Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-158

MARCH TERM, 2021

State of Vermont v. Joshua Rose*	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 472-4-18 Rdcr
		Trial Judges: Thomas A. Zonay (motion to suppress); David R. Fenster (trial)

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

Defendant appeals his conviction of heroin trafficking following a jury trial. On appeal, defendant argues that the court erred in denying his motion to suppress evidence and in permitting the State to introduce evidence at trial regarding the sale value of the heroin. We affirm.

Following a traffic stop, defendant was charged with one count of heroin trafficking under 18 V.S.A. § 4233(c). Defendant moved to suppress all statements and evidence collected from the stop on the grounds that it violated his rights under the Fourth Amendment to the U.S. Constitution and Chapter 1, Article 11 of the Vermont Constitution. Following a hearing, the court found the following facts related to the stop. Trooper Loyzelle works in Rutland and was assigned to the Drug Task Force until November 2017. In April 2018, he received a call from Rutland City Police Officer Sergeant Whitehead advising that an individual, referred to in this decision as informant,[1] was present at the probation and parole office and had information regarding a drug trade. Trooper Loyzelle was familiar with informant from Trooper Loyzelle's time with the drug task force.[2] Trooper Loyzelle traveled to the probation office and met with informant. Informant told Trooper Loyzelle that he knew a person, referred to in this decision as driver, that was traveling to Albany, New York, to obtain drugs. Informant said that driver had asked him for gas money the prior day so driver could make the trip. Informant gave police driver's name and a description of driver's vehicle as well as the time driver was expected to be back in Rutland. He also stated that driver would be accompanied by a black passenger. Informant contacted driver via text and phone while at the probation and parole office, and driver told informant his location and where he was heading.

[1] Informant's identity was disclosed in the trial court.

[2] Informant provided information concerning the drug trade to Trooper Loyzelle during the officer's time on the Drug Task Force, however, no evidence was presented as to whether the information previously provided by informant was reliable or led to arrests or convictions. There was also no evidence concerning informant's motive for speaking with officers.

There was no evidence that during these communications, driver made any statements that he had obtained or was transporting drugs.

Based on this information, Trooper Loyzelle and other troopers traveled to the area where they expected driver to be. Trooper Loyzelle saw a vehicle matching the description provided by informant. The vehicle had an inoperable fog light, and Trooper Loyzelle conducted a motor-vehicle stop on that basis. Defendant was in the passenger seat. He did not have any identification. Trooper Sullivan monitored the occupants of the vehicle while Trooper Loyzelle contacted dispatch. Trooper Sullivan observed the occupants deleting messages on their cell phones but could not see the content of those messages. Trooper Loyzelle learned that defendant had prior charges, including involvement with controlled substances and that there was a nonextraditable warrant for defendant in another jurisdiction.

When he returned to the vehicle, Trooper Loyzelle asked driver if he would be willing to step out of the vehicle to speak with the officers, and driver declined. Driver confirmed that he was coming from Albany and showed a receipt for a stay at a motel. Around thirteen minutes after the stop commenced, Trooper Loyzelle called for a drug-sniffing dog.

Around twenty minutes after the stop began, Trooper Loyzelle observed that the VIN on the registration and insurance card did not match. In particular, Trooper Loyzelle noticed that the insurance card looked as though it had been cut out and the last digit cut off; other than the last digit, the numbers on the insurance card and VIN matched, and there was no evidence that the identifying information on the insurance card was inaccurate or that the vehicle was not insured. Trooper Loyzelle called the insurance company approximately twenty-three minutes after the stop commenced but was unable to reach a person to confirm the insurance information.

At thirty-four minutes, Officer Harvey arrived with a drug-detection dog. The dog's response led Officer Harvey to conclude that there may be narcotics in the vehicle or on the occupants. The vehicle, driver, and defendant were seized, and a warrant was obtained to search the vehicle and occupants. In the search, police found heroin on defendant's person.

Based on these facts, the court denied the motion to suppress and dismiss. The court noted that defendant had not challenged the basis of the initial stop for the inoperable fog light. Therefore, the court focused on the expansion of the stop and concluded that the expansion of the stop into a drug investigation was properly based on a reasonable suspicion that defendant was involved in a drug-related crime. The court found that informant had indicia of reliability given that his identity was known, Trooper Loyzelle knew him through previous work in the Drug Task Force, informant was able to predict driver's itinerary, and informant had specific information about where driver was coming from, when he would arrive, and a description of driver's vehicle and passenger. In addition, the court found it significant that police found driver in the place and vehicle that matched the description provided by informant. The court further found that driver and defendants' action of deleting messages was suspicious and contributed to reasonable suspicion of unlawful activity.

At trial, the State presented testimony from Trooper Loyzelle and Officer Harvey, among others. The evidence showed that after a search, police discovered on defendant's person a black plastic bag filled with 23 bundles of heroin. Trooper Loyzelle explained this was equivalent to 230 individual bags of heroin and would have a market price of $2300 to $4600. Defendant objected to the admission of evidence concerning the value of the drugs. The court overruled the objection, concluding that the value of the drugs was relevant to whether defendant possessed the drugs with the intent to sell. A state forensic chemist testified that she counted all bags and

weighed them. The minimum weight was 52.7 milligrams, and the average weight was 58.1 milligrams. She randomly tested four bags for heroin. She multiplied the average weight by 230 to get an overall amount of 13.363 grams.

At the close of the State's case, defendant moved for judgment of acquittal, arguing that there was insufficient evidence regarding the amount of heroin because the four bags tested amounted to 232 milligrams, which was far less than the 3.2 grams charged. The court denied the motion, concluding that there was sufficient evidence to support the charge if the evidence was viewed in the light most favorable to the State. The court explained that the jury could reasonably infer the overall amount of drugs from the evidence presented concerning the weight of each bag and the number of bags. The court also found that the jury could infer from the evidence that the rest of the bags contained heroin in an amount approximately equal to the four bags randomly chosen for testing.

The jury found defendant guilty, and defendant filed this appeal.

I. Initial Seizure and Search

On appeal, defendant challenges the lawfulness of the initial stop, as well as the expansion of the stop into a full-blown drug investigation. "To carry out a legal traffic stop, a law enforcement officer must have a reasonable, articulable suspicion of wrongdoing." State v. Harris, 2009 VT 73, ¶ 3, 186 Vt. 225. Reasonable suspicion of a motor-vehicle violation is a sufficient basis to justify a motor-vehicle stop. Id. "Grounds for an investigatory stop are not limited to the officer's own observations. An informant's tip, if it carries enough indicia of reliability, may justify a forceable stop." State v. Kettlewell, 149 Vt. 331, 335 (1987). On review of a motion to suppress, we will uphold the court's factual findings unless clearly erroneous. State v. Simoneau, 2003 VT 83, ¶ 14, 176 Vt. 15. We review the court's legal conclusion as to the legality of the stop de novo. Id.

A. Reasonable Suspicion for Initial Stop

Defendant first contends that there was no reasonable suspicion to support the initial vehicle stop because the defective fog light was not a motor-vehicle violation and there was insufficient information prior to the stop to detain defendant for a drug investigation. In the trial court, defendant moved to suppress on the ground that there was no basis for law enforcement to expand the detention beyond what was reasonably necessary to address the initial purpose of the stop—the defective fog light. Defendant did not allege that there was no reasonable suspicion to support the initial stop. At the motion-to-suppress hearing, in response to the court's inquiry, defense counsel specifically confirmed that there was no challenge to whether the fog light provided a basis for the stop. For the first time on appeal, defendant now challenges the initial stop and argues on a plain-error standard that there was no reasonable suspicion for the stop because a defective fog light was not a motor-vehicle violation and there was insufficient evidence to provide reasonable suspicion of illegal drug activity. See V.R.Cr.P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

Even assuming that we can meaningfully apply plain error review in this case, defendant has not shown on this record that the defective fog light was not a motor-vehicle violation.[3] See

[3] Sometimes "plain-error review is not feasible because the factual record is not adequately developed." State v. Nash, 2019 VT 73, ¶ 15. For example, when the basis for a motion to suppress is not raised below, there may be an insufficient record to allow for appellate review,

State v. Ray, 2019 VT 51, ¶ 6 n.3, 210 Vt. 496 (noting that defendant bears burden of showing that error was plain). The defective fog light was alleged to violate the statute requiring that all vehicles operated on the highway be properly equipped. See 23 V.S.A. § 1221. Whether a vehicle with an inoperable fog light is not properly equipped depends on what standard equipment was required for motor vehicles at the time of the stop. See State v. Thompson, 175 Vt. 470, 471-72 (2002) (evaluating whether bumper or side mirror is standard equipment by examining Vermont Periodic Inspection Manual, "which sets forth the equipment requirements for the annual inspection of all motor vehicles"). Defendant contends that pursuant to the 2018 amendments to the Vermont Periodic Inspection Manual ("Inspection Manual"), fog lights are not considered "required minimum lighting" so that a vehicle with fog lights that are not operational does not fail inspection. Defendant concedes that the exact date the 2018 changes became effective is not known, but asserts, based on a trial court opinion in a different case, that the changes became effective some time before December 2018. The State argues, based on a 2012 non-precedential decision of this Court, that prior to 2018 a defective fog light was a basis for failing an inspection under the Inspection Manual, and thus supported a motor vehicle stop. The stop in this case took place on April 20, 2018. Because defendant did not contest the stop, neither party presented evidence to the trial court regarding the date of the 2018 amendment, and defendant has not on appeal provided a sufficient basis from which we can conclude that the amendment took effect before April 20, 2018. For that reason, defendant has not met his burden of showing the trial court committed plain error by failing to conclude that the initial stop was unlawful.

B. Extension of Stop

Defendant next argues that, even if there was a basis for the initial stop, pursuant to the Fourth Amendment and Article 11, the officers unconstitutionally expanded the detention by keeping defendant for thirty-four minutes and using a drug-sniffing dog. Once officers lawfully stop a vehicle, they can "detain a suspect to investigate the circumstances that provoke [the] suspicion as long as the scope of the detention is reasonably related to the justification for the stop and inquiry." Simoneau, 2003 VT 83, ¶ 14. "In determining whether an officer had reasonable suspicion to expand an interaction, we look at the totality of the circumstances." State v. Tetreault, 2017 VT 119, ¶ 29, 206 Vt. 366.

Here, the facts when viewed as a whole provided a basis for reasonable suspicion of drug-related activity sufficient to expand the basis of the stop. The information provided by informant contributed to reasonable suspicion of drug activity. See State v. Cunningham, 2008 VT 43, ¶¶ 30-31, 183 Vt. 401 (explaining that tip can support reasonable suspicion to prolong stop if tip carries enough indicia of reliability). This information had sufficient indicia of reliability for several reasons. The informant here was named and was known to Trooper Loyzelle. The informant offered a basis for his belief that driver would be transporting drugs in his car at the predicted time, and provided detailed predictive information about driver's itinerary, driver's location, driver's name, driver's passenger, and driver's vehicle. During his own investigation, Trooper Loyzelle

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even plain error review. State v. Cameron, 2016 VT 134, ¶ 16, 204 Vt. 52; see V.R.Cr.P. 12(b)(3)(C) (requiring that motion to suppress be made prior to trial if basis for motion then exists). In the trial court, defendant agreed that the defective fog light provided a basis for law enforcement to stop his vehicle. As a result, the parties did not present evidence concerning whether the defective fog light violated the motor-vehicle code. Ordinarily, whether conduct violates the law is a legal question that does not depend upon a factual record. However, for the reasons set forth above, in this case the legal question turns on the requirements of the applicable Vermont Periodic Inspection Manual. Neither the trial court record nor the briefs on appeal establish the requirements of the applicable Manual with respect to inoperative fog lights.

was able to corroborate informant's tip including the description of the vehicle, the driver's name, where driver was coming from, and the location of the vehicle. See State v. Lamb, 168 Vt. 194, 202 (1998) (concluding that informant's information provided basis to justify stop where police were able to verify information supplied by informant and informant had described vehicle and location). These combined circumstances provided sufficient reasonable suspicion to support extending the stop to get a drug-sniffing dog and investigate drug-related activity.

II. Evidence Concerning Street Value of Drugs

Defendant next argues that the court erred in admitting evidence regarding the street value of the drugs. At trial, Trooper Loyzelle testified that the amount of drugs defendant possessed had a market price of $2300 to $4600. Defendant objected to admission of this evidence on relevance grounds. The court overruled the objection, concluding that the value of the drugs was relevant to defendant's intent to sell. On appeal, defendant contends that this evidence was not relevant to intent because the charge was focused on the quantity of drugs possessed by defendant, not the value. See 18 V.S.A. § 4233(c) (prohibiting possession of 3.5 grams or more of heroin with intent to sell or dispense and authorizing permissive inference that person who possesses heroin in amount of 3.5 grams or more intends to sell or dispense heroin).

Under Vermont Rule of Evidence 401, evidence is relevant if it has a tendency "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "The trial court has discretion in determining the relevancy of evidence, and we will reverse a determination of relevancy only for abuse of discretion." State v. Brochu, 2008 VT 21, ¶ 49, 183 Vt. 269.

The trial court acted within its discretion in this case. The State had the burden to prove that defendant possessed more than 3.5 grams of heroin with the intent to sell or dispense it. Although the statute contains a permissive inference that a person who possesses more than 3.5 grams of heroin intends to sell it, 18 V.S.A. § 4233(c), that does not preclude the State from introducing other evidence showing an intent to distribute. As other courts have determined, the value of heroin is relevant to whether defendant intended to sell the drugs. See, e.g., United States v. Rivera, 68 F.3d 5, 8 (1st Cir. 1995) (holding that information regarding price of drugs was relevant to proving intent to distribute).

Defendant also argues that even if the value of the drugs was relevant to the elements of the charge, the trial court should have excluded it because the prejudicial effect outweighed any probative value. Under Vermont Rule of Evidence 403, evidence may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." At trial, defendant's objection regarding the drugs' value was based on relevance under Rule 401. Defendant did not object on the ground that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under Rule 403. We therefore review for plain error. State v. Laprade, 2008 VT 83, ¶ 23, 184 Vt. 251 (reviewing defendant's argument regarding Rule 403 for plain error where not raised below). "When the admission of prejudicial evidence is claimed to be plain error, the appellant must show that the judgment below was substantially affected by its admission." Id.

Defendant has not met that burden. Defendant does not provide an in-depth analysis of the weighing under Rule 403, claiming simply on appeal that the probative value is outweighed by the prejudicial effect and the possible confusion for the jury. Evidence regarding the street value of the drugs was prejudicial to defendant in the sense that it tended to inculpate him. See United

States v. DiNovo, 523 F.2d 197, 202 (7th Cir. 1975) (holding that street value of heroin was relevant to question of intent to distribute and any prejudice resulted from fact that amount of heroin possessed was relevant to crime charged). Rule 403 only excludes evidence that is unfairly prejudicial, "described as evidence having the primary purpose or effect of provoking horror or punishing the defendant, or appealing to the jury's sympathies." State v. Brown, 2010 VT 103, ¶ 13, 189 Vt. 88 (quotation omitted). The evidence regarding the value of the drugs lacked any of these attributes. In addition, defendant has failed to show how the evidence of the street value created confusion for the jury. For that reason, we conclude that admission of the evidence was not error, let alone plain error.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice