NO. COA05-643

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v. Forsyth County
No. 03 CRS 63172

HENRY LEE SCALES

Appeal by defendant from judgment entered 7 December 2004 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 25 January 2006.

Attorney General Roy Cooper, by Assistant Attorney General Jason T. Campbell, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes, for defendant-appellant.

ELMORE, Judge.

Henry Lee Scales (defendant) was indicted for possession with intent to sell or deliver cocaine, trafficking in cocaine by possession, trafficking in cocaine by transportation, and trafficking in cocaine by sale. The State's evidence tended to establish the following: On 30 September 2003 Detective Jeffrey Royall was a member of the narcotics unit of the Forsyth County Sheriff's Office. Using a confidential informant, Detective Royall arranged to purchase two ounces of cocaine for $1,900.00.

Detective Royall testified that he arrived at Pete's Grocery Store at approximately 4:00 p.m. He pulled ten feet in front of a

black Isuzu truck and another vehicle parked side-by-side. The truck was occupied by a person later identified as defendant. The second vehicle was occupied by Keith and Brock Speas. Detective Royall offered Keith Speas $2,000.00 to purchase two ounces of cocaine. Keith Speas walked over to the back of defendant's pickup truck and reached down into the bed of the truck to retrieve a package wrapped in plastic. Detective Royall described the substance as a "hard, off-white, rock-like substance, which I believed to be crack cocaine."

Defendant was sitting in the truck observing the exchange between Detective Royall and Keith Speas. Defendant did not say anything or get out of the truck at any point. After the transaction, Keith Speas returned to the vehicle occupied by Brock Speas. Defendant followed behind this vehicle as it left the parking lot. Detective Royall ran the tag number of defendant's truck and obtained a DMV photograph. The vehicle was registered to defendant. Also, Detective Royall testified that he was able to observe defendant inside the truck because the windshield was not tinted.

The State proffered evidence of another incident involving defendant that occurred on 24 November 2003, two months after the incident in the present case. The trial court overruled defendant's objection to the admission of this evidence. Officer Gerald Lovejoy testified that he encountered defendant at an apartment complex at Wabash Boulevard on 24 November 2003. Officer Lovejoy stated that he responded to a call about a suspicious

person at the apartment complex, which was known for automobile break-ins. When he arrived, Officer Lovejoy observed defendant sitting in a black Isuzu truck in the parking lot. Defendant was lying down in the seat and moving around inside the vehicle. When defendant noticed the officer, he jumped out of the truck and asked why he was being stopped.

Officer Lovejoy testified that he recovered a glass pipe with a Brillo pad stuffed in the end of it and a hard, rock-like substance that field tested positive for crack cocaine. After the field test showed the presence of crack cocaine, defendant was arrested. During his discussion with Officer Lovejoy, defendant stated that he had been dropped off in the parking lot by Keith Speas.

Defendant presented the testimony of the confidential informant, David George. Mr. George testified that he went to a "crack house" to arrange for Detective Royall to purchase cocaine from Keith Speas and Brock Speas. Defendant, a cousin of Keith and Brock Speas, was present at the house. Keith and Brock Speas agreed to meet at Pete's Grocery to complete the transaction.

Defendant testified that he was at his cousin's house to help his other cousin, Brock Speas, move furniture. Defendant admitted that he knew Brock Speas had sold drugs in the past but denied he was aware of a pending drug deal. Defendant stated that he followed Keith and Brock Speas to Pete's Grocery because he thought he was going to move furniture.

The jury returned verdicts of guilty on all charges. The trial court sentenced defendant to 35 months to 42 months imprisonment and a fine of $50,000.00. Defendant gave notice of appeal in open court.

By his first assignment of error, defendant contends that the trial court erred in admitting evidence under Rule 404(b) that defendant committed a subsequent act, offered to show that defendant knew one of the co-conspirators. Rule 404(b) of the North Carolina Rules of Evidence provides:

> 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) (2005). Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion 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. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). The list of permissible purposes is not exclusive; evidence of other acts is admissible where it is "relevant to any fact or issue other than the defendant's propensity to commit the crime [charged]." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (1995).

Foremost, we note that evidence of *subsequent* crimes, wrongs, or acts is admissible under Rule 404(b) so long as they are not too

remote in time. *See State v. Hutchinson*, 139 N.C. App. 132, 136, 532 S.E.2d 569, 572 (2000). Defendant contends that the evidence that he possessed a substance the officer thought was cocaine two months after the offense date at issue during trial lacked sufficient temporal proximity to the date of the offense to be admissible under Rule 404(b). Our case law does not support defendant's contention. In *Hutchinson*, the State offered evidence of the subsequent crimes of shoplifting, larceny, and car theft to show the defendant's intent at the time of the alleged burglary. Also, evidence that the defendant sold some of the stolen goods from these subsequent larcenies for drugs tended to show the defendant's motive for committing the burglary offense. Significantly, the Court held that a "time span of one to two months between the burglary and the subsequent larcenies does not render [those subsequent crimes] too remote in time" under Rule 404(b). *Id.* at 137, 532 S.E.2d at 573 (citing *State v. Biggs*, 224 N.C. 722, 726, 32 S.E.2d 352, 354-55 (1944)).

Here, the incident involving Officer Lovejoy, which occurred two months after the charged crime, was not too remote to be admissible under Rule 404(b). *See id.; see also State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) (remoteness in time is more significant when evidence of other crime or conduct used to show both crimes arose out of a common scheme or plan; remoteness in time is less significant when evidence of other conduct used to show intent, motive, knowledge, or lack of accident).

The State offered the evidence of the subsequent transaction, during which defendant admitted knowing Keith Speas, in order to rebut defendant's denial that he knew Keith or Brock Speas. More specifically, it tended to show that it was not an accident that defendant was parked next to Keith and Brock Speas at Pete's Grocery at the time of the drug transaction. As it appeared on the record that defendant was going to deny knowledge of Keith or Brock Speas and any drug transaction, this was a permissible purpose for admitting the evidence of defendant's subsequent arrest in November 2003. The fact that defendant later acknowledged knowing both of his co-conspirators, when he testified that he was helping them move furniture, is inconsequential to our analysis; the evidence was proffered to show knowledge and lack of accident, permissible purposes under Rule 404(b).

Defendant argues that, even if the evidence was admissible under Rule 404(b), the trial court erred in failing to give a limiting instruction *at the time the evidence was admitted*. But defendant did not request such an instruction. Therefore, he cannot challenge the lack of an instruction on appeal. *See Stager*, 329 N.C. at 310, 406 S.E.2d at 894 ("The defendant, having failed to specifically request or tender a limiting instruction at the time the evidence was admitted, is not entitled to have the trial court's failure to give limiting instructions reviewed on appeal."). Additionally, the trial court gave a limiting instruction to the jury before deliberations:

> Evidence has been received tending to show that at . . . a time subsequent to this offense the Defendant was stopped in a parking lot -- you recall the testimony of Officer Lovejoy, and he approached the Defendant and noticed a crack pipe, as he describe it, in his, on the floor board, and found some controlled substance that, what, in his opinion to be cocaine.
>
> This evidence was received solely for the purpose of showing that the Defendant had knowledge, which is a necessary element of the crime charged in this case; that there existed in the mind of the Defendant a plan, scheme, system or design involving the crime charged in this case.
>
> If you believe this evidence you may consider it only for the limited purpose for which it was received. In other words, you cannot find him guilty of this offense because of some other incident that he has been described to have participated in.

Defendant's assignment of error is overruled.

Next, defendant contends that the trial court erred in allowing an officer to testify to the composition of an alleged controlled substance where no report was introduced to support the officer's opinion and no qualifications shown for the officer to conduct such a test. We hold that any error in allowing the testimony of Officer Lovejoy concerning the field test was harmless because of the overwhelming evidence of defendant's guilt. *See State v. Moore*, 152 N.C. App. 156, 162, 566 S.E.2d 713, 717 (2002) (an erroneous admission of evidence is not prejudicial to the defendant where there is overwhelming evidence presented of the defendant's guilt). Here, the State introduced evidence that defendant was sitting in the truck and observed the drug

transaction between Keith Speas and Detective Royall. Keith Speas retrieved the cocaine from the bed of defendant's truck. Defendant did not step out of the vehicle at any point to go into the store. Defendant's vehicle followed behind the vehicle occupied by Keith and Brock Speas as it exited the parking lot of Pete's Grocery. Defendant simply fails to establish that there is a reasonable possibility that had the field test of the alleged controlled substance possessed by defendant in November 2003 not been admitted, a different result would have been reached at trial. *See* N.C. Gen. Stat. § 15A-1443(a) (2005).

Next, defendant assigns error to the trial court's ruling to allow the prosecutor to refer to the house where defendant and Keith and Brock Speas left from as a "crack house." On cross-examination of defendant, defense counsel objected as follows:

> Q. What I mean is, you met them at a crack house?
>
> [defense counsel]: Objection to --
>
> Q. Is that right?
>
> [defense counsel]: -- crack house.
>
> THE COURT: Overruled.

However, defendant made no objection when the house was described as a "crack house" or "drug house" earlier in the trial proceedings. Detective Royall testified on direct examination as follows:

> A. The informant and myself went to a known drug house located . . . on Boiling Springs Road . . . .

. . . .

> A. The original deal was to take place at the drug house on Boiling Springs Road. Due to the fact that the first time I was there, there were approximately eight people inside, and a lot of them were high, and I knew I was going to have like two thousand dollars in my pocket, I didn't feel it would be safe for me to go in that situation. So I offered Keith Speas an additional one hundred dollars to bring the dope to the grocery store.

In addition, David George – the confidential informant – testified on direct examination by defense counsel as follows:

> A. At the, what we call a crack house on Boiling Springs Road . . . .
>
> Q. Whose house was it?
>
> A. I just knowed it to be a crack house . . .

The record reveals that defendant did not object at any point during the testimony of these witnesses. As such, he waived his subsequent objection to the implication that the house where he met Keith and Brock Speas was known as a "crack house." *See State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) ("the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of similar character").

Next, defendant contends that the trial court erred in refusing to dismiss the charges based upon insufficient evidence of constructive possession. When ruling upon a defendant's motion to dismiss for insufficiency of the evidence, the trial court must view the evidence in the light most favorable to the State. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000). The court must give the State the benefit of all reasonable inferences,

and any contradictions in the evidence are to be resolved by the jury. *Id.* A defendant has constructive possession of contraband when the defendant "has the intent and capability to maintain control and dominion over" the narcotics. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). When the defendant does not have exclusive possession of the premises where the contraband was found, an inference of constructive possession may arise only if the State shows other incriminating circumstances. *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 588-89 (1984).

We need not decide whether defendant was in exclusive possession of the bed of his truck, as the State in the case *sub judice* showed other incriminating circumstances to support an inference of constructive possession. The confidential informant testified that defendant followed Brock and Keith Speas to Pete's Grocery in his own vehicle, and that they were going there for the purpose of a drug deal. Detective Royall testified that defendant observed the transaction between himself and Keith Speas. More specifically, defendant watched as Keith Speas walked to the back of defendant's truck and pulled out a package from the bed of the truck. Detective Royall testified that, after the transaction was complete, defendant left the parking lot in his vehicle following behind the vehicle occupied by Keith and Brock Speas. The trial court must view the evidence in the light most favorable to the State, *see Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455, and thus could not consider defendant's testimony that he did not see what Keith Speas was pulling out of the back of his truck. The

State's evidence of other incriminating circumstances was sufficient to raise an inference of constructive possession. Defendant's assignment of error on this point is overruled.

By his next assignment of error, defendant asserts that the trial judge committed plain error when he "expressed his opinion about the evidence." Pursuant to N.C. Gen. Stat. § 15A-1222, a trial judge must not express an opinion on any question of fact to be determined by the jury. N.C. Gen. Stat. § 15A-1222 (2005). However, an improper remark by the trial judge will not require a new trial unless the remark goes to the heart of the case against the defendant. *See State v. Sidbury*, 64 N.C. App. 177, 178-79, 306 S.E.2d 844, 845 (1983).

Defendant challenges the following portions of the trial court's instruction to the jury:

> Evidence has been received tending to show that at . . . a time subsequent to this offense the Defendant was stopped in a parking lot -- you recall the testimony of Officer Lovejoy, **and he approached the Defendant and noticed a crack pipe, as he describe it, in his, on the floor board, and found some controlled substance that, what, in his opinion to be cocaine.**
>
> This evidence was received solely for the purpose of showing that the Defendant had knowledge, which is a necessary element of the crime charged in this case; that there existed in the mind of the Defendant a plan, scheme, system or design involving the crime charged in this case.
>
> . . . .
>
> Now, **Officer Lovejoy testified that he field tested something, but he also testified that he was familiar with the substance.** When

> evidence has been received from a witness in the form of an opinion, you may only consider the opinion of a witness which is rationally based on the perception of the witness and helpful for the determination of a fact in issue.

Defendant asserts that, taken together, these remarks by the trial judge expressed an opinion about the evidence because the jurors could have interpreted the judge as believing that the officer found crack cocaine and a pipe. Defendant cites to *State v. Guffey*, 39 N.C. App. 359, 250 S.E.2d 96 (1979). In *Guffey*, the defendant made a pre-trial motion to dismiss the indictment. The trial judge, in responding to the defendant's argument that the indictment should have charged one count rather than two crimes, remarked: "Well, it's two different — two different people. He was pretty busy that day." *Id.* at 361, 250 S.E.2d at 97. The trial judge's comment was made in the presence of prospective jurors. This Court held the defendant was entitled to a new trial because the comment expressed an opinion on the defendant's guilt. *Id.* at 361-62, 250 S.E.2d at 97-98. Here, unlike in *Guffey*, the trial judge's comment did not bear upon defendant's guilt. Instead, the remark was directed at a subsequent act of defendant offered to show that he knew Keith Speas. The trial judge did not directly or indirectly express an opinion on whether defendant knew that Keith Speas retrieved a package of contraband from defendant's truck – an issue of fact to be decided by the jury.

Defendant also cites to *State v. Hewett*, 295 N.C. 640, 247 S.E.2d 886 (1978). There, the trial judge summarized the State's contentions in the instructions to the jury, but not the

contentions of the defendant. This Court held that the trial judge's expressing the State's contentions and failure to relate any of the defendant's contentions was prejudicial error requiring a new trial. *Id.* at 642-43, 247 S.E.2d at 887-88. *Hewett* is inapposite to the instant case. Here, the trial judge did not state either party's contentions in the instructions to the jury. Indeed, the trial judge noted this as part of the instructions:

> I have not reviewed the contentions of the State or of the Defendant, but it is your duty not only to consider all of the evidence, but also to consider all of the arguments, the contentions and positions urged by the State's attorney and the Defendant's attorney in their speeches to you, and any other contention that arises from the evidence[.]

In sum, we hold that the statements by the trial judge do not express an opinion by the court on an issue to be decided by the jury, the guilt of defendant, or the credibility of defendant's evidence. Defendant cannot show error in the trial court's instructions. *See State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985) (no prejudicial error unless trial judge intimates opinion on defendant's guilt, weight of evidence, or factual issue).

Finally, defendant assigns as error the trial court's instruction on the common elements of the three charges only once. The trial court noted that these common elements applied to all three charges. Defendant did not object to the instructions. He asserts that the failure to instruct on the common elements of each charge separately constitutes plain error. In *State v. Evans*, 162 N.C. App. 540, 591 S.E.2d 564 (2004), the defendant was indicted

for taking indecent liberties with a minor, statutory sex offense, and sexual activity by a custodian on 28 May, 29 May, 31 May, and 2 June 2000. The trial court instructed the jury on the elements of taking indecent liberties with a child with respect to the alleged events of 28 May 2000; and the elements of statutory sex offense and sexual activity by a custodian alleged to have occurred on 29 May 2000. The defendant argued on appeal that the failure of the trial judge to instruct on each charge for each date constituted plain error. *Id.* at 543, 591 S.E.2d at 566. This Court held "there was no reasonable possibility that, had the trial court specifically instructed the jury on the same offense for each date alleged, a different result would have ensued." *Id.* at 544, 591 S.E.2d at 567.

Defendant argues that *Evans* is distinguishable because there the trial court provided the jury with a written copy of the instructions on each of the crimes on each date. In the instant case, the trial judge did not provide a written copy of the instructions. However, defendant's argument must fail in light of *State v. Parker*, 119 N.C. App. 328, 459 S.E.2d 9 (1995). The trial court in *Parker* did not instruct the jury on each count of the indictments separately. But the court stated that it would be submitting twelve separate verdict sheets and that the jury could vote either guilty or not guilty on each verdict sheet. *Id.* at 339, 459 S.E.2d at 15. This Court held that, viewed in its entirety, the instructions made clear that the jury should consider each charge separately in its deliberations. *Id.* Here, as in

Parker, the instructions viewed in their entirety made clear that the jury was to consider each charge separately in its deliberations. The trial judge instructed, in relevant part, as follows:

> All right, Ladies and Gentlemen, now I specifically went through the instruction for drug trafficking by possession. The -- and it speaks for itself, but to avoid any possible confusion, there are two elements for trafficking cocaine by sell, as there were two elements for trafficking cocaine by possession.
>
> And as I said, for the first element for by possession, that the [defendant] knowingly possessed the relative amount of cocaine. However, for sell, the way it differs is that instead of the Defendant knowingly possessed, that the Defendant knowingly sold . . . and the amount that he sold, as I've stated. That's the only way it differs. Is that clear, Ladies and Gentlemen?
>
> And for transportation it's two elements as well: that the Defendant knowingly transported and the amount that the Defendant transported was at least twenty-eight grams, no more than one hundred and ninety-nine grams. So the only way those instructions differ is that in one instruction you knowingly possess, another one, you knowingly sell, and another one you knowingly transport. That other element as it concerns the amount and the substance remains the same.

Defendant cannot show a reasonable possibility that, had the trial court separately instructed on each count, the jury would have reached a different result. *See Evans*, 162 N.C. App. at 544, 591 S.E.2d at 567.

No error.

Judges McCULLOUGH and LEVINSON concur.

Report per Rule 30(e).