IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-385

Filed: 6 March 2018

Brunswick County, No. 13 CRS 680

STATE OF NORTH CAROLINA

v.

KEVIN LYNDELL DAVIS

Appeal by defendant from judgments entered 19 August 2015 by Judge James F. Ammons Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 12 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan D. Shaw, for the State.

Kimberly P. Hoppin for defendant-appellant.

BRYANT, Judge.

Where the trial court properly allowed Rule 404(b) evidence of a similar transaction and gave a proper limiting instruction to the jury, we find no error in the ruling of the trial court.

On 18 March 2013, a Brunswick County grand jury indicted defendant Kevin Lyndell Davis for the sale and delivery of a Schedule II controlled substance and the

possession with intent to sell and deliver a Schedule II controlled substance. The matter came on for trial in Brunswick County Superior Court, before the Honorable James F. Ammons, Jr.

The evidence presented at trial provided that in February 2013, a confidential informant ("CI") contacted the Brunswick County Sheriff's Department about making a controlled purchase of cocaine on behalf of the Department. The CI had defendant's phone number and had purchased drugs from him three or four times in the past. He always bought from defendant at the same location: 800 McMilly Road in Brunswick County. Law enforcement agents set up a controlled purchase with the CI on 20 February 2013. The CI met with two agents prior to the purchase at a staging area. The agents searched the CI, confirmed that he did not have any money or other items on his person, and then issued him money to buy an "eight-ball" of crack cocaine—approximately 3.5 ounces. The agents also gave the CI an audio recording device and a small video camera that was disguised as a key fob. The CI then drove to 800 McMilly Road.

The CI successfully recorded defendant's voice during the controlled purchase, and the State introduced the recording into evidence at trial. Upon arriving at 800 McMilly Road, the CI approached a man that he initially mistook for defendant. However, defendant approached the CI and the controlled purchase began. The CI and defendant haggled over the price, quality, and quantity of the drugs, and then

settled on an amount. Defendant became suspicious that the key fob was a recording device and asked to see it, but the CI declined.

After purchasing the crack cocaine, the CI returned to the staging area and met with the agents. He gave the agents the recording devices and an off-white substance, which was packaged in a sandwich bag. The agents then conducted another search of the CI to ensure that he did not have any additional items on his person. The substance was later tested and confirmed to be 1.15 grams of crack cocaine.

At trial, the State introduced evidence that the agents continued their investigation of defendant and arranged a second controlled purchase on 20 June 2013 with a different CI. After the June purchase, the agents intended to arrest defendant. They met with the CI before the controlled purchase and provided him with marked money and a recording device. The CI then went to the buy location on McMilly Road and made the purchase from defendant while the agents watched from the perimeter. After backing away from the CI's car, law enforcement attempted to stop defendant, but he fled and threw a white package onto the ground. He was eventually apprehended and taken into custody. Additionally, the money provided to the CI for the controlled buy was found on defendant's person. After the controlled purchase, the CI gave the agents an off-white substance in a plastic bag and an audio recording device.

The jury found defendant guilty of the sale or delivery of cocaine and possession with intent to sell and deliver cocaine, based on the 20 February 2013 incident. The trial court sentenced defendant to consecutive active terms of 19–32 months and 11–23 months. Defendant timely filed a *pro se* written notice of appeal.

Petition for Writ of Certiorari

After filing a written notice of appeal with the Brunswick County Clerk of Superior Court, defendant filed a petition for writ of certiorari with this Court. In this petition, defendant acknowledged that his *pro se* notice of appeal failed to conform with the requirements set forth in our Rules of Appellate Procedure, Rule 4(a). Defendant argues that issuance of the writ is appropriate because his intent to appeal from the judgments entered against him can be fairly inferred from the notice and the State is not prejudiced by the written notice. We agree and grant defendant's petition.

In his sole argument on appeal, defendant contends that the trial court erred by allowing the State to introduce evidence of the 20 June 2013 drug transaction, for which defendant was separately charged, during the trial on defendant's 20 February 2013 drug transaction. Defendant moved to exclude the evidence pertaining to the 20 June 2013 drug transaction at trial, but the trial court denied the motion, finding

that the evidence was relevant, showed pattern and identity, and was not too remote in time. We reject defendant's argument.

Pursuant to Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017). However, evidence of "other bad acts" may be admissible as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.*; *see also State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (holding that the permissible purposes listed in Rule 404(b) are nonexclusive). Rule 404(b) is a

> general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990). "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159.

Our Supreme Court has stated that although Rule 404(b) is a rule of inclusion, it is still "constrained by the requirements of similarity and temporal proximity." *Id.* at 131, 726 S.E.2d at 159 (citation omitted). In order to demonstrate similarity, "there

must be shown some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes." *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983) (citations omitted). However, the similarities need not "rise to the level of the unique and bizarre." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citation omitted). "The determination of similarity and remoteness is made on a case-by-case basis, and the required degree of similarity is that which results in the jury's '*reasonable inference*' that the defendant committed both the prior and present acts." *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (citation omitted).

Here, the trial court found that the 20 February and 20 June 2013 transactions were sufficiently similar to admit evidence of the 20 June 2013 transaction at trial. While the State did introduce evidence identifying the off-white substance recovered from the CI after the 20 February transaction as cocaine, the State did not introduce evidence of the chemical composition of the substance recovered during the 20 February transaction, though a law enforcement officer testified that the substances were similar in appearance and texture. A review of the record indicates that both CIs telephoned defendant to purchase crack cocaine; both CI's agreed to a time and place to meet defendant; both purchase transactions occurred near the same location, McMilly Road; when each CI arrived, defendant approached the CI's vehicle; and after each purchase, both CIs returned to a law enforcement handler with a similar

off-white substance, reputed to be cocaine. The similarities between the 20 February and 20 June transactions are not merely generic characteristics of a drug crime. *See State v. Welch*, 193 N.C. App. 186, 192, 666 S.E.2d 826, 830–31 (2008) ("[A] drive-by, street-level drug sale is not a general substantive crime in and of itself and not all drug sales are conducted in this manner. Rather, it is a *modus operandi* by which a party carries out the sale or distribution of drugs."). Evidence of the characteristics of both the 20 February and 20 June 2013 controlled cocaine purchases supports the inference that the same person committed both crimes and did so in a similar place and manner. Therefore, the trial court did not err by finding the evidence regarding the 20 June 2013 purchase relevant and admissible.

We further conclude that the trial court did not err in finding that the 20 June 2013 purchase, occurring four months following the indicted conduct on 20 February, was not too remote in time. Our Supreme Court has held that there is no bright-line test governing temporal proximity of Rule 404(b) evidence. *State v. Maready*, 362 N.C. 614, 624, 669 S.E.2d 564, 570 (2008). Given that both instances involved an ongoing investigation of defendant and controlled purchases using a CI—which necessarily take time to set up and carry out—we find the four-month gap in time to be sufficient for purposes of Rule 404(b) admissibility.

Additionally, we find that the trial court did not abuse its discretion in admitting the testimony in light of the Rule 403 balancing test. The trial court gave

limiting instructions that the jury was to consider evidence of the 20 June 2013 controlled purchase only for the limited purpose of establishing identity, motive, knowledge, or plan. "[W]e assume that jurors are people of character and sufficient intelligence to fully understand and comply with the court's instructions." *State v. Raye*, 73 N.C. App. 273, 275–76, 326 S.E.2d 333, 335 (1985). Accordingly, the trial court did not err in allowing the Rule 404(b) evidence at trial.

NO ERROR.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).