An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1185

Filed: 15 May 2018

Cleveland County, No. 16 CRS 204

STATE OF NORTH CAROLINA

v.

SAMANTHA RAE XIONG

Appeal by defendant from judgment entered 7 June 2017 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 1 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Oliver G. Wheeler IV, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

BRYANT, Judge.

Where defendant's claim for ineffective assistance of counsel cannot be determined on direct appeal, we dismiss this issue without prejudice for defendant to bring this claim in the trial court. Where the trial court properly allowed Rule 404(b) evidence of a similar transaction and gave proper limiting instructions to the jury, we find no error in the ruling of the trial court.

Defendant Samantha Rae Xiong was indicted for trafficking opium or heroin on 11 April 2016. The matter was called for trial during the 5 June 2017 session of Criminal Superior Court for Cleveland County before the Honorable Robert C. Ervin, Judge presiding. The jury returned a verdict finding defendant guilty of one count of possession of more than 28 grams of heroin. Judge Ervin sentenced defendant to 225 to 282 months in prison. Defendant appealed.

Case in chief

On 22 December 2015, Detective Clint Bridges worked with the Gastonia Police Department and a task force with the DEA to investigate crimes involving drug trafficking and money laundering. He, along with Gastonia Detective Jim Poole, were in Kings Mountain conducting a heroin trafficking investigation on defendant and Mike Caudillo. They conducted several controlled buys with the confidential informant ("CI"), who purchased heroin from Caudillo. On the night in question, they spotted defendant and Caudillo driving a white Elantra which had been rented several times to facilitate heroin trafficking. Upon seeing defendant and Caudillo get into the Elantra, the detectives pulled up beside them. As Detective Bridges approached the car and showed them his credentials, Caudillo yelled at defendant to "gas it" as defendant drove off. Before defendant drove off, Detective Bridges noticed Caudillo holding a clear plastic bag, which was later determined to contain heroin. Defendant drove the Elantra to the dead-end of Ridge Street and stopped. Caudillo

then jumped out the car and threw down the plastic bag. Eventually, he was stopped and arrested. Defendant did not flee but stayed in the Elantra until Detective Poole approached the vehicle. Defendant subsequently agreed to cooperate in the heroin investigation. Defendant later revealed that she had participated in heroin sales with Caudillo, including a drug deal on 9 December 2015 where detectives captured video evidence of Caudillo.

Prior Sale – 404(b) Evidence

On 9 December 2015, Detective Bridges and Detective Poole had used the CI to purchase heroin from Caudillo, who was driving the white Elantra. The CI wore a body cam that captured video of Caudillo and a female voice in the back seat which defendant later admitted was her voice. On the recording from the car, Caudillo told the CI to give the money to defendant to count. Defendant was also heard asking why the CI was buying that amount of heroin and directed the CI to delete his text messages following the exchange.

During defendant's trial, the State sought to introduce evidence of the 9 December 2015 drug deal. Defendant objected. The court overruled defendant's objection and allowed the State to offer the evidence.

On appeal, defendant argues (I) trial counsel was ineffective for failing to move to dismiss the trafficking count on the ground that the State failed to present

substantial evidence that defendant aided or encouraged Caudillo to possess the 29.83 grams of heroin on 22 December 2015; and (II) the trial court erred by permitting the State to introduce evidence of the 9 December 2015 drug deal where the facts and circumstances regarding that deal were dissimilar to those of the 22 December 2015 encounter.

I

Defendant first argues trial counsel was ineffective for failing to move to dismiss the trafficking count on the ground that the State failed to present substantial evidence that defendant aided or encouraged Caudillo to possess the 29.83 grams of heroin on 22 December 2015. Specifically, defendant argues that because her underlying claim is meritorious—that the State failed to present substantial evidence of "acting in concert"—trial counsel was ineffective for not presenting this argument during his motion to dismiss, which in turn has prevented defendant now on appeal "from raising a straight-forward insufficiency claim arguing this very point." As a result, defendant contends that she was prejudiced by counsel's ineffectiveness as it is reasonably probable the trial court would have granted the motion to dismiss absent the error. We decline to address this argument.

"Decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court." *State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002). "Thus, when this Court reviews ineffective

assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *State v. Thompson*, 359 N.C. 77, 123, 604 S.E.2d 850, 881 (2004).

Given the record before this Court, it is unclear on direct appeal whether defendant received ineffective assistance of counsel. We note that counsel for defendant did not raise certain arguments in reference to defendant's motion to dismiss; however, it appears a thorough review of the record is necessary to get a clear understanding of counsel's reasoning at trial. *See State v. Stroud*, 147 N.C. App. 549, 556, 557 S.E.2d 544, 548 (2001) (where the claim raises "potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues"). Accordingly, we dismiss defendant's argument without prejudice to pursue her right to file a motion for appropriate relief in the trial court.

II

Defendant also argues the trial court erred by permitting the State to introduce evidence of a prior drug deal in 9 December 2015 where the facts and circumstances regarding that deal were dissimilar to those of the 22 December 2015 encounter. Specifically, defendant contends the two drug deals were so dissimilar that evidence

of the 9 December 2015 drug deal should have been rendered inadmissible under Rules 404 and 403. We find this argument to be without merit.

"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." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

"Rule 404(a) is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character." *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989). However, such evidence is admissible where it concerns "any [relevant] fact or issue other than the defendant's propensity to commit a crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853 (1995). As such, "evidence of prior acts may be admitted, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159. Moreover, evidence of prior acts must demonstrate a degree of similarity and remoteness so much so that a "reasonable inference [can be made] 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). For the purposes of proving a prior act is similar, evidence should reflect "some unusual facts present in both crimes or particularly

similar acts which would indicate that the same person committed both." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890–91 (1991) (citations omitted).

Here, there are notable similarities between the 9 December and 22 December transactions. Defendant makes no argument regarding the remoteness of the 9 December transaction, which occurred thirteen days prior to the offense for which she was charged, and concedes that the 9 December transaction hinges on the similarity analysis. First, the vehicle identified during the controlled buy on 22 December was in fact the same vehicle used during the 9 December transaction. Specifically, the vehicle used for the offense charged was rented to facilitate several drug buys, including the 9 December transaction. Review of the record indicates that defendant was present in the car during both transactions; either as a driver or passenger. Second, the substance recovered from the CI during both transactions was heroin.

Notwithstanding the similarities, the State presented evidence that defendant admitted to participating in heroin sales with Caudillo which also included the transactions at issue. The evidence supports the inference that the 9 December and 22 December transactions are not too distinct to derive a *reasonable inference* that the same person committed both crimes. *See Stevenson*, 169 N.C. App. at 800, 611 S.E.2d at 209. Moreover, it supports the inference that defendant had the intent and knowledge to carry out the common scheme in both occurrences sufficient to satisfy Rule 404(b).

Accordingly, we find that the trial court did not abuse its discretion in allowing the evidence of the 9 December transaction pursuant to the Rule 403 balancing test. During the admission of evidence, the trial court instructed the jury to only consider evidence for the purpose of establishing defendant's knowledge of the transaction. As such, we find the trial court did not err in allowing the Rule 404(b) evidence at trial.

DISMISSED in part, NO ERROR in part.

Judges CALABRIA and HUNTER, JR., concur.

Report per Rule 30(e).