NO. COA06-305

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 04 CRS 23118
04 CRS 73752

LEVON TOBY EZEKIEL,
Defendant.

Appeal by defendant from judgment entered 8 September 2005 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 16 April 2007.

Attorney General Roy Cooper, by Assistant Attorney General Scott A. Conklin, for the State.

Brannon Strickland, PLLC, by Anthony M. Brannon, for defendant-appellant.

GEER, Judge.

Defendant Levon Toby Ezekiel appeals his convictions for felony possession of cocaine and having attained habitual felon status. On appeal, defendant argues that the trial court erred by: (1) denying his motion to dismiss for lack of evidence that he possessed cocaine; (2) permitting the State's attorney, during closing arguments, to reference defendant's failure to present exculpatory evidence; and (3) improperly instructing the jury on the issue of reasonable doubt. We find defendant's arguments unpersuasive and, therefore, hold that there was no error in his

convictions.

Facts

The State's evidence at trial tended to show the following facts. On the morning of 26 March 2004, Officers Chris Martin and Erich Crouch, probation officers with the North Carolina Division of Community Corrections, were attempting to find a woman who was on probation. They observed defendant, whom they recognized, leaving a convenience store. After making eye contact with the officers, defendant got into a vehicle driven by an elderly black male and left the parking lot. The officers were aware that there was an outstanding order for defendant's arrest for failure to appear in court on a probation violation.

After confirming with their supervisor that the warrant was still outstanding, the officers followed the vehicle containing defendant for several blocks. From about a car's length away, the officers saw defendant throw a bag out the passenger-side window. Officer Crouch, who was riding in the passenger seat, took note of where the bag fell. The officers, however, continued to follow defendant. About two blocks later, the car carrying defendant stopped, and defendant jumped out and started running. Officer Crouch chased defendant on foot until defendant was out of sight. The officers drove to the next block to see if they could find defendant, but they were unsuccessful.

The officers immediately returned to the area where they had seen defendant throw the bag from the car. Officer Crouch

testified that five minutes or less had elapsed since defendant had thrown the bag. When they reached the location, they found a small brown package "like a balled piece of paper." Inside the package was a white rock-like substance, broken up into little chips that was later identified as cocaine. Both officers saw no one nearby when the bag was thrown and observed only one person sitting on a front porch several houses away when they returned to the location.

Defendant was indicted for possession of cocaine, misdemeanor resisting a public officer, and attaining the status of habitual felon. At trial, the court dismissed the charge of misdemeanor resisting a public officer, but the jury found defendant guilty of possession of cocaine and of being a habitual felon. The trial court sentenced defendant as a habitual felon to a term of 100 to 129 months imprisonment. Defendant timely appealed to this Court.

I

Defendant first argues that the trial court erred by denying his motion to dismiss because, according to defendant, the State failed to present evidence that defendant possessed the cocaine found by the officers on the side of the road. A defendant's motion to dismiss should be denied if there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* at 597, 573 S.E.2d at 869. On review of a denial of a motion to dismiss, this Court must

view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869. Contradictions and discrepancies do not warrant dismissal of the case, but, rather, are for the jury to resolve. *Id.*

"An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law 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). In the present case, both Officer Martin and Officer Crouch testified that they saw defendant throw the bag from the car and observed where it landed. When they returned a few minutes later, the officers found a bag containing cocaine that Officer Crouch stated at trial was the "same identical package" he had seen defendant throw from the vehicle. At the time the officers recovered the bag, "the street was empty" and "no one [was] around."

Construed in the light most favorable to the State, this is sufficient evidence from which a jury could rationally conclude that defendant had actual possession of the cocaine prior to throwing it out the car window. *See State v. Wilder*, 124 N.C. App. 136, 140, 476 S.E.2d 394, 397 (1996) (sufficient evidence of possession existed when officer observed defendant throw a bag into some bushes, defendant's neighbor found a bag matching the officer's description in those bushes the following day, and the bag contained cocaine). Accordingly, this assignment of error is

overruled.

II

Defendant next argues that the State improperly commented on his failure to testify at trial. Specifically, defendant points to the following statements made by the prosecutor during closing arguments:

> All of the evidence in this case shows that the defendant is guilty. He did not put on any exculpatory evidence, did not put on any evidence to contradict the State's evidence, did not put on any evidence showing an alibi, that he was anywhere else other than that Dodge Stratus throwing [the bag of cocaine] out of the passenger window.
>
> [Defense counsel] may argue to you the State shouldn't argue that, I'm trying to shift the burden of proof to the defendant by saying he didn't put on exculpatory evidence or evidence of an alibi. According to our law, ladies and gentlemen, our Supreme Court, your Supreme Court says we can argue that.

Defense counsel's timely objection was overruled. Defendant contends that these statements, as well as the trial court's failure to give a curative instruction, constituted prejudicial error entitling him to a new trial.

"[A] prosecution's argument which clearly suggests that a defendant has failed to testify is error." *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993). Nevertheless, "[t]he prosecution may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State." *Id.* Here, the prosecutor's statements were directed solely toward defendant's failure to offer evidence

to rebut the State's case and no reference was made to defendant's failure to take the stand. Consequently, the prosecutor's statements were not improper. *See State v. Erlewine*, 328 N.C. 626, 633, 403 S.E.2d 280, 284 (1991) ("The record shows that the prosecutors never commented directly on the defendant's failure to testify or suggested that the defendant should have or even could have taken the witness stand. Thus, the prosecutors' arguments were fair and proper commentary on the defendant's failure to present any evidence."). This assignment of error is overruled.

III

Finally, defendant contends that the trial judge improperly instructed the jury regarding reasonable doubt.[1] The trial judge gave the following instruction:

> A reasonable doubt, members of the jury, means exactly what it says. It is not a mere possible doubt, or an academic or a forced doubt, because there are few things in human experience which are beyond a shadow of a doubt or which are beyond all doubt. Nor is it a doubt suggested by the ingenuity of counsel or even by the ingenuity of your own mind not legitimately warranted by the evidence and the testimony here in this case. Of course, your reason and your common sense would tell you that a doubt would not be reasonable if it was founded by or suggested by any of these types of considerations.

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[1]Defendant also challenges instructions regarding reasonable doubt given by the trial judge during jury selection and statements made by the prosecutor also during jury selection. Defendant neither objected at trial nor has argued plain error on appeal. Consequently, these statements are not properly before this Court for appellate review. *See State v. Roache*, 358 N.C. 243, 292, 595 S.E.2d 381, 413 (2004) ("Defendant has neither assigned nor argued plain error as to the admission of this evidence. Hence, this issue is not properly before the Court.").

> A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

We first address defendant's contention that this instruction "unconstitutionally lowered" the State's burden of proof under *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991). In *Cage*, the Supreme Court found reversible error when a trial court's jury instruction equated reasonable doubt with a "grave uncertainty" and "actual substantial doubt," and permitted conviction on the basis of merely a "moral certainty" as to guilt. *Id.* at 41, 112 L. Ed. 2d at 342, 111 S. Ct. at 329. As the challenged instruction in the present case includes none of this terminology, we find *Cage* inapplicable. *See State v. Wills*, 110 N.C. App. 206, 215, 429 S.E.2d 376, 381 (finding *Cage* "sufficiently distinguishable" when jury charge did not include any of the offensive terms found in *Cage*), *disc. review denied*, 334 N.C. 438, 433 S.E.2d 184 (1993).

Defendant argues that, even if the challenged instruction did not unconstitutionally lower the State's burden of proof, it "mudd[ied] the standard." We note, however, that the second paragraph of the trial court's instruction has previously been found to pass constitutional muster by our Supreme Court. *State v. Simpson*, 341 N.C. 316, 356, 462 S.E.2d 191, 214 (1995), *cert.*

denied, 516 U.S. 1161, 134 L. Ed. 2d 194, 116 S. Ct. 1048 (1996).

With respect to the first paragraph, our Supreme Court found no error in an instruction substantially similar, holding:

> Conceding *arguendo* that the judge overdefined reasonable doubt, it appears nevertheless that he did give equal stress to the affirmative aspects of the definition. We cannot believe that the jury was misled or confused.

State v. Ward, 286 N.C. 304, 310, 210 S.E.2d 407, 412 (1974), *vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1207, 96 S. Ct. 3206 (1976). As in *Ward*, the trial judge, in this case, provided equal attention to both what a reasonable doubt *is* as well as what it *is not*. We find *Ward* controlling. This assignment of error is, therefore, overruled. *See also Wills*, 110 N.C. App. at 214-16, 429 S.E.2d at 380-81 (finding no error in a similar instruction that defined reasonable doubt both in terms of what it is and what it is not).

As defendant's remaining assignments of error have not been brought forth in his brief, they are deemed abandoned. N.C.R. App. P. 28(b)(6). *See State v. Canellas*, 164 N.C. App. 775, 777, 596 S.E.2d 889, 890-91 (2004) (assignments of error not presented in appellant's brief are abandoned).

No error.

Judges WYNN and ELMORE concur.

Report per Rule 30(e).