

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1996 SESSION

**FILED**

May 9, 1996

**Cecil W. Crowson**  
Appellate Court Clerk

**STATE OF TENNESSEE,**

Appellee,

V.

**SUSIE LOWE,**

Appellant.

)  
) C.C.A. No. 01C01-9409-CC-00313  
)  
) Houston County  
)  
) Hon. Leonard W. Martin, Judge  
)  
) (Sale of Cocaine)  
)  
)

FOR THE APPELLANT:

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**PAUL G. SUMMERS,**  
Judge

## OPINION

The appellant, Susie Lowe, was convicted following a jury trial of sale of cocaine. Her sole issue in this appeal is whether the trial court erred by allowing into evidence her prior drug use and dealings. We affirm the conviction.

The record reveals that Robert Kizer, a codefendant, approached a car occupied by two confidential informants and asked them if they "needed anything." One of the informants responded that he needed "a twenty." Kizer walked to the appellant's vehicle, received the cocaine from the appellant and returned to the confidential informant. After accepting the money from the informant, Kizer returned to the appellant's vehicle and handed her the money. Both the appellant and Kizer were charged with conspiracy to sell cocaine.<sup>1</sup> The appellant gave a videotaped statement at the police station in which she admitted to cocaine purchases, use and sale. At least one of these prior sales involved the same confidential informants.

Appellant made a motion in limine on the morning of trial to exclude the videotaped statement as well as other statements she had made to Agent Mike Shires. In her statements she did not discuss the facts surrounding the sale at issue and made no direct admission of her participation in it.

At the hearing on the motion in limine, Agent Shires testified that the appellant had given a videotaped statement in which she admitted to prior drug sales and use. Further, he spoke of statements the appellant had made to him and other agents before and after her arrest. In these statements, the appellant similarly said that she had purchased and sold drugs. She also acknowledged her cocaine addiction. The appellant wanted to become a confidential informant in exchange for "help on her charges." The trial judge viewed the videotape.

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<sup>1</sup>The trial judge granted a motion for judgment of acquittal as to the conspiracy count following the state's proof.

Appellant's counsel announced his intention to pursue a casual exchange theory. Following the mandates of Tenn. R. Evid. 404(b), the trial judge concluded that the statements would be admissible. He surmised that because the appellant was charged with conspiracy, the evidence was admissible to show common scheme or plan and identity. He further concluded that the probative value outweighed the prejudice.

At trial, the videotape was played in its entirety. Agent Shire gave substantially the same testimony as he had given at the motion in limine hearing. No objection was made to the videotape or to the oral statements. In her brief, the appellant attacks only one oral statement made by Agent Shire during the trial.<sup>2</sup>

The admission and exclusion of evidence are within the sound discretion of the trial judge. State v. Baker, 785 S.W.2d 132 (Tenn. Crim. App. 1989). This discretion will not be disturbed unless it has been arbitrarily exercised. Id. Here, the trial judge properly conducted the 404(b) analysis before concluding that the evidence was relevant to show a common scheme or plan. Further, based on appellant's casual exchange theory, it is likely the evidence would also have been useful to show absence of mistake. Following our review of the videotape and oral statements, we find no abuse of discretion.

The judgment of the trial court is affirmed.

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<sup>2</sup>Agent Shires testified at trial as follows: "I can't give you the exact number [of occasions], but every time I've been up here, she kind of pops up and talks to me, wanting to assist and telling me she needs help and that she'd done wrong, she had sold crack cocaine. No specific names when she comes up here, mostly it's just wanting to assist us and try to get some help on her charges."

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PAUL G. SUMMERS, Judge

CONCUR:

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GARY R. WADE, Judge

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JOSEPH M. TIPTON, Judge