ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION I

CA CR 06-1212

VALDEZ TREVINO WOODS
APPELLANT

November 7, 2007

APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT
[NO. CR-2004-269-1]

V.

HONORABLE WILLIAM A. STOREY, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

A jury found appellant, Valdez T. Woods, guilty of possession of crack cocaine with intent to deliver and possession of marijuana with intent to deliver. Appellant received consecutive sentences of thirty years' imprisonment and ten years' imprisonment, respectively. Appellant raises nine issues on appeal, including (1) the evidence was insufficient to show intent to deliver; (2) the State violated his speedy trial rights; and (3) a variety of arguments related to the admissibility of the evidence at trial. We find no error and affirm.

On January 13, 2004, a "Be On The Lookout" alert was issued for appellant due to suspected drug activity. The information given to officers included a description of both

appellant and his vehicle. Two Fayetteville police officers recognized appellant walking to his vehicle and conducted a traffic stop after confirming it was the correct license plate. Appellant was placed under arrest, and in searching his pockets, the officers found three baggies containing marijuana and three baggies containing cocaine. Appellant also had cash in the amount of $641 on his person.

In a felony information filed February 12, 2004, appellant was charged with four counts: Count 1, delivery of a controlled substance; Count 2, delivery of a counterfeit substance; Count 3, possession of a controlled substance with intent to deliver (crack cocaine); Count 4, possession of a controlled substance with intent to deliver (marijuana).[1] After a series of continuances, a trial on the matter was set for November 17, 2004. On the date of trial, however, appellant failed to appear and a warrant was issued for his arrest.

Appellant was arrested in Tennessee on September 15, 2005. He was returned to Arkansas, and a trial date was set for December 7, 2005. The trial was continued, however, and on January 24, 2006, appellant filed a motion for dismissal for want of a speedy trial. A hearing on the speedy trial issue was held on January 25, 2006, at which appellant's motion for dismissal was denied.

The case proceeded to trial on June 27, 2006, and a jury found appellant guilty of possession of cocaine with intent to deliver and possession of marijuana with intent to deliver. Appellant was sentenced to thirty years' imprisonment on the possession of cocaine

[1] Counts 1 and 2, which were eventually severed and tried separately after appellant's trial on Counts 3 and 4, are not at issue in the present appeal.

charge and ten years' imprisonment on the possession of marijuana charge, to run consecutively. This appeal followed.[2]

Sufficiency of the Evidence

Although appellant's argument challenging the sufficiency of the evidence was listed last in his brief, we address the sufficiency of the evidence supporting a conviction before considering other trial errors to preserve appellant's right to be free from double jeopardy. *Hickman v. State*, ___ Ark. App. ___, ___ S.W.3d ___ (Aug. 29, 2007). We have repeatedly held that, in reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Smith v. State*, 367 Ark. 274, ___ S.W.3d ___ (2006). We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id*.

In challenging the sufficiency of the evidence in this case, appellant simply asserts that while he admitted he had drugs in his possession at the time he was stopped by the police, the State did not prove any intent to sell or distribute the drugs. However, the testimony at trial established that appellant was arrested with almost two-and-a-half ounces

[2] Appellant's notice of appeal was untimely, as the judgment and commitment order memorializing appellant's conviction was entered on June 30, 2006, and appellant's notice of appeal was not filed until August 30, 2006. However, our supreme court granted a motion for rule on the clerk so that appellant could file a belated appeal, *see Woods v. State*, 368 Ark. 131, ___ S.W.3d ___ (2006); therefore, appellant's appeal is properly before this court.

of marijuana and six grams of crack cocaine in his possession, which exceeds the amounts necessary under Ark. Code Ann. § 5-64-401(d) (Supp. 2007) to create a rebuttable presumption of intent to deliver. Under the statute, possession of one ounce of marijuana or one gram of cocaine creates a rebuttable presumption of intent to deliver. Ark. Code Ann. § 5-64-401(d)(3)(A)(i) and (vii). Appellant offers no argument to rebut this presumption. In addition, there was testimony that appellant had previously sold drugs to a police informant, that the drugs were packaged as if to be sold, and that appellant had sent a letter to the trial judge admitting that he used and sold drugs. We find that substantial evidence exists to support appellant's convictions for possession of cocaine and marijuana with intent to deliver.

Speedy Trial

Arkansas Rule of Criminal Procedure 28.1 (2007) requires the State to try a defendant within twelve months, excluding any periods of delay authorized by Rule 28.3. *Miles v. State*, 348 Ark. 544, 75 S.W.3d 677 (2002). The twelve-month period begins to run on the date the information is filed or the date of arrest, whichever occurs first. *Id*. In this case, appellant was arrested on January 13, 2004, and therefore should have been brought to trial by January 13, 2005, if there were no excludable delays. Appellant's trial did not occur until June 27, 2006, 530 days over the allowed 12-month period. Once it is shown that a trial was held after the speedy-trial period set out in Rule 28.1 has expired, the State has the burden of showing that any delay was the result of the defendant's conduct or was otherwise legally justified. *Id*.

There are three time periods in dispute on appeal: (1) May 6, 2004 to July 12, 2004 (67 days); (2) July 12, 2004 to September 22, 2004 (72 days); (3) September 16, 2005 to December 7, 2005 (82 days). Appellant does not dispute that the period from November 17, 2004 to September 16, 2005, the time from his failure to appear to his recapture in another state, should be excluded for purposes of the speedy trial calculation. This excluded period, a total of 304 days, reduces the time beyond the allowable twelve months to 226 days. Also, appellant does not challenge any exclusions for speedy trial purposes after December 7, 2005. Therefore the period of time from December 7, 2005 to June 27, 2006, a period of 202 days, is deemed properly excluded. This exclusion reduces the time beyond the allowable twelve months to twenty-four days. The result being that, if any of the three disputed time periods, the shortest of which was sixty-seven days, were properly excluded, appellant's right to a speedy trial was not violated. We hold that the eighty-two day period between September 16, 2005 and December 7, 2005 was properly excluded. We decline to reach appellant's arguments concerning the other disputed periods.

After his failure to appear, appellant was arrested and returned to Arkansas on September 16, 2005. At the speedy trial hearing, the parties agreed that appellant had been arraigned on October 10, 2005, on the new charge of failure to appear, and all charges were set for retrial on December 7, 2005.[3] At the speedy trial hearing, appellant argued that there had been no finding that December 7 was the next available trial date, and the State had a

[3] We note that these actions are not memorialized on the docket or in the record. Appellant ostensibly filed a motion for continuance on December 7, 2005, as well, but that motion and the order granting the motion are not in the record.

duty to make sure the trial date was set rather quickly, otherwise it violated the "spirit of the speedy trial." The court disagreed and stated that December 7 was the next available trial date considering the number of cases already scheduled on the court's docket. The court stated that fifty-plus days was not an excessive period of time, and appellant's case was set as quickly and promptly as it could have been.

On appeal, appellant again contends that the period from September 16, 2005, to December 7, 2005, should not be excluded for purposes of the speedy trial calculation. The State, on the other hand, argues that the period should be excluded as a delay for good cause pursuant to Rule 28.3(h). In resolving this issue, we find the case of *Osborn v. State*, 340 Ark. 444, 11 S.W.3d 528 (2000), to be instructive. In *Osborn*, the defendant was arrested on a charge of aggravated robbery, and after a series of continuances, his trial date was set for October 17, 1997. The defendant failed to appear, however, and he was later arrested in Colorado and returned to Arkansas on December 4, 1997. The defendant argued that the State was required to bring him to trial within eighteen days after his return from Colorado to comply with speedy trial requirements, but the supreme court did not agree:

> Osborn's trial was set for October 17, 1997, and he failed to appear. The duration of a defendant's unavailability is clearly an excludable period for speedy-trial purposes. *See* Ark. R. Crim. P. 28.3(e). Moreover, once he was arrested and returned to Arkansas, he was not entitled to a trial within 18 days, as he now argues. That would have had the effect of disrupting the trial court's entire docket. What the trial court did, upon Osborn's arrest and return to this state, was to set the trial down for the next available trial date. Osborn was entitled to nothing more under our rules.

Id. at 446-47, 11 S.W.3d at 530. Similarly, we find that upon appellant's return to Arkansas, the trial court reset his trial for the next available trial date, which was fifty-six working days after appellant's return and twenty-five days after the time for speedy trial expired,[4] and we find no error in that decision. *See also Yarbrough v. State*, 370 Ark. 31, ___ S.W.3d ___ (2007) (holding that a defendant's failure to appear constitutes "good cause" to exclude the time attributable to the delay); *Henson v. State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992) (holding that defendant's speedy trial rights were not violated when, after defendant's failure to appear, trial date was rescheduled for five days after the time for speedy trial had expired). Accordingly, we find no violation of appellant's speedy trial rights and affirm.

Evidentiary Issues

The remainder of appellant's arguments focuses on evidence that should or should not have been admitted at trial. The circuit court has wide discretion in making evidentiary rulings, and we will not reverse its ruling on the admissibility of evidence absent an abuse of discretion. *Wright v. State*, 368 Ark. 629, ___ S.W.3d ___ (2007). Abuse of discretion is a high threshold that does not simply require error in the trial court's decision, but requires that the trial court act improvidently, thoughtlessly, or without due consideration. *Butler v. State*, 367 Ark. 318, ___ S.W.3d ___ (2006).

1. DVD of Traffic Stop

[4] This number has been calculated on the assumption, for purposes of argument, that the two other disputed time periods are not excluded for purposes of the speedy trial calculation.

At trial, a DVD copy of the police videotape of appellant's arrest was introduced into evidence over appellant's objection that there was a lack of proper foundation based on chain of custody and that the testifying officer had not made the DVD himself. Officer Sean Chandler, one of the arresting officers, testified that he had viewed the DVD and verified that it was an accurate representation of the traffic stop and arrest. He also testified that an employee at the prosecutor's office had actually made the DVD copy from the police videotape. The court overruled appellant's objection and found that there was proper foundation for the DVD.

On appeal, appellant again argues that the chain of custody had been broken and that Officer Chandler was not the proper person to lay a foundation for the introduction of the evidence. However, Rule 901(b)(1) of the Arkansas Rules of Evidence provides that the "testimony of a witness with knowledge that a matter is what it is claimed to be" is sufficient for authentication purposes. In *Owens v. State*, 363 Ark. 413, 214 S.W.3d 849 (2005), our supreme court held that it was not essential for purposes of laying a proper foundation to have the person who actually took still photographs from a videotape be in court to testify. Similarly, in this case, we do not believe there was a lack of proper foundation or a chain-of-custody issue simply because Officer Chandler did not personally make the DVD copy. As an arresting officer, he was present at the scene, and he testified that he had viewed the DVD and that it was an accurate depiction of the arrest as seen on the police videotape. We find no abuse of discretion in admitting the DVD copy of the traffic stop.

2. Testimony of Charlene Hardy Elder

Charlene Elder was a drug addict and police informant who purchased drugs from the appellant on two occasions prior to his arrest. At trial, appellant objected to her testimony, arguing it was irrelevant, inadmissible character evidence under Rules 404(a) of the Arkansas Rules of Evidence, and prejudicial under Rule 403. The State countered by arguing that the prior drugs sales were relevant to show intent. The court overruled appellant's objection and gave the jury a cautionary instruction that the testimony was offered not to show that the allegations actually took place but to show a course of conduct or lack of mistake and that it should be considered only for that purpose.

On appeal, appellant renews his Rule 404 argument and asserts that the testimony of the previous two drug transactions was introduced solely for the purpose of giving the jury the impression that appellant was a drug dealer. Appellant also argues that the testimony was highly prejudicial and should have been excluded under Rule 403.

We do not agree with appellant's assertion that the testimony regarding the previous drug transactions was introduced solely as character evidence. Our case law has established that in cases involving possession with intent to deliver, as here, evidence of prior drug sales is admissible to show intent as long as the earlier sales are not too remote in time to be relevant. *Owens v. State,* 325 Ark. 110, 926 S.W.2d 650 (1996). In this case, the prior drug sales testified to by Elder occurred on December 5, 2003, and January 6, 2004, thirty-eight days and seven days before appellant's arrest. These drugs sales are certainly not too remote in time to render their significance irrelevant. As to appellant's Rule 403 argument, he contends that the testimony was highly prejudicial and had no probative effect because the

prior drug sales "had no temporal relation or similarity to the simple possession of drugs on January 13, 2004."

First, we note that appellant has mischaracterized the charges against him; he was charged with possession with intent to deliver, not simple possession as he asserts in his argument. Second, the balancing of probative value against prejudice under Rule 403 is a matter left to the sound discretion of the circuit court, and we will not reverse the lower court's decision on such a matter absent a manifest abuse of discretion. *Davis v. State*, 368 Ark. 401, ___ S.W.3d ___ (2007). Considering the testimony's relevance with regard to the element of intent, we find no abuse of discretion in the trial court's decision to admit Elder's testimony with regard to the prior drug sales.

Also with regard to Elder's testimony, appellant argues that the trial court improperly restricted his cross-examination of Elder. At trial, appellant's counsel questioned Elder regarding her financial situation, including her sources of income and amount of rent, but the State objected to a question regarding Elder's car payment as beyond the scope of direct examination, which was sustained. Appellant also was not allowed to inquire into Elder's financial needs that exceeded the amount of her disability check; the court ruled that the question had been asked and answered. On appeal, appellant contends he was entitled to determine whether Elder had a bias or reason to lie, and he was prejudiced because he was not allowed to expose Elder's lack of credibility to the jury.

In considering an argument that appellant's right of cross-examination was unduly restricted, it must be kept in mind that the trial judge is vested with some discretion in the

limitation of the scope and extent of cross-examination. *Dillard v. State*, 260 Ark. 743, 543 S.W.2d 925 (1976). In this case, we find no abuse of discretion in the trial court's ruling, as the questioning concerning Elder's sources of income and monthly expenses was clearly outside the scope of direct examination. In addition, appellant is unable to demonstrate any prejudice from the trial court's ruling. Elder was called again as a witness during appellant's case in chief, thus giving him an opportunity to cure any restriction placed upon his cross-examination, and we do not reverse a decision by the trial court absent a showing of prejudice. *Miller v. State*, 97 Ark. App. 285, ___ S.W.3d ___ (2007).

3. Testimony of Craig McKee

Craig McKee, a former officer with the Fayetteville Police Department, testified that he had been an officer for almost ten years and had worked on the drug task force for five years. He explained that he had attended drug-investigation training and had participated in hundreds of drug investigations. McKee also testified that he had interviewed hundreds of drug suspects and had learned the methods that they use. The State then moved to have McKee declared an expert witness in the field of narcotics investigations, and after a brief voir dire by appellant, McKee was declared an expert in the field of drug investigation without objection by appellant.

Appellant did lodge an objection, however, when the State asked McKee how drugs are sold. Appellant argued that McKee was not an expert in drug sales, and although he had been qualified as an expert, the court did not specify his field of expertise. The trial court disagreed and noted that McKee had been recognized as an expert in the field of drug

investigation with appellant's consent. Over appellant's objection that "this testimony is subject to the expert's testimony level of the *Dow Pharmaceuticals* case which has not been met in this case," the trial court overruled appellant's objection.

On appeal, appellant again argues that McKee's testimony regarding drug sales should not have been allowed. Appellant contends that McKee did not possess any expertise in the area of drug sales, therefore his testimony should have been excluded. To support his argument, appellant cites *Smith v. State*, 330 Ark. 50, 953 S.W.2d 870 (1997), in which a recreational hunter with no formal training or expertise was not qualified to testify as an expert in ballistics. Similarly, appellant argues, McKee did not have any formal education in the area of drug sales and should not have been allowed to provide expert testimony regarding drug sales.

We find *Smith* to be inapposite, however, because the proffered expert in *Smith* was a layman with no formal training, whereas McKee was an experienced police officer with special training in narcotics investigations. McKee testified that he had interviewed hundreds of drug suspects and learned their methods of use and sale, and he also participated in multiple controlled drug buys through his work in the drug task force. We find no abuse of discretion in McKee being allowed to testify as an expert regarding drug sales.

4. Testimony of Alex Pickering and the Letter to Judge Gunn

Alex Pickering, an employee of the Washington County Sheriff's Office, testified that he was familiar with appellant and appellant's handwriting through request forms and outgoing mail that appellant had given to him while at the detention center. Pickering

testified that appellant had a unique way of writing the letter "e." The State asked Pickering to identify a letter, and he identified it as a letter that was written to Judge Mary Ann Gunn in the same handwriting as appellant's. Appellant objected to the introduction of this evidence, however, on the ground that the letter contained inadmissible references to appellant's previous conviction. The letter was then admitted into evidence with the objectionable portion redacted.

Pickering proceeded to read to the jury a portion of the letter, which stated, "My name is Valdez T. Woods, I'm writing you to ask for drug court," and "I've wasted many years selling and ultimately using drugs." At that point, appellant raised an objection to the introduction of the letter to the jury, arguing that Pickering was not a handwriting expert and the State had not laid a proper foundation. The court overruled appellant's objection, noting that the letter had already been admitted into evidence, subject to the sustained objection from appellant, and the issue was now over.

On appeal, appellant argues that the letter (1) was prejudicial, (2) should only have been used for impeachment, and (3) was inadmissible hearsay. Appellant also contends that because Pickering's testimony was only offered to identify appellant's handwriting and introduce the letter, Pickering's testimony should have been excluded. We cannot reach the merits of appellant's argument, however, because he failed to make a contemporaneous objection to the letter on these grounds at the time it was introduced. An appellant's failure to make a contemporaneous objection prevents him from asserting any error on the part of the trial court for admitting the evidence. *McClain v. State*, 361 Ark. 133, 205 S.W.3d 123

(2005). In this case, the only contemporaneous objection to the letter raised by appellant concerned inadmissible portions of the letter, which were redacted prior to the evidence being admitted. Appellant's later arguments concerning Pickering's qualifications as an expert and lack of proper foundation came too late. *See Dixon v. State*, 310 Ark. 460, 839 S.W.2d 173 (1992) (holding that objection to an exhibit should have been made at the time it was admitted, and failure to do so rendered the argument not preserved for appellate review). We also note that the arguments made by appellant on appeal were not raised to the trial court at all, and issues raised for the first time on appeal will not be considered because the trial court never had an opportunity to rule on them. *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006).

5. The Money

During his description of appellant's arrest, Officer Chandler testified that he and the other arresting officer found three baggies of marijuana, three baggies of cocaine, and $641 in cash on appellant's person. Chandler testified that once they had arrived at the jail, he filled out a tally sheet documenting the total amount of cash found on appellant and the quantity of each bill denomination. The State moved to introduce the tally sheet into evidence, at which point appellant objected on grounds that it was irrelevant and unduly prejudicial. The court disagreed and stated that it was indeed relevant, and the court also noted that the witness had already made a statement with regard to how much money was found on appellant.

On appeal, appellant argues that "the money" should have been excluded on the basis that it had little probative effect but was highly prejudicial. Appellant appears to be mistaken in his argument, however, because there was no money introduced at trial. Furthermore, testimony had already been given as to the amount of money found on appellant's person without objection from appellant, and without a contemporaneous objection made at the first opportunity, the proverbial bell had been rung. *McClain, supra*. Finally, there was no abuse of discretion in the trial court's decision to admit the tally sheet into evidence. Our case law has established that possession of a large sum of money is relevant to the question of delivery of a controlled substance, *Jackson v. State*, 52 Ark. App. 7, 914 S.W.2d 317 (1996), and appellant can show no prejudice from the admission of the tally sheet, as he did not object to Chandler's earlier testimony telling the jury the amount of money found on appellant's person.

6. The Receipt

During appellant's case-in-chief, he offered the testimony of Ayala Rahm, a friend and associate of appellant's. Rahm testified that appellant's car was not driveable for the first two weeks of January 2004, and the car was in Rahm's driveway during that period of time. Appellant then testified on his own behalf and denied selling drugs to Charlene Hardy Elder in December 2003 or January 2004. He reiterated that his car was broken down, "sitting on its rims," at Rahm's house until January 13, 2004. Appellant testified that on January 13, he removed the rims from his vehicle and had new tires put on the rims. Appellant attempted

to introduce a receipt into evidence showing his purchase of new tires on January 13. The State objected based on relevancy, and the court agreed and sustained the objection.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ark. R. Evid. 401. On appeal, appellant argues that the trial court erred in excluding the receipt as irrelevant, because it directly contradicted Elder's previous testimony in which she had identified appellant's car as the vehicle he was driving at the time of the alleged drug sales on December 5, 2003 and January 6, 2004. Appellant contends that the receipt was relevant to prove that Elder lied as to her previous drug dealing with appellant and also corroborated the previous testimony of Rahm and appellant.

We concede that the receipt had some relevance, in that it could cast some doubt on Elder's testimony regarding the prior drug sales and provided corroboration for appellant's and Rahm's testimony. But the receipt itself only proved a purchase of new tires on January 13 and did not prove that appellant's car had been undriveable for the previous two weeks. Because the receipt was only marginally relevant, we hold that appellant has failed to demonstrate prejudice by its exclusion, and the trial court's exclusion of such evidence did not amount to an abuse of discretion. *See Harris v. State*, 366 Ark. 190, ___ S.W.3d ___ (2006) (holding that an appellate court will not reverse a trial court's evidentiary ruling absent a showing of prejudice).

7. Testimony of Warren Lloyd

Appellant attempted to call Warren Lloyd, a friend of appellant's, to the stand during his case-in-chief, and the State objected on the ground that it did not receive notice of the witness until that morning. Appellant argued that the witness had just come to his attention that morning, and he notified the State as soon as possible. Appellant explained that Lloyd would testify that appellant's car was sitting in Rahm's driveway at the time of the second alleged drug transaction. The court ruled that the State was entitled to reasonable notice, which they did not receive, and that the testimony was cumulative, so the objection was sustained.

On appeal, appellant argues he was prejudiced by the exclusion of Lloyd's testimony because it would have cast doubt on the State's case. We find no abuse of discretion in the trial court's ruling, however, considering (1) the State had no opportunity to speak with the witness before he testified, and (2) the testimony was merely cumulative, as it was repeating the same information given by both Rahm and appellant. *See McEwing v. State*, 366 Ark. 456, ___ S.W.3d ___ (2006) (holding that trial court did not abuse its discretion in excluding defendant's alibi witness from testifying on basis that it would be unfair to allow witness to testify, as defendant failed to disclose witness until day of trial, and prosecutor did not have opportunity to speak with the witness in hours before trial). Moreover, appellant has failed to demonstrate any prejudice resulting from the trial court's ruling as the proffered testimony was merely cumulative, and we will not reverse absent a showing of prejudice. *Harris, supra*.

Affirmed.

GLADWIN and BIRD, JJ., agree.