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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-647

Filed: 19 May 2020

Stokes County, No. 18 CRS 050040

STATE OF NORTH CAROLINA

v.

MARK ALLEN HARTGROVE

Appeal by Defendant from Judgment entered 12 March 2019 by Judge Angela B. Puckett in Stokes County Superior Court. Heard in the Court of Appeals 18 February 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Gail E. Carelli, for the State.*

*Crumpler Freedman Parker & Witt, by Stuart L. Brooks, for defendant-appellant.*

HAMPSON, Judge.

**Factual and Procedural Background**

Mark Allen Hartgrove (Defendant) appeals from a Judgment entered upon his convictions for (1) Possession with Intent to Sell and Deliver Oxymorphone (Opana), a Schedule II Controlled Substance (PWISD Opana), (2) Sale of a Schedule II Controlled Substance, (3) Delivery of a Schedule II Controlled Substance, and (4)

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having attained Habitual-Felon status. The Record before us, including evidence presented at trial, tends to show the following:

On 21 November 2017, law enforcement officers with the Stokes County Sheriff's Department met with a confidential informant, Sheena Ortiz (Ortiz), to arrange a controlled buy of Opana from Defendant. Ortiz called Defendant and arranged to meet at the 4 Brothers Gas Station (4 Brothers) in Pinnacle to purchase one Opana for \$40.00. Later that day, Deputy Amanda Moorefield of the Stokes County Sheriff's Department (Deputy Moorefield), who was present during this phone call, accompanied Ortiz to 4 Brothers wearing plain clothes. Deputy Moorefield testified when Defendant arrived, she got into Defendant's vehicle and handed him \$40.00 in exchange for a single pill of Opana.

On 16 January 2018, Defendant was indicted for PWISD Opana, Sale of a Schedule II Controlled Substance, and Delivery of a Schedule II Controlled Substance. Defendant was also indicted for having attained Habitual-Felon status. The matter originally came on for trial on 27 August 2018; however, the trial court declared a mistrial. Defendant's second trial began on 11 March 2019.

Prior to the start of the second trial, Defendant filed a Motion in Limine objecting to the State's introduction of evidence of two prior drug transactions for which Defendant had been previously convicted. The first transaction, which occurred on 7 July 2016, involved Defendant selling three Opana pills to an

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undercover officer. Specifically, on that occasion a confidential informant arranged a meeting with Defendant to purchase the Opana, met Defendant in a public place, and exchanged \$60.00 for each pill. The second transaction, which occurred on 20 June 2016, involved Defendant again selling illicit drugs to an undercover officer in a public place; however, on this occasion, Defendant sold the undercover officer heroin.

The trial court heard arguments from counsel regarding the admissibility of these two prior drug transactions. The State asserted these two sales were admissible under North Carolina Rule of Evidence 404(b) to show (1) absence of mistake or accident, (2) lack of entrapment, (3) and a common plan or scheme by Defendant to sell illicit drugs. Defendant argued evidence of the two other buys was inadmissible because the State was offering the evidence to show Defendant “has a propensity to use, possess and sell drugs[.]” Further, Defendant argued the probative value of this evidence was substantially outweighed by their prejudicial effect.

After hearing arguments from counsel, the trial court made the following ruling: “The Court will allow the Opana sale but will not allow the heroin sale.” The trial court did not make any further specific findings on the admissibility of these two incidents. The trial court permitted Defendant to lodge a standing objection to the introduction of this testimony at trial.

During Defendant’s trial, the State called Detective David White of the Stokes County Sheriff’s Department (Detective White), who testified about Defendant’s prior

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sale of Opana to Detective White on 7 July 2016. Defendant requested the trial court give a limiting instruction to the jury prior to this testimony. The trial court declined to give the instruction prior to Detective White's testimony; however, the trial court did give a limiting instruction on the use of this evidence in its final jury instructions given before the jury retired to deliberate.

On 12 March 2019, the jury returned verdicts finding Defendant guilty of PWISD Opana, Sale of a Schedule II Controlled Substance, and Delivery of a Schedule II Controlled Substance. Thereafter, Defendant pleaded guilty to attaining Habitual-Felon status. The same day, the trial court entered a consolidated Judgment against Defendant, sentencing him to 110–144 months' imprisonment. Defendant filed timely written Notice of Appeal on 20 March 2019.

### **Issues**

The dispositive issues on appeal are whether the trial court erred by: (I) admitting evidence of the 7 July 2016 controlled purchase of Opana by Detective White from Defendant under Rules 403 and 404(b) of the North Carolina Rules of Evidence and (II) failing to give a contemporaneous limiting instruction to the jury at the time the evidence of Defendant's prior sale of Opana was admitted.

### **Analysis**

#### **I. Admission of Rule 404(b) Evidence**

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)).

“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.]

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*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*,

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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).

Defendant first contends the trial court erred by determining the 7 July 2016 Opana sale was admissible under Rule 404(b). However, review of the Record reveals similarities in the 7 July 2016 Opana sale and the Opana sale in the present case. In both instances, a confidential informant contacted Defendant and arranged to purchase Opana from Defendant. Thereafter, in both instances, the confidential informants traveled to a public place where they met Defendant and handed him money in exchange for Opana. Moreover, the similarities between the two events, which occurred within approximately a year and a half of each other, are not merely

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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 two purchases supports the inference that the same person committed both crimes and did so with a similar *modus operandi*, evincing a lack of mistake and a common plan relevant to the PWISD Opana charge. Accordingly, the trial court did not err by admitting the evidence of the 7 July 2016 Opana sale 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)).

Defendant further contends the trial court abused its discretion by admitting the 7 July 2016 Opana sale under Rule 403 because the trial court made no specific finding the probative value of the previous sale outweighed its prejudicial effect. “However, as long as the procedure followed by the trial court demonstrates that a Rule 403 balancing test was conducted, a specific finding is not required.” *State v. Harris*, 149 N.C. App. 398, 405, 562 S.E.2d 547, 551 (2002) (citation omitted). Rather, “when prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule



403.” *Id.* at 404, 562 S.E.2d at 551 (alteration, citation, and quotation marks omitted).

Here, the trial court heard arguments from counsel regarding the admissibility of the 7 July 2016 Opana sale and the 20 June 2016 heroin sale and made the following ruling: “The Court will allow the Opana sale but will not allow the heroin sale.” The trial court’s ruling indicates the trial court engaged in a balancing test weighing the admissibility and probative value of the evidence of both prior drug transactions under Rule 404(b) and any unjustly prejudicial impact on the jury of this evidence under Rule 403. Indeed, the trial court’s exclusion of the heroin sale, which involved a different drug than the present sale, tends to show the trial court concluded the probative value of the evidence of this sale under Rule 404(b) would be unduly prejudicial to Defendant under Rule 403. *See id.* at 405, 562 S.E.2d at 551 (explaining “as long as the procedure followed by the trial court demonstrates that a Rule 403 balancing test was conducted, a specific finding is not required” (citation omitted)).

Further, “the trial court guarded against the possibility of prejudice by . . . instructing the jury that it could only consider [the 7 July 2016 Opana sale] for the limited purposes of . . . intent, [knowledge, absence of mistake or accident,] and common plan or scheme.” *Welch*, 193 N.C. App. at 193, 666 S.E.2d at 831 (citation

omitted). Accordingly, the trial court did not abuse its discretion in admitting the 7 June 2016 Opana sale. *See Harris*, 149 N.C. App. at 405, 562 S.E.2d at 551.

## II. Limiting Instruction

Defendant also contends the trial court erred by failing to give his requested limiting instruction on the evidence of the prior 7 July 2016 Opana transaction at the time this evidence was introduced. We disagree.

Under Rule 105 of the North Carolina Rules of Evidence, “[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.” N.C. Gen. Stat. § 8C-1, Rule 105 (2019). Our Supreme Court has explained, “the correct procedure [is] for the [trial] court to give the requested instruction at the time the request was made and in conjunction with the admission of [the evidence of prior bad acts.]” *State v. Williams*, 341 N.C. 1, 11, 459 S.E.2d 208, 215 (1995) (citations omitted). However, if “the trial court gave a correct limiting instruction in its charge, the error [is] not prejudicial.” *Id.* (citations omitted).

Here, Defendant requested the trial court give a limiting instruction to the jury prior to Detective White’s testimony regarding Defendant’s prior 7 July 2016 Opana sale. The trial court declined to give a limiting instruction prior to this testimony;

however, the trial court did give the following limiting instruction in its final charge to the jury:

Evidence has been received tending to show that [D]efendant sold Opana in [July] of 2016. This evidence was received solely for the purposes of showing that [D]efendant had the intent which is a necessary element of the crime charged in this case, that [D]efendant had the knowledge, which is a necessary element of the crime charged in this case, that there existed in the mind of [D]efendant a plan, scheme, system or design involving the crime charged in this case, that [D]efendant had the opportunity to commit the crime, the absence of mistake, the absence of entrapment and the absence of accident. If you believe this evidence, you may consider it but only for the limited purpose for which it was received. You may not consider it for any other purpose.

“Although the correct procedure would have been for the [trial] court to give the requested instruction at the time the request was made and in conjunction with the admission of [Detective White’s testimony], because the trial court gave a correct limiting instruction in its charge, the error was not prejudicial.” *Id.* (citations omitted). Further, “[w]e 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.” *State v. Montgomery*, 291 N.C. 235, 244, 229 S.E.2d 904, 909 (1976) (citation omitted). Therefore, the trial court did not commit prejudicial error in failing to give a limiting instruction to the jury at the time the evidence was introduced. *See Williams*, 341 N.C. at 11, 459 S.E.2d at 215 (citations omitted).

**Conclusion**

Accordingly, for the foregoing reasons, we conclude there was no prejudicial error in Defendant's trial.

NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge BRYANT concur.

Report per Rule 30(e).