NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 0888

STATE OF LOUISIANA

VERSUS

DONNY FRANKLIN

Judgment Rendered: DEC 2 3 2014

Appealed from the
Eighteenth Judicial District Court
In and for the Parish of Pointe Coupee, State of Louisiana
Trial Court Number 76276-F

Honorable James J. Best, Judge Presiding

* * * * * * * * * *

Richard J. Ward, Jr.
Chad Aguillard
New Roads, LA

Counsel for Appellee,
State of Louisiana

Elizabeth A. Engolio
Plaquemine, LA

Roberta M. Vath
Thomas C. Damico
Baton Rouge, LA

Counsel for Defendant/Appellant,
Donny Franklin

* * * * * * * * * *

BEFORE: WHIPPLE, C.J., McCLENDON AND HIGGINBOTHAM, JJ.

WHIPPLE, C.J.

The defendant, Donny Wayne Franklin, was charged by bill of information with illegal carrying of weapons while in the possession of cocaine (count 1), a violation of LSA-R.S. 14:95E, and possession with intent to distribute a Schedule II controlled dangerous substance (cocaine) (count 2), a violation of LSA-R.S. 40:967A. He pled not guilty, and following a jury trial, was found guilty as charged on both counts. He filed a motion for new trial, which the district court denied. The defendant was sentenced to five years at hard labor on each count to run concurrently. The district court ordered that four years of the defendant's five-year sentence on count 2 run concurrently with the five-year sentence on count 1. The defendant made an oral motion to reconsider, requesting that the court run all five years on both counts concurrently. The State had no objection to the defendant's request. The district court granted the defendant's motion and sentenced the defendant to five years on each count to run concurrently. The defendant now appeals, alleging three assignments of error. For the following reasons, we affirm his convictions and sentences.

FACTS

After receiving complaints that the defendant was selling drugs out of his home, officers with the Pointe Coupee Parish Sheriff's Office sent a confidential informant ("CI") to purchase crack cocaine from the defendant on May 18, 2010. The CI knocked on the defendant's door, stood in the kitchen area, purchased a rock of crack cocaine, and returned with the cocaine to the officers who observed the buy. Based on the CI's purchase, an affidavit and search warrant were prepared. The search warrant was executed on May 21, 2010, and officers located crack cocaine inside of a plastic baggie and the defendant's driver's license in a cookie jar in the defendant's kitchen. A loaded firearm was also located on top of

the refrigerator in the kitchen. Seventy-two dollars in cash was located on the kitchen counter next to the cookie jar; six hundred and two dollars in cash was located inside a Crown Royal bag in an air conditioning vent in the dining room area; and approximately three thousand, seven hundred and sixty dollars in cash was located inside of a purse in a bedroom closet "underneath a bunch of clothes." The defendant stated that the cocaine, gun, and money (except for the money found inside of the purse) belonged to him. He wrote a voluntary statement taking full responsibility for the cocaine and firearm. A total of 4.8 grams of crack cocaine was recovered from the defendant's home.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant contends that the district court abused its discretion in allowing testimony of a prior bad act to be heard by the jury without sufficient proof from the State that the defendant committed the act. Referring to the purchase by the CI, the defendant argues that the State failed to prove that the transaction occurred. Specifically, the defendant complains that the only evidence offered in support of the transaction was the "hearsay testimony" of Detective Salvador Genusa of the Pointe Coupee Parish Sheriff's Office. Prior to trial herein, the State filed a notice of intent to use evidence of other crimes pursuant to LSA-C.E. art. 404B, to show the defendant's intent, guilty knowledge, motive, opportunity, preparation, plan, identity, and absence of mistake or accident. Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to the defendant. State v. Hills, 99-1750 (La. 5/16/00), 761 So. 2d 516, 520.

Under Article 404B(1), other crimes evidence "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." The

evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. LSA-C.E. art. 404B(1). At least one of the enumerated purposes in Article 404B must be at issue, have some independent relevance, or be an element of the crime charged in order for the evidence to be admissible under Article 404. Thus, to be admissible under Article 404B, evidence of the defendant's prior bad acts must meet two criteria: (1) it must be relevant to some issue other than the defendant's character, and (2) its probative value must be greater than its potential to unfairly prejudice the jury. See LSA-C.E. 403 & 404B. A district court's ruling on the admissibility of evidence of other crimes will not be overturned absent an abuse of discretion. State v. Galliano, 2002-2849 (La. 1/10/03), 839 So. 2d 932, 934 (per curiam).

The procedure to be used when the State intends to offer evidence of other criminal offenses was formerly controlled by State v. Prieur, 277 So. 2d 126 (La. 1973). Under Prieur, the State was required to prove by clear and convincing evidence that the defendant committed the other crimes. Id. at 129. However, 1994 La. Acts 3rd Ex. Sess. No. 51 added LSA-C.E. art. 1104 and amended Article 404B. Article 1104 provides that the burden of proof in pretrial Prieur hearings, "shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404." The burden of proof required by Federal Rules of Evidence Article IV, Rule 404 is satisfied upon a showing of sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. See Huddleston v. U.S., 485 U.S. 681, 685, 108 S. Ct. 1496, 1499, 99 L. Ed. 2d 771 (1988). The Louisiana Supreme Court has yet to address the issue of the burden of proof required for the admission of other crimes evidence in light of the repeal of LSA-C.E. art. 1103 and the addition of

Article 1104. However, numerous Louisiana appellate courts, including this court, have held that burden of proof to now be less than "clear and convincing." State v. Millien, 2002-1006 (La. App. 1st Cir. 2/14/03), 845 So. 2d 506, 514; see also State v. Williams, 99-2576 (La. App. 1st Cir. 9/22/00), 769 So. 2d 730, 734 n. 4.

At the Prieur hearing, the State offered the testimony of Detective Genusa, who testified that he was the lead detective involved in the controlled buy between the defendant and the CI that took place on May 18, 2010. The detective testified that the CI knew the defendant. The CI's person was searched as well as his vehicle to ensure that he had no cash, drugs, or weapons. He was then set up with a camera. Detective Genusa remained nearby while the CI went to the defendant's residence. Audio contact was maintained throughout the transaction, and visual contact was maintained until the CI entered the residence. The CI returned with the cocaine and stated that he purchased it from the defendant. The CI also told Detective Genusa that there was more cocaine inside of the residence. Thereafter, the detective watched a video of the transaction and subsequently destroyed it to protect the CI's identity. Based on this transaction, Detective Genusa prepared an affidavit and search warrant for the defendant's residence. The affidavit submitted in support of the search warrant also indicated that "visual and audible contact was made on the cooperating individual from the time of contact until the time cooperating individual entered the residence, audible contact continued at all times." The State offered the affidavit of probable cause and search warrant into evidence.

The defendant argues that the identity of the CI should have been disclosed. As a general rule, the State is not required to divulge to the accused the name of a confidential informant. However, an exception is made when the informant was a participant in an illegal drug transaction. State v. Buffington, 452 So. 2d 1313 (La.

App. 1st Cir. 1984). The CI participated in the controlled drug buy, which was used as the source of probable cause for the search warrant. However, the charges in this case were based on the evidence seized in the search of the residence, not on any evidence seized from the controlled drug buy between the defendant and the CI. The CI did not play a crucial role in the transaction (i.e., the search) that led to the defendant's arrest because he played no part in the execution of the search warrant and subsequent search. See State v. Clark, 2005-61 (La. App. 5th Cir. 6/28/05), 909 So. 2d 1007, 1015-16, writ denied, 2005-2119 (La. 3/17/06), 925 So. 2d 538. See also State v. Diliberto, 362 So. 2d 566, 567-68 (La. 1978); State v. Jackson, 94-1500 (La. App. 4th Cir. 4/26/95), 654 So. 2d 819, 823, writ denied, 95-1281 (La. 10/13/95), 661 So. 2d 495. Accordingly, the State was not required to divulge the name of the CI. Because the State was not required to disclose the CI's identity, the testimony of Detective Genusa, who planned and oversaw the controlled buy, was sufficient to support a finding by the jury that the defendant committed the other crime, wrong, or act. Thus, the State met its burden of proof.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, the defendant argues that the district court erred in removing a juror without adequate cause after the jury had been sworn. Specifically, the defendant contends that the sole minority juror, Erica Walls, was removed for an improper comment that she allegedly made to a potential juror.

After the final jury was selected, a potential juror approached one of the bailiffs and stated that she needed to speak to the assistant district attorney. The potential juror told the assistant district attorney that she overheard Walls say, "I feel sorry for the Defendant, and I am gonna stay on this Jury to help him out."

Walls also told the potential juror that her "baby daddy is in prison, and that she's gonna stay here to help him out[.]"

Walls was brought before the court for questioning, and she confirmed that she had a child whose father was in prison. She indicated that her child's father was in jail for murder and was scheduled for trial the following month. She denied saying that she would stay on this case to help the defendant. Defense counsel asked Walls whether she could be a fair juror, and she indicated that she could.

Although the potential juror who disclosed the alleged comments did not appear before the court, the assistant district attorney identified the woman who approached him with the information as "Mel Bueche's sister." He indicated that he did not know her name, but that the court knew her. He further stated that when the potential juror approached him, she said:

> "I don't know what I should do with this, but . . . there's a lady on the Jury who I heard say that . . . her baby's daddy was in jail for murder. Somebody suggested that she could get off the Jury if she would let everybody know that, and . . . her response was, "No; I don't want to. I wanna help this young man out."

The State challenged Walls for cause based on her alleged statement. Then, the State decided to exercise a peremptory challenge rather than challenging Walls for cause. The defendant objected, arguing that Walls had already been sworn in, did not know the defendant, denied making the statement, and indicated that she could be fair. Despite the defendant's objections, the court accepted the peremptory challenge and also granted the challenge for cause, excusing Walls and making the first alternate the twelfth juror.

In accepting the State's peremptory challenge and granting the challenge for cause, the court stated:

> The State is urging that the peremptory [sic] challenge be peremptory - - the Court will accept that peremptory challenge at this time, but also, in a - - in furtherance, the Court also grants a challenge for Cause. This is exactly the type of jurors [sic] that should never be

> on the Jury. That information is good information. There's no reason to believe that it was made up solely to - - for any reason to get [Walls] off. The information was specific as to a child, a – a child's father in prison, and that could only have come about by the representation made by [the assistant district attorneys] and [the bailiff].

A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably implied. A district court is accorded great discretion in determining whether to seat or reject a juror for cause, and such rulings will not be disturbed unless a review of the voir dire as a whole indicates an abuse of that discretion. See State v. Jones, 474 So. 2d 919, 926 (La. 1985), cert. denied, 476 U.S. 1178, 106 S. Ct. 2906, 90 L. Ed. 2d 992 (1986).

"If it is discovered after a juror has been accepted and sworn, that he is incompetent to serve, the court may, at any time before the first witness is sworn, order the juror removed and the panel completed in the ordinary course." LSA-C.Cr.P. art. 796. The State shows good cause for a challenge when "[t]he juror is biased against the enforcement of the statute charged to have been violated[.]" LSA-C.Cr.P. art. 798(1). Louisiana Code of Criminal Procedure article 789 permits replacement of a juror with an alternate juror when the juror is found to have become disqualified.

The district court judge did not abuse his discretion in dismissing Walls from the jury. The judge was able to evaluate Walls's entire demeanor—not just her words, but also her facial expressions, gestures, and overall bearing. Based on his observations, the district court judge concluded Walls was "exactly the type of [juror] that should never be on the [j]ury." In replacing Walls with an alternate juror, the district court was protecting the proceedings from potential error. The

district court's finding that Walls should be removed is supported by the record. Accordingly, this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 3

In his last assignment of error, the defendant argues that he was denied his right to present a defense by the State's improper assertion that he could not recall a key witness, Quinton Franklin.

Prior to resting its case, the State called Franklin, a defense witness who was the defendant's nephew. Franklin testified that the gun located in the defendant's residence belonged to him. The defendant then questioned the witness. After the State rested its case and defense counsel began the presentation of her case, she stated, "My first witness for today is Mr. Quinton - - Your Honor, I would just recall him, Your Honor." The State argued that defense counsel was barred from calling Franklin. Defense counsel responded that the State misunderstood her and that, "I didn't ask to recall him. I said I didn't want to recall him." She further explained, "The only witness I was going to call was Mr. Quinton, and we called him . . . I'm not asking to recall him."

The record does not support the defendant's assertion that defense counsel "wanted to recall [Quinton] Franklin as a defense witness, and question him on direct[,]." Moreover, the trial court never entered a ruling prohibiting the defense from calling Quinton Franklin as a witness. Absent such a ruling, this assignment of error presents nothing for review. Nonetheless, the record is clear that the defendant was not denied his right to present a defense. For all of these reasons, this assignment of error lacks merit.

CONCLUSION

For the above reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.