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NO. COA08-1189

NORTH CAROLINA COURT OF APPEALS

Filed: 18 August 2009

STATE OF NORTH CAROLINA

v. Forsyth County
No. 06CRS054799

ANTHONY DEWAYNE TUCKER,
Defendant.

Appeal by defendant from judgment entered on or about 23 April 2008 by Judge Edgar B. Gregory in Forsyth County Superior Court. Heard in the Court of Appeals 26 March 2009.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Christopher H. Wilson, for the State.

Brian Michael Aus, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments entered pursuant to jury verdicts finding him guilty of trafficking by possession of 28 grams or more but less than 200 grams of cocaine, possession with intent to sell and deliver 28 grams or more but less than 200 grams of cocaine, and conspiracy to commit the offense of trafficking cocaine by possession of 28 grams or more but less than 200 grams of cocaine. Defendant argues that the trial court: (1) erred by denying his motion to dismiss all of the charges against him; (2) committed plain error by allowing Officer Hege to testify that defendant had an outstanding warrant for drug activity; and (3)

committed plain error by allowing Detective Paul to testify that there had been numerous reports of drug dealing in the area where defendant was arrested. For the reasons stated below, we conclude that the trial court properly denied defendant's motion to dismiss, that the trial court did not plainly err by the admission of Officer Hege's testimony that defendant had an outstanding warrant for drug activity, and that the trial court did not err by allowing Detective Paul to testify regarding his reason for surveillance of the Citgo station area.

I. Background

On 16 April 2006,[1] Winston-Salem Police Detectives Paul, Singletary, Spain, and Underwood were traveling on Martin Luther King, Jr. Drive in Winston-Salem in an unmarked van. Detective Paul saw defendant's Dodge Magnum automobile pull into a Citgo station near the Waughtown Street intersection. They began to watch defendant because Detective Paul was aware of an outstanding warrant for defendant's arrest. While Detective Paul "attempt[ed] to confirm the warrant was still out there, that it hadn't been served," the detectives observed the location. According to Detective Paul, they observed "for a while due to [the fact that] I know personally I have arrested people up there dealing drugs before and numerous reports that it was still going on in that area."

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[1] According to the indictment in the record, the events occurred on 14 April 2006, but the date on the indictment was amended to 16 April 2006 in open court at the beginning of trial with the consent of both the State and defendant.

As they watched, Detective Paul saw defendant's vehicle cross the street into the Citgo parking lot, stopping between the gas pumps and the front of the store, with the passenger side "right in front of the . . . front door" of the store. Detective Paul saw defendant get out of the vehicle and stand outside of the store, but no one put gas into defendant's vehicle. Detective Paul was not sure if defendant went into the store, but if he did, it was only once, for a brief time, and he did not recall seeing anything in defendant's hand. About five minutes after defendant's car pulled into the Citgo parking lot, a gold Chevrolet Trailblazer pulled into the Citgo station and parked right in front of a gas pump. The Trailblazer and defendant's vehicle blocked the gas pumps closest to the store. A person unknown to Detective Paul at that time but later identified as Mr. Carter got out of the Trailblazer, but he did not put gas into the vehicle or enter the store. He began to talk to defendant and several other men, including Mr. Brayboy, Mr. Covington, and Mr. Holifield.[2]

The detectives continued surveillance of the Citgo station after defendant and Mr. Carter arrived. As the detectives watched, various people either drove or walked up to the store. Some of the people did not buy gas or enter the store, but carried on brief conversations with defendant, Carter or Holifield. Defendant made "hand-to-hand transactions" with "two or three" of the individuals, exchanging "some type of small item" in return for "what appeared

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[2] Mr. Holifield's name is spelled "Hollifield" in the trial transcripts, but "Holifield" in the indictment.

to be money[.]" Then the individual who received the "small item" would leave, either driving or walking away. Although the detectives believed that defendant, Carter and Holifield were selling drugs, they did not have the manpower to arrest any of the people who came to the store and engaged in the transactions.

After about 30 to 40 minutes of surveillance, Detective Paul saw defendant wave at a burgundy or red Saturn car which was headed south on Martin Luther King. Defendant directed the car to pull over to the south side of the Citgo. The person in the Saturn did not get out of the car or buy gas. Defendant walked to the Trailblazer, reached into the driver's side door of the Trailblazer to the floorboard area, and removed a folded newspaper. Defendant then walked to the south side of the Citgo, where he had directed the Saturn, opened the newspaper, removed a small item, and handed the item to someone in the car. He then closed the newspaper, had a brief conversation with the person in the car, and returned to the front of the Citgo store, while the car drove away.

Detective Paul concluded that defendant and the other men were selling drugs and determined that the detectives should attempt to detain the suspects. By this time, Detective Paul had also confirmed that defendant had an outstanding warrant for his arrest, so he intended that defendant be arrested on that warrant, regardless of the results of any additional investigation after defendant and the other men were detained. Detective Paul called for marked patrol cars and uniformed officers to assist them. At

least three patrol cars came to the scene, driven by Officer Collins, Officer Hege, and Officer Berrier.

Officer Hege also knew defendant from “prior dealings” and was aware of his outstanding arrest warrant. When he arrived at the scene, he saw defendant walking away from a vehicle and toward the gold Trailblazer. Officer Hege ordered defendant to lay down on the ground, because he was a suspect in the on-going narcotics investigation and also because of defendant’s “outstanding warrant for drug activity.” However, defendant did not comply with the demand to lie down. Instead, he threw a “bundle of newspapers” into the Trailblazer and attempted to enter the passenger side of the Trailblazer. Officer Hege pulled defendant from the vehicle and placed him under arrest. Mr. Carter had been in the driver’s seat of the Trailblazer, but he got out and ran away. Defendant consented for Detective Paul to search his Dodge Magnum, but nothing was immediately found on defendant or in his vehicle.

Officer Hege began to look into the Trailblazer from the outside. He saw newspapers laying in the front passenger and driver’s area and a large black plastic bag in the driver's floorboard. The black plastic bag contained 22.9 grams of crack cocaine. A drug dog discovered an additional 7.4 grams of powder cocaine in the console of the Trailblazer. The combined amounts of cocaine in the Trailblazer totaled 30.3 grams. Defendant, Mr. Carter, and Mr. Holifield were all arrested.

On 17 July 2006, the Forsyth County Grand Jury indicted defendant for trafficking in cocaine by possession of more than 28

but less than 200 grams, possession with intent to sell and deliver cocaine, and conspiracy to traffic more than 28 grams but less than 200 grams of cocaine by possession.[3]

Defendant was tried before a jury at the 21 April 2008 Criminal Session of Superior Court, Forsyth County. At the close of the State's evidence, defendant made a motion to dismiss all three charges. Defendant argued that each offense would require proof that defendant possessed the drugs, that there was no evidence of his actual possession, and that the evidence was not sufficient to support constructive possession. Defendant's motion to dismiss was denied. Defendant presented evidence, including his own testimony, and at the close of the evidence, defendant renewed his motion to dismiss on the grounds of insufficient evidence of constructive possession. The motion to dismiss was again denied.

Defendant was found guilty of all three charges. The trial court sentenced defendant to 35 to 42 months imprisonment on the trafficking by possession charge and a consecutive term of imprisonment of 35 to 42 months on the remaining charges, which were consolidated for sentencing. Defendant appeals.

II. Motion to Dismiss

Defendant raises two arguments on appeal as to the denial of his motion to dismiss all of the charges against him. His first argument is that "it was improper to add the weights of crack and powder cocaine that were recovered from different areas of the

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[3] Mr. Carter and Mr. Holifield were alleged to be defendant's co-conspirators.

Trailblazer to meet the trafficking element of more than 28 grams but less than 200 grams of cocaine." His second argument is that "there was insufficient evidence that he constructively possessed any of the cocaine."

A. Adding of Weights

Defendant never raised before the trial court the issue of whether the weights of the crack and cocaine could be added together to meet the amount of cocaine required for the trafficking charge. The general rule is "[w]hen a party changes theories between the trial court and an appellate court, the assignment of error is not properly preserved and is considered waived." *State v. Shelly*, 181 N.C. App. 196, 207, 638 S.E.2d 516, 524 (citation omitted) (when the defendant moved to dismiss murder charge at trial on the basis of accidental death, he could not argue *corpus delicti* rule on appeal), *disc. review denied*, 361 N.C. 367, 646 S.E.2d 768 (2007); *see also State v. Euceda-Valle*, 182 N.C. App. 268, 271, 641 S.E.2d 858, 861–62 (when the defendant moved to dismiss drug possession charge at trial on the basis of lack of ownership interest in vehicle and no knowledge of the contraband inside, he could not argue lack of possession of the vehicle on appeal), *disc. review denied*, 361 N.C. 698, 652 S.E.2d 923 (2007).

Despite the general rule, defendant cites *State v. Mueller*, 184 N.C. App. 553, 647 S.E.2d 440, *cert. denied*, 362 N.C. 91, 657 S.E.2d 24 (2007), to argue that "[t]his issue was preserved for appellate review although it was not specifically addressed in Mr. Tucker's motions to dismiss." However, *Mueller* is distinguishable

from this case. In *Mueller*, the issue was whether the defendant had made a motion to dismiss as to each charge, not the grounds argued for the motion to dismiss. 184 N.C. App. at 558-59, 647 S.E.2d at 445-46. *Mueller* held that the defendant's general motion to dismiss "preserve[d] his right to appeal all of the convictions before us based upon an insufficiency of the evidence to support each conviction." *Id.* at 559, 647 S.E.2d at 446. Unlike defendant herein, the defendant in *Mueller* did not change his argument on appeal. *Id.*

We therefore do not reach the merits of defendant's first argument as to the amount of cocaine possessed. This argument is dismissed.

B. Constructive Possession

Defendant's second argument is that there was insufficient evidence of his constructive possession of cocaine. Defendant contends that the State's evidence showed that he was merely near the cocaine in the vehicle but did not show that he had knowledge of its existence. Because possession or constructive possession of the same quantity of cocaine is an element of all three of the charges, he contends that all three should have been dismissed.

The standard of review of a motion to dismiss a criminal charge for insufficient evidence is well-settled:

> Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.

> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility. Evidence is not substantial if it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, and the motion to dismiss should be allowed even though the suspicion so aroused by the evidence is strong. This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*.

State v. Robledo, ___ N.C. App.___, ___, 668 S.E.2d 91, 94 (2008) (citations, quotation marks, brackets and ellipses omitted).

"[T]he mere presence of the defendant in an automobile containing drugs [when he does not have exclusive possession of the vehicle] does not, without additional incriminating circumstances, constitute sufficient proof of drug possession [to withstand a motion to dismiss]." *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996). However, "a showing by the State of other incriminating circumstances . . . permit[s] an inference of constructive possession." *Id.* "A defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it." *State v. Miller*, 363 N.C. 96, 99, ___ S.E.2d ___, ___ (2009) (citations and quotation marks omitted). Furthermore, the outcome of constructive possession cases "tend[s] to turn on the specific facts [of incriminating circumstances] presented." *Id.*

Three incriminating circumstances exist in the case *sub judice* which have been recognized by the North Carolina appellate courts

as tending to show constructive possession. First, defendant was arrested getting into the passenger side of the Trailblazer while cocaine was found in the floor of the driver's seat. *See Miller*, 363 N.C. at 100, ___ S.E.2d at ___ (close proximity to contraband is a highly persuasive incriminating circumstance). Second, defendant had been seen reaching toward the place inside the vehicle where the drugs were later found. *See State v. Frazier*, 142 N.C. App. 361, 367, 542 S.E.2d 682, 687 (2001) (defendant's "'lunge' into the bathroom and the placing of his hands into the bathroom ceiling, where the drugs were later found" is an incriminating circumstance); *see also State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001) ("defendant was the only person in the car who could have shoved the package containing the cocaine into the crease of the car seat"). Third, defendant acted suspiciously when confronted by police, throwing a "bundle of newspapers" into the Trailblazer and trying to evade police by attempting to enter the vehicle. *See State v. Butler*, 356 N.C. 141, 147, 567 S.E.2d 137, 141 (2002) (the "defendant appeared 'very nervous' and 'fidgety' when the officers approached . . . . [and] concealed [his hands] from the officers' view").

Viewing the evidence in the light most favorable to the State, these facts are sufficient to demonstrate that defendant had the ability and intent to "maintain control and dominion" over the cocaine. *Miller*, 363 N.C. at 99, ___ S.E.2d at ___. The State therefore presented sufficient evidence "from which a reasonable mind could conclude" that defendant constructively possessed

cocaine. *Id.* at 101, ___ S.E.2d at ___. Accordingly, we conclude defendant’s motion to dismiss was properly denied by the trial court. *See id.*

III. Testimony of Officer Hege

Defendant argues that the trial court committed plain error by permitting Officer Hege to testify that defendant had an outstanding warrant for drug activity. Defendant argues that Officer Hege’s testimony about the specific crime named in the outstanding warrant violated Rule 404(b) because it was offered only to show defendant’s “propensity or disposition to commit an offense of the nature of the crime charged.” (Quoting *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002)).

The specific testimony to which defendant assigns error occurred on two occasions during the trial. The first reference to defendant’s outstanding warrant for drug activity occurred during Officer Hege’s testimony on direct examination. Without objection from defendant, Officer Hege testified that when he was approaching defendant, he “ordered Mr. Tucker to lay [sic] on the ground due to him being involved in a narcotics investigation and *due to the fact that he had an outstanding warrant for drug activity*.” (Emphasis added.) The second reference to a warrant for drug activity occurred on cross examination of Officer Hege where the following colloquy took place:

> Q: . . . [W]ere you instructed to be on the lookout for somebody that was carrying drugs at the location?
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> A: I was informed by Detective Paul that he was watching Anthony Tucker. *I knew Mr.*

> *Tucker had a warrant for loitering for drug activity.* I've observed Mr. Tucker engage in numerous drug activities throughout my career, and since Mr. Tucker was alleged to be involved in narcotics activity that date, I was watching for any type of suspicious movements that he would make, to wit, throwing a newspaper into a vehicle.
>
> Q: Isn't that why you took him into custody, because you said he had a warrant?
>
> . . . .
>
> A: That, and he was observed making numerous drug transactions that day. He was . . . conducting *the same activity that he had a warrant for* from the prior dealings.

(Emphasis added.)

At that point, the trial court intervened *ex mero moto*. Out of the presence of the jury, the trial court instructed Officer Hege "not to mention any other activities that the defendant may have been engaged in on any other day, whether you observed it or you didn't observe it." Defense counsel then requested that the Court strike the testimony about Officer Hege "observing [defendant] on any other day," and the Court did so.

When the jury returned, the trial court instructed the jurors:

> I have granted a motion to strike part of this witness's testimony in which he describes seeing the defendant do certain things on other days. I instruct you that you are not allow [sic] that testimony to enter into your consideration of this case, and I would like for you -- each of you to hold up your right hand if you will agree to abide by that instruction and feel like you can abide by that instruction.

All of the jurors raised their hands.

Defendant argues that although the trial court intervened and instructed the jury not to consider Officer Hege’s comments about seeing defendant engage in drug activities on other days, the trial court failed to instruct the jury to disregard any testimony that the outstanding warrant was for drug activity. Because defendant did not object to either instance of testimony about the reason for the outstanding warrant, this argument is subject to plain error review. N.C.R. App. P. 10(c)(4).

“A plain error is one so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.” *Robledo*, ___ N.C. App. at ___, 668 S.E.2d at 97 (citation and quotation marks omitted). Before analyzing for “plain” error, however, we must determine whether admission of the evidence “complained of constitutes error at all.” *Id.* (citation and quotation marks omitted).

Generally, evidence of a pending charge for an unrelated crime is inadmissible unless the evidence falls under one of the exceptions set forth in Rule 404(b). N.C. Gen. Stat. § 8C-1, Rule 404(b) (“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.”); *State v. McMillian*, 169 N.C. App. 160, 164, 609 S.E.2d 265, 268 (At defendant’s trial for attempted

robbery, "the admission of . . . testimony concerning [an earlier] arrest of defendant for DWI was error."), *disc. review denied*, 359 N.C. 640, 617 S.E.2d 284 (2005). The State made no argument that the evidence fell under one of the Rule 404(b) exceptions.

While error, however, admission of the evidence *sub judice* does not rise to the level of plain error. Detective Paul had testified earlier, also without objection from defendant, that a warrant had already been issued for defendant's arrest, though he did not specify the crime charged. Defendant testified in his own defense and admitted that he had been convicted of possession of cocaine with the intent to sell and deliver in 2004 and possession of over a half ounce but less than one and one half ounces of marijuana in 2001, so evidence of defendant's past drug activity was otherwise before the jury. In addition, the State presented eye-witness evidence that defendant reached into a vehicle where a substantial quantity of cocaine was later found and engaged in "hand-to-hand transactions" with various people in front of a gas station where he (and they) did not buy gas. Given this evidence, we are not "convinced that absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). This argument is overruled.

IV. Testimony of Detective Paul

Defendant's last argument is that the trial court committed plain error by permitting Detective Paul to testify that there had been "numerous reports" of drug dealing in the area of the Citgo station. Defendant relies on *State v. Weldon*, which stated the

general rule "that in a criminal prosecution evidence of the reputation of a place or neighborhood is ordinarily inadmissible hearsay." 314 N.C. 401, 408, 333 S.E.2d 701, 705 (1985). The State contends that this case is apposite to *State v. English*, which held that when "testimony regarding the neighborhood's reputation was prompted by a question by the State as to why [the police officer] was in the neighborhood[,]" the testimony was not inadmissible hearsay. 171 N.C. App. 277, 284, 614 S.E.2d 405, 410 (2005). We agree with the State.

The facts in this case are very similar to *English*, as Detective Paul testified, "we observed the location for a while due to [the fact that] I know personally I have arrested people up there dealing drugs before and numerous reports that it was still going on in that area." Furthermore, in *State v. Blair*, this Court considered a very similar argument regarding an officer's testimony that "he was conducting surveillance of the area where the robbery occurred because police 'had numerous complaints of prostitution, street-level drugs, larcenies, shoplifting, robberies, [and] assaults.'" 181 N.C. App. 236, 246, 638 S.E.2d 914, 921, *appeal dismissed and disc. review denied*, 361 N.C. 570, 650 S.E.2d 815 (2007). *Blair*, citing *English*, noted that the "testimony was elicited in response to the State's question asking [the police officer] why he was conducting surveillance in that area, on that day." 181 N.C. App. at 246, 638 S.E.2d at 921. Accordingly, *Blair* held that the officer's "testimony was not admitted for the truth of the matter asserted, but rather to explain why [the officer] was

in a position to observe the robbery. Therefore, the statement was not hearsay and was admissible." *Id.*

Even assuming *arguendo* that this testimony was not admissible as an explanation of a police officer's location in a particular area, erroneous admission of the reputation of a place was deemed to be harmless in *Weldon*, 314 N.C. at 411, 333 S.E.2d at 707. Likewise in this case, given the State's other evidence of defendant's guilt as noted *supra* Part III, it is not probable that the jury "would have reached a different verdict." *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. This argument is also overruled.

V. Conclusion

For the reasons stated above, the trial court properly denied defendant's motion to dismiss all of his charges. The admission of Officer Hege's testimony regarding the outstanding warrant for drug activity was not plain error, and the admission of Detective Paul's testimony regarding numerous reports of drug activity in the area was not error. We therefore hold that defendant received a fair trial, free from plain or prejudicial error.

NO ERROR.

Judges JACKSON and STEPHENS concur.

Report per Rule 30(e).