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NO. COA01-1477

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v.

BRIAN KEITH PERSON

Pitt County
Nos. 00 CRS 53833
00 CRS 53834

Appeal by defendant from judgments entered 25 July 2001 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Gaines M. Weaver, for the State.

James M. Bell for defendant-appellant.

THOMAS, Judge.

Defendant, Brian Keith Person, appeals convictions of marijuana possession, keeping and maintaining a motor vehicle used for the purpose of unlawfully keeping or selling a controlled substance, and possession of drug paraphernalia. The trial court sentenced defendant to two consecutive forty-five day terms of imprisonment.

On 31 March 2000, Officer J.C. Curry and Sergeant Phipps were in their patrol vehicle. Curry noticed a man approaching the driver's side of a burgundy Nissan Sentra, which was occupied by

two men. The driver of the Nissan looked up, saw the marked police car, and sped off. Curry checked the vehicle tags through communications and was notified that the Nissan was registered to defendant and was not covered by insurance. Curry activated the patrol vehicle's blue lights and pulled the Nissan over.

As Curry and Phipps walked toward the Nissan, it sped off. They eventually pulled the car over again. Defendant remained in the passenger's seat while the driver of the Nissan, defendant's brother, ran. Curry observed defendant's brother drop a small item on the ground when he exited the vehicle. Curry also noticed a small bag of marijuana under one of defendant's legs.

Police located a cigarette pack containing a bag of marijuana and four small purple zip-lock bags containing crack on the ground near the Nissan. They also found two zip-lock bags of crack inside the Nissan.

After Curry gave defendant his *Miranda* rights, defendant made a statement. He initially said that all of the drugs were his, but later claimed the crack was not his. Defendant said that he had initially told them the drugs were his because he did not want his brother to go to jail for three years.

At trial, Curry testified that police seized \$41 in cash and a pager from defendant and \$34 from defendant's brother. Over defendant's objection, Curry testified that "[i]t's not uncommon to see people that we arrest for violations of controlled substances have a pager[.]"

Defendant testified that his mother gave him the pager so

"[s]he [could] get in touch with me." He said when he and his brother were in the police vehicle, his brother told him "to take the blame for him because he was facing time." The trial court sustained the State's objection to defense counsel's question regarding the amount of time defendant's brother was asking defendant "to take the blame for." Defendant appeals.

By defendant's first assignment of error, he argues the trial court erred by allowing Curry to testify about defendant's pager. We disagree.

During direct examination of Curry, the following questioning occurred:

Q: Based upon your training and experience, finding a pager on the subject, is that on a subject that's in possession of controlled substances, would that suggest anything to you?

[DEFENSE COUNSEL]: Objection.

THE COURT: The objection is overruled.

A: It's not uncommon to-to see people that we arrest for violations of controlled substances have a pager or some type of communications with them. As a matter of fact, it's very - it's very rare that they do not have some type of communications system with them. They use it on - several operations that I've done in the past[.]

[DEFENSE COUNSEL]: Objection, Your Honor. Involves hearsay.

THE COURT: Sustained as to your portion.

Defendant asserts Curry's response led the jury "to believe that mere possession of a pager implicated defendant as a member of the illegal drug trade." He argues that the "prejudicial weight of

police opinion as to what a pager suggested far outweighed any legitimate ground for admission of such testimony[.]”

We first address the State's argument that defendant did not preserve this issue for appellate review. Generally, “[t]his Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal.” *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); see also N.C. R. App. P. 10(b)(1).

Here, defendant did not object to the testimony based on it being improper opinion testimony as he now asserts for the first time. Rather, defendant only objected on the grounds of hearsay. The trial court ruled in defendant's favor by sustaining defense counsel's objection as to the hearsay portion of Curry's testimony.

Moreover, defendant did not ask for the hearsay portion of the testimony to be stricken. When a trial court sustains a defendant's objection, and the defendant fails to move to strike the objectionable testimony, he waives his right to assert on appeal error arising from the objectionable testimony. *State v. Barton*, 335 N.C. 696, 709-10, 441 S.E.2d 295, 302 (1994). We thus reject this argument.

By defendant's second assignment of error, he argues the trial court erred by excluding hearsay statements allegedly made by defendant's brother to defendant when the two men were being transported to the police station. On direct examination, defendant testified that his brother “told me to take the blame for him because he was facing time.” The State objected when defense counsel asked defendant what kind of time his brother asked him “to

take the blame for." The trial court sustained the State's objection and further objections regarding statements made to defendant by his brother. Defendant asserts that his brother's statements should have been admitted under Rule 804(b)(3) of the North Carolina Rules of Evidence.

Rule 804(b)(3) states that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(3) (1999). Rule 804(b)(3) requires a two-pronged analysis. *State v. Wilson*, 322 N.C. 117, 134, 367 S.E.2d 589, 599 (1988). First, the statement must be "deemed to be against the declarant's penal interest." *Id.* Second, "the trial judge must be satisfied that corroborating circumstances clearly indicate the trustworthiness of the statement if it exposes the declarant to criminal liability." *Id.*

Here, the trial court allowed defendant to testify that his brother asked him to "take the blame" because his brother was facing jail time. The fact that defendant's brother was facing a specific amount of jail time does not subject him to criminal liability. Furthermore, there were no corroborating circumstances to indicate the trustworthiness of the statements. Finally,

defendant has failed to show that there exists any reasonable possibility that the outcome of the trial would have been any different had the testimony been allowed. N.C. Gen. Stat. § 15A-1443 (1999). *State v. Hardy*, 104 N.C. App. 226, 238, 409 S.E.2d 96, 102 (1991) ("An error is not prejudicial unless a different result would have been reached at the trial if the error in question had not been committed.") Accordingly, the trial court properly excluded the statements.

Defendant has abandoned his remaining assignments of error.

NO ERROR.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).