IN THE COURT OF APPEALS OF IOWA

No. 7-520 / 96-0381

000421

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CARLOS LADEAN RUSH,

Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

Defendant appeals from his convictions for possession of a controlled substance with the intent to deliver in violation of Iowa Code sections 124.401(1)(b)(3), 124.311, and 124.413 (1995), and failure to affix a drug tax stamp in violation of Iowa Code sections 453B.1 and 453B.12. **AFFIRMED.**

Harold J. DeLange, II, Davenport, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Scott D. Brown, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Sackett and Huitink, JJ.

SACKETT, J.

Defendant-appellant Carlos Ladean Rush appeals convictions for possession of a controlled substance with the intent to deliver in violation of Iowa Code sections 124.401(1)(b)(3), 124.311, and 124.413 (1995) and failure to affix a drug tax stamp in violation of Iowa Code sections 453B.1 and 453B.12. Defendant contends the trial court should have suppressed evidence obtained in searching his apartment. He contends the officer applying for the search warrant intentionally made false claims in reckless disregard of the truth. He further contends even if the first warrant were valid, officers exceeded the warrant in looking for cocaine. Defendant also contends the trial court erred in denying a motion he made for a mistrial. We affirm.

The Burlington police department obtained a warrant to search defendant's apartment for a VCR, its packaging, the owner's manual, the original sales receipt, and indicia of defendant's residency. The VCR had been purchased from K-Mart with a stolen credit card. While searching, crack cocaine was found in a coat pocket in a closet. A second search warrant was obtained for controlled substances and related items.

Defendant sought to suppress evidence found in both searches. He first contends the officer in his affidavit falsely attributed statements to Charles Ford. He contends if the statements attributed to Ford are excised, there is insufficient reason to believe evidence of a crime would be found at defendant's apartment. Defendant

further contends the credibility of the informant was not established and the officer failed to make that known to the magistrate. The relevant parts of the affidavit state:

> [D]ispatch sent me to . . . South Marshall Street in reference to a theft/forgery of a credit card . . . used at K-Mart on . . . March 26, 1995 at 5:17 p.m. to purchase a . . . VCR . . . . Cathy Burk was the . . . owner of the credit card. The card had been locked in a box in her bedroom, and she was out of town during the time the credit card was taken.
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> I went to K-Mart and spoke to . . . Steele who works in loss prevention. Steele said . . . Christine Jennings of . . . Columbus Drive had tried to return the VCR . . . using a portion of the receipt with the credit card number cut off. K-Mart would not refund cash . . . and Jennings left with the VCR. Jennings was arrested for theft by possession.
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> Charles Ford came forward after Jennings' arrest and said Jennings should not have been arrested. Ford said that he is the one who should have been arrested. Ford said that Marie Wilkerson and Becky Bowman were over at Burk's house . . . while James Burk was there. Wilkerson and Bowman approached Ford about returning the VCR to K-Mart for cash so Wilkerson and Bowman could purchase . . . crack cocaine. Ford took the . . . VCR . . . to Jennings' house . . . . Ford asked Jennings to return it for him and she attempted to . . . . When K-Mart refused to issue a cash refund, Ford said he returned the . . . VCR to Wilkerson and Bowman and they took the VCR to Carlos Rush to use it as payment for crack cocaine. Ford returned the VCR to Wilkerson and Bowman . . . and afterwards the VCR was taken to Carlos Rush.
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> James Burk corroborated . . . that Wilkerson and Bowman were at his residence . . . . James Burk stated that Wilkerson . . . would have had access to Cathy Burk's lock box. After the credit card was used, it was returned to . . . Burk's lock box and . . . Burk said Wilkerson and Bowman returned to his house and Wilkerson used the excuse she might have lost her house key upstairs to look for it and could have returned the card at that time.
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> Agent Derron McDuffee of the Iowa Division of Criminal Investigation is investigating a bad check scam involving Charles Ford. During the course of that investigation . . . McDuffee interviewed

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> Steven Freeman . . . at the Des Moines County Jail. Steven Freeman indicated . . . Ford had written bad checks for a car stereo, television, VCR, and a Super Nintendo. Steven Freeman indicated this property had been given to Carlos Rush in exchange for money and possibly crack cocaine. Steven Freeman indicated this exchange had taken place between the dates of January 26, 1995 and February 25, 1995. . . . The known residence of Carlos Rush is 300 Angular #33.

Ford was specifically named in the affidavit. He gave detailed information concerning the VCR. His statements in part were corroborated by the victim and the employee in charge of loss control at K-Mart. The fact the VCR was at defendant's apartment was not general knowledge. These factors support Ford's credibility. *See State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987). We affirm on this issue.

Defendant contends the search was too broad. Defendant did not raise this issue until the day of trial. The State advances error was not preserved. Without addressing the issue of preservation of error, we disagree that the search was too broad. The officer found the VCR and owner's manual at 1:16 a.m., almost immediately upon entry, but had not found the receipt or indicia of defendant's residency in the apartment and was yet looking when he found the cocaine. Defendant has failed to show the search was too broad. *Munz v. State*, 382 N.W.2d 693, 699 (Iowa App. 1985).

Defendant next contends the trial court erred in failing to grant a mistrial. The motion followed an exchange on cross-examination between defendant's attorney and Detective Hall, a witness for the State:

> COUNSEL: You said that you've done controlled buys in investigations of the sale of narcotics . . . . DETECTIVE: That's correct.
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> COUNSEL: You didn't do any in this case, did you? DETECTIVE: No.
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> COUNSEL: You didn't do any surveillance in this case, did you? DETECTIVE: No.
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> COUNSEL: You can't tell whether there was any undue amount of traffic in and out of No. 33 at 300 Angular; is that correct? DETECTIVE: You'll have to ask that one more time.
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> COUNSEL: It probably wasn't the greatest question in the world. You can't testify -- If you're doing a drug investigation, many times you're going to -- one of the things you look for is people coming and going, staying five minutes and leaving, and a lot of people; is that correct? DETECTIVE: That's correct.
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> COUNSEL: Did you have any of that evidence in this case? DETECTIVE: We have had intelligence, yes.

Defendant's trial counsel moved for a mistrial claiming Detective Hall's answer was not responsive to the question and puts in the mind of the jury that other transactions were involved other than the one at issue. He further claimed it told the jury defendant had been under investigation for drug trafficking. The district court overruled the motion. It found Detective Hall's answer was responsive to defense counsel's question and was not in violation of the motion in limine.

We agree with the trial court the detective's answer was responsive to the question. There was no error in overruling the motion for mistrial. *State v. Hinkle*, 229 N.W.2d 744, 750 (Iowa 1975).

AFFIRMED.