NO. COA01-993

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v. Durham County
No. 99CRS70775

WILLIAM MORRIS McQUAIG

Appeal by defendant from judgment entered 26 January 2001 by Judge Evelyn W. Hill in Durham County Superior Court. Heard in the Court of Appeals 8 April 2002.

*Attorney General Roy Cooper, by Special Deputy Attorney General George W. Boylan, for the State.*

*Douglas T. Simons for defendant-appellant.*

TYSON, Judge.

William Morris McQuaig ("defendant") was charged with felony possession with intent to sell and deliver cocaine and misdemeanor possession of drug paraphernalia. The State's evidence tended to show that Bobby Lewis and Bobby McClure were drinking at Lewis' home when defendant arrived on the evening of 28 November 1999. Defendant told Lewis and McClure that he needed to make a run. Lewis asked defendant what he meant, whereupon defendant pulled out a bag of cocaine and explained that a "run" meant to get money for cocaine. Defendant gave McClure cocaine to drive him to "make his

run." The three men subsequently left in defendant's vehicle--McClure driving, Lewis in the front passenger seat, and defendant in the backseat with the cocaine. Durham Police Officer D.J. Osmond stopped the vehicle driven by McClure when the vehicle ran a red light. Another Durham Police Officer, C.H. Chappell, arrived on the scene. McClure was arrested for DWI and various other traffic offenses. During a search made incident to a lawful arrest, Officer Chappell retrieved a "push rod," used in crack cocaine pipes, from the driver's pocket. The officer asked Lewis and defendant to exit the vehicle. Lewis, who had an outstanding warrant for his arrest, attempted to flee on foot. When both officers gave chase, defendant remained standing by the vehicle. The officers subsequently apprehended Lewis and placed him under arrest. Officer Osmond also arrested defendant after Officer Chappell told Officer Osmond that he had found drugs by defendant's feet in the back of the car. The search incident to defendant's lawful arrest yielded cash and a pager. The search did not yield any drugs or weapons on defendant's person. The cocaine found by defendant in the back of the car was packaged as if for sale, and the pager found on his person, had more than twenty messages.

Defendant presented the testimony of his wife, Tamaria McCollum. McCollum testified that she repeatedly called her husband on his pager on the evening in question, and that she customarily gave him money from her rental properties to pay their expenses, and that she has seen Lewis use cocaine at his house on previous occasions. Bobby McClure also testified for defendant.

McClure refuted Lewis' testimony that defendant had given him cocaine to drive that evening. McClure stated that it was Lewis who asked him to drive the night of the arrest.

The jury found defendant guilty as charged. The trial court, by consolidated judgment, sentenced defendant to fifteen to eighteen months imprisonment. Defendant appeals.

Defendant did not object to the trial court's jury charge before the jury retired as required by N.C.R. App. P. 10(b)(2) in order to preserve the issue for appeal. In his sole assignment of error, defendant argues that the trial court committed plain error in instructing the jury. *See State v. Odom,* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Defendant contends that the trial court's instruction that "merely being present at or near the scene does not make a person guilty of the crime charged," was prejudicial error. We have reviewed the transcript and cannot find this misstatement in the trial court's instruction.

It is well settled that "[w]here 'a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance.'" *State v. Clegg*, 142 N.C. App. 35, 46, 542 S.E.2d 269, 277, *appeal dismissed and disc. review denied*, 353 N.C. 453, 548 S.E.2d 529 (2001) (quoting *State v. Garner,* 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995) (citations omitted)). It is equally settled that a court's instruction will not be taken in isolation, but will be viewed as a whole. *See State v. Boykin*, 310 N.C. 118, 125, 310 S.E.2d 315, 319 (1984).

Here, defendant requested that the trial court give the following instruction on "mere presence" to the jury:

> A person is not guilty of a crime merely because he is present at or near the scene where a crime is alleged to have been committed. Merely being present at or near the scene, does not make a person guilty of the crime charged.
>
> To find the Defendant guilty, the prosecution must prove beyond a reasonable doubt by competent evidence that Mr. McQuaig did actually commit or actively aid in committing this crime.
>
> In this case, the mere presence of Mr. McQuaig at or near the scene where the crime is alleged to have occurred is not sufficient evidence for a finding of guilt.

The trial court gave the following instruction:

> Possession of a substance may be either actual or constructive. . . . .
>
> A person has constructive possession of a substance if he does not have it on his person but is aware of its presence, and has either by himself or together with others, both the power and intent to control its disposition or use. 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 the defendant, that would be a circumstance from which, together with other circumstances, you may infer that the defendant 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 which you find from the evidence beyond a reasonable doubt.
>
> And, second, that the defendant intended to sell or deliver the cocaine. Intent is seldom, if ever, provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.
>
> . . . .
>
> A person is not guilty of a crime merely because he is present at or near the scene where a crime is alleged to have been committed. *Merely being present at or near the scene does not make a person guilty of the crime charged.*

(Emphasis supplied). Reading this portion of the court's charge, it immediately becomes clear that the trial court did give defendant's requested instruction, "'at least in substance.'" *See Clegg*, 142 N.C. App. at 46, 542 S.E.2d at 277 (quoting *Garner*, 340 N.C. at 594, 459 S.E.2d at 729 (citations omitted)). This assignment of error is overruled.

No error.

Judges GREENE and HUDSON concur.

Report per Rule 30(e).