IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRENDA LIDDELL — APPELLANT

VS. — NO. 2008-KA-0747

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

BRENDA LIDDELL **APPELLANT**

vs. **CAUSE No. 2008-KA-00747-COA**

THE STATE OF MISSISSIPPI **APPELLEE**

BRIEF ON BEHALF OF THE STATE OF MISSISSIPPI

STATEMENT OF THE CASE

This is an appeal against a judgment of the Circuit Court of Tunica County, Mississippi in which the Appellant was convicted and sentenced for her felony of **SALE OF COCAINE**.

STATEMENT OF FACTS

Louis Hawkins, an investigator with the Mississippi Bureau of Narcotics testified that another Mississippi Bureau of Narcotics agent, Maeena Cody, a confidential informant named Dustin Purser and he met in a "pre-buy" meeting at about one o'clock in the afternoon on 7 December 2006 in Tunica County. The usual preliminaries were attended to, such as a search of the informant and his vehicle, provision of a covert camera and audio recorder, and money with which to purchase narcotics. These details attended to, the informant was sent to the Clark Cove area of Tunica, a place known to harbor narcotics dealers, the two agents following at some

distance.

The informant traveled to 1002 Clark cove in Tunica, the Appellant's residence. The Bureau of Narcotics agents did not follow the informant into "the cove," but did establish a surveillance position not far away. The audio device provided to the informant was working properly.

Hawkins heard the informant leave his car, approach a female, and exchange greetings with her. The informant called the person to whom he was speaking by the Appellant's given name. The informant asked to look at what he was about to purchase, which was cocaine. The Appellant agreed to let the informant do so. The informant then asked for one hundred fifty dollars worth of the drug; the Appellant remonstrated with the informant, telling him that he had asked for two hundred dollars worth the night before. In any event, the informant began counting out the money. The Appellant told him to put the bills on a table. The informant then left and got back into his vehicle.

As the informant sat in his vehicle, he informed Hawkins as to what had occurred. At some point, the informant left his vehicle and returned to the Appellant's residence. The informant asked the Appellant if she had Xanax for sale. She told him she had as much as he might want, at two dollars per pill. The Appellant told the informant that she did not fool with Ecstacy, though. The informant then drove back to the place where the "pre-buy" meeting took place, where he was relieved of the purchase he made from the Appellant by the Bureau of Narcotics agents.

An audio recording of the conversation between the informant and the Appellant was introduced into evidence. Hawkins was familiar with the Appellant's voice. The informant volunteered to make purchases for the Bureau of Narcotics, and specifically mentioned the

Appellant as being a person from whom he could purchase narcotics, even though she had once sold him some "bad dope." (R. Vol. 2, pp. 23 - 35; 42 - 43; 46 - 48).

The informant testified. He recounted what occurred at the "pre - buy" meeting. He stated that he then drove to the Appellant's residence, put one hundred fifty dollars on a counter, left her residence, and that then the Appellant or someone by name of Catherine Bogan, also known as Doll, threw a plastic container to him. He then had a brief discussion with the Appellant about the availability of other drugs. The informant had previously purchased drugs from the Appellant. It was a rare thing that the Appellant herself let the Appellant into the residence. The jury was then shown a video tape of the transaction between the informant and the Appellant. The jury then heard the audio tape of the transaction. (R. Vol. 2, pp. 48 - 68; 77).

The substance sold by the Appellant to the informant contained 1.8 grams of cocaine. (R. Vol. 2, pp. 89 - 97).

The defense called Catherine Lynn Bogan to testify. She stated that she did not recall the seventh day in December of 2006, but had seen Dustin Purser, the informant, several times at Clark Cove. In December of 2006, she was staying at Dishman Cove, "where the warden stay." The Appellant was her friend and she visited the Appellant from time to time at Clark Cove. Bogan spent many a night at the Appellant's residence. There were other girls there as well, and they played at cards and held barbeques.

Purser came to see the Appellant at Clark Cove a number of times, as well as at other houses in the area. Bogan first met the Purser "over in the old-sub house," which was before Clark Cove. One Marlo Wade was at that house and, while Bogan did not know what he did for a living, she did know that he used to be involved in dog fighting. Apparently Wade was part of the group that hung out together at or near Clark Cove.

Bogan knew a John Clark ever since 1985. Clark was the Appellant's romantic interest and then became her husband.

Bogan knew a Mabel White and one Melvin Trippe, also known as "Porkchop." They used to hang with the Appellant too.

Michael Simmons had just been released from the penitentiary. He lived in a car out in the Appellant's yard.

Bogan admitted that she was wearing green and white pants. She said that was because she was then currently an inmate in Rankin County. But her incarceration there was not on account of the sale for which the Appellant was being tried. She said she had never been charged in connection with the sale for which the Appellant was charged.

Bogan was then permitted to see the video tape. She testified that she was standing at the door of the residence and that the Appellant came to the door as well. There was someone outside the residence though the tape did not show who that person was. She stated that the tape did not show her throwing drugs out of the door and did not show the Appellant selling drugs to the informant. Based upon this, she stated that she could not say that the Appellant or she sold drugs to Purser.

Bogan denied having seen the Appellant throw anything on the ground and further denied having seen Purser give money to the Appellant. She stated that she told Purser on one occasion that the Appellant's house was not a drug house. She claimed that she never saw anybody sell drugs to Purser. On the other hand, she did not remember the day.

Purser did come around the area from time to time, seeking to purchase narcotics. But he would just call out a name. Bogan figured that people were just giving him names to call out because she and her group, according to her, did not know who Purser was.

Bogan did not think it was she who was shown in the video because, according to her, she did not hang out in the yard. When she went to the Appellant's residence, she stayed inside because she liked to do housework. She stated that she would not lie for her good friend the Appellant, claimed she had no reason to lie for her. She said that she was a recovered crack addict, and that, while she had in the past smoked crack, she never sold crack. She denied ever having been a "runner" – a person who delivered drugs on behalf of the seller.

On cross - examination, Bogan did admit that she was in prison on account of a sale of a controlled substance, that sale having taken place at Clark Cove. When asked whether she had just testified that the Appellant and she had never sold drugs at Clark Cove, Bogan testified that she did not know what was in the package that was in the freezer except that she did know that it did not contain cocaine. She then said that she "took the charge" because she did it. She maintained, though, that she was no runner and that no one gave her drugs at Clark Cove. (R. Vol. 3, pp. 103 - 113).

At sentencing, the Appellant expressed her remorse for having committed this felony. (R. Vol. 3, pg. 159).

STATEMENT OF ISSUES

1. DID THE TRIAL COURT ERR IN FAILING TO SUSTAIN THE DEFENSE OBJECTION TO EVIDENCE OF PRIOR SALES OFF NARCOTICS; DID THE TRIAL COURT ERR IN FINDING THAT A LIMITING INSTRUCTION WAS SUFFICIENT TO PROTECT THE APPELLANT AGAINST UNFAIR PREJUDICE?

2. WAS THE APPELLANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

3. WAS THE VERDICT SUPPORTED BY THE EVIDENCE; WAS THE VERDICT CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

SUMMARY OF ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF PRIOR SALES OF NARCOTICS; THAT THE TRIAL COURT DID NOT ERR IN GRANTING A LIMITING INSTRUCTION

2. THAT THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

3. THAT THE VERDICT IS SUPPORTED BY THE EVIDENCE; THAT THE VERDICT IS NOT OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE

ARGUMENT

1. THAT THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF PRIOR SALES OF NARCOTICS; THAT THE TRIAL COURT DID NOT ERR IN GRANTING A LIMITING INSTRUCTION

In the First Assignment of Error, the Appellant attempts to demonstrate error on the part of the trial court in its decision to admit evidence of prior sales of narcotics, and in its decision to grant a limiting instruction concerning such evidence. We think a discussion of the facts concerning this issue would be useful to the Court.

In the State's opening statement, the prosecutor told the jury that she expected to prove that the informant had made purchases at the Appellant's residence on prior occasions and that there was a particular way in which those transactions were concluded. (R. Vol. 2, pp. 4 - 5). At the conclusion of the State's opening statement, the defense moved the trial court to prohibit the State from introducing evidence of prior sales of narcotics in any attempt to prove a "common method." (R. Vol. 2, pp. 7 - 8). The State responded that the informant had purchased drugs from the Appellant on several occasions. It stated that it wished to introduce evidence of other sales as proof of a "common plan." However, the prosecutor then stated that the evidence would show the Appellant's particular method in making a sale of narcotics. At that point, the trial court requested the State and the defense to review any "common plan"

exception under M.R.E. 404(b) over the lunch break. (R. Vol. 2, pp. 8 - 9).

After the lunch break, argument on the issue was resumed. The defense asserted that the manner in which the prior drug sales were handled did not fit under the common plan or scheme, motive, opportunity, intent, preparation or knowledge exceptions stated in Rule 404(b).

The State responded by asserting that the method in which the Appellant made the sales was consistent. Essentially, in each instance the Appellant would not accept payment by hand, and she used someone else to actually set the drugs down somewhere so as to allow the purchaser to pick them up. The trial court considered this evidence of a plan, for purposes of Rule 404(b), and then asked the attorneys to address M.R.E. 403. The court heard arguments and at the conclusion of them found that the prejudicial effect was outweighed by its probative value.

The court also asked the prosecutor to draft a limiting instruction. That instruction was to inform the jury that testimony concerning the informant's prior drug transactions with the Appellant was not be considered as proof of guilt, but only of the Appellant's intent, plan and/or identity of the Appellant. At one point, the prosecution pointed out that the evidence would go to identity, which was a contested issue in the case, particularly in view of the defense witness. The defense entered a continuing objection to the testimony and the limiting instruction. (R. Vol. 2, pp. 10 - 18). At that point, the witnesses in the case were brought on to testify.

As the cross - examination of the State's witnesses shows, the defense attempted to cast doubt on the identity of the seller, beginning with the first witness, Hawkins. (R. Vol. 2, pp. 39 - 43). During the direct examination of the informant, the State brought out the fact that the informant had purchased drugs from the Appellant on a prior occasion. The witness was asked to explain the Appellant's method of making a sale, and he did so. (R. Vol. 2, pp. 52 - 53). On cross-examination of this witness, the defense again put the issue of the Appellant's identity as

the seller into question. (R. Vol. 2, pp. 67 - 68; 74 - 81; 83). At the conclusion of the informant's testimony, the trial court instructed the jury that it could not consider any prior drug transactions as proof of guilt, but could only consider such evidence as evidence of intent, plan or identity of the Appellant. (R. Vol. 2, pg. 87).

The witness produced by the defense continued with the theory that the Appellant was not the one who sold the informant cocaine on the date alleged in the indictment.

LAW

M.R.E.404(b)

The Appellant correctly notes that evidence of prior bad acts is admissible under Rule 404(b) to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (Brief for the Appellant, at pages 17 - 18). However, she asserts that the prosecutor and the trial court failed to identify the consequential fact to which the proffered evidence of other crimes or wrongs was to be directed, and failed to articulate precisely the evidential hypothesis by which the consequential fact may be inferred from such proffered evidence, citing *Edlin v. State*, 533 So.2d 403 (Miss. 1988). She then goes on to argue, it seems, that because the prosecutor asserted that the proffered evidence showed a common plan, the prosecutor failed to demonstrate a conspiracy or that the acts were sufficiently interrelated so as to constitute a continuing transaction. She then complains that the prosecutor did not produce evidence to show that the Appellant did commit the prior acts. (Brief for the Appellant, at 19 - 23).

First of all, these alleged procedural deficiencies on the part of the State were not urged upon the trial court. The defense never made an objection concerning deficiencies in the State's presentation on these grounds; it merely objected generally to the admission of the evidence,

alleging that it was unduly prejudicial. Since the argument raised by the Appellant here was not raised in the trial court, it should not be considered here. *Swington v. State*, 742 So.2d 1106 (Miss. 1999). Secondly, as to the limiting instruction, the Appellant merely stated that she objected to it on the basis of the grounds previously stated. (R. Vol. 2, pg. 17). She did not raise the objections raised here concerning the "intent, plan and/or identity" language of the instruction. Consequently, she may not be heard here to complain of it.

Assuming that the Appellant's argument is before the Court, there is no merit in it.

As to whether the State established a proper predicate (Brief for the Appellant, at 18 - 19), the State explained to the trial court that it intended to prove that the Appellant had a particular method of making her sales. (R. Vol. 1, pp. 8; 12; 17 - 18). While it may be that the prosecutor used the phrase "common plan," it is clear from her words and the context of the argument that she was referring to the Appellant's *modus operandi*. *Modus operandi* is one method of proving identity. The prosecutor clearly stated what she wished to prove and what proper inference could be drawn from that proof by the jury. The other sale did involve this same or similar procedure employed by the Appellant in the case at bar. *Liddell v. State*, 7 So.3rd 217 (Miss. 2009).

Furthermore, the State also explained to the trial court that it expected a defense witness to testify that she sold the cocaine. (R. Vol. 2, pg. 18). In the event, that witness, Bogan, denied having sold the cocaine and testified that she could not say that the video tape showed the Appellant selling cocaine to the informant. She further testified that she did not see the Appellant take money from the informant and did not see the Appellant throw anything outside. Bogan also testified that there were a number of people in the area at the time. She stated that she did not see anybody sell the informant drugs. (R. Vol. 3, pp. 107 - 109). Given this, the

evidence of the Appellant's mode of selling drugs was particularly relevant and probative.

The Appellant, though, asserts that by invoking "common plan," the State was bound to demonstrate the existence of a conspiracy. (Brief for the Appellant, at 19 - 22). It is true that the prosecutor asserted "common plan" in her argument to the trial court. What she evidently meant to say, as we have said, was that she meant to prove that the Appellant had a particular way of selling narcotics. That, in turn, would go to evidence of identity of the Appellant as the seller. That the prosecutor realized this is demonstrated by the limiting instruction she drafted at the behest of the trial court in which identity was set out, which was subsequently given by the trial court.

It may be that the prosecutor did not say the magic word "identity" in her first comments on the subject. But this should not be of any significance in view of the fact that identity is certainly one of the exceptions to the general rule barring prior bad act evidence. A *modus operandi* may be established under Rule 404(b). *Ford v. State*, 555 So.2d 691 (Miss. 1989).

In *Carter v. State*, 953 So.2d 224 (Miss. 2007), the prosecutor in that case urged admission of 404(b) evidence on the basis that it went to establish intent. The trial court in that case allowed the evidence because it went to prove motive. The appellant there asserted that it was error to allow the evidence to establish motive, where the State never argued motive, and further asserted error because the trial court there did not perform an M.R.E. 403 analysis with respect to motive. The Supreme Court found that to the extent this was error, it was harmless error at most. The evidence was properly admissible and the jury was properly instructed. This was sufficient. *Carter*, at 231 - 233. The same result should obtain here.

The Appellant, perhaps anticipating the foregoing argument, says that the prior sale evidence was not admissible to prove identity because the State did not invoke that exception

initially, and because there were "multiple other means of establishing identity." (Brief for the Appellant, at 23 - 24).

As *Carter* shows, at least by analogy, the simple fact that identity was not initially invoked is no basis to find error on the part of the trial court in admitting the evidence for that purpose. As to whether there was other evidence to establish identity, it is true that the informant identified the Appellant and that there were audio and video tapes. On the other hand, given the number of people who were in the immediate area of the sale, the fact that Bogan's testimony tended to exclude the Appellant as the seller, and that it was part of the defense strategy to attempt to throw doubt on the issue of the Appellant's identity of the seller, this was not a case in which it may be said that the evidence was not needed, or was introduced to show that the Appellant was a person of poor character. The facts here are much different from those in *Darby v. State*, 538 So.2d 1168 (Miss. 1989), cited by the Appellant. Unlike *Darby*, use of the prior sales evidence did not act so as to foreclose the Appellant's defense. Here, the method employed by the Appellant in selling drugs was highly probative on her identity as the seller.

The Appellant seems to think that the State was required to demonstrate the existence of a conspiracy or demonstrate that the prior sale was a part of a continuing transaction. (Brief for the Appellant, at 19 - 22). While there was evidence to show that the Appellant was involved with Bogan, at least, in a conspiracy to sell cocaine, there is no reason to consider the propriety of an admission of this testimony for that purpose. The Appellant was not indicted for conspiracy. (R. Vol. 1, pg. 5). She was not on trial for conspiracy. The prior sale evidence was admissible to show the Appellant's identity; this was sufficient to permit it introduction. Identity of the seller was clearly a contested issue. Nor was it or is it necessary to consider whether the evidence was admissible under a theory of that it was part of a continuing transaction. These

were not the theories of the prosecutor. *Modus operandi* with respect to how the Appellant conducted her sales was. The mere fact that the prosecutor first mentioned "common plan" did not require all of this, after it became apparent that she was referring only to the method by which the Appellant made her drug sales. The mere fact that the prosecutor used the phrase "common plan, where she was clearly referring to a *modus operandi*, did not require the State to lay out a conspiracy or a continuing transaction in order to have the prior sale admitted. The State was not proceeding under a conspiracy or continuing transaction theory of admissibility. There is no need to discuss admissibility with respect to them.

Continuing on with its argument, the appeals clinic then says that the State failed to provide any information on the recency of the prior conviction. (Brief for the Appellant, at 21). The Circuit Court cause number in the case at bar was 2007-0145; the prior sale sought to be used by the State was in cause number 2007-0144. (R. Vol. 2, pg. 10; Vol. 1, pg. 5). Thus, it seems that the time of the prior sale was quite close to the time of the sale in the case at bar. While the trial court did not make a specific finding as to remoteness, there is no indication in this record that the prior sale was "too remote." Certainly the Appellant did not trouble herself to explain why it might have been. Nor did the Appellant press for a specific ruling on this claim.

As for the claim that the informant was biased because the Appellant sold him "bad dope" (Brief for the Appellant, at 21 - 22), that was merely a matter concerning the weight and credibility of his testimony. It had no bearing on the admissibility of the 404(b) evidence.

The Appellant then complains about the invocation of the intent exception in Rule 404(b). (Brief for the Appellant, at 24 - 25). It is not necessary to consider whether the evidence demonstrated intent. It did go to identity, and that was an entirely sufficient basis upon which to admit the evidence. So seen, error, if any, in admitting it as evidence of intent is strictly

harmless. The addition of intent and plan in the limiting instruction was surplusage at worst. Since the evidence was properly admissible to establish identity, it was harmless error at most that "intent" and "plan" were included.[1]

Having said all of this, we note that it was actually the Appellant who first introduced the subject of her prior involvement in dealing in drugs during cross -examination of the narcotics agent once trial began. (R. Vol. 2, pp. 39; 46 - 47). There was no need for the Appellant to do so. By doing so, the Appellant opened the door to the subject. *Lewis v. State*, 445 So.2d 1387 (Miss. 1984).

M.R.E. 403

The Appellant then complains of the trial court's analysis under M.R.E. 403. In passing, she asserts that the State represented to the trial court that it intended to use the prior sale as evidence of the Appellant's guilt for the felony involved in this case.

The Appellant makes much of the prosecutor's response to the trial court's question as to whether the "common plan" (by which was meant the *modus operandi* utilized by the Appellant in selling drugs) could be considered by the jury as evidence of guilt. The prosecutor's response was "Not evidence of guilt, Your Honor. But to show that, well, yeah, that's what, yes. That that was part–". At that point, the trial court interrupted the prosecutor and asked her a question about a limiting instruction. The prosecutor responded, "Yes, sir, I can, I mean, its going to be very similar to the language in the rules. That they can put that evidence admissible for such and such purpose, but that they're not to consider that for other reasons. (R. Vol. 2, pg. 13).

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[1] The prosecutor at trial did not assert the knowledge exception under 404(b) as a basis for admitting this evidence. But since the Appellant claims here that the State did not prove that she knew she was selling cocaine (Brief for the Appellant at 43 - 44), these furtive acts of hers would have been evidence of such knowledge, and admissible under 404(b).

This was not the clearest expression of a position one might find in a transcript of a record, but we think the prosecutor's meaning can be gleaned from what she said. Her meaning was that the evidence of *modus operandi* could be used by the jury in considering the issue of whether the Appellant was the seller. On the other hand, such evidence could not be used by the jury for any other issue in the case, and certainly not for the purpose of finding guilt in the case at bar because the Appellant might have sold drugs on another occasion.

We find nothing amiss in this. Under Rule 404(b), evidence admitted under it may be used for the substantive purposes stated in the rule. The prosecutor was correct in saying that evidence of the Appellant's *modus operandi* with respect to sale of drugs was substantive evidence of her identity as the seller in the case at bar. That the prosecutor did not express herself with the sort of precision one would expect from one who had the luxury of time to fully fit out his position hardly means that her position was incorrect. This prosecutor, after all, was in the middle of trial, not in a serene library of a school of law. The prosecutor most certainly was not asserting that the evidence of another sale could be used by the jury to decide that the Appellant was guilty here for the simple reason that she might have sold drugs before.

Here, the appeals clinic appears to assert that evidence admitted under Rule 404(b) may only be used as "credibility impeachment material." (Brief for the Appellant, at 27). If indeed the Appellant believes this, the Appellant is in error. By the terms of the rule itself, evidence admitted under 404(b) is admissible to substantively prove one or more of the items set out in the rule. Evidence admitted under Rule 404(b) is admitted for distinctly different purposes than evidence admitted under M.R.E. 608 or 609.

As to the Rule 403 issue, the defense asserted that the proposed evidence would be unduly prejudicial because it might inform the jury that the Appellant had sold drugs before, and

might even have been convicted of having done so. The Appellant also contended that there was no plan or scheme involved. (R. Vol. 2, pg. 14).

To this, the prosecution responded that it had no intention of proving a conviction. (R. Vol. 2, pg. 15). As for the probative value of the evidence, the State described the method by which the Appellant sold drugs. It proposed to show that the way the drug were sold in the case at bar was consistent with way they were sold on another occasion. This was to go to prove identity. (R. Vol. 2, pp. 17 - 18).

Upon hearing these arguments, the court found that the probative value of the evidence outweighed the prejudicial value, and ruled that the evidence would be admitted and a limiting instruction given. (R. Vol. 2, pg. 18).

The trial court did enter upon an analysis as to why the proof of *modus operandi*, and thus of identity, was more probative than prejudicial. The Appellant's claim that it was "prejudicial" was an off -the - shelf argument. He pointed to nothing to give color to the claim that the evidence was unduly prejudicial. On the other hand, the evidence was certainly probative on the issue of identity, especially given the defense raised and given the fact that there were a number of people in the immediate area when the sale occurred.

There is nothing to demonstrate that the trial court's resolution of the issue under Rule 403 was "patently prejudicial." That being so, this Court, given the deferential standard on review attached to rulings under Rule 403, should not disturb the trial court's resolution of the issue. *Jones v. State*, 920 So.2d 465, 467 (Miss. 2006).

The limiting instruction

The Appellant next complains of the limiting instruction. However, the points she raises here were not raised in the trial court. Her objection to the instruction was on the same grounds

as her objection to the prior sale evidence. That ground was that the evidence, and thus the instruction, was unduly prejudicial. She may not expand upon those grounds here. *Swington v. State*, 742 So.2d 1106 (Miss. 1999); *Russell v. State*, 607 So.2d 1107 (Miss. 1992). Assuming for argument that the complaints raised here are properly before the Court, there is no merit in them.

The Appellant first says that the instruction allowed the jury to consider the evidence for an improper purpose. It takes awhile, reading the appeals clinic brief, to discover why it thinks the instruction permitted the jury to utilize the evidence for an improper purpose, but one reason alleged seems to be a renewal of the claim that the evidence was improperly admitted. It was not, as we have said above.

Another reason, according to the appeals clinic, is that the instruction was overly broad in that it contained 404(b) purposes which were not alleged by the prosecution. Yet, while the defense did dispute whether the evidence proposed to be admitted by the State demonstrated a plan, there was, in contrast, no objection that the instruction was over broad at trial. In absence of an objection on this ground, it is not error to grant such an instruction. *Scruggs v. State*, 756 So.2d 817, 821 (Miss. Ct. App. 2000). Moreover, the Mississippi Supreme Court has approved a limiting instruction which contained each of the purposes set out in Rule 404(b), even though only three of those purposes was argued by the State. *Swington, supra.* Here, two purposes other than identity were stated. In view of the fact that the Appellant did not object to the inclusion of those other two, and in view of the fact that the courts have not found error when all of the purposes specifically stated in Rule 404(b) have been included in an instruction even though not all were urged as grounds for admission of 404(b) evidence, there was no error in the instruction in the case at bar.

But, like a late night Ginsu knife television commercial, the appeals clinic has more to offer! The next point by the appeals clinic in this never - ending brief filed by it is its entirely speculative claim that the instruction used the prior sales evidence for the very purpose forbidden by the instruction. In support of this claim, the appeals clinic notes that it took the jury a very short period of time – four minutes, it is said – to return a verdict of guilty.

Citing *Weeks v. Angelone*, 528 U.S. 225 (2000), the appeals clinic thinks that this Court may consider the length of time it took the jury to reach a verdict in while in the process of speculating why the jury took the time it took to reach its verdict. That decision concerns the propriety of an instruction in a death penalty case given to the jury in response to question by it. The federal supreme court stated, in passing, that a number of "empirical"factors showed that the jury followed the instructions given it, one of which being the fact that it returned a verdict two hours after the instruction was given. However, the time to reach a verdict was but one factor, and not said to have been any more important than the others. Furthermore, *Weeks* was a death penalty case, one involving instructions and a body of law unrelated to the instant case. The facts there are not even weakly similar to those here.

There is no set amount of time a jury should use before reaching a verdict. It may well have been here, as it was in *Smith v. State*, 569 So.2d 1203 (Miss. 1990), a case in which the jury deliberated for only three minutes, that the Appellant's guilt was quite clear to each juror by the time summation concluded, and that all that was needful was a quick discussion among them. While the appeals clinic has managed, somehow, to write a forty -seven page brief on a simple, garden variety sale of cocaine case, the fact remains that the case at bar was not complicated, factually or legally, and the Appellant's guilt was overwhelmingly established.

The appeals clinic offers nothing but their own supposition that the jury used the prior

sales evidence as evidence of the Appellant's guilt for the sale at bar. Yet, even if the prior sales evidence had never been admitted, the State's evidence overwhelmingly showed the Appellant's guilt. If there is to be speculation as to what caused the verdict, the more likely theory is that the Appellant was clearly and completely shown to be guilty of the felony. Quite contrary to the appeals clinic's opinion of the evidence of the Appellant's guilt, her guilt was overwhelmingly proven by the State.

Finally, even if this Court were to conclude that there was error in the admission of this evidence, any such error would be harmless. Holding aside the prior sale evidence, the verdict of guilty was inevitable, given the strength of the State's case. That being so, any error in the admission of this evidence was harmless. *Caldwell v. State*, 6 So.3rd 1076 (Miss. 2009). We will address the appeals clinic's arguments concerning that evidence further on, but we will note that the informant's testimony was fully corroborated by the video and audio tapes. Likewise the Bureau of Narcotics agent's testimony fully corroborated the informant. The Appellant was guilty beyond doubt.

The First Assignment of Error is without merit.

2. THAT THE APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

In the Second Assignment of Error the Appellant asserts that her trial attorney was ineffective. In addressing the claims raised against the attorney, we bear in mind test by which such claims are measured. *Strickland v. Washington*, 466 U.S. 668 (1984).

We do not stipulate that the record in the instant case is sufficient for appellate review of the ineffectiveness claim. That being the case, this Court will not find merit in such a claim unless the record demonstrates that the attorney's performance was so inadequate or incompetent

that the trial court should have declared a mistrial. *Ramsey v. State*, 959 So.2d 15, 25 - 26 (Miss. Ct. App. 2006).

The first claim appears to be that the attorney in the dock "allowed improper testimony to be repeatedly presented to the jury." (Brief for the Appellant, at 35). By this, the Appellant apparently means to say that the attorney failed to object to the evidence admitted under M.R.E. 404(b). The appeals clinic also seems to be of the view that the attorney was ineffective for having failed to assert in his motion for a directed verdict that evidence of past drug sales is insufficient to prove intent to distribute in a possession with intent to distribute case. Strangely, after arguing that intent is not an element of the felony of sale of cocaine in the first assignment of error (Brief for the Appellant, at 25), now it is said that the defense attorney failed to assert lack of evidence of intent to distribute. (Brief for the Appellant, at 36).

First of all, the defense attorney did indeed object to the admission of evidence of prior or other sales by moving the trial court to prohibit any testimony of such sales. The attorney effectively made a motion *in limine*. (R. Vol. 2, pg. 7 - 8). In the course of the argument on the point, the attorney stated that he had a "continuing objection" to such testimony and to the limiting instruction. (R. Vol. 2, pg. 17). In our view, the attorney preserved his objection that (1) the prior or other sale was not a "common plan" or scheme under M.R.E. 404(b) (R. Vol. 2, pg. 10) and (2) that such evidence was unduly prejudicial under M.R.E. 403 (R. Vol. 2, 13 - 14). By having done so, the attorney made his record on these issues. It was not necessary for him to become a jack-in-the-box thereafter. *Kettle v. State*, 641 So.2d 745 (Miss. 1994). Nonetheless, during the testimony of the informant, when the prosecutor asked her first question as to whether the he had purchased drugs from the Appellant, the attorney did raise an objection. (R. Vol. 2, pg. 52).

As for any failure to assert during the motion for a directed verdict that the State failed to prove intent, we are not quite sure why the appeals clinic would think that such an argument would have been relevant. The appeals clinic has asserted that intent is not an element of the felony of sale of cocaine. (Brief for the Appellant, at 25). The case at bar was not a possession with intent to sell case, as was *Holland v. State*, 656 So.2d 1192 (Miss. 1995). We find it difficult to see how an attorney may be found to have been ineffective for having failed to argue a point about an element of a crime that the one accusing him of ineffectiveness says was not an element of the crime charged against his client.

The appeals clinic then castigates the attorney because the attorney did not move to strike or move for an instruction to disregard with respect to certain testimony by the witness Hawkins. Brief for the Appellant, at 36 - 37). The attorney may well have decided not to risk having that testimony emphasized by such an instruction. The decision to ask for such relief is a strategic decision, and unreviewable. *Commodore v. State*, 994 So.2d 864 (Miss. Ct. App. 2008). In any event, while the appeals clinic predictably refers to the testimony as "highly prejudicial," this characterization is quite overstated. Such testimony would have been admissible had the witness been qualified to give such testimony. The prosecutor, for whatever reasons, chose not to attempt to do so. (R. Vol. 2, pg. 29).

It is true that there was no objection to Hawkins testimony concerning Xanax. (R. Vol. 2, pg. 30). This may well have been a strategic decision, given the fact that the Appellant was not on trial for anything having to do with Xanax. In any event, the appeals clinic does not and cannot show prejudice for the lack of an objection here. More importantly, it is ludicrous to suppose that the trial court should have declared a mistrial on account of the fact that the attorney did not object to this testimony.

The next complaint is that the defense attorney "failed to request language be added to the instructions and to object to the format of the jury's use of [the prior sale evidence]." (Brief for the Appellant, at 38). Curiously, the appeals clinic does not trouble itself to tell this Honorable Court what "language" should have been inserted, or what better "format" should have been used. Since the appeals clinic either does not know or cannot tell the Court what should have been done, or done better, we see no reason to respond to that allegation.

Then the Appellant then natters on, claiming that the evidence against her was weak, and complaining that the jury (evidently finding the evidence of guilt was quite strong indeed) spent less than ten minutes considering the case. This, according to the appeals clinic, shows that the jury disregarded the limiting instruction. (Brief for the Appellant, at 38). It shows no such thing. That is mere speculation. Beyond that, though, since the appeals clinic cannot tell this Court how the instruction might have been better drafted, this speculation is pointless.

The appeals clinic then says that the timing of the instruction was "patently ineffective" and further evidence of the jury's total disregard of the trial judge's oversimplified limiting instruction" (Brief for the Appellant, at 39). Now this is quite a claim. It is now this unfortunate attorney's duty to be responsible for the trial court's instruction and the jury's use of it. Where to begin with such a position. First of all, again, the appeals clinic tells no tales to show how the instruction was "oversimplified." Nor, other than in the appeals clinic's overwrought speculations, is there the first suggestion that the jury did not understand or did not follow the instruction. Finally, the appeals clinic presents no authority that the timing of the giving of the instruction was in some wise error. It was a matter of trial strategy whether to object to the time of the giving of the instruction. The appeals clinic also fails to tell the Court how the trial attorney could have controlled what the jury did with or made of the instruction.

The Court is then told that the trial attorney misstated the Appellant's sentence on her prior conviction and that this misstatement prejudiced the Appellant because the Appellant might have received a more lenient sentence in the case at bar. (Brief for the Appellant, at 39 - 40).

It is true that the Appellant's attorney informed the trial court during sentencing that "[t]he amount of [the Appellant's] sentence was five years." (R. Vol. 3, pg. 156). The attorney later told the court that the Appellant was currently serving a five year sentence. (R. Vol. 3, pg. 158). The Appellant's sentence in that case was ten years imprisonment, five years to serve and five years suspended on conditions. *Liddell v. State*, 7 So.3rd 217 (Miss. 2009). While the Appellant's attorney was not precise, he was correct that the Appellant, at the time of sentencing in the case at bar, was serving a five year sentence.

As for a sentence in the case at bar, the State had no recommendation. (R. Vol. 3, pg. 158). The attorney for the Appellant asked that the court "sentence similarly" but asked that the sentence in the case bar be served concurrently with the prior sentence. (R. Vol. 3, pg. 156). This was also the Appellant's request. (R. Vol. 3, pg. 159).

The trial court decided to impose a less severe sentence in light of the previous sentence. It imposed a three - year sentence, to be served consecutively with the previously imposed sentence. (R. Vol. 3, pg. 160).

The Appellant claims that the trial court "implied" that it would give a lighter sentence "in congruence" with the previous sentence. The Appellant claims that she received more time than she would have received in the case at bar had the trial court been informed that her first sentence was one of ten years, with five to serve.

The record does not bear out this said - to- be implication. Nor does it bear out the notion that the court was intending to give a sentence "in congruence" (whatever that may mean) with

the previous sentence. In any event, the court did in fact impose a lighter sentence.

We fail to see how it would have been of benefit to the Appellant had the trial court known that her first sentence was actually ten years, with five suspended. It seems to us that there would have been a risk that the Appellant would have received more than three years in the case at bar had the trial court known that. The Appellant's trial attorney may well have wanted to keep the court's attention focused on the "to serve" portion of the sentence, with the goal being to keep the Appellant's sentence in the case at bar to a period of five years or less. If so, the strategy succeeded.

In any case, the Appellant has not clearly demonstrated a deficient performance in this regard, and certainly has not shown prejudice at all. There is nothing to show that the Appellant would have received a sentence less than three years had the trial court known that her actual sentence in the previous case was ten years, with five years suspended. On the other hand, the court might well have sentenced the Appellant to more than three years.

Continuing on with this nitpicking of the Appellant's attorney, the Court is told that the cumulative alleged errors and omissions committed by the attorney should result in a finding of ineffective assistance of counsel. (Brief for the Appellant, at 40). We have demonstrated above that the particular claims of ineffective assistance of counsel do not on this record demonstrate ineffectiveness. As they do not individually, they cannot cumulatively. The case at bar bears not the slightest resemblance to *Waldrop v. State*, 506 So.2d 273 (Miss. 1987) or *Stewart v. State*, 229 So.2d 53 (Miss. 1969).

But the Appellant still is not finished! She then complains that her attorney called Bogan to the witness stand, even though the Appellant admits that decisions concerning which witnesses to call to the witness stand are a matter of trial strategy. (Brief for the Appellant, at 40).

Whether the decision to call Bogan was an instance of ineffective assistance of counsel cannot possibly be determined here. The record sheds no light on how or why that decision was made, although it is clear that Bogan's testimony on direct examination was of some benefit to the Appellant. Parties to litigation take their witnesses as they find them. It is hardly uncommon to see witnesses for the State or the defense with credibility issues, such as having been convicted of a crime. In any event, there was no basis to declare a mistrial on account of Bogan's testimony. There is no basis to find that the trial attorney was ineffective for having called Bogan on this appeal.

The Appellant then says that her attorney failed to prepare her for trial. In an attempt to support this bald allegation, she points to the fact that she became equivocal about whether she wanted to testify. (Brief for the Appellant, at 41).

It is true that the trial court had a hard time in getting a straight answer from the Appellant when it informed her of her right to testify and asked her what decision she had come to. (R. Vol. 3, 100 - 101; 114 - 116; 120 121). However, the trial attorney was unequivocal when the trial court asked him whether he had advised the Appellant of her right to testify. (R. Vol. 3, pg. 100).

The attorney indicated that he had advised the Appellant of her right to testify. The trial court advised the Appellant of her rights in this respect. There is no basis on this record to find that the attorney did not advise her of her rights. And even if he had not, the trial court did. That being so, there would have been no prejudice to the Appellant, assuming that the trial attorney lied to the trial court. That the Appellant went wobbly when it came to the point at which to elect to testify or not is no basis to conclude that the attorney did not advise the Appellant.

As for the suggestion that the trial attorney was ineffective in other respects prior to trial,

this record is utterly insufficient to support that suggestion.

The Second Assignment of Error is without merit.

3. THAT THE VERDICT IS SUPPORTED BY THE EVIDENCE; THAT THE VERDICT IS NOT OPPOSED BY THE GREAT WEIGHT OF THE EVIDENCE

In the final Assignment of Error, the Appellant asserts that the verdict was not supported by the evidence or that it was opposed by the great weight of the evidence. In considering these claims, we bear in mind the standard of review applicable to them. *May v. State*, 460 So.2d 778 (Miss. 1984).

Taking the evidence in support of the verdict as true, together with all reasonable inferences therefrom, and ignoring all evidence opposed to the verdict, the State proved the informant drove to the Appellant's residence and greeted her, that he asked to see the cocaine he there to purchase and that he was allowed to do so, that he counted out one hundred fifty dollars and placed that money on a table or a shelf, and that he then left the residence. At that point, a plastic container was thrown out of the residence. He retrieved it, later gave it to the bureau of narcotics officers. The container contained 1.8 grams of cocaine. The conversation the informant had with the Appellant was overheard by the bureau of narcotics agent, and it was recorded on audio tape. The meeting with the Appellant was also recorded on video tape. This was a routine sale of cocaine case.

The Appellant, though, asserts that the State failed to show that the Appellant knowingly and intentionally sold cocaine. This particular claim was not raised in the motion for a directed verdict. (R. Vol. 2, pg. 99). It may not be raised here. *Riley v. State*, 2007-KM-00953-COA (Miss. Ct. App., Decided 27 May 2008, Not Yet Officially Reported).

Assuming for argument that the contention is before the Court, there is no merit in it.

This is a peculiar claim raised by the Appellant in view of the fact that the Appellant told the informant that she thought he wanted two hundred dollars' worth of cocaine and in view of the fact that she was going to let him see what he was going to purchase. (R. Vol. 2, pg. 60). It is also a peculiar claim in view of the Appellant's *modus operandi*. If the Appellant did not know that what she was taking money for was contraband, it is difficult to understand why she would not simply take the money and hand what she selling to the informant. The informant went to the Appellant's residence for the purpose of purchasing cocaine from her, and that it what he did, identifying the Appellant as the one who sold him the cocaine.

The Appellant says that there was no evidence to show that she actually sold cocaine to the informant. This is an extraordinary thing to say in light of the evidence in support of the verdict. The Appellant accepted the money, and either she or Bogan tossed the package to the informant. Whether she or Bogan tossed the package is a matter of no significance. If Bogan did so, she was simply aiding and abetting the Appellant's sale. *Thames v. State*, 5 So.3rd 1178 (Miss. Ct. App. 2009). That does not mean that the Appellant was not guilty of sale of cocaine.

The Appellant then goes on to suggest that the evidence of prior sales was the only evidence that the Appellant knew that she was selling cocaine. This is simply untrue. Without regard to the prior or other sale evidence, the informant very clearly testified that the Appellant sold him cocaine. While the Appellant would also attempt to suggest that the bureau of narcotics agent gave improper testimony that established the Appellant's identity as the seller, this is not so. It was the Appellant's words and actions, testified to by the agent and the informant, that showed that she was the seller.

The Appellant cites *Clayton v. State*, 582 So.2d 1019 (Miss. 1991) in support of her contention that the State failed to prove that she knowingly sold cocaine. Why the appeals clinic

has cited *Clayton* will remain a mystery. *Clayton* was a garden variety sale case, and the sale conviction was affirmed. What was reversed in *Clayton* was a separate charge of possession with intent to distribute. The Appellant here was neither indicted nor convicted of possession with intent to distribute cocaine.

As for the Appellant's contention that the trial court should have granted a new trial, the Appellant's argument centers upon a claim that the informant's testimony was unreliable and that he was biased. The very most that may be said of the Appellant's characterization is that it goes to witness credibility. Witness credibility issues are for the jury to resolve. *Barnett v. State*, 987 So.2d 1070 (Miss. Ct. App. 2008).

The Appellant also makes much of the possibility that Bogan threw the cocaine out of the Appellant's residence. Perhaps she did, but, as we have said above, this would only mean that Bogan was an aider and abettor of the felony. This is no basis to find that the verdict against the Appellant constitutes an unconscionable injustice.

The Appellant then points out that the jury took little time to return a verdict, and again speculates that this was on account of testimony concerning prior sales. This, again, is mere speculation on the part of the Appellant. The jury had before it the testimony of the narcotics agent, who knew the Appellant's voice, the informant, who clearly had negotiated a purchase from the Appellant and paid her money for the cocaine, and the video and audio tapes. It is not difficult to see that it would take little time for a jury to find guilt beyond a reasonable doubt

The Third Assignment of Error is without merit.

CONCLUSION

The Appellant's forty -seven page brief constitutes perhaps a new record in length for a routine sale of cocaine case. Nonetheless, the Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John R. Henry, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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