

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-065

MARCH TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Chittenden Circuit
	}	
Danny B. Davis	}	DOCKET NO. 6123-12-05 Cncr

Trial Judge: Michael S. Kupersmith

In the above-entitled cause, the Clerk will enter:

Defendant appeals his convictions for possession of cocaine and marijuana following a jury trial. Defendant argues that the trial court committed reversible error when it denied his motion to exclude evidence that the State did not disclose until the day before trial. We affirm.

The charges stem from drugs discovered by Burlington police in defendant's vehicle and in a hotel room where defendant was staying. A Burlington police officer stopped defendant's vehicle on December 7, 2005 at 3:30 a.m. after the officer observed the vehicle running a red light. As the officer approached the vehicle, he shone a spotlight in the car and saw a female driver, later identified as defendant's girlfriend, defendant in the front seat, and a male passenger in the backseat. The officer observed a lot of movement in the car between defendant and the male passenger in the back seat. The officer called for back-up and proceeded to interview the female driver. During the investigation, defendant gave police permission to search the vehicle. Police discovered a cigarette pack jammed between the cushions in the backseat with several baggies containing a white powdery substance, later identified as cocaine. Defendant agreed to speak with police and stated that the cocaine belonged to the other male occupant of the car. Defendant also admitted that he and the male passenger had done cocaine earlier in the evening. Police obtained a warrant to search the hotel room where defendant and his girlfriend were staying. The police officer's affidavit of probable cause listed the items discovered during the search of the hotel room, including a white powder suspected to be cocaine, digital scales, a baggie containing a green leafy plant material that smelled like marijuana in the pocket of a pair of men's jeans, and another baggie containing some paper and some more suspected marijuana. The affidavit explained that "the paperwork had the name Danny Davis on it."

Defendant was charged with possession of cocaine and marijuana. At trial, several officers from the Burlington police department testified for the State. Two officers testified that defendant said he was staying in a room with his girlfriend at the hotel. The state chemist testified that the substance found in defendant's car was cocaine and there were traces of cocaine in the hotel room. The chemist confirmed that the leafy substance found in the hotel room was marijuana. During the chemist's testimony, the State sought to admit the document that was discovered in the hotel room. This document was a hearing notice from a Vermont district court, which stated that defendant had failed to fully pay a fine of \$334. The document did explain the nature of the underlying offense. Defendant objected on the grounds that the State failed to provide proper notice of its intent to introduce the evidence, and that the document was unduly prejudicial because it indicated that defendant had a prior criminal record. The court denied defendant's motion. The court concluded that any prejudice was minimal because the citation was for a fine only, and that the paperwork was probative of defendant's connection to the room. Defendant testified on his own behalf. He admitted that he was staying in the room with his girlfriend. He also admitted that a substantial part of the marijuana found in the room was his. In addition, he testified that he had a prior conviction for driving while under the influence of alcohol. After the jury's verdict, defendant filed a motion for a new trial, claiming that the document with defendant's name was improperly admitted given the State's late disclosure, and the highly prejudicial nature of the evidence.

The court denied defendant's motion for a new trial. The court concluded that defendant had actual notice that the document had been seized because the affidavit of probable cause specifically states that during the search of the hotel room police found some paper that "had the name Danny Davis on it." In addition, the court held that defendant did not establish how he was prejudiced by the State's failure to produce the document until just prior to trial.

On appeal, defendant claims it was prejudicial error to admit: (1) the evidence of the documents with defendant's name on it where the document was not disclosed until the day before trial, and (2) the entire document into evidence because the prejudicial effect substantially outweighed any probative value.

Under Vermont Rule of Criminal Procedure 16(a)(2)(D), the prosecutor is obligated to disclose to defendant documents that the prosecutor intends to use at trial. The purpose of the discovery rules "is to prevent the State from assuming an unfair advantage over the defense." State v. Streich, 163 Vt. 331, 349 (1995). "To establish reversible error, however, defendant must show both a violation of the rule and resulting prejudice." Id. We review the trial court's decision on defendant's motion for a new trial for an abuse of discretion. See State v. Passino, 161 Vt. 515, 521 (1994) (reviewing trial court's sanction decision for a discovery violation under an abuse-of-discretion standard). We conclude that the trial court did not abuse its discretion in denying defendant's motion.

Assuming that the State's action violated the discovery rules, we conclude that it was not reversible error for the court to admit the document because defendant cannot demonstrate how he was prejudiced by its introduction. Defendant claims that the document was highly prejudicial because it linked him to the hotel room where the marijuana and cocaine powder was

found. To warrant reversal, however, defendant must demonstrate that the discovery violation caused him prejudice, not that the late-discovered evidence itself was prejudicial. See State v. Provost, 2005 VT 134, ¶ 13, 179 Vt. 337 (explaining that the question is whether the defendant was prejudiced by the lack of notice of the evidence, not by the evidence itself). Defendant has not demonstrated how he would have responded differently to the evidence if he had prior notice that the State would seek to introduce it at trial. See Streich, 163 Vt. at 350 (concluding that defendant had failed to demonstrate prejudice where his only claim was that he defense would have been stronger without the evidence).

We also reject defendant's related claim that he was prejudiced because, during plea negotiations, he did not know that the State would seek to introduce the document at trial. Defendant has failed to demonstrate how his plea strategy would have differed had he known that the State would introduce this evidence at trial given that there was other evidence linking defendant to the hotel room, including his own statements to police that he was staying in that room, and his admission that some marijuana in the room was his.

Next, defendant argues that even if the court correctly admitted the testimony about the document with defendant's name on it, it was error to admit the actual document because the prejudicial effect substantially outweighed any probative value of the document. See V.R.E. 403 (explaining that relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice). Defendant argues that introducing the document was not probative of any relevant fact and was highly prejudicial because it provided the jury with evidence that defendant had committed prior criminal conduct. Defendant contends that the document should have been excluded, or redacted. The trial court has substantial discretion in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, and absent an abuse of discretion the trial judge will not be overruled. State v. McElreavy, 157 Vt. 18, 23 (1991).

We conclude that the court did not abuse its discretion in admitting the entire document. We agree with the trial court that the document was probative of whether the drugs in the hotel room belonged to defendant because the document had drug residue on it, because defendant's name was on the document, and because the document was an important paper that one would not leave casually lying around. The document's prejudicial effect did not substantially outweigh this probative value given the small amount of the fine involved and defendant's admission that he had a prior conviction for driving while under the influence of alcohol. See State v. Davis, 165 Vt. 240, 251 (1996) (concluding that the trial court's admission of the defendant's knife in the victim's home was not an abuse of discretion because it was probative of defendant's presence in the victim's home and not unfairly prejudicial).

Finally, defendant argues that the court erred in failing to give the jury a limiting instruction regarding the document. Because defendant did not request such an instruction or object to the jury charge, we review this claim for plain error and find none. V.R.Cr.P. 52(b). Under this standard, we will reverse "only in rare and extraordinary cases where the error so affects the substantial rights of the defendant that we cannot find the trial overall to be fair." State v. Turner, 2003 VT 73, ¶ 15, 175 Vt. 595 (quotation omitted). The document was admitted

to link defendant to the hotel room and the drugs found therein. The document did not reference any particular prior bad act of the defendant in general, or an act similar to the one he was charged with so there was minimal risk the jury would “use the evidence to show a predisposition or character trait directly related to the charged crime.” State v. Holcomb, 156 Vt. 251, 256 (1991).

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice