NO. COA06-878

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 05CRS69466-68

LENIN JAVIER FLORES-MATAMOROS

Appeal by defendant from judgments entered 12 January 2006 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 21 February 2007.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the State.

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

McCULLOUGH, Judge.

Defendant appeals from a jury verdict of guilty of one count of trafficking by transporting 400 grams or more of cocaine, one count of trafficking by possession of 400 grams or more of cocaine, and one count of conspiracy to traffick cocaine by possession. We determine there was no prejudicial error.

FACTS

Lenin Javier Flores-Matamoros ("defendant") was indicted for trafficking in cocaine by transporting, trafficking in cocaine by possession, and conspiracy to traffick in cocaine. The case was

tried before a jury at the 2 January 2006 Criminal Session of Guilford County Superior Court.

The State presented evidence at trial which tended to show the following: Prior to defendant's arrest on the evening of 9 February 2005, Detective H. N. Sampson observed a person driving a flatbed truck to a Mayfair Avenue residence, which was under surveillance. The driver of the truck was Melvin Marquez. Melvin Marquez lived with defendant in an apartment at 3806 Moseby Drive. Items were removed from the truck and taken inside the residence. Police stopped the truck and discovered three kilograms of cocaine and $37,000 in cash. The cocaine was hidden on the back of the truck in hollowed out sections of chip board. It was Sampson's experience, as a law enforcement officer, that drug dealers keep drugs at their residences, or stash houses, in addition to their vehicles. The truck was registered to Flavian Pena ("Pena"). Melvin Marquez was placed into custody and Detective Sampson directed other officers to take up positions around Marquez's apartment on Moseby Drive.

Officer Snaden was watching the apartment on Moseby Drive because he was aware that a search warrant was going to be served for the apartment. He was looking for any kind of activity that would indicate that someone had been contacted at the apartment and would attempt to move contraband out of it before officers had a chance to get there with the search warrant. As Officer Snaden was watching the apartment, a man stuck his head out of the apartment door and looked around. Soon thereafter, a Toyota 4Runner pulled up in front of the apartment. The driver got out and met the man

who had earlier stuck his head out of the apartment door. Both men walked into the apartment. Detective Snaden also observed someone in the front passenger seat of the 4Runner remain in the vehicle.

About five to ten minutes after the men went inside the apartment, a man returned to the 4Runner, carrying a large plastic Tupperware-type container. The man placed the container in the backseat of the 4Runner. The same man then walked back to the apartment and stayed inside for several minutes. Then, both men came out of the apartment, with one carrying a small backpack. They placed some items in the backseat. During the activity by the men, the female passenger remained inside the vehicle. Then, one man got in the front driver's seat, with the other sitting in back behind the front-seat passenger.

Detective Snaden radioed other officers and requested them to stop the vehicle. Officer Richardson of the Greensboro Police Department participated in the investigation and conducted the traffic stop. After the stop, the driver agreed to a search of the vehicle. The search revealed about $2,500 cash hidden inside socks in the Tupperware container, a kilogram of cocaine, four smaller baggies of white powder, and a white plastic bag with six bundles of currency in the trunk area totaling $11,241. The officers also seized $3,621 from the female passenger, $711 from defendant's wallet, $640 from the other male’s wallet, and $495 was found in the blue backpack. Defendant and the other vehicle occupants were arrested and processed.

The driver of the Toyota 4Runner, Wuilfredy Vides ("Vides"), testified against defendant in this matter. Vides stated that on 9 February 2005, he learned that his brother, Melvin Marquez had been arrested in Greensboro. Vides and his girlfriend drove to Greensboro to try and get his brother out of jail. Defendant told Vides about some drugs he had because they thought the drugs could be used to get Melvin Marquez out of jail. Vides testified that both he and defendant placed some cocaine into the container prior to Vides placing it in the 4Runner. Defendant told Vides that defendant got the brick of cocaine from Pena.

Detective Kevin Cornell testified that defendant's apartment appeared to be used as a stash house where large amounts of drugs were stored in anticipation of sale. Upon execution of a search warrant, officers discovered substances they believed to be cocaine and marijuana. Also found was $3,900 in U.S. currency, rolling paper, and numerous cigarette lighters.

The multi-agency investigation that led to the arrest of defendant began about six months prior to 9 February 2005. The focus of the investigation initially was on Pena. The investigation revealed that Pena rented two storage units at American Flag storage facility, about one to one and a half miles from Melvin Marquez and defendant's residence. Upon execution of a search warrant for the units, officers located items used to manufacture drugs, along with a drug stash compartment similar to the chip board stash compartment on the truck Marquez was driving. Underneath the chip board, officers found 43 kilograms of cocaine,

and approximately $280,000 in cash. Officers also found digital scales, a box of Foodsaver bags, notes, permanent markers, and a vacuum sealer. The "white powder" and kilos seized from the 4Runner and storage units were determined to be cocaine hydrochloride. Doreen Huntington, a latent fingerprint examiner for the Guilford County Sheriff's Department, conducted fingerprint examinations of the evidence and was of the opinion that defendant's fingerprints were on a Diesel shoe box that was seized from Pena's storage unit. Defendant's thumb and fingerprints were also determined to be on a potato chip bag and light box also seized from the storage unit. Defendant admitted that he had visited the storage facility.

The jury found defendant guilty of all charges. Defendant appeals.

ANALYSIS

I.

Defendant contends the trial court erred in allowing evidence of (1) the drug seizure at the storage unit and (2) the seizure of drugs from Melvin Marquez. Specifically, defendant asserts that the evidence admitted by the court violated Rule of Evidence 404(b) and was not relevant. We disagree.

Rule 404(b) of the North Carolina Rules of Evidence provides:

> [e]vidence 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). Generally, this rule is one of inclusion of relevant evidence, so long as its probative value serves more than to show an individual's criminal propensity or disposition. *State v. Summers*, ___ N.C. App. ___, ___, 629 S.E.2d 902, 906, *appeal dismissed*, *disc. review denied*, 360 N.C. 653, 637 S.E.2d 192 (2006). We review a trial court's determination to admit evidence under Rule 404(b) for an abuse of discretion. *Id.* at ___, 629 S.E.2d at 907.

In the instant case, the trial court did not abuse its discretion. Even if we presume error, "we are not persuaded that such error would have prejudiced defendant, given the other evidence presented in this case." *State v. Calvino*, ___ N.C. App. ___, ___, 632 S.E.2d 839, 843 (2006). There was substantial evidence from Vides about defendant's involvement regarding the cocaine. For example, defendant was living in the apartment where the cocaine was located. Vides testified that both he and defendant placed some cocaine into the container which was eventually taken to the 4Runner. Then, defendant got into the 4Runner which was later stopped by officers who found cocaine during a search. We also determine that the evidence was relevant and the probative value was not substantially outweighed by unfair prejudice. Accordingly, we disagree with defendant.

II.

Defendant contends the trial court erred by denying his motion to dismiss at the close of evidence. Specifically, defendant

asserts that there was no evidence whatsoever that defendant substantially moved or transported the cocaine. We disagree.

A motion to dismiss is properly denied if there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered 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).

The North Carolina General Statutes provide that "[a]ny person who ... transports ... 28 grams or more of cocaine and any salt, isomer, salts or isomers, compound, derivative, or preparation thereof ... shall be guilty of a felony, which felony shall be known as 'trafficking in cocaine' ... ." N.C. Gen. Stat. § 90-95(h)(3) (2005). "'A conviction for trafficking in cocaine by transportation requires that the State show a "substantial movement."'" *State v. Manning*, 139 N.C. App. 454, 467, 534 S.E.2d 219, 227 (2000) (citations omitted), *aff'd*, 353 N.C. 449, 545 S.E.2d 211 (2001). "'Our courts have determined that even a very slight movement may be "real" or "substantial" enough to constitute "transportation" depending upon the purpose of the movement and the

characteristics of the areas from which and to which the contraband is moved.'" *Id.*

In the instant case, we determine the trial court did not err by denying defendant's motion to dismiss. Vides testified that both he and defendant placed some cocaine inside the container. Moreover, although Vides testified he carried the container to the 4Runner, defendant stated he carried it to the 4Runner. Then, defendant, Vides, and Vides' girlfriend left defendant's apartment in the 4Runner which was subsequently stopped by officers and the cocaine was found in the 4Runner. In the light most favorable to the State, this is sufficient evidence for a reasonable mind to determine that defendant transported the cocaine. Accordingly, we disagree with defendant.

III.

Defendant contends the trial court erred by instructing the jury on "flight." We disagree.

There must be some evidence reasonably supporting the theory that a defendant fled after the commission of the crime charged before a trial judge may instruct the jury on defendant's alleged flight. *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Blakeney*, 352 N.C. 287, 314, 531 S.E.2d 799, 819 (2000) (citation omitted), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001).

In the instant case, the trial court's instruction on flight was proper. There was sufficient evidence by which the jury could reasonably infer that defendant was fleeing before the police arrived at his apartment. For example, defendant knew that his housemate, Melvin Marquez, had been arrested on drug charges. Vides, Marquez's brother, came from out of town to defendant's apartment. Some items were placed in the 4Runner, including defendant's clothes, and defendant got in the 4Runner with Vides and Vides' girlfriend and drove off. Defendant's clothes, large amounts of money, and cocaine were found in the 4Runner during a search of the vehicle. Accordingly, we disagree with defendant.

No prejudicial error.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).