IN THE COURT OF APPEALS OF THE STATE OF ALASKA

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| DEMOND D. SNOWDEN,<br><br>Appellant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Appellee. | Court of Appeals No. A-11814<br>Trial Court No. 4FA-12-2774 CR<br><br>MEMORANDUM OPINION<br><br>No. 6502 — August 2, 2017 |

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Bethany Harbison, Judge.

Appearances: Marjorie Mock, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

A jury convicted Demond D. Snowden of two counts of third-degree misconduct involving a controlled substance for selling cocaine to a confidential

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

informant.[1] Snowden argues on appeal that the trial court committed error by refusing to grant a mistrial after the informant testified that she approached Snowden (and asked him to sell drugs to her) because she had witnessed Snowden selling drugs to other women at the Show Boat nightclub where she worked.

For the reasons explained here, we conclude that the trial judge did not abuse her discretion when she denied Snowden's motion for a mistrial.

*Facts and proceedings*

In late 2011, Alaska State Troopers discovered cocaine and drug paraphernalia at the residence of Lisa Reyes. They asked Reyes if she wanted to "help herself" by becoming a confidential informant, and Reyes agreed to work with Investigator Albert Bell. Reyes told Bell that she could buy cocaine from someone nicknamed "D" who she knew from her job at the Show Boat, a local nightclub. The investigators determined that "D" was Demond Snowden.

On two occasions in July 2012, while under trooper surveillance, Reyes purchased an "eight ball" (one-eighth ounce of cocaine) from Snowden for $300. For each controlled buy, Reyes arranged to meet Snowden outside his apartment. Each time, the troopers first searched Reyes and her vehicle. They then followed her to Snowden's apartment and watched as Snowden entered Reyes's car. After Snowden returned to his apartment, the troopers followed Reyes back to their station, where she turned over the cocaine.

Before the second transaction, Investigator Bell obtained a warrant to electronically record the buy. Bell furnished Reyes with a recording device to put in her

[1] Former AS 11.71.030(a)(1) (2014).

car. The drug transaction between Reyes and Snowden was captured on the ensuing audio recording.

Prior to trial, the parties stipulated to a protective order precluding any mention of Snowden's prior criminal record or his status as a probationer. During the defense attorney's opening statement at trial, he contended that Snowden had not sold cocaine to Reyes, and that the State was relying on the word of an informant who was trying to curry favor to avoid incarceration in her own drug case.

During his direct examination of Reyes, the prosecutor asked her how she knew Snowden. Reyes explained that she had "witnessed him sell [cocaine] to some of the girls [she] worked with [at the nightclub]." The defense attorney objected and requested a conference outside the presence of the jury.

At this bench conference, the defense attorney conceded that the protective order did not apply to the testimony that Reyes had just given, but the attorney argued that the jury should not hear evidence of any prior uncharged drug sales by Snowden. In response, the prosecutor asserted that Reyes's testimony on this point was necessary to explain why Reyes had approached Snowden to set up a drug buy. In the absence of this testimony, the prosecutor contended, it would seem as if Reyes had just picked somebody "out of a hat" and decided to ask him for drugs.

Superior Court Judge Bethany Harbison implicitly acknowledged that evidence of uncharged drug sales could pose a danger of unfair prejudice to Snowden. The judge instructed the prosecutor not to elicit any additional testimony about Snowden's prior drug sales. But the judge did not strike Reyes's testimony that she knew Snowden to have sold cocaine to other Show Boat employees.

Following this ruling, the judge asked Snowden's attorney if he had any other requests. The defense attorney replied that he would decide after the next break in the trial whether to request a curative instruction.

During the defense cross-examination of Reyes, Snowden's attorney focused on Reyes's credibility as an informant. Then, on redirect, the prosecutor seemingly ignored the judge's admonition to avoid further mention of Snowden's prior drug sales. The prosecutor asked Reyes about the same topic that had earlier drawn the defense attorney's objection: why she told the police that she could buy drugs from "D." Reyes responded, "Because that's what I witnessed at the club I was working at ... ."

The defense counsel objected once again and, outside the presence of the jury, moved for a mistrial on the ground that the jury should not have heard any evidence of Snowden's prior uncharged drug sales. Judge Harbison ruled that "the State has a right to explain why they've chosen this person," and so she denied the request for a mistrial.

When the prosecutor resumed his redirect examination, he asked Reyes if she would have approached Snowden if she didn't think that he would sell her drugs. Reyes responded that she would not have done so, and that she did not know anybody else she could have asked.

The jury convicted Snowden on both counts of misconduct involving controlled substances in the third degree.

*The superior court did not abuse its discretion when it denied Snowden's motion for a mistrial*

When the defense attorney, in his opening statement to the jury, claimed that Snowden had not in fact sold cocaine to Reyes, he effectively accused Reyes of perpetrating a fraud on an innocent man in order to avoid prison herself. The attorney's implication was that Reyes had employed some pretext to arrange a meeting with Snowden, and had then invited him into her car and pretended to buy cocaine from him

— cocaine that she had obtained elsewhere and had then secreted on her person or in her car without detection by the troopers during their pre-buy searches.

Once Snowden's attorney suggested that Snowden had been set up, the prosecutor was entitled to confront this claim by introducing evidence that Reyes had reason to know that Snowden would sell cocaine to her (because she had witnessed his prior cocaine sales to other Show Boat employees). As Judge Harbison concluded, Reyes's testimony on this point was relevant for a case specific, non-propensity purpose. It was therefore not precluded by Alaska Evidence Rule 404(b)(1).

Of course, even when evidence of prior bad acts is not precluded by Evidence Rule 404(b), a trial judge must still analyze this evidence under Alaska Evidence Rule 403, weighing the probative value of the evidence against its potential for unfair prejudice.[2] Here, the judge acknowledged the potential prejudice of Reyes's testimony, but she concluded that this potential prejudice did not outweigh the probative value of the evidence.

Under these circumstances, Snowden has not demonstrated that the judge's ruling was an abuse of discretion.[3] Accordingly, the judge properly denied Snowden's mistrial motion.

*Conclusion*

We AFFIRM the judgment of the superior court.

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[2] *See, e.g.*, *Bingaman v. State*, 76 P.3d 398, 416 (Alaska App. 2003).

[3] *See, e.g.*, *Olson v. State*, 390 P.3d 1188, 1191 (Alaska App. 2017).