Circuit Court for Wicomico County
Case No. C-22-CR-19-000563

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 31

September Term, 2020

CHARLES DAVIS WHITE

v.

STATE OF MARYLAND

Graeff,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Eyler, James R., J.

Filed: January 29, 2021

A jury sitting in the Circuit Court for Wicomico County convicted Charles White, appellant, of possession of cocaine, and acquitted him of possession with intent to distribute cocaine.[1] The court sentenced him to serve one year, with credit for 224 days' time served.

Appellant presents three questions for our review, which we have rephrased as:

> 1. Did the circuit court err by permitting the State to introduce at trial evidence of prior drug sales made by appellant at trial?
>
> 2. Was the evidence legally sufficient to convict appellant of possession of cocaine?
>
> 3. Did the trial court abuse its discretion by not replacing a juror mid-trial after she disclosed that she knew the son of a State's witness?

Finding no error and concluding that the evidence was legally sufficient to convict appellant, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

On July 22, 2019, Corporal Tyler Bennett and Detective Andrew Riggin from the Wicomico County Sheriff's Office conducted a traffic stop in Salisbury after Corporal Bennett observed a vehicle speeding. Corporal Bennett approached the driver's side of the vehicle and Detective Riggin approached the passenger side. Appellant was the driver and Darryl Byrd, Sr. was his front seat passenger. Byrd's six-year old grandson was in the backseat.

[1] The trial court granted appellant's motion for judgment of acquittal on the charge of driving without a license.

Through the window, Detective Riggin observed that Byrd was holding what appeared to be a marijuana "blunt" in one hand and a clear baggie containing marijuana in the other hand. Detective Riggin opened the front passenger side door and directed Byrd to get out of the vehicle. Upon opening the door, Detective Riggin observed two clear baggies of suspected crack cocaine on the floorboard by Byrd's feet. The officers placed appellant and Byrd under arrest and conducted a full search of the vehicle. In addition to the items observed in plain view, the police seized a black metal tray, a knife with suspected drug residue on it, and a flip-style cell phone that Byrd had been holding when the traffic stop began. The cell phone rang and received text message alerts "rapidly" during the traffic stop.

The contents of the two baggies found at Byrd's feet were analyzed and found to contain 3.417 grams and 2.722 grams, respectively, of cocaine.

The vehicle appellant was driving was registered to Linda Ford. She was interviewed at the Sheriff's Office that same day. She showed Corporal Bennett a contact in her phone under the name "Chuck," which is the name she used for appellant. She testified at trial that she lent her car to appellant on July 22, 2019 because he said he needed it to go look for a job. She further testified that she had used cocaine for three years and purchased from appellant every week. She arranged her drug purchases by calling appellant but could not recall his phone number.

Byrd testified at trial that the cocaine in the vehicle did not belong to him. He recounted that when Corporal Bennett activated his lights and siren to initiate the traffic

stop, appellant reached into his left pocket with his left hand, pulled out the two bags of cocaine, and tossed them onto the passenger side of the vehicle. Byrd further testified that the cell phone seized belonged to appellant. Byrd had purchased cocaine from appellant "once or twice" in the past, but not for two or three months.

Corporal Bennett testified that he interviewed appellant the same day he was arrested. Appellant initially denied that the cell phone belonged to him, but later said that it belonged to him and Byrd and that they shared it. He said that "they" had used it that day. Corporal Bennett obtained a search warrant for the phone and manually reviewed photographs and text messages stored on it.[2] As we will discuss, he testified, over objection, about text messages he reviewed.

Michael Daugherty, a former police officer and current special investigator for the Wicomico County State's Attorney's Office, testified as an expert in the distribution of narcotics. He opined that cocaine found in the vehicle was worth between $1,200 to $1,800 and that that quantity, coupled with the text messages and other evidence, was consistent with the distribution of drugs.

We shall include additional facts as necessary to our resolution of the issues.

[2] Because of the age of the cell phone, the data could not be extracted using Cellebrite software.

DISCUSSION

I.

Other Crimes Evidence

a.

On the day of trial, appellant filed a motion *in limine* to preclude the State from introducing "anonymous text messages allegedly requesting CDS" found on the cell phone linked to him and "the testimony of Linda Ford that she has purchased CDS from [appellant] on unspecified dates." Before jury selection, the court heard argument on the motion. Defense counsel asserted that because the text messages and Ford's testimony were not temporally or substantively connected to the cocaine found in the vehicle, they were not relevant to show appellant's intent and were being offered as improper propensity evidence. The State responded that it was not offering the evidence to show criminal propensity, but rather to show appellant's motive, intent, and lack of mistake with respect to the cocaine found in plain view in the vehicle he was operating. The court reserved on the motion until after jury selection.

At that juncture, defense counsel amplified his argument that the text messages were inadmissible, noting that they were undated and thus, could have been sent weeks or months before the traffic stop. Further, she argued that Ford's anticipated testimony that she had purchased cocaine from appellant in the past did not establish that she had done so recently and the evidence that she had lent him her car on July 22, 2019 did not establish that she did so in payment for drugs.

The State maintained that it would adduce circumstantial evidence creating an inference that some of the text messages were sent the same day as the traffic stop and that that evidence, coupled with appellant's admission to Corporal Bennett that he had used the cell phone on July 22, 2019, was sufficient to link the messages to the drugs found in the vehicle. Alternatively, he argued that the recurrent nature of the drug related text messages was relevant to show a common scheme or plan. The State further stipulated that it only would seek to introduce incoming text messages if the message received a response.

The court ruled that the text messages and Ford's testimony were relevant to show "intent, opportunity, common scheme or plan, [and/or] knowledge" and that its probative value was not outweighed by any unfair prejudice. The court cautioned the State that it would not be permitted to go too far afield, however, and should focus on the most recent messages.

b.

After Ford testified that she lent her car to appellant on July 22, 2019, the following colloquy occurred:

> [PROSECUTOR]: Have you had any other interaction with the Defendant?
>
> [FORD]: No.
>
> [PROSECUTOR]: None whatsoever?
>
> [FORD]: None.
>
> [PROSECUTOR]: Have you ever purchased something from the Defendant?

[FORD]: Yes.

[PROSECUTOR]: What have you purchased from the Defendant?

[FORD]: Crack cocaine.

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Approach.

At the bench conference that followed, defense counsel renewed her motion *in limine*. The court overruled the objection. Ford then testified that she had used crack cocaine for three years and that she purchased $20 worth of cocaine from appellant on a weekly basis.

During Corporal Bennett's direct examination, the State first attempted to establish that the cell phone was used by appellant and that it was not used by Byrd. Corporal Bennett identified a "selfie" photograph stored on the cell phone that depicted appellant's face and torso as he lay in bed and a still shot from body camera footage during the traffic stop, both of which depicted appellant wearing the same t-shirt and hat. Corporal Bennett also identified photographs showing an incoming text message to the phone stating, "Yo Chuck, it's me Dre" and two contacts in the phone that appeared to be for Byrd, one labeled "Cuz Daryl"[3] and a second labeled, "Daryl Byrd." Those exhibits were admitted without objection.

[3] Byrd testified that he and appellant were cousins by marriage.

The State then turned to a series of text messages that were alleged to pertain to the distribution of narcotics. Prior to any questioning about those messages, defense counsel renewed her motion *in limine* and was granted a continuing objection to the text messages.

As mentioned, none of the text messages bore dates. Corporal Bennett testified that older flip-style cell phones typically displayed the most recent text messages at the top of the list of messages. He testified that the top-most text message exchange was from an unlabeled contact, providing:

[INCOMING TEXT]: I got 28 i spent 2 . .

[OUTGOING TEXT]: Ok where you at

[INCOMING TEXT]: Premberton [sic] u got wheels?

[OUTGOING TEXT]: Not yet

[INCOMING TEXT]: Soon or should i walk to u ?

Byrd had testified earlier that when appellant picked him up on July 22, 2019, they were planning to go to a McDonalds near Pemberton, which is a park in Salisbury.

The next incoming text message exchange was from a contact labeled "Linda":

[LINDA]: Do you think I could get a 2 for $35 worth of food stamps

[LINDA]: Call me when you are ready . . . k

[OUTGOING TEXT]: Real soon

[LINDA]: Can I see you for a two

Special Investigator Daugherty testified that a "2" or a "two" referred to $20 worth of narcotics, which as mentioned was the quantity of cocaine that Ford testified that she regularly purchased from appellant. He further opined that it is common for a dealer to charge extra if a buyer uses food stamps to purchase the drugs.

Other recent text messages were from contacts labeled, "Black Cowboy" and "Widdit," asking appellant for a "thirty." A contact labeled "Reds" requested a "20[.]"

c.

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *Bernadyn v. State*, 390 Md. 1, 7 (2005). Relevant evidence ordinarily is admissible unless "otherwise provided" by law. Md. Rule 5-402. Among other reasons, it may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice[.]" Md. Rule 5-403. The admission of "[e]vidence of other crimes, wrongs, or other acts" committed by the defendant, Md. Rule 5-404(b), is prejudicial because "it may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant." *State v. Faulkner*, 314 Md. 630, 633 (1989) (citation omitted). Such evidence may not be admitted to show the defendant's criminal propensity, but may be admitted if it is relevant to proof of "motive, intent, absence of mistake, a common scheme or plan, identity, opportunity, preparation, [or] knowledge[.]" *Id*. at 634.

In assessing if other crimes evidence is admissible, the trial court should engage in three "procedural steps[.]" *Solomon v. State*, 101 Md. App. 331, 338 (1994). First, it

must determine whether the evidence fits within one or more of the categories of special relevance under Rule 5-404(b) or as elucidated by case law. *Faulkner*, 314 Md. at 634. "That is a legal determination and does not involve any exercise of discretion." *Id*. Second, the trial judge must be persuaded by clear and convincing evidence that the other crimes took place. *Solomon*, 101 Md. App. at 338-39; *Faulkner*, 314 Md. at 634. We review the trial court's determination in that regard for *prima facie* sufficiency. *Solomon*, 101 Md. App. at 339; *Faulkner*, 314 Md. at 635. If the evidence satisfies the first two steps, the trial court must exercise its discretion to weigh "[t]he necessity for and probative value of the 'other crimes' evidence . . . against any undue prejudice likely to result from its admission." *Faulkner*, 314 Md. at 635.

In the case at bar, appellant contends the trial court erred as a matter of law by not making a threshold determination as to which category of special relevance the other crimes evidence fell into and by not finding by clear and convincing evidence that the other crimes occurred. Further, even if those steps were satisfied, appellant maintains that the trial court abused its discretion by admitting the evidence of prior drug sales because temporal proximity was not established and the risk that the evidence would be considered by the jury for an improper purpose was high.

The State responds that this issue is not preserved for appellate review because defense counsel did not object until after Ford testified that she had previously purchased crack cocaine from appellant and, at that juncture, did not move to strike the testimony, and because similar testimony came in through Byrd without objection. If preserved, the

State asserts that the evidence was specially relevant to show appellant's intent with respect to the cocaine found in the vehicle he was driving. In any event, the State maintains that any error in admitting the evidence was harmless beyond a reasonable doubt both because the text messages were cumulative of testimony admitted without objection through Ford and Byrd, and because the jury acquitted appellant of possession with intent to distribute cocaine, the only charge implicated by the other crimes evidence.

d.

We are satisfied that appellant preserved her objection to the other crimes evidence by moving *in limine* to exclude that evidence and renewing the motion each time the challenged evidence was offered at trial. See Md. Rule 4-323(c) (it is sufficient that the party makes "known to the court the action that the party desires the court to take or the objection to the action of the court"). On the merits, we conclude that Ford's testimony about her prior purchases of cocaine from appellant and the text messages soliciting purchases of drugs properly were admitted. Evidence of prior instances of distribution of drugs is relevant to show intent to distribute. S*ee Anaweck v. State*, 63 Md. App. 239, 258 (1985) ("how better can the State prove the intent to sell than by proving that one is in the habit of selling?"), *overruled on other grounds*, *Wynn v. State*, 351 Md. 307 (1998). In *Anaweck*, a husband and wife were convicted of possession with intent to distribute cocaine after five baggies of wholesale quality cocaine were seized from their apartment during the execution of a search warrant. Only the wife was home when the warrant was executed, and she directed the police to the location of the drugs.

Over objection, the State adduced evidence that a neighbor of the couple had purchased cocaine from them twice in the two days preceding execution of the search warrant. On appeal following conviction, this Court held that the evidence of the prior drug sales properly was admitted to show the husband's knowledge and to show both defendants' intent to distribute.

In support of our holding, we discussed *Nutter v. State*, 8 Md. App. 635 (1970), a case in which a defendant was convicted of possession of cocaine after the drugs were found in a barbershop where he and two other barbers worked. In that case, we reasoned that evidence of two prior drug sales by the defendant occurring, respectively, one month and two weeks prior to the discovery of the drugs at the barbershop, was relevant and admissible to prove his knowledge and intent and, thus, that he and not the other barbers possessed the cocaine.

We return to the case at bar. Like in *Anaweck* and *Nutter*, the appellant's knowledge and intent with respect to the cocaine were facts in dispute. Also like in those cases, the evidence of prior drug sales made by appellant was relevant because they tended to make it more likely that the drugs found in Ford's car and at the feet of Byrd belonged to appellant and that he possessed the drugs not for personal use, but to distribute. Circumstantial evidence supported an inference that the drug sales Ford testified about and the text messages soliciting drug sales, were at least as recent as those in *Nutter*. Ford testified that she purchased cocaine from appellant on a weekly basis. Though she did not specify the date of her most recent purchase, a purchase within one

week of the traffic stop was sufficiently close in time to be relevant to appellant's knowledge and intent. Likewise, Corporal Bennett testified that text message alerts were sounding during the traffic stop and appellant admitted that he had used the phone that day. The text exchange referencing "Pemberton" and appellant's need to borrow "wheels" reasonably could be linked to the events of July 22, 2019. The court reasonably could infer that Ford was the person labeled "Linda" and, as discussed, her testimony about the frequency of her purchases made it reasonable to infer that her texts were sent within one week of the traffic stop.

Though the court did not make an on the record finding that the prior drug sales had occurred, there was sufficient evidence establishing those sales by clear and convincing evidence. As discussed, Ford already had testified, without objection, that she purchased crack cocaine from appellant. Further, the substance of the text messages was evidence that the prior instances of distribution had occurred.

The trial court did not abuse its broad discretion in weighing the relevance of Ford's testimony and the text messages to show appellant's knowledge and intent against the prejudice to him inherent in the admission of other crimes evidence. The text messages and Ford's testimony were cumulative of Byrd's testimony that he had purchased drugs from appellant in the past and were not inflammatory. Further, the very risk of unfair prejudice envisioned by the rule – that the jurors would improperly consider the evidence to show appellant's criminal propensity to sell narcotics – did not come to pass given that the jurors acquitted appellant of the charge of possession with intent to

distribute drugs. For all these reasons, the trial court did not err by admitting the evidence.

II.

Sufficiency of the Evidence

We assess if the evidence was sufficient to support a criminal conviction on appeal by asking "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in *Jackson*)). We "view not just the facts, but all rational inferences that arise from the evidence, in the light most favorable to the prevailing party," *Smith v. State*, 232 Md. App. 583, 594 (2017) (cleaned up), giving "due regard to the fact finder's findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Potts v. State*, 231 Md. App. 398, 415 (2016) (cleaned up).

Appellant contends that the evidence was legally insufficient to support his conviction for possession of cocaine because a rational juror could not find that he was in constructive possession of cocaine found in Ford's car and secreted on the passenger side floor by Byrd's feet. This contention is without merit. It is well-established that "the testimony of a single eyewitness, if believed, is sufficient evidence to support a conviction." *Reeves v. State*, 192 Md. App. 277, 306 (2010). Here, Byrd testified that the cocaine belonged to appellant and that when Corporal Bennett activated his

emergency lights, appellant reached into his left pocket, removed the cocaine, and tossed it onto the passenger side. This was evidence from which a rational juror could find that appellant, not Byrd or Ford, possessed the cocaine.

III.

Motion to Replace a Juror

During jury selection, the court asked the venire panel if any member knew any of the State's witnesses, including Corporal Bennett. Numerous prospective jurors responded in the affirmative and were questioned about their relationships with these witnesses.[4]

During Corporal Bennett's testimony, Juror Number 12 gave the bailiff a note stating that she had just realized that the witness's father was her son's boss. The court called Juror Number 12 to the bench. She advised that she had not met Corporal Bennett before, but she had met his father approximately four times. The court asked Juror Number 12 if her acquaintance with Corporal Bennett's father would "in any way impact [her] ability to be fair and impartial as a juror" and she replied, "No." In response to a follow up question as to whether her relationship would "impact[] [her] ability to listen and weigh [Corporal Bennett]'s testimony and decide whether or not to believe him,"

[4] One prospective juror advised that he had been assaulted by Ford; that that would impact his ability to be fair and impartial; and was struck for cause. Neither party requested that any of the other prospective jurors who knew witnesses be struck for cause.

Juror Number 12 replied, "No, not at all." She added that she was not even certain that she should "bring it up."

Defense counsel asked the court to replace Juror Number 12 with the sole alternate juror. The court asked for the basis for that request, noting that Juror Number 12 did not even know the witness. Defense counsel argued that because the witness's father supervised the juror's son, she might feel "pressure to find in favor of the State." The court disagreed and denied the request to replace Juror Number 12.

Appellant concedes that Juror Number 12 was not subject to removal for cause based upon her prior acquaintance with the father of a State's witness, but nevertheless contends that because the information Juror Number 12 disclosed could have been a basis upon which defense counsel would have exercised a peremptory strike, the court abused its discretion by not replacing her when she disclosed the information midtrial.

The State responds that because appellant had exhausted his peremptory strikes before Juror Number 12 was seated and does not argue on appeal that he would have "spent his peremptory strikes differently" had he known the connection between the juror and a witness, he has not demonstrated any prejudice in this regard. We agree.

The record reflects that appellant exhausted his ten peremptory strikes prior to the eighth regular juror being seated, well before prospective juror number 230 was seated as Juror Number 12. Because Juror Number 12 was not subject to exclusion for cause and because appellant was not prejudiced in the exercise of his peremptory strikes by her belated disclosure, the only issue is whether the trial court abused its broad discretion by

not replacing her with the single alternate. The trial judge's ruling in this regard plainly was not "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable" and, thus, was not an abuse of discretion. *Patterson v. State*, 229 Md. App. 630, 639 (2016) (cleaned up; citation omitted).

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.