NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 1716

STATE OF LOUISIANA

VERSUS

TYLER BAYE

Judgment Rendered: APR 2 4 2015

Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche, State of Louisiana
Trial Court Number 522067

Honorable Jerome J. Barbera, III, Judge Presiding

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Tyler Baye

* * * * * * * * * *

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

WHIPPLE, C.J.

The defendant, Tyler Baye, was charged by bill of information with possession of marijuana, third offense, in violation of LSA-R.S. 40:966, and pled not guilty. The defendant filed a motion to suppress inculpatory statements and the motion to suppress was denied. Following a jury trial, the defendant was found guilty as charged. He was sentenced to five years imprisonment at hard labor. The sentence was suspended, and the defendant was placed on four years of probation with certain conditions. The defendant was further ordered to serve sixty days in jail at the Lafourche Parish Detention Center. The defendant now appeals, asserting one assignment of error. We affirm the conviction and sentence.

FACTS

Charles Frederick was working as a confidential informant (CI) for Agent Derek Champagne, an officer with the Lafourche Parish Sheriff's Office and member of the Lafourche Parish Drug Task Force. The defendant contacted Frederick by phone and told him he had marijuana to sell him. Frederick informed Agent Champagne about this phone call. On May 8, 2013, Frederick called the defendant back to set up a deal. The phone call was being recorded and monitored by agents with the task force. After Frederick spoke briefly to Michelle Bourgeois, the defendant's girlfriend, she handed the phone to the defendant, who set up the deal with Frederick.

Frederick and Agent Justin Leonard, an officer with the Lafourche Parish Sheriff's Office working in an undercover capacity, drove together in Frederick's truck to the parking lot of the Walgreens store on South Acadia in Thibodaux. A button camera was affixed to Frederick's person to record the purchase. Michelle pulled in next to Frederick in a minivan. Frederick approached Michelle, and they exchanged some words. Frederick also spoke to the defendant, who was in the front passenger seat. Frederick then handed over the serialized cash ($60.00 to

$80.00) from the Sheriff's Office. The defendant gave a baggie of about four grams of marijuana to Michelle, and she passed the drugs to Frederick. Frederick went back to his truck, where Agent Leonard took possession of the marijuana. Agent Leonard then turned the marijuana over to Agent Champagne, who deposited the drugs into evidence.

The CD of the recorded phone call with the defendant and the DVD of the recorded drug deal were submitted into evidence at trial. Because of the awkward angle of Frederick's camera button, Michelle and the defendant cannot be seen, but are only heard. Deputy Ryan Perrera, with the Lafourche Parish Sheriff's Office, testified that he monitors misdemeanor probations and that he had monitored the defendant, who had been put on probation for two misdemeanor convictions for possession of marijuana in 2012.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in denying his motion to suppress his statement. Specifically, the defendant contends that his recorded telephone conversation wherein the CI, Charles Frederick, discussed purchasing marijuana from him should have been suppressed because the CI did not freely and voluntarily consent to call the defendant and record the conversation.

When a court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the court's discretion, i.e., unless such ruling is not supported by the evidence. See State v. Green, 94-0887 (La. 5/22/95), 655 So. 2d 272, 280-81. However, a court's legal findings are subject to a *de novo* standard of review. See State v. Hunt, 2009-1589 (La. 12/1/09), 25 So. 3d 746, 751. In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence

adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. State v. Chopin, 372 So. 2d 1222, 1223 n.2 (La. 1979).

According to the testimony of Frederick and Agent Champagne at the motion-to-suppress hearing, Agents Champagne and Pritchard found alprazolam in Frederick's apartment on June 28, 2012. Thereafter, on July 31, 2012, Frederick turned himself in pursuant to the issuance of an arrest warrant. He bonded out the same day and was told by the agents to stay in contact with them. During this time, Frederick conducted about four controlled drug purchases for the agents. In January of 2013, Frederick pled guilty to possession of alprazolam. He was given a suspended sentence and two years of supervised probation. According to Frederick, after the July 31, 2012 incident, but before he pled guilty in January of 2013, he had another encounter with the agents, but was never arrested. Agent Pritchard was the case agent on both of these cases; as such, Agent Champagne did not do any follow-up on these cases since he did not make the decision to arrest Frederick. Frederick further testified at the motion to suppress hearing that on the date of the instant offense, May 8, 2013, he did some more confidential informant work (the call to the defendant) in order to help himself. The testimony at the motion-to-suppress hearing indicates that Frederick apparently did not have any more encounters with the agents (involving his own illegal behavior) between his guilty plea in January of 2013 and May 8, 2013.

At trial, however, Frederick testified that on February 21, 2013, the same agents found eight alprazolam pills inside his jacket in his room. Frederick stated that, nevertheless, he had already agreed to work for the Drug Task Force prior to this February incident. On this same date (February 21), Frederick was given an Informant Report, a packet of information which included a conduct form (CI form) for those agreeing to act as confidential informants. The CI form explained

the code of conduct the CI is expected to abide by while working undercover. As part of this packet, Frederick was also given a one-party consent form, which indicates that the signing party is aware that a conversation is being recorded. Frederick signed and dated this form, which allowed the agents to monitor his phone calls. Frederick was not arrested for the February 21, 2013 incident, but instead, helped the agents by placing the phone call to the defendant and making the drug purchase on May 8, 2013.

The Electronic Surveillance Act, LSA-R.S. 15:1301, et seq., generally prohibits the interception and disclosure of wire or oral communications. However, there are exceptions to this general prohibition, such as where one of the parties to the communication consents to its interception, or where a prior court order for the interception is obtained. State v. Vince, 98-1892 (La. App. 1st Cir. 6/25/99), 739 So. 2d 308, 310, writ denied, 99-2232 (La. 1/28/00), 753 So. 2d 230. Specifically, LSA-R.S. 15:1303(C)(3) of the Act provides in pertinent part that it "shall not be unlawful under this Chapter for a person acting under color of law to intercept a wire, electronic, or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

In his brief, the defendant asserts that Frederick was induced to place the recorded phone call to him. Specifically, the defendant suggests that Frederick acted as a confidential informant in this case under fear and duress of probation revocation and prosecution for additional drug offenses. The defendant notes that, while Frederick testified at trial about the February 21, 2013 incident with the agents (including pills found in his jacket), he did not mention this incident at the motion to suppress hearing. As such, the defendant contends, the trial court mistakenly believed that all of Frederick's potential outstanding legal issues were closed out when he pled guilty in January of 2013. Instead, according to the

defendant, Frederick's awareness of the "years in prison" he faced for violation of his probation, and having tested positive for drugs while on probation, as well as the unresolved February 21, 2013 incident, is what induced him to work for the agents. Thus, asserts the defendant, while Frederick was a party to the recorded communication with the defendant, the prior consent he gave the agents to the monitored interception was not free and voluntary, but was given under fear and duress. Finally, the defendant asserts in brief:

> Agent Champagne testified that in exchange for the assistance of confidential informants, the agents will contact the District Attorney's Office and request leniency .... That is not what happened in this case. In this case Frederick was never arrested and charged with the new crimes. There is no evidence in the record that the District Attorney's Office was involved in any matters concerning Frederick after he was placed on probation on January 9, 2013. The testimony indicates that agents Prichard and Champagne acting unilaterally decided not to arrest Frederick. This is not a promise of leniency – it is absolution and was certainly an inducement to consent. Frederick's testimony at the hearing on the motion to suppress was impeached by undisputed trial testimony. His self-serving testimony indicating he had altruistic motives to voluntarily consent should be disregarded. The state did not meet its burden of proving that the consent was free and voluntary.

After carefully considering these arguments, we find it difficult to reconcile the defendant's premise that Frederick was acting under fear and duress while simultaneously having been granted the opportunity to be absolved of all wrongdoing if he helped the agents. On the one hand, the defendant argues that the prospect of facing a prison sentence was held over Frederick's head to induce him to help the agents. However, on the other hand, the defendant argues that the agents "decided not to arrest Frederick," which, according to the defendant, was not a promise of leniency, but was "absolution and was certainly an inducement to consent."

Furthermore, there is nothing in the record to show how the defendant knows, as he asserts in brief, that the agents never contacted the District Attorney's Office regarding leniency for Frederick in this instant matter. On the issue of

whether such contact was made by the agents, the defendant insists, "That is not what happened in this case." However, Agent Champagne testified at trial that the District Attorney's Office was, in fact, contacted. Following is the relevant exchange:

> Q. Can you give us some of the reasons why someone would be a confidential informant?
> A. Sometimes we pay them in the form of currency. Other times they might be themselves facing narcotics charges and want to help themselves out on their charges.
> Q. Is that something that happens frequently?
> A. Yes, ma'am.
> Q. So, it wasn't unusual in this case?
> A. No, ma'am.
> Q. Did [Frederick] receive money, payments, for his service?
> A. No, ma'am.
> Q. OK. What benefit did he receive from you?
> A. In this particular case he received help on some charges that he had filed with us.
> Q. What - describe that help.
> A. Well, he provided us information, made controlled purchases, and in return we contact the district attorney's office and let them know that Charles Frederick did A, B, and C, and asked for their assistance in helping him out.

At the motion-to-suppress hearing, regarding how Frederick helped himself by acting as a confidential informant, Agent Champagne testified, "He provides information to us. We prepare something for the D.A.'s office and they decide the amount of assistance that he will receive." Agent Champagne explained that Lieutenant John Champagne handled all correspondence with the District Attorney's Office regarding confidential informants. Lieutenant Champagne did not testify at trial or the motion to suppress hearing.

Throughout his brief, the defendant contends that Frederick called the defendant because he was induced to do so with the prospect of facing jail time, as if that consideration alone vitiated Frederick's voluntariness in agreeing to make the call. In Vince, 739 So. 2d at 311-312, we addressed a similar argument:

> The defendant's instant argument rests upon the fact that Mr. Campbell likely went to the police and proposed the taped telephone conversation with the defendant out of a selfish desire to obtain police

> assistance to better his own position. However, even under such a scenario, the fact would remain that Mr. Campbell went to the police independently and of his own free will, rather than in response to any police "inducement." If anything, Mr. Campbell induced the police to action, rather than vice versa.

As the jurisprudence suggests, the fundamental nature of this type of relationship is the quid pro quo arrangement between the police officer and the confidential informant. See United States v. Buchanan, 70 F.3d 818, 823-24 (5th Cir. 1995), cert. denied, 517 U.S. 1114, 1126, 116 S. Ct. 1340, 1366, 134 L. Ed. 2d 490, 532 (1996) ("Diana and John Buchanan distributed crack cocaine out of their home in Houston. An informant, Ernest 'Easy' McDay, began working with the Austin Police Department ('APD') to build a case against the Buchanans. McDay had served as a middleman on some of the Buchanans' Austin drug sales, and was facing drug charges of his own when he agreed to help APD"); State v. Stallworth, 98-2356 (La. App. 4th Cir. 10/21/98), 720 So. 2d 746, 747 ("the informant had been compensated by payment of $200 for the first incident and $300 for the second incident when the informant provided information"); State v. Anderson, 30,306 (La. App. 2nd Cir. 1/21/98), 706 So. 2d 598, 600 (Inmate told Deputy Lewis Russell that he could purchase drugs from one or more persons in the parish. The inmate answered in the affirmative to Russell's inquiry of whether the inmate could buy drugs from Anderson. Russell then agreed to help the inmate to reduce his bond in return for the inmate's serving as a confidential informant). See also McAfee v. State, 204 S.W.3d 868, 880 (Tex. App. 2006) ("courts have recognized that confidential informants often work with police for self-interested reasons and 'generally have an incentive or hope for personal gain,' such as monetary compensation or dismissal of pending charges"); Hall v. State, 546 So. 2d 673, 675 (Miss. 1989) ("Smith was cooperating with the police in exchange for relief from a charge of sale of less than an ounce of marijuana").

In any event, the evidence adduced at the motion-to-suppress hearing and

the trial indicates that Frederick's prior consent to the recorded telephone conversation between him and the defendant was free and voluntary. At the motion-to-suppress hearing, the following exchange between Frederick and defense counsel took place:

> Q. You testified you pled guilty January 2013. When you agreed to cooperate, to assist the sheriff's office, what type of assistance or how did they explain you could help yourself in your situation?
> A. It was more or less me wanting to help them.
> Q. And why did you want to help them?
> A. It was a corroboration. They didn't have to do much convincing.
> Q. And why was that?
> A. Because I was sick and tired of where I was at.
> Q. And what do you mean by that? Could you expound on that?
> A. What do I mean by that, sir, is the mere fact that the world that I was living in, the drug induced world that I was in is not a good one and I was ready to turn it around.

Later, the following exchanges between Frederick and defense counsel took place:

> Q. On May 8th, 2014, you were working in the capacity of a confidential informant; correct?
> A. Which date was that?
> Q. May 18th -- excuse me, May 8th of 2013.
> A. Yes.
> Q. And the reason why you were acting as a confidential informant, you were trying to -- you were given an opportunity to help yourself, right?
> A. Yes.
> Q. And you were doing things to help yourself?
> A. Yes.
> Q. What did you want to see happen? How do you want to see yourself helped at the end? What did you want to see?
> A. I'm glad you asked that question. I really am. When you work for the narcotics agency, you are helping people. You, sir, may not believe that, but you are. You are giving them a reason to get out the lives they live. I'm sure you know, as well as I know, that any drug world is not a good world. I could tell you right now, I do not regret a single thing I did because of who I am today. I wasn't a bad person back then, but I was a drug induced person. And if I made a phone call to let somebody else have the same opportunity that I had, then I do not regret that because they could, too, better themselves.
>
> * * * * *
>
> Q. In connection with your efforts and your assistance with Drug Task Force, what were you given? What did they provide you?

A. Are we -- material -- I mean, are we talking about material items?
Q. Material, immaterial, tangible, intangible, what were you given for your assistance?
A. First and foremost sobriety. Secondly, an understanding of the agency, an understanding of law enforcement, an understanding of Lafourche Parish in general of the State of Louisiana, an understanding as to why there are agents. Because I used to fight against them. I don't anymore because I see why they're there. I was -- like I said, I was given an opportunity. I did not serve jail time. My name was not in the newspapers. My name was not on the internet. I was given leeway in my case I would suspect because I helped Lafourche Narcotics Task Force.
Q. Any time were you paid for your assistance monetarily?
A. No, sir.
Q. Your appreciation, your understanding is that because of your assistance, you were given leeway I think is the word you used, leeway in your case, right?
A. Yeah, I would suspect so. I mean, I helped -- I helped the narcotics agency.

On cross-examination at the motion-to-suppress hearing, Frederick testified he continued to help the police because he felt like it was the right thing to do. Later, Frederick was asked if he felt pressured by outside forces to "bust" the defendant. Frederick responded, "Pressure, no."

Regarding the consent form signed by Frederick before he made the call to the defendant, Agent Champagne testified at the motion-to-suppress hearing as follows:

Q. If you could, just a summary what it contains.
A. It's a form with the confidential informant's name and it states that -- that they waive their Fourth Amendment rights to be able to have their phone recorded.
Q. Any other attestations, meaning there were no threats, inducements, duress --
A. No.
Q. -- anything else?
A. The form specifically states that has no threats, coercion, any form been used against me to obtain this kind of recorded phone call.

* * * * *

A. It says, not verbatim, but that no promises, threats, coercion of any kind have been used against me to get me to sign this form.

In denying the motion to suppress, the trial court stated in pertinent part:

So, two questions, was there consent? And, number two, was the consent freely and voluntarily given?

* * * * *

Mr. Frederick's testimony is very interesting in this case about his position with the Task Force, how he viewed law enforcement, how he viewed his position as an accused, as someone charged with a felony, and how that might translate into what he might do, as we heard the terminology, to help himself. Mr. Frederick . . . did not perceive himself as someone who was being watched by the Drug Task Force and that he was nervously sitting by the telephone hoping that the phone never rang from an agent calling to get help. He presented himself as someone who said, well, yeah, he called me. I told him I'd call him back and then I went to the Task Force. And he said I went to the Task Force because, to paraphrase, because basically I thought it was the right thing to do. If somebody else could get help like I got help to get off the street and get drugs out of my life, then that's what I wanted to do. So he presented that as his desire to help Tyler Baye in the same way that he believed that he was helped before.

He says that he knew the conversation was recorded. Although I asked the question, I did not prompt an answer. It was a direct question, was it recorded? Did you know it was recorded? He said, yes, I knew it was recorded. I didn't ask anything further from that, but I will assume from that for the purpose of this hearing, that the State has proved, has carried their burden of proof in this hearing that he knew that it was being recorded, which meant that before he went there, his consent was certainly implied consent. I don't know that in the statute if there's any or in the case law if there's any -- if they make any differentiation between implied or implicit or direct consent.

The other question is whether or not there were promises made. The testimony that was presented by the agent and by Mr. Frederick was that they would pass the information along. There were no promises. He stated that there were no promises about exactly what happened. Evidently, evidently, from the way things happened in the case, the Task Force got tired of waiting for Mr. Frederick to call up because somebody went [to] get a warrant not too long after the investigation. Things happened in June and then in July he finds out there's a warrant for his arrest. So somebody had to do something to produce an affidavit to a Judge to get a warrant. So if the Task Force was trying to bury what happened against the June 28th event, if the Task Force was trying to bury it hoping that they would get some assistance from Mr. Frederick, they didn't wait very long. Got a warrant.

So at that point, Mr. Frederick initiates, again, the effort to try to help himself by turning himself in, but nothing happens. He says that he maybe participated in three other events. There was no direct evidence of what else he did. Three other events he says he believes that it might have been. There was no testimony, there's no book, there's no manual about how much people have to do to get a break. What we know is and what the testimony shows today is that there are no promises made other than I will tell somebody across the street what happened, which is, in essence, what was done in the Vince case where the Court found that -- and they also cited another case, a

> Cutrera case, where what the investigating officers promised is that they would let somebody else know what he did, which is in a sense all that they can promise is to pass on the fact that he did provide some assistance.
>
> There's no evidence of any promises, inducements. The fact that the other incident was out there doesn't impress me as being a problem because in my experience in this position, when someone pleads guilty to a felony charge and they're placed on probation that that plea generally is a closeout of what law enforcement has on somebody at that point or intends to present.
>
> Mr. Chatagnier made argument and you can certainly make good argument that even the D.A. didn't know about that. So [the] Task Force is holding onto it. Well, that doesn't make too much sense if somebody's pleading to a felony. If they at that point were not happy with his helping himself, all they had to do was present what they had to the District Attorney's Office. I don't believe that that was an issue in the case.
>
> So I believe that there was consent. I believe the consent to the recording was a knowing and voluntary consent. So for those reasons, the Motion to Suppress is denied.

The defendant suggests in brief that the trial court may not have been aware of the February 21, 2013 incident, which could have prompted Frederick to continue helping the police. As noted, however, under Chopin, 372 So. 2d at 1223 n.2, in determining the propriety of the trial court's ruling, we are to consider the evidence given at trial, as well. When asked on direct examination at trial why he became a confidential informant, Frederick stated that agents came into his home and that he was thankful they gave him the opportunity to not spend a lot of time in jail and to not have to throw away his entire life because of drugs. At trial, Agent Champagne discussed the February 21, 2013 incident where he and Agent Pritchard found pills in Frederick's jacket. According to Agent Champagne, Frederick was not arrested and, ultimately, not charged for this offense, but continued working as a confidential informant for the agents. Sergeant Adam Dufrene, with the Lafourche Parish Sheriff's Office, was the supervisor for the drug task force involved in the instant May 8, 2013 drug purchase. Regarding the motivation for why a person becomes a confidential informant, Sergeant Dufrene testified at trial as follows:

Q. All right. Have you had experience working with CI's before?
A. Yes, ma'am.
Q. OK. Now, can you tell the members of the jury what type of individual a CI usually is? Or their motivations for working.
A. Could be different things. From good citizen to pending charges.
Q. OK.
A. Typically, the type of individual it is is either someone, primarily, that has a history in narcotics.
Q. Out of what percentage would you say out of the cases you've worked it involved someone who's trying to work off charges or trying to avoid getting charged?
A. About 99 percent.

Based on the foregoing, the trial court did not err in finding that Frederick consented to placing a recorded phone call to the defendant and that the consent was free and voluntary. Moreover, even if the trial court had erred in allowing the recorded conversation into evidence, such error surely would have been harmless. Louisiana Code of Criminal Procedure article 921 states that "[a] judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." The test for determining whether an error is harmless is whether the verdict actually rendered in this case "was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993).

The defendant was charged with possession of marijuana (third offense) and the evidence overwhelmingly established such possession. Frederick testified that at the scene of the deal, Michelle Bourgeois was in the driver's seat of the minivan and the defendant was the front passenger. Frederick approached Michelle on the driver's side and spoke to her and the defendant. Seconds later, he exchanged money for about four grams of marijuana. Michelle testified at trial that she was dating the defendant. According to her testimony, on the day (May 8, 2013) Frederick bought marijuana from the defendant, the defendant was in possession of marijuana while in her car. The defendant kept marijuana in his house and in his bedroom, and he had marijuana in his bedroom on May 8, 2013. He had taken

some marijuana from his room on that date and rode with Michelle to Walgreens to sell it. During the drug purchase, the defendant handed the marijuana to Michelle, and she handed the marijuana to Frederick.

The evidence at trial clearly established the defendant was guilty of possessing marijuana. The evidentiary value, if any, of the thirty-two seconds of a recorded conversation between Frederick and the defendant prior to any actual drug sale was limited and largely inconsequential, given the entirety of the other evidence presented at trial. An error is harmless if it is unimportant in relation to the whole and the verdict rendered was surely unattributable to the error. State v. Koon, 96-1208 (La. 5/20/97), 704 So. 2d 756, 763, cert. denied, 522 U.S. 1001, 118 S. Ct. 570, 139 L. Ed. 2d 410 (1997). Considering the foregoing, we are convinced that the guilty verdict rendered was surely unattributable to any alleged error in allowing the defendant's recorded conversation into evidence and that such alleged error was harmless beyond a reasonable doubt. LSA-C.Cr.P. art. 921; Sullivan, 508 U.S. at 279, 113 S. Ct. at 2081.

Accordingly, we find no error or abuse of discretion by the trial court in denying the defendant's motion to suppress. Finding no merit to the assignment of error, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.