Circuit Court for Harford County
Case No. 12-K-16-001392

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1262

September Term, 2017

SHANI TIFFERA MCDONALD

v.

STATE OF MARYLAND

Wright,
Friedman,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: February 15, 2019

A jury in the Circuit Court for Harford County convicted appellant Shani Tiffera McDonald of possession of cocaine, possession with intent to distribute cocaine, and possession of cocaine as a volume dealer.[1] The trial court sentenced McDonald to a total of 40 years in prison, after which he filed a timely notice of appeal. He asks us to consider the following questions:

1. Did the trial court err in admitting evidence of other bad acts under Md. Rule 5-404(b)?
2. Are separate sentences for both possession of cocaine with intent to distribute and possession of 448 grams or more of cocaine improper?

Because we conclude that the trial court should have merged the conviction of possession of cocaine as a volume dealer into the conviction of possession with intent to distribute cocaine for sentencing purposes, we vacate one of the sentences. We otherwise affirm the convictions.

FACTS AND LEGAL PROCEEDINGS

In April 2016, after receiving information from a reliable confidential source that McDonald was selling narcotics, Maryland State Police Corporal John Kumberland, assigned to the Carroll County drug task force, opened an investigation. On May 23, 2016, Kumberland obtained a court order authorizing the placement of a GPS tracking device on the red Mazda CX-7 SUV McDonald was known to drive and frequently ride in as a passenger. Based on the GPS tracking data and physical surveillance, investigators learned

[1] The jury acquitted McDonald of conspiracy to distribute cocaine, importing cocaine into the state, being a drug kingpin, and common nuisance of distributing cocaine.

that McDonald typically spent his days travelling around northern Baltimore County and Carroll County, stopping in numerous places.

On June 22, 2016, Kumberland observed McDonald travel to several locations, where he met with various people for short amounts of time. On July 5, 2016, Kumberland observed McDonald drive the Mazda to a residence in Baltimore County, set up a folding chair, and meet briefly with people as they pulled up in their vehicles. From the corporal's training, knowledge, and experience, he concluded that these transactions involved the hand-to-hand sale of controlled dangerous substances ("CDS").

Following one of the July 5, 2016 transactions, the police stopped a pickup truck as it left the residence. A search of the truck, occupied by Charles Blizzard and Vernon Kidd, revealed drug paraphernalia and a small amount of heroin. On a cell phone recovered from Blizzard was a text message from a phone number identified as McDonald's: "[T]his is Ni/Tony, I'm good now, and it is fire. This is my new number, log me in."[2] Kidd and Blizzard were arrested.

On September 12, 2016, after checking the GPS tracker for McDonald's location, Kumberland learned that the Mazda was traveling north out of Maryland, a departure from McDonald's usual daily routine. A review of its stops indicated that the Mazda left McDonald's residence at approximately 9:00 a.m., picked up Kidd and Blizzard, drove to

[2] McDonald was known to go by nicknames including Tony, Ni, and Na. According to the State's CDS expert, "fire" refers to heroin. Kumberland took the message as an alert to McDonald's customers that "he was good with his controlled dangerous substance and letting them know that it was good ... stuff basically."

a nearby methadone clinic, and then proceeded north to New York, arriving in the city at approximately 2:30 p.m. Shortly thereafter, the car returned to Maryland, which, to Kumberland, was indicative of "somebody who is re-supplying [his] stash."

At 5:19 p.m., when the car was on I-95 near the Cecil/Harford County line, it was subjected to a traffic stop by Maryland State Police Trooper Gregory Bragg.[3] Kidd was driving the vehicle, and McDonald was a passenger in the back seat. Bragg separated McDonald and Kidd. When they exhibited nervous behavior and gave conflicting stories about their trip, Bragg called for a K-9. The dog gave a positive alert for narcotics. Two large packages of suspected cocaine totaling 1036.4 grams were found near the rear spare tire.[4] McDonald and Kidd were arrested. From McDonald, Bragg recovered a set of five keys on a ring, several phones, a GPS device, and just over $500 in U.S. currency.

Shortly thereafter, police executed a search warrant at the home McDonald shared with his girlfriend, Alicia Hance, and recovered documents and $3320 in U.S. currency. Hance told the police that McDonald had gone to New York to purchase drugs, and she agreed to show the police other locations relevant to their investigation—a residence on

[3] The car was targeted by the police because of the drug investigation, but it was pulled over for a seatbelt violation and an impermissible obstruction on the windshield.

[4] The State's expert forensic chemist later confirmed that the substance recovered was cocaine. The State's expert opined that the amount of cocaine recovered from the Mazda indicated it was meant to be repackaged for distribution. The expert further stated that it is common in the drug trade for someone who "has control of the operation" to use other people to conduct activities, such as driving and stashing the drugs and money in separate houses, "so they can try to remove themselves from . . . getting into trouble" while still maintaining control over the drug enterprise.

Old Court Road where appellant stashed his drugs (the "drug house"), and a residence on Greenhaven Drive, where appellant kept his money from the sale of the drugs (the "cash house").

A search warrant executed at the drug house yielded a safe, which contained 569.7 grams of heroin, a digital scale, scissors, a metal sifter, a metal spoon, a metal screwdriver, and rubber bands. The resident of the house, John Scrivener, advised the police that in August 2016, a man he knew as "Na," later identified as McDonald, had offered to pay him $1000 to maintain the safe at his residence. Scrivener claimed not to know what was in the safe, but he said McDonald came to check on it approximately twice a week.

A search warrant executed at the cash house, where McDonald's sister lived, yielded $7000 in U.S. currency in a safe which was opened with a key from McDonald's key ring. McDonald's sister claimed the money belonged to her, but she was unable to produce a key to the safe or any verification of her ownership of the money.

Vernon Kidd testified that he knew McDonald through Blizzard, his sister's boyfriend. On July 5, 2016, he and Blizzard went to a house near Gwynbrook Avenue so Blizzard could purchase heroin from McDonald. On the morning of September 12, 2016, Blizzard asked Kidd to take a drive with McDonald. During the trip, Kidd learned he was driving to New York, at which time he became "sure it was for drugs." Upon their arrival in New York, Kidd waited in the car for about an hour while McDonald went into a residence. McDonald retrieved a bag from the Mazda's hatch, went back inside the house, and returned with the same bag, which he placed under the vehicle's spare tire.

Alicia Hance testified that during her relationship with McDonald she became aware that he was selling drugs, although he did not keep drugs at their apartment. On several occasions, she went with him when he sold and obtained drugs to sell, including one trip to New York in the Mazda, and she knew where he stashed his drugs and his money from drug sales.

McDonald elected not to put on any evidence.

DISCUSSION

I. EVIDENCE OF PRIOR BAD ACTS

McDonald first contends that the trial court erred or abused its discretion in admitting evidence of his other bad acts, specifically the drug sales as observed by Kumberland on June 22 and July 5, 2016, as well as testimony by Kumberland and Hance about his prior drug sales on unspecified dates. McDonald concedes that the evidence recovered from his drug house and cash house in the days *after* his September 12, 2016 arrest was admissible because it was especially relevant to the issue of whether he had knowledge of the cocaine recovered from the car after his trip to New York. McDonald disputes, however, whether evidence of hand-to-hand drug sales more than two months *before* the search of the Mazda is sufficiently probative of his knowledge of the cocaine in the car to outweigh the risk of unfair prejudice. In response, the State argues that McDonald failed to preserve the issue for appellate review because he did not make a contemporaneous objection to the testimony at trial after the court had ruled it admissible during a pre-trial motion *in limine*. We agree with the State.

Prior to jury selection on the first day of trial, the State moved *in limine* to be permitted to introduce evidence of McDonald's drug activity prior to his September 2016 arrest to show McDonald's motive, knowledge, and intent, and to "give the jury the full picture, give them all of this evidence so that they can consider the kingpin charge fairly."[5] The prosecutor argued that testimony showing that McDonald was a passenger in the car driven by Kidd at the time of the September 12, 2016 arrest, without the evidence that McDonald had previously sold drugs, would give the jury "the murky picture that [McDonald] is potentially a mere bystander" and not the mastermind who engineered the drug run to New York and was a volume drug dealer.

Defense counsel countered that, in trying to prove that McDonald was a drug kingpin who brought a kilogram of cocaine into the state, the State did not have to bring in evidence of prior distribution of drugs because the prosecutor only had to prove that the cocaine was transported into Maryland in an amount sufficient to meet the requirement of CR § 5-612. Evidence that McDonald had sold heroin in other counties on previous occasions was, in his view, more prejudicial than probative.

The trial court heard testimony from Kumberland, and the following day made an oral ruling that the evidence of the earlier sales was admissible. Following the court's ruling

[5] The "kingpin charge" refers to a violation of Md. Code § 5-613 of the Criminal Law Article ("CR"). The statute defines "drug kingpin" as "an organizer, supervisor, financier, or manager who acts as a coconspirator in a conspiracy to manufacture, distribute, dispense, transport in, or bring into the State a controlled dangerous substance" and prohibits a drug kingpin from conspiring to manufacture, distribute, dispense, or transport or bring into the State, as pertinent to this matter, 448 grams or more of cocaine or cocaine base, commonly known as "crack." A convicted drug kingpin is subject to a mandatory minimum prison sentence of 20 years, with a maximum sentence of 40 years.

on the motion *in limine*, the court gave the jury preliminary instructions and the parties made lengthy opening statements. Thereafter, over the course of two days of trial, the State elicited testimony from Kumberland, Kidd, Scrivener, and Hance about McDonald's drug sales prior to September 12, 2016. During that testimony, defense counsel did not interpose a single objection. At the close of the State's case, following the court's denial of McDonald's motion for judgment of acquittal, defense counsel attempted to "revive" the earlier motion *in limine* and argued that admission of the evidence about the prior bad acts warranted a mistrial. The trial court denied the motion.

"It is well-established that a party opposing the admission of evidence 'shall' object 'at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent.'" *Wimbish v. State*, 201 Md. App. 239, 260-61 (2011) (quoting Md. Rule 4-323(a)) (additional citation omitted). And, "to preserve an objection, a party must either 'object each time a question concerning the [matter is] posed or . . . request a continuing objection to the entire line of questioning.'" *Id.* at 261 (quoting *Brown v. State*, 90 Md. App. 220, 225 (1992)) (alterations in original). "[This] requirement of a contemporaneous objection at trial applies even when the party contesting the evidence has made his or her objection known in a motion in limine[.]" *Id.*

Here, following the court's ruling on the State's motion *in limine* permitting evidence of prior drug sales, McDonald did not request a continuing objection to the line of questioning, nor did he offer the required contemporaneous objection to any of the questions posed to several witnesses—including Kumberland, Kidd, Scrivener, and Hance—that elicited evidence that he had sold drugs prior to September 12, 2016.

McDonald argues, however, that there was sufficient temporal proximity between the trial court's denial of the motion *in limine* and the direct examination of Kumberland so that his failure to make a contemporaneous objection should be excused.

The Court of Appeals has recognized an exception to the general rule requiring a contemporaneous objection. *Watson v. State*, 311 Md. 370 (1988). In *Watson*, the trial court denied the defendant's motion *in limine* objecting to the use of a prior conviction for impeachment purposes. *Id.* at 372 n.1. The Court of Appeals held that, despite the defendant's failure to object during cross-examination, because the trial court had reiterated its ruling immediately before the State's cross-examination of the defendant, requiring the defendant to object would have been futile and would have "exalt[ed] form over substance." *Id.* This exception is, however, a narrow one. *Reed v. State*, 353 Md. 628, 636 n.4 (1999). The Court of Appeals has explained that it is limited to the specific circumstances where a trial court reiterates its pretrial ruling "while the relevant witness was actually testifying, and shortly before the challenged evidence was admitted." *Id*. *See also Norton v. State*, 217 Md. App. 388, 396-97 (2014) (deciding, "[i]n light of the close temporal proximity between the trial court's ruling on the motion *in limine* and [the witness's] testimony," that appellant's objection to an expert witness, despite a failure by appellant's counsel to later object, was preserved for review).

The exception does not apply here because Kumberland's testimony was separated from the court's ruling on the motion *in limine* by both the court's introductory instructions to the jury and the parties' lengthy opening statements. Moreover, even were we to conclude that the lack of objection to Kumberland's testimony was not fatal to McDonald's

appellate claim, that would not excuse McDonald's failure to object during the later testimony of Kidd, Scrivener, and Hance over the course of two more days of trial. *See, e.g., Hickman v. State*, 76 Md. App. 111, 118 (1988) ("temporal closeness" exception to the contemporaneous objection rule applies only when the court rules (or reiterates a prior ruling) immediately prior to the objectionable testimony being elicited or evidence being offered). The totality of the circumstances leads us to conclude that McDonald, in failing to lodge any objections to the evidence he claims should not have been admitted, did not preserve this issue for appellate review.[6]

[6] Even if the issue had been preserved, McDonald's claim would fail on the merits. Under Maryland Rule 5-404(b), a court may not admit evidence of other crimes, wrongs, or acts that is offered "to prove the character of a person in order to show action in conformity therewith." The rule is intended to prevent the jury from "developing a predisposition of guilt or prejudice" based on unrelated conduct by the defendant. *Sinclair v. State*, 214 Md. App. 309, 334 (2013). Notwithstanding this rule of exclusion, a trial court may admit other crimes or prior bad acts evidence if it has special relevance to the charges for which the defendant is then on trial and satisfies three requirements. *First*, the evidence must be relevant to the offense charged on some basis other than mere propensity to commit crime, such as "motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Second*, the evidence must be clear and convincing that the defendant was involved in the alleged acts. *Third*, the probative value of the evidence must substantially outweigh its potential for unfair prejudice to the defendant. *Gutierrez v. State*, 423 Md. 476, 489-90 (2011) (citing *State v. Faulkner*, 314 Md. 630, 634-35 (1989)). All three requirements were met here. As part of his defense, McDonald argued that he was merely a bystander to the purchase and possession of the cocaine being transported from New York, and the actual kingpin was either Kidd or Hance. In light of this argument, evidence of the prior drug sales tied McDonald to the larger drug operation and was relevant to his motive, knowledge, and intent with regard to the cocaine, as well as his identity as the drug kingpin. There was ample evidence, established through the testimony of Kumberland and including GPS tracking and surveillance, identifying McDonald as a participant in the previous drug sales. And finally, the prejudice of the small hand-to-hand sales paled in comparison to the probative value of showing McDonald's involvement in the ongoing illegal business and his role in bringing a kilogram of cocaine into the State. Had the issue been preserved, we therefore would

II. MERGER OF CONVICTIONS

McDonald also argues that the trial court erred in imposing separate sentences for possession with intent to distribute cocaine and possession of cocaine as a volume dealer. He asserts that the possession as a volume dealer charge should have merged with the possession with intent to distribute charge for sentencing purposes under the rule of lenity.[7] We agree.

During sentencing, the State pointed out that McDonald was a major offender under the sentencing guidelines and requested an above-guidelines prison sentence of 40 years on the count of possession with intent to distribute cocaine, along with a concurrent five years on the count of possession of cocaine as a volume dealer. Defense counsel argued that deviating from the sentencing guidelines was inappropriate, and instead asked the court to consider a split sentence, with a period of time suspended, within the guidelines so McDonald could get help for his heroin and cocaine addictions.

The trial court recounted McDonald's "extensive history," which qualified him as a subsequent offender, subject to a range of 14 to 28 years in prison. Agreeing with the State

have held that the trial court did not abuse its discretion in admitting evidence of the prior drug sales.

[7] "The rule of lenity is a rule of statutory construction whereby two crimes arising out of a single act, even if not merged under the required evidence test, will not be punished separately if it is unclear whether the legislature intended the crimes to be punished by one sentence or more. If the legislature's mandates are ambiguous, under the rule of lenity the defendant is given the benefit of the doubt and is punished by only one sentence." *Monoker v. State*, 321 Md. 214, 218 n.3 (1990).

that a split sentence would be inappropriate because McDonald was not a good candidate for probation after conviction of this "major CDS offense," the court deviated from the guidelines and sentenced McDonald to 40 years in prison on the count of possession with intent to distribute cocaine, pursuant to CR § 5-602, along with a concurrent five years without the possibility of parole on the count of possession of cocaine as a volume dealer, pursuant to CR § 5-612. McDonald argues on appeal that the convictions should have merged for sentencing purposes.[8]

We have previously held that possession as a volume dealer pursuant to CR § 5-612 and the separate crime of possession with intent to distribute pursuant to CR § 5-602 do not merge under the required evidence test. *Kyler v. State*, 218 Md. App. 196, 227 (2014). We have also held that the record is ambiguous as to whether the General Assembly intended that the two crimes be *punished* separately, and therefore we have merged the sentences under the rule of lenity. *Id*. at 229.

The State makes much of the fact that possession as a volume dealer was once only a sentence enhancement statute but is now a stand-alone crime with its own penalty, and argues that as a result the offense should not merge into the charge of possession with intent to distribute for sentencing purposes. We disagree. The fact that possession as a volume dealer is a crime separate from possession with intent to distribute has no effect on the propriety of merger under the rule of lenity. There is no language in CR § 5-612 providing

[8] McDonald did not make this argument to the trial court, but when a trial court is required to merge convictions for sentencing purposes and instead imposes separate sentences, the sentence is illegal and may be raised on appeal, even in the absence of an objection below. *Kyler v. State*, 218 Md. App. 196, 222 (2014).

that a conviction under that section does not merge with other crimes. We continue to find sufficient ambiguity in the intent of the volume dealer statute with regard to the imposition of penalty so as to require merger of McDonald's volume dealer conviction into the possession with intent to distribute conviction for sentencing purposes.[9]

SENTENCE IMPOSED PURSUANT TO CR § 5-612 VACATED. JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID HALF BY APPELLANT AND HALF BY HARFORD COUNTY.

[9] In applying the rule of lenity, the lesser penalty merges into the greater penalty. *Kyler*, 218 Md. App. at 229.