NO. COA05-1381

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Iredell County
No. 04 CRS 54434

JAMES FREDRICK SHUFORD

Appeal by defendant from judgment entered 7 July 2005 by Judge Kimberly S. Taylor in Iredell County Superior Court. Heard in the Court of Appeals 17 May 2006.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State.

J. Clark Fischer, for defendant-appellant.

CALABRIA, Judge.

James Fredrick Shuford ("defendant") appeals from judgment entered upon a jury verdict finding him guilty of trafficking in cocaine consisting of possession of 28 grams or more, but less than 200 grams of cocaine and guilty of trafficking in cocaine consisting of the transport of 28 grams or more, but less than 200 grams of cocaine. We find no error.

At trial, C.J. Barnett, a Patrol Officer with the Mooresville Police Department ("Officer Barnett") testified that on 12 May 2004 at 3:00 p.m. he observed four individuals near the rear of a car.

Once these four individuals noticed Officer Barnett, "one subject took off running ... and the other three ... got into the car and started to proceed towards [him]." Officer Barnett blocked their egress and "notic[ed] ... that the front right passenger was the Defendant [upon whom] we held four failure to appear warrants[.]" Officer Barnett observed the "[defendant] was ... fumbling around a lot in the seat and appeared to be nervous." Officer Barnett arrested the defendant pursuant to the warrants. Officer Barnett then asked the defendant "why he was so nervous and why he was moving around in the seat and if he was hiding anything." Defendant admitted to possessing "a little bit of weed." Officer Barnett seized the marijuana and "placed [the defendant] in the rear of [his] vehicle." Officer Barnett also found $470.00 on defendant. Officer Barnett arrested one of the remaining two individuals on outstanding warrants. Officer Barnett subsequently performed a "search incident to arrest [and found] a large baggie of what appeared to be crack cocaine ... sitting in the floorboard in the rear of the vehicle." Adam Dillard, a Patrol Officer with the Statesville Police Department, assisted Officer Barnett in detaining the defendant and searching the vehicle. The State and the defendant each stipulated that on 14 May 2005 "evidence was submitted to the ... [State Bureau of Investigation] Lab[.] The items submitted were the plastic bag containing all white solid material. [The State] requested ... [an examination] ... for controlled substances [and the] [r]esults of [the] examination ...

[measured] cocaine base ... [of] 42.1 grams." The defendant did not present any evidence.

On 7 July 2005, the jury returned a verdict finding the defendant guilty of trafficking in cocaine consisting of possession of 28 grams or more, but less than 200 grams of cocaine and guilty of trafficking in cocaine consisting of the transport of 28 grams or more, but less than 200 grams of cocaine. Defendant was sentenced to the North Carolina Department of Correction to a minimum of 35 months to a maximum of 42 months for each charge. Defendant appeals.

I. *Motions to Dismiss*:

Defendant argues the trial court erred in denying his motions to dismiss. However, defendant failed to preserve this assignment of error for appellate review. North Carolina Rule of Appellate Procedure 10(c)(1) (2005) states, in pertinent part, "[e]ach assignment of error ... *shall state* plainly, concisely and without argumentation *the legal basis upon which error is assigned*." (emphasis added). However, defendant's third assignment of error states "[t]he Trial Court's denial of Defendant's Motions to Dismiss made at the close of the State's evidence and renewed at the close of the evidence." Thus, defendant's third assignment of error violates Rule 10(c)(1) because no legal rationale is provided upon which the alleged error is predicated. Failure to comply with the North Carolina Rules of Appellate Procedure subjects the appeal to dismissal. *See State v. Buchanan*, 170 N.C. App. 692, 613 S.E.2d 356 (2005).

II. *Plain Error*:

Defendant argues the trial court committed plain error by twice allowing the State to present evidence that the location of his arrest was a high crime and drug infested neighborhood. We disagree. "The plain error rule ... is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.'" *State v. Davis*, __ N.C. App. __, __, 627 S.E.2d 474, 477 (2006) (emphasis in original) (citing *State v. Lemons*, 352 N.C. 87, 96, 530 S.E.2d 542, 548 (2000) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). However, "[t]o constitute plain error, *defendant bears the burden* of convincing the appellate court that absent the error, the jury probably would have reached a different verdict." *State v. Cromartie*, __ N.C. App. __, __, 627 S.E.2d 677, 679 (2006). In the instant case, defendant failed to meet his burden. Defendant alleges "[g]iven the minimal evidence presented to link [himself] with the cocaine at issue, there is a more than reasonable possibility that the improper testimony from both officers tipped the scales in favor of conviction." This singular sentence fails to amount to a credible argument that absent the officers' testimony, the jury would have reached a different result. Assignments of error numbers one and two are overruled.

III. *Jury Instruction*:

Defendant argues the trial court erred by instructing the jury on acting in concert. Defendant contends the evidence does not support such an instruction. Defendant further argues the trial court's instruction unconstitutionally lessened the State's burden of proof. We disagree.

At trial, the defendant objected solely on the basis of insufficient evidence. Nevertheless, on appeal he raises a constitutional objection. However, "[w]e are not required to respond to defendant's constitutional objections because they *were not raised at trial*." *State v. Carroll*, 356 N.C. 526, 541, 573 S.E.2d 899, 910 (2002) (emphasis added). Therefore, because defendant failed to object at trial on the grounds that the jury instruction unconstitutionally lessened the State's burden of proof, he waived appellate review of that argument. *See* N.C. R. App. P. 10(b)(1) (2005) (stating "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely ... objection[.]")

"A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence." *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001). Further, "[o]nly jury instructions based on a fact or facts presented by a reasonable view of the evidence should be given." *State v. Smart*, 99 N.C. App. 730, 735, 394 S.E.2d 475, 477 (1990). "To be convicted of a crime under the theory of acting in concert, the defendant need not do any particular act constituting some part of the crime." *State v. Lundy*, 135 N.C. App. 13, 18, 519 S.E.2d 73,

78 (1999). In fact, "[a]ll that is necessary is that the defendant be present at the scene of the crime and that he act[] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *Id.* (citation and internal quotation marks omitted). In the instant case, four individuals standing near the rear of a vehicle, where drugs were later found, noticed Officer Barnett. At that moment, one person fled and three persons, including defendant, "jumped" into the vehicle. The vehicle, with defendant in the front right passenger seat, attempted to leave the scene. Officer Barnett blocked the vehicle and arrested defendant on four failure to appear warrants. Following the arrest, Officer Barnett searched the vehicle and found a large quantity of cocaine in the floorboard of the rear of the vehicle where the four individuals were standing. Officer Barnett searched the defendant and found $470.00. Pursuant to *Lundy*, *supra*, the State presented sufficient evidence defendant was present at the scene of the crime and acted with two others for a common purpose or plan. Thus, a reasonable view of the evidence warranted submission of the jury instructions. *See Smart*, *supra*. Therefore, the trial court did not err in submitting to the jury an instruction on acting in concert. This assignment of error is overruled.

No error.

Judge BRYANT concurs.

Judge HUNTER concurs in the result only.

Report per Rule 30(e).