NO. COA11-701

NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Pitt County
No. 06 CRS 61617

TERVOR CORTEZ CHATMAN

Appeal by Defendant from judgments entered 17 August 2010 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 9 November 2011.

Attorney General Roy Cooper, by Assistant Attorney General Tina Lloyd Hlabse, for the State.

Haral E. Carlin for Defendant.

STEPHENS, Judge.

Evidence and Procedural History

On 9 June 2008, Defendant Tervor Cortez Chatman was indicted for possession with intent to sell or deliver cocaine and possession of drug paraphernalia. The charges arose from the events of 4 December 2006. The evidence at trial tended to

show the following: On that date, Defendant was inside a friend's apartment with her permission. Officer Chris Harrison and other officers with the Greenville Police Department ("GPD") responded to the apartment to investigate a report of breaking and entering. Harrison handcuffed and frisked Defendant (finding no contraband or weapons) before transporting him to the police station in the rear of his patrol car. The car had a partition and metal caging which completely separated the rear seat from the front seat. After learning that Defendant had permission to be at the apartment, GPD detectives released him. Harrison then drove Defendant back to his own car and, after Defendant got out of the patrol car, Harrison discovered three bags of white powder and a straw under the rear seat. Harrison arrested Defendant. After qualifying as an expert in forensic chemistry, State Bureau of Investigation chemist Irvin Alcox testified the powder was cocaine. Harrison testified that he always searched the rear seat of his patrol car before and after it was occupied. Specifically, he searched the rear seat before driving Defendant back, and Harrison was "[a] hundred percent" certain the bags and a straw had not been under the seat.

At the close of the State's evidence, Defendant moved to dismiss. The trial court denied the motion. Defendant did not

present any evidence, but did renew his motion to dismiss, which the court again denied. Following trial, on 17 August 2010, a jury found Defendant guilty on both charges, and the trial court sentenced him in accordance with the Structured Sentencing Act. On 15 December 2010, this Court allowed Defendant's petition for writ of *certiorari* to review the judgments.

Discussion

Defendant makes five arguments: that the trial court erred in (1) denying his motion to dismiss, and (2) overruling his objection to Harrison's testimony about the weight of the cocaine; and committed plain error in (3) allowing Alcox's testimony about the weight of the cocaine, (4) instructing the jury on constructive possession, and (5) failing to instruct on the testimony of expert witnesses. We affirm the court's denial of Defendant's motion to dismiss and find no error in Defendant's trial.

Motion to Dismiss

Defendant first argues that the trial court erred in denying his motion to dismiss. We disagree.

> In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged has been presented, and that defendant was the perpetrator of the offense. . . . Substantial evidence is such

> relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence.

State v. Boyd, 154 N.C. App. 302, 305, 572 S.E.2d 192, 195 (2002) (internal citations and quotation marks omitted), *cert. denied*, 357 N.C. 463, 586 S.E.2d 104 (2003).

Defendant contends that the State's evidence was insufficient to prove that he possessed cocaine (a necessary element of possession with intent to sell or deliver cocaine) or the straw (a necessary element of possession of drug paraphernalia). *See* N.C. Gen. Stat. §§ 90-95(a)(1), 90-113.22 (2009). As there was no evidence that Defendant was in actual possession of the cocaine and straw, the State proceeded on a theory of constructive possession.

> Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that [the] defendant had the intent and capability to exercise control and dominion over the controlled substance. Where contraband is found on premises under the control of the defendant, that in itself is sufficient to go to the jury on the question of constructive possession. However, unless the person has exclusive possession of the place where the narcotics are found, the

> State must show other incriminating circumstances before constructive possession may be inferred.

Boyd, 154 N.C. App. at 306, 572 S.E.2d at 195 (internal citations and quotation marks omitted).

Here, Harrison testified that he searched the rear seat before driving Defendant back. Harrison was "[a] hundred percent" certain the bags and straw had not been under the seat before Defendant got into the rear seat. Defendant was the only person in the rear seat, and this part of the patrol car was completely separated from the front seat. Immediately after Defendant got out of the rear seat, Harrison discovered the cocaine and straw. This evidence would permit a reasonable jury to infer either that Defendant was in exclusive control of the rear seat during the relevant time period or that there were "other incriminating circumstances" beyond Defendant's mere presence in the rear of the patrol car. Because either scenario could constitute constructive possession, the trial court properly denied Defendant's motion to dismiss. Accordingly, we affirm the court's ruling.

Testimony Regarding the Weight of the Cocaine

Defendant also argues the court erred in overruling his objection to Harrison's testimony about the weight of the

cocaine and committed plain error in permitting Alcox to present the same testimony. Specifically, Defendant contends that because the weight of cocaine is not an element of possession with intent to sell or deliver, this evidence was irrelevant. We disagree.

> Evidence is admissible at trial if it is relevant and its probative value is not substantially outweighed by, among other things, the danger of unfair prejudice. Relevant evidence is defined as any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401 sets a standard to which trial judges must adhere in determining whether proffered evidence is relevant; at the same time, this standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has *any* logical tendency to prove any fact that is of consequence. Thus, even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal.

State v. Wallace, 104 N.C. App. 498, 501-02, 410 S.E.2d 226, 228 (1991) (internal citations and quotation marks omitted), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). In addition, where a party fails to object to the admission of evidence, we review only for plain error, which requires a

showing "that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

Here, Alcox testified that the powder discovered in the rear seat was 1.1 grams of cocaine and Defendant did not object. Defense counsel had cross-examined Harrison about whether any contraband was discovered during his frisk of Defendant before Harrison took Defendant to the police station. Harrison explained that he had only frisked Defendant and had not checked inside his waistband, pockets, or clothing. Although weight is not an element of the offense charged, we conclude that the relatively small amount of cocaine was relevant here because it could explain how Harrison might have missed it when frisking Defendant. Thus, we see no error in the admission of Alcox's testimony. Further, Defendant does not explain how knowing the weight of the cocaine likely altered the jury's verdict. A mere "assertion of plain error, without . . . analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule." *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). This argument is overruled.

Defendant did object when Harrison testified about the amount of cocaine. However, "[w]here evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995). As discussed *supra*, Defendant did not object to Alcox's testimony about the weight of the cocaine. Because Defendant thereby waived his objection to Harrison's testimony, we overrule this argument.

Jury Instructions

Defendant argues plain error in the court's instructions to the jury on constructive possession. We disagree.

At the charge conference, Defendant did not object to the court's proposed instructions and thus we review only for plain error. *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. The trial court instructed the jury using the pattern jury instruction for constructive possession, N.C.P.I.—Crim. 104.41. After defining constructive possession, the court stated:

> A person's awareness of the presence of the substance and his power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances.
>
> If you find beyond a reasonable doubt that a substance was found in close physical

> proximity to a place where the defendant had been, *that would be a circumstance from which, together with other circumstances, such as time*, that you may infer that the defendant at the time that he was in that place, was aware of the presence of the substance and had the power and intent to control its disposition or use.
>
> However, the defendant's *physical proximity, if any, to the substance does not by itself permit an inference* that the Defendant was aware of its presence or had the power or intent to control its disposition or use. Such an inference *may be drawn only from this and other circumstances* that you find from the evidence beyond a reasonable doubt.

(Emphasis added). As discussed *supra*, the State presented substantial evidence that Defendant had exclusive control of the rear seat of the patrol car between the time Harrison inspected it and found no contraband and his later discovery of same. Further, the court stated *three times* in the instruction that proximity alone was not sufficient to support an inference of constructive possession, the correct standard in cases of non-exclusive constructive possession. We see no error, let alone plain error, in the instruction given. Accordingly, this argument is overruled.

Defendant also argues that the court committed plain error in failing to give the pattern jury instruction on testimony of expert witnesses. We disagree.

Because at trial Defendant did not object to the court's proposed instructions or specifically request an instruction on the testimony of expert witnesses, we review only for plain error. *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. Defendant contends that, in the absence of the pattern jury instruction on testimony of expert witnesses (N.C.P.I. Crim.—104-94), the jury may have felt "required to accept" Alcox's testimony that the substance Harrison recovered was cocaine hydrochloride, a Schedule II substance. However, the trial court did instruct the jury as follows:

> You are the sole judges of the credibility of each witness.
>
> You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of what a witness has said on the stand.
>
> In determining whether to believe any witness, you should apply the same tests of truthfulness that you apply in your everyday affairs. As applied to this trial, these tests may include: the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias, or partiality the witness may have; the apparent understanding and fairness of the witness; whether the witness's testimony is reasonable; and whether the testimony of the witness is consistent with other believable evidence in the case.

> You are the sole judges of the weight to be given to any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.

"[E]xpert testimony should be subject to the tests that are ordinarily applied to the evidence of other witnesses and to the court's instruction that the jury must find the facts upon their own sound judgment." *Hedgpeth v. Coleman*, 183 N.C. 330, 336-37, 111 S.E. 517, 520 (1922). Thus, the trial court instructed the jury correctly on the standard to apply in evaluating Alcox's testimony, and we see no error. Further, Defendant does not explain how the failure to give the instruction on expert testimony was prejudicial. The contested issue at trial was whether Defendant or some other person left the powder in the patrol car, not whether the powder was, in fact, cocaine.[1] Thus, even were there error in the jury instructions, it would not rise to the level of plain error. We overrule this argument.

NO ERROR.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).

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[1]The only questions defense counsel asked Alcox were whether fingerprint analyses were requested or performed on the bags.