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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-431

Filed: 3 March 2020

Cleveland County, No. 15 CRS 912

STATE OF NORTH CAROLINA

v.

KENYON KONTAR ESKRIDGE

Appeal by Defendant from Judgments entered 11 May 2018 by Judge Gary M. Gavenus in Cleveland County Superior Court. Heard in the Court of Appeals 29 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General E. Burke Haywood, for the State.

Irons & Irons, PA, by Ben G. Irons II, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Kenyon Kontar Eskridge (Defendant) appeals from his convictions for Possession with Intent to Sell and Deliver Cocaine (PWISD Cocaine) and Sale and Delivery of Cocaine. The Record before us, including evidence presented at trial, tends to show the following:

The Shelby, North Carolina, Police Department (Shelby P.D.) began using John Johnson (Johnson) as a confidential informant in approximately 2014. As part of this arrangement, Shelby P.D. would provide Johnson with money to purchase illicit drugs from local drug dealers, and Johnson would turn over the illegal drugs to Shelby P.D. For his part, Johnson would receive \$100.00 for each successful purchase and approximately half for unsuccessful purchases.

On 25 February 2015, Johnson called Defendant, whom he claimed to have known for roughly six months, and arranged to purchase cocaine from Defendant at Defendant's home on Cedarwood Drive. After talking to Defendant, Johnson informed Shelby P.D. of the pending drug purchase. Johnson met several Shelby P.D. officers at a dead end on West Sumter Street. The officers searched Johnson, confirmed he did not have any money or other items on his person, and provided him with \$160.00 to buy an "eight-ball" of crack cocaine—approximately 3.5 grams. The officers also gave Johnson a video camera with an audio component that allowed the officers to communicate with Johnson.

Johnson then drove to Defendant's house on Cedarwood Drive in a car provided by Shelby P.D. Upon arrival, Johnson saw Defendant standing outside. Johnson got out of the car and exchanged with Defendant \$160.00 for a bag containing an off-white substance. After making the controlled buy, Johnson returned to West Sumter

Street and met with the officers. Johnson provided the officers with the bag containing the off-white substance and the recording device.

An officer with Shelby P.D. subsequently tested and weighed the bag, concluding it contained 2.3 grams of crack cocaine. An analyst from the North Carolina State Crime Lab testified to weighing and testing the substance; however, the analyst concluded the bag contained approximately 1.14 grams of cocaine. At Defendant's trial, the State also introduced into evidence the video recording of the 25 February 2015 controlled buy, which video was consistent with the event as described by Johnson.

At trial, the State also introduced, over Defendant's objection, evidence of two other controlled purchases by Johnson from Defendant—one on 20 February 2015 and another on 5 March 2015. In both instances, Johnson contacted Defendant and arranged to purchase cocaine from Defendant at Defendant's home on Cedarwood Drive. Prior to the buys, Johnson met officers from Shelby P.D., who searched Johnson, confirmed he did not have any drugs or money, and provided Johnson with money for the controlled buy. In each case, Johnson went to Defendant's house and knocked on the door. Johnson testified both times Defendant let him inside and the two exchanged cash for crack cocaine. On each occasion, Johnson was wearing a video recording device, and the State introduced portions of these videos at trial.

Prior to this testimony, the trial court conducted a voir dire hearing to determine the admissibility of this evidence. The State asserted these two sales were admissible under North Carolina Rule of Evidence 404(b) to show (1) Defendant's *modus operandi*, (2) the identity of the seller, (3) a common plan or scheme to sell cocaine at Defendant's residence, and (4) intent to sell and deliver cocaine. Defendant argued evidence of the two other buys was inadmissible because the State was offering the evidence to show "action in conformity therewith." Defendant further asserted the prior incidents were not sufficiently similar to the offense for which Defendant was being tried and that even if the previous purchases were sufficiently similar, their probative value was substantially outweighed by their prejudicial effect. After hearing arguments from counsel, the trial court made the following ruling:

I've heard the arguments of counsel, I've considered it. I do find that these incidents are sufficiently similar to the incident on February 25th; further find that they are not so remote in time, basically being within weeks of each other; and I also find that they are more probative than prejudicial, and they certainly are relevant.

I will allow it. I will allow it for the purpose of showing the identity of the person that committed the crime charged in this case; I'll allow it that the defendant had the intent, which is a necessary element of the crime charged; I'll also allow it that the defendant had the knowledge, which is a necessary element of the crime; and that there existed in the mind of the defendant a plan, scheme, system, or design involving the charged crime -- crime charged in this case.

Before offering this testimony, the trial court gave a limiting instruction to the jury that the testimony regarding these prior incidents could only be used to show identity, intent, knowledge, and a common plan or scheme. On 11 May 2018, the jury returned verdicts finding Defendant guilty of PWISD Cocaine and Sale and Delivery of Cocaine. The same day, the trial court entered Judgments against Defendant, sentencing him to two consecutive, active sentences totaling 37 months to 63 months' imprisonment. Defendant gave Notice of Appeal in open court.

Issue

The sole issue on appeal is whether the trial court erred by admitting evidence of the two other controlled purchases by Johnson from Defendant under Rules 403 and 404(b) of the North Carolina Rules of Evidence.

Analysis

I. Standard of Review

Our Supreme Court has held:

[W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. 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); *see also State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (“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.” (citation omitted)).

II. Admission of Rule 404(b) Evidence

“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.” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). “However, evidence of a defendant’s prior crimes, statements, actions, and conduct is admissible, if relevant to any fact or issue other than the defendant’s character.” *State v. Fink*, 252 N.C. App. 379, 390, 798 S.E.2d 537, 544 (2017) (citation omitted). Accordingly, “North Carolina Rule of Evidence 404(b) is a rule of inclusion, not exclusion.” *Id.* (citation omitted).

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.]

Beckelheimer, 366 N.C. at 130, 726 S.E.2d at 159 (citations and quotation marks omitted).

Our Supreme Court has recognized Rule 404(b) is “subject to but *one exception* requiring the exclusion of evidence 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. Lyons*, 340 N.C. 646, 668, 459 S.E.2d 770, 782 (1995) (alterations, citation, and quotation marks omitted); *see also State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005) (“As long as the prior acts provide substantial evidence tending to support a reasonable finding *by the jury* that the defendant committed a similar act or crime and its probative value is not limited *solely* to tending to establish the defendant’s propensity to commit a crime such as the crime charged, the evidence is admissible under Rule 404(b).” (citation and quotation marks omitted)). “In drug cases, evidence of other drug violations is often admissible under Rule 404(b).” *Stevenson*, 169 N.C. App. at 800, 611 S.E.2d at 209 (citation omitted).

“In determining the admissibility of evidence of prior conduct under Rule 404(b), a court must determine whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of [N.C. Gen. Stat.] § 8C-1, Rule 403.” *State v. Welch*, 193 N.C. App. 186, 190, 666 S.E.2d 826, 829 (2008) (citation and quotation marks omitted); *see also State v. Smith*, 152 N.C. App. 514, 527, 568 S.E.2d 289, 297 (2002) (“The use of evidence permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity.” (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.” *Stevenson*, 169 N.C. App. at 800, 611 S.E.2d at 209 (citation and quotation marks omitted). “The similarities need not be unique and bizarre.” *Id.* (citation and quotation marks omitted). “However, when the State’s efforts to show similarities between crimes establish no more than characteristics inherent to most crimes of that type, the State has failed to show that sufficient similarities existed for the purposes of Rule 404(b).” *Welch*, 193 N.C. App. at 190-91, 666 S.E.2d at 829 (alterations, citation, and quotation marks omitted).

Here, the trial court found the 20 February and 5 March 2015 transactions were sufficiently similar and not too remote in time to the 25 February 2015 transaction to be admitted under Rule 404(b). A review of the Record indicates for all three purchases, Johnson contacted Defendant and arranged to purchase crack cocaine from Defendant. Thereafter, Johnson traveled to Defendant’s residence where he then handed Defendant money in exchange for an off-white substance reputed to be crack cocaine. The similarities between the events, which all occurred within approximately two and a half weeks of each other, are not merely generic characteristics of a drug crime. *See id.* at 192, 666 S.E.2d at 830-31 (“[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 these three purchases supports the inference that the same person committed all

three crimes and did so in a similar place and manner. Accordingly, the trial court did not err by finding the evidence regarding these two other purchases relevant and admissible under Rule 404(b). *See id.* at 192-93, 666 S.E.2d at 830-31 (concluding on similar facts that evidence of prior drug sales was admissible under Rule 404(b)).

Further, the trial court did not abuse its discretion by admitting evidence of Defendant's prior drug sales under Rule 403, which were otherwise admissible under Rule 404(b). As in *Welch*, "the trial court guarded against the possibility of prejudice by conducting *voir dire* and by instructing the jury that it could only consider this evidence for the limited purposes of identity, intent, [knowledge,] and common plan or scheme." *Id.* at 193, 666 S.E.2d at 831 (citation omitted). Indeed, under our caselaw, the presumption is the jury followed the trial court's instructions. *See State v. Montgomery*, 291 N.C. 235, 244, 229 S.E.2d 904, 909 (1976) ("We assume, as our system for administration of justice requires, that the jurors in this case were possessed of sufficient character and intelligence to understand and comply with th[e limiting] instruction by the court." (citation omitted)). Therefore, we hold the trial court did not abuse its discretion by admitting the challenged evidence under Rules 403 and 404(b) for the limited purpose of showing Defendant's intent, knowledge, identity, and common plan or scheme.

Conclusion

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Opinion of the Court

Accordingly, for the foregoing reasons, we hold the trial court did not err in admitting evidence of Defendant's prior drug sales.

NO ERROR.

Judges INMAN and BERGER concur.

Report per Rule 30(e).