No. COA 23-592 DISTRICT NINETEEN-A

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cabarrus County
	)	
RONALD MCCROREY	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

INDEX

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

No. COA 23-592 DISTRICT NINETEEN-A

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cabarrus County
	)	
RONALD MCCROREY	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

ISSUES PRESENTED

I. DID THE TRIAL COURT ERR IN DENYING THE MOTION TO DISMISS WHERE THE STATE FAILED TO PROVE THAT FENTANYL SOLD BY MR. MCCROREY CAUSED THE DEATH OF MS. HOOPER?

II. DID THE TRIAL COURT ERR ADMITTING EVIDENCE UNDER RULE 404(B) THAT MR. MCCROREY SOLD DRUGS ON PRIOR OCCASIONS?

STATEMENT OF THE CASE

This case came on for trial at the 14 November 2022 criminal session of Cabarrus County Superior Court, before the Honorable Martin McGee, on an indictment charging Defendant Ronald McCrorey with death by distribution. (R pp 1, 4)

On 17 November 2022, the jury found Mr. McCrorey guilty of death by distribution. (R p 32; T p 784) The same day, Mr. McCrorey was sentenced to 79 to 96 months' imprisonment. (R pp 35-36; T p 804) Oral notice of appeal was given in open court. (R pp 37-38; T pp 804-05)

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Mr. McCrorey appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) from a final judgment entered in Cabarrus County Superior Court.

STATEMENT OF FACTS

Michelle Hooper struggled with drug addiction for over a decade. In late 2019, she entered a rehabilitation program in Charlotte. In February 2020, she returned to her mother's home in Concord. (T pp 309-12) On 25 March 2020, Ms. Hooper told her mother that she had several doctor's appointments in Charlotte. Ms. Hooper went out for

several hours, returning home in the early afternoon. She attended a church function with her family and was in her room when her mother went to bed around 9:00 PM. (T pp 315-18)

When Ms. Hooper's mother woke up around 6:00 AM the next morning, Ms. Hooper's light was on, but the door was closed. Speaking through the closed door, Ms. Hooper told her mother she had a headache and was going back to bed. Around 10:00 AM, Ms. Hooper's mother went out to run some errands. She noticed that the family dog was curled up in front of Ms. Hooper's door. When Ms. Hooper's mother returned around noon, the dog was still there. She pushed the dog out of the way, opened the door, and discovered her daughter doubled over on the bed, unresponsive. Ms. Hooper's mother called 911 but Ms. Hooper was already deceased. (T pp 318-20)

The police observed several needles in Ms. Hooper's room, as well as makeshift tourniquet around her arm. (T pp 333, 345-48) On Ms. Hooper's bedside table were items used to prepare drugs for injection. (T pp 348-49) Four empty baggies of the type used to contain narcotics were found under Ms. Hooper's pillow. (T pp 348, 364-66; *see also* State's Exhibit 25 at Doc. Ex. 1-3) Officers did not know where these

baggies came from or who sold them to Ms. Hooper. (T pp 641-44) No controlled substances were found in Ms. Hooper's room or in her car. No testing was done on any of the baggies or syringes, including the syringe Ms. Hooper appears to have dropped during her overdose. (T pp 346, 363-64, 367-68)

Forensic pathologist Dr. Jonathan Privette testified that his autopsy of Ms. Hooper revealed no significant physical injury or apparent cause of death. (See State's Exhibit 26 at Doc. Ex. 4-7) Later toxicology testing showed the presence of cocaine and fentanyl in Ms. Hooper's system, in addition to dextromethorphan and chlorpheniramine. (T pp 382-83; Doc. Ex. 8-9) Dr. Privette testified that although fentanyl was the "primary" agent, "the cause of death is all these drugs combined." (T pp 383-85) Given the amounts of cocaine and fentanyl in Ms. Hooper's system, either could have been fatal. (T pp 396-97)

Forensic toxicologist Justin Brower, Ph.D. agreed that either cocaine or fentanyl could have caused Ms. Hooper's death. (T pp 422-25) Dr. Brower testified that the half-life of cocaine in the body is 30 minutes to an hour. Cocaine quickly breaks down into benzoylecgonine,

which stays in the body longer. The fact that both cocaine and benzoylecgonine were present in Ms. Hooper's system indicates that she was on a prolonged cocaine binge, and that she used cocaine very shortly before her death. (T pp 415-17) Dr. Brower further testified that any amount of fentanyl can be lethal, and that the amount of fentanyl necessary to cause death varies widely from person to person. Some people die with as little as 1 ng/L of fentanyl in their system, while others require hundreds of nanograms. Ms. Hooper had 32 ng/L of fentanyl in her blood. (T pp 417-19; State's Exhibit 28 at Doc. Ex. 10-18) Dr. Brower testified that when a person dies from cocaine, they usually have a cardiac episode and die quickly. When a person dies from fentanyl, they become unconscious and then slowly die as their lungs fill with fluid and they stop breathing. (T pp 419-20)

On the bed next to Ms. Hooper when she died was an address book, open to the contact information for Kayla Wood. Ms. Hooper's mother told detectives that Wood had been a problem for her daughter for years. (T pp 321, 656-59) When the police located Wood, she was clearly impaired. Wood told the police that she and Ms. Hooper obtained drugs from Mr. McCrorey. Wood was more upset that the police seized

her phone as evidence than she was that her friend had died. (T pp 656-62, 668-71)

When the police analyzed Wood's phone, they only reviewed messages between Wood and Ms. Hooper and Wood and Mr. McCrorey. (T pp 620-22) At 5:15 PM on March 24th, Ms. Hooper texted Wood, "I wanna get some hard[1]." (State's Exhibit 31 at Doc. Ex. 34) Later that night she texted that she would see Wood at 9:00 AM, "And like I said, I wanna buy some crack", and "And you'll have something waiting on me? Crack?" (Doc. Ex. 35) Ms. Hooper asked Wood's advice on how to fool a urine drug screen. (*Id.*) Ms. Hooper texted, "still got a bunch of boy[2]." (*Id.*) Ms. Hooper also indicated that she wanted to do "some calls[3]." (*Id.*) The extraction report produced by the Cabarrus County Sheriff's Office does not contain Wood's responses to these messages. The next morning, Wood texted Ms. Hooper, "I have me and Ronald set up too." (Doc. Ex. 36) When Ms. Hooper did not immediately respond, Wood texted, "Michelle, really???????? Wow I have this hit for us and boi!!! The Ronald said come see him at 9." (*Id.*) The extraction report indicates

---

[1] This is code for crack cocaine. (T p 587)
[2] This is code for heroin. (T p 588)
[3] This is code for engaging in prostitution. (T p 575)

that Ms. Hooper called Wood a short time later. (Doc. Ex. 33) The report does not show any contact between Ms. Hooper and Wood after 9:04 AM. (*Id.*)

The extraction report indicates that Wood texted Mr. McCrorey at 8:31 AM on March 25th, "Please let me know when I can come I'm about the be sick." (Doc. Ex. 37) At 8:34, he texted back, "So what's the deal." (*Id.*) Wood called Mr. McCrorey one minute later. (Doc. Ex. 34) At 8:55 AM, Wood texted Mr. McCrorey, "Okay listen by friend will be in 15 min. She wants half and half[4] & I also want half and half FOR MYSELF." (Doc. Ex. 37) Mr. McCrorey called Wood four times between 9:06 and 9:53 AM. (Doc. Ex. 33) The extraction report does not contain any further communications between Wood and Mr. McCrorey.

At trial, Wood testified that she met Ms. Hooper in middle school. As adults, they kept in touch but only saw each other about every six months. (T pp 441-43) Wood testified that Ms. Hooper contacted her on 24 March 2020 looking for heroin and crack cocaine, and that the next

---

[4] Wood testified that "half and half" means half an ounce of heroin and half an ounce of cocaine. (T p 448) However, this is also common slang for a particular act of prostitution. Urban Dictionary, available at: https://www.urbandictionary.com/define.php?term=Half%20and%20half .

day, the two met at the hotel where Wood was staying. Wood stated that she did not know Ms. Hooper to stockpile drugs for future use, and that she did not think Ms. Hooper would have contacted her if she already had drugs. (T pp 443-46)

Wood testified that when Ms. Hooper arrived, she gave Wood fifty dollars, at which point Wood contacted Mr. McCrorey to ask for half a gram of cocaine and half a gram of heroin for each woman. Wood testified that 15-20 minutes later, she met Mr. McCrorey downstairs while Ms. Hooper waited in the hotel room. She gave Mr. McCrorey one hundred dollars and he gave her four baggies, two containing crack cocaine and two containing heroin. (T pp 450-53)

When Wood returned to the hotel room, she gave one bag of heroin and one bag of cocaine to Ms. Hooper and kept one of each for herself. Both Wood and Ms. Hooper used the cocaine and heroin they had just obtained[5]. They then left the hotel and smoked more crack before Ms. Hooper dropped Wood off around 2:00 PM. Ms. Hooper had to hurry back to her mother's house to meet curfew. (T pp 453-59) Wood testified

[5] Wood testified that she and Ms. Hooper snorted the heroin, but told the police that Ms. Hooper injected the heroin. (*See* T p 671)

about other occasions when she and others purchased drugs from Mr. McCrorey. (T pp 544-48)

On cross-examination, Wood testified that Ms. Hooper had drug connections other than Mr. McCrorey. (T pp 550-51) When Wood first spoke to detectives, she did not tell them that she snorted heroin with Ms. Hooper, and did not mention cocaine at all. Wood also told the detectives three different stories about where she met with Mr. McCrorey. (T pp 555-58, 668-71) She gave conflicting testimony about the price of the drugs. (T pp 558-60, 579)

Wood testified that she did not know if the drugs she bought from Mr. McCrorey were actually the drugs that killed Ms. Hooper. (T pp 567-69) Wood had not seen Ms. Hooper for many months before this incident and did not know how much heroin she was using around this time. (T pp 600-01) Wood further testified that after Ms. Hooper died, she got a Facebook message from someone who was not Mr. McCrorey saying that they felt responsible for Ms. Hooper's death. (T pp 579-80)

The police did not speak to Mr. McCrorey until almost a year after Ms. Hooper's death. (T p 666) Given the passage of time, he was unable to recall his exact whereabouts on that day. Mr. McCrorey stated that

he knew Wood and had met Ms. Hooper at some point. He stated that sometime around 25 March 2020, he met Wood at a hotel to give her money so she could rent a room. Mr. McCrorey acknowledged that he traded crack cocaine for sex with Wood in the past but denied doing so around the time of Ms. Hooper's death. (T pp 662-64, 666-68) When the police searched Mr. McCrorey's home, they found white powder on a table. Mr. McCrorey said that it was heroin which other people left at his house. The police did not conduct any testing to determine whether the substance was in fact heroin. (T pp 684-86) No paraphernalia indicative of drug dealing, such as scales or baggies, was found in Mr. McCrorey's home.

The police were unable to recover any surveillance footage from Wood's hotel to corroborate that Mr. McCrorey had been there. License plate readers in the area did not pick up Mr. McCrorey's car near the hotel. (T pp 671-72)

The indictment in this case alleges that McCrorey "did sell Fentanyl, a 'certain controlled substance' as defined in G.S. 14-18.4. . . and that the ingestion of that controlled substance proximately caused the death of Michelle Hooper." (R p 4)

ARGUMENT

I. WHERE THE STATE FAILED TO PROVE THAT FENTANYL SOLD BY MR. MCCROREY CAUSED THE DEATH OF MS. HOOPER, THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS.

A. Standard of Review and Preservation

This Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Under *de novo* review, this Court should "consider the matter anew and substitute [its] judgment for that of the trial court." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

When considering a motion to dismiss, the Court must consider the evidence in the light most favorable to the State and decide whether there is substantial evidence to establish every element of the offense charged and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). If the evidence raises only a suspicion or conjecture as to the defendant's guilt, then the motion to dismiss should be allowed, even if the suspicion of guilt is strong. *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

To preserve this issue for appeal, the defendant must make a motion to dismiss at the close of the State's evidence and, if the defense also presents evidence, at the close of all the evidence. N.C. R. App. P. 10(a)(3). In the instant case, trial counsel moved to dismiss for insufficiency after the State rested and at the close of all the evidence. (T pp 687, 692) Specifically, counsel argued that there was no evidence that any drugs Mr. McCrorey sold to Wood were the same drugs that caused Ms. Hooper's death. (T pp 687-89) The State acknowledged, "It's a circumstantial case [but is] certainly a question for the jury." (T pp 689-90) The motions to dismiss were denied, thus preserving this issue for appellate review. (T pp 690, 692)

B. Legal Analysis

The statutory provision for death by distribution, N.C.G.S. § 14-18.4(b), provides:

> A person is guilty of death by distribution of certain controlled substances if all of the following requirements are met:
>
> 1) The person unlawfully sells at least one certain controlled substance.
>
> 2) The ingestion of the certain controlled substance or substances causes the death of the user.

> 3) The commission of the offense in subdivision (1) of this subsection was the proximate cause of the victim's death.
>
> 4) The person did not act with malice.

The straightforward scenario likely contemplated by our legislature in passing the death by distribution statute was "Dan sells Vikki heroin; Vikki uses that heroin and dies of a heroin overdose." *See* Phil Dixon, Defending Death by Distribution Cases, *available at*: https://ncccriminallaw.sog.unc.edu/defending-death-by-distribution-cases/. It can be expected that in most cases prosecuted under this statute, the chain of causation will be clear, with few actors between the seller and the user and little passage of time between acquisition, use, and death.

The scenario presented by this case is more complex. The State's theory at trial was that Mr. McCrorey sold Kayla Wood crack cocaine and what they both believed was heroin but was instead fentanyl. Wood then provided those drugs to Michelle Hooper. Roughly twenty-four hours later, Ms. Hooper was found dead of a fentanyl overdose caused by the drugs provided by Mr. McCrorey. (*See* State's closing argument at T pp 714-15) As instructed, the jury could only convict Mr. McCrorey if they believed beyond a reasonable doubt that he sold fentanyl to

Kayla Wood, and that the same fentanyl eventually caused Ms. Hooper's death. (T p 773); *see also* N.C.P.I. Crim. 206.70.

1. Review of Law

There are no published or unpublished decisions in North Carolina courts analyzing the death by distribution statute. The statute became effective on 1 December 2019. N.C. Sess. Law. 2019-83.

Prior to 2019, a drug-induced homicide in North Carolina could only be prosecuted under the second-degree murder statute, N.C.G.S. 14-17(b)(2). In the vast majority of cases, this statute was used as a plea-bargaining tool; defendants would be charged with second-degree murder to encourage them to plead guilty to involuntary manslaughter instead. Gorga, J. Matthew, Comment: "Retribution, not a Solution": Drug-Induced Homicide in North Carolina, 42 Campbell L. Rev. 161, 174 (2020). The creation of N.C.G.S. § 14-18.4(b) eliminated the malice requirement but maintained or increased the possible sentence, depending on the defendant's prior criminal record. *Id.* at 175; *see also* Shea Denning, General Assembly Creates New Crime of Death by Distribution, *available at:* https://nccriminallaw.sog.unc.edu/general-assembly-creates-new-crime-of-death-by-distribution/.

Over twenty states, as well as the District of Columbia and the federal government, have some version of a drug-induced homicide law. *See* Prescription Drug Abuse Policy System, *available at:* https://pdaps.org/datasets/drug-induced-homicide-1529945480-1549313265-1559075032; Fair and Just Prosecution, Drug-Induced Homicide Prosecutions, *available at*: https://fairandjustprosecution.org/wp-content/uploads/2022/07/FJP-Drug-Induced-Homicide-Brief.pdf. Most jurisdictions require that drug use be the "but for" cause of death, but North Carolina is among the handful of states requiring only proximate cause. *See* Fl. Stat. 782.04(1)(a)(3); Minn. Stat. 609.195(b); Tenn. Code. 39-13-210(a)(3); 18 V.S.A. § 4250; W.V. Code § 60A-4-416. The leading U.S. Supreme Court case on drug-induced homicide, *Burrage v. United States*, 571 U.S. 204, 134 S. Ct. 881 (2014), concerns the federal sentencing enhancement and employs the "but for" standard.

Because there is no local case law specific to death by distribution to guide this Court's analysis, it must rely on discussions of proximate cause in other contexts. "Proximate cause is defined as a cause: (1) which, in a natural and continuous sequence and unbroken by any new

and independent cause, produces an injury; (2) without which the injury would not have occurred; and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed." *State v. Pierce*, 216 N.C. App. 377, 383, 718 S.E.2d 648, 652 (2011) (cleaned up).

2. The State Failed to Present Substantial Evidence that Mr. McCrorey Sold Fentanyl to Wood.

Assuming *arguendo* that Mr. McCrorey sold narcotics to Wood, there was not substantial evidence that one of the substances he sold was fentanyl.

In the light most favorable to the State, Wood contacted Mr. McCrorey seeking to buy heroin and cocaine for herself and Ms. Hooper. (T p 448) Wood and Ms. Hooper both sampled the heroin they received from Mr. McCrorey. (T pp 453-54) However, the toxicology screen conducted after Ms. Hooper's death does not indicate the presence of heroin in her blood. (T p 396; Doc. Ex. 11) The State assumed from the absence of heroin in Ms. Hooper's blood on March 26th that what she purchased on March 25th was fentanyl. Assumptions are not substantial evidence.

No testing was done on the substances Mr. McCrorey sold to Wood, or on the drug bags found in Ms. Hooper's home, to prove that the baggies contained fentanyl as opposed to heroin or some other substance. Wood described consuming the heroin she received from Mr. McCrorey and did not claim to have experienced any ill effects. (T p 454) Wood did not testify that she believed the substance she purchased from Mr. McCrorey was fentanyl. Wood did not use the word "fentanyl" at any point during her testimony; instead, she consistently referred to the substance she purchased from Mr. McCrorey as heroin. (*See* T pp 452-56)

There was no testimony regarding how long heroin is detectable after use. It is unclear whether heroin Ms. Hooper used at any point on March 25th would have been detectable in her body when she died on the morning of March 26th. The absence of heroin in the toxicology screen proves only that Ms. Hooper did not consume heroin within this unknown window of time. It is not substantial evidence that the substance Mr. McCrorey sold twenty-four hours earlier was necessarily fentanyl. Because the State failed to prove that Mr. McCrorey sold

fentanyl, the motion to dismiss should have been allowed. *See* N.C.G.S. § 14-18.4(b)(1).

3. The State Failed to Present Substantial Evidence that Fentanyl Was Ms. Hooper's Cause of Death.

Assuming *arguendo* that Mr. McCrorey sold fentanyl to Wood, there was not substantial evidence that fentanyl was Ms. Hooper's cause of death.

The medical examiner testified that Ms. Hooper's autopsy gave no indication of why she died. (T pp 380-81) Because the medical examiner knew from the outset that Ms. Hooper had a history of heroin abuse and the police suspected an overdose, samples were sent for toxicology testing. (T pp 379, 381) While this testing found fentanyl, it also showed that the amount of cocaine in Ms. Hooper's system could have been fatal by itself. (T p 397) Given the presence of actual cocaine and not just cocaine metabolites in her blood, Ms. Hooper must have used cocaine shortly before her death. (T pp 382-83, 394) It is not possible to tell how soon before Ms. Hooper's death she consumed fentanyl.

Yet the medical examiner speculated that the primary cause of Ms. Hooper's death must have been fentanyl because "this is what we see day in and day out these days unfortunately is people dying from

Fentanyl toxicity. Cocaine is a dangerous drug. But typically, in a 27 year old who has a normal heart and cardiovascular system, you know, would be able to survive cocaine use. But Fentanyl is mainly what we're seeing day in day out." (T pp 384-85) That is, the medical examiner concluded that Ms. Hooper died from a fentanyl overdose because fentanyl overdoses are common. Once fentanyl appeared on the toxicology screen, the question was closed. (T p 385)

Asked whether the amount of fentanyl in Ms. Hooper's system was necessarily fatal, the medical examiner responded, "Yes, it could be. I mean, I see people with just Fentanyl less than this, I see people with more than this. It's all over. But this is definitely within the fatal range." (T p 386) Testimony that the volume of fentanyl in Ms. Hooper's blood *could* have been lethal was insufficient to establish that she did, in fact, die of a fentanyl overdose. *See generally Lord v. Beerman*, 191 N.C. App. 290, 300, 664 S.E.2d 331, 338 (2008) (testimony that a particular treatment "perhaps" or "may have" improved a patient's outcome was insufficient to establish that a doctor's negligence in failing to provide that treatment was the proximate cause of the patient's subsequent blindness). As the medical examiner noted,

"People who are using drugs can die from other means." (T pp 379-80) Along the same lines, people who are using fentanyl along with other substances can overdose on those substances while having fentanyl in their system. The mere presence of fentanyl does not make it a proximate cause of death.

Similarly, the forensic toxicologist testified that Ms. Hooper used cocaine shortly before her death and that the amount of cocaine in her system was potentially lethal. (T pp 417, 422) The forensic toxicologist further testified that a death from cocaine can be distinguished from a fentanyl death. When a person overdoses on cocaine, it is often a cardiac issue leading to "a sudden collapse." (T p 419) When a person dies from fentanyl, the death is "lingering;" the person's breathing slows as their "lungs fill full of fluid" until they die. (*Id.*) The autopsy report does not show any fluid in Ms. Hooper's lungs. (Doc. Ex. 5) Although there was moderate congestion, this would be consistent with Ms. Hooper having a cold. Accordingly, she had dextromethorphan, a cough medicine, and chlorpheniramine, an antihistamine, in her system. (T p 383)

If Ms. Hooper died from a cocaine overdose and not a fentanyl overdose, then Mr. McCrorey was not guilty of death by distribution.

(*See* T p 773, as instructed, the jury could only convict if fentanyl was a proximate cause of death; R p 4, the substance alleged in the indictment is fentanyl). While it is true that the amount of fentanyl in Ms. Hooper's system *could* have been fatal, it is also true that some drug users have built up their tolerance such that only a significantly larger amount would be lethal. (T p 418) The evidence showed that since her release from rehab, Ms. Hooper had been using both cocaine and heroin, either of which could have exposed her to fentanyl. Given that there was a potentially independent cause of death, the State needed to do more than show that Ms. Hooper *could* have died from fentanyl, or even that she *probably* died from fentanyl. This is not substantial evidence, it is speculation. "A proximate cause is a real cause, without which the user's death would not have occurred." N.C.P.I. Crim. 206.70. While the State was not required to prove that fentanyl was the only cause of Ms. Hooper's death, it also could not rely on the assumption that when there is any amount of fentanyl in a person's system, that fentanyl necessarily played a role in their death. Without more than testimony that fentanyl could have caused Ms. Hooper's death, there was not substantial evidence to defeat a motion to dismiss.

4. The State Failed to Present Substantial Evidence that Any Fentanyl Sold by Mr. McCrorey Proximately Caused the Death of Ms. Hooper.

Assuming *arguendo* that Mr. McCrorey sold fentanyl to Wood and that fentanyl was the cause of Ms. Hooper's death, there was not substantial evidence that the specific fentanyl sold by Mr. McCrorey was the cause of Ms. Hooper's death.

There was no direct evidence linking Mr. McCrorey's drugs to Ms. Hooper's death. Wood did not know whether Mr. McCrorey's drugs killed Ms. Hooper. (T pp 568-69) Wood did not identify any of the four baggies found in Ms. Hooper's room as having come from Mr. McCrorey. The police did not collect any forensic evidence linking the baggies and syringes found in Ms. Hooper's room to Mr. McCrorey. None of the medical professionals testified that any particular batch of narcotics was responsible for Ms. Hooper's death.

In the light most favorable to the State, the evidence showed that Mr. McCrorey provided one bag of cocaine and one bag of presumed heroin that ended up in Ms. Hooper's possession twenty-four hours before her death. Yet there was no evidence that these two bags were among the four bags found in Ms. Hooper's room by police, or which of

those four bags contained the drugs that killed Ms. Hooper. The State's case was based on conjecture, and the motion to dismiss should have been allowed.

In *State v. Eldred*, 259 N.C. App. 345, 347, 815 S.E.2d 742, 744 (2018), this Court "examine[d] the boundary between evidence supporting suspicion and conjecture, which is insufficient to submit a criminal charge to the jury, and, on the other hand, evidence allowing a reasonable inference of fact, which is sufficient to support a criminal conviction." In *Eldred*, an unoccupied wrecked vehicle was found by the side of the highway, its owner was found walking along the same highway, admittedly under the influence of drugs, and the owner admitted to wrecking the vehicle. *Id.* at 345, 815 S.E.2d. at 742. Based on these facts, "Most anyone might surmise what happened, and might very well be right. But because the law prohibits imposing criminal liability based on conjecture, gaps in the evidence and controlling precedent require" the reversal of the defendant's conviction for driving while impaired. *Id.* Evidence that the defendant was impaired some hours after the accident was not competent evidence of the essential element that he was impaired at the time of the accident; instead, it

served only to invite improper speculation. *Id.* at 350; 815 S.E.2d at 745-46; *see also State v. Nazzal*, 270 N.C. App. 345, 352, 840 S.E.2d 881, 886-87 (2020) (reaching same result), *later proceeding at Nazzal v. James*, 2022 U.S. Dist. LEXIS 169264.

In this case, evidence that Mr. McCrorey sold drugs to Kayla Wood, who provided them to Ms. Hooper prior to her death, does not prove that those same drugs were responsible for Ms. Hooper's death, particularly where the death did not occur until almost twenty-four hours later and Ms. Hooper's room contained additional drug bags that indisputably did not come from Mr. McCrorey. One can speculate, but there was no evidence clearly establishing the essential elements that "the ingestion of *the* certain controlled substance or substances cause[d] the death of the user" or that Mr. McCrorey's actions were the proximate cause of death. N.C.G.S. § 14-18.4(b)(2-3) (emphasis added). The presence of four drug bags, not just the two Wood claimed she took from Mr. McCrorey and gave to Ms. Hooper was, even in the light most favorable to the State, evidence that Ms. Hooper had access to other drugs that could have caused her death. Under these circumstances, it was incumbent upon the State to prove which drugs caused Ms.

Hooper's death. If the fatal fentanyl came from another source, Mr. McCrorey was not guilty as a matter of law. Because the State failed to provide substantial evidence of every element of the crime, the motion to dismiss should have been allowed.

Furthermore, there was evidence that any drugs provided by Mr. McCrorey were not the cause of Ms. Hooper's death. In her text messages to Wood, Ms. Hooper said that she only wanted to buy crack cocaine because she already had plenty of heroin. (Doc. Ex. 35) There was evidence from both Wood and Ms. Hooper's mother that Ms. Hooper had other sources of heroin, including some in the neighborhood where she lived. (T pp 313, 551) Even if Ms. Hooper did obtain heroin from Mr. McCrorey, the State's evidence was that Wood and Ms. Hooper sampled this heroin together before leaving the hotel and suffered no adverse effects. (T p 455) There was testimony that addicts will often sample heroin by snorting it before injecting to be sure it is "good." (T pp 635-36) If the heroin obtained from Mr. McCrorey had been "bad," both Wood and Ms. Hooper would have known immediately. There was no evidence that Wood experienced any ill effects when she later consumed the remainder of her heroin.

The State could only arrive at a conviction by convincing the jury to make a sequence of assumptions. First, the jury had to assume that Mr. McCrorey sold fentanyl to Kayla Wood, in the absence of testimony or forensic evidence to that effect. Next, the jury had to assume that Ms. Hooper died of a fentanyl overdose, despite the presence of a potential independent cause of death. Finally, the jury had to assume that Mr. McCrorey's drugs caused of Ms. Hooper's death, despite the presence of drug bags that were indisputably not connected to Mr. McCrorey. "[I]n this case, the link between the circumstances proved by direct evidence and the inferences drawn from these circumstances stretches too far." *State v. Lamp*, 382 N.C. 562, 571, 881 S.E.2d 62, 68 (2022). The motion to dismiss should have been allowed.

C. Conclusion

Death by distribution is a new law in North Carolina, meant to address a serious public health crisis. In the vast majority of cases, it can be anticipated that the chain of events will be clear. However, under the unusual facts of this case, the jury could only speculate about whether Mr. McCrorey sold fentanyl, whether fentanyl caused Ms. Hooper's death, and which of the drugs Ms. Hooper had access to

actually led to her demise. The State's case was based on a series of suppositions, and as such should not have survived a motion to dismiss.

The trial court erred in denying the motion to dismiss where the State failed to provide substantial evidence that fentanyl provided by Mr. McCrorey caused the death of Michelle Hooper. Mr. McCrorey's conviction for death by distribution should be vacated.

II. THE TRIAL COURT ERRED IN ADMITTING 404(B) EVIDENCE THAT MR. MCCROREY SOLD DRUGS ON PRIOR OCCASIONS.

A. Standard of Review and Preservation

Whether 404(b) evidence was improperly admitted is a question of law to be reviewed *de novo*. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). Under a *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Whether evidence admissible under 404(b) should nonetheless have been excluded under Rule 403 is reviewed for abuse of discretion. *State v. Al-Bayyinah*, 359 N.C. 741, 747, 616 S.E.2d 500, 506 (2005).

The trial court conducted a hearing to determine the admissibility of 404(b) evidence during the testimony of Kayla Wood. (T pp 469-534) During this hearing the defense lodged objections on several bases, including the lack of sufficient similarity. (T pp 507-10) The trial court ultimately concluded that the evidence was admissible under Rule 404(b) and Rule 403. (T pp 525-28) This claim is preserved for appellate review. N.C. R. App. P. 10(a)(1).

B. Legal Analysis

1. Core Principles

"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." N.C. Gen. Stat. § 8C-1, Rule 404(b). "The admissibility of evidence under this rule is guided by two further constraints – similarity and temporal proximity." *State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993). Prior acts are sufficiently similar under Rule 404(b) "if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (cleaned up).

When the State seeks to admit evidence under Rule 404(b), that evidence "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al-Bayyinah*, 356 N.C. 131, 154, 567 S.E.2d 120, 122 (2002). It is the "natural and inevitable tendency" of the jury "to give excessive weight to the vicious record of crime thus exhibited and either allow it to bear too strongly on the present charge or take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge." *Id.* at 154 (citation omitted). Therefore, evidence which might otherwise be admissible under 404(b) must nonetheless be excluded when its probative value is outweighed by the danger of unfair prejudice. *State v. Scott*, 331 N.C. 39, 4113 S.E.2d 787 (1992) (new trial where evidence of an alleged prior rape was admitted in a proceeding regarding another rape).

2. Kayla Wood's Testimony Regarding Alleged Prior Drug Sales by Mr. McCrorey was Inadmissible Under Rule 404(b).

The prosecution sought to offer 404(b) evidence regarding alleged prior drug sales by Mr. McCrorey to prove intent, knowledge, identity, absence of mistake, and common scheme or plan. (T pp 501-03) The

trial court determined that knowledge and absence of mistake were not proper bases, but that the evidence was admissible to show intent, identity, and common scheme or plan. (T pp 525-28) Subsequently, Kayla Wood testified that she purchased drugs from Mr. McCrorey on prior occasions, both alone and when accompanied by Ms. Hooper. Wood further testified that she introduced Mr. McCrorey to another friend, Andrea, to whom Mr. McCrorey then sold drugs. (T pp 544-48) This testimony was uncorroborated and emerged only two weeks before trial. (T p 477)

In *State v. Carpenter*, 361 N.C. 382, 383, 646 S.E.2d 105, 107 (2007), our Supreme Court reversed the conviction of a defendant charged with possession with intent to sell or deliver cocaine because the 404(b) evidence admitted against him at trial – a prior conviction for the same offense eight years before – was not sufficiently similar and served only to show the defendant's propensity to commit a similar crime. The *Carpenter* court observed that while 404(b) is generally a rule of inclusion, this must be balanced against the longstanding precedent "that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another

distinct, independent, or separate offense. This is true even though the other offense is of the same nature as the crime charged." *Id.* at 386, 646 S.E.2d at 109, *citing State v. McClain*, 240 N.C. 171, 173, 81 S.E.2d 364, 365 (1954).

Carpenter further affirms the language of *McClain* that this principle of exclusion has at least four justifications. First, guilt of one crime is not proof of guilt of another. Second, evidence of crimes other than the one being tried is impermissible character evidence. Third, evidence of the commission of similar crimes predisposes the jury to believe that the defendant is guilty of the present crime. Fourth, evidence of other crimes diverts the attention of both the defendant and the jury from the matter at hand. *Carpenter*, 361 N.C. at 387, *citing McClain*, 240 N.C. at 173-74.

"When the State's efforts to show similarities between crimes establish no more than characteristics inherent to most crimes of that type, the State has failed to show that sufficient similarities existed for the purposes of Rule 404(b)." *Carpenter*, 361 N.C. at 390, 646 S.E.2d at 111 (cleaned up). For example, the "use of a weapon, a demand for money, [and] immediate flight" are characteristics "inherent to most

armed robberies" and therefore too generic to carry the State's burden to tie two robberies together. *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123.

In *Carpenter*, our Supreme Court determined that the defendant's prior felony conviction for sale of cocaine was not sufficiently similar to the offense for which he was tried, possession with intent to sell or deliver cocaine. The fact that on both occasions the defendant possessed multiple rocks of crack cocaine which were not individually packaged showed only "generic behavior," not sufficient similarity for purposes of Rule 404(b). 361 N.C. at 389-90, 646 S.E.2d at 110-11. Distinguishing factors included the quantity of drugs involved, the location, and the time of day. *Id.* at 390, 646 S.E.2d at 111.

In the instant case, Mr. McCrorey is alleged to have sold one gram of cocaine and one gram of heroin to Kayla Wood at a hotel in the middle of the day, with the narcotics divided into four corner bags. The other incidents Wood described to the jury were as follows:

- Wood and Hooper met with Mr. McCrorey in his home to buy heroin. Quantity, time of day, and manner of packaging were unknown. (T p 545)

- Wood put Mr. McCrorey in contact with her friend Andrea. Wood was not present when Andrea purchased the drugs but was aware that Andrea purchased heroin from Mr. McCrorey. Quantity, time of day, location of transaction, and manner of packaging are unknown. (T pp 546-47)
- Wood herself purchased heroin from Mr. McCrorey on several occasions. No specific description of these sales was given. (T p 547)

Wood testified that these incidents were "generally consistent" with the sale that took place on 25 March 2020. (T p 548) However, nothing Wood described can be described as distinctive, unusual, or not simply inherent to the crime of selling heroin. *See Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123. Furthermore, the incidents were so dissimilar as to not be probative. The March sale is the only one to take place at a hotel. It is the only one to involve cocaine. It is the only one involving a specified quantity, time of day, or manner of packaging[6].

[6] In the absence of any evidence that the bags were distinctively marked, even if all the transactions involved corner bags, this testimony would still fail under 404(b). *See State v. Johnson*, 269 N.C. 63, 75, 837 S.E.2d 179, 188 (2019) (in a case involving crack cocaine, officer testifies that corner bags are used as packaging in over 70% of cases).

Cases in which this Court has found sufficient similarity to prior drug deals illustrate the inadequacy of the evidence here. In *State v. Stevenson*, 169 N.C. App. 797, 801, 611 S.E.2d 206, 210 (2005), all the incidents took place on the same property and involved identical flight behavior by the defendant. In *State v. Welch*, 193 N.C. App. 186, 192, 666 S.E.2d 826, 830 (2008), all the sales were made by the defendant while standing on the street to persons sitting inside cars, all the sales occurred within two blocks of each other, and all the sales were for the same amount and the same price. The trial court erred in concluding that there was substantial similarity between the three pieces of 404(b) evidence and the incident for which Mr. McCrorey was on trial. *See State v. Williams*, 156 N.C. App. 661, 663-65, 557 S.E.2d 143, 145-46 (2003) (ordering new trial where defendant was on trial for possession of cocaine and the prosecution presented evidence of a dissimilar incident).

3. The Trial Court's Error in Admitting this Evidence Was Prejudicial to Mr. McCrorey.

This error was prejudicial and requires a new trial if "there is a reasonable possibility that, had the error in question not been

committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443.

As described in Claim I above, the evidence that the drugs that killed Michelle Hooper were provided by Mr. McCrorey was speculative at best. Given that the evidence against Mr. McCrorey was "not conclusive," it is reasonably possible that testimony about prior drug sales tipped the scales in favor of conviction. *Williams*, 156 N.C. App. at 665, 577 S.E.2d at 146. Wood's testimony that Mr. McCrorey engaged in multiple drug deals on multiple dates with multiple individuals communicated to the jury not only that he was a drug dealer, but that if acquitted, he was likely to continue distributing narcotics, putting many members of the community at risk. The prosecution repeatedly emphasized the seriousness of the opioid overdose crisis, urging them to find Mr. McCrorey guilty to "send a very strong message not only to this man here but to our entire community that what happened in this case cannot, should not, and is not tolerated." (*See e.g.*, T pp 712-13, 738-39) Jurors who were not certain about Mr. McCrorey's conduct in this instance could have been motivated to convict because of broader concerns about his other conduct or the opioid crisis generally.

4. The Trial Court Abused its Discretion in Admitting Testimony Regarding Prior Drug Deals that Was More Prejudicial than Probative.

For purposes of Rule 403, Wood's testimony had very little probative value, serving only to signal to the jury that Mr. McCrorey was more likely to be guilty of this offense because he had engaged in similar conduct in the past. Indeed, the prosecution made exactly this point to the jury in closing. In arguing that there was sufficient evidence Mr. McCrorey sold a controlled substance, the prosecutor argued, "Kayla had purchased drugs from the Defendant one or two times a week over a period of two plus years. Think about how many times that is. One to two times a week for two plus years. So is the Defendant really serious when he says that he didn't sell to Kayla on March 25th of 2020?" (T p 715, *see also* T p 717, "You also heard from Kayla that the Defendant was known to sell drugs, and not only to her but to Michelle and this girl named Andrea also. . . He is a known drug dealer. He's a known drug dealer.") For the reasons described above, this testimony was unduly prejudicial and should not have been admitted.

Should this Court find that the evidence of prior drug sales was properly admitted under Rule 404(b), it should nonetheless order a new trial because the trial court abused its discretion in failing to exclude the testimony under Rule 403.

C. Conclusion

The trial court erred in admitting evidence which served only to signal to the jury that Mr. McCrorey was likely to have committed the present offense because he engaged in similar conduct in the past. In addition, the trial court abused its discretion in admitting evidence that was more prejudicial than probative. Because the admission of this evidence was prejudicial to Mr. McCrorey, he is entitled to a new trial.

CONCLUSION

For the foregoing reasons and authorities, Mr. McCrorey respectfully requests that his conviction be vacated, or in the alternative that he receive a new trial.

Respectfully submitted, this, the 4th day of August 2023.

By Electronic Submission:
Sarah Holladay
North Carolina State Bar Number 33987
P.O. Box 52427
Durham, NC 27717

(919) 695-3127
sarah@holladaylawoffice.com
ATTORNEY FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(J)(2)

I hereby certify that Defendant-Appellant's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure as it is printed in fourteen-point Century font and the body of the brief, including footnotes and citations, contains no more than 8750 words as indicated by the word-processing program used to prepare the brief.

This, the 4th day of August 2023.

By Electronic Submission:
Sarah Holladay
North Carolina State Bar Number 33987

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's Brief has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the above and foregoing Defendant-Appellant's Brief has been duly served upon Justin "Skip" Eason, Assistant Attorney General, North Carolina Department of Justice, by electronic means by emailing it to jeason@ncdoj.gov.

This, the 4th day of August 2023.

By Electronic Submission:
Sarah Holladay
North Carolina State Bar Number 33987