

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

)

v.

)

From Scotland

)

WARREN CLEVELAND GIBSON

)

)

BRIEF FOR THE STATE

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES	ii
ISSUES PRESENTED	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
ARGUMENT	5
I. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION FOR A MISTRIAL AFTER THE STATE’S WITNESS TESTIFIED ABOUT “PAST ENCOUNTERS” WITH DEFENDANT AND DEFENDANT’S HAVING BEEN ALREADY “PICKED UP” BEFORE THE WITNESS HAD A CHANCE TO ARREST DEFENDANT.	5
II. THE TRIAL COURT PROPERLY ADMITTED IDENTITY EVIDENCE UNDER RULE 404(b) AFTER CONSIDERING WHETHER THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGHED ITS POTENTIAL PREJUDICIAL EFFECT ON DEFENDANT AND ISSUING A LIMITING INSTRUCTION TO THE JURY.	14
CONCLUSION	19
CERTIFICATE OF SERVICE	21

TABLE OF CASES AND AUTHORITIES

FEDERAL CASES

U.S. v. Masters, 622 F.2d 83 (4th Cir. 1980) 10

STATE CASES

State v. Badgett, 361 N.C. 234, 664 S.E.2d 206 (2007) . 10,15,17

State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993) . 12,18

State v. Brooks, 61 N.C. App. 572, 310 S.E.2d 421 (1983) . . . 8

State v. Coffey, 326 N.C. 268, 389 S.E.2d 48 (1990) 7

State v. Fielder, 88 N.C. App. 463, 363 S.E.2d 662 (1988) . . . 9

State v. Handy, 331 N.C. 515, 419 S.E.2d 545 (1992) 9

State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61 (2002),
cert denied, 537 U.S. 1133, 154 L. Ed. 2d 823(2003) . . . 17

State v. Jennings, 333 N.C. 579, 430 S.E.2d 188
cert denied 510 U.S. 1028, 126 L. Ed. 2d 602 (1988) . . . 18

State v. Mason, 315 N.C. 724, 340 S.E.2d 430 (1986) 11

State v. McAbee, 120 N.C. App. 674, 463 S.E.2d 281
(1995) 12,18

State v. Sloan, 316 N.C. 714, 724, 343 S.E.2d 527,
533 (1986) 6

State v. Trogden, 135 N.C. App. 85, 519 S.E.2d 64 (1999) . 12,18

State v. Wallace, 104 N.C. App. 498, 502, 410 S.E.2d 226,
228 (1991). 5

State v. Ysaquire, 309 N.C. 780, 309 S.E. 436 (1983) 12

STATE STATUTES AND RULES

N.C.G.S. § 8C-1, Rule 401 5

N.C.G.S. § 8C-1, Rule 402 6

N.C.G.S. § 8C-1, Rule 403 10,11,15,17

N.C.G.S. § 8C-1, Rule 404(a) 7,8,10

N.C.G.S. § 8C-1, Rule 404(b) 7,8,9,10,14,17

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BRIEF FOR THE STATE

ISSUES PRESENTED

- I. DID THE TRIAL COURT PROPERLY DENY DEFENDANT'S MOTION FOR A MISTRIAL AFTER THE STATE'S WITNESS TESTIFIED ABOUT "PAST ENCOUNTERS" WITH DEFENDANT AND DEFENDANT'S HAVING BEEN ALREADY "PICKED UP" BEFORE THE WITNESS HAD A CHANCE TO ARREST DEFENDANT.

- II. DID THE TRIAL COURT PROPERLY ADMIT IDENTITY EVIDENCE UNDER RULE 404(b) AFTER CONSIDERING WHETHER THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGHED ITS POTENTIAL PREJUDICIAL EFFECT ON DEFENDANT AND ISSUING A LIMITING INSTRUCTION TO THE JURY?

STATEMENT OF THE CASE

On December 17, 2010, defendant was arrested and charged with possession with intent to sell and deliver cocaine, selling and delivering cocaine, and maintaining a vehicle for keeping and selling a controlled substance. (R p. 2) On February 7, 2011, defendant was indicted for these three offenses, and habitual felon status. (R p. 3)

The case came on for trial on September 26, 2011, in the Criminal Session of the Superior Court for Scotland County, the Honorable James Gregory Bell, Superior Court Judge Presiding. (R

p. 1) Defendant was represented at trial by counsel. At some point prior to seating of the jury and presentation of the evidence, the State voluntarily dismissed the charge of maintaining a vehicle for keeping and selling a controlled substance.

On September 28, 2011, a jury found defendant guilty of possession with intent to sell and deliver cocaine and selling and delivering cocaine. (R pp. 14-15) Defendant pled guilty to habitual felon status. (R pp. 16-19) Defendant was then sentenced to serve two consecutive terms of 108 to 129 months in prison, with credit for 287 days spent in pre-judgment custody. (R pp. 23, 27)

On September 29, 2011, defendant gave written notice of appeal to this Court, and Appellate Entries were signed on October 13, 2011. (R p. 31)

Defendant filed a Petition for Writ of Certiorari with this Court on February 9, 2012, due to defendant's failure to accompany his Notice of Appeal with a Certificate of Service. The State filed its Response to defendant's Petition for Writ of Certiorari on February 14, 2012. The Petition was referred to the panel by an Order of this Court filed on February 17, 2012.

STATEMENT OF THE FACTS

In December 2010, Detective Earl Lee Haywood, Jr. was a narcotics investigator for the Scotland County Sheriff's Office. (T p. 5) Through his prior work as a criminal investigator, Detective Haywood had come to know Mr. Michael Clark. (T pp. 5-6) Mr. Clark had a criminal record and had been convicted of misdemeanor larceny and a felony marijuana charge. (T pp. 36-37) Mr. Clark had acted

as an informant to law enforcement in the past, and when asked by Detective Haywood to assist in some narcotics investigations, Mr. Clark agreed. (T pp. 7-8) Per their arrangement, Mr. Clark would provide names of possible drug dealers to Detective Haywood and be paid for making undercover drug buys. (T p. 8) One of the names Mr. Clark provided to Detective Haywood was "Warren Gibson," the defendant in this matter. (T p. 8)

On December 14, 2012, Detective Haywood and Mr. Clark initiated a prearranged investigation of defendant, during which Mr. Clark would meet with defendant and purchase illegal narcotics. (T p. 9) Detective Haywood first brought Mr. Clark to the Scotland County Sheriff's Office and thoroughly searched him to insure that Mr. Clark was not in possession of illegal contraband, weapons, narcotics, or anything else that could discredit the operation. (T pp. 9-10) Detective Haywood then fitted Mr. Clark with a concealed audio/video recording device and gave Mr. Clark two ten dollar bills to make the drug buy. (T pp.10-11) In the presence of Detective Haywood, Mr. Clark called defendant's cell phone, spoke with defendant, told defendant he wanted to purchase a twenty dollar piece of cocaine, and arranged to meet defendant at Mr. Clark's residence "in a few minutes". (T pp. 14,38) Mr. Clark testified that he knew defendant's phone number because defendant had given it to him, and that it wasn't necessary to give defendant directions to Clark's residence because defendant already knew where Mr. Clark lived. (T pp. 38-39)

Detective Haywood and Mr. Clark proceeded to Mr. Clark's residence where Detective Haywood instructed Mr. Clark to sit in a chair in front of his driveway in his front yard. (T pp. 14,39) Detective Haywood positioned himself near the tree line of some woods approximately sixty feet away from where Mr. Clark was sitting. (T pp. 14-16, 24, 39) Detective Haywood was able to maintain his view of Mr. Clark from his position, while remaining hidden. (T p. 14-16) Approximately fifteen minutes later, a Ford pick-up truck being driven by defendant arrived. (T pp. 14-15, 39) Mr. Clark stood up, walked to the driver's side of the truck, spoke briefly with defendant, and handed defendant the two ten dollar bills. (T pp. 15, 39) Defendant handed Mr. Clark a "small plastic bag containing white rock like type substance," that Mr. Clark testified was a twenty dollar piece of cocaine. (T pp. 15-17, 39) Defendant drove away, and Mr. Clark gave the bag with the substance he had just purchased to Detective Haywood. (T pp. 16-17, 40) Detective Haywood secured the substance and performed a preliminary field test on it. (T p. 17)

The substance obtained through the arranged buy was later determined to be less than a tenth of a gram of "cocaine base, otherwise known as crack" by Nicole Manley, a State Crime Lab drug chemist. (T p. 57)

The audio/video tape obtained from the concealed recorder worn by Mr. Clark during the buy showed the hand-to-hand transaction between defendant and Mr. Clark, including the money involved, but did not show the drugs being passed from defendant to Mr. Clark.

(T pp. 25, 46) The audio/video tape was shown to the jury at trial. (T p. 52)

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL AFTER THE STATE'S WITNESS TESTIFIED ABOUT "PAST ENCOUNTERS" WITH DEFENDANT AND DEFENDANT'S HAVING BEEN ALREADY "PICKED UP" BEFORE THE WITNESS HAD A CHANCE TO ARREST DEFENDANT.

Defendant argues that testimony given by Detective Haywood resulted in substantial and irreparable prejudice to defendant's case, and thus, the trial court erred by denying defendant's motion for a mistrial. Defendant's arguments are without merit.

A. Detective Haywood's statements that he could identify defendant "due to past encounters" and that defendant "got picked up" before he had a chance to arrest defendant, are admissible.

In order for the two statements at issue to be admissible, they must be relevant, not excluded by some other rule or consideration, and their probative value must not be substantially outweighed by any potential prejudicial effect. Both statements were relevant, neither is excluded by rule, and neither create potential prejudice to defendant that substantially outweighs their probative value.

i. Detective Haywood's statements were relevant.

N.C.G.S. § 8C-1, Rule 401 (2012), defines relevancy for evidentiary purposes: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." State v. Wallace explains the relevancy standard set by this rule: "This

standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has any logical tendency to prove any fact that is of consequence." 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). State v. Sloan reiterates this interpretation of the standard for relevancy: "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." 316 N.C. 714, 724, 343 S.E.2d 527, 533 (1986). These cases make clear that Rule 401 sets a broad standard of relevancy, including within its definition any evidence which could be helpful to a jury in deciding on an issue. Rule 402 states that "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible." N.C.G.S. § 8C-1, Rule 402 (2003). So any evidence that meets this broad standard of relevancy set out in Rule 401 should be included unless it is excluded by some other rule or consideration.

The two statements in question made by Detective Haywood during his testimony are relevant. The first statement that "[t]he individual that drove up in the particular truck was identified by me as [defendant], due to past encounters", is relevant to show that the witness had properly identified defendant. Detective Haywood's second statement that defendant had been picked up before the detective had a chance to arrest defendant is relevant to

explain the chain of events in the case and is simply a part of the witness' story.

ii. The statements in question are not excluded under Rules 404(a) or 404(b) .

Rule 404(a) provides in relevant part,

Evidence of a person's character or a trait of his character is not admissible for purposes of proving that he acted in conformity therewith on a particular occasion[...].

N.C.G.S. § 8C-1, Rule 404(a) (2012).

Rule 404(b) provides in relevant part,

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 of other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

N.C.G.S. § 8C-1, Rule 404(b) (2012). Rule 404(b) is a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, requiring its exclusion if its *only* probative value is to show that defendant has the propensity or disposition to commit the charged offense. State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48,54 (1990) (emphasis added).

Defendant erroneously characterizes Detective Haywood's statements as character evidence being offered under Rule 404(a) in an improper attempt to besmirch defendant's character. (Def's Br. P. 7) Defendant also argues that the statements are inadmissible evidence of other crimes that the accused may have committed under Rule 404(b). (Def's Br. P. 7) Neither statement made by Detective Haywood has anything to do with defendant's character, nor were the

statements offered to prove that defendant acted in conformity with a certain character trait. Furthermore, the statements were not offered as evidence of other crimes, wrongs, or bad acts. And, even if the first statement that the Detective knew defendant from "past encounters" is considered by this Court as evidence of a prior bad act, it is still admissible as identity evidence. Thus, contrary to defendant's assertion, the statements were properly admitted and should not be excluded under Rules 404(a) and/or 404(b).

As discussed above, the first statement at issue, that defendant "was identified by me [...] due to past encounters" is simply an explanation for how the witness knew who defendant was. Moreover, the testimony was vague and devoid of any detail about the "past encounters." The Detective did not describe the "past encounters," nor did he characterize them in any way. For all the jury knew, the Detective could have known defendant from meeting him at church, school, or the grocery store. In the analogous case of State v. Brooks, 61 N.C. App. 572, 574, 310 S.E.2d 421,422 (1983) this Court held that a police officer's testimony that he knew the defendant "prior to this" did not imply that the defendant had either committed or been suspected of committing a crime. Instead, this Court found that such testimony was relevant and admissible to show that the officer had properly identified the defendant. Id. at 574, 310 S.E.2d at 422.

The second statement at issue is part of the witness's story. It was not offered as character evidence, nor was it offered to

prove that defendant either committed a prior bad act or acted in conformity with a prior bad act. Detective Haywood simply said that before he could arrest defendant, defendant had already been "picked up." He did not elaborate on the phrase "picked up" in any way. As the prosecutor at trial noted for the trial judge outside the presence of the jury, the jury did not know who picked up defendant, what he was picked up for, or even exactly what "picked up" meant. (T p. 18) There is no indication from the testimony that defendant had a criminal record or had been either suspected of or arrested for anything else. Rule 404(b) is implicated only if the evidence actually shows the defendant committed other crimes, wrongs, or acts. See State v. Fielder, 88 N.C. App. 463, 466-68, 363 S.E.2d 662, 663-64 (1988) (stating that the challenged testimony was not the sort contemplated by Rule 404(b) because the "wrong" in question could not be easily compared to the crime for which the defendant was tried). Also, evidence of a prior act which is introduced not to show a defendant's propensity or character, but rather to show the chain of circumstances surrounding the crime charged, is not excluded by Rule 404(b). See State v. Handy, 331 N.C. 515, 531, 419 S.E.2d 545, 554 (1992). In the case at bar, the jury is not told what "picked up" means and even if they make the assumption that it meant that defendant had been arrested, they have no idea what he may have been arrested for. The mere fact that defendant was "picked up," without any other context, cannot reasonably be considered inadmissible

character evidence under Rule 404(a) or inadmissible evidence of a prior crime, wrong, or bad act under Rule 404(b).

iii. Detective Haywood's statements are more probative than prejudicial.

N.C.G.S. § 8C-1, Rule 403 (2012) provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of its unfair prejudicial effect. The Court of Appeals for the Fourth Circuit articulated the standard to be employed when weighing the prejudicial effect of evidence against its probative value in U.S. v. Masters, 622 F.2d 83 (4th Cir. 1980). In that case the Court stated that

In exercising its discretion to admit or not to admit the evidence, the district court was required to consider whether the probative value of this evidence was substantially outweighed by its unfair prejudice...It has been said that such undue prejudice would seem to require exclusion only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence.

Id. at 87. The North Carolina Supreme Court has held, and it is well-established law, that "[t]he exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court, which is left undisturbed unless the trial court's ruling is 'manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision'." State v. Badgett, 361 N.C. 234, 245, 664 S.E.2d 206, 213 (2007) (citing State v. Mason, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) and quoting State v. Syriani, 333 N.C. 350, 379, 428 S.E.2d. 118, 133, cert. denied, 520 U.S. 948, 126 L. Ed. 2d 341 (1993)).

The relevancy and probative value of the two statements at issue in this appeal are discussed above. The first statement has probative value both as identity evidence and as an explanation for how the witness knew who defendant was. The second statement is part of the chain of events and has probative value to the jury to help it understand all of the events related to the case, including the apprehension of defendant. There is probative value for the jury to understand why the Detective who oversaw the undercover operation did not immediately arrest defendant after obtaining the warrant. Neither statement at issue on appeal creates the substantial prejudicial effect that Rule 403 is concerned with. Both statements are too vague to mislead or confuse the jury. Neither statement could reasonably be taken to create a presumption that defendant was of questionable character or had committed prior bad acts in conformity with the offenses charged. In weighing the probative value of Detective Haywood's statements against any potential for substantial prejudice, it is clear that there is no concern the statements might unduly prejudice the jury.

Moreover, as discussed above, the balancing of the probative value against the prejudicial effect of evidence under Rule is a matter squarely within the discretion of the trial court, and "[i]n other than capital cases a motion for mistrial is addressed to the sound discretion of the trial judge, and may only be reversed upon a showing that it 'was so arbitrary that it could not have been the result of a reasoned decision.'" State v. Mason, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (citing State v. Yancey, 291 N.C. 656,

664, 231 S.E. 2d 637, 642 (1977) and quoting State v. Thompson, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985)). In reviewing a trial court's decision for abuse of discretion, the appellate court may not substitute its own judgment. State v. Ysaquire, 309 N.C. 780, 786, 309 S.E. 436, 441 (1983). At trial, defendant's attorney made a motion for a mistrial after the jury had been excused from the courtroom. (T p. 18) The trial judge heard arguments from both defense counsel and the prosecution, and, in his sound discretion, denied defendant's motion for a mistrial, allowing the testimony in question into evidence. (T pp. 18-19) This decision by the trial judge that the probative value of the evidence outweighed any potential prejudicial effect should not be disturbed because no abuse of discretion has been shown.

B. Exclusion of Detective Haywood's testimony regarding his "past encounters" with defendant and the fact that defendant had been "picked up" before the Detective could arrest him, would not have changed the outcome of the case.

Even if this Court finds that the trial court improperly admitted the testimony in question, "in order to obtain relief, a defendant must show that the error asserted is material and prejudicial." State v. McAbee, 120 N.C. App. 674, 683, 463 S.E.2d 281, 286 (1995). North Carolina courts have held that a defendant must show that an evidentiary ruling affected the outcome of a trial so that a different evidentiary ruling would have led to a different result in the trial in order for that ruling to constitute reversible error. State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993), State v. Trogden 135 N.C. App. 85, 519

S.E.2d 64 (1999). If the testimony in question had been found more prejudicial than probative and excluded under Rule 403, the outcome of this case would have been the same.

Detective Haywood's statements that he knew the identity of defendant from "past encounters" and that defendant had already been "picked up" before Detective Haywood could execute the warrant were not determinative factors in defendant's conviction. There was an overwhelming abundance of other evidence upon which to convict defendant of possessing and selling crack cocaine. Specifically, Detective Haywood saw and heard the informant call defendant and ask to purchase some crack cocaine. Then Detective Haywood witnessed defendant drive up to the informant's home and sell to the informant a substance that was later determined to be crack cocaine by lab testing. The informant testified that he purchased crack cocaine from defendant during the day in question in this matter. And finally, there was an audio/video recording of the exchange between defendant and the informant. There was ample evidence upon which to convict defendant without the two specific witness statements in question.

In support of his argument that his motion for a mistrial should have been granted, Defendant notes that the jury needed to return to court for a second day of deliberations. (Def's Br. p. 8) He asserts that this fact indicates that defendant's guilt or innocence was not a matter to be easily resolved, presumably because the alleged prejudicial effect of the statements in question created error that was not harmless. (Def's Br. p. 8)

This presumption is completely speculative and lends absolutely no support to defendant's arguments. Neither defendant nor his counsel was present in the jury room, and any inferences drawn from the amount of time it took the jury to return a verdict is completely irrelevant to defendant's appeal.

Defendant's argument that the two specific statements made by Detective Haywood during his testimony tipped the scales against defendant ignores the overwhelming body of evidence specifically related to defendant's guilt, and thus, its admission, even if made in error, was harmless.

II. THE TRIAL COURT PROPERLY ADMITTED IDENTITY EVIDENCE UNDER RULE 404(b) AFTER CONSIDERING WHETHER THE PROBATIVE VALUE OF THE EVIDENCE OUTWEIGHED ITS POTENTIAL PREJUDICIAL EFFECT ON DEFENDANT AND ISSUING A LIMITING INSTRUCTION TO THE JURY.

Defendant argues that the trial court erred and abused its discretion by allowing testimony by the State's witness, Mr. Clark, related to his purchasing crack cocaine from defendant in the past because the prejudicial effect of such evidence substantially outweighed its probative value. Defendant's arguments are without merit.

A. The witness's testimony related to his purchasing drugs from defendant in the past is admissible and the trial court did not abuse its discretion.

Defendant correctly concedes that Clark's testimony about other drug transactions with defendant is admissible under Rule 404(b). (Def's Br. p. 9) Defendant argues only that the testimony in question should have been excluded under Rule 403 because its prejudicial effect substantially outweighed its probative value.

As discussed in detail above, when weighing the prejudicial effect of evidence against its probative value under Rule 403, evidence should only be excluded where the trial judge believes there is a real risk that the jury will be so prejudiced by the evidence in question that it would act irrationally. (See Arg. I.A.iii. p. 10) Furthermore, “[t]he exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court, which is left undisturbed unless the trial court’s ruling is ‘manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision’.” State v. Badgett, 361 N.C. 234, 245, 664 S.E.2d 206, 213 (2007) (citing State v. Mason, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) and quoting State v. Syriani, 333 N.C. 350, 379, 428 S.E.2d. 118, 133, cert. denied, 520 U.S. 948, 126 L. Ed. 2d 341 (1993)).

In the present case, the prosecutor needed to establish how Mr. Clark, the informant, knew defendant, could identify defendant at the arranged narcotics buy, and could believably get defendant to sell him drugs on the basis of one short phone call. The prosecutor also needed to establish Mr. Clark’s credibility and control any attacks on the witness’s character by the defense attorney because Mr. Clark had a criminal record and had admittedly purchased and used narcotics in the past (T pp. 36-37), facts sure to be used to discredit him on cross-examination. Importantly, outside the presence of the jury, and before offering the testimony in question, the prosecutor notified the defense and the trial court of his intention to offer Mr. Clark’s testimony about his

past drug purchases from defendant. (T pp. 28-30) The testimony was to be offered for the purpose of identification of the witness, to bolster the witness's credibility, and to fill in important background for the conversation the witness had with defendant by telephone. (T pp. 28-30) The prosecutor assured the trial court that the testimony would be brief and would not go into details about the transactions, presumably to limit any potential prejudicial effect. (T pp. 29-30) The prosecutor, with the trial court's permission, then performed a voir dire of Mr. Clark outside the presence of the jury. (T pp. 30-33) After hearing arguments from both sides and carefully weighing the probative value of the testimony against its potential prejudicial effect, the trial court decided to allow admission of the testimony, but only after giving a limiting instruction to the jury. (T pp. 34-45) The limiting instruction given by the trial court was as follows:

Ladies and Gentlemen, let me give you this instruction.

Evidence -- you are about to receive evidence tending to show an interaction in the past between this witness, Mr. Clark and the defendant, Mr. Gibson.

This evidence will be received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed at all.

If you believe this evidence, you may consider it but only for the limited purpose for which it is received. All right.

(T pp. 35-36)

When the prosecutor asked Mr. Clark to explain to the jury how he knew defendant, Mr. Clark responded that he had "bought crack

cocaine from Mr. Gibson four times prior to December 14th." (T p. 36)

The record in this matter clearly shows that the trial court carefully weighed the probative value of the testimony in question against its prejudicial effect in considering whether to admit the evidence, as is required under Rule 403. In an exercise of its sound discretion, the trial court decided to allow the introduction of the evidence along with an instruction to the jury to mitigate any prejudicial effect.

The issuance of the limiting instruction in this case is an important factor to consider in reviewing the trial court's evidentiary decision. Far from abusing its discretion or ruling in a manner "manifestly unsupported by reason or so arbitrary as to not have been the result of reason", State v. Badgett, 361 N.C. 234, 245, 664 S.E.2d 206, 213 (2007) (citations omitted), the fact that the trial court gave a limiting instruction before allowing the testimony highlights the careful consideration the trial court gave to the evidentiary issue and illustrates how the trial court exercised its sound discretion.

In State v. Hyatt, our Supreme Court held that a trial court did not abuse its discretion by admitting evidence of bad acts otherwise admissible under Rule 404(b) where the trial court guards against the possibility of prejudice by instructing the jury to consider the testimony in question for the limited purpose for which it is introduced. State v. Hyatt, 355 N.C. 642, 662, 566 S.E.2d 61, (2002), cert denied, 537 U.S. 1133, 154 L. Ed. 2d

823(2003). It is well-established law that a jury is presumed to follow instructions given to it by the trial court. Id. (citing State v. Jennings, 333 N.C. 579, 618, 430 S.E.2d 188, 208, cert denied 510 U.S. 1028, 126 L. Ed. 2d 602 (1988)). Thus, in the present case, particularly in light of the issuance of the limiting instruction, the trial judge's decision to allow the testimony should not be disturbed.

B. Exclusion of the witness testimony in question would not have changed the outcome of the case.

Even if the trial court improperly admitted the testimony in question, "in order to obtain relief, a defendant must show that the error asserted is material and prejudicial." State v. McAbee, 120 N.C. App. 674, 683, 463 S.E.2d 281, 286 (1995). As discussed above in the State's arguments regarding harmless error, North Carolina courts have held that a defendant must show that an evidentiary ruling affected the outcome of a trial so that a different evidentiary ruling would have led to a different result in the trial in order for that ruling to constitute reversible error. State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993), State v. Trogden 135 N.C. App. 85, 519 S.E.2d 64 (1999). (See also Arg. I.B. pp. 12-13) If the testimony in question had been found more prejudicial than probative and excluded under Rule 403, the outcome of this case would have been the same.

Mr. Clark's testimony that he had purchased drugs from defendant in the past was not a determinative factor in defendant's conviction. As discussed in relation to Detective Haywood's two statements at issue in Argument I above, there was an overwhelming

abundance of other evidence upon which to convict defendant of possessing and selling crack cocaine, including but not limited to Detective Haywood and Mr. Clark witnessing the crime committed by defendant, the lab results showing the substance sold was cocaine, and the audio/video recording of the transaction. (See Arg. I.B. pp. 13-14) There was ample evidence to convict defendant without the two specific witness statements in question.

Defendant's argument that Mr. Clark's testimony about past drug transactions with defendant created such prejudice against defendant as to change the outcome of the verdict ignores the overwhelming body of evidence specifically related to defendant's guilt, and thus, its admission, even if made in error, was harmless.

CONCLUSION

For the forgoing reasons, the State respectfully submits that the trial court properly denied defendant's motion for a mistrial and committed no prejudicial error in admitting any of the evidence in question. Accordingly, the State respectfully requests that the convictions for possession with intent to sell and deliver cocaine and selling and delivering cocaine, and defendant's habitual felon status be upheld.

- 20 -

Electronically submitted this the 12th day of March, 2012.

Roy Cooper
ATTORNEY GENERAL

Electronically Submitted
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing BRIEF FOR THE STATE upon the DEFENDANT by placing a copy of same in the United States Mail, first class postage prepaid, addressed to his ATTORNEY OF RECORD as follows:

William B. Gibson
1315 Brookstown Avenue
Winston-Salem, NC 27101

This the 12th day of March, 2012.

Electronically Submitted
Daniel S. Hirschman
Assistant Attorney General