NO. COA08-788

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2009

STATE OF NORTH CAROLINA

v. Orange County
No. 06 CRS 53465-9

GWENDOLYN E. RICHARDSON

Appeal by defendant from judgment entered 8 November 2007 by Judge Michael R. Morgan in Orange County Superior Court. Heard in the Court of Appeals 14 January 2009.

Russell J. Hollers, III, for defendant.

Attorney General Roy Cooper, by Assistant Attorney General Douglas A. Johnston, for the State.

ELMORE, Judge.

Gwendolyn E. Richardson (defendant) appeals from judgments entered on 8 November 2007 pursuant to jury verdicts finding her guilty of possession of cocaine, possession of drug paraphernalia, and possession of firearms by a felon. After careful review, we find no error.

I.

In May 2006, Officer Josh Wood of the Orange County Sheriff's Department received information leading him to suspect defendant and her boyfriend were selling drugs stored at their shared home in Chapel Hill. During his subsequent surveillance of the home,

Officer Wood observed nothing out of the ordinary and no adults other than defendant and her boyfriend. He also noted that defendant was occasionally a passenger in a black Lexus parked at the house registered to her boyfriend. He saw none of the comings and goings expected if drugs were being sold from the home.

Under Officer Wood's direction, a confidential informant arranged to meet and buy drugs from defendant and her boyfriend on three separate occasions. Each time, officers saw them both leave the house in the Lexus and — without making any stops — meet the informant at a predetermined location. At that location, officers saw defendant trade drugs for money with the informant. After the exchange, the informant gave Officer Wood the drugs he purchased. Each time, the drugs bought field-tested positive as cocaine.

Based on this information, Officer Wood obtained and executed a search warrant for the home on 22 June 2006. In the kitchen, officers found baking soda, razor blades, plates, a scale, and plastic baggies. In a cabinet above the kitchen counter, officers found a shoebox containing a brick of cocaine that weighed 979 grams. A search of a bedroom closet revealed a duffel bag containing four pistols.

At trial, Officer Wood testified that, after defendant and her boyfriend were taken to the magistrate's office, the boyfriend stated, "We were in a good spot. Y'all didn't know where we were at." The boyfriend also made a comment to police about money hidden in different locations. According to Officer Wood, when the boyfriend made both of those statements, defendant snickered and

smiled.

Defendant filed pre-trial motions to suppress the evidence seized from her home and to compel the state to reveal the identity of the informant. Both motions were denied. She was found guilty of trafficking in cocaine, possession of a firearm by a felon, and possession of drug paraphernalia and sentenced to 175 months' to 219 months' imprisonment. Defendant now appeals.

II.

Defendant first argues that the trial court erred in denying her motion to suppress the evidence obtained from the house. Specifically, she contends that the warrant to search her home was fatally defective as it lacked facts and circumstances establishing probable cause to believe drugs were in her home. We disagree.

Our review of the denial of a motion to suppress evidence "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Furthermore, "when addressing whether a search warrant is supported by probable cause, a reviewing court must consider the 'totality of the circumstances.'" *State v. Sinapi*, 359 N.C. 394, 398, 610 S.E.2d 362, 365 (2005) (citation omitted). Under the totality of the circumstances test:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the

> "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed.

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (citation omitted) (alterations in original).

In the case at hand, defendant made no stops between leaving her home and meeting the informant with drugs ready to sell. The personal knowledge and experience of the magistrate — combined with common sense and logic — led him to infer that the drugs sold away from the house likely were stored at that same house. This was a permissible inference. Beyond the obvious temporal and chronological connection, it is rational to assume that persons engaged in selling drugs might wish to separate the place where the drugs are sold from the place where they are stored.

Mobile contraband associated with a suspect in one location can support a finding of probable cause to search another location. In *State v. McCoy*, officers supervised controlled drug buys in two different hotel rooms, but the defendant vacated the premises before search warrants could be obtained and executed. 100 N.C. App. 576, 576-77, 397 S.E.2d 355, 357 (1990). This Court held that probable cause existed to search a third hotel room registered to the defendant despite an absence of observed criminal activity in that room. *Id.* at 578, 397 S.E.2d at 358. As in the present case, sufficient probable cause was found because of reasonable inferences drawn from the totality of the circumstances. If a

suspect is seen with drugs in one location, and the circumstances surrounding the drugs at that location are such that officers reasonably suspect that drugs might be found at another location, a magistrate's finding that probable cause existed to search that second location may be sustained. *See State v. O'Kelly*, 98 N.C. App. 265, 272, 390 S.E.2d 717, 721 (1990) (holding that probable cause with respect to main residence was sufficient to search outbuilding storage unit rented by the defendant).

The facts reasonably indicate that defendant was part of, essentially, a drug delivery business from the house. Therefore, the Superior Court's conclusion that probable cause existed to issue a search warrant of that house, and denial of defendant's motion to suppress, is affirmed.

III.

Defendant next argues that the trial court erred in denying her request to reveal the identity of the confidential informant who bought drugs from defendant away from her home. We disagree.

"Non-disclosure of an informant's identity is a privilege justified by the need for effective law enforcement[.]" *State v. Grainger*, 60 N.C. App. 188, 190, 298 S.E.2d 203, 204 (1982). This privilege encourages citizens to report crimes by preserving their anonymity. *State v. Ketchie*, 286 N.C. 387, 390, 211 S.E.2d 207, 209 (1975) (citing *Rovario v. United States*, 353 U.S. 53, 1 L. Ed. 2d 639 (1957)). However, the privilege of allowing an informant's identity to remain confidential is not absolute. *Id.* "[W]here the informant's identity and potential testimony are essential to a

fair determination of the case or material to the defense, the privilege must give way and the informant's identity be disclosed[.]" *Grainger*, 60 N.C. App. at 190, 298 S.E.2d at 204 (internal citations omitted).

To determine whether a defendant has a right to disclosure of an informant's identity, a court must consider the particular circumstances of each case such as "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *State v. Cheek*, 351 N.C. 48, 57, 520 S.E.2d 545, 551 (1999) (quoting *Roviaro*, 353 U.S. at 62, 1 L. Ed. 2d at 646). Likewise, disclosure of an informant's identity is required "where the informer directly participates in the alleged crime so as to make him a material witness on the issue of guilt or innocence." *Ketchie*, 286 N.C. at 390, 211 S.E.2d at 209.

Defendant argues that the informant could have clarified contradictions between her testimony and the State's evidence. She contends that the informant could have testified as to whether he spoke with defendant or her boyfriend when setting up the controlled buys, whether defendant was an active participant in those buys, and whether defendant knew about the drugs and guns stored in the house. However, the first two contentions apply to uncharged conduct — the sale of cocaine to the informant away from the house — and are not relevant to the drugs stored in the home. Likewise, there is nothing to indicate that the informant would be able to testify as to defendant's knowledge regarding what drugs were stored in the house.

Defendant was charged for possession of the drugs and guns found at her home. The trial court explicitly decided that since the informant did not make the three controlled buys at defendant's home, the informant was not an actual participant in the charged crimes. Defendant contends that Officer Wood's testimony on direct examination that he "received information from a confidential source that [defendant and her boyfriend] were selling at [the house]" means that the informant participated in those sales and therefore his identity is necessary to her defense. However, Officer Wood corrected this statement on cross-examination and said that he did not know anything about the house — other than it was where defendant lived — before seeing her leave the home and go straight to the controlled buys. Even with that correction put aside, Officer Wood's initial statement that the informant knew about drugs sold at the house does not mean the informant was a participant in the crime. It is entirely possible for someone to have knowledge about someone else's criminal activity without taking part in the crime.

Because defendant failed to show that the informant was a participant in, or could serve as a material witness to, the crimes charged, the trial court committed no error in denying defendant's motion to reveal the informant's identity.

IV.

Defendant also argues that the trial court erred in allowing Officer Wood to testify about statements made by defendant's boyfriend to police after arrest. Although no objection was made

to the testimony at trial, defendant argues that the evidence constituted hearsay not within an exception and that its admission was plain error. In addition, she contends that admission of the statements violated her right to confront her accuser under the Sixth Amendment of the United States Constitution. We do not agree.

A defendant must make a timely objection to proffered testimony in order to preserve the issue for appellate review. When a defendant fails to make such an objection, this Court may only review the matter for plain error. N.C.R. App. P. 10(b)(1), (c)(4) (2007). Because defendant failed to object to the testimony in question, this assignment of error may only be reviewed for plain error.

Under North Carolina Rule of Evidence 801(c), "[h]earsay is a statement, other than one made by the declarant, while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2007). Under Rule 801(d), a statement is admissible as an exception to the hearsay rule if it is offered against a party and it is his own statement or is a statement of which he has manifested his adoption or belief in its truth. N.C. Gen Stat. § 8C-1, Rule 801(d)(A)-(B) (2007). "A person may expressly adopt another's statement as his own, or an adoptive admission may be inferred from other conduct of a party which manifests circumstantially the party's assent to the truth of a statement made by another person." *State v. Sibley*, 140 N.C. App. 584, 588, 537 S.E.2d 835, 839 (2000) (quoting *FCX, Inc.*

v. Caudill, 85 N.C. App. 272, 278, 354 S.E.2d 767, 772 (1987) (internal citations omitted)). "Adoption or acquiescence may be manifested in any appropriate manner." *State v. Thompson*, 332 N.C. 204, 218, 420 S.E.2d 395, 403 (1992) (quoting N.C. Gen. Stat. § 8C-1, Rule 801(d) official commentary).

Officer Wood's testimony indicates that defendant "smiled and snickered" when her boyfriend made both of the statements at issue. While another trial court might have come to a different decision as to whether such actions constituted an adoptive admission, reading them as such under the circumstances does not constitute plain error. If defendant was ignorant as to the presence of drugs in the house, a smile hardly seems the appropriate response to her boyfriend's statement that it was "a good spot" to avoid police detection. The same can be said of the statement regarding hidden money: defendant sat beside her boyfriend and smiled while he admitted that he and defendant had hidden evidence of a crime. If she had no knowledge of those activities, one would expect her response to be shock or possibly anger, but instead, her conduct indicates amusement. A reasonable person could easily come to the conclusion that defendant's conduct amounted to an adoption of the statements. Therefore, no plain error was committed in admitting Officer Wood's testimony regarding defendant's boyfriend's statements as her conduct adopted those statements and made them her own.

It is important to note that the North Carolina Rules of Evidence differ from the Federal Rules in their treatment of party

admissions. The Federal Rules exempt adoptive admissions of a party-opponent from the hearsay definition, while in North Carolina, adoptive admissions are exceptions to the hearsay rule. Fed. R. Evid. 801(d)(2)(B) (2007). In the final analysis, the difference is not important: admissions are admissible. The reason that the Federal Rules characterize adoptive admissions as "exemptions" is that, unlike the other categorical exceptions, the justification for admitting those types of statements does not depend upon their trustworthiness or reliability. Rather, the nature of the adversary system itself is what makes admissions admissible. A defendant is free to take the stand and explain, deny, or otherwise address the statement. In the end, the bottom line is the same: admissions are admissible whether they are exempted from or are exceptions to the hearsay rule.

This is important because defendant argues that admission of Officer Wood's testimony about her boyfriend's statements and her adoption of those statements violated her Sixth Amendment rights to confront and cross-examine the declarant. However, constitutional issues not "raised and passed upon" at trial cannot be argued on appeal. *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (quoting *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003)). Moreover, while defendant correctly points out that under the United States Supreme Court's decision in *Crawford v. Washington,* testimonial statements — as undoubtedly these statements were — may be introduced only if the declarant is unavailable for trial and subject to a prior cross-examination.

Crawford v. Washington, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). Nonetheless, because of the adoption of her boyfriend's statements, it was defendant's own admissions and not those of her boyfriend properly before the jury. *Crawford* is not applicable if the statement is that of the defendant because the point of requiring the availability of the declarant for cross-examination is to provide the defendant an opportunity to cast doubt on the statement's value for truth. When the defendant and the declarant are one and the same, certainly she has the ability to do that by taking the stand in her own defense. It cannot be said that the declarant is "unavailable."

Even were we to reach a contrary conclusion and find that the State did elicit improper hearsay testimony, defendant must still prove that there is a reasonable possibility that a different result would have been reached had the error not been committed. *State v. Sills*, 311 N.C. 370, 378, 317 S.E.2d 379, 384 (1984); N.C. Gen. Stat. 15A-1443(a) (2007). The great weight of the remaining evidence leads us to conclude that the same result would have been reached even if our decision were different. The evidence properly before the court showed that defendant, her boyfriend, and children were the only ones coming in and out of the house. Utility bills and a rent agreement indicated that defendant leased the home. In that home, the police found nearly a kilogram of cocaine, weapons, and guns. Defendant was seen on several occasions leaving the house and — without stopping — driving with her boyfriend to the controlled buys with the informant. In sum, the evidence is such

that even were the admission of the statements improper hearsay, the trial court would have reached the same result.

For the above reasons, we find no error.

No error.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).