NO. COA02-340

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

STATE OF NORTH CAROLINA

v. Wake County
Nos. 00 CRS 68406
00 CRS 68407

JOSE LUIS MACIAS

Appeal by defendant from judgments dated 26 January 2001 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 30 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General David G. Heeter, for the State.

John T. Hall, for defendant-appellant.

McGEE, Judge.

Jose Luis Macias (defendant) was charged with trafficking in cocaine by possession and tracking in cocaine by transportation. At trial, Miguel Uriv Rios (Rios) testified he met defendant approximately three weeks before he and defendant were arrested. Defendant told Rios, an admitted drug dealer, that he had some cocaine and he gave Rios a sample.

Rios testified he was asked by an individual named Pajuan for some cocaine. Defendant indicated that he could provide a kilo of cocaine for the sale to Pajuan. Rios arranged for the sale of the cocaine to Pajuan. Defendant said he wanted $24,000.00 for the

kilo of cocaine. Rios was to make $500.00 from the sale to Pajuan.

Rios and his girlfriend, Maria Castro Guzman (Guzman), met defendant at a trailer off Highway 401 in Wake County on 2 August 2002. While at the trailer, defendant showed Rios the cocaine in the trunk of defendant's white Honda. Rios and Guzman drove in Rios' van from the trailer to a Sam's Club on South Saunders Street in Raleigh. Defendant followed Rios' van to the Sam's Club in defendant's white Honda. When Rios and defendant arrived at the Sam's Club, defendant parked his car a few parking spaces away from Rios' van. Rios exited his van and walked towards the Sam's Club. Defendant opened up the trunk of his car and took out a couple of white bags and placed them in Rios' van.

Pajuan changed the location of the transaction to the Innkeeper Motel. When Rios got back into his van, defendant was already sitting in the middle seat located behind Rios and Guzman. Defendant had a white bag either under his feet or under the seat, which Rios testified he believed contained cocaine. As Rios and defendant were leaving the Sam's Club parking lot to drive to the Innkeeper Motel, Raleigh police stopped them. Rios ran but was apprehended a short distance away. Pajuan was a confidential informant for the police. The police found a plastic bag containing powder cocaine in the passenger compartment of the van, where defendant had been sitting. Defendant stipulated that a laboratory analysis showed the bag contained 993.1 grams of cocaine.

Before defendant's trial, Rios pleaded guilty to trafficking

in cocaine by possession and trafficking in cocaine by transportation. Rios testified that while he was in jail he received some letters in Spanish, which he understood were written by defendant, who was also in the same jail. Rios testified that while he and defendant were in the exercise yard at the jail, defendant told him that he would write a letter to Rios. Rios saw defendant hand letters to the "hall man" or "cleanup man" at the jail, who delivered them to Rios.

On direct examination, Rios read the letters in Spanish and then testified about them in English. Rios stated that through the letters, defendant offered him $3,000.00 and either the white car or the money from the sale of the white car, if he would take all the blame for the drug transaction. Rios initially informed defendant that he would accept the offer. However, Rios testified that after defendant's wife had paid money into Rios' jail account, for which Rios had the deposit receipt, Rios changed his mind and rejected defendant's offer. When the letters were introduced into evidence, English translations were attached to them. The translations had been prepared by Officer Campos, who was fluent in Spanish. Defendant did not object to admission of the letters or the attached translations.

The first day of trial ended after Rios' direct examination and a portion of his cross-examination had occurred. During the first day of the trial, an interpreter, Gonzalo Herrera (Herrera), sat behind Rios while he was testifying, in order to assist Rios if any assistance was needed. Judge Howard E. Manning, Jr. replaced

Judge James Spencer, the trial judge from the first day of trial, because Judge Spencer was ill. On the second day of the trial, defendant objected to Herrera assisting Rios during Rios' testimony on the previous day. Defendant moved to strike Rios' testimony and for a mistrial. The trial court determined that any assistance Herrera gave Rios, although it was not clear that Herrera ever translated anything for Rios, was rendered by Herrera only during the last twenty-five minutes of the first day, while Rios was being cross-examined by defendant's attorney. The trial court denied defendant's motions but permitted defendant to begin his cross-examination of Rios anew, using the court-appointed interpreter, Bibi Rodriguez (Rodriguez), not Herrera, in case Rios needed assistance.

The jury found defendant guilty of one count of trafficking in cocaine by possession and one count of trafficking in cocaine by transportation. Defendant appeals from the convictions.

I.

Defendant argues the trial court erred in refusing to allow a qualified interpreter of Spanish to English to testify about an alternative translation of certain letters introduced by the State, on the grounds that the trial court's actions violated defendant's state and federal constitutional rights to due process and equal protection.

At the close of the State's evidence, defendant called the court-appointed interpreter, Rodriguez, as a witness to challenge the interpretation of certain words in the letters introduced by

the State. Defendant specifically contested the interpretation of the Spanish word "papales" and a phrase about his codefendants. Defendant contended that the word "papales" could not mean thousands of dollars in money, as the State translation stated.

The trial court ruled that the interpreter would not be permitted to testify as to the meaning of the word "papales." The trial court stated that defendant had the opportunity to cross-examine Rios about the letters and Officer Campos' translations of the letters, and that defendant had ample chance to contest the State's translation of the word "papales." The trial court stated defendant was attempting to directly challenge testimony by Rios concerning the letters long after the letters and Rios' translation of the word "papales" had been admitted without objection. In fact, during the cross-examination of Rios, defendant directly challenged Rios' translation of the words in question before the jury. During cross-examination, Rios disagreed with defendant's translation of the word "papales," but he agreed with defendant's characterization of the phrase concerning the codefendants.

Despite the unusual nature of the proceedings, defendant's only assignment of error concerning the use of translators and the translations offered is that the trial court's refusal to allow the court-appointed translator to testify about alternative meanings of the word "papales" and a few other phrases in the letters violated defendant's state and federal constitutional rights to due process and equal protection. The scope of review on appeal is limited to those issues presented by assignment of error. *Koufman v. Koufman*,

330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991) (citing N.C.R. App. P. 10(a)). As defendant states in his brief, defendant failed to raise these constitutional issues at trial. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473, *cert. denied*, ___ U.S. ___, ___ L. Ed. 2d ___ (2002) (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)). This assignment of error is overruled.

II.

Defendant next argues that the trial court erred by denying his motion to dismiss the charges for insufficiency of the evidence. In *State v. King*, our Supreme Court stated that

> [t]he law concerning motions to dismiss is well settled. "If there is substantial evidence-whether direct, circumstantial, or both-to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991). The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal. *Id.* at 99, 261 S.E.2d at 117.

State v. King, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996).

Defendant was charged with trafficking in cocaine by possession and trafficking in cocaine by transportation in

violation of N.C. Gen. Stat. § 90-95(h)(3). The two essential elements of trafficking in cocaine by possession are that "[t]he [cocaine] must be possessed, and the [cocaine] must be knowingly possessed." *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (quoting *State v. Rodgers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977)). "A person [has] 'possession' of [cocaine] within the meaning of G.S. 90-95 if they have the power and intent to control it; possession need not be actual." *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citing *State v. Baize*, 71 N.C. App. 521, 323 S.E.2d 36 (1984), *disc. review denied*, 313 N.C. 174, 326 S.E.2d 33 (1985)). Further, the State need not show that the defendant owned the cocaine or was the only individual with access to it. *Id.* (citations omitted). "[T]he State may overcome a motion to dismiss . . . 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) (citations omitted).

Similarly the two essential elements of trafficking in cocaine by transportation are that (1) the defendant must have transported the cocaine, and (2) the defendant must have transported the cocaine knowingly. *See State v. Outlaw*, 96 N.C. App. 192, 385 S.E.2d 165 (1989), *disc. review denied*, 326 N.C. 266, 389 S.E.2d 118 (1990). Transportation is "'any real carrying about or movement from one place to another.'" *Id.* at 197, 385 S.E.2d at 168 (quoting *Cunard Steamship Co. v. Mellon*, 262 U.S. 100, 122, 67

L. Ed. 894, 901 (1923)). "A conviction for trafficking in cocaine by transportation requires that the State show a 'substantial movement.'" *State v. Wilder*, 124 N.C. App. 136, 140, 476 S.E.2d 394, 397 (1996) (quoting *State v. Greenidge*, 102 N.C. App. 447, 451, 402 S.E.2d 639, 641 (1991)). "Our courts have determined that even a very slight movement may be 'real' or 'substantial' enough to constitute 'transportation' depending upon the purpose of the movement and the characteristics of the areas from which and to which the contraband is moved." *State v. McRae*, 110 N.C. App. 643, 646, 430 S.E.2d 434, 436, *disc. review denied*, 334 N.C. 625, 435 S.E.2d 347 (1993) (citation omitted). "A determination of whether there has been 'substantial movement' involves consideration of '*all* the circumstances surrounding the movement'" *State v. Manning*, 139 N.C. App. 454, 468, 534 S.E.2d 219, 228 (2002), *aff'd per curiam*, 353 N.C. 449, 545 S.E.2d 211 (2001) (quoting *Greenidge*, 102 N.C. App. at 451, 402 S.E.2d at 641).

In *State v. Outlaw*, the defendant was stopped by law enforcement as he was backing out of his driveway with cocaine in his truck. 96 N.C. App. 192, 197, 385 S.E.2d 165, 168-69 (1989). Our Court held there was sufficient evidence to sustain a charge of trafficking, where the evidence tended to show the defendant would have continued on in the car if the agent had not pulled him over. *Id.*

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in its favor, the evidence tended to show that defendant told Rios he could provide a kilo of

cocaine for Rios to sell to Pajuan; defendant had cocaine in the trunk of his car; defendant carried a plastic bag from the trunk of his car; and when defendant got into Rios' van, he put the bag either under his feet or under the seat. When the location of the drug sale changed from the Sam's Club parking lot, defendant and Rios drove in Rios' van out of that parking lot towards the new location of the proposed sale. When police stopped Rios' van, there was a plastic bag containing powder cocaine in the passenger area of the van where defendant had been sitting. Defendant stipulated that the cocaine found was approximately one kilogram. Evidence also tended to show that defendant paid money into Rios' account in order to get Rios to take the blame for the crimes. We hold that viewing the evidence in a light most favorable to the State, the trial court did not err in denying defendant's motion to dismiss.

III.

Defendant next argues the trial court erred in admitting, over defendant's objection, the testimony of Detective Greg Baker that Detective Baker believed Rios was telling the truth during questioning by Detective Baker. Defendant contends that N.C. Gen. Stat. § 8C-1, Rules 608 and 405(a), when read together, prohibit expert opinion testimony as to the credibility of a witness.

"The trial court has wide discretion in determining whether expert testimony is admissible" and the decision is normally within the sound discretion of the trial court. *State v. Owen*, 133 N.C. App. 543, 549, 516 S.E.2d 159, 164, *disc. review denied*, 351 N.C.

117, 540 S.E.2d 744 (1999). We review such decisions for an abuse of discretion. *Id.* at 549, 516 S.E.2d at 164.

Detective Baker testified that

> [w]e re-Mirandized [Rios] with the Spanish version and we asked him the initial questions again, just asked him to tell us about the incident that had just occurred. He again told me that they went to Sam's to buy a car stereo. And at that point I told him that we knew about what was going on than he was letting on [sic]. And I told him that he needed to start telling the truth, and I believe from thereafter he did.

Defendant argues that Detective Baker's qualifications as an expert in law enforcement, even though he was never tendered as an expert, caused the jury to give undue weight to his statement that Rios was being truthful during his questioning. In limited circumstances, a witness can be considered an expert even if that witness is never formally qualified as an expert witness. *See State v. McCoy*, 105 N.C. App. 686, 414 S.E.2d 392 (1992) (noting that, given an agent's opinions were based on many years of personal experience in the field of narcotics, admission of testimony based on that experience amounted to a finding by the trial court that the witness had certain expertise beyond that of the average juror). Defendant bases his argument on N.C. Gen. Stat. § 8C-1, Rules 405(a) and 608, which if "read together, forbid an expert's opinion as to the credibility of a witness." *State v. Heath*, 316 N.C. 337, 342, 341 S.E.2d 565, 568 (1986).

In *State v. Richardson*, 346 N.C. 520, 488 S.E.2d 148 (1997), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 652 (1998), the defendant argued that the trial court erred by allowing a police

officer and an agent of the State Bureau of Investigation to testify that a key witness was telling the truth when he was being questioned. *Id.* at 533-34, 488 S.E.2d at 156. The defendant argued that by using such inadmissible character evidence to strengthen the witness's testimony, the State violated N.C.G.S. § 8C-1, Rules 405 and 608. *Richardson*, 346 N.C. at 534, 488 S.E.2d at 156. The police officer "testified that officers had 'checked out' [the witness's] story, 'taking care to make sure he was telling us the truth.'" *Id.* The officer further testified that "in his opinion, [the witness] had told him the truth." *Id.* The State Bureau of Investigation agent "similarly testified that it appeared that [the witness's] story was true." *Id.*

Our Supreme Court concluded that the police officer and the State Bureau of Investigation agent "were not giving character testimony, but rather explaining their investigation following [the] defendant's implication of [the witness]." *Id.* The Court stated that the officer "was not commenting on [the witness's] general credibility; he merely told the jury that he believed [the witness] had told the truth during the investigation." *Id.* We recognize the fine line between opinion testimony as to a witness's general credibility and the evidence in *Richardson*. Although in *Richardson* the Supreme Court went on to discuss that any assumed error would be harmless before overruling the defendant's assignment of error, we apply the logic employed by the Supreme Court in the analogous case before us.

Detective Baker was not providing general character testimony

in this case, rather he was explaining the course of defendant's questioning. Detective Baker was not commenting on Rios' general credibility, he was simply saying that he believed Rios was telling the truth about the alleged incidents during the questioning after Detective Baker told Rios that he "knew about what was going on." We thus determine that the trial court did not abuse its discretion in admitting Detective Baker's testimony.

Even assuming *arguendo* that the trial court erred in admitting Detective Baker's testimony, defendant must show sufficient prejudice from the admission of the evidence to entitle him to a new trial. *State v. Teeter*, 85 N.C. App. 624, 632, 355 S.E.2d 804, 809, *disc. review denied*, 320 N.C. 175, 358 S.E.2d 67 (1987). Defendant is only entitled to a new trial if he can show a reasonable probability that, had the error not occurred, a different result would have been reached. *Id.* (citing N.C. Gen. Stat. § 15A-1443(a)). Defendant has failed to show a sufficient likelihood that a different result would have occurred at trial had the testimony of Detective Baker concerning his belief about Rios's statements during questioning been excluded. This assignment of error is overruled.

Defendant argues in his brief that the trial court erred in failing to include language in the verdict sheet indicating he was guilty of trafficking in cocaine in an amount greater more than 400 grams; however, defendant did not assign this as error and did not object to it in the trial court below. This argument is not properly before this Court and therefore we do not address it.

N.C.R. App. P. 10(a) (2002).

No error.

Judges HUDSON and BIGGS concur.

Report per Rule 30(e).