NO. COA09-1430

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v. Forsyth County
Nos. 08 CRS 37918; 58735

BRIAN LEIGH CHAMBERS

Appeal from judgment entered 12 August 2009 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 14 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

James N. Freeman, Jr., for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Brian Leigh Chambers ("defendant") appeals as a matter of right from a jury verdict finding him guilty of possessing cocaine. Defendant pled guilty to being an habitual felon after the jury verdict. On appeal, defendant contends he is entitled to an order dismissing the charges against him, or in the alterative a new trial, because the trial court committed reversible error in: (1) denying defendant's motion for a mistrial after "prejudicial" testimony was elicited by the State; (2) declining to strike testimony from a police officer regarding statements made by defendant following his arrest; (3) declining to dismiss the

charges for insufficiency of the evidence; and (4) failing to set aside defendant's sentence as an habitual felon on the grounds that the sentence violated defendant's constitutional rights. After careful review, we find no error.

I. BACKGROUND

On 8 August 2008, Officer Kyle Krawczyk of the Winston-Salem Police Department ("W.S.P.D."), was on patrol in the area of Waughtown Street and Longview Drive as part of a special assignment to deter robberies in the area. Officer Krawczyk received a radio call from Officer Eric Johnson that suspicious activity, consistent with illegal narcotics purchases, had occurred nearby involving a white Toyota Paseo. After receiving a description of the vehicle and the driver, Officer Krawczyk began "doing moving surveillance on the vehicle" in the 1400 block of Belleauwood Street. The vehicle's registration was verified through entering the vehicle's tag number into the DMV mobile database. The database search showed that the registered owner of the vehicle was defendant.

Officer Krawczyk followed defendant's vehicle for several blocks, and after observing defendant throw a white piece of paper out of the car, he initiated a traffic stop for littering. He approached defendant's vehicle on the driver's side, identified himself, and advised defendant of the reason for having stopped him. While speaking with defendant, the sole occupant of the vehicle, Officer Krawczyk observed a Kenmore vacuum cleaner on the front passenger floorboard. After asking defendant from whom he purchased the vacuum and receiving no reply, Officer Krawczyk

walked to the passenger side of the vehicle to examine the vacuum. While observing the vacuum, Officer Krawczyk noticed a "rocklike white substance" lying on the front passenger's seat. Officer Krawczyk seized the substance from the front seat, reexamined it, and determined that the substance "appeared to look like cocaine." The substance was then packaged, sealed, and labeled in accordance with W.S.P.D. policy and procedure. Defendant was placed under arrest.

Officer Johnson, prior to radioing Officer Krawczyk, also observed defendant's vehicle in the 1400 block of Belleauwood Street. Officer Johnson was parked facing east on Belleauwood Street when defendant drove by him, allowing Officer Johnson to observe his vehicle registration and perform a DMV query. Officer Johnson continued to observe defendant to a point where defendant's vehicle was briefly out of his line of sight as it reached the bottom of Belleauwood Street; however, Officer Johnson could see unidentified individuals approach from the right-hand side of the street. After about 10 seconds, Officer Johnson witnessed defendant continue up Belleauwood Street.

Officer Johnson testified that later that day at the jail, defendant approached him and stated, "I will help you out." Defendant said that he would like to assist in providing information to the police. Defendant stated that he had purchased the confiscated crack rock in the Easton neighborhood, and that he had unsuccessfully attempted to purchase crack cocaine in the 1400 block of Belleauwood Street where he was arrested. Officer Johnson

testified that he gave defendant a *Miranda* warning. Defendant was not asked to sign a waiver following notification of his *Miranda* rights.

Lori Knops, a forensic chemist for the State Bureau of Investigation ("SBI") crime laboratory, conducted a chemical analysis on the "rocklike white substance" found in defendant's vehicle. Ms. Knops' analysis of the substance involved two individual tests, both designed to detect the presence of a controlled substance. Each test confirmed the presence of cocaine or cocaine base. Ms. Knops concluded that the material she analyzed was cocaine base of a total weight of .09 of a gram.

On 10 November 2008, defendant was indicted for possession of cocaine in violation of N.C. Gen. Stat. § 90-95(a)(3) (2009). Defendant was also charged with being an habitual felon. Defendant's case was heard at the 10 August 2009 Session of Criminal Superior Court for Forsyth County before Judge Wood. During the course of the trial, defendant made, and the trial court denied, defendant's motion for a mistrial and defendant's motions to dismiss.

On 12 August 2009, the jury returned a verdict finding defendant guilty of possession of cocaine, and defendant subsequently pled guilty to being an habitual felon. Defendant made a motion to set aside the habitual felon conviction, which was denied by the court. That same day, the trial court entered the judgment sentencing defendant to a minimum of 80 months, and a

maximum of 105 months to be served in the Department of Corrections. Defendant gave timely notice of appeal.

II. ANALYSIS

A. Motion for Mistrial

Defendant argues the trial court abused its discretion in denying defendant's motion for mistrial after the State, and the State's witness, made several references to inadmissible evidence. We disagree.

Our Court has jurisdiction to hear this appeal pursuant to N.C. Gen. Stat. § 7A-27(b) (2009) (review of final judgment). Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion. *State v. Allen*, 141 N.C. App. 610, 617, 541 S.E.2d 490, 496 (2000). A "'[m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict.'" *State v. Smith*, 320 N.C. 404, 418, 358 S.E.2d 329, 337 (1987) (quoting *State v. Stocks*, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987)). A trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2009). "Absent a showing of gross abuse of a trial court's discretion, the trial court's ruling will not be disturbed on appeal." *State v. Brown*, 177 N.C. App. 177, 189, 628 S.E.2d 787, 794-95 (2006).

Here, the specific grounds for mistrial alleged are (1) the response by a witness for the State on direct examination, and (2) subsequent questions by the State. Specifically, defendant contends that the State's references to a "field test" administered on the "rocklike white substance" presented the jury with inadmissible and highly prejudicial evidence that compromised defendant's ability to receive a fair trial. The transcript reveals that, after testifying about the initial vehicle stop of defendant, Officer Krawczyk offered the following testimony on direct examination:

> Q. What did you do?
>
> A. I then *field-tested* the -
>
> [DEFENSE COUNSEL]: Objection.
> THE COURT: sustained.
>
> Q. After *field-testing* the substance what did you -
>
> [DEFENSE COUNSEL]: Objection.
> THE COURT: Sustained.
>
> Q. After the *field-test* -
>
> COURT: Sustained.
>
> Q. Did you have any other further contact with the defendant?
>
> A. I did.
>
> Q. And where was that?
>
> A. After the *field-test*.
>
> [DEFENSE COUNSEL]: Objection.
> THE COURT: sustained.
> [DEFENSE COUNSEL]: Move to strike, Judge.
> THE COURT: Motion to strike is allowed. Don't consider anything about any field test. . . .

(JURY LEAVES THE COURTROOM AT 2:18 P.M.)

. . . .

[DEFENSE COUNSEL]: Judge, I'm asking for a mistrial at this point. I think I've heard [field test] at least four or five times from this officer --

THE COURT: I heard it three times.

. . . .

THE COURT: Okay. The motion for a mistrial is denied at this time.

Though the trial court denied defense counsel's motion for a mistrial, the trial court nevertheless: (1) sustained defendant's objections; (2) allowed defendant's motion to strike and instructed the jury not to "consider anything about any field test"; (3) removed the jurors from the courtroom after repeated mention of the term "field-test"; and (3) gave a curative instruction immediately following the jurors' return to the courtroom. Thus, it does not appear from the record that the trial court abused its discretion in denying defendant's first motion for a mistrial.

Defendant further argues that the trial court abused its discretion because the trial court informed the prosecutor that one more mention of a "field test" would require a mistrial. Thereafter, in closing arguments, the State mentioned "field test." The trial court excused the jury, and outside of the presence of the jury, determined that the remark was an inadvertent "slip of the tongue." The trial court reached this conclusion because it was uttered in the context of a "laboratory test" conducted by the SBI as opposed to the "field test" conducted by the Officer

Krawczyk. *See State v. Taylor*, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008) ("In determining whether [prosecutor's closing] argument was grossly improper, this Court considers 'the context in which the remarks were made[.]'") (quoting *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41 (1994)). The trial court again denied defense counsel's motion for a mistrial, and instructed each juror "not to consider field test in any way at all." The trial court further questioned each juror individually regarding his or her ability to follow the instruction.

In light of the fact that the testimony at issue consisted of brief references to a "field test," followed by timely objections, "[w]e believe that the court's prompt action in striking the testimony and so instructing the jury was sufficient to cure any possible prejudice." *State v. Monk*, 63 N.C. App. 512, 521, 305 S.E.2d 755, 761 (1983). "It is well-settled that where the trial court withdraws incompetent evidence and instructs the jury not to consider that evidence, any prejudice is ordinarily cured." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Jurors are assumed to have sufficient intelligence to understand and comply with the court's instructions and are presumed to have done so." *Monk*, 63 N.C. App. at 521, 305 S.E.2d at 761.

In light of the brief testimonial remarks at issue, followed by prompt remedial action by the trial court, we are not persuaded that defendant's case suffered "substantial and irreparable prejudice." N.C.G.S. § 15A-1061. This assignment of error is overruled.

B. Statements Following Arrest

Defendant contends that the trial court committed plain error by failing to exclude Officer Johnson's testimony pertaining to statements defendant made following his arrest. In essence, defendant contends that he was subjected to custodial interrogation. We disagree.

"Where, as here, a criminal defendant fails to object to the admission of certain evidence, the plain error analysis . . . is the applicable standard of review." *State v. Ridgeway*, 137 N.C. App. 144, 147, 526 S.E.2d 682, 685 (2000). Plain error is a "'*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002, *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "Under the plain error standard of review, defendant has the burden of showing: '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.'" *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135 (2004) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)). "In determining whether the error rises to plain error, the appellate court examines the entire record and decides whether the 'error had a probable impact on the jury's finding of guilt.'" *State v. McLean*, No. COA09-1602, 2010 WL 2650567, at *2 (2010) (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 379).

"'*Miranda* warnings . . . are required only when an individual is being subjected to custodial interrogation. "Custodial interrogation" means questioning *initiated by law enforcement* officers after a person has been taken into custody[.]'" *State v. Kincaid*, 147 N.C. App. 94, 101, 555 S.E.2d 294, 300 (2001) (citations omitted) (emphasis added); *see Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966) (custodial interrogation requires questioning be initiated by law enforcement). "'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.'" *In re D.L.D.*, __ N.C. App. __, __, 694 S.E.2d 395, 402 (2010) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300, 64 L. Ed. 2d 297, 307 (1980)).

In the present case, even though defendant was under arrest and as a consequence "in custody," defendant's *Miranda* rights were not violated because his inculpatory statements were not made during a custodial interrogation. The record indicates that *defendant* approached Officer Johnson stating that he had "some information to give [him]," and that he would help the officer out. Defendant stated that he would like to assist in providing information to police personnel. Thereafter, defendant offered information concerning the drugs seized from his vehicle. From this exchange, it is clear that defendant initiated the conversation which led to his inculpatory statements. Thus, defendant did not make the inculpatory statements in the context of a police-initiated interrogation, and it was not required that

defendant be informed of his *Miranda* rights. *See State v. Holcomb*, 295 N.C. 608, 611-12, 247 S.E.2d 888, 891 (1978) (although defendant was in custody, evidence did not result from "custodial interrogation" where police did not initiate questioning).

Because defendant's statements were voluntary and initiated by himself, "defendant was not entitled to the protections of *Miranda* and its progeny." *State v. Little*, __ N.C. App. __, __, 692 S.E.2d 451, 457 (2010). Therefore, the trial court's admission of defendant's statements did not amount to a miscarriage of justice. Moreover, given the weight of the State's evidence, aside from Officer Johnson's testimony, we are not convinced that defendant has demonstrated that the jury would have likely reached a different verdict than it otherwise reached. This assignment of error is overruled.

C. Motion to Dismiss

Defendant argues that the trial court erred in denying his motion to dismiss the charge of possession of cocaine. Defendant contends that "the State failed to present substantial evidence that [defendant] had knowledge that he had any cocaine in his possession[.]" We disagree.

"The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 526, 644 S.E.2d 615, 623 (2007) (citation omitted). Review in this Court is limited to "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2)

of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Blizzard*, 169 N.C. App. 285, 289, 610 S.E.2d 245, 249 (2005) (citation and quotation marks omitted). This Court "'must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.'" *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 926 (1996) (quoting *State v. Saunders*, 317 N.C. 308, 312, 345 S.E.2d 212, 215 (1986)). "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *State v. Johnson*, __ N.C. App. __, __, 693 S.E.2d 145, 148 (2010).

For a conviction of felonious possession of cocaine under N.C. Gen. Stat. § 90-95(a)(3), the State is required to prove that a defendant "knowingly possessed" a controlled substance. *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977). "Possession of a controlled substance may be either actual or constructive." *State v. Anderson*, 76 N.C. App. 434, 438, 333 S.E.2d 762, 765 (1985).

In this case, defendant maintains that the State has failed to provide sufficient evidence that defendant had actual knowledge of the presence of the cocaine in his vehicle. Defendant claims that even though the cocaine was in his vehicle, there was no evidence presented to show that he knew it was there. Under the doctrine of constructive possession, however, "'possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily *the questions will be for the jury*.'"

State v. Butler, 147 N.C. App. 1, 11, 556 S.E.2d 304, 310-11 (2001) (citation omitted), *aff'd*, 356 N.C. 141, 567 S.E.2d 137 (2002). "'Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the drugs.'" *Id.* at 10-11, 567 S.E.2d at 310-11 (quoting *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996); *see State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972) ("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.").

The evidence in this case, taken in the light most favorable to the State, indicates that defendant constructively possessed cocaine in his vehicle. Defendant was the subject of a lawful traffic stop, and the registered owner of the vehicle. Defendant was the sole occupant of the vehicle. The contraband was discovered next to the driver's seat, and was located in plain view of the police. Defendant later initiated a conversation with the police, where he admitted that he purchased cocaine. This evidence clearly supports a reasonable inference that the cocaine was in defendant's possession with his knowledge, and therefore, defendant's motion to dismiss was properly denied. This assignment of error is overruled.

D. Sentencing and Habitual Felon Status

Lastly, defendant contends that his sentence is cruel and unusual in violation of the Eighth Amendment of the United States Constitution and sections 19 and 27 of article I of the North Carolina Constitution. We disagree.

"[B]oth this Court and our Supreme Court have rejected constitutional challenges to the Habitual Felon Act based on allegations of cruel and unusual punishment." *State v. McIlwaine*, 169 N.C. App. 397, 403, 610 S.E.2d 399, 403 (2005). "Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983). "[T]his Court has on several occasions affirmed the sentence of a defendant as an habitual felon where the defendant was convicted of an underlying Class H or Class I felony." *State v. Clifton*, 158 N.C. App. 88, 95-96, 580 S.E.2d 40, 45 (2003). "Further, as noted by the United States Supreme Court, when deciding whether a sentence is grossly disproportionate, 'we must place on the scales not only [a defendant's] current felonies, but also his . . . history of felony recidivism.'" *Id.* at 96, 580 S.E.2d at 46 (quoting *Ewing v. California*, 538 U.S. 11, 29, 155 L. Ed. 2d 108, 112 (2003)).

Here, defendant points to the "lack of any violence, firearms, or selling or trafficking drugs in his criminal history." Defendant claims that he is a drug addict, and that his sentence is cruel and unusual because he uses drugs instead of selling them.

This Court is not the proper forum for addressing defendant's concerns. The General Assembly has enacted our drug laws to protect the citizens of this State in accordance with the policies they have been elected to implement. There is no question that defendant's prior felony convictions, all connected to drugs, were, in fact, felonies. Since defendant has failed to demonstrate that his sentence is "grossly disproportionate" in relation to the number of felonies he has committed in the past, we find no error with the jury's verdict convicting him of being an habitual felon. This assignment of error is overruled.

No error.

Judges McGEE and STROUD concur.

Report per Rule 30(e).