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NO. COA02-367

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v.

Durham County
No. 00 CRS 051891

JYMELL RASHAAD SCOTT

Appeal by defendant from judgment entered 6 September 2001 by Judge W. Osmond Smith in Durham County Superior Court. Heard in the Court of Appeals 9 December 2002.

Attorney General Roy Cooper, by Assistant Attorney General Barbara A. Shaw, for the State.

Hall & Hall, by Susan P. Hall, for defendant-appellant.

CAMPBELL, Judge.

Defendant was found guilty of possession of a firearm by a felon and was sentenced to an active term of imprisonment of a minimum of fifteen months and a maximum of eighteen months.

The evidence of the State tends to show that on the night of 14 February 2000, Officer John Tyler ("Officer Tyler") of the Durham Police Department conducted a traffic stop of a vehicle defendant was operating. As he talked to defendant, Officer Tyler smelled the odor of marijuana emanating from the interior of the vehicle. Officer Tyler called for assistance from other officers.

While awaiting the arrival of backup assistance, Officer Tyler

instructed defendant to keep his hands visible and on the steering wheel. However, defendant kept dropping his hands below the seat. Defendant slid across the seat of the vehicle and exited out of the passenger side. Defendant grabbed a light-colored bag from under the seat of the vehicle and ran.

As Officer Tyler chased defendant, he saw a bag on the ground that was similar to the one he had seen defendant retrieve from under the seat of the vehicle. He also saw defendant drop a dark-colored small object at the corner of a church located at 102 Enterprise Street. Officer Tyler then lost sight of defendant as defendant rounded the corner of the front of the church. Officer Tyler apprehended defendant, who had stopped and raised his hands in the air, between the church and a house located at 104 Enterprise Street.

After placing defendant in the custody of other officers, Officer Tyler walked to the spot where he saw defendant drop a dark object and found a fully loaded magazine containing eight .45 caliber rounds. Another officer, following the same path, saw a .45 caliber handgun on the roof of the house at 104 Enterprise Street. Officer Tyler climbed a ladder and retrieved the gun from the roof.

One bullet, of the same color, make and grain as the bullets found in the magazine, was found in the gun's chamber. Although the roof was wet with rainfall, the gun only had some mist on it. Similarly, the magazine was dry although the surrounding pavement and ground was wet.

The parties stipulated that defendant was convicted of a felony on 11 July 1997.

Defendant brings forward four assignments of error. For the following reasons, they are overruled.

First, he contends the court erred by denying his motion to dismiss the charge. In ruling upon a motion to dismiss, the court must determine whether the State has presented substantial evidence of each element of the offense. *State v. Small*, 328 N.C. 175, 180, 400 S.E.2d 413, 415 (1991). A person is guilty of the offense of possession of a firearm by a felon if he possesses any handgun after he has been convicted of a felony. N.C. Gen. Stat. § 14-415.1(a) (2001). Defendant argues the State failed to present sufficient evidence that he possessed the .45 caliber pistol found on the roof of the house.

Possession of an item may be actual, as when a party has actual physical custody of the item, or constructive, as when a party does not have actual physical custody but retains the power and intent to control the disposition or use of the item. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). When the item is not in the person's actual custody at the time of its seizure, "manifestations of actual possession must be inferred from the circumstances." *State v. Thorpe*, 326 N.C. 451, 454, 390 S.E.2d 311, 313 (1990). Similarly, because constructive possession involves questions of intent, proof is ordinarily by circumstantial evidence. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986).

Where there is no direct evidence as to the essential fact involved in the issue to be passed upon by the jury, such fact may nevertheless be inferred by the jury from facts and circumstances which they may find from the evidence. Where such inference may be reasonably drawn by the jury, and is altogether consistent with the facts and circumstances which the jury may find from the evidence, the evidence should be submitted to them; where the inference cannot be thus reasonably drawn, it should be withdrawn from the jury.

State v. Weston, 197 N.C. 25, 28-29, 147 S.E.2d 618, 620 (1929). Whether direct, circumstantial or both, the evidence must be considered by the court as a whole in the light most favorable to the State. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

When these principles are applied to the case at bar, the evidence shows that before running from the vehicle, defendant retrieved a bag from the seat. As he chased defendant, Officer Tyler saw a similar bag on the ground. He also observed defendant drop a small black object to the ground. Defendant disappeared temporarily from Officer Tyler's view after defendant rounded the corner of the church. When Officer Tyler next saw him, defendant had stopped and turned to face Officer Tyler with his arms and hands up. Officer Tyler found a black magazine in the area where he saw defendant drop the dark object. The magazine was dry although the surrounding pavement was wet. Likewise, the light-colored bag and the gun found on top of the house neighboring the church were less wet than their surroundings, thereby indicating they had been recently deposited. The single bullet in the gun was

of the same caliber, make, color and type as the bullets found in the magazine. A reasonable deduction may be reached from the foregoing facts and circumstances that defendant had the bag, magazine and handgun in his possession and that he discarded each item as he fled from Officer Tyler. The court therefore properly submitted the issue to the jury.

Defendant next contends that the court erred by allowing Officer Tyler to testify that the bullets in the magazine and gun were .45 caliber bullets and that the bullet jackets were unusual because they were solid gold instead of copper or silver in color. He argues Officer Tyler was not qualified as an expert to give this testimony.

Lay testimony may be given in the form of an opinion if the testimony is rationally based upon the perception of the witness and is helpful to an understanding of the matter. N.C. Gen. Stat. § 8C-1, Rule 701 (2001). For instance, the conclusion drawn by a lay witness based upon a mere visual comparison may be the appropriate subject of lay opinion testimony. *State v. Mewborn*, 131 N.C. App. 495, 499, 507 S.E.2d 906, 910 (1998). Here, whether the bullets were the same caliber and color is a determination that could be made by mere visual observation. In addition, Officer Tyler could testify, based upon his training and experience as a police officer, that gold bullets are unusual.

Defendant next contends that the court erred by admitting the gun, magazine and bullets into evidence because a complete chain of custody was not established. A detailed chain of custody is

required only when the item of evidence is not readily identifiable or is susceptible to alteration. *State v. Campbell*, 311 N.C. 386, 389, 317 S.E.2d 391, 392 (1984). If the item has fairly unique or identifiable characteristics and is impervious to change, the court has broad discretion to admit the evidence. *State v. Hill*, 139 N.C. App. 471, 480, 534 S.E.2d 606, 613 (2000). We find no abuse of discretion. Officer Tyler identified the items as those he seized. Nothing in the record indicates that the evidence was not readily identifiable or that it was altered.

Finally, defendant contends the court committed plain error by not declaring a mistrial and requiring the jury to deliberate further after the foreman indicated that the jury was having difficulty in reaching an unanimous verdict and that additional deliberations might not be helpful.

The record shows that the jury began deliberations at 3:13 p.m. and at 5:08 p.m. returned to the courtroom to ask, *inter alia*, for procedural guidance in the event the jury was unable to reach an unanimous verdict as to a charge. The court instructed the jury to attempt to reach an unanimous verdict and that if it could not, then the jury was to report its inability to reach an unanimous verdict to the court, at which time the court would deal with it. The court then granted the jury an overnight recess. The jury resumed deliberations at 10:17 a.m. the next morning and returned to the courtroom at 12:07 p.m. with a verdict as to one charge. The court inquired of the foreman whether the jury desired to break for lunch at that time or to continue to deliberate. The foreman

replied, "I'm not certain if further deliberations would help us." Nonetheless, the court allowed the jury to recess for lunch and to resume deliberations after lunch. After the jurors returned from lunch, the court instructed the jury in accordance with N.C. Gen. Stat. § 15A-1235 to attempt to reach a verdict but not to surrender an honest conviction for the purpose of reaching a verdict. The jury resumed deliberations at 1:35 p.m. and returned with the final verdict at 2:17 p.m. The jury found defendant guilty of possession of a firearm by a convicted felon and not guilty of possession with intent to sell or deliver cocaine.

In determining whether a trial judge has coerced a verdict by requiring the jury to deliberate further, the appellate court must examine the totality of the circumstances before the trial court at the time it acted. *State v. Patterson*, 332 N.C. 409, 415-16, 420 S.E.2d 98, 101 (1992). Factors this Court may consider include whether the trial court conveyed any irritation with the jury for its failure to reach a verdict, whether the trial court indicated it would hold the jury until it reached a verdict, or whether the trial court made statements regarding the burdens or costs of another trial if the jury could not reach a verdict. *State v. Beaver*, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988). The decision whether or not to declare a mistrial when a jury may be deadlocked is within the discretion of the trial judge, whose decision will not be disturbed unless it is so clearly erroneous as to amount to a manifest abuse of discretion. *State v. Nobles*, 350 N.C. 483, 511, 515 S.E.2d 885, 902 (1999).

In *State v. Baldwin*, 141 N.C. App. 596, 608-09, 540 S.E.2d 815, 824 (2000), the jury had been deliberating approximately two and one half hours when it returned to the courtroom and asked for guidance because it was at an impasse. The court noted the jury had not been deliberating very long and the court directed the jury to resume deliberations. The jury deliberated two and one half more hours, took a dinner recess, and deliberated approximately ninety more minutes before returning to the courtroom with the message that it could not come to an unanimous decision as to either charge before it. The court allowed the jury to take a fifteen-minute recess. After the jury returned from the recess, the court instructed the jury in accordance with N.C. Gen. Stat. § 15A-1235. The jury resumed deliberations and returned to the courtroom one hour later with the message that the jury had been at an impasse, having stayed at a 10-2 vote for two hours on one charge. After ascertaining that the jury had progressed from a 9-3 vote to an 11-1 vote on the other charge, the court caused the jury to deliberate further. Approximately one hour later, the jury returned with verdicts as to both charges. This Court held that the totality of the circumstances did not reveal coercion by the trial court and that the court did not abuse its discretion by not declaring a mistrial.

In *Patterson*, 332 N.C. 409, 420 S.E.2d 98, the jury had deliberated approximately one hour and fifteen minutes during an afternoon and one and a half hours during the next morning when it delivered a message to the court that it was deadlocked. The court

instructed the jury in accordance with N.C. Gen. Stat. § 15A-1235 and directed the jury to resume deliberations. Approximately thirty minutes later the jury returned and stated it was unable to reach an unanimous verdict. The trial judge expressed his appreciation to the jury. Articulating the thought that some time to themselves may help the jurors, the court declared a lunch recess. After the lunch recess, the court charged the jury again pursuant to N.C. Gen. Stat. § 15A-1235. Less than one hour later, the jury returned with a verdict. In holding the trial court did not coerce a verdict, our Supreme Court noted that the jury had deliberated less than four hours, the trial court instructed the jury in strict accordance with N.C. Gen. Stat. § 15A-1235, the court reminded the jurors not to forsake their convictions, and the court never impugned the jury or intimated that the jury might be held until it reached a verdict.

The circumstances in the case at bar are very similar. The jury had been deliberating less than two hours when it sought guidance as to what would happen if it did not reach a verdict. After the overnight recess, the jury had been deliberating less than two additional hours when the foreman expressed his opinion that further deliberations may not be fruitful. The court instructed the jury in accordance with the statute, and reminded the jurors not to forsake their convictions for the sake of reaching a verdict. The jury returned its verdicts less than one hour later, thereby validating the court's intuition that further deliberations might produce unanimity. At no time did the court

express or intimate any irritation or impatience with the jury. Under these circumstances, the court did not coerce a verdict and did not abuse its discretion by not declaring a mistrial.

In defendant's trial, we find no error.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).