NO. COA13-390
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Durham County
Nos. 11 CRS 50268-69, 50273

BARRY CRANSTON LILLIE, II

Appeal by defendant from judgments entered 2 March 2012 by Judge William O. Smith in Durham County Superior Court. Heard in the Court of Appeals 30 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Barry H. Bloch, for the State.

James N. Freeman, Jr., for defendant-appellant.

HUNTER, Robert C., Judge.

A jury found defendant guilty of trafficking in more than four but less than fourteen grams of heroin by possession, by sale, and by transportation, conspiracy to traffic in heroin by sale, and possession of heroin with intent to sell or deliver. The trial court sentenced him to two consecutive prison terms of 70 to 84 months each. Defendant gave notice of appeal in open court. After careful review, we find no error.

The State's evidence showed that Priscilla Hudson cooperated with members of the Durham Police Department's Special Operations Division ("SOD") to make two "controlled buys" of heroin from Frankie Pettiford on 4 and 12 January 2011. Officers provided Hudson with traceable currency to purchase the drugs and monitored the transactions by equipping her vehicle with audio-visual recording devices. Hudson received $300 after each purchase and a $300 "bonus" for testifying at defendant's trial.

On 4 January 2011, Hudson telephoned Pettiford in the presence of an SOD officer and arranged to purchase five grams of heroin. She drove to Pettiford's residence near the intersection of Martha Street and Fayetteville Road to pick him up. She then proceeded to a McDonald's restaurant in downtown Durham, where Pettiford met briefly with defendant in defendant's white pickup truck and returned to Hudson's vehicle to complete the transaction. Hudson returned Pettiford to his residence before surrendering the heroin to the surveillance officers.

On 12 January 2011, Hudson telephoned Pettiford and arranged to purchase eleven grams of heroin for $1,500.00. Hudson again picked up Pettiford from his residence but drove

him on this occasion to a convenience store on Mangum Street. Defendant was already at the store, having driven the white pickup truck used in the 4 January 2011 transaction. Pettiford told Hudson that "my man's here," and asked her for the money. After receiving the $1,500 from Hudson, Pettiford exited her vehicle and went into the store. Pettiford emerged with defendant; and the two men entered defendant's pickup truck. Defendant pulled his truck directly beside Hudson's vehicle and parked. Pettiford then exited defendant's truck, got into Hudson's vehicle, and handed her a substance later determined to be 9.9 grams of heroin. The SOD officer monitoring the transaction called in the takedown team. Police searched Pettiford after his arrest and found $420 of the photocopied currency provided to Hudson and a packet containing one gram of heroin. A bag containing 9.9 grams of heroin was recovered from the center console of Hudson's vehicle.

Officers stopped defendant's white pickup truck as he drove away from the convenience store. Defendant was alone in the vehicle and had the remaining $1,080.00 of the department's currency in his pocket.

Defendant was indicted for the acts allegedly committed on 12 January 2011. The trial court denied his motion *in limine* to

exclude the evidence regarding the 4 January 2011 transaction. The court also granted defendant a standing objection to this evidence at trial.

Defendant first claims the trial court erred in denying his motion for a mistrial after Pettiford alluded to defendant's prior imprisonment. Under N.C. Gen. Stat. § 15A-1061 (2011), a mistrial is warranted when "there occurs during the trial . . . conduct . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2011). The denial of a motion for mistrial is reviewed only for manifest abuse of discretion. *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996). "The trial court's decision . . . is to be afforded great deference since the trial court is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable." *Id.*

The transcript reflects the trial court's prompt remedial actions following Pettiford's improper testimony, as follows:

> [PROSECUTOR]: And how long have you known [defendant]?
>
> A Since like '96, '97. But we had separated for a while. *And then when he came home from prison* –
>
> [DEFENSE COUNSEL]: Well, objection to that, Your Honor.

> THE COURT: Sustained. And disregard any reference –
>
> [DEFENSE COUNSEL]: Motion for mistrial.
>
> THE COURT: . . . I'm directing you to disregard this witness's last reference about knowledge of the defendant. . . . I've granted a motion to strike and directed you not to consider it in any fashion whatsoever. If you can and will disregard such testimony by this witness and not let it influence you in your decision in this case in any way whatsoever, please raise your hand.
>
> (Hands raised.)
>
> THE COURT: All 13 jurors raised a hand confirming and affirming their willingness and their statement that they will follow the Court's instruction in that regard and not consider such stricken evidence.

(Emphasis added). We note that the prosecutor's question did not invite the improper testimony.

We find no abuse of discretion here. "When a court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. Absent circumstances indicating otherwise, jurors are presumed to follow a trial court's instructions." *State v. McQueen*, 165 N.C. App. 454, 458, 598 S.E.2d 672, 675-76 (2004) (quotation omitted). By immediately sustaining defendant's objection, striking Pettiford's testimony, and ascertaining that jurors

would be able to disregard it, the trial court effectively cured any prejudice to the defense. *See id.* (upholding denial of mistrial after complainant testified that he "'learned that [Defendant] was in prison'").

Defendant next claims the trial court erred by allowing the State to introduce evidence of the controlled buy that occurred on 4 January 2011. Because he was not charged with any crimes based on the 4 January 2011 transaction, defendant contends that the evidence of this prior "bad act" was inadmissible under N.C.R. Evid. 404(b) simply "to show that [he] acted in conformity therewith" on 12 January 2011. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2011). To the extent that the 4 January 2011 evidence was otherwise admissible under Rule 404(b), defendant argues that it carried a risk of unfair prejudice that outweighed any probative value under N.C.R. Evid. 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2011).

Rule 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b). "Rule 404(b) states a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002) (quotation omitted). Rule 404(b) also requires a showing of both factual similarity and temporal proximity between the charged and uncharged acts. *Id.* at 154, 567 S.E.2d at 123.

"We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). However, we find that the trial court accurately assessed the substantial similarity and close temporal proximity between the two controlled buys, as follows:

> . . . [T]he January 4, 2011 transaction and the January 12, 2011 transaction include[d] the same informant, Priscilla Hudson, . . . [and] the same . . . alleged coconspirator, Frankie Pettiford . . . .
>
> . . . Pettiford initiated the call to the defendant to set up the controlled buys on both days. The transactions involved the purchase of trafficking amounts of heroin . . . . The defendant arrived . . . in the same white pickup truck. The January 4th

> transaction was at a McDonald's. The January 12th transaction was at a convenience store within approximately one mile of each other. The actual transactions were conducted in a significantly similar manner. The timing was eight days apart.

We likewise agree with the court's conclusion that defendant's actions on 4 January 2011 were admissible "to show motive, opportunity, intent, preparation, plan, knowledge, and identity of the person accused of committing" the acts of 12 January 2011. This evidence was of particular relevance to the conspiracy charge, which required the State to prove an agreement between defendant and Pettiford to sell the heroin to Hudson. *See State v. Love*, 131 N.C. App. 350, 356, 507 S.E.2d 577, 582 (1998), *aff'd per curiam*, 350 N.C. 586, 516 S.E.2d 382 (1999). Finally, we note that the court gave an appropriate limiting instruction.

Nor do we find an abuse of discretion by the court in admitting the evidence after balancing its probative value against the risk of unfair prejudice to defendant under N.C.R. Evid. 403. *See State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992) ("Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court."). Although defendant's participation in the 4 January 2011 heroin sale was doubtless prejudicial to his

defense, it was not unfairly so. The State's evidence of the transaction was straightforward and devoid of any extraneous or inflammatory details. Accordingly, we overrule defendant's exception to the evidence of his acts on 4 January 2011.

Defendant also excepts to Pettiford's testimony that he obtained the heroin found on his person on 12 January 2011 from defendant. However, defendant did not object to the question that elicited this testimony and did not move to strike Pettiford's response after it was given. Therefore, defendant waived appellate review of this issue. *State v. Gamez*, __ N.C. App. __, __, __ S.E.2d __, __ (July 16, 2013) (No. COA12-1488) (citing *State v. Curry*, 203 N.C. App. 375, 387, 692 S.E.2d 129, 138 (2010)). While defendant makes reference to the plain error standard of review, *see State v. Lawrence,* 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012), he offers no explanation of how the admission of Pettiford's testimony meets this standard. Rather, he conjoins this evidence with the evidence of the transaction on 4 January 2011.

We find no error – let alone plain error – by the trial court. Hudson testified that she observed Pettiford "stuff his hands down his pants" after he left defendant's pickup truck on 12 January 2011. Police later found one gram of heroin in his

groin area. Pettiford's testimony that he obtained this heroin from defendant tended to account for the discrepancy between the eleven-gram purchase arranged by Hudson and the 9.9 grams of heroin recovered from her vehicle. It also tended to show an arrangement between defendant and Pettiford regarding the sale to Hudson.

NO ERROR.

Judges BRYANT and McCULLOUGH concur.

Report per Rule 30(e).