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NO. COA06-129

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 02 CRS 213637

DONNIE RAY WINSTON

Appeal by defendant from judgment entered 10 December 2002 by Judge James E. Lanning in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General James C. Holloway, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

TYSON, Judge.

Donnie Ray Winston ("defendant") appeals from judgment entered after a jury found him to be guilty of trafficking in cocaine by transportation and trafficking in cocaine by possession. We find no error.

I. Background

In March 2002, as defendant walked toward his home, "Dave" drove by defendant and stopped his car. Defendant had known Dave for ten years, but had not seen him in eight or nine years. Defendant entered Dave's car and rode with him toward defendant's house. While in transit, Dave asked defendant if he wanted to

travel to Jamaica and offered to pay for one-half of the cost of his ticket. A few days later, Dave drove defendant to an U.S. Airways' ticket office. Dave paid \$300.00 toward defendant's \$615.00 airplane ticket. Dave also supplied defendant with luggage.

On 15 March 2002, Dave drove defendant to the airport to travel to Montego Bay, Jamaica. Dave gave defendant \$400.00 and told him to meet a man named, "Andre," at the airport upon arrival. Dave described Andre to defendant.

Defendant arrived in Jamaica and two men, Andre and "Bodou," met defendant at the airport. Andre and Bodou asked defendant if he was "Dave's boy." Andre paid for defendant to stay in a cottage in Jamaica. Defendant, Andre, and Bodou consumed alcohol and smoked marijuana. Defendant admitted Andre and Bodou possessed marijuana in pound quantities.

On 27 March 2002, Andre and Bodou drove defendant to the airport to return to North Carolina. While in transit to the airport, the men stopped at a residence. Bodou got a shopping bag out of a vehicle parked at the residence. He told defendant it was "coffee for Dave" and packed the bag inside defendant's luggage. Defendant boarded an airplane bound for Charlotte.

Defendant arrived at Charlotte-Douglas International Airport and waited to collect his luggage from the baggage carousel. United States Customs Senior Inspector Dennis Knapp ("Inspector Knapp") observed and described defendant as somewhat confused and "kind of apprehensive." Defendant collected his luggage and

approached the United States Customs' checkpoint. Inspector Knapp referred defendant to a secondary inspection checkpoint. This referral was based upon Inspector Knapp's knowledge of the United States Customs' travel records which showed: (1) defendant's ticket was purchased three days in advance of travel; (2) the tickets were paid for in cash; and (3) defendant had no previous foreign travel. Inspector Knapp asked defendant routine questions about his luggage. Defendant told Inspector Knapp that the luggage belonged to him and that he had packed a couple of items given to him in Jamaica.

Inspector Knapp opened defendant's luggage and noticed a distinct smell of bleach. Defendant's clothes were damp. Defendant explained he had washed them prior to leaving Jamaica, but had not had time for them to dry. Inspector Knapp was concerned the bleach odor was being used to mask the smell of cocaine and further inspected the luggage.

Inspector Knapp found minimal amounts of marijuana residue in the luggage. Inspector Knapp also found two coffee bags in defendant's luggage which were vacuum sealed in "metallic type" bags and enclosed by burlap bags and sealed with cardboard labels at the opening. Inspector Knapp x-rayed these bags and discovered a secondary object located inside each bag. Inspector Knapp opened each bag with a knife and found a plastic liner located inside containing a white substance he believed to be powder cocaine.

Inspector Knapp contacted United States Customs Inspector Thomas George Shedd, who performed field tests on the substances

which tested positive for cocaine. The combined substances weighed slightly over 1,000 grams. United States Customs officials placed defendant in a holding room and handcuffed him to a bench. Inspector Knapp contacted local law enforcement and Charlotte-Mecklenburg Police Detective James Beaver ("Detective Beaver") responded. Detective Beaver visited defendant in the holding room. Defendant waived his *Miranda* rights and gave a statement confessing to the facts above. Detective Beaver took possession of the cocaine and turned over custody of the cocaine to Property Control. Property Control gave the cocaine to Charlotte-Mecklenburg Police Department Crime Lab Chemist Tony A. Aldridge, who tested the substance positively for cocaine and confirmed the cocaine weighed slightly over 1,000 grams.

Defendant testified to and confirmed the above facts. The sole discrepancies were: (1) defendant told Detective Beaver that Dave had paid \$300.00 for the ticket, when Dave actually paid the entire cost of the ticket and (2) Detective Beaver testified defendant told him he had previously sold cocaine for Dave, when, in truth, defendant sold cocaine, but not for Dave.

On 8 April 2002, a grand jury indicted defendant on one count of trafficking cocaine and one count of possession of cocaine. On 10 December 2002, a jury found defendant to be guilty of one count of trafficking in cocaine by transportation and one count of trafficking in cocaine by possession. The trial court sentenced defendant to two concurrent terms of a minimum of 175 months to a

maximum of 219 months. On 29 July 2004, this Court allowed defendant's petition for writ of certiorari.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to dismiss both charges; (2) allowing Detective Beaver to testify regarding defendant's statement that he had "sold cocaine for Dave;" and (3) instructing the jury, over his objection, on North Carolina Pattern Jury Instructions 105.21 on false, contradictory, or conflicting statements of a defendant. Defendant also argues he was denied effective assistance of counsel under the Sixth and Fourteenth Amendments.

III. Motion to Dismiss

Defendant contends the trial court erred in denying his motion to dismiss both charges where the evidence presented at trial was insufficient for a rational trier of fact to find each and every element of the crimes charged beyond a reasonable doubt.

A. Standard of Review

The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, ___ N.C. App. ___, ___, 622 S.E.2d 120, 123 (2005) (internal quotations omitted).

B. Analysis

Defendant was charged with: (1) possession of drugs under N.C. Gen. Stat. § 90-95(h) and (2) feloniously transporting drugs under N.C. Gen. Stat. § 90-95(h). N.C. Gen. Stat. § 90-95(h) (3) (c) (2005) states:

(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

. . . .

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof . . . shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

. . . .

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars (\$250,000).

"It is now well-established that convictions for the separate offenses of transporting and possessing a controlled substance are consistent with the intent of the legislature and do not violate the constitutional prohibition against double jeopardy." *State v. Bogle*, 90 N.C. App. 277, 285, 368 S.E.2d 424, 430 (1988), *rev'd on other grounds*, 324 N.C. 190, 376 S.E.2d 745 (1989). "To convict defendant of [possession of a controlled substance and transporting

the controlled substance], the State [is] required to prove that defendant knowingly possessed and transported the [controlled substance]" *Bogle*, 324 N.C. at 193, 346 S.E.2d at 746-47; see *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985).

Defendant argues he did not knowingly possess and transport cocaine. We disagree. "Felonious possession of a controlled substance has two essential elements." *Weldon*, 314 N.C. at 403, 333 S.E.2d at 702 (internal quotations and citations omitted). "The substance must be possessed, and the substance must be 'knowingly' possessed." *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977). "An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material . . . when he has both the power and intent to control its disposition or use." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "The requirements of power and intent necessarily imply that a defendant must be aware of the presence of an illegal drug if he is to be convicted of possessing it." *State v. Davis*, 20 N.C. App. 191, 192, 201 S.E.2d 61, 62 (1973), *cert. denied*, 284 N.C. 618, 202 S.E.2d 274 (1974). "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714.

Sufficient evidence tended to show defendant had knowledge or a reason to know he possessed and transported a controlled substance. The State presented evidence, and defendant admitted: (1) he had not seen Dave for eight or nine years; (2) he had previously sold cocaine for Dave; (3) Dave bought him an airplane ticket and drove him to the airport; (4) Dave told him to meet Andre, whom he had never met, at the Jamaica airport; (5) Andre and Dave paid for his living expenses during his visit in Jamaica; (6) Andre and Bodou possessed marijuana in pound quantities, and Andre, Bodou, and he smoked marijuana together while in Jamaica; (7) in transit to the airport in Jamaica, Bodou retrieved a package from the trunk of a parked car and placed the package in defendant's suitcase and told him to give the package to Dave; and (8) the cocaine was found in defendant's luggage after his arrival in Charlotte.

Viewed in the light most favorable to the State, sufficient evidence tends to show defendant possessed and had knowledge of his possession of a controlled substance. The trial court did not err in denying defendant's motion to dismiss both charges. This assignment of error is overruled.

IV. Detective Beaver's Testimony

Defendant contends the trial court erred in allowing Detective Beaver to testify regarding defendant's statement that he had previously "sold cocaine for Dave" where this testimony was inadmissible under Rule 403 and Rule 404 of the North Carolina

Rules of Evidence and defendant was highly prejudiced by the admission of their testimony.

A. Standard of Review

Defendant failed to object to Detective Beaver's testimony. Our review is limited to plain error. N.C.R. App. P. 10(b)(2) (2006); *State v. Allen*, 339 N.C. 545, 554-56, 453 S.E.2d 150, 154-55 (1995). Plain error is a:

fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotations omitted). To be awarded a new trial due to plain error, a defendant must show the error complained of was so fundamental that a different result would have probably occurred without the error. *State v. Parker*, 350 N.C. 411, 444, 516 S.E.2d 106, 127 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000).

B. Analysis

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005) states:

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.

Evidence of prior crimes, wrongs, or acts by a defendant is "inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged[.]" *State v. Young*, 317 N.C. 396, 412, 346 S.E.2d 626, 635 (1986).

"[E]vidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986). Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (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), cert. denied, ___ N.C. ___, 421 S.E.2d 360 (1992).

During the State's direct examination of Detective Beaver, the following colloquy occurred:

Prosecutor: Did [defendant] tell you anything else about the occasion?

Beaver: Not about the actual trip that I recall. He gave me some other information about Dave.

Prosecutor: And what was that?

Beaver: Like originally I stated earlier he said he had known Dave for approximately ten years; he hadn't seen him in eight or nine years before running into him on the street. He said that back when he knew Dave he admitted he used to sell cocaine, [defendant]. [Defendant] admitted that he sold cocaine for Dave. It was approximately a six-month period of time and he got arrested in Raleigh for selling cocaine to an undercover officer, at which point he told me he stopped.

Prosecutor: Is there anything else that he said?

Beaver: He told me he never used cocaine.

Prosecutor: But he did admit to selling it for Dave in the past.

Beaver: Yes, sir.

Detective Beaver's testimony that defendant admitted he had previously sold cocaine for Dave is probative of defendant's knowledge that Dave paid for and arranged defendant's trip to Jamaica for the purpose of defendant possessing and transporting a controlled substance. Detective Beaver's testimony is also probative of defendant's knowledge that he transported a controlled substance in his luggage. Presuming error, under plain error review, defendant failed to show the error complained of was so fundamental that a different result would have probably occurred without the alleged error. This assignment of error is overruled.

V. Pattern Jury Instructions

Defendant contends the trial court erred in instructing the jury, over defendant's objection, on North Carolina Pattern Jury Instructions 105.21 for false, contradictory, or conflicting

statements of defendant. Defendant argues such instruction was not supported by the evidence at trial and defendant was highly prejudiced by the instruction.

A. Standard of Review

The standard of review for jury instructions is well-established:

This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] . . . Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Blizzard, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (quotations omitted).

B. Analysis

Pattern Jury Instruction Crim. 105.21 for False, Contradictory, or Conflicting Statements of Defendant states:

Note Well: This instruction is ONLY proper where the defendant's statements and/or trial testimony is contradictory to highly relevant facts proven at trial. HOWEVER, this instruction should NOT be used if the statements are completely irrelevant and without substantial probative force in tending to show a consciousness of guilt.

_____

The State contends (and the defendant denies) that the defendant made false, contradictory, or conflicting statements. If you find that the defendant made such statements, they may be considered by you as a circumstance tending to reflect the mental process of a person

possessed of a guilty conscience, seeking to divert suspicion or to exculpate himself, and you should consider that evidence, along with all the other believable evidence in this case. However, if you find that the defendant made such statements, they do not create a presumption of guilt, and such evidence standing alone is not sufficient to establish guilt

1 N.C.P.I.--Crim. 105.21 (2005).

In reviewing jury instructions on false or misleading statements, our Supreme Court has stated:

[i]t is established by our decisions that false, contradictory or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself].

State v. Myers, 309 N.C. 78, 86, 305 S.E.2d 506, 511 (1983) (citing *State v. Redfern*, 246 N.C. 293, 297-98, 98 S.E.2d 322, 326 (1957)).

The probative force of such evidence is that it tends to show consciousness of guilt. *Redfern*, 246 N.C. at 297-98, 98 S.E.2d at 326. The instruction is proper not only where a defendant's statements contradict each other, but also where a defendant's statements flatly contradict the relevant evidence. *State v. Walker*, 332 N.C. 520, 537-38, 422 S.E.2d 716, 722 (1992), *cert. denied*, 508 U.S. 919, 124 L. Ed. 2d 271 (1993) (jury instruction properly given because contradictory evidence that the defendant embraced the victim after shooting her when there was no evidence of blood on his clothes); *see Myers*, 309 N.C. at 88, 305 S.E.2d at 512 (jury instruction erroneously given because contradictory evidence that the defendant had a dentist appointment the morning

the victim was killed when the defendant's dentist testified he was not at an appointment).

The trial court gave the following instruction:

The State contends that the defendant made false, contradictory or conflicting statements. If you find that the defendant made these statements, they may be considered by you as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience seeking to divert suspicion or to exculpate themselves. You should consider that evidence along with other believable evidence in this case.

However, if you find that the defendant made such statements, they do not create a presumption of guilt, and such evidence standing alone is not sufficient to establish guilt.

The trial court gave the instruction because contradictory evidence was presented that: (1) defendant told Detective Beaver he never smoked crack cocaine, then changed his statement and testified he had smoked crack cocaine, but not often and (2) defendant told Detective Beaver that he had paid for one-half of the cost of the airplane ticket, then changed his statement and testified Dave paid the entire cost of the airplane ticket.

Defendant's contradictory statements were relevant because they tended to show defendant knew Dave sold cocaine. The statements were relevant to show Dave's motive for paying for defendant's trip to Jamaica and defendant's knowledge of his possession of cocaine.

The substantial probative force of the inconsistencies tended to show defendant's consciousness of guilt. Defendant's statements contradict earlier statements he had told Detective Beaver the day

he was arrested as compared with defendant's testimony at trial. The trial court did not err by giving this instruction on false, contradictory, or conflicting statements by defendant. This assignment of error is overruled.

VI. Effective Assistance of Counsel

Defendant asserts he was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and under Article I, Section 19 and Section 23 of the North Carolina Constitution because defense counsel failed to object to Detective Beaver's testimony that defendant admitted he had "sold cocaine for Dave" in the past. Defendant argues this testimony was inadmissible and he was highly prejudiced.

The test for determining whether a defendant in a criminal case has received effective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984), and the test is the same under both the Federal and State Constitutions. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)). To establish that there was ineffective assistance of counsel, a defendant must meet the two-prong test of *Strickland*:

First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must

show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Lewis, 321 N.C. 42, 48-49, 361 S.E.2d 728, 732 (1987). The burden of showing ineffective assistance of counsel is on the defendant. *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985).

Defense counsel failed to object to Detective Beaver's testimony that defendant stated he had sold cocaine for Dave. As discussed above, Detective Beaver's testimony is admissible under Rule 404(b) because it is probative of defendant's knowledge, motive, or plan. Defendant failed to show there would probably have been a different result at trial, but for defense counsel's failure to object. See *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 ("The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings."). Presuming defense counsel erred by his failure to object, defendant has failed to show his "counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable." *Lewis*, 321 N.C. at 49, 361 S.E.2d at 732. Defendant failed to meet his burden of proving ineffective assistance of counsel. This assignment of error is overruled.

VII. Conclusion

The trial court did not err in denying defendant's motion to dismiss both charges. Sufficient evidence tended to show defendant possessed and had knowledge he possessed and transported a controlled substance. Defendant failed to show plain error resulted from Detective Beaver's testimony that defendant had previously sold cocaine for Dave. The trial court's jury instruction on defendant's false, contradictory, or conflicting statements was proper. Defendant failed to prove ineffective assistance of counsel when defense counsel failed to object to Detective Beaver's testimony that defendant said he sold cocaine for Dave. Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued.

No Error.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).