NO. COA07-1150

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 05 CRS 240202
06 CRS 25220

WILLIE ALEXANDER BAILEY

Appeal by Defendant from judgment entered 3 May 2007 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Lisa C. Glover, for the State.

Duncan B. McCormick, for Defendant.

ARROWOOD, Judge.

Willie Alexander Bailey (Defendant) appeals from judgment entered convicting him of possession with the intent to sell and deliver cocaine, N.C. Gen. Stat. § 90-95(a)(1), and of attaining the status of an habitual felon, N.C. Gen. Stat. § 14-7.1. We find no error.

The evidence tends to show that on 26 August 2005, Sergeant Steven P. Winterhalter (Sergeant Winterhalter) of the Charlotte-Mecklenburg Police Department observed Defendant driving a black Jaguar into the gravel parking lot of a residence on Custer Street in Charlotte, North Carolina, which the police "believed . . . to

be a drug house[.]" Several people were "loitering in the gravel lot[,]" and Sergeant Winterhalter observed the loiterers and Defendant smoking what appeared to be "marijuana[.]" Sergeant Winterhalter continued his surveillance and observed "[an alleged] hand-to-hand drug transaction [between Defendant and an] individual." Sergeant Winterhalter said, "[Defendant] hand[ed] an item to this unknown black male across the hood of his car[,] . . . [a]nd it appeared that the other individual had offered a DVD or a CD in exchange[.]" Soon thereafter, Sergeant Winterhalter observed a second individual approach the gravel parking lot and "[Defendant] . . . placed multiple small items, after counting them out, into the palm of the [man's] hand[.]" Sergeant Winterhalter believed the items were rocks of crack cocaine. After the second transaction, Defendant "got into his vehicle" and drove away.

Officer Vaughn Pauls (Officer Pauls) of the Charlotte-Mecklenburg Police Department in the street crimes unit, followed Defendant to a convenience store after "[Sergeant] Winterhalter informed [him] that [Defendant] had just completed a drug transaction[.]" Sergeant Winterhalter "gave [Officer Pauls] a description [of Defendant,]" and stated that "he was . . . in a black Jaguar." Officer Pauls approached Defendant at the convenience store and said, "[H]ey, can I talk to you[?]" Defendant "continued to walk in the store." Officer Pauls "followed him inside the store," to the "second aisle[.]" There were "about five" other people in the convenience store "at the cash register." Officer Pauls stated that there was no one "in the

middle aisle . . . at that time[,]" except Defendant. "[Defendant then began] moving his left hand . . . in and outside of his waistband[,]" after which Officer Pauls "identified [him]self as police," and directed, "let me see your hands." When Defendant came to the end of the aisle, "he turned around and then put his right hand behind his back and put his left hand up." Officer Pauls then "put [his] hand on [Defendant's] shoulder[,]" after which Defendant "put both of his hands in plain view." Officer Pauls stated that "I was looking at his hands[,]" not "the floor."

Officer Pauls detained Defendant, took him out of the convenience store, and searched Defendant for weapons and drugs; the search revealed nothing. Officer Pauls then "went inside the store . . . [to the] middle aisle, and found on the ground a plastic baggie with crack cocaine loaded inside." Officer Pauls testified that he was outside with Defendant "[l]ess than a minute[,]" and the five other people "were still at the cash register" when he reentered the store. When asked why he did not see the bag beforehand, Officer Pauls said, "[m]y main concentration was the hands[,] because I perceive that as a possible threat[.]"

On 24 April 2006, Defendant was indicted on charges of possession with intent to sell or deliver a controlled substance and of attaining the status of an habitual felon. At the conclusion of Defendant's trial, a jury returned a verdict finding Defendant guilty of possession with intent to sell or deliver cocaine. On 3 May 2007, the court entered judgment consistent with

the jury's verdict, sentencing Defendant to 120 to 153 months incarceration in the North Carolina Department of Correction. From this judgment, Defendant appeals.

Constructive Possession

In his first argument, Defendant contends that the trial court erred by denying Defendant's motion to dismiss the charge of felony possession with the intent to sell and deliver cocaine, because the State failed to present substantial evidence that Defendant constructively possessed the cocaine. We disagree.

"A motion to dismiss must be denied if 'there is substantial evidence (1) of each essential element of the offense charged and (2) that [the] defendant is the perpetrator of the offense.'" *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)). "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 offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance.'" *State v.*

McNeil, 165 N.C. App. 777, 781, 600 S.E.2d 31, 34 (2004) (quoting *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001)); N.C. Gen. Stat. § 90-95(a)(1) (2007). "However, 'in a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials.'" *McNeil*, 165 N.C. App. at 781, 600 S.E.2d at 34 (quoting *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001)). "Instead, 'possession of a controlled substance may be either actual or constructive.'" *McNeil*, 165 N.C. App. at 781, 600 S.E.2d at 34 (quoting *State v. Hamilton*, 145 N.C. App. 152, 155, 549 S.E.2d 233, 235 (2001)). "'[U]nless the person has exclusive possession of the place where the narcotics are found, the State must show *other incriminating circumstances* before constructive possession may be inferred.'" *State v. McNeil*, 359 N.C. 800, 810, 617 S.E.2d 271, 277 (2005) (quoting *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989)).

> As long as the defendant has the intent and capability to maintain control and dominion over the controlled substance, he can be found to have constructive possession of the substance. Incriminating circumstances, such as evidence placing the accused within close proximity to the controlled substance, may support a conclusion that the substance was in the constructive possession of the accused. Thus, where sufficient incriminating circumstances exist, constructive possession of a controlled substance may be inferred even where possession of a premises is nonexclusive.

McNeil, 165 N.C. App. at 781, 600 S.E.2d at 34 (internal quotation marks omitted). The State can overcome a defendant's motion to dismiss by presenting evidence that places the defendant "'within

such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'" *State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972) (quoting *State v. Allen*, 279 N.C. 406, 412, 183 S.E.2d 680, 684 (1971)).

In the instant case, Defendant did not maintain exclusive possession of the premises. We must therefore determine whether sufficient incriminating circumstances exist to infer that defendant had the intent and capability to maintain control and dominion over the contraband. *See State v. Kraus*, 147 N.C. App. 766, 770, 557 S.E.2d 144, 147 (2001). The evidence viewed in the light most favorable to the State tends to show the following: Sergeant Winterhalter observed Defendant drive into the parking lot of a residence the police "believed . . . to be a drug house[,]" smoke "marijuana[,]" and engage in "a hand-to-hand drug transaction [with two] individual[s]." Sergeant Winterhalter witnessed "[Defendant] . . . plac[ing] multiple small items, after counting them out, into the palm of [one man's] hand[;]" the items appeared to be rocks of crack cocaine. Minutes later, Officer Pauls observed Defendant at a convenience store; "Sergeant Winterhalter informed [him] that [Defendant] had just completed a drug transaction[.]" When Officer Pauls asked Defendant "[H]ey, can I talk to you[?]" Defendant "continued to walk in the store." Officer Pauls testified that there were "about five" other people were in the convenience store "at the cash register[,]" and no one was "in the middle aisle[,]" except Defendant. Defendant began "moving his left hand . . . in and outside of his waistband[,]"

Officer Pauls said, "let me see your hands." Defendant "turned around and then put his right hand behind his back and put his left hand up." Officer Pauls then "put [his] hand on [Defendant's] shoulder[,]" after which Defendant "put both of his hands in plain view." Officer Pauls then exited the store with Defendant and searched Defendant for weapons and drugs. Less than one minute later, Officer Pauls "went [back] inside the store . . . [to the] middle aisle . . . and found on the ground a plastic baggie with crack cocaine loaded inside." Officer Pauls testified that the five other people "were still at the cash register" when he reentered the store. When asked why he did not see the bag before he reentered the store, Officer Pauls said, "[m]y main concentration was the hands because I perceive that as a possible threat[.]"

We conclude that the foregoing evidence viewed in the light most favorable to the State is sufficient to support a finding of constructive possession of cocaine sufficient to survive Defendant's motion to dismiss. Defendant's assignment of error is overruled.

Admissibility of Evidence

In his second argument, Defendant contends that the trial court erred by overruling Defendant's objections to the testimony of Sergeant Winterhalter regarding his observation of Defendant's alleged sale and use of drugs at Custer Street prior to Defendant's detention at the convenience store by Officer Pauls. We find no error.

Relevant evidence is any "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 (2007). N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007), states that "[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." Rule 404(b). However, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." Rule 404(b). Rule 404(b) is a rule of inclusion, "subject to but one exception requiring . . . exclusion [of such evidence] 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, 279, 389 S.E.2d 48, 54 (1990). All evidence that is relevant and otherwise admissible is also still subject to Rule 403, which excludes evidence when its "probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2007). The Rule 403 "determination is within the sound discretion of the trial court, whose ruling will be reversed on appeal only when it is shown that the ruling was so arbitrary that it could not have resulted from a reasoned decision." *State v. Stevenson*, 169 N.C. App. 797, 800-01, 611 S.E.2d 206, 209 (2005). Our Supreme Court has

held that evidence of the "chain of circumstances[,]" is also admissible under Rule 404(b):

> "Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."

State v. Agee, 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990) (quoting *United States v. Williford,* 764 F.2d 1493, 1499 (11th Cir. 1985)). "This exception is known variously as the 'same transaction' rule, the 'complete story' exception, and the 'course of conduct' exception." *Agee*, 326 N.C. at 547, 391 S.E.2d at 174 (quoting *Crozier v. State,* 723 P.2d 42, 49 (Wyo. 1986)). "Such evidence is admissible if it forms part of the history of the event or serves to enhance the natural development of the facts." *Agee,* 326 N.C. at 547, 391 S.E.2d at 174 (internal quotation marks omitted).

In the instant case, Defendant specifically argues that Sergeant Winterhalter's testimony regarding his observation of Defendant's suspicious engagements with the loiterers at the residence on Custer Street, was inadmissible under Rule 404(b). The trial court admitted Sergeant Winterhalter's testimony "for the limited purpose of showing the [Defendant's] intent, and showing the reasons for the police contact with the [Defendant] on the part of Officer Pauls." The court also instructed the jury:

> I instruct you that this testimony by the sergeant that's just been given regarding his opinion as to what occurred should be

> considered [by] you for a very limited purpose. That limited purpose is to explain the actions of the other officers involved, specifically Officer Pauls to which he relayed that opinion. That opinion is not relevant and should not be considered by you for any other purpose, that [sic] the purpose of explaining the subsequent actions of Officer Pauls. I caution you not to use it for any other purpose.

The foregoing evidence is admissible pursuant to the "chain of circumstances" rationale provided in *Agee*. Because the evidence served the purpose of establishing the chain of circumstances leading up to Defendant's arrest for possession of cocaine, Rule 404(b) did not require its exclusion as evidence probative only of Defendant's propensity to possess illegal drugs. Moreover, the trial court did not abuse its discretion in concluding that the probative value of the foregoing evidence was not substantially outweighed by the danger of unfair prejudice. This assignment of error is overruled.

Defendant also disputes the admission of the DVD, containing footage recorded by Sergeant Winterhalter during his surveillance on the night of Defendant's arrest.

At trial, Defendant did not object to the admission of the DVD; rather, Defendant objected to certain portions of the audio recorded on the DVD. On appeal, Defendant disputes the admission of the DVD in its entirety. Because Defendant did not object to its admission at trial, the matter is reviewed for plain error.

> Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental

> right of the accused; or error that has resulted in a miscarriage of justice or in the denial to [the] appellant of a fair trial.

State v. Gregory, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "[I]n order to prevail under the plain error rule, [a] defendant must convince this Court that (1) there was error and (2) without this error, the jury would probably have reached a different verdict." *State v. Najewicz*, 112 N.C. App. 280, 294, 436 S.E.2d 132, 141 (1993).

Here, the DVD illustrated the testimony of Sergeant Winterhalter, which was admissible pursuant to Rule 404(b). Sergeant Winterhalter observed Defendant drive into the parking lot of a residence the police "believed . . . to be a drug house[,]" smoke "marijuana[,]" and engage in "a hand-to-hand drug transaction [with two] individual[s]." Sergeant Winterhalter witnessed "[Defendant] . . . plac[ing] multiple small items, after counting them out, into the palm of [one man's] hand[;]" the items appeared to be rocks of crack cocaine. Minutes later, in the middle aisle of a convenience store where Officer Pauls observed Defendant, "moving his left hand . . . in and outside of his waistband[,]" Officer Pauls discovered "a plastic baggie with crack cocaine loaded inside." The incriminating evidence against Defendant is strong; we cannot conclude that the jury would probably have reached a different verdict had the DVD not been admitted. Therefore, admission of the DVD did not constitute plain error. This assignment of error is overruled.

For the foregoing reasons, we find no error.

No Error.

Judges MARTIN and BRYANT concur.

Report per Rule 30(e).