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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-857

Filed: 20 March 2018

Wake County, No. 15 CRS 206387-88

STATE OF NORTH CAROLINA

v.

ALBERT DESHAWN DENT

Appeal by defendant from judgment entered 13 October 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 20 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph A. Newsome, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

TYSON, Judge.

Albert Deshawn Dent ("Defendant") appeals from judgments entered upon jury verdicts convicting him of possession of a firearm by a convicted felon, intentionally maintaining a dwelling for keeping or selling controlled substances, trafficking in cocaine by possession, and misdemeanor possession of marijuana. We find no error in the jury's convictions. We vacate and remand the consolidated judgment for re-

sentencing in 15 CRS 206387 for possession of a firearm by a felon, maintaining a dwelling and possession of marijuana.

I. Factual and Procedural Background

On 14 March 2015, Raleigh Police Detective Camacho ("Det. Camacho") was informed by a confidential informant that a man known as El Charro was selling cocaine out of his apartment E at 1300 Steinbeck Drive. Det. Camacho gave this informant $60 in "prerecorded" money, $20 bills which had been previously photocopied for record-keeping purposes, to use in a controlled purchase with El Charro. Det. Camacho drove the informant to the location of the controlled buy, and after the informant had met with El Charro, El Charro went into apartment 1300 E, and returned, handing the informant what was later identified as cocaine. At that point, the informant no longer had the prerecorded money.

Det. Camacho continued to observe the apartment, and later saw El Charro go across the hall to the door of apartment H at 1300 Steinbeck Drive, knock, and exchange something with the resident, before returning to apartment E. At trial, Det. Camacho testified that this exchange, based on his "training and experience," appeared to be "a hand-to-hand drug transaction." Det. Camacho observed multiple such transactions with various individuals, each arrived at the door of apartment H and exchanged something. He observed one individual go into apartment E after

completing the exchange at apartment H. Det. Camacho saw someone emerge from apartment H.

On 16 March 2015, Det. Camacho returned to investigate this individual, and on closer inspection, observed the strong smell of marijuana coming from apartment H. He ultimately identified Defendant as this individual in apartment H.

With the information Det. Camacho had gathered from: (1) his observations of the individuals coming to the door of apartment H at 1300 Steinbeck Drive, (2) that address being listed as Defendant's on the automobiles he saw Defendant drive; and, (3) the marijuana odor emanating from apartment H, he applied for and obtained a search warrant.

On 18 March 2015, Det. Camacho, along with other officers, executed two search warrants at apartments E and H. In their search of apartment H, officers found cocaine, marijuana, guns, and Western Union money order documents. Defendant was subsequently arrested. Officers found more than $600 in currency on Defendant's person. Included in that money found on Defendant was one of the prerecorded $20 bills the informant had paid to El Charro during the controlled drug buy.

Defendant was indicted for two counts of possession of a firearm by a felon, as well as one count each of maintaining a dwelling for keeping or selling controlled substances, trafficking in cocaine by possession, and possession with intent to sell or

deliver marijuana. Prior to trial, Defendant filed a motion *in limine* to exclude evidence of other crimes, wrongs, or acts, including, *inter alia*, his possession of the prerecorded $20 bill. Defendant's motion was heard pre-trial. The trial court denied it. At trial, prior to Det. Camacho's testimony about discovering the prerecorded $20 bill on Defendant, Defendant once again objected. The trial court overruled the objection, but prohibited the State's use of the term "buy money" with regard to the prerecorded $20 bill recovered from Defendant.

In the search warrant application, Det. Camacho had averred that "multiple subjects" entered and exited apartment H. At trial, Det. Camacho testified that only Defendant did so. Defendant moved for mistrial, and alleged Det. Camacho's testimony was inconsistent with his statement in the application for the search warrant. Defendant argued this discovery undermined the credibility of the affidavit supporting the search warrant, and was grounds for mistrial. The trial court denied Defendant's motion.

The jury found Defendant guilty on all counts. The trial court arrested judgment on one count of possession of a firearm by a felon, and sentenced Defendant to an active term of a minimum of 35 months and a maximum of 51 months for the trafficking count. The court consolidated judgment on the remaining offenses and sentenced Defendant to a suspended sentence of a minimum of 13 months and a

maximum of 25 months with 24 months of supervised probation, to commence upon his release from prison for the trafficking offense. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) and N.C. Gen. Stat. § 15A-1444 (2017).

III. Motion *in Limine*

Defendant asserts the trial court erred by denying his motion *in limine* to exclude the prerecorded $20 bill discovered on his person at arrest as improper Rule 404(b) evidence. He argues that this evidence was unduly prejudicial. We disagree.

A. Standard of Review

"The decision of whether to grant [a motion *in limine*] rests in the sound discretion of the trial judge." *State v. Hightower*, 340 N.C. 735, 746-47, 459 S.E.2d 739, 745 (1995). "[A] trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Burrus*, 344 N.C. 79, 91, 472 S.E.2d 867, 875 (1996) (citation omitted).

B. Rule 404(b)

The trial court determined the money recognized by the officer as "buy money," and used in an investigation of drug activity across the hall from Defendant's apartment four days earlier, was not 404(b) evidence. The court found the $20 bill

"simply indicated[d] that there was some transaction between wherever that buy money first went" and that it "ultimately ended up in this [D]efendant's hand." Defendant relies upon *State v. Johnson,* 13 N.C. App. 323, 185 S.E.2d 423 (1971) and *State v. Moctezuma*, 141 N.C. App. 90, 539 S.E.2d 52 (2000) to support his argument that this evidence purports to prove he was the supplier of cocaine to El Charro and participated in other criminal cocaine deals, crimes of which he was not charged.

In *Johnson,* the trial court allowed the prosecution to offer evidence of a transaction between the defendant and a confidential informer two weeks prior to the search in question at trial. 13 N.C. App. at 324, 185 S.E.2d at 424-25. This Court recognized the general rule that evidence attempting to prove another crime is inadmissible. *Id.* This Court held the evidence was admissible because it tended to show knowledge, intent, and motive thus falling into an exception to the general rule. *Id.* at 325, 185 S.E.2d at 425.

In *Moctezuma*, law enforcement officers testified that they saw the defendant, with others, enter a van, travel some distance, exit the van and enter a trailer, then leave the trailer and return to the van. 141 N.C. App. at 91, 539 S.E.2d at 54. Defendant was apprehended and charged with trafficking by possession of an amount of cocaine officers had observed the defendant place under the seat of the van.

The defendant testified that he lived in the front of the trailer, and another man lived in the back. *Id.* at 92, 539 S.E.2d at 54. On cross-examination, the State

questioned the defendant about illegal drugs and paraphernalia found in the bathroom of the trailer, which allegedly belonged to the other resident. *Id.* The defendant had not been charged with possession of these substances, "but the trial court instructed the jury that they could consider the drug evidence for the purpose of showing defendant's awareness of cocaine in the van." *Id.*

A panel of this Court held:

> There was no evidence introduced at trial to directly link defendant to the drugs seized at the trailer in which he occupied a bedroom. Defendant was not charged with any offense in connection with the drugs seized at the trailer, and defendant consistently denied any knowledge of such drugs.

Id. at 94-95, 539 S.E.2d at 56. This Court held the introduction of this evidence was irrelevant and prejudicial, and that defendant was entitled to a new trial. *Id.*

Presuming the prerecorded $20 bill discovered on Defendant's person at his arrest was Rule 404(b) evidence, it would have been properly admitted under our statutes and current case law. "Evidence 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge[.]" N.C. Gen. Stat. §8C-1, Rule 404(b) (2017).

Since a panel of this Court decided *Moctezuma* in 2000, the Supreme Court of North Carolina has repeatedly emphasized that Rule of Evidence 404(b) is a rule of

inclusion, not exclusion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (emphasis supplied) (citing *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990)). "The rule lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. This list is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue [at trial][.]" *Id.* (internal citations and quotation marks omitted).

C. Rule 403

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2017).

Since we find no error with the trial court's determination that the evidence was relevant, we next review for abuse of discretion the trial court's determination that evidence of the prerecorded $20 bill was not unduly prejudicial. *Id.* at 133, 726 S.E.2d at 160-61.

At the pre-trial hearing on Defendant's motion *in limine*, the trial court found the evidence of the prerecorded $20 bill to be probative of Defendant's constructive possession, showing knowledge of the cocaine found under the bed in his apartment. The court also determined the $20 bill was relevant to the charge of possession with

intent to sell and deliver marijuana. The court found the evidence to be relevant and "not unduly prejudicial."

Here, as in *Beckleheimer*, the trial court considered probative value against any prejudicial effect, found the probative value for the purposes offered exceeded any prejudicial effect. Again, as our Supreme Court did in *Beckleheimer*, we conclude "that it was not an abuse of discretion for the trial court to determine that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence." *Id.,* 726 S.E.2d at 161.

D. Failure to Demonstrate Prejudice

Were we to presume *arguendo* that allowing Det. Camacho's testimony that the prerecorded $20 bill found on Defendant was error, Defendant has failed to show any purported error was prejudicial.

Our Supreme Court requires the defendant to show prejudice from erroneous admission of Rule 404(b) evidence. *State v. Davis*, 368 N.C. 794, 809, 785 S.E.2d 312, 321 (2016). "A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2017). Defendant must show "a reasonable possibility that, absent the . . . testimony, the jury would have reached a different result." *Davis*, 368 N.C. at 809, 785 S.E.2d at 321.

Here, Defendant has failed to show the alleged, but presumed, error was prejudicial. Defendant was charged with trafficking by possession of cocaine hidden under the bed of his apartment and marijuana and firearms in the closet of the same bedroom. The jury heard Defendant was in possession of the $20 bill and that the same $20 bill had been previously used in a controlled drug purchase. The State offered other relevant circumstantial evidence tending to show Defendant constructively possessed the cocaine, marijuana and firearms with which he was charged. Defendant's connection to El Charro through possession of a prerecorded $20 bill previously used in a drug transaction was not needed to support the jury's convictions.

The State offered substantial other evidence to show Defendant's constructive possession of the cocaine, marijuana and firearms. Det. Camacho testified he ran a check with DMV and that Defendant's driver's license and vehicle registration showed 1300 H Steinbeck Drive. He observed multiple people go up to the door and back and engage in what he believed to be hand-to-hand drug transactions.

Raleigh Police Detective Braswell testified two baggies of cocaine and money order receipts were found inside a shoe box under the bed in a bedroom of the apartment. The first baggie contained 28 grams of crack cocaine and the second, 7.2 grams of crack cocaine. Another shoe box found nearby contained a vehicle title

mailed to Albert Deshwan Dent with an address of 1300 Steinbeck Drive, Apartment H, Raleigh, North Carolina.

In the closet of the same bedroom, a shoe box containing a mason jar with 77 grams of marijuana was recovered. The officer found men's clothing hanging in the same closet. Officer Braswell testified Defendant's W-2 tax statement was found in the kitchen along with a digital scale. Over $600 in currency was recovered from Defendant's person. This Court has held that the possession of a large sum of cash is an incriminating factor relevant to constructive possession of illegal drugs. *State v. Alston*, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386 (2008).

Defendant cannot demonstrate he was prejudiced by the admission of the evidence of the prerecorded $20 bill in his possession along with a substantial amount of cash when he was arrested. Defendant's arguments are overruled. *See Davis*, 368 N.C. at 809, 785 S.E.2d at 321.

E. Limiting Instruction

Since the trial court found the evidence not to be Rule 404(b) evidence, Defendant asserts he was unable to obtain a limiting instruction. He argues the trial court erred by not giving a limiting instruction on this admitted evidence. Defendant cites *State v. Watts*' holding that the trial court's failure to give a limiting instruction with regard to 404(b) evidence was error. *State v. Watts*, __ N.C. __, __, 802 S.E.2d 905, 906-07 (2017).

In *Watts*, the defendant requested "an instruction" following the prosecution's presentation of Rule 404(b) evidence of allegations of a prior sex offense. *Id.* at __, 802 S.E.2d at 906. Here, Defendant did not seek a limiting instruction on the evidence, after the trial court denied his motion *in limine* or after the court had ruled the evidence was admissible during trial. Further, Defendant did not seek any additional instructions at the charge conference and noted no objections to the jury's instructions proposed by the court.

"The admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions." *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988). Defendant may not make the trial court's omission of a limiting instruction the basis of an issue on appeal, unless he objected to the omission before the jury retired. N.C. R. App. P. 10(a)(2). Defendant's arguments are overruled.

Defendant next requests this Court to conduct a plain error review. Under plain error review, Defendant must show the error had "a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983) (citation omitted). As previously discussed, the State offered substantial other evidence from which the jury could infer Defendant's knowledge of the contraband items and his guilt of the crimes charged. Defendant has not shown any plain error to warrant a new trial.

IV. Motion for Mistrial

Defendant contends the trial court erred when it denied his motion for mistrial due to Det. Camacho's misstatement in the application for the search warrant.

A. Standard of Review

"The decision to order a mistrial lies within the discretion of the trial judge." *State v. Odom*, 316 N.C. 306, 309, 341 S.E.2d 332, 334 (1986) (citing *Arizona v. Washington,* 434 U.S. 497, 54 L.Ed.2d 717 (1978); *State v. Alston,* 294 N.C. 577, 243 S.E.2d 354 (1978); *State v. Birckhead,* 256 N.C. 494, 124 S.E.2d 838 (1962)).

B. Analysis

"The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2017).

"There is a presumption of validity with respect to the affidavit supporting the search warrant." *State v. Fernandez*, 346 N.C. 1, 14, 484 S.E.2d 350, 358 (1997) (citing *Franks v. Delaware,* 438 U.S. 154, 171, 57 L.Ed.2d 667, 682 (1978)). Defendant relies upon N.C. Gen. Stat. § 15A-978(a) (2017).

> A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance . . . truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

Id.

Here, Defendant does not show, and the record does not indicate, Det. Camacho had acted in bad faith in his affidavit for the application for the search warrant. Det. Camacho testified the error in the search warrant was a typo or mistake. Defendant offered no evidence to the contrary. *See Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358 ("[T]he evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith.").

The distinction between multiple persons coming to Defendant's door versus the persons entering inside the apartment is minimal in this case. Further, the trial court found sufficient evidence was presented to support the warrant, even without the misstatement of the detective in his affidavit. The trial court properly denied Defendant's motion for a mistrial. Defendant's argument is overruled.

V. Prior Record Level

Finally, Defendant argues in his brief and in his related Motion for Appropriate Relief that the trial court erred in calculating his prior record level.

A. Standard of Review

> The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal. It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review.

State v. Bohler, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citations omitted), *disc. review denied*, ___ N.C. ___, 691 S.E.2d 414 (2010).

B. Analysis

Defendant asserts the trial court erred when it assigned him one prior record level point for his 2012 conviction of possession of drug paraphernalia. At sentencing, Defendant stipulated he was a prior record level 3.

We first note that Defendant's stipulation was not binding upon the trial court. "While a stipulation by a defendant is sufficient to prove the existence of the defendant's prior convictions, which may be used to determine the defendant's prior record level for sentencing purposes, the trial court's assignment of defendant's prior record level is a question of law." *State v. Wingate*, 213 N.C. App. 419, 420, 713 S.E.2d 188, 189 (2011) (citations omitted). Such stipulations on questions of law are not binding upon the court. *Id.*

In 2012, a conviction for possessing drug paraphernalia was a Class 1 misdemeanor. Court records indicate Defendant was charged with misdemeanor possession of marijuana and misdemeanor possession of drug paraphernalia and pled guilty to the paraphernalia charge. In 2014, our General Assembly created a separate statute for marijuana-related paraphernalia and the possession of marijuana paraphernalia became a Class 3 misdemeanor.

"In determining the prior record level, the classification of a prior offense is the classification assigned to that offense *at the time the offense for which the offender is being sentenced is committed*." N.C. Gen. Stat. § 15A-1340.14(c) (2017) (emphasis supplied). The trial court must classify the prior conviction under the statutory framework in existence at the time Defendant committed the maintaining a dwelling, and possession of a firearm by a felon charges, 18 March 2015. *See State v. Frady*, 175 N.C. App. 393, 396-97, 623 S.E.2d 346, 349 (2006) ("[T]he two second-degree kidnapping offenses [were] committed on 9 November 2001. Accordingly, we look to the classification of the misdemeanor offense[s] . . . as of that date.").

Defendant asserts that since his conviction in 2012 was marijuana-related and the trial court, when considering his prior convictions at the time of sentencing, should have classified the 2012 conviction as a Class 3 misdemeanor, he should not have been assigned any record level points for that conviction. We agree and we reject the State's assertion to the contrary. *See id.*

Without the added record level point for the 2012 possession of drug paraphernalia conviction, Defendant would no longer fall into prior record level III. We allow Defendant's motion for appropriate relief for the limited purpose to remand 15 CRS 206387 for the trial court to re-sentence Defendant under the proper prior record level.

VI. Conclusion

The trial court ruled the prerecorded $20 bill was not Rule 404(b) evidence and denied Defendant's motion *in limine*. This evidence would have been properly admitted under Rule 404(b). Were we to presume, *arguendo*, this evidence was improperly admitted, Defendant has failed and cannot show any prejudice, in light of the other unchallenged evidence the State presented. The trial court properly denied Defendant's motion for mistrial.

The judgment in 15 CRS 206387 is remanded for re-sentencing at the proper record level. We find no error in the jury's convictions or in the remaining judgment entered thereon. *It is so ordered.*

NO ERROR AT TRIAL; REMAND FOR RE-SENTENCING IN 15 CRS 206387.

Judges CALABRIA and DILLON concur.

Report per Rule 30(e).