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NO. COA07-739

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

STATE OF NORTH CAROLINA

v.

MENDESI LAMONT FORTE

Cabarrus County
Nos. 06 CRS 2658
06 CRS 311
06 CRS 312

Appeal by defendant from judgments entered 2 February 2007 by Judge Christopher M. Collier in Cabarrus County Superior Court. Heard in the Court of Appeals 15 January 2008.

Court of Appeals

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Charlotte Gail Blake, for defendant-appellant.

Slip Opinion

CALABRIA, Judge.

Mendesi Lamont Forte ("defendant") appeals from judgments entered upon a jury verdict finding him guilty of possession of marijuana, possession of drug paraphernalia, and possession with intent to sell and deliver cocaine. We find no prejudicial error.

The State presented the following pertinent evidence: On 6 January 2006, a team of detectives and other officers of the Concord Police Department executed a search warrant at a house located at 96 Northeast Long Avenue ("96 Long Avenue" or "the house") in Concord, North Carolina. When they arrived at the house, Detective Patrick Tierney ("Detective Tierney"), Officer

Matt Sellers ("Officer Sellers"), and Officer Richard Olomua ("Officer Olomua") walked to the front of the house. When they approached the house, the glass storm door was closed and the inside door was open. Since the storm door was glass, they could see into the house and down the hallway.

After they knocked on the door, Detective Tierney announced that they were the police and they had a search warrant. Officer Olomua then saw defendant leaving the back left bedroom and running towards the front door. When defendant saw Officer Olomua standing at the front door, defendant turned to the right and ran into the kitchen area. Officer Olomua then opened the storm door and the officers ran into the house. Officer Sellers walked into the kitchen and noticed the sliding screen door leading from the kitchen to the back porch appeared to have been knocked off its hinges because it was laying on the porch.

A.D. Atwell of the Concord Police Canine Unit ("Officer Atwell") observed defendant walk out the side door and onto the porch. As soon as Officer Atwell saw defendant run onto the porch, he ordered defendant to get down on the ground, and defendant started "dancing around, [and] running back and forth[.]" Defendant then laid face down on the deck. Officer Sellers restrained defendant in handcuffs and moved defendant to the kitchen in order to read him the information in the search warrant.

Officer Sellers searched the back bedroom of the house, and discovered what he believed to be three grams of crack cocaine in a plastic bag on the dresser and 6.2 grams of marijuana, as well as

a Time Warner Cable bill addressed to defendant at 96 Long Avenue. When Officer Sellers searched the bedroom closet, he discovered $1,890 of U.S. currency, consisting of one hundred dollar bills and twenty dollar bills, in the pocket of a child's coat. Defendant was placed under arrest, and during a search incident to the arrest, Officer Sellers found $307 of U.S. currency in defendant's back pants pocket.

When other officers of the Concord Police Department searched the kitchen and kitchen cabinets, they discovered several items relating to drug use and distribution. Specifically, the officers found a plate with cocaine residue, five razor blades, a half-gram of crack cocaine on a tupperware plate, 0.2 grams of powder cocaine in a plastic bag, and a set of digital scales.

Prior to defendant's January 2006 arrest, on 3 December 2005, Cabarrus County Deputy Sheriff Brian Berg ("Deputy Berg") stopped defendant's vehicle for speeding. When defendant lowered the driver's side window, Deputy Berg believed he detected an odor of marijuana emanating from inside defendant's vehicle. Defendant consented to a search of his vehicle. Deputy Berg discovered what he believed to be a bag of marijuana, a partially burned portion of a marijuana "blunt," some "blunt" wrappers, and nine rocks of crack cocaine contained in a nearly-empty bottle of Cheerwine. Defendant was charged with, *inter alia*, possession with intent to sell and deliver cocaine. At the time of defendant's trial for the marijuana, crack cocaine, and drug paraphernalia found at 96 Long Avenue, the December 2005 charge for possession with intent to sell

and deliver cocaine was still pending. Defendant did not present any evidence at his trial for the marijuana, crack cocaine, and drug paraphernalia found at 96 Long Avenue.

On 2 February 2007, a jury returned guilty verdicts for possession of marijuana, possession of drug paraphernalia, and possession with intent to sell and deliver cocaine. Defendant then pled guilty to attaining the status of an habitual felon, and the trial court found there was a factual basis for entry of the plea. Judge Christopher M. Collier sentenced defendant to a minimum term of 133 months and a maximum of 169 months in the North Carolina Department of Correction. Defendant appeals.

On appeal, defendant argues the trial court erred in (I) admitting evidence under North Carolina Rule of Evidence 404(b) regarding defendant's arrest in December 2005 for possession of cocaine with intent to sell and deliver; (II) denying defendant's motion to dismiss; and (III) instructing the jury on flight.

I. Rule 404(b)

Defendant argues the trial court erred in admitting evidence, over defendant's objection, of defendant's arrest in December 2005 for possession of cocaine with intent to sell and deliver under North Carolina Rule of Evidence 404(b). We disagree.

Rule 404(b) 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).

Our Court has stated:

> [Rule 404(b) is] a clear 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. Thus, even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis supplied) (quotation marks and quotations omitted).

Moreover, a prerequisite for admitting evidence of a prior crime is that the prior crime must be relevant to the currently alleged crime. *Id.* "'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). The major constraints on the use of 404(b) evidence are similarity and temporal proximity. *State v. Carpenter*, 361 N.C. 382, 388, 646 S.E.2d 105, 110 (2007).

In the instant case, there are similarities between the 2005 and 2006 incidents. On 3 December 2005, Deputy Berg searched defendant's vehicle (the same 2005 Chrysler 300C that was parked in the driveway of 96 Long Avenue), and discovered a small bag of marijuana behind the back seat armrest. Deputy Berg also

discovered "blunt wrappers" and nine rocks of crack cocaine concealed in a Cheerwine bottle in the front seat center console. The defendant possessed between $900-1000 in cash on his person.

On 6 January 2006, when the officers executed a search warrant at 96 Long Avenue, while defendant was present in the house, they found cocaine, crack cocaine, marijuana, and drug paraphernalia. Furthermore, they discovered that defendant possessed $307 in cash in his pocket, and they found an additional $1,890 in a child's coat in the bedroom closet where they found crack cocaine and 6.2 grams of marijuana.

More importantly, the two incidents occurred very close together, as they were approximately one month apart. Furthermore, the amount of drugs found on defendant during the two incidents was similar. On 3 December 2005, defendant possessed nine "rocks" of cocaine as well as a small bag of marijuana and "blunt wrappers." On 6 January 2006, defendant was present in the room of the house where officers discovered three grams of crack cocaine in a plastic bag along with 6.2 grams of marijuana on a bedroom dresser.

Moreover, even assuming *arguendo* that admission of evidence of defendant's 2005 arrest was error, it was harmless error. "The erroneous admission of evidence requires a new trial only when the error is prejudicial." *State v. Chavis*, 141 N.C. App. 553, 566, 540 S.E.2d 404, 414 (2000) (citation omitted). "To show prejudicial error, a defendant has the burden of showing that 'there was a reasonable possibility that a different result would have been

reached at trial if such error had not occurred.'" *Id.* (quoting *State v. Locklear*, 349 N.C. 118, 149, 505 S.E.2d 277, 295 (1999)).

At trial, the State presented the testimony of Officer Sellers, Detective Tierney, Officer Olomua, and Officer Atwell. As Detective Tierney announced they had a search warrant, Officer Olomua observed defendant leave the left back bedroom and run towards the front door. When Officer Sellers and Detective Tierney subsequently searched the back bedroom, they discovered crack cocaine and marijuana on the bedroom dresser. They also discovered other items on the same dresser. Specifically, they found a Time Warner Cable bill addressed to defendant at 96 Long Avenue, a man's fake Rolex watch, and a gold chain with a cross. Defendant's vehicle was parked in the driveway of the house and defendant had large amounts of cash in his back pants pocket. When the trial court instructed the jury, he emphasized that they were only to consider defendant's 2005 arrest "for the sole purpose of showing intent or knowledge." Therefore, because the officers discovered additional evidence and the trial court gave a limited jury instruction, defendant has failed to demonstrate prejudice. This assignment of error is overruled.

II. Motion to Dismiss

Defendant argues the trial court erred in failing to grant his motion to dismiss all charges against him. We disagree.

Our review of the trial court's denial of defendant's motion to dismiss is as follows:

> In ruling on a motion to dismiss, the trial court is to consider the evidence in the light

> most favorable to the State, and the State is entitled to every reasonable inference to be drawn from that evidence. The trial court must determine if the State has presented substantial evidence of each essential element of the offense. Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion.

State v. Teel, 180 N.C. App. 446, 450, 637 S.E.2d 288, 290-91 (2006) (internal quotation marks omitted) (citations and internal quotation omitted).

In the case *sub judice*, defendant was charged with possession of marijuana, possession of cocaine with the intent to sell or deliver, and possession of drug paraphernalia. Since the State cannot show defendant was in actual physical possession of the items found in the house, the State must prove defendant was in constructive possession of the items discovered in the house. Under a theory of constructive possession:

> a person may be charged with possession of an item such as narcotics when he has both the power and intent to control its disposition or use even though he does not have actual possession. 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. However, unless 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. Davis, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (internal quotation marks omitted) (citations omitted).

Defendant argues on appeal that the State did not carry its burden of presenting substantial evidence to show defendant had

both the power and intent to control the items discovered in the searched premises.

In *State v. Brown*, 310 N.C. 563, 570, 313 S.E.2d 585, 589 (1984), our Supreme Court held the evidence presented was substantial to prove defendant was in constructive possession of cocaine and other drug paraphernalia in order to support the trial court's denial of defendant's motion to dismiss his charge for manufacturing a controlled substance by packaging and repackaging cocaine. In *Brown*, the defendant was arrested when police officers executed a search warrant at an apartment leased by the defendant's brother. *Id.* at 565, 313 S.E.2d at 586. The police officers discovered defendant in one of the apartment's bedrooms, standing close to a table while the officers found cocaine and numerous drug paraphernalia items. *Id.* at 564-65, 313 S.E.2d at 586. Defendant possessed a key to his brother's apartment and over $1,700 in cash in his pockets. *Id.* at 565, 313 S.E.2d at 586. Furthermore, the defendant was under surveillance for some period of time prior to his arrest, and every time the police officers observed the defendant, they found him at his brother's apartment rather than his claimed residence. *Id.* at 569-70, 313 S.E.2d at 589. The North Carolina Supreme Court held that although "defendant was not in exclusive control of the searched premises, there are circumstances other than defendant's proximity to the contraband materials which tend to buttress the inference that defendant was the person engaged in the manufacture of cocaine." *Id.* at 569, 313 S.E.2d at 589.

Brown is on point with the case *sub judice*. Here, as in *Brown*, defendant was not in exclusive control of the searched premises. Therefore, in order to withstand defendant's motion to dismiss, "the State must show other incriminating circumstances before constructive possession may be inferred." *Davis*, 325 N.C. at 697, 386 S.E.2d at 190. At trial, the State's evidence revealed that police officers observed defendant's vehicle in the driveway at 96 Long Avenue on previous occasions. When the officers arrived at 96 Long Avenue to execute the search warrant, defendant was the only person they found in the house. Upon searching the house, the officers discovered crack cocaine, powder cocaine, and marijuana. The officers also discovered $1,890 in cash in the pocket of a child's coat, located in the closet of the bedroom where they found the crack cocaine. Officers also discovered a bill from Time Warner Cable addressed to defendant at 96 Long Avenue, where defendant had maintained cable services since October 2005. In addition, in the kitchen area of the house, officers discovered a plate with cocaine residue, five razor blades, a half-gram of cocaine placed on a tupperware plate, 0.2 grams of powder cocaine in a plastic bag, and a set of digital scales. Officer Andy Berry testified that in his experience of patrolling high-crime neighborhoods, the scales and razor blades were items typically used by drug dealers to measure and package cocaine.

Therefore, when we "consider the evidence in the light most favorable to the State," we conclude the State presented substantial evidence of each element of the offenses for which

defendant was charged, and there is sufficient evidence to create an inference that defendant possessed the marijuana, crack cocaine, and drug paraphernalia discovered in the searched premises. *Teel*, 180 N.C. App. at 450, 637 S.E.2d at 290-91. This assignment of error is overruled.

III. Flight Instruction

Finally, we address defendant's contention that the trial court erred in instructing the jury, over defendant's objection, on attempted flight.

"[A] trial court may not instruct a jury on defendant's flight unless 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.'" *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 435 (1990) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). "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. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

In the instant case, the evidence presented reveals that Officer Olomua saw defendant walk out of the back left bedroom and run towards the front door. When defendant saw Officer Olomua standing at the front door, defendant turned to the right, ran into the kitchen area, and onto the deck. As defendant ran onto the deck, Officer Atwell, who was standing outside, saw defendant run onto the deck, and ordered defendant to get down on the ground.

Officer Sellers then arrived at the door leading onto the deck. Defendant started "dancing around, [and] running back and forth[.]" Then, defendant laid face down on the deck.

This evidence is not enough to show "defendant took steps to avoid apprehension." *Id.* As such, the jury should not have been instructed on attempted flight. After concluding the trial judge erred in instructing the jury on attempted flight, we now determine whether the instruction was prejudicial error.

In order to grant defendant a new trial based on an erroneous jury instruction, the "defendant must establish prejudice by showing that there is a reasonable possibility that 'had the instructional error . . . not occurred, a different result would have been reached [at trial].'" *State v. Weaver*, 123 N.C. App. 276, 286, 473 S.E.2d 362, 368 (1996) (alteration in original) (citations omitted). Here, as previously discussed, there is substantial evidence to support defendant's convictions for possession of marijuana, possession of drug paraphernalia, and possession of cocaine with intent to sell and deliver. Furthermore, "[e]vidence of a defendant's flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt." *State v. King*, 343 N.C. 29, 38, 468 S.E.2d 232, 238 (1996). Therefore, considering the other evidence surrounding defendant's convictions and the fact that flight is only considered "as evidence of guilt or consciousness of guilt," we find the trial court's erroneous instruction to the jury regarding defendant's attempted flight did

not prejudice defendant. *Id.* This assignment of error is overruled.

No prejudicial error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).