NO. COA01-1193

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 00 CRS 22020, 25307

JERMAINE HARRIS

Appeal by defendant from judgment entered 25 April 2001 by Judge Howard R. Greeson, Sr. in Forsyth County Superior Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General John F. Maddrey, for the State.

Bryan Gates for defendant-appellant.

WALKER, Judge.

Defendant was convicted of possession with intent to sell and deliver cocaine. He pled guilty to a charge of being an habitual felon and was sentenced to a minimum term of 118 months and a maximum term of 151 months in prison.

The evidence at trial tended to show that on 2 May 2000 at about 11:40 p.m., Officers Andrew Goldberg and D.R. Crews of the Winston-Salem Police Department made a traffic stop of a vehicle in which defendant was a passenger. Defendant exited the vehicle through the right front passenger door and quickly walked away from the scene despite Officer Goldberg's request to speak with him. At

that time, both Officers Goldberg and Crews remained with the vehicle and the driver, Shannon Kimbro. After Officer Goldberg discovered a clear plastic bag containing marijuana inside the vehicle on the left side of the front passenger seat, he called for another officer to locate and return defendant to the scene. Officer Goldberg then discovered another clear plastic bag containing cocaine on the ground a few inches from the passenger door of the vehicle where defendant had exited. Defendant was returned to the scene and placed under arrest.

Officer Goldberg testified that defendant stated that when the vehicle was stopped, Kimbro removed the bag of marijuana and bag of cocaine from his pants pocket, passed the bags to defendant and told him to "hold this stuff." Defendant further stated that the marijuana and cocaine did not belong to him since nothing was found on his person.

At trial, the State sought to introduce evidence surrounding defendant's prior drug offenses through testimony of Officers Steve Tolley and Doug Nance. Officer Tolley's testimony related to two of defendant's previous drug offenses occurring on 10 January and 22 July 1997. Officer Nance testified as to defendant's statements made to him during an October 1997 interview. Defendant objected to the admission of the evidence of the prior drug offenses on the grounds that it was not offered for a proper purpose under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001).

The trial court conducted a *voir dire* during which Officer Tolley testified about the 10 January 1997 stop of a vehicle in

which defendant was a passenger. On this occasion, Officer Tolley observed defendant reach into the center console of the vehicle and pass an item to the passenger occupying the back seat. After searching the vehicle, Officer Tolley discovered marijuana, a bag of cocaine and a handgun concealed in the rear passenger area of the vehicle. Later, defendant stated to Officer Tolley "[y]ou can't put that on me. I was in the front." Officer Tolley also testified to an incident occurring on 22 July 1997, when he was working with another officer who had observed defendant engaging in hand-to-hand transactions indicative of drug dealings. When Officer Tolley approached the apartment which defendant had entered after making the transactions, he observed defendant and another person enter a bedroom and immediately turn off the lights. Officer Tolley obtained consent to search the bedroom and found a bag of crack cocaine under the bed where defendant had been present. Defendant made no statement to Officer Tolley.

Officer Nance's *voir dire* testimony related to his interview of defendant on 14 October 1997, when defendant was being held for trafficking cocaine. Defendant told Officer Nance of an incident occurring around the middle 1990s, in which defendant and his associates had hidden drugs in a field for the purpose of "avoid[ing] detection" should an officer attempt to search them for drugs.

After hearing the evidence and arguments from the State and the defendant, the trial court ruled that the evidence of defendant's prior incidents was admissible under Rule 404(b)

because it was "highly probative of whether or not [defendant] knowingly possessed cocaine in May of 2002" and the probative value far outweighed the prejudicial effect of this evidence.

Defendant contends the prior incidents are not sufficiently similar to the present offense to show a common plan, knowledge or *modus operandi* to be admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b)(2001). Rule 404(b) states:

> 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001). The rule is one of inclusion, "subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). As long as the prior acts provide "substantial evidence tending to support a reasonable finding *by the jury* that the defendant committed a similar act or crime and its probative value is not limited *solely* to tending to establish the defendant's propensity to commit a crime such as the crime charged," the evidence is admissible under Rule 404(b). *State v Stager*, 329 N.C. 278, 303-304, 406 S.E.2d 876, 890 (1991) (emphasis in original). Further, this Court has held that, "'[i]n drug cases, evidence of other drug violations is relevant and admissible if it tends to show . . . *knowledge of the presence* and

character of the drug . . . .'" *State v. Montford,* 137 N.C. App. 495, 500, 529 S.E.2d 247, 251, *cert. denied,* 353 N.C. 275, 546 S.E.2d 386 (2000) (emphasis added) (citations omitted).

Where evidence of prior conduct is relevant to an issue other than the defendant's propensity to commit the crime, "the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). Such determination of similarity and remoteness is made by the trial court on a case-by-case basis, and the trial court's decision to admit or exclude evidence under the Rule 403 balancing test controls absent a showing of abuse of discretion. *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992); *State v. Wilkerson*, 148 N.C. App. 310, 313, 559 S.E.2d 5, 7 (2002) . The required degree of similarity is that which results in the jury's "*reasonable* inference" that defendant committed both the prior and present acts. *Stager*, 329 N.C. at 304, 406 S.E.2d at 891 (emphasis in original). The similarities need not be "unique and bizarre," but some "unusual facts" common to each instance of defendant's conduct must be present. *State v. Sokolowski*, 351 N.C. 137, 150, 522 S.E.2d 65, 73 (1999) (citations omitted).

In *Wilkerson*, a test tube containing cocaine was found on defendant. *Wilkerson*, 148 N.C. App. at 311, 559 S.E.2d at 6. At defendant's trial, two law enforcement officers each testified to prior instances of possession or sale of cocaine by defendant. *Id.*

The trial court admitted the testimony regarding the defendant's prior drug convictions under Rule 404(b), finding the evidence was probative of the defendant's intent and knowledge and was not unfairly prejudicial. *Id.* at 314, 559 S.E.2d at 8. On appeal, defendant argued the trial court committed prejudicial error by admitting the testimony of prior incidents. However, the *Wilkerson* Court noted four similarities between the prior incidents and the present offense: (1) the events occurred at the same location, (2) defendant was present at each, (3) all the crimes involved cocaine and (4) the prior incidents occurred within a year of the present offense. *Id.* This Court held that, because of these similarities, the evidence was admissible under Rule 404(b) to show intent and knowledge and that the probative value of the evidence outweighed any potential prejudice under Rule 403. *Id.* at 314-17, 559 S.E.2d at 8-9.

Here, as in *Wilkerson*, similarities exist between the prior incidents and the present offense: (1) as above, all the incidents involved cocaine, (2) the cocaine was found in close proximity to defendant but not on his person, and (3) another individual was present or involved in each of the prior incidents.

Defendant also contends that the three earlier incidents took place in 1997 and are too remote in time to be probative. Our Supreme Court has stated that remoteness is a less significant factor in determining Rule 404(b) admissibility when the prior acts go to prove something other than a common plan or scheme, such as defendant's knowledge. *State v. Lloyd*, 354 N.C. 76, 91, 552 S.E.2d

596, 610 (2001); *Stager*, 329 N.C. at 307, 406 S.E.2d at 893. Prior acts occurring as long as twenty-three years before the charged offense have been held as not too remote and probative of non-character issues. *State v. Sneeden*, 108 N.C. App. 506, 510, 424 S.E.2d 449, 452 (1993), *aff'd,* 336 N.C. 482, 444 S.E.2d 218 (1994). Further, "'[i]t is proper to exclude time defendant spent in prison when determining whether prior acts are too remote.'" *Lloyd*, 354 N.C. at 91, 552 S.E.2d at 610 (2001) (*quoting State v. Berry*, 143 N.C. App. 187, 198, 546 S.E.2d 145, 154, *disc. rev. denied*, 353 N.C. 729, 551 S.E.2d 439 (2001)).

In this case, the trial court did not abuse its discretion in admitting the evidence of the prior incidents which tended to show defendant's knowledge, identity and lack of mistake and was not offered to demonstrate defendant's propensity to commit the charged crime. Furthermore, the trial court did not abuse its discretion in determining that the prior incidents were not too remote and that the probative value of the evidence outweighed the prejudicial effect.

During the charge conference, defendant requested an instruction on his right not to testify which the trial court agreed to give. The trial court inadvertently omitted defendant's requested instruction when it charged the jury; however, defendant failed to object. Before the jury reached a verdict, the trial court corrected the omission by reinstructing the jury regarding defendant's right not to testify and his right not to put on

evidence. The jury resumed its deliberation and returned with a verdict a short time later.

Defendant contends that the trial court's failure to give his requested instruction regarding his right not to testify constitutes prejudicial error entitling him to a new trial. Under our Rules of Appellate Procedure, a party may not assign as error an omission in the jury instruction unless the party objects before the jury retires for deliberation. N.C.R. App. P. 10(b)(2) (2001). However, our Supreme Court has held that a party may assign error absent an objection if that party requested the instruction during a charge conference, and the trial court agreed to give the instruction but failed to do so. *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988). Because the defendant's right not to testify in his own defense is constitutionally protected, the State must prove that the omitted jury instruction constitutes harmless error.

Here, when the trial court realized the inadvertent omission, it gave appropriate additional instructions before the jury rendered its verdict. Thus, any possible prejudice to the defendant was cured.

No error.

Chief Judge EAGLES concurs.

Judge BIGGS concurs in the result with separate opinion.

Report per Rule 30(e).

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BIGGS, Judge concurring in result with separate opinion.

While I agree with the majority that the trial court did not abuse its discretion in admitting the evidence of defendant's prior incidents under Rule 404(b), I do not believe the incidents tend to establish either intent or knowledge as the majority suggests. Rather, I find much more compelling the trial court's determination that the prior incidents tend to demonstrate the absence of mistake or accident. The court noted "the last three times that this individual has had contact with the police department, he's had cocaine within almost arm's reach of him." Thus the prior incidents were probative in that they tended to negate any inference of inadvertent or accidental connection between the defendant and the drugs. *See State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) (evidence of similar acts may be offered under Rule 404(b) to show that the act in dispute was not inadvertent, accidental or involuntary).

Moreover, it is clear that the admission of the evidence was highly prejudicial to defendant in that, absent the admission of the three prior incidents, it is unlikely that the State could have

established its case; however, I cannot conclude that the trial court abused its discretion in applying the balancing test under Rule 403. *See State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988) (where decision is in the sound discretion of the trial court it will not be overturned on appeal unless it is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision).

Accordingly, I concur in result only.