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NO. COA08-210

NORTH CAROLINA COURT OF APPEALS

Filed: 7 October 2008

STATE OF NORTH CAROLINA

v.

JERMAINE LYNN THOMAS

Wake County  
Nos. 06 CRS 107605, 107608  
07 CRS 1005

Appeal by defendant from judgment entered 11 July 2007 by Judge Paul G. Cessler in Wake County Superior Court. Heard in the Court of Appeals 27 August 2008.

*Attorney General Roy Cooper, by Assistant Attorney General Richard Bradford, for the State.*  
*Linda B. Weisel for defendant-appellant.*

BRYANT, Judge.

Jermaine Lynn Thomas (defendant) appeals from a judgment entered upon a jury verdict finding him guilty of possession of marijuana, possession of cocaine, and attaining the status of an habitual felon. We find no error.

At trial, the State presented evidence tending to show the following: On 30 November 2006, Raleigh Police Officer T. L. Hairston (Officer Hairston) helped secure a home located at 1104-A Mark Street, Raleigh, North Carolina in preparation for executing a search warrant. When Officer Hairston approached the residence, the front door was open. He announced his presence and purpose to

serve a police search warrant, and entered the home. Inside, Officer Hairston encountered defendant sitting on a sofa in the front room of the home. Officer Hairston also noticed another man sitting on another sofa on the right side of the room. Officer Hairston instructed defendant to "get down" on the floor; when defendant did not comply, Officer Hairston physically forced defendant onto the floor. Before defendant was secured on the floor, Officer Hairston noticed defendant pushed his hands in between the cushions on the sofa. After Officer Hairston placed defendant on the floor, he noticed a bag containing marijuana pushed against the rear of the sofa cushions. Officer Hairston conducted a patdown search of defendant and retrieved a large amount of U.S. currency from defendant's front, right pocket.

At the time the search warrant was executed, defendant, an adult male, and defendant's teenage son were in the home. Each person was placed on the kitchen floor and instructed to sit with their legs crossed and their hands on their knees. Approximately fifteen minutes after Officer Hairston and his team entered the home to secure it, a second team of officers entered to search the home for drugs. Officer A.R. Caruana searched one of the two bedrooms in the home; he testified the room appeared to belong to a teenage male and did not contain any contraband. Officer B.A. Howard searched the second bedroom; he testified the bedroom contained mostly male clothing, two small plastic baggies containing marijuana, and \$2,978.00 in cash. Officer L. Younker searched the living room; she testified no contraband was

discovered other than the bag of marijuana mentioned by Officer Hairston. Officer Younker also searched the kitchen where she found a crack pipe, a digital scale, plastic baggies, and "a bunch of little crumbs" which were later tested for and confirmed to be cocaine. She also testified that she heard defendant say, "Anything in the house is mine, and nobody else has anything to do with it."

The State also presented "other crimes" evidence through the testimony of Officer L.M. Butcher of the Raleigh Police Department. Officer Butcher testified that on 5 September 2006, he arrived at 1104-A Mark Street after responding to a call for backup where he encountered the defendant handcuffed and sitting on the curb in front of the home. Officer Butcher asked defendant why he was handcuffed and defendant stated he had been smoking marijuana and had attempted to run from police officers. Officer Butcher also testified defendant's girlfriend stated that marijuana was hidden in the house near the washing machine. In addition to the marijuana found inside the house, officers found a digital scale, plastic baggies and a large amount of cash. Defendant was arrested and charged with possession of marijuana with intent to sell or deliver. The charge was still pending at the time of defendant's trial in the instant case.

On 6 February 2007, defendant was indicted for one count of possession of marijuana with intent to sell or deliver, one count of possession of cocaine, and attaining the status of a habitual felon. On 5 April 2007, a jury found defendant guilty of

misdemeanor possession of marijuana, possession of cocaine, and attaining the status of an habitual felon. Defendant appeals.

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Defendant presents five issues on appeal: (I) whether the trial court erred by admitting evidence of "other crimes" in violation of Rule 404(b); (II) whether the trial court erred by instructing the jury that it could consider evidence of other crimes to prove plan, scheme, system or design; (III) whether defendant received ineffective assistance of counsel; (IV) whether sufficient evidence was presented that defendant possessed cocaine; and (V) whether the trial court erred by denying defendant's motion for mistrial.

*I & II*

Defendant argues the trial court erred by admitting the testimony of Officer Butcher regarding the incident on 5 September 2006. Because defendant failed to object at trial to the admission of the officer's testimony, we must review for plain error. N.C. R. App. P. 10(b)(2) (2007); *State v. Holbrook*, 137 N.C. App. 766, 529 S.E.2d 510 (2000).

"Plain error is error 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." *Holbrook*, 137 N.C. App. at 767, 529 S.E.2d at 511 (citations omitted).

The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a

*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

*State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)  
(internal quotations omitted) (emphasis in original).

North Carolina Rule of Evidence 404(b) provides:

*Other crimes, wrongs, or acts.* - 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) (2007). Rule 404(b) is a "general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant[.]" *State v. Carpenter*, 361 N.C. 382, 386, 646 S.E.2d 105, 109 (2007) (quotation omitted). Admission of evidence under the rule is "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." *Id.* (emphasis omitted). "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." *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) (quotations omitted) (emphasis omitted).

Where evidence of other conduct or other crimes is introduced for some purpose other than to establish a defendant's propensity to commit a particular crime, "the ultimate test for determining whether such evidence is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403." *Id.* Once the court determines that the evidence is admissible, the court must then conduct a Rule 403 balancing test to determine whether the probative value of the evidence outweighs the danger of unfair prejudice to the defendant. See N.C. Gen. Stat. § 8C-1, Rule 403 (2007).

Prior to defendant's trial, the trial court conducted a hearing on defendant's *motion in limine* to exclude testimony regarding defendant's arrest on 5 September 2006 and evidence obtained during defendant's arrest. The State argued it would admit evidence regarding defendant's 5 September arrest to prove intent and absence of mistake. After hearing arguments from both sides, the trial court found the evidence was offered for a purpose other than to prove propensity; specifically it was offered to prove absence of mistake, knowledge, motive, and opportunity.

Approximately three months before the date of the offense in the present case, defendant was arrested on 5 September 2006 for possession of marijuana at 1140-A Mark Street. Defendant admitted

possessing marijuana at that time and a bag containing marijuana was found inside the home. On 30 November 2006, defendant was arrested again at 1140-A Mark Street for possession of marijuana. Defendant claimed possession of everything in the home; bags containing marijuana as well as cocaine residue were found in the home.

We agree with the trial court that the evidence admitted was relevant and sufficiently similar and close in time to show absence of mistake, knowledge, motive, and opportunity. See *State v. Brewington*, 170 N.C. App. 264, 278, 612 S.E.2d 648, 657, *disc. rev. denied*, 360 N.C. 67, 621 S.E.2d 881 (2005) ("To be relevant in a particular case, evidence of prior bad acts must be sufficiently similar to the crime charged and be temporally proximate to that crime.").

We also find the trial court's instruction to the jury regarding the 5 September incident sufficient. The trial court instructed the jury as follows:

[M]embers of the jury, evidence has been received . . . tending to show that at an earlier date, the defendant was charged with possession of marijuana at the same location as the offense in this case. This evidence was received solely for the purpose of showing that the defendant had a motive for the Commission of the crime charged in this case and that the defendant had the knowledge, which is a necessary element of the crime charged in this case, and that there existed in the mind of the defendant a plan, scheme, system or design involving the crime charged in this case.

We find no error in the trial court's "other crimes" instruction to the jury. These assignments of error are overruled.

III

Defendant argues he received ineffective assistance of counsel (IAC) because defendant's trial counsel failed to object to Officer Butcher's testimony and failed to object to the jury instructions given by the trial court regarding Officer Butcher's testimony. We disagree.

Generally, IAC claims should be considered via motions for appropriate relief and not on direct appeal. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, "IAC claims brought on direct [appeal] will be decided on the merits when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). In this case, defendant's IAC claim can be decided by review of the materials contained in the record on appeal.

"Attorney conduct that falls below an objective standard of reasonableness and prejudices the defense denies the defendant the right to effective assistance of counsel." *Id.* at 167, 557 S.E.2d at 525. Having reviewed the record and transcripts in this case, we cannot say the performance of defendant's trial counsel was ineffective. Even assuming, *arguendo*, trial counsel's failure to object during the trial to the admission of testimony regarding the 5 September incident could be considered as ineffective assistance of counsel, defendant cannot show that he was prejudiced. As we



have already determined, evidence of defendant's arrest on 5 September was properly admitted under Rule 404(b). Additionally, the instructions given to the jury by the trial court properly limited the use of the evidence presented regarding the 5 September incident. We also note trial counsel was successful in having other evidence excluded based on the motion *in limine*. Therefore, based on the record before us, and considering the high standard defendant must meet before maintaining a successful IAC claim, we cannot say counsel here was deficient in her performance. Further, we are not persuaded that had trial counsel objected to the evidence, a different result would have been reached at trial. This assignment of error is overruled.

#### IV

Defendant argues the trial court erred by denying his motion to dismiss the possession of cocaine charge. We disagree.

A defendant's motion to dismiss is appropriately denied when "the State has presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator." *State v. Boyd*, 177 N.C. App. 165, 175, 628 S.E.2d 796, 804 (2006). In ruling on a motion to dismiss, a trial court must view the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the

substance must be knowingly possessed. *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985).

[I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Instead, possession of a controlled substance may be either actual or constructive. 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.

*State v. McNeil*, 165 N.C. App. 777, 781, 600 S.E.2d 31, 34 (2004), *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005) (internal citations and quotations omitted).

In this case, defendant did not have exclusive possession of the home in which the cocaine was found. Therefore, the State must provide evidence of other incriminating circumstances. The State presented evidence that during execution of the search warrant, defendant stated that "anything in the house is mine." When the officers entered the home, defendant attempted to conceal a bag of marijuana by placing it between the seat cushions on the couch. During their search, officers found another bag of marijuana in a room that contained mostly male clothing and articles. The officers also found almost \$3,000 dollars in U.S. currency in one of the rooms as well as a large sum of money in defendant's pocket.

Additionally, the officers found drug paraphernalia which included a crack pipe, digital scales, and plastic baggies that were located in the kitchen along with the cocaine crumbs. Viewing the evidence in the light most favorable to the State, defendant's uncontroverted statement coupled with the contraband found in the home was sufficient to show defendant was in possession of the cocaine. For defendant to essentially argue he possessed all contraband items found in the home, including a crack pipe and digital scale containing cocaine residue, but deny possessing the crumbs of cocaine found in the home, is unreasonable in light of the circumstances. This assignment of error is overruled.

V

Defendant argues the trial court erred by denying his motion for mistrial based on defendant's absence from the courtroom. We disagree.

Upon motion by a defendant, "[t]he judge must declare a mistrial . . . if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2007). "The decision to grant or deny a mistrial rests within the sound discretion of the trial court" and will be reversed on appeal only upon "a clear showing that the trial court abused its discretion." *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991) (quotation omitted). A mistrial should not be allowed unless "there are improprieties in the trial so serious that they

substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *Id.*

A defendant has a right to be present at all stages of his trial. In noncapital felony trials, a defendant may personally waive the right to be present. See *State v. Richardson*, 330 N.C. 174, 178, 410 S.E.2d 61, 63 (1991); see also *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985); *State v. Hayes*, 291 N.C. 293, 296-97, 230 S.E.2d 146, 148 (1976). "A defendant's voluntary and unexplained absence from court subsequent to the commencement of trial constitutes such a waiver." *Richardson*, 330 N.C. at 178, 410 S.E.2d at 63 (citation omitted). "Once trial has commenced, the burden is on the defendant to explain his or her absence; if this burden is not met, waiver is to be inferred." *Id.* "[It is] incumbent upon defendant to explain his absence to the court's satisfaction." *Id.* at 179, 410 S.E.2d at 63.

Here, it is clear that trial had begun before defendant absented himself. Defendant and counsel were present during jury selection on 3 April 2007. Defendant was absent for the remainder of the trial and defense counsel indicated she had not seen or heard from defendant. Meanwhile during defendant's unexplained absence the jury returned guilty verdicts against him. At the sentencing hearing, which had been delayed until defendant could be located and brought into court, defendant testified he was absent because his children were being evicted from a home located at 1133 March Street. Defendant presented evidence of an eviction hearing

scheduled to be held on 3 April 2007 - the same day as his trial. However, given defendant's lack of communication with his trial counsel, and the evidence he presented of only an eviction *hearing*, such action can be viewed as a waiver of the right to confrontation. Therefore, the trial court did not abuse its discretion by denying defendant's motion for a mistrial. This assignment of error is overruled.

For the foregoing reasons, we find no error.

NO ERROR.

Judges JACKSON and ARROWOOD concur.

Report per Rule 30(e).