NO. COA05-1394

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v. Bladen County
No. 04 CRS 53140

ANTHONY SENTEL COWAN,
Defendant.

Appeal by defendant from judgment entered 15 June 2005 by Judge D. Jack Hooks, Jr. in the Superior Court in Bladen County. Heard in the Court of Appeals 18 May 2006.

Attorney General Roy Cooper, by Senior Deputy Attorney General William P. Hart and Assistant Attorney General Tina Lloyd Hlabse, for the State.

William D. Spence, for defendant-appellant.

HUDSON, Judge.

At the 14 June 2005 criminal session of superior court, a jury convicted defendant Anthony Sentel Cowan of possession of cocaine. The court sentenced defendant to eight to ten months, suspended for thirty-six months following an active term of sixty days. Defendant appeals. We conclude there was no error.

On 27 September 2004, Officers Ronnie Cheshire and Gary Britt stopped a vehicle driven by defendant. A license check revealed that the car was owned by another person (Shirley Ann Cowan) and that defendant's license was suspended. During a search incident

to defendant's arrest, Officer Cheshire found two rocks of crack cocaine in the floorboard behind defendant's (the driver's) seat and a small clear baggie between the driver's seat and the console. Over defendant's objection, Officer Cheshire was allowed to testify about an incident five years previously in which he had arrested defendant for possession of crack cocaine after locating the drugs in the ash tray of a car in which he was a passenger. Defendant presented no evidence.

Defendant first argues that the court erred in allowing the State to introduce the testimony of Officer Cheshire about his 1999 arrest of defendant. We do not agree.

Defendant contends that this evidence was too remote in time and not sufficiently similar to be admitted under Rule 404(b) of the North Carolina Rules of Evidence. Rule 404(b) states that

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003). "This rule is a general rule of inclusion of such evidence, subject to an exception if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). "In drug cases, evidence of other drug violations is often admissible under Rule 404(b)." *State v. Stevenson*, 169 N.C. App. 797, 800, 611 S.E.2d 206, 209 (2005).

"[T]he ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). These similarities need not "rise to the level of the unique and bizarre." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). "Rather, the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *Id.* Here, the two incidents were quite similar: both involved defendant being found with crack cocaine within his control in a car he did not own. These similarities supported a reasonable inference that defendant committed both acts.

"Remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Stevenson*, 169 N.C. App. at 801, 611 S.E.2d at 210 (internal citation and quotation marks omitted). In *Stevenson*, the evidence at issue concerned drug incidents five and six years prior to the offense for which the defendant was being tried. *Id.* Here, the prior incident occurred five years previously, and we conclude it was not too remote to be admissible.

Defendant also contends that, even if the evidence was admissible under Rule 404(b), the trial court should have excluded

it under Rule 403. Under Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2003). "Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court. Such a decision may be reversed for abuse of discretion only upon a showing that [the trial court's] ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992) (internal quotation marks omitted). Here, the trial court properly allowed the evidence under Rule 404(b). The court then gave the jury a limiting instruction to the effect that Officer Cheshire's testimony was only to be used for the purpose of considering defendant's intent, knowledge or awareness of the presence of the cocaine in the vehicle. This assignment of error is without merit.

Defendant next argues that the trial court erred in denying his motion to dismiss at the close of the evidence because the State did not prove that he had constructive possession of the cocaine. We disagree.

The standard of review on a motion to dismiss for insufficiency of the evidence is well-established:

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of

> such offense. If so, the motion is properly denied. Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. If substantial evidence, whether direct, circumstantial, or both, supports a finding that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be denied and the case goes to the jury.

State v. Ellis, 168 N.C. App. 651, 656, 608 S.E.2d 803, 807 (2005) (internal citations and quotation marks omitted). "In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *Id.* "In a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials." *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). "Proof of nonexclusive, constructive possession is sufficient." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001). "Constructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the narcotics. *Id.* (internal quotation marks omitted). "Where the driver is in control of the car (as here) and the controlled substance is found in the car (on the floorboard under both driver's and passenger's seats in this case), such evidence is sufficient to withstand motion for dismissal." *State v. Rogers*, 32 N.C. App. 274, 277, 231 S.E.2d 919, 921 (1977). Here, the State introduced evidence that defendant was driving and the cocaine was found on the floor behind

his seat. This evidence was sufficient to withstand defendant's motion. We overrule this assignment of error.

No error.

Judges MCCULLOUGH and TYSON concur.

Report per Rule 30(e).