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NO. COA05-1485

NORTH CAROLINA COURT OF APPEALS

Filed: July 5 2006

STATE OF NORTH CAROLINA

v.

New Hanover County  
No. 04 CRS 51671

CARL ANTONIO SCOTT

Appeal by defendant from an order dated 9 February 2005, signed *nunc pro tunc* 28 April 2005, by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 7 June 2006.

*Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.*

*Duncan B. McCormick for defendant.*

BRYANT, Judge.

Carl Antonio Scott (defendant) appeals from an order dated 9 February 2005 consistent with a jury verdict convicting him of felony possession of cocaine. The order was signed *nunc pro tunc* on 28 April 2005.

On 30 January 2004, Wilmington Police Department Detectives Chris Mayo and David Pellegrino entered an apartment complex, in which several drug-related arrests occurred weekly, to investigate pervasive drug trafficking. As Detective Mayo went around the corner of one building, he saw a group of three or four men standing on the sidewalk, including defendant. Defendant turned

and started walking in the opposite direction as soon as he noticed Detective Mayo approaching. Detective Mayo followed defendant, and was twenty yards behind defendant when Detective Pellegrino intercepted defendant.

Once defendant saw Detective Pellegrino, he stopped walking. Detective Pellegrino approached defendant and observed the muscles in defendant's jaws flexing and making chewing motions. Detective Pellegrino asked defendant if he resided in that area, but defendant did not respond and continued to make chewing motions. The detective inquired as to whether defendant had anything in his mouth. Defendant again failed to respond and attempted to swallow the items in his mouth. After asking defendant a second time what was in his mouth, Detective Pellegrino grabbed defendant's lower jaw to prevent him from swallowing what the officer believed to be contraband. As he held defendant's jaw, Detective Pellegrino told him several times to spit out the contraband, but defendant continued chewing. Detective Mayo assisted Detective Pellegrino and forced defendant to the ground. Defendant's mouth opened slightly and Detective Mayo observed a white rock-like substance therein, which, based on his training and experience, he believed to be crack cocaine. Detective Pellegrino also saw several pieces of a white rock-like substance in defendant's mouth and believed the substance to be crack cocaine. Detective Pellegrino then swept his little finger through the front of defendant's mouth to dislodge the rock-like substance and watched the substance fall to the ground. The rock-like substance was picked up, placed in a

plastic bag and subsequently identified as cocaine by the State Bureau of Investigation.

At trial, during the testimony of the first trial witness, Detective Mayo, defendant renewed his objection to evidence seized from his person by the detectives. Judge Cobb excused the jury and conducted a *voir dire* hearing in which the State introduced the testimony of Detective Mayo and Detective Pellegrino, and in which defendant chose not to testify and did not offer evidence. Judge Cobb denied the motion to suppress from the bench and made written findings of fact and conclusions of law in an Order signed 28 April 2005.

Defendant testified he was standing with a group of young men who were gambling with dice when the police officers arrived. Defendant stated when he saw the officers, he walked toward the men who were gambling and was stopped by one of the officers. According to defendant, although he was standing still, Detective Pellegrino came up to him saying "spit it out" and grabbed defendant by the throat, and the two officers then threw him to the ground. Defendant further testified he did not have drugs in his mouth or anywhere on his person and speculated that a rock of crack cocaine was already on the ground next to where he fell. Defendant was convicted of a single count of possession of cocaine and placed on supervised probation for thirty-six months. Defendant appeals.

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Defendant raises five issues on appeal: whether the trial court erred in (I) denying defendant's motion to suppress the crack

cocaine seized from defendant; (II) making findings of fact which recited the testimony of the arresting officers; (III) concluding the officers observed "defendant engaged in behavior that they suspected to be a drug transaction" and concluding the officers appropriately stopped defendant from "unprovoked flight"; (IV) denying defendant's motion to dismiss the charge of felony possession; and (V) overruling defendant's objection to the admission of expert opinion testimony by Agent Wagner.

I

Defendant first argues the trial court erred in denying defendant's motion to suppress the crack cocaine seized from defendant. We disagree.

"The standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Smith*, 160 N.C. App. 107, 114, 584 S.E.2d 830, 835 (2003) (internal quotation marks and citations omitted). If the trial court's conclusions of law are supported by its factual findings, we will not disturb those conclusions on appeal. *State v. Logner*, 148 N.C. App. 135, 138, 557 S.E.2d 191, 193-94 (2001).

The decision to stop defendant is justifiable if "specific and articulable facts, taken together with the rational inferences from those facts, created a reasonable suspicion of criminal activity." *State v. Harrell*, 67 N.C. App. 57, 61, 312 S.E.2d 230, 234 (1984). The only requirement in deciding to stop defendant is a minimal

level of objective justification, something more than an "unparticularized suspicion or hunch." *State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) (citing *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)).

In this case, the detectives' *voir dire* testimony established the officers had reasonable suspicion of criminal activity at the time they detained and searched defendant. The detectives made, on average, several drug-related arrests weekly at this particular apartment complex. At 6:00 p.m. on 30 January 2004, defendant was observed standing in a group of men outside this apartment complex. When defendant saw one detective coming toward the group, he made eye contact with the detective, stopped for a moment and immediately walked in the opposite direction, around the building, where he was met by another detective. When he was asked whether he lived in the apartments, he did not respond, and was observed chewing and attempting to swallow items in his mouth. The detective asked him what was in his mouth, but he again did not respond and continued to chew. The officers' suspicions at that point were based on their observation of defendant for a period of time prior to an actual seizure and would lead any reasonable and cautious officer, with the requisite training and experience, to believe criminal activity was afoot. See *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995) (holding the officer was justified (1) in detaining the defendant where he reasonably suspected criminal activity because defendant was standing near a store where multiple recent drug arrests had occurred and took

evasive action; (2) in applying pressure to the defendant's throat so that he would spit out the items where the evidence was in imminent danger of being lost; and (3) in arresting the defendant where there was probable cause) (citation omitted)); see also *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (holding when defendant left suspected drug house on foot and took evasive action when he knew he was being followed, sufficient incriminating circumstances existed to create a reasonable suspicion defendant was engaged in criminal conduct). Competent evidence supports the trial court's findings of fact which support the trial court's conclusions of law. Defendant's motion to suppress was properly denied. This assignment of error is overruled.

II & III

Defendant next argues the trial court erred in making findings of fact which recited the testimony of the arresting officers and in concluding the officers observed "defendant engaged in behavior that they suspected to be a drug transaction" and concluding the officers appropriately stopped defendant from "unprovoked flight." We disagree.

"In reviewing the trial court's ruling on a suppression motion, [we determine] only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Tarlton*, 146 N.C. App. 417, 553 S.E.2d 50, 53 (2001). Only if there is a material conflict in the evidence on *voir dire*, must the

trial court make findings of fact to resolve the conflict. *State v. Vick*, 341 N.C. 569, 580, 461 S.E.2d 655, 661 (1995) (citations omitted). If there is no material conflict in the evidence on *voir dire*, it is not error to admit the challenged evidence without making specific findings of fact. *State v. Riddick*, 291 N.C. 399, 230 S.E.2d 506 (1976); *State v. Biggs*, 289 N.C. 522, 223 S.E.2d 371 (1976). In that event, the necessary findings are implied from the admission of the challenged evidence. *State v. Whitley*, 288 N.C. 106, 215 S.E.2d 568 (1975).

In the present case, the trial court was not required to make findings of fact because there was no material conflict of the evidence. *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980) (holding no prejudicial error where the sole finding made by the trial court was a recitation of the officer's testimony and the trial court specifically concluded that the officer had probable cause to effect the arrest -- a conclusion based upon the State's undisputed, uncontroverted evidence). If there is no conflict in the evidence on *voir dire*, it is not error to admit the challenged evidence without making specific findings of fact. *Id.* Defendant presented no evidence at the motion to suppress hearing, therefore the trial court's findings did not materially conflict with defendant's evidence. The trial court's findings were not error.

Furthermore, the evidence presented at the *voir dire* hearing supports the trial court's conclusions that "defendant engaged in behavior that they suspected to be a drug transaction" and

concluding the officers appropriately stopped defendant from "unprovoked flight." As stated above, the detective had reasonable suspicion defendant was engaged in criminal activity when he met defendant coming around the corner of the building. Detective Mayo specifically testified on *voir dire* that defendant's instant departure around the building, away from Detective Mayo, raised his suspicion. Both officers' suspicion of criminal conduct was heightened when they saw what they reasonably believed to be crack cocaine in defendant's mouth. It is reasonable on these facts for the trial court to properly conclude the officers observed defendant engaged in a drug transaction and was attempting to leave the scene. These assignments of error are overruled.

IV

Defendant argues the trial court erred in denying defendant's motion to dismiss the charge of felony possession of cocaine. We disagree.

"In ruling upon a motion to dismiss, the trial court must determine if the State has presented substantial evidence of each essential element of the offense." *State v. Reid*, 151 N.C. App. 379, 565 S.E.2d 747 (2002) (citation omitted). "Whether the evidence presented is substantial is a question of law for the court." *State v. Siriguanico*, 151 N.C. App. 107, 564 S.E.2d 301 (2002) (citation omitted). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002) (citing *Vick* at 583-84, 461 S.E.2d at 663), *cert.*



denied, 537 U.S. 1006, 154 L. Ed. 2d 404. When considering a criminal defendant's motion to dismiss, the trial court must view all of the evidence presented "in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998) (citation omitted). If there is substantial evidence, whether direct, circumstantial, or both, to support a finding that the offense charged has been committed and that the defendant was the perpetrator, the case is for the jury; and the motion to dismiss should be denied. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988). North Carolina General Statutes, Sections 90-95(a)(3) and (d)(2) provide that it shall be unlawful to possess cocaine, which is a Schedule II controlled substance. N.C. Gen. Stat. §§ 90-95(a)(3) and (d)(2) (2005).

In this case, Detective Pellegrino testified he swept a rock-like substance from defendant's mouth, picked it up, placed it in a plastic bag, and delivered it to the evidence locker at the police station. An SBI analyst, Special Agent Richard Wagner, was tendered and accepted, without objection from defendant, as an expert in the field of forensic chemistry and in the analysis of controlled substances. Agent Wagner subsequently testified that in his opinion, the material provided for testing by Detective Pellegrino was cocaine base, commonly known as crack cocaine. This is substantial evidence of felony possession of cocaine. This assignment of error is overruled.

Defendant argues the trial court erred in overruling defendant's objection to the admission of expert opinion testimony by Agent Wagner regarding the opinion of another SBI agent that the State's Exhibit three, seized from defendant's mouth, consisted of one-tenth of a gram of cocaine. Defendant contends that expert testimony based on analyses conducted by someone other than the testifying expert violated his right to confrontation under the rationale of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

However, defendant concedes in his brief that *State v. Bunn* \_\_\_ N.C. App. \_\_\_, 619 S.E.2d 918 (2005) is controlling and admits that he brings forth this issue for preservation purposes. In *Bunn*, this Court found that:

after a recitation of his credentials, Special Agent Robert Evans was tendered and accepted, without objection by Defendant, as an expert in forensic drug examination. Special Agent Evans, after a thorough review of the methodology undertaken by his colleague, relied on his colleague's analyses in forming his opinion that the substance sold to the undercover officers was cocaine, and his opinion was based on data reasonably relied upon by others in the field.

*Id.* at \_\_\_, 619 S.E.2d at 920. The Court noted that "it is well established that an expert may base an opinion on tests performed by others in the field and [d]efendant was given an opportunity to cross-examine Special Agent Evans on the basis of his opinion[,]"

*Id.* at \_\_\_, 619 S.E.2d at 920-21, thereby concluding that *Crawford* did not apply and there was no violation of the defendant's right

of confrontation. See also *State v. Lyles*, 172 N.C. App. 323, 325-27, 615 S.E.2d 890, 892-94 (2005) (no error in the admission of laboratory reports prepared by a non-testifying analyst as the basis for an expert witness' opinion). The trial court did not err in denying defendant's motion to dismiss the charge of felony possession of cocaine. This assignment of error is overruled.

No error.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).