NO. COA03-985

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

STATE OF NORTH CAROLINA

v. Dare County
Nos. 02 CRS 51103, 51105

DAIN GARRETT

Appeal by defendant from judgments dated 28 February 2003 by Judge J. Richard Parker in Superior Court, Dare County. Heard in the Court of Appeals 28 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Charles J. Murray, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant.

McGEE, Judge.

Dain Garrett (defendant) was convicted of selling cocaine, possession with intent to sell or deliver cocaine, trafficking in cocaine by possession, trafficking in cocaine by sale, and conspiracy to traffic in cocaine by possession. Defendant's convictions for the sale of cocaine and for possession with intent to sell and deliver cocaine were consolidated for sentencing and defendant was sentenced to a minimum of fifteen months and a maximum of eighteen months in prison. Defendant was sentenced to a minimum of thirty-five months to a maximum of forty-two months in

prison for one conviction of trafficking in cocaine by possession. Defendant's convictions for trafficking in cocaine by sale and for conspiracy to traffic in cocaine by possession were consolidated for sentencing and defendant was sentenced to a minimum of thirty-five months to a maximum of forty-two months in prison. Defendant's terms of imprisonment were to be served consecutively. Defendant appeals.

This case concerns the sale of cocaine by defendant to an undercover law enforcement officer on 8 and 9 May 2002 in Dare County, North Carolina (Dare County). Video and audio recordings of the sale transactions were taped by the Dare County Sheriff's Department. The evidence presented at trial tended to show that defendant met Wayne Danner (Danner) in Virginia Beach, Virginia in late 2001. Danner, who operated his own business, was in the Virginia Beach area for the purpose of remodeling motels. Danner testified that he worked for the Virginia Beach Narcotics Bureau and was "working on [defendant] at the time" as a confidential informant. Danner socialized with defendant regularly for three to four months for the purpose of gaining defendant's confidence.

Danner testified that on 7 May 2002, when he was preparing to go to Nags Head, North Carolina, defendant told him that he wanted to sell some crack cocaine in North Carolina and asked whether Danner knew of someone who would be interested in purchasing cocaine. According to Danner, defendant had cocaine on his person at that time. Danner stated that he informed defendant that he knew of a prospective buyer in North Carolina. Danner drove

defendant to Dare County and arranged for defendant to sell cocaine to Investigator John Kissinger (Kissinger), who was working undercover for the Dare County Sheriff's Department.

Defendant sold Kissinger approximately six grams of cocaine on 8 May 2002 for $700 dollars. During the sale on 8 May 2002, defendant asked Kissinger how much cocaine sold for in the area and Kissinger responded that it sold for twice as much as in Virginia. Defendant replied that Danner had told him the same. Kissinger then discussed purchasing thirty-four grams of cocaine the next day from defendant for $2,000. Kissinger suggested to defendant that he would pay for defendant's hotel room and provide him with female dancers. Defendant agreed to the second sale and Danner drove defendant back to Virginia for the purpose of purchasing cocaine to make the second sale. After obtaining a sufficient quantity of cocaine, Danner and defendant drove back to Dare County and defendant sold forty grams of cocaine to Kissinger on 9 May 2002.

The Dare County Sheriff's Department compensated Danner for his expenses for 8 and 9 May 2002 in the amount of $420 for his "time and gas." Danner testified that he was regularly paid to "set up drug deals."

Defendant testified at trial that Danner initially suggested that defendant could "get a lot of money if [he] invested in some cocaine." However, defendant informed Danner that he was not interested in selling cocaine due to the risk involved. According to defendant, Danner offered defendant employment, but then told defendant that he would be unable to provide him with work. A

couple of days later, Danner told defendant that the cocaine Danner had purchased for twenty dollars in Virginia was worth fifty dollars in North Carolina. Danner again suggested that defendant sell cocaine, but defendant reiterated his reluctance to "mess with the stuff."

Defendant testified that Danner telephoned him twice on 7 May 2002 regarding selling cocaine in North Carolina to some friends of Danner's. Danner "talked about the money and he kept pushing the issue." Defendant, who was financially unstable, agreed to the sale. At around 2:00 p.m. that day, Danner asked defendant whether he could locate cocaine to sell. Danner then drove defendant around all afternoon in an effort to locate cocaine, and at around 10:00 p.m., defendant located cocaine. Defendant and Danner then drove to Dare County. Once in North Carolina, Danner contacted Kissinger and arranged for them to meet at 9:00 a.m. on 8 May 2002.

Defendant further testified that after completing the sale on 8 May 2002, he was driven back to Virginia Beach by Danner. Defendant stated that Kissinger contacted him repeatedly regarding a second sale. When defendant was unable to locate cocaine for a second sale, he told Danner that the sale would have to wait. Danner decided to remain in Virginia Beach to see what transpired. After contacting several sources for cocaine, defendant was able to successfully purchase the additional cocaine requested by Kissinger. Danner thereafter drove defendant to Dare County where defendant completed the second sale.

I.

Defendant first argues the trial court erred in declining to instruct the jury on entrapment. Defendant has contended that he was befriended by an agent of the State, who encouraged defendant to sell cocaine, and had it not been for the actions of the State's agent, defendant would not have committed the offenses. During the charge conference, defendant requested an instruction as to entrapment. The trial court declined to give the instruction because defendant had presented "insufficient evidence of inducement and lack of predisposition."

Generally, entrapment is defined as "'the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him.'" *State v. Stanley*, 288 N.C. 19, 27, 215 S.E.2d 589, 594 (1975) (citations omitted). "'A defendant is entitled to a jury instruction on entrapment whenever the defense is supported by defendant's evidence, viewed in the light most favorable to the defendant.'" *State v. Sanders*, 95 N.C. App. 56, 60, 381 S.E.2d 827, 829 (1989) (quoting *State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983)). An instruction is warranted when a defendant produces "some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law." *State v. Burnette*, 242 N.C. 164, 173, 87 S.E.2d 191, 197 (1955). Hence, "[t]he issue of whether or not a defendant was entrapped is generally a question of fact to be resolved by the jury." *State v. Collins*, 160 N.C. App. 310, 320, 585 S.E.2d 481, 489 (2003), *aff'd*, 358 N.C. 135, 591 S.E.2d 518 (2004). The

decision as to whether the defense of entrapment should be submitted to the jury is dependent on the facts of each case. *See State v. Walker*, 295 N.C. 510, 246 S.E.2d 748 (1978).

Generally, there are two elements to the defense of entrapment:

> (1) acts of persuasion, trickery, or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.

Id. at 513, 246 S.E.2d at 750. However, a defendant may not raise the defense of entrapment when the defendant is "'predisposed to commit the crime charged absent the inducement of law enforcement officials.'" *State v. Thompson*, 141 N.C. App. 698, 706, 543 S.E.2d 160, 165 (2001) (quoting *State v. Davis*, 126 N.C. App. 415, 418, 485 S.E.2d 329, 331 (1997)), *disc. review denied*, 353 N.C. 396, 548 S.E.2d 157 (2001).

Under the first prong of the entrapment defense, a defendant must show that he was "induced to commit the crime, and that the person who induced the defendant to do so was acting on behalf of the government." John Rubin, *The Entrapment Defense in North Carolina*, § 2.3 (2001). "Merely affording opportunities or facilities for the commission of a crime, however, does not amount to entrapment." *Walker*, 295 N.C. at 515, 246 S.E.2d at 751.

In the case before us, Danner testified that defendant had sold him drugs on a prior occasion in Virginia and that he had bought drugs from individuals employed by defendant. Defendant

testified that he purchased the cocaine sold in both transactions from persons known to him and contacted several suppliers to obtain the cocaine for the second sale to Kissinger. Regarding the second sale, defendant testified he purchased a greater amount of cocaine than he sold to Kissinger and was able to purchase the cocaine in part on credit with his supplier. Defendant also stated that he engaged in the drug sales for the purpose of obtaining as much profit as possible and financed his purchases of cocaine without the assistance of any government agent. Danner provided the opportunity to defendant to sell the cocaine in North Carolina, but defendant was predisposed to engage in the drug transactions. Furthermore, defendant has failed to show that his participation was the result of "persuasion, trickery, or fraud" on the part of Danner or Kissinger. Defendant testified that he had not been forced to sell cocaine, although Danner persuaded him to sell the cocaine in North Carolina. Thus, defendant's assignment of error is overruled.

II.

Defendant next asserts that the trial court erred in denying his motion to dismiss the charges due to the insufficiency of the evidence. Defendant's motion was made at the close of the State's evidence and defendant thereafter introduced evidence on his own behalf. Defendant did not renew his motion to dismiss at the close of all the evidence.

Pursuant to N.C. Gen. Stat. § 15-173 (2003), "[i]f the defendant introduces evidence, he thereby waives any motion for

dismissal . . . which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." *See also* N.C.R. App. P. 10(b)(3) ("Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal."). Defendant did not move to dismiss at the close of all the evidence and he therefore may not assert as error, upon appellate review, the denial of his motion to dismiss at the close of the State's evidence. This assignment of error is overruled.

III.

Defendant further contends that the trial court committed plain error in permitting testimony by Danner and Kissinger regarding defendant's alleged drug activity committed in Virginia prior to the dates of the offenses for which he was convicted. Danner testified that he had purchased cocaine from defendant on one occasion, had seen defendant sell cocaine to others, and had purchased cocaine from people who worked for defendant on fifteen to twenty occasions. Kissinger stated at trial that he had spoken with the Virginia Beach narcotics unit about defendant.

Danner was called as a defense witness and the complained of testimony was elicited on cross-examination by the State. However, on direct examination, Danner testified that he had been working as a confidential informant for the Virginia Beach Narcotics Bureau at the time he met defendant and that he bought cocaine from defendant as part of an operation conducted by the Virginia Beach narcotics unit in January 2002. On direct examination, Danner further noted

that defendant had completed a cocaine sale just prior to meeting Danner on 7 May 2002, and that it was at this point in time that defendant told Danner that things were "hot" for him in the Virginia Beach area due to the arrest of "some of his [drug] runners."

Defendant's only objection at trial to the testimony at issue concerned Danner's remark that Danner had purchased drugs from people Danner "believed" to be working for defendant. Danner then elaborated, stating that he "knew" the individuals worked for defendant selling drugs. Defendant argues that Danner's testimony that defendant employed the runners was mere speculation. Danner's later testimony that he knew the individuals worked for defendant cured any error that may have existed and the statement was not in the form of an opinion. Our Supreme Court has stated that "'[u]nder the Rules of Evidence, a witness may testify as to any relevant matter about which he has personal knowledge.'" *State v. Anthony*, 354 N.C. 372, 411, 555 S.E.2d 557, 583 (citation omitted), *cert. denied*, 354 N.C. 575, 559 S.E.2d 184 (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002); *see also* N.C. Gen. Stat. § 8C-1, Rule 602 (2003).

Defendant contends Danner's additional testimony regarding defendant's drug activity in Virginia was inadmissible hearsay. N.C. Gen. Stat. § 15A-1443(c) (2003) provides that "[a] defendant is not prejudiced . . . by error resulting from his own conduct." The content of the testimony to which defendant objects is overwhelmingly similar to the testimony elicited on direct

examination of Danner by defendant. Defendant may not now take issue with its admission since he was responsible for eliciting Danner's prior testimony concerning defendant's drug activity in Virginia.

Specifically, defendant also directs this Court to Kissinger's testimony regarding his conversations with Mark Pantick (Pantick) of the Narcotics Unit regarding Danner's work with the Narcotics Unit. Kissinger stated nothing more than that he had spoken with Pantick on several occasions. It is defendant's contention that this testimony was solicited to bolster Danner's credibility and that the testimony amounted to impermissible hearsay. Since Kissinger disclosed nothing about the content of that conversation, the testimony is not hearsay and we fail to see how such limited testimony served any State purpose. Defendant asserts that Kissinger implicitly conveyed to the jury that Danner was an agent of the Narcotics Unit. Assuming arguendo that Kissinger's statement was admitted in error, it did not amount to plain error because we cannot conclude that the mistake had a probable impact on the jury's determination of defendant's guilt. *See State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986) (To be plain error, the error must be such that it "tilted the scales" and resulted in the jury's verdict convicting the defendant.). For the foregoing reasons, defendant's argument is without merit.

IV.

Defendant also argues that the trial court committed plain error by allowing the State to question defendant as to the terms

and conditions of his 1996 conviction in Wake County for possession of cocaine. The State questioned defendant about whether he had received an active sentence or probation for the offense.

After inquiring about defendant's punishment, the State asked, "[t]hat was as a result of [your] going into a house looking to purchase marijuana and while you were in there the house was busted by the cops and everybody was arrested?" Defendant responded affirmatively. Defendant had previously testified on direct examination that he had been convicted of cocaine possession in 1996 and remarked that he "had went in a house. It was a house that, you know, sold drugs. I went in to buy some weed and . . . a lot of police [were] kicking in the door and [there were] fourteen people in the house so they just charged everybody with possession."

As defendant concedes, Rule 609 provides that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." N.C. Gen. Stat. § 8C-1, Rule 609(a) (2003). "The permissible scope of inquiry into prior convictions for impeachment purposes is restricted, however, to the name of the crime, the time and place of the conviction, and the punishment imposed." *State v. Lynch*, 334 N.C. 402, 409, 432 S.E.2d 349, 352 (1993).

The only information admitted during cross-examination that was not elicited on direct examination regarded the sentence

received by defendant as to the past offense. The State's questions were within the permissible scope of inquiry as to past convictions. Moreover, as to the circumstances of the offense, defendant is attempting to object to testimony that is virtually identical to testimony he provided on direct examination. Defendant has thus waived his right to raise on appeal his objection to the evidence. *See* N.C.G.S. § 15A-1443(c). Thus, defendant's assignment of error is overruled.

V.

Lastly, defendant assigns error to the trial court allowing Kissinger to provide opinion testimony regarding the distribution of narcotics in Dare County when he had not been qualified as an expert witness. Defendant contends that Kissinger impermissibly testified that most of the cocaine in Dare County originated in Virginia, Elizabeth City and Rocky Mount, and that the price of cocaine in Dare County was significantly higher than it was in Virginia.

The testimony complained of is as follows:

> Q: So based upon your experience here in the county, where does the cocaine come from?
>
> A: Quite a bit of our cocaine comes from Virginia, from Elizabeth City and from the Rocky Mount area.
>
> . . .
>
> Q: Is Virginia - do you have any knowledge about the price of cocaine in Virginia versus Dare County?
>
> A: Limited knowledge. I do have some.
>
> Q: Is the price - how does it compare?

> A: I guess an example would be in Dare County it would not be unusual to pay $100 for a gram of cocaine and in areas of Virginia it can go as low as $60 for a gram of cocaine.

Defendant failed to object to the testimony to which he now assigns error. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1). Accordingly, we do not address defendant's argument.

No error.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).