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NO. COA08-661

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v.

JOHN LAMONT LEWIS

Buncombe County
Nos. 06 CRS 9858; 57491;
57494; 57496 and 57498

On writ of certiorari from judgments entered 22 March 2007 by Judge Mark E. Howell in Buncombe County Superior Court. Heard in the Court of Appeals 8 December 2008.

Attorney General Roy Cooper, by Assistant Attorney General Kevin G. Mahoney, for the State.
Christy E. Wilhelm, for defendant-appellant.

BRYANT, Judge.

John Lamont Lewis (defendant) appeals from judgments entered upon jury verdicts finding him guilty of two counts of assault with a deadly weapon on a government official, possession of drug paraphernalia, resisting a public officer, and simple possession of marijuana. We find no error.

Facts

The State presented evidence tending to show that at 12:43 a.m. on 18 June 2006, two Asheville Police Department officers, one of whom was a canine handler, responded to a dispatch regarding a possible breaking or entering of a residence in progress. As the

officers walked toward the residence, they heard a vehicle start and proceed toward them. The officers identified themselves as police officers and commanded the driver of the vehicle to stop. Instead of stopping, the vehicle accelerated and the officers jumped out of the vehicle's path. The vehicle narrowly missed striking the canine handler and his canine. The vehicle spun around and accelerated toward the officers again, but the driver suddenly stopped the vehicle and put it in reverse. The vehicle crashed into a tree and a rock wall, becoming lodged on the wall. The driver exited the vehicle and ran into some bushes. The canine apprehended the driver, identified as defendant. As the canine handler approached defendant and the canine, defendant jumped up and ran toward the officer, who had a gun in his left hand. Defendant grabbed the officer's left arm and tried to disarm him. Defendant and the officer struggled; the officer ultimately subdued defendant and placed handcuffs on him. The other officer secured the passenger of the vehicle, who remained in the vehicle and did not resist. The officers searched the vehicle and the area immediately surrounding the vehicle and found marijuana in the center console of the vehicle and on the ground outside the driver's side door.

Defendant testified that he brought his friend Everett Hill to view the house as a possible location for a day care center, that he saw two people carrying flashlights but they did not identify themselves as police officers, and that he jumped in his vehicle and drove away because he felt threatened by the two people.

On 21 March 2007, a jury found defendant guilty of two counts of assault with a deadly weapon on a government official, possession of drug paraphernalia, resisting a public officer, and simple possession of marijuana. Defendant was sentenced to two consecutive terms of 21 to 26 months imprisonment in the North Carolina Department of Correction. Defendant appeals.

On appeal, defendant argues the trial court erred by: (I) denying defendant's motion for mistrial; (II) admitting exhibits into evidence when a chain of custody was not properly established; (III) denying defendant's motion to dismiss the charge of possession of marijuana; (IV) denying defendant's motion to dismiss the charge of assault with a deadly weapon; and (V) entering judgment when the evidence was insufficient to support a guilty verdict.

I

Defendant contends the trial court erred by denying his motion for a mistrial made on the grounds that the prosecution failed to provide him with complete discovery material, specifically, a report written by one of the officers. The record shows that during cross examination of the officer, defense counsel asked the officer whether he was "testifying off of a police report that [he] wrote." The officer responded that he had prepared a report but that he did not have it with him on the stand. Defense counsel commented to the court that he did not receive a copy of the report during discovery. The prosecutor interjected that the report had

been provided to defendant's previous counsel. Nonetheless, the prosecutor offered to allow defense counsel to review the report and the court allowed defendant a recess of fifteen minutes for this purpose. After the recess, the court inquired of defense counsel whether he had adequate time to review the report. Counsel responded, "If I may, Your Honor, I feel compelled for the record to make a motion for mistrial. I believe it would be the appropriate motion to make, based on the fact that I've just seen this report for the first time." Counsel stated that had he seen the report before trial, "it may have changed the way that [he] would have spent [his] time preparing for this case." The court asked counsel, "Can you tell me specifically what was in the report that may change the way you would have approached this case?" Counsel replied, "I'd say the fact that there was a report at all." The Court then asked counsel ". . . tell me specifically how . . . that would affect your trial strategy." Counsel related that he had prepared questions and examination of the officers based upon the lack of a report. The court queried, "Is there anything specifically, though, contained in the report that surprised you?" Counsel conceded, "I would have to say there's no surprises in the report, other than the fact that there was one." Counsel declared that he had planned to use the lack of a report to attack the credibility of the officer's trial testimony.

For noncompliance with a discovery order a court may impose several sanctions, including the declaration of a mistrial. N.C. Gen. Stat. § 15A-910 (a) (3a) (2007). The decision whether or not

to impose sanctions "is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 748, 370 S.E.2d 363, 372 (1988). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Assuming, *arguendo*, that a violation of discovery was committed, defendant has failed to show that the trial court abused its discretion in denying defendant's motion for a mistrial. "A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Laws*, 325 N.C. 81, 105, 381 S.E.2d 609, 623 (1989), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). In denying the motion, the court found that although the report had been provided to previous counsel it had not been provided to current counsel for defendant. The court noted that counsel claimed the failure to provide him with a report prejudiced his defense because he planned to argue the lack of a report diminished the officer's credibility. The court found the failure to supply the report not "to be materially prejudicial" to defendant. The court denied the request for a mistrial with a caveat that if counsel found some new information contained in the report, then the court would consider giving counsel more time to investigate and research. The

foregoing reflects a reasoned decision by the court and the court's decision was not arbitrary or unsupported. The trial court did not abuse its discretion in denying defendant's motion for mistrial. This assignment of error is overruled.

II

Defendant argues the trial court erred by admitting the marijuana evidence. He contends the evidence should have been excluded on the ground that a complete chain of custody was not established. As missing links in the chain he cites (1) a lapse of time between the discovery of the contraband and its seizure, (2) the lack of a photograph of the contraband at the scene, and (3) the failure of the police department evidence custodian, who also handled the evidence, to testify.

There are no simple standards for determining the sufficiency of the chain of custody when authenticating real evidence. *State v. Morris*, 102 N.C. App. 541, 545, 402 S.E.2d 845, 848 (1991). Thus, "the trial court 'possesses and must exercise a sound discretion in determining the standard of certainty required to show that the object offered is the same as the object involved in the incident giving rise to the trial and that the object is in an unchanged condition.'" *Id.* (quoting *State v. Abernathy*, 295 N.C. 147, 161, 244 S.E. 2d 373, 382 (1978)). "A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered." *State v. Campbell*, 311 N.C. 386, 389, 317 S.E.2d 391, 392 (1984) (citation

omitted). "[A]ny weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility." *Id.* "Where a package of evidence is properly sealed by the officer who gathered it and is still sealed with no evidence of tampering when it arrives at the laboratory for analysis, the fact that unknown persons may have had access to it does not destroy the chain of custody." *State v. Newcomb*, 36 N.C. App. 137, 139, 243 S.E.2d 175, 176 (1978).

An adequate chain of custody was established in this case. Here, Detective Diana Loveland of the Asheville Police Department testified that she found marijuana on the ground beside the vehicle; that she retrieved the marijuana and placed it into a special narcotics evidence envelope; that she recorded the contents on the envelope, signed the envelope and secured it; that she recorded her personnel number on the seams of the envelope to show that she sealed it and to show that the seals had not been broken once she sealed it; and, that she caused the envelope to be transmitted to the State Bureau of Investigation (SBI) for testing of its contents. Special Agent Jay Pentacuda of the State Bureau of Investigation testified that he received the envelope "in a sealed condition . . . meaning that it had not been tampered with before [he] examined it."

The State's evidence tended to show that the marijuana was properly sealed by Detective Loveland and arrived at the SBI with no evidence of tampering. The chain of custody was not destroyed. The trial court did not abuse its discretion by admitting the

marijuana evidence. This assignment of error is overruled.

III

Defendant argues the trial court erred in denying his motion to dismiss the charge of possession of the marijuana. We disagree.

Upon a motion to dismiss, the court determines "whether there is substantial evidence" to establish each "element of the offense charged" and to identify the defendant as the perpetrator. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). In making this determination, the court must examine "the evidence in the light most favorable to the State, giving the State the benefit of [every] reasonable inference[]" that may be deduced from the evidence and leaving contradictions or discrepancies in the evidence for the jury to resolve. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

Defendant argues the State failed to present sufficient evidence to establish that he possessed the marijuana found on the ground and in the center console of the vehicle.

An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss or motion for

judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'

State v. Harvey, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972). The discovery of narcotics on premises under the exclusive control of the accused is ordinarily sufficient alone to take a case to the jury on a charge of unlawful possession but when the "possession of the premises is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984).

Here, other incriminating circumstances existed allowing the inference that defendant constructively possessed the marijuana. The evidence tended to show that defendant was in close proximity to the marijuana when it was found. Detective Loveland found the marijuana in the center console next to the driver's seat. She also testified that the console in which the marijuana was found opened towards the driver seat and away from the passenger. The officers also found marijuana on the ground outside of the vehicle on the driver's side. Also, when the officers approached, defendant, alone, ran from the vehicle. His passenger remained in the vehicle. Viewing the evidence in the light most favorable to the State, there was substantial evidence that defendant constructively possessed the marijuana. This assignment of error is overruled.

Defendant assigns as error the trial court's denial of his motion to dismiss the charge of assault with a deadly weapon on a government official. He contends the State failed to present any evidence to show that the automobile was used as a deadly weapon.

"A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981). "It is well settled in North Carolina that an automobile can be a deadly weapon if it is driven in a reckless or dangerous manner." *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000). Viewed in the light most favorable to the State, the evidence shows that defendant accelerated the vehicle, drove towards the officers, and narrowly missed striking one of the officers and his dog. After that near miss, defendant turned the vehicle around and headed back toward the officers before immobilizing the vehicle. Based upon this evidence, a jury could reasonably find that defendant drove the vehicle in a reckless or dangerous manner. This assignment of error is overruled.

V

Defendant contends the court erred by entering judgment on the jury verdicts due to the lack of evidence argued above. As we have found the evidence to be sufficient for the reasons herein stated, we overrule this assignment of error.

We hold defendant received a fair trial, free of prejudicial error.

No error.

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Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).