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NO. COA02-73

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

STATE OF NORTH CAROLINA

v.

Columbus County
No. 01 CRS 50410

LEGRANDE DURANT, JR.,
Defendant

Appeal by defendant from judgment entered 25 July 2001 by Judge D. Jack Hooks, Jr., in Columbus County Superior Court. Heard in the Court of Appeals 15 October 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M. Manthei, for the State.

Angela H. Brown for the defendant.

BRYANT, Judge.

Defendant Legrande Durant, Jr., was arrested and subsequently indicted for possession of a controlled substance (cocaine) with intent to sell and deliver, and possession of drug paraphernalia. This matter came for jury trial at the 22 July 2001 criminal session of Columbus County Superior Court with the Honorable D. Jack Hooks, Jr., presiding. On 25 July 2001, defendant was found guilty of possession of a controlled substance (cocaine) and possession of drug paraphernalia. Defendant was sentenced to a term of 6-8 months imprisonment, and a term of 45 days imprisonment, with the sentences running consecutively. Both

sentences were suspended and defendant was placed on 30 months supervised probation. Defendant gave notice of appeal on 27 July 2001.

Facts

The State's evidence tended to show the following: On 2 February 2001, Officer Kevin Norris of the Columbus County Sheriff's Department went to a club called "Neck Bones" to investigate complaints of drug activity. Upon arriving at Neck Bones, Officer Norris observed a group of thirty to forty African-American males standing outside of the club. At trial, Officer Norris testified that he saw defendant walk behind the club and drop something; although he did not see what defendant dropped. Officer Norris testified that he immediately went to the area where defendant made the drop, and there he found a pill bottle containing several small packages of what appeared to be a controlled substance. It was later determined that the packages contained cocaine.

Defendant testified on his own behalf, and admitted to being at Neck Bones on 2 February 2001, but denied dropping or owning the pill bottle Officer Norris found. Rather, defendant testified that he went behind the nightclub to urinate because the club did not have a bathroom.

I.

First, defendant argues that the trial court committed plain error when allowing defendant, a black resident of Columbus County, to be tried before a jury pool that was not reflective of the

community's racial demographics. Defendant further argues that this error deprived defendant of his rights which are secured by our state and federal constitutions. We disagree.

Plain error review is to be applied only to exceptional cases. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). Further, our Supreme Court has specified that plain error review is limited only to jury instructions and evidentiary rulings. *State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

The Supreme Court in *Duren v. Missouri*, established a three-prong test to determine whether the right to a fair cross-section in the jury pool has been violated. 439 U.S. 357, 58 L. Ed. 2d 579 (1979). To establish a *prima facie* case of disproportionate representation in the jury pool, a defendant must show: 1) "the group alleged to be excluded is a 'distinctive' group in the community;" 2) "the representation of this group in pools from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and" 3) "this underrepresentation is due to systematic exclusion of the group in the jury selection process." *Duren*, 439 U.S. at 364, 58 L. Ed. 2d at 668.

Our Supreme Court in *State v. Golphin*, has held that African-Americans are a distinctive group for purposes of satisfying the first prong of the *Duren* test. 352 N.C. 364, 393, 533 S.E.2d 168, 191 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Defendant, however, has presented no evidence to this Court (and

apparently failed to present any evidence to the trial court) as relates to the second and third prong of the *Duren* test. Defendant concedes in his brief that "[t]here is no evidence in the record but presumably the jury pool consisted of more than 20 people, therefore there was some disparity in the ratio of [African-American] residents to jurors but the extent is unknown." Defendant then continues to argue that only eight members of the jury pool were African-American, even though approximately forty percent of Columbus County's population is African-American. Based on his unsubstantiated claim concerning the racial demographics of the county population, and based on his guess that the jury pool was not reflective of the county's racial demographics, defendant now argues that the trial court committed plain error in failing to order an evidentiary hearing as to this matter. We disagree.

Defendant has failed to offer any evidence of disparity between the jury pool racial demographics and that of the community at large (second prong of *Duren* test). Moreover, in his brief, defendant concedes that "[Defendant] failed to present any evidence showing that the jury selection process was tainted by the systematic exclusion of African-Americans from the jury pool" (third prong of *Duren* test). In light of the fact that defendant concedes that he has failed to present sufficient evidence in support of all of the prongs of the *Duren* test, and because defendant failed to request an evidentiary hearing on this matter (or otherwise make an offer of proof concerning the disparity), this assignment of error is overruled.

II.

Second, defendant argues that the trial court erred in refusing to admit witness Jimmy Rose's inculpatory statement concerning ownership of the drugs as a statement against interest. In addition, defendant argues that the trial court erred in providing a limiting instruction regarding the purpose for which the jury could consider Rose's inculpatory statement to Officer Norris. We disagree.

At trial, Officer Norris testified that on the night and at the time of defendant's arrest, Rose originally told him that the drugs were Rose's, but then Rose denied owning the drugs. Officer Norris testified that he did not make any further investigation concerning Rose's claim of ownership of the drugs. At trial, Rose testified that he did not tell Officer Norris that the drugs were his.

Defendant sought to have Rose declared to be unavailable and to have Rose's statement to Officer Norris admitted as a statement against interest. The trial court denied defendant's request and admitted Officer Norris's testimony concerning Rose's statement for the limited purpose of showing what effect Rose's statement had on Officer Norris, and whether Norris further investigated Rose's statement.

On appeal, defendant contends that the trial court erred in failing to find Rose to be unavailable pursuant to Rule 804. We disagree.

Under Rule 804 of the North Carolina Rules of Evidence, a

declarant is unavailable as a witness when he: 1) asserts a privilege to prevent him from testifying; 2) refuses to testify despite a court order to do so; 3) testifies to a lack of memory regarding the testimony elicited; 4) is unable to be present at trial due to death or illness; or 5) is absent from trial and the party, after a reasonable effort, has been unable to procure the witness's attendance. See N.C.G.S. § 8C-1, Rule 804 (2001); *State v. Triplett*, 316 N.C. 1, 7-8, 340 S.E.2d 736, 740 (1986).

The trial court found that Rose was present in the courtroom, had not asserted any privilege to prevent him from testifying, had not refused to testify, nor had he demonstrated any lack of memory concerning the subject matter. Moreover, the trial court found that even if Rose had been found to be unavailable, the statement he made against his interest, was not supported by corroborating evidence. See N.C.G.S. § 8C-1, Rule 804(b)(3) (2001) ("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."). Defendant has not presented any evidence to corroborate Rose's statement claiming ownership of the drugs. Therefore, even if the trial court erred in failing to find that Rose was unavailable, the trial court correctly found that Rose's statement could not come in as a statement against his interest due to the lack of corroborating evidence. This assignment of error is overruled.

In addition, defendant argues that the trial court erred in repeating its limiting instruction during the charge to the jury,

regarding Rose's statement to Officer Norris, after having given the same limiting instruction at the time the statement came into evidence. Defendant has failed to cite to any authority for this argument, therefore, this issue is deemed abandoned. N.C. R. App. P. 28.

III.

Third, defendant argues that the trial court committed error in denying his motion to dismiss the charges. Specifically, as relates to the first count of the indictment, defendant argues that there existed insufficient evidence of each element of the offense of possession of a controlled substance with intent to sell and deliver. We disagree.

"In reviewing a motion to dismiss, 'the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant[] being the perpetrator of the offense.'" *State v. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001), *aff'd as modified*, 355 N.C. 266, 559 S.E.2d 788 (2002). When reviewing challenges to the sufficiency of the evidence, the evidence must be viewed in the light most favorable to the State, with the State receiving the benefit of all reasonable inferences to be drawn from the evidence. *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 355 (1988).

Possession of a controlled substance with intent to sell or deliver is a violation of N.C.G.S. § 90-95. Possession may be actual or constructive for purposes of finding a person in

violation of N.C.G.S. § 90-95. *State v. Hamilton*, 145 N.C. App. 152, 155, 549 S.E.2d 233, 235 (2001). Constructive possession occurs when "a person has the intent and capability to maintain control and dominion over [a] thing." *State v. Morris*, 102 N.C. App. 541, 545, 402 S.E.2d 845, 847 (1991). Defendant was found guilty of the lesser included offense of possession of a controlled substance (cocaine).

The State's evidence tended to show: Officer Norris testified that he saw defendant walk away from the crowd, drop something and walk away. Officer Norris testified that he was approximately fifteen to twenty feet away from defendant when he saw him make the drop; and that he never saw defendant "take a pee" as defendant alleged was the reason why he was behind the building.

Officer Norris went to the area where he saw defendant drop something, and found a pill bottle. Officer Norris took note of defendant's attire as Officer Norris went to scan the area. No one else was standing in the area where Officer Norris found the pill bottle. In addition, the pill bottle was the only object laying in that area.

Officer Norris testified that the pill bottle contained fifteen smaller packages of cocaine. Because of the way the drugs were packaged, Officer Norris testified that it was probable the packages were for sale rather than for personal use. *State v. Scott*, ___ N.C. App. ___, 567 S.E.2d 466 (2002) ("It is true that packaging and/or quantity of a drug may permit an inference that the possessor intends to sell or deliver the drug.").

There existed sufficient evidence of each of the elements of the offense charged or of a lesser included offense, and of defendant being the perpetrator. This assignment of error is overruled.

IV.

Fourth, defendant argues that the trial court abused its discretion in denying defendant's motion to dismiss (presented after the jury verdict), and in denying defendant's motion for appropriate relief which sought to set aside the verdict when there existed insufficient evidence of possession of cocaine with intent to sell and deliver. We disagree.

We first note that defendant's motion to dismiss was timely as it was presented after the jury had reached a verdict but before entry of judgment. However, for the reasons stated in Issue III *supra*, we hold that the trial court did not err in denying defendant's motion to dismiss.

N.C.G.S. § 15A-1411(a) (2001), provides: "(a) Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief. Procedure for the making of the motion is as set out in G.S. 15A-1420."

N.C.G.S. § 15A-1420(c) (6) (2001), provides that "[a] defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443."

N.C.G.S. § 15A-1443 (2001), provides:

(a) A defendant is prejudiced by errors relating to rights arising other than under

the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

(b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

(c) A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.

The decision to set aside a verdict as against the weight of the evidence, is addressed to the sound discretion of the trial court. *State v. Pratt*, 306 N.C. 673, 681, 295 S.E.2d 462, 468 (1982). The trial court's decision in this regard will not be overturned absent abuse of that discretion. *See id.*

Defendant has not asserted any violation enumerated in N.C.G.S. § 15A-1443 that would justify the granting of a motion for appropriate relief, nor has he presented any evidence showing an abuse of the trial court's discretion in not setting aside the verdict. Therefore, this assignment of error is overruled.

NO ERROR.

Judges GREENE and MARTIN concur.

Report per Rule 30(e).