IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1270

Filed: 7 August 2018

Iredell County, No. 120-CRS-056463

STATE OF NORTH CAROLINA

v.

HAROLD LEE PLESS, JR., Defendant.

Appeal by defendant from judgment entered 28 April 2017 by Judge Jeff Carpenter in Iredell County Superior Court. Heard in the Court of Appeals 6 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State.

William D. Spence for defendant-appellant.

BERGER, Judge.

An Iredell County jury found Harold Lee Pless, Jr. ("Defendant") guilty of possession with the intent to sell and deliver ("PWISD") a Schedule II controlled substance, PWISD marijuana, trafficking oxycodone by transportation, and trafficking oxycodone by possession. Defendant filed timely notice of appeal.

Factual and Procedural Background

On October 5, 2012, Deputy Patrick Campbell ("Deputy Campbell") with the Iredell County Sheriff's Department initiated a traffic stop after he observed Defendant driving a gold Lexus with an expired registration. Defendant pulled the Lexus into a McDonald's parking lot. As he was driving through the lot, Deputy Campbell observed a small baggie fall out of the driver's window. Defendant then parked the Lexus in the back of the parking lot.

When Deputy Campbell approached the Lexus, he smelled a strong odor of marijuana and ordered Defendant to exit his vehicle. Defendant told Deputy Campbell that he was "high as hell" and showed visible signs of impairment. Deputy Campbell searched Defendant and discovered a small baggie of marijuana in his left pocket. He then placed Defendant under arrest.

During his search of the Lexus, Deputy Campbell found a marijuana cigarette and a rolled-up prescription bag full of loose pills. Additional law enforcement officers arrived on the scene and recovered the bag Deputy Campbell observed falling out of Defendant's window. The contents of both baggies were tested and confirmed to be marijuana. The contents of the prescription bag were also tested and determined to contain oxycodone, a Schedule II controlled substance.

Defendant was indicted for PWISD oxycodone, PWISD marijuana, trafficking oxycodone by transportation, and trafficking oxycodone by possession. The State presented evidence that Defendant had previously sold nineteen oxycodone pills and

a small baggie of heroin to Deputy Jessica Jurney ("Deputy Jurney") in the same McDonald's parking lot.

On April 28, 2017, the jury returned verdicts finding Defendant guilty of PWISD oxycodone, trafficking oxycodone by transportation, trafficking oxycodone by possession, and misdemeanor possession of marijuana. The trial court consolidated the charges for judgment and sentenced Defendant to an active term of 225 to 279 months of imprisonment. Defendant appeals.

Analysis

Defendant first argues that the trial court erred by permitting the State to present testimony regarding a prior drug transaction under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017). We disagree.

> [W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159, *remanded*, 222 N.C. App. 317, 729 S.E.2d 730 (2012). Rule 404(b) provides that while 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," such evidence is 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). Our Supreme Court has described Rule 404(b) as a

> general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception*[,] requiring [the exclusion of evidence] 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. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). However, "the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted).

In this case, the trial court concluded that Deputy Jurney's testimony was admissible "to prove motive, opportunity, knowledge, intent, plan and preparation." In support of this conclusion, the court made findings reflecting the following similarities between the two incidents: (1) Defendant was driving the same gold-colored Lexus; (2) both transactions involved oval-shaped tablets with "M522" on one side and "7.5/325" on the other; (3) the tablets were found in paper Walmart pharmacy bags; (4) the tablets were later determined to be oxycodone; (5) both incidents occurred in the same McDonald's parking lot; and (6) the incidents occurred less than one month a part. We agree with the trial court that, given the similarities

in substance and time noted in its order, Deputy Jurney's testimony fell within the parameters of Rule 404(b), and therefore, was admissible.[1]

Next, Defendant contends that the trial court abused its discretion by allowing Deputy Jurney's testimony, because the unfair prejudice which resulted from the testimony substantially outweighed its probative value.

> Even if evidence is admissible according to Rule 404(b), it must also be scrutinized under Rule 403, which provides for the exclusion of otherwise admissible evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. In each case, the burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted. The determination of whether relevant evidence should be excluded under Rule 403 is a matter that is left in the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion.

State v. Mangum, 242 N.C. App. 202, 207-08, 773 S.E.2d 555, 561 (citations and quotation marks omitted), *disc. review denied*, 368 N.C. 601, 780 S.E.2d 564 (2015).

We find no abuse of discretion in this case. The prior transaction was relevant in establishing Defendant's motive, opportunity, knowledge, intent, plan, and preparation when he was pulled over by Deputy Campbell. Moreover, the trial court

[1] The trial court excluded a portion of Deputy Jurney's testimony which referred to Defendant's prior sale of heroin since that substance was not present when Deputy Campbell arrested Defendant. This Court makes no determination concerning the trial court's ruling on this point, or whether the Defendant's prior sale and distribution of heroin at a particular location may be sufficiently similar to meet the requirements of Rule 404(b).

specifically gave the jury limiting instructions in order to minimize any potential prejudice to Defendant. *See State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998) (finding no abuse of discretion when "the record reveals that the trial court was aware of the potential danger of unfair prejudice to defendant and was careful to give a proper limiting instruction to the jury"), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999). Therefore, the trial court did not abuse its discretion.

Finally, Defendant argues that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. We disagree.

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Waring, 364 N.C. 443, 499-500, 701 S.E.2d 615, 650 (2010) (*purgandum*[2]), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d 53 (2011). "[S]tatements contained in closing

[2] Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of

arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal[,] we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Cummings*, 353 N.C. 281, 297, 543 S.E.2d 849, 859 (citations and quotation marks omitted), *reh'g dismissed*, 353 N.C. 533, 549 S.E.2d 553, *and cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001).

In this case, Defendant challenges the following sentence from the State's closing argument: "There is a pill epidemic in this country right now, it is out of control, and trafficking laws are designed to do something about them." However, it is clear from the larger context of the prosecutor's statement that this remark did not constitute an extreme impropriety:

> I am going to not be talking a whole lot more. The defendant is charged with trafficking by transportation and possession of the pills. Now, transporting meaning driving them from one place to another. He obviously knew that the pills were in the car, we've already addressed that. The defendant knew that he possessed those pills, the pills weigh more than 31 grams. In spite of what [defense counsel] may argue. We are talking about what the law is. We are talking about what the law is. There is a pill epidemic in this country right now, it is out of control, and trafficking laws are designed to do something about them. We are not talking about what an attorney would like the law to be. We are talking about what the law is, that's what we're talking about.

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superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

This passage, which itself was only a small part of the twelve-page transcript of the prosecutor's argument, shows that the challenged statement was explaining the purpose behind the creation of the trafficking charge for when an individual, like Defendant, was found with a large number of pills. The prosecutor "did not suggest that the jury should punish Defendant based on community sentiment against [the crime itself] rather than the evidence presented." *State v. Bishop*, 346 N.C. 365, 396, 488 S.E.2d 769, 786 (1997). When considered in context, the statement did not "so infect[ ] the trial with unfairness that [it] rendered the conviction fundamentally unfair," *Waring*, 364 N.C. at 500, 701 S.E.2d at 650. The trial court did not err by not intervening *ex mero motu* during the closing argument, and we find no error.

Conclusion

The trial court properly concluded that testimony regarding a prior drug transaction was admissible under Rule 404(b). In addition, the trial court did not abuse its discretion by concluding that any unfair prejudice which resulted from the testimony did not substantially outweigh its probative value. Finally, the trial court did not err by declining to intervene *ex mero motu* during the State's closing argument. Defendant received a fair trial free from error.

NO ERROR.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).