NO. COA01-1584

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Wake County
Nos. 99 CRS 63089-90

TYRONE STEVE WIGGINS

Appeal by defendant from judgment entered 11 April 2001 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 29 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jane L. Oliver, for the State

James M. Bell for defendant-appellant.

BIGGS, Judge.

Defendant appeals his convictions of trafficking in cocaine by transportation and by possession. We find no error.

The State presented evidence which tended to show the following: On 13 July 1999, Albert Lewis and Alvin Prince were driving a green Dodge Intrepid in Raleigh, North Carolina, when the car ran out of gas. Lewis had borrowed the car the previous day from defendant, who had asked Lewis if he would switch cars with him. Lewis' car was a white Isuzu Rodeo. When the Dodge ran out of gas, Lewis and Prince walked to a pay phone and called defendant

for help. About twenty minutes later, defendant drove up in Lewis' car with a friend, Clinton Todd. Defendant told Lewis that the gas gauge on the Dodge Intrepid was broken. Shortly thereafter, Officer K.J. Patchin drove up and got out of his car. Defendant told Officer Patchin that the car was out of gas. Then, all four men got into the Isuzu and drove to a nearby gas station. Officer Patchin remained with the Dodge.

While the four men were getting gas for the Dodge, a pickup truck pulled alongside Officer Patchin and told him the Dodge was stolen. The man told Officer Patchin that the car was owned by his brother, and that he did not recognize any of the people who were in the car. The man gave Officer Patchin the name of the registered owner, the owner's address, and where the owner lived, and Officer Patchin verified the information. The man then drove away to check on his brother. Officer Patchin called for assistance.

A short time later defendant returned with gas for the car, and Officer Patchin began to question him regarding ownership of the vehicle. Officer Patchin testified that the four men gave confusing and conflicting answers, and that they did not have identification. Officers S.A. Larkins and D.D. McDonald arrived to assist Officer Patchin. Eventually, defendant admitted that he was the driver of the Isuzu and gave Officer McDonald consent to search the car. Officer McDonald began his search and found eight rocks of crack cocaine in the pocket of a camouflage fatigue jacket. Lewis told Officer McDonald that the jacket was his. Officer

McDonald continued his search and found a black pouch in the glove compartment. Inside the pouch was a large "chunk" of crack cocaine.

Prior to trial, defendant made a motion in *limine* pursuant to Rule 404(b) to exclude evidence that he was arrested for drugs a few weeks before the arrest at issue in this case. The State announced that it did not plan to present any 404(b) evidence during its case in chief, and agreed to notify the court before it sought to elicit any such evidence. During defendant's case, Todd testified that he and defendant were placed in the back of a police vehicle, and discussed the fact that police had found drugs. Todd told defendant that whoever had the drugs should speak up, to which defendant responded: "Well, I know you didn't have no drugs. And he said, you know, I didn't have no drugs." After Todd testified, defendant testified in his own defense. Defendant testified that about two weeks prior to his arrest, he had been in a motorcycle accident and fractured his skull. On cross-examination, the State questioned defendant about the accident and his hospitalization, and then stated: "you are aware that the nurse found cocaine in your slacks[.]" Defendant objected and the trial court sustained the objection and ordered that the jury disregard the prosecutor's statement.

Defendant was convicted of trafficking in cocaine by possession and trafficking in cocaine by transportation. The convictions were consolidated for judgment and defendant was sentenced to thirty-five to forty-two months imprisonment.

Defendant appeals.

Defendant's sole argument on appeal is that the trial court should have declared a mistrial *ex mero motu* when the State inquired about whether the nurse had found cocaine in his pants. Defendant contends that the statement could not be cured by the trial court's instructions to disregard the question, and that defendant's case was thus "irrevocably prejudiced." Defendant argues that the evidence went directly to the question of whether defendant was involved in the illegal drug trade. Defendant further notes that the question was in violation of a prior agreement with the Court whereby notice would be given with an opportunity to be heard regarding whether the line of questioning would be allowed. Defendant argues that he was denied the right to argue against the line of questioning, and thus the conviction should be vacated.

After careful review of the record, briefs and contentions of the parties, we find no error. Whether to declare a mistrial is a decision:

> "'. . . within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion.'" It is appropriate for a trial court to declare a mistrial "'only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law.'"

State v. Bowman, 349 N.C. 459, 472, 509 S.E.2d 428, 436 (1998)(quoting *State v. Sanders*, 347 N.C. 587, 595, 496 S.E.2d 568, 573 (1998), *cert. denied* __ U.S. __, 151 L. Ed. 2d 95

(2001))(quoting *State v. Norwood*, 344 NC. 511, 537-38, 476 S.E.2d 349, 361 (1996), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997)), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999). Here, defendant argues that the trial court should have declared a mistrial because the State asked defendant an improper question. However, the question was not improper, because defendant opened the door to the line of questioning by presenting evidence that he had no prior knowledge of the drugs in the car and no involvement with cocaine. Furthermore, evidence of defendant's prior possession of drugs was admissible pursuant to Rule 404(b) for the purpose of proving knowledge on the part of the defendant. Even *assuming arguendo* that the question was improper, we conclude that the question did not necessitate a mistrial. Our Supreme Court has stated:

> A defendant is entitled to a new trial on the basis of an improper question if there is a reasonable possibility that such an improper question affected the outcome of his trial. Merely asking an improper question to which an objection is sustained does not automatically result in prejudice to a defendant. When the trial court sustains a defendant's objections to improper questions and instructs the jury to disregard such questions, any possible prejudice to the defendant is cured.

State v. Knight, 340 N.C. 531, 564, 459 S.E.2d 481, 501 (1995) (citations omitted). Here, the trial court sustained defendant's objection, struck the question from the record, and instructed the jury to disregard the statement. Thus, any prejudice to the defendant was cured. *Id.* Furthermore, the question did not result in "substantial and irreparable prejudice to the defendant's case,"

State v. Harris, 145 N.C. App. 570, 576, 551 S.E.2d 499, 503 (2001), *disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002). especially in light of the substantial evidence of defendant's guilt. Specifically, we note that there was testimony that defendant had handed Lewis the pouch and told him to put it in the glove compartment; other witnesses testified that they had seen defendant in possession of the pouch and that defendant kept cocaine in the pouch; defendant had taken cocaine from the pouch and given it to witnesses to sell; and, defendant admitted he was driving the car in which the cocaine was found. Accordingly, we find no error.

No error.

Judges WALKER and THOMAS concur.

Report per Rule 30(e).