NO. COA05-1056

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

STATE OF NORTH CAROLINA

v. Forsyth County
No. 03 CRS 53434

CHRISTINA SHEREE DAVIS,
Defendant.

Appeal by defendant from judgment entered 23 February 2005 by Judge Ronald E. Spivey in the Superior Court in Forsyth County. Heard in the Court of Appeals 10 April 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Pitman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

HUDSON, Judge.

At the 21 February 2005 criminal session of superior court, defendant Christina Sheree Davis was tried on charges of trafficking cocaine by possession and by transportation. The jury found defendant guilty of trafficking by possession and not guilty of trafficking by transportation. The court sentenced defendant to an active term of 35 to 42 months. Defendant appeals. As discussed below, we conclude the trial was free from error.

The evidence tended to show the following: On 30 March 2003, defendant was a passenger along with her boyfriend John-Morro Smith

in a truck driven by Franklin Ray Hutchins. When Sergeant McMasters of the Winston-Salem police stopped the truck for a seatbelt infraction, Smith dropped a baggie of crack cocaine on defendant's lap and told her to hide it. Defendant put the baggie in her pants. Sgt. McMasters asked for and received permission to search Hutchins and his truck, and the search revealed drug paraphernalia. Corporal Trentini, a female police officer called in by Sgt. McMasters, asked defendant to consent to a search of her person. Defendant first responded that she didn't care, then responded to a second request by saying "go ahead." Cpl. Trentini discovered the baggie in defendant's pants. Defendant gave a statement explaining that Smith had given her the drugs and told her to hide them. Defendant testified that she did so because she feared Smith, who had previously assaulted her on numerous occasions, though none of alleged assaults were ever reported to police. Defendant acknowledged that she did not fear Smith would immediately harm her, but rather worried about possible violence from him at some later time.

Defendant argues that the trial court erred in failing to include a verdict of not guilty due to acting under duress in its final mandate.

"North Carolina case law recognizes the doctrine of duress or coercion as a defense to criminal prosecutions other than homicide." *State v. Henderson*, 64 N.C. App. 536, 539, 307 S.E.2d 846, 849 (1983). "In order to have the court instruct the jury on the defense, the defendant must present some credible evidence on

every element of the defense." *Id.* at 540, 307 S.E.2d at 849. "It is the general rule that in order to constitute a defense to a criminal charge other than taking the life of an innocent person, the coercion or duress must be present, imminent or impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done." *State v. Kearns*, 27 N.C. App. 354, 357, 219 S.E.2d 228, 230-31 (1975), *disc. review denied*, 289 N.C. 300, 222 S.E.2d 700 (1976). Thus, fear of future injury can be sufficient to support a duress instruction, if the fear is of an imminent injury.

At the charge conference, defendant's trial counsel conceded that defendant had no fear of immediate harm while the police officers were present. In addition, defendant testified that she hid the drugs first because she feared the police finding it and only secondarily because she feared what Smith might do if she did not. However, she also testified that she did not live with Smith nor depend on him at the time of her arrest. There was no evidence that Smith directly threatened to harm defendant if she did not hide the drugs. In addition, defendant testified that she did not fear harm from Smith while the police were present. After Smith left the scene, defendant still did not tell police about the drugs, even though she had a duty to surrender the drugs to the police once free from duress or coercion. *See Henderson*, 64 N.C. App. at 540, 307 S.E.2d at 849. Because she failed to present credible evidence on every element of the defense, the trial court

did not err in failing to instruct the jury on duress at the final mandate. This assignment of error is without merit.

Defendant also argues that the court erred in adding language to the pattern jury instruction on duress. We do not agree.

Defendant requested the pattern jury instruction on duress at trial and objected to the insertion of the additional language. We review the court's instruction for prejudicial error. "Prejudicial error is defined as a question of whether '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.'" *State v. Lanier*, 165 N.C. App. 337, 354, 598 S.E.2d 596, 607, *disc. review denied*, 359 N.C. 195, 608 S.E.2d 59 (2004) (quoting N.C. Gen. Stat. § 15A-1443(a) (2003)).

Defendant contends that the court improperly added the phrase "the threat of future injury is not enough" to the pattern jury instruction on duress. This phrase is taken from *State v. Borland*, 21 N.C. App. 559, 564, 205 S.E.2d 340, 344 (1974). *Borland* predates this Court's establishment of the general rule for elements of duress in *Kearns*, *supra*. As discussed above, defendant failed to present credible evidence of each element of duress. Given that defendant was not entitled to an instruction on duress, any error in inserting the language from *Borland* was not prejudicial. We overrule this assignment of error.

Defendant also argues that the trial court erred in denying her motion to suppress the drugs discovered on her person. We disagree.

Defendant contends that she did not freely consent to the search of her person because her response was not a clear and unequivocal assent and because her response was coerced by the presence of four police officers. "The standard of review in evaluating a trial court's ruling on a motion to suppress is whether the court's findings of fact are supported by competent evidence and if those findings of fact support the trial court's conclusions of law." *State v. Price*, 170 N.C. App. 57, 64, 611 S.E.2d 891, 896 (2005).

Consent searches

> have long been recognized as a "special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given."" *State v. Smith*, 346 N.C. App. 794, 799, 488 S.E.2d 210, 214 (1997). "Consent to search, freely and intelligently given, renders competent the evidence thus obtained." *State v. Frank*, 284 N.C. 137, 143, 200 S.E.2d 169, 174 (1973) (citations omitted). "The question whether consent to a search was in fact 'voluntary' or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 862-63 (1973).

State v. Graham, 149 N.C. App. 215, 218-19, 562 S.E.2d 286, 288 (2002), *disc. review denied*, 356 N.C. 685, 578 S.E.2d 315 (2003). N.C. Gen. Stat. § 15A-221(b) (2005) defines consent as "a statement to the officer, made voluntarily and in accordance with the requirements of G.S. 15A-222, giving the officer permission to make a search." Our courts have held that consent may be "'a verbal assertion or nonverbal conduct intended as an assertion.'" *Graham*,

149 N.C. App. at 219, 562 S.E.2d at 288 (quoting Black's Law Dictionary, 1416 (7th ed. 1999)). The Supreme Court has held that responding "I don't care" in response to an officer's request to search constituted valid consent. *State v. Sokolowski*, 344 N.C. 428, 432-33, 474 S.E.2d 333, 336 (1996).

Here, defendant responded to Cpl. Trentini's first request by stating "I don't care." Cpl. Trentini asked again for permission to search and defendant responded "Go ahead." The second response constitutes clear and unequivocal assent to the search. Further, the evidence tends to show that defendant dealt only with Cpl. Trentini and Officer Vanderport during the traffic stop, and that Cpl. Trentini and defendant were alone when the search request was made. No evidence at trial indicated that defendant felt coerced into consenting to the search. This assignment of error is without merit.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).