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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-646

No. COA21-613

Filed 20 September 2022

Rowan County, Nos. 18CRS054801, 18CRS054804, 19CRS 000043

STATE OF NORTH CAROLINA

v.

KEVIN LAMONT HAYES, Defendant.

Appeal by Defendant from judgments entered 22 April 2021 by Judge William A. Wood II in Rowan County Superior Court. Heard in the Court of Appeals 11 May 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Carl Newman, for the State.

Mark L. Hayes for defendant-appellant.

MURPHY, Judge.

¶ 1 Entrapment occurs when acts of persuasion, trickery, or fraud are carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the criminal intent lies with law enforcement. Criminal intent does not lie with law enforcement when a defendant is independently predisposed to engage in the criminal behavior. Where a defendant moves for an entrapment instruction, the

trial court must give the instruction if there is sufficient evidence, when viewed in the light most favorable to the defendant and when taking the defendant's evidence as true, for the jury to reasonably infer that the defendant was entrapped. A defendant bears the burden of proving entrapment; and, if a trial court erred in failing to instruct on entrapment, the error must also be prejudicial to entitle a defendant to a new trial.

¶ 2 Here, Defendant requested an entrapment instruction that the trial court did not give despite there being evidence, when viewed in the light most favorable to Defendant and when taking Defendant's testimony as true, that entitled Defendant to an instruction on entrapment. However, Defendant was not prejudiced by this error due to the weakness of the evidence of entrapment and the strength of the evidence of his predisposition to commit the crimes charged.

BACKGROUND

¶ 3 This appeal originates from Defendant Kevin Hayes's convictions of two counts of possession with intent to sell or deliver marijuana, two counts of possession with intent to sell or deliver methamphetamine, two counts of selling methamphetamine, and having attained habitual felon status. Defendant's convictions for these offenses arise out of his sale of marijuana and methamphetamine to Sergeant Jagger Naves, an undercover officer whom Defendant met at a drug purchase organized by his childhood friend, Kimberly.

¶ 4 Kimberly was a drug addict who became a police informant for Sgt. Naves. On 19 January 2018, in the presence of Sgt. Naves, Kimberly texted Defendant to arrange for the purchase of marijuana and methamphetamine after she had brought up Defendant as a potential target for a narcotics investigation to Sgt. Naves. The text message indicated that Sgt. Naves was looking for marijuana and methamphetamine and had $200.00 to spend. The purchase was scheduled to take place at the parking lot of a Walmart.

¶ 5 Kimberly and Sgt. Naves arrived, and Defendant was shopping inside. A law enforcement surveillance team was also present. Defendant eventually came to the car, sat in the rear passenger seat, and placed two bags of methamphetamine and marijuana on the center console. Sgt. Naves gave Defendant $200.00 in cash, at which point Defendant gave Kimberly a small bag of what appeared to be marijuana and left the vehicle.

¶ 6 Defendant was contacted about a second potential sale on 6 February 2019 after Kimberly indicated to Sgt. Naves that Defendant was in a position to sell more drugs. Again, Kimberly informed Defendant that Sgt. Naves had $200.00 and was looking to purchase marijuana and methamphetamine. This time, they arranged to meet at Kimberly's residence. Defendant was hesitant to meet with Sgt. Naves directly and wanted to just meet with Kimberly; however, after Sgt. Naves threatened to leave and buy from someone else, Defendant eventually showed up at the

residence. Defendant placed the marijuana and methamphetamine on the driver seat of his car and told Sgt. Naves to put the $200.00 on the driver seat; after doing so, Sgt. Naves left.

¶ 7 Defendant was subsequently indicted for two counts of possession with intent to sell or deliver marijuana, two counts of possession with intent to sell or deliver methamphetamine, two counts of selling methamphetamine, and having attained habitual felon status.

¶ 8 Defendant's trial began on 21 April 2021. During his case, Defendant testified that,

> without Kim being my best friend at the time, I would have never ever been around no meth, period. You know, the only reason why that I did that little favor for her is because she asked me. She was begging me. And then once I got to the house, she begged me to get out of the car.

He also testified:

> I don't sell meth. The only reason why I was stuck in the predicament was because of Kimberly Hill.
>
> . . . .
>
> The crumbs was so small of the meth, listen, I ain't never been around meth, period. And if it wasn't for her, I wouldn't have ever been around meth, period. I wouldn't even be sitting right here.
>
> . . . .
>
> I would have never ever been around any meth, period. I smoke weed all the time. I done smoke -- me and Kimberly,

we hang, we grew up together. That's the only reason why I did that favor for her. I would never be in the predicament if it wasn't for her just because she went and did. And that was the only time that I was around that drug, period.

. . . .

Me and Kimberly been friends ever since we were young, really young. Grew up together. We always hang out. They know we hang out.

. . . .

Now, before all this happened Kimberly, she -- and then she came to my job one day. We always hang out. She came to my job and she was begging me. She was begging me to find her some. 'Cause the day when she came up there she was with one of our old friends, ex-husbands, so, you know, I didn't pay no -- me and Kim, we so cool that I'm not even thinking about it. So, eventually, maybe, like, later on in that week I was, like, well, I just grab it for her, you know, just harmless. It's so small, it's harmless. It's not going to kill her, come on. So I -- once I did it, you know, I know I made a mistake. I know I made a mistake even just by trying to help her out. But, you know, me and Kim are so cool, like, she like my little sister, you know, like, we've always hung out.

But anyway, once I get there -- 'cause I don't even remember seeing him. The first time he said I seen him, I don't remember that. But only time I remember seeing him is at her house. And once I get there, he said that I -- that he talked to me. He didn't talk to me. I didn't talk to him. I didn't know him. Once I pulled up, she walked to my car begging me to get out the car. And I was telling her, "Kim, come on. Now, like, I got to get back to my little boy." 'Cause my momma had my son. I got a three-year-old. My momma had my son. I was trying to get back to my -- my kid. I ain't got time to be playing around, trying to do a

> little favor so she can hang out with her little friend so I can go, you know. So she begged me to get out of the car, and that's part of the -- the entrapment part.
>
> And I even offered to tell her, I told her, I said, "Kim" -- because she tried to call me back, and I said, "Kim, if you really want to do that, just go meet him yourself." But she never did call me back. She didn't want to go meet with him herself. She wanted me to do it. I should have known then that she was trying to get me in trouble.
>
> . . . .
>
> But as far as that, I wouldn't -- I would have never ever been around meth, period, if it wasn't for her in this instance right here. Like I said, me being young riding around smoking weed, I might get pulled or something, you know, and I got weed in the car, that's just young and being dumb, you understand what I'm saying? . . . . I got some stuff on my background, but it's only marijuana.
>
> . . . .
>
> I'm not a meth dealer. Like, I smoke weed. I've been around weed all my life. The only thing I did was she begged me to go to somebody's house because she knew I knew where she -- I can grab her something real quick. She told me -- she told me she's hanging with our old friends. What are you thinking about then. I just ran and got it for her real quick and dropped it off and I left.

¶ 9 On cross-examination, Defendant acknowledged getting paid $200.00 both times for these "favors." He also testified, "I said weed wasn't nothing and I wouldn't have ever ever been around any meth if it wasn't for Kimberly. This was the only time that I was around any kind of meth when Kimberly and [Sgt. Naves] did this illegal stuff, the entrapment part, the bribery part."

¶ 10 At the charging conference, the following exchange occurred:

> THE COURT: . . . . Now, [], do you wish to be heard about 309.10, entrapment?
>
> [THE STATE]: I don't believe there is any evidence of that, Your Honor. There have been no motions of [] [D]efendant. I would ask Your Honor not include that.
>
> THE COURT: When you say no motions, there's been no --
>
> [THE STATE]: No filed motions, Your Honor, in reference to any suppression or anything of that matter that I don't think entrapment is appropriate here just because he has said entrapment and bribery.
>
> THE COURT: Well, I realize he just said it.
>
> [THE STATE]: Yes.
>
> THE COURT: Do you wish to be heard on that, [Defendant]?
>
> [] DEFENDANT: Yes, because it's illegal and you can't do that.
>
> THE COURT: Okay. Well --
>
> [] DEFENDANT: Like, regardless of, like, whatever happened, like, between me and her, like, when it come down to, if somebody's, like, breaking the law on their own, it's different. But when somebody is begging somebody to do something for them just to get that person in trouble and that's only reason, sole purpose of just -- just getting that person in trouble just to get yourself out of trouble, I've been studying this, like, and entrapment, like, you read it. You see what it says. I mean, you're a smart man, but this says -- this says the action of tricking someone into committing a crime in order to secure their prosecution, that's illegal. That's exactly what happened. She tricked me to go do something for her that I ain't have nothing to

do with. I would never ever been around no methamphetamine, period. The only thing I ever did all my life was smoke some weed. That's it, the only thing.

So we all sitting here under oath, right, and the definition of evidence, like, it's there. The actions of tricking someone into committing a crime in order to secure their prosecution, that's law. That is the law. Like, how can you -- how can you even go around that? And it's, like, you know I'm right. You know I'm right, but it's just because it's drugs involved, y'all weren't --

THE COURT: Sir, don't refer to me as y'all again.

[] DEFENDANT: I'm sorry. It just came out. I didn't mean it like that. I'm just sorry. I'm just trying to explain to you, like, I study this, I read this, entrapment and bribery. And bribery is when you pay somebody, pay to have them to go -- bribery is whenever you offer somebody something to do something, and that's exactly what happened, too. They let her go for free for whatever she did.

THE COURT: Well, [Defendant], you can drop the bribery talk. Bribery's a crime, and we're not getting into that right now.

[] DEFENDANT: Exactly, it's a crime. He can't do it. You can't do that. You cannot bribe somebody to go do something for you.

THE COURT: [Defendant], I don't want to hear another word about bribery. I've asked you about something completely different. I've asked you about entrapment.

[] DEFENDANT: Entrapment is illegal. You cannot trick somebody to do something for you to get them in trouble to cover your own self.

THE COURT: All right. Well, I'll make a decision on this --

> [] DEFENDANT: I mean, what you want? I mean, ain't the rule talking about? You said bribery. What do you want me to say?
>
> THE COURT: Wait a minute. Don't interrupt me again --
>
> [] DEFENDANT: I'm not.
>
> THE COURT: -- [Defendant]. I'll make a decision on this at a later time. We'll talk about it in the morning.

¶ 11 The trial court did not include an entrapment instruction, reasoning that

> I believe there is no credible evidence of an entrapment defense. Additionally, there was no notice, but that's not the reason I denied the request. There was no notice to the State, but that's not the reason I denied the request. I denied the request because there was no credible evidence of the entrapment allegation.

¶ 12 Ultimately, Defendant was found guilty of two counts of possession with intent to sell or deliver marijuana, two counts of possession with intent to sell or deliver methamphetamine, two counts of selling methamphetamine, and having attained habitual felon status. He was given to an active sentence of 66 to 92 months. Defendant timely appeals.

ANALYSIS

¶ 13 Defendant's sole argument on appeal is that he is entitled to a new trial due to the trial court's error in refusing to give a jury instruction on entrapment. We hold that, although the trial court erred, Defendant has not demonstrated the prejudice necessary to warrant a new trial.

¶ 14 "Whether the evidence, taken in the light most favorable to the defendant, is sufficient to require the trial court to instruct on a defense of entrapment is an issue of law that is determined by an appellate court de novo." *State v. Ott*, 236 N.C. App. 648, 651 (2014). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment[] for that of the lower tribunal." *Id.* Recently, our Supreme Court described the law regarding entrapment as follows:

> Generally, the issue of whether a defendant is entrapped is a question of fact to be resolved by the jury. A defendant is entitled to jury instructions on the defense of entrapment if he presents some credible evidence tending to support the defendant's contention that he was a victim of entrapment. In order to determine whether [the] defendant presented "some credible evidence," we consider whether [the] defendant has presented sufficient evidence to permit a jury to reasonably infer that he was entrapped.
>
> Here, we do not determine [the] defendant's guilt or weigh the credibility of his testimony; rather, we consider whether [the] defendant met the threshold burden of producing "some credible evidence" of each element of entrapment.
>
> When making this determination, we view the evidence in the light most favorable to the defendant and we take the defendant's testimony as true. Discrepancies in [the] defendant's evidence or contradictory evidence offered by the State do not bar the availability of this defense. Therefore, it is not necessary that this Court find [the] defendant's evidence persuasive on its merits—we need only find that, giving the defendant the benefit of every doubt and assuming the veracity of his testimony, a reasonable jury could do so.

State v. Keller, 374 N.C. 637, 645-46 (2020) (marks and citations omitted).

Furthermore, our Supreme Court described entrapment in *Keller* as follows:

> The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Thus, the defense of entrapment is available when there are acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the criminal intent lies with the law enforcement agencies. Entrapment is a complete defense to the crime charged. Defendants have the burden of proving the defense of entrapment to the satisfaction of the jury and the burden does not shift to the prosecution to prove predisposition beyond a reasonable doubt.
>
> The crucial inquiry by this Court is whether law enforcement or the defendant created the criminal intent. If a defendant has a predisposition to commit the crime independent of governmental inducement and influence, the origin of the criminal intent lies with the defendant and the defense of entrapment is unavailable. Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime.

Id. at 644-45 (marks and citations omitted).

A. Entitlement to Instruction

¶ 15 Here, when viewing the evidence in the light most favorable to Defendant, we conclude that Kimberly, acting on behalf of law enforcement, performed an act of persuasion, trickery, or fraud by repeatedly requesting the drugs from Defendant while acting on behalf of law enforcement. *State v. Hageman*, 307 N.C. 1, 28 (1982) ("The defense of entrapment is available when there are acts of persuasion, trickery

or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the criminal intent lies with the law enforcement agencies."); *see, e.g.*, *State v. Pratt*, 270 N.C. App. 363, 367 (2020) ("[T]he record contain[ed] credible evidence tending to show that [the] [d]efendant was persuaded by Jason Ford, a confidential informant working with the Onslow County Sheriff's Office, to commit the crimes for which [the] [d]efendant was tried and convicted. The State conceded at the charge conference that Ford acted as a confidential informant for the State and . . . [the] [d]efendant testified that Ford encouraged [the] [d]efendant to obtain methadone and exchange it for assistance with repairing the roof of [the] [d]efendant's house."). As a result, we must resolve whether "law enforcement officers or their agents [] induce[d] [] [D]efendant to commit a crime [] when the criminal intent lies with the law enforcement agencies." *Hageman*, 307 N.C. at 28.

¶ 16 To do this, we must evaluate "[i]f [] [D]efendant has a predisposition to commit the crime independent of governmental inducement and influence." *Keller,* 374 N.C. at 645. If so, "the origin of the criminal intent lies with [] [D]efendant and the defense of entrapment is unavailable." *Id.* "Predisposition may be shown by [] [D]efendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime." *Id.*

¶ 17 Here, viewing the evidence in the light most favorable to Defendant and

assuming the truth of his testimony, as we must, Defendant only sold the methamphetamine because his best friend, Kimberly, "begged" him to do so. Defendant testified repeatedly that, otherwise, he would not have been involved with methamphetamine. Additionally, the idea to exchange the marijuana and methamphetamine for money appears to have come from Kimberly each time. *See Ott,* 236 N.C. App. at 652 (finding evidence sufficient to warrant an entrapment instruction where the defendant's evidence showed the informant was acting for the sheriff's office when she approached the defendant, initiated the conversation about selling pills to her buyer, provided the defendant the pills, and coached her on what to say during the sale). Like in *Keller* and *Ott,* there was no prior history of such an offense. *Id.*; *Keller,* 374 N.C. at 646. Like in past cases, Defendant indicated he only sold the methamphetamine in response to repeated begging by Kimberly. *See State v. Jamerson,* 64 N.C. App. 301, 303-04 (1983) (holding that the defendant introduced sufficient evidence of inducement to justify a jury instruction on entrapment by showing: (1) an undercover officer and his informant initiated a conversation about selling drugs with the defendant; (2) the officer repeatedly urged the defendant to provide the drugs; (3) the informant located a person who would sell the drugs and drove the officer and the defendant to the location; and (4) the officer then provided the defendant the money to buy the drugs); *State v. Stanley,* 288 N.C. 19, 32-33 (1975) (holding that the evidence was sufficient to establish that the defendant was

entrapped as a matter of law where the undisputed evidence showed that an undercover officer befriended the defendant based on false pretenses, repeatedly asked the defendant about purchasing drugs, persuaded the defendant to purchase drugs for him, and supplied the defendant with the money to do so). As a result, viewing the evidence in the light most favorable to Defendant and taking his testimony as true, Defendant was not predisposed to possess or sell methamphetamine and therefore agents of law enforcement induced Defendant's behavior in this regard, entitling Defendant to an entrapment instruction for the offenses involving methamphetamine.

¶ 18 However, even viewing the evidence in the light most favorable to Defendant and accepting his testimony as true, there was no evidence to suggest that Defendant was not predisposed to sell marijuana. Defendant's testimony about doing a favor for Kimberly consistently referred to his interaction with methamphetamine only. Regarding marijuana, Defendant testified:

> [DEFENDANT:] I would have never ever been around any meth, period. I smoke weed all the time.
>
> . . . .
>
> This doesn't even involve me, like -- like I said, I smoke weed all the time. We've been smoking weed ever since we were little.
>
> . . . .
>
> But as far as that, I wouldn't -- I would have never ever

> been around meth, period, if it wasn't for her in this instance right here. Like I said, me being young riding around smoking weed, I might get pulled or something, you know, and I got weed in the car, that's just young and being dumb, you understand what I'm saying? Even the last time -- the last time when I ever got caught with a bag of weed -- my son's in the eighth grade, okay, my son was seventh -- seventh or eighth grade, but he's in the twelfth grade now about to graduate.
>
> . . . .
>
> The only thing I'm saying before y'all make -- make y'all decision, because I'm not a meth dealer. Like, I smoke weed. I've been around weed all my life. The only thing I did was she begged me to go to somebody's house because she knew I knew where she -- I can grab her something real quick. She told me -- she told me she's hanging with our old friends. What are you thinking about then. I just ran and got it for her real quick and dropped it off and I left.
>
> . . . .
>
> I didn't say meth was legal. I said weed wasn't nothing and I wouldn't have ever ever been around any meth if it wasn't for Kimberly. This was the only time that I was around any kind of meth when Kimberly and [Sgt. Naves] did this illegal stuff, the entrapment part, the bribery part.

¶ 19 This testimony establishes that Defendant was contesting the possession and sale of methamphetamine specifically, as opposed to the sale and possession of marijuana, which Defendant did not challenge at any point, instead repeatedly admitting to using marijuana. In light of this testimony, we conclude there was evidence to show Defendant was predisposed to the possession and sale of marijuana, and, as such, Defendant was not entitled to an entrapment instruction for his

marijuana offenses.

B. Prejudice

¶ 20 In order for an error in failing to provide a requested instruction on entrapment to warrant a new trial, Defendant must be prejudiced. *See Keller,* 374 N.C. at 649. In evaluating prejudice, we consider whether "'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.'" *Id.* (quoting N.C.G.S. § 15A-1443(a) (2019)).

¶ 21 When viewing the facts of this case impartially, we conclude the failure to instruct on entrapment was not prejudicial error. Here, there was significant evidence to suggest that Defendant was predisposed to sell methamphetamine such that there is not a reasonable possibility that a different result would have been reached at trial had the trial court instructed on entrapment.

¶ 22 Defendant's only evidence to dispute his predisposition to sell methamphetamine was his own testimony that he would not have sold methamphetamine if Kimberly had not been involved. However, there was a plethora of evidence that Defendant knew before each drug purchase that he was providing the methamphetamine and marijuana for Sgt. Naves, rather than for Kimberly, suggesting that Kimberly acted as an intermediary for the drug exchange rather than being the recipient of a favor. Indeed, at each transaction, Sgt. Naves provided the cash that was exchanged for the drugs; and, at the first exchange, Defendant

separately provided Kimberly with what appeared to be a separate, small bag of marijuana, suggesting Defendant understood that Sgt. Naves's drugs were not Kimberly's drugs and that he was not providing drugs for Kimberly. Additionally, there was a phone conversation prior to the second drug purchase that reiterates that Defendant was aware that Sgt. Naves was the purchaser of the methamphetamine, rather than Kimberly, which was played for the jury and testified to as follows:

> [SGT. NAVES:] [Defendant] had been speaking with [Kimberly], again, pushing them to do the transaction instead of me. And I heard him say, "I'm up the street. Don't fuckin' play with me. Y'all tripping like hell. Something's gonna get fucked up." At that point I felt like that was a threat, so I got on the phone and spoke to [Defendant]. I said, "Yo, Kevin, fuck it. I'm gonna bounce. I'm a grown-ass man. Yo, listen, dog, she said you were good people, bro. It's all good. *I'll get a little weed somewhere else*." [Defendant] then stated, "*What I'm saying is why you so scared to hand her your money*?" And then I stated, "Because if you're going to try to rip me, you're gonna look in my eyes, bro. It's all good, brother. I'll bounce." [Defendant] stated, "Rip you. Rip you for what?"
>
> [Kimberly] then stated, "Nobody wants to get ripped off, dude. This shit happens all the fuckin' time. It's [$200.00]." I stated, "You were cool the last time, bro. She said you were good people. She said you were gonna be here 20 minutes ago. I got to be in Lexington at 11:30. It's now 11:01." [Defendant] advised, "I'm trying to figure out what y'all acting a fool. I'm not the goddamn one. I don't care about those little ass crumbs. That's nothing to me. I'm not gonna run around trying to shit no-goddamn-buddy."
>
> [Kimberly] said, "You don't realize I used to be a drug

> addict. Nobody wants to hand me any money. That's all it is. You ain't got to have an attitude. It's just to prevent being ripped off. That's all. I'm just saying, if you were coming, come. If not, he's gonna leave." And [Defendant] stated, "I'm about to pull the fuck up."

(Emphases added). This testimony significantly undermines Defendant's claim that he was only selling methamphetamine as a favor to Kimberly.

¶ 23 Additionally, Defendant's claim that he would not otherwise have sold or been around methamphetamine if not for Kimberly's involvement is further undermined by his knowledge of where to obtain methamphetamine, his implied familiarity with dosage of methamphetamine in his testimony that he believed the methamphetamine to be "harmless" due to the small quantity, and that he sold methamphetamine to Sgt. Naves *on two separate occasions*.

¶ 24 In light of the evidence of his predisposition to sell methamphetamine, we conclude that there was not "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C.G.S. § 15A-1443(a) (2021). As a result, Defendant was not prejudiced by the trial court's failure to instruct on entrapment.[1]

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[1] The parties filed State's Exhibit 5, which is an audio recording of the second transaction of which a portion was played for the jury. The transcript indicates that State's Exhibit 5 was played for the jury from 4:27 p.m. to 4:34 p.m. In its brief, the State notes that, "[t]he recording in total is 1 hour 1 minute and twenty-eight seconds long, but the State only played approximately eight minutes beginning at the 41:14 mark." This is supported by the discussion in the trial court as indicated in the transcript:

CONCLUSION

¶ 25 The trial court erred in failing to provide an entrapment instruction regarding Defendant's charges related to methamphetamine, but did not err in failing to provide an entrapment instruction regarding Defendant's charges related to marijuana. Despite the trial court's error in failing to instruct on entrapment, it did not commit prejudicial error.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judge ZACHARY concurs.

> [THE STATE]: Your Honor, [the] State would ask at this time to publish to the jury the CD beginning at minute 41, 14 seconds, and play the CD for approximately eight minutes long after that.
>
> THE COURT: All right. Wish to be heard on that, [Defendant]?
>
> THE DEFENDANT: I don't need to be heard because they already know that I was there.
>
> THE COURT: All right.
>
> THE DEFENDANT: They know that I did that favor for my friend so --
>
> THE COURT: It was a yes or no question, [Defendant].
>
> THE DEFENDANT: I'm sorry.

As a result, our prejudice analysis does not extend beyond the 49:14 mark of State's Exhibit 5. This lack of specific clarity on the amount of time played and our limited analytical review is not prejudicial to Defendant as the portions beyond 49:14 would remove any possibility of a different result at trial as, therein, Defendant appears to be discussing his knowledge of the methamphetamine market and pricing.

Judge HAMPSON concurs in the result.

Report per Rule 30(e).