NO. COA05-1150

NORTH CAROLINA COURT OF APPEALS

Filed: 18 July 2006

STATE OF NORTH CAROLINA

v. Montgomery County
No. 03 CRS 51253

QUALO LOWERY

Appeal by defendant from judgment entered 30 March 2005 by Judge W. David Lee in Montgomery County Superior Court. Heard in the Court of Appeals 15 May 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Barbara A. Shaw, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

JACKSON, Judge.

Qualo Lowery ("defendant") appeals his conviction of possession of a controlled substance (marijuana) on the premises of a penal institution and habitual felon on 30 March 2005 in Montgomery County Superior Court.

On 8 July 2003, Officers Tucker and Martindale conducted a random search of defendant's cell at Southern Correctional Center in Troy, North Carolina. During the search, Officers Tucker and Martindale recovered a substance believed to be marijuana from a pair of pants in defendant's one-man cell. Officer Tucker transferred defendant to segregation. The officers continued their

search and discovered more of the suspicious substance in another pair of pants.

Officers Tucker and Martindale gave the substance to Sergeant Moore, who called the Troy Police Department. Officer Lucas of the Troy Police Department responded to Southern Correctional Center for the purpose of investigating the discovery of the substance. Sergeant Moore gave the substance to Officer Lucas who mailed it to the State Bureau of Investigation ("S.B.I.") crime lab in Raleigh. S.B.I. Agent Baxter tested the substance and determined that the substance was 3.4 grams of marijuana. Agent Baxter repackaged the substance and returned it to the Troy Police Department.

A grand jury indicted defendant on 29 March 2004 for felony possession of marijuana in a prison or jail and on 18 October 2004 for habitual felon. On 28 March 2005, the Honorable W. David Lee presided over defendant's jury trial. The jury found defendant guilty of possession of a controlled substance on the premises of a penal institution and guilty of habitual felon. Judge Lee sentenced defendant to a term of eighty-four to 110 months imprisonment in the Department of Corrections. Defendant appeals to this Court.

On appeal, defendant argues two assignments of error: (1) the trial court erred in admitting and publishing the State's exhibits 3A (the marijuana) and 4 (Agent Baxter's analysis report) because there was an insufficient chain of custody; and (2) the trial court erred in failing to admit evidence of a continuing investigation of

prison staff for possession of marijuana on relevancy grounds. For the reasons stated below, we find no error.

We first address whether the trial court erred in admitting and publishing the State's exhibits 3A and 4 because there was an insufficient chain of custody. It is well established that a defendant's failure to make a timely objection results in a waiver of his right to assert the alleged error upon appeal. *See State v. McDougall*, 308 N.C. 1, 9, 301 S.E.2d 308, 314, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983). "'An objection is timely only when made as soon as the potential objector has the opportunity to learn that the evidence is objectionable.'" *Main St. Shops, Inc. v. Esquire Collections, Ltd.*, 115 N.C. App. 510, 515, 445 S.E.2d 420, 422 (1994)(quoting 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 19, at 79 (4th ed. 1993)).

When inadmissibility is not apparent immediately, the objection and a motion to strike should be made as soon as the inadmissibility becomes known, such as when it is the response rather than the question which is objectionable, or when the admissible evidence later becomes inadmissible for some reason. *See State v. Jones*, 347 N.C. 193, 215, 491 S.E.2d 641, 654 (1997) (error not preserved when defendant failed to move to strike objectionable testimony); *Ziglar v. Ziglar*, 226 N.C. 102, 103, 36 S.E.2d 657, 658 (1946) (no error when plaintiff failed to move to strike evidence relevant to subsequently withdrawn cross-complaint). However, when evidence is admitted generally, which is competent for some purposes, but not necessarily for all purposes,

such admission "'will not be held reversible error in the absence of a request at the time that its admission be restricted.'" *State v. Sawyer*, 283 N.C. 289, 297, 196 S.E.2d 250, 255 (1973)(quoting 7 Strong N.C. Index 2d, *Trial* § 17).

In the present case, defendant failed to object when the State introduced exhibits 3A and 4 into evidence. However, defendant argues that his chain of custody objection arose when the State sought to publish exhibits 3A and 4 to the jury without Sergeant Moore's testimony. Nonetheless, defendant failed to object to the admission of the exhibits at the time the exhibits were offered for admission into evidence. Furthermore, defendant failed to make a motion to strike the exhibits, and failed to request that their admission be restricted in any way. Because defendant failed to object, we are limited to reviewing for plain error.

Plain error is error "'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000)(quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

The facts of this case show that a green leafy substance was discovered in defendant's one-man cell at a time when defendant was present. Officers Tucker and Martindale testified that they discovered this substance in the pockets of pants found in defendant's one-man cell, and gave the substance to Sergeant

Moore. Although Sergeant Moore did not testify, Officer Lucas of the Troy Police Department testified that he received the substance from Sergeant Moore. Agent Baxter testified that she received the substance from the Troy Police Department, and the substance tested positive as marijuana. This evidence alone is sufficient for a jury to find that marijuana was found in defendant's possession. Introduction of the actual marijuana and Agent Baxter's lab report only serve to corroborate the statements made by the witnesses. "[A]ny weak links in the chain of custody relate only to the weight to be given evidence and not to its admissibility." *State v. Campbell*, 311 N.C. 386, 389, 317 S.E.2d 391, 392 (1984)(citing *State v. Montgomery*, 291 N.C. 91, 229 S.E.2d 572 (1976)). The trial court in this case recognized the weakness in the chain of custody, and specifically allowed defense counsel to argue the weak link in closing arguments. Therefore, defendant was not prejudiced by admission and publication of State's exhibits 3A and 4 without Sergeant Moore's testimony.

Second, we address whether the trial court erred in failing to admit evidence of a continuing investigation of prison staff for possession of marijuana on relevancy grounds. "To prevail on a contention that evidence was improperly excluded, either a defendant must make an offer of proof as to what the evidence would have shown or the relevance and content of the answer must be obvious from the context of the questioning." *State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157 (1996), *cert. denied*, 522 U.S.

825, 139 L. Ed. 2d 43 (1997)(citing *State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310 (1994)).

On direct examination, defense counsel asked Officer Lucas the following:

> [Defense Counsel]: Are you aware if there was an ongoing investigation at Southern Correctional regarding possession of marijuana by staff?
>
> [Prosecutor]: Object to the relevance.
>
> [The Court]: That's sustained.
>
> [Defense Counsel]: No further questions.

In the present case, defense counsel failed to make an offer of proof as to what the evidence would have shown. Furthermore, the relevance and content of the answer was not obvious from the context of the questioning. Therefore, the issue was not properly preserved for appeal, and we lack sufficient information to review defendant's assignment of error. Accordingly, this assignment of error is dismissed.

NO ERROR.

Chief Judge MARTIN and Judge LEVINSON concur.

Report per Rule 30(e).