belgarde, 110 Wn.2d 504, 506-08, 755 P.2d 174 (1988) (unobjected-to remarks made by prosecutor in closing argument saying that defendant was 'strong in' the American Indian Movement and that its members were 'a deadly group of madmen' and 'butchers, that killed indiscriminately,' were highly prejudicial, introduced facts not in evidence, and had a substantial likelihood of affecting the verdict, mandating a retrial); State v. Reed, 102 Wn.2d 140, 147-48, 684 P.2d 699 (1984) (in murder prosecution in which defendant's sole defense theory was that he could not form intent to kill his wife due to his intoxication, prosecutor's improper comments during closing argument which appealed to hometown instincts of jury by emphasizing that defendant's counsel and expert witnesses were outsiders and that they drove expensive cars, resulted in prejudice to defendant and denied petitioner a fair trial in light of evidence supporting defendant's diminished capacity defense).

First, Milhouse contends that it was misconduct for the prosecutor to ask Hayes questions designed to bolster the confidential informant's testimony.

It is indeed misconduct for the prosecutor to seek directly or indirectly testimony as to whether another witness is telling the truth. State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996); State v. Padilla, 69 Wn. App. 295, 299, 846 P.2d 564 (1993). Such questioning invades the jury's province and is unfair and misleading. State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). But here, the prosecutor asked Hayes general questions about selecting informants. Milhouse was challenging the credibility of a confidential informant, whose familiarity with the drug culture comes from past drug use. Eliciting the testimony regarding the confidential informant selection process did not rise to the level of 'flagrant or ill-intentioned' conduct necessary to preserve the merits of this issue for appeal.

Second, Milhouse contends that the prosecutor improperly asked him to comment on the testimony of the police officers.

Questions put to one witness as to whether another is lying or not telling the truth are improper and constitute misconduct because they are designed to elicit personal opinion testimony, which is irrelevant and may be prejudicial. See Casteneda-Perez, 61 Wn. App. 354; State v. Barrow, 60 Wn.

App. 869, 875-77, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). But where, as here, conflicts in the testimony make questions about the discrepancies relevant, questioning a witness about those discrepancies may be proper. State v. Wright, 76 Wn. App. 811, 822, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). Here, the State asked Milhouse whether he 'disagreed' with Brooks's and Garrison's account that they chased him. But under the circumstances, such questioning was a proper inquiry into testimonial and evidentiary discrepancies of the sort described by Wright. And Milhouse did not object to these clarifying questions.

Third, Milhouse contends that in its closing argument, the State improperly asserted that the jury would have to find that the officers and the informant were lying in order to find Milhouse was not guilty.

In closing, the State contrasted Milhouse's account of his confrontation with the police with the officers' account: '{T}he State submits to you that even -- this isn't a mistaken impression on circumstances. This is absolutely 180 degrees opposite.' III RP at 215. The State added later, '{I}t makes absolutely no sense that the police would want to frame or add another individual who has absolutely nothing to do with this transaction . . . it makes no sense that the confidential informant would drive another person into it.' III RP at 218-19. Milhouse did not object to these comments, request a curative instruction, or move for a mistrial. We will not address alleged prosecutorial misconduct for the first time on appeal unless the alleged misconduct is so flagrant and ill-intentioned that a curative instruction could not have prevented the resultant prejudice. See Barrow, 60 Wn. App. at 876. The State's comments do not rise to that level.

In his fourth and final prosecutorial misconduct contention, Milhouse asserts misconduct based on the State's 'repeatedly drawing notice to the fact that {Milhouse} exercised his right to remain silent by not giving police information after he was arrested.' Br. of Appellant at 18. Again Milhouse did not object, and the record reveals that the State merely recited the facts of the case once saying: 'The defendant refuses to give his name. At that point . . . once he's placed in the holding cell, the defendant does finally identify himself.' III RP at 198-99. The record reveals that the State did not place undue emphasis on Milhouse's initial refusal to identify himself or imply that it proved Milhouse's guilt. And Milhouse does not argue that these remarks affected the outcome of the trial in any way.

We therefore hold that the State did not engage in reversible flagrant or ill-intentioned prosecutorial misconduct in its questioning or closing argument.

Ineffective Assistance: Failure to Object to Improper Opinion Testimony

Milhouse contends that his trial counsel was ineffective for failing to object to the Hayes opinion testimony set forth above.

To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. Stenson, 132 Wn.2d at 705. Prejudice occurs when there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, counsel's deficiencies must have adversely affected the defendant's right to fair trial to an extent that 'undermine{s} confidence in the outcome.' State v. Horton, 116 Wn. App. 909, 922, 68 P.3d 1145 (2003) (quoting Strickland, 466 U.S. at 694.); State v. Brett, 126 Wn.2d 136, 199, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996).

When trial counsel's actions involve matters of trial tactics, we hesitate to find ineffective assistance of counsel. State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And we presume that counsel's performance was reasonable. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). Where a witness does not expressly assert a belief in the truthfulness of another witness's account, the lack of objection does not demonstrate ineffective assistance of counsel. See Madison, 53 Wn. App. at 763-64.

Milhouse's counsel was not ineffective for failing to object to Hayes's testimony. Milhouse's theory of the case was that he was in the wrong place at the wrong time that he lived in the area and was merely walking down the street when Brooks and Garrison approached him and mistakenly believed that he was connected with Fowler, the man who sold Josey the drugs. This was a legitimate trial tactic to avoid a direct contradiction of the police view of the events, and it gave the defense the opportunity to argue to the jury that Josey and the police running the Hard Rock Five operation had mistakenly swept a bystander into their net. There was evidence from which the jury could have accepted Milhouse's version of the events: the jury saw the videotape of the events that night (which apparently revealed that, contrary to the testimony of Josey and the officers, there were other people on the streets that evening), heard the audiotape, and heard testimony from Josey and the officers, who chased Milhouse only after stopping and identifying Fowler. Defense counsel's decision not to object to Hayes's testimony was a reasonable tactical decision consistent with his defense theory, and not, as Milhouse claims, ineffective assistance of counsel.

Statement of Additional Grounds for Review

We next address the contentions contained in Milhouse's SAG.[9]

Sufficiency of the Evidence

Here, Milhouse contends that there was insufficient evidence to convict him of delivery of a controlled substance because Fowler did not testify that Milhouse had provided him with the cocaine and only Josey's 'hearsay' testimony incriminated him.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). 'A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.' Salinas, 119 Wn.2d at 201.

Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992).

Josey testified in court that he asked Fowler for a 'twenty,' saw Fowler go to Milhouse, saw Milhouse pass something to Fowler, and bought a 'rock' from Fowler immediately afterwards. There was sufficient evidence to convict Milhouse. In addition, Milhouse ran from the police, giving rise to an inference of consciousness of guilt. State v. Bruton, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965). See Illinois v. Wardlow, 528 U.S. 119, 124-25, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). The jury was entitled to believe Josey's account of the transaction, much of which was corroborated by the audio- and videotapes they viewed.

Necessary Elements

Milhouse also contends that his charging document used inartful language and did not include all essential elements of the crime of which he was convicted. He asserts that he was charged with RCW 69.50.401, but actually convicted under RCW 69.50.407, conspiracy. Milhouse appears to be arguing that the information does not specifically charge Milhouse as Fowler's accomplice.

Accomplice liability is not an alternative means of committing a crime. State v. Haack, 88 Wn. App. 423, 428, 958 P.2d 1001 (1997), review denied, 134 Wn.2d 1016 (1998). Moreover, the elements of the crime are the same for both a principal and an accomplice. State v. Carothers, 84 Wn.2d 256, 264, 525 P.2d 731 (1974), overruled on other grounds by State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984). An information need not allege accomplice liability in order to state the nature of the charge charging the accused as a principal is adequate notice of the potential for accomplice liability. State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402 (2003), review granted, 151 Wn.2d 1009 (2004); State v. Rodriguez, 78 Wn. App. 769, 774, 898 P.2d 871 (1995), review denied, 128 Wn.2d 1015 (1996). Here, the information stated:

That CHRIS FOWLER and GERARD L MILHOUSE, in the State of Washington, on or about the 23rd day of May, 2002, did unlawfully, feloniously, and knowingly deliver to another, a controlled substance, to-wit: COCAINE, a narcotic, classified under Schedule II of the Uniform Controlled Substance Act, and such delivery took place within 1000 feet of a school bus route stop, contrary to RCW 69.50.435, and adding additional time to the presumptive sentence as provided in RCW 9.94A.310/9.94A.510, contrary to RCW 69.50.401(a)(1)(i), and against the peace and dignity of the State of Washington.

Clerk's Papers (CP) at 1-2. The information stated all essential elements of the offense and likewise provided sufficient warning of potential accomplice liability.

Ineffective Assistance (Failure to Impeach Key Witness By Evidence of Conviction)

Milhouse next contends that his attorney failed to impeach Josey, the confidential informant, with a 1995 drug conviction. In support, he cites ER 609. The record shows that Josey was arrested but not convicted of the drug charge. Moreover, ER 609 does not control. Nevertheless we address the substance of Milhouse's contention.

The State moved in limine to exclude mention of Josey's prior drug charge under 'ER 401 (irrelevance), ER 403 confusion to the jury, and prejudice far outweighs any probative value, and 404(b) (prior bad acts inadmissible to prove act in conformity therewith).' CP at 25. At a pretrial hearing, the defense argued that it should be allowed to introduce the contract:

{I}t is anticipated under cross-examination that Mr. Josey will correctly reveal how it is that he became involved as an informant. That may have to do with the fact that he was originally put on a contract as a result of this felony drug case in 1995. We would expect to be able to establish that connection, the fact that there {is} some criminal history without naming specific crimes.

I RP at 15-16. The State responded that the arrest and resulting contract actually fell under prior bad acts, not convictions, and that a contract completed six years ago was not relevant and was potentially confusing. The State then moved to exclude the evidence under ER 401, 403, and 404(b). The court excluded the evidence of the contract: 'At this point I'm going to exclude mention of it. The remoteness is the issue and it is a prior bad act.' I RP at 17. The court also stated:

Certainly I think the Defense can ask the witness about his involvement and knowledge of the substances and how he has that knowledge. . . . {T}hat's allowing you to get into prior bad acts because I assume that will all have to do with his involvement in the drug scene. . . .

I'm making that statement from having done a lot of these cases over the years. I think those are all fair questions even though they will bring out bad acts. Asking him specifically if he has a conviction in '95 [10] and if he worked it off, I'm prohibiting Defense from bringing that out because it's so

remote. For closer in time or if he were actually doing one, it would be a completely different ruling.

I RP at 17.

The State brought out Josey's prior rock cocaine use on direct examination. On cross, the defense asked Josey whether he had any current drug charges pending or if he had been under the influence of drugs in the last five months. Josey replied no to both questions.

Defense counsel is not ineffective merely because his strategy is sometimes unsuccessful. See State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737, cert. denied, 459 U.S. 842 (1982). Moreover, Milhouse does not argue that the court's decision to exclude the evidence was in error.[11]

The record does reveal that Josey had two third degree driving while license suspended convictions. But ER 609(a) provides that

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted . . . or (2) involved dishonesty or false statement, regardless of the punishment.

Because Josey's prior convictions clearly did not involve dishonesty, Milhouse's counsel was not ineffective for failure to object to their exclusion.

Timely Trial

Milhouse contends that he was not afforded a timely trial as required by former CrR 3.3 (2001).

Under former CrR 3.3(c)(1), a defendant in custody must be brought to trial within 60 days of arraignment. See State v. Striker, 87 Wn.2d 870, 557 P.2d 847 (1976). When the defendant is in custody, a defendant 'shall be arraigned not later than 14 days after the date the information or indictment is filed.' Former CrR 3.3(c)(1). Under former CrR 3.3(e), a party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule must state the objection to the court at the time of the arraignment. If the court rules that the objection is correct, it must establish and announce the proper date of arraignment. CrR 3.3(e). See State v. Greenwood, 120 Wn.2d 585, 599, 845 P.2d 971 (1993).

The State filed the information on June 24, 2002,[12] and the court issued a bench warrant. Milhouse was brought into custody and arraigned on July 17, 2002. Milhouse objected to untimely arraignment, making the constructive arraignment date July 8. On August 21, Milhouse waived his timely trial rights until October 23, 2002, and the court granted his request to continue his trial to October 9.

The period from August 21 to October 23 is not included in the timely trial calculation. See former CrR 3.3(g)(3) and CrR 3.3(h). Therefore, the time that passed from constructive arraignment until Milhouse waived timely trial was only 44 days, well within the 60-day timely trial limit.

Improper Sentence

Finally, Milhouse contends that he should have been sentenced to a standard range of zero to 90 days because the crime he was charged with was 'a Schedule II.' SAG at last unnumbered page. This is incorrect. The severity level of the crime Milhouse was convicted of, RCW 69.50.401(a)(1)(i), is VIII. Former RCW 9.94A.515 (2001). The sentencing grid at former RCW 9.94A.510(1) (2000) provides for a standard range sentence of 21-27 months for level VIII crimes with an offender score of zero. With a school bus route enhancement,[13] however, the standard range was 45-51 months. The trial court did not err when it sentenced Milhouse to 48 months, the midpoint of the standard range.

Despite the asserted errors set forth in Milhouse's SAG, Milhouse was properly charged, his counsel was effective, his trial fair, and his sentence appropriate. We therefore affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

HOUGHTON, J.

SEINFELD, J.P.T.

1. RAP 10.10.

2. The car was wired and equipped with a camera that filmed the car interior.

3. As Garrison testified, 'Usually what we do is we use some form of a ruse . . . as to why we're contacting the subject so as not to give away the operation.' I RP at 64.

4. See Tacoma Municipal Code sec. 8.20.050 ('Except as permitted by the Washington State Liquor Act, no person in a public place shall open a package containing liquor, possess an opened package containing liquor, or consume liquor.').

5. RCW 9A.76.020.

6. 'Manifest' means unmistakable, evident, or indisputable, as distinct from obscure, hidden, or concealed the error must

have had 'practical and identifiable consequences in the trial of the case.' Lynn, 67 Wn. App. at 345.

7. Likewise, in State v. Stevens, 58 Wn. App. 478, 495, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990), Division One cited to Madison and again held that a defendant failed to preserve for review his objection to a caseworker's testimony in that case that it was unusual for young children to lie when disclosing sexual abuse. Cf. State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996) (reversing conviction based on prosecutorial misconduct where prosecutor asked mother whether she thought her children were telling the truth).

8. Hayes's statements were also self-evident most people would not continue to employ someone whom they believed was not doing the job he was being paid for.

9. See RAP 10.10.

10. The trial court was incorrect: Josey did not actually have a conviction.

11. Admission of evidence is within the sound discretion of the trial court and will not be disturbed on review absent a showing of abuse of discretion. State v. Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987).

12. The information was dated June 20, 2002, but was not filed until June 24.

13. See RCW 69.50.435 and former RCW 9.94A.510(6).