An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA09-1392

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v.

JAVIER ARELLANO GOMEZ

Watauga County
Nos. 08 CRS 50291-92
08 CRS 50297
08 CRS 50300

Appeal by defendant from judgments entered 8 May 2009 by Judge Joe Crosswhite in Watauga County Superior Court. Heard in the Court of Appeals 24 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Scott K. Beaver, for the State.

J. Clark Fischer, for defendant-appellant.

CALABRIA, Judge.

Javier Arellano Gomez ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of three counts of trafficking in cocaine and one count of conspiracy to traffic in cocaine. We find no prejudicial error.

I. Background

In January 2008, Juan Cantero ("Cantero"), a confidential informant for the Watauga County Sheriff's Department ("the Sheriff's Department"), arranged a meeting with Delfino Arellen Avellaneda ("Avellaneda") to discuss the purchase of six to nine ounces of cocaine. The two men met in a Walmart parking lot in

Boone, North Carolina, where they agreed to a purchase price of five or six thousand dollars. In addition, Cantero provided Avellaneda with three hundred dollars, provided by the Sheriff's Department, "for gas." Avellaneda then drove away in a Chevrolet S10 pickup truck ("the Chevrolet"), which was owned by defendant.

Approximately two days later, on Thursday, 31 January 2008, Avellaneda arrived at defendant's home in Cape Carteret, North Carolina, in the Chevrolet. On Saturday, 2 February 2008, Avellaneda, defendant, and Brandy Walley ("Ms. Walley"), who was defendant's girlfriend, left defendant's home to travel to Boone. Defendant and Ms. Walley drove in the Chevrolet. Earlier that day, Avellaneda had left separately in his blue Dodge Neon ("the Dodge"). Although Avellaneda owned the Dodge, it had been in defendant's possession for approximately one month.

Defendant and Ms. Walley then met up with Avellaneda in Richlands, North Carolina, which is approximately one hour from Cape Carteret. In Richlands, defendant and Ms. Walley switched vehicles with Avellaneda. During the remainder of the trip, defendant and Avellaneda switched vehicles on two additional occasions.

When they arrived in Boone, the group traveled to a mall, where they switched vehicles one final time. Avellaneda was then driving the Dodge and defendant and Ms. Walley were in the Chevrolet. When Ms. Walley asked defendant why they continued to switch vehicles with Avellaneda, defendant replied that it was none of her business.

Defendant and Ms. Walley then went to a hotel and Avellaneda returned to his home. Approximately one and one-half hours later, the couple proceeded to Los Arcoiris, a Mexican restaurant. While they were traveling, defendant received a phone call from Avellaneda. While defendant and Ms. Walley were eating their meal, defendant seemed extremely nervous and was continually checking his cell phone. In addition, defendant got up to use the restroom on four separate occasions during the forty-five minute meal.

On that same day, Cantero received a phone call from Avellaneda, informing him that the cocaine was ready to be picked up. Cantero again met with Avellaneda at the Walmart in Boone. Cantero and Avellaneda then drove separately to the Los Arcoiris parking lot. At this time, Avellaneda was driving a green Ford Taurus ("the Ford").

Cantero and Avellaneda then walked to the Dodge, which was also in the parking lot. Avellaneda opened the Dodge's hood and revealed a package hidden next to the battery. He then handed the package to Cantero. While Cantero attempted to open the package, members of the Sheriff's Department arrived and placed Avellaneda under arrest. The package was subsequently opened and found to contain several plastic baggies and a substance that was later identified as 205.9 grams of cocaine.

The Sheriff's Department towed away the Dodge and the Ford and then left the scene. However, Captain Al Reed ("Capt. Reed") had noticed the Chevrolet, which had distinctive markings, in the Los Arcoiris parking lot during the arrest of Avellaneda, and, as a

result, he stayed behind in his unmarked vehicle to observe it. Approximately thirty seconds to one minute after the other Sheriff's Department vehicles had exited the parking lot, Capt. Reed witnessed defendant and Ms. Walley exit the restaurant and enter the Chevrolet. Capt. Reed called the other units of the Sheriff's Department, who then returned to the parking lot and placed defendant and Ms. Walley under arrest.

Defendant was subsequently indicted and tried in Watauga County Superior Court for four counts of trafficking in cocaine, one count of maintaining a dwelling for a controlled substance, and one count of conspiracy to traffic in cocaine. At trial, defendant made a motion to dismiss all charges for insufficient evidence, which was denied by the trial court. Defendant renewed this motion at the close of all evidence, and it was again denied.

On 8 May 2009, the jury returned verdicts of guilty to three counts of trafficking in cocaine and one count of conspiracy. The jury also returned verdicts of not guilty to the remaining charges. For each conviction, defendant was sentenced to a minimum of 70 months to a maximum of 84 months. These sentences were to be served consecutively in the North Carolina Department of Correction. Defendant appeals.

II. Motion to Dismiss

Defendant argues that the trial court erred in denying his motion to dismiss. Defendant contends that the State failed to provide substantial evidence that he possessed the cocaine. We disagree.

> The standard of review on a motion to dismiss for insufficient evidence is whether the State has offered substantial evidence of each required element of the offense charged. Substantial evidence is relevant evidence which would be sufficient to convince a rational juror to accept a particular conclusion. The evidence must be viewed in the light most favorable to the State and the State must be given the benefit of every reasonable inference which may be drawn from the evidence when deciding a motion to dismiss for insufficient evidence.

State v. Fuller, 176 N.C. App. 104, 110-11, 626 S.E.2d 655, 659 (2006)(citations omitted).

"[T]o convict an individual of drug trafficking . . . the statute requires only that the defendant knowingly possess or transport the controlled substances; if the amount exceeds 28 grams, then a conviction for trafficking may be obtained." *State v. Shelman*, 159 N.C. App. 300, 306, 584 S.E.2d 88, 93 (2003). "The 'knowing possession' element of the offense of trafficking . . . may be established by a showing that (1) the defendant had actual possession, (2) the defendant had constructive possession, or (3) the defendant acted in concert with another to commit the crime." *State v. Reid*, 151 N.C. App. 420, 428, 566 S.E.2d 186, 192 (2002).

Defendant argues only that the evidence presented at trial was insufficient to support the knowing requirement under a theory of constructive possession. Because we determine the State presented substantial evidence that defendant possessed the cocaine under the acting in concert theory, it is unnecessary to address the doctrine of constructive possession. *See State v. Diaz*, 317 N.C. 545, 552, 346 S.E.2d 488, 493 (1986)("When the State has established . . .

that a defendant was present while a trafficking offense occurred and that he acted in concert with others to commit the offense ... it is not necessary to invoke the doctrine of constructive possession.").

"[I]f two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose[.]" *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)(internal quotations and citation omitted). "A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." *State v. Gaines*, 345 N.C. 647, 675-76, 483 S.E.2d 396, 413 (1997). "[A] defendant acts in concert in committing the offense of trafficking where the evidence establishes that the defendant was present while a trafficking offense occurred and that the defendant acted in concert with others to commit the offense pursuant to a common plan or purpose." *Reid*, 151 N.C. App. at 429, 566 S.E.2d at 192.

In the instant case, the State presented substantial evidence that defendant was acting in concert with Avellaneda in order to traffic in cocaine. Ms. Walley testified that she had previously witnessed defendant and Avellaneda cutting cocaine together. She testified further that defendant and Avellaneda would take frequent weekend trips together to conduct drug deals. Avellaneda

negotiated the terms of a drug transaction with Cantero in Boone and then drove to defendant's home in Cape Carteret. Shortly thereafter, defendant and Avellaneda drove in separate vehicles from Cape Carteret to Boone, switching vehicles between the Dodge and the Chevrolet on multiple occasions. In Boone, defendant and Avellaneda spoke on the phone as defendant traveled to Los Arcoiris. Defendant was acting nervous and getting up repeatedly throughout his meal. Finally, while defendant was inside the restaurant, Avellaneda attempted to sell the cocaine, which was located in the engine compartment of the Dodge that defendant had recently been driving, to Cantero, in the parking lot of that same restaurant. This evidence, taken in the light most favorable to the State, would allow a jury to find that defendant and Avellaneda were acting in concert to traffic in cocaine. This determination, in turn, satisfies the knowing possession element of a trafficking offense. This assignment of error is overruled.

Defendant additionally argues that the motion to dismiss should have been granted because (1) the State provided no evidence of any drug related communications between defendant and Avellaneda and (2) defendant made no incriminating or confessional statement to the Sheriff's Department or Ms. Walley. Defendant cites no authority in support of either of these arguments, and they are therefore deemed abandoned pursuant to N.C.R. App. P. 28(b)(6) (2008).

III. Evidence of Assault

Defendant argues that the trial court erred by allowing the State to present evidence that Ms. Walley was assaulted by an unidentified Hispanic male shortly before she testified. We agree, but determine that the error was not prejudicial.

In the instant case, the State questioned Ms. Walley on redirect examination about an encounter she had with a Hispanic male the weekend before she testified. Ms. Walley testified, over defendant's objection, that this unidentified male roughed her up by punching her and grabbing her arm. While the trial court initially overruled defendant's objection, it eventually asked the State to provide a connection between the assault and defendant. When the State failed to present any admissible evidence of such a connection, the trial court sustained defendant's objection and forbid any further inquiries into the assault by the State. However, the trial court also denied defendant's motion to strike the previous testimony, stating, "[t]hat testimony is out. It can stay in."

N.C. Gen. Stat. § 8C-1, Rule 401 defines relevant evidence as "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 (2009). Evidence is admissible at trial if it is relevant and its probative value is not substantially outweighed by, *inter alia*, the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rules 402 and 403 (2009).

Without any evidence to link the assault on Ms. Walley to defendant, evidence of the assault was not relevant, as it did not touch upon any fact that was of consequence to the determination of defendant's guilt. While it is true that Ms. Walley had previously testified that she was scared of defendant and his friends, she also testified that she had never seen the man who attacked her with defendant and provided no connection between defendant and her unknown assailant. Some connection between the assault and defendant was required before evidence of the assault could be considered relevant to establish Ms. Walley's fear of reprisal from defendant. The trial court provided the State with an opportunity to submit admissible evidence that would link defendant to the assault, but the State failed to do so. The trial court then, correctly, forbid the State from questioning Ms. Walley about the incident further. However, the trial court also refused to strike Ms. Walley's previous testimony about the assault. Since it has been determined that this evidence was not relevant, this was 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). "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 (1998)). Defendant has failed to make this showing.

In the instant case, Ms. Walley had previously testified, without objection, that defendant had previously threatened her and that she had only stayed with him because she feared for her life. Additionally, we have previously chronicled the substantial evidence presented that defendant was acting in concert with Avellaneda for the purpose of trafficking in cocaine. Considering all of this evidence, we find no reasonable possibility that a different result would have been reached if Ms. Walley's testimony regarding the assault had been stricken. This assignment of error is overruled.

IV. Conclusion

Defendant has failed to bring forth any argument regarding his remaining assignments of error. As such, we deem these assignments of error abandoned pursuant to N.C.R. App. P. 28(b)(6) (2008). Defendant received a fair trial, free from prejudicial error.

No prejudicial error.

Judges HUNTER, Robert C. and HUNTER, Jr., Robert N. concur.

Report per Rule 30(e).