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NO. COA04-1567

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Durham County
No. 03 CRS 42976

PATRICK OBIORAH

Appeal by defendant from judgment entered 17 August 2004 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 23 August 2005.

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

Linda B. Weisel, for the defendant-appellant.

CALABRIA, Judge.

Patrick Obiorah ("defendant") appeals a judgment upon a jury verdict finding him guilty of the following offenses: trafficking in heroin by possession; trafficking in heroin by transportation; and possession of heroin with the intent to sell or deliver. We find no error.

The State presented the following evidence: based upon information gleaned from a confidential informant, on 21 February 2003, Durham, North Carolina police stopped Lodie Nelson ("Nelson") during a heroin purchase. Nelson informed the police that Reginald Chavis ("Chavis") sold him drugs. Nelson took police to Chavis'

residence where, after witnessing Nelson purchase drugs from Chavis, police obtained a search warrant for Chavis' home and pursuant to that warrant discovered narcotics. Chavis informed police that not only had he purchased these drugs from defendant, but that he "regularly bought" narcotics from defendant. Chavis agreed to help the police by calling defendant and ordering twenty grams of heroin. Chavis and defendant agreed to meet at 9 p.m. that evening at the Wynnsong theaters ("Wynnsong") in Durham.

Police gave Chavis "flash money" to engage in the drug transaction. The police drove Chavis' car from his house to a K-Mart located near the Wynnsong. Police searched Chavis and his vehicle for narcotics and other currency prior to the transaction with the defendant and found none. Investigator Husketh ("Husketh") drove Chavis to the K-Mart parking lot where Chavis, now "wired" by the police, drove his car to the Wynnsong. During Chavis' drive from the K-Mart to the Wynnsong, Husketh and Investigator Green ("Green") maintained consistent visual surveillance of him. Subsequent to parking his car, Chavis walked to defendant's car and got in the front passenger seat. Police had established with Chavis that uttering the code phrase, "it's all good," was the sign drugs were present in defendant's vehicle.

Upon hearing that phrase from Chavis, police rushed to the location of defendant's car, where Husketh blocked his egress. While Green went to the driver's side door, Husketh went to the passenger's side and took Chavis from the car so as to "arrest" him. Green, who along with several other officers struggled to

detain defendant, noticed defendant take two items with his right hand and "go directly into his mouth." As the struggle ensued, defendant wound up face down on the front seat of the car with his head towards the passenger side. Due to the continuing struggle and concern over safety, Husketh used pepper spray on defendant. In doing so, defendant, as well as the officers attempting to detain him, were hit. Defendant continued to struggle with the police and, as a result, Husketh punched defendant in order to arrest him. Sergeant John Morris recovered an item from the passenger side of defendant's car which later tested positive for heroin.

Defendant presented evidence he knew Chavis for six months and the purpose of their 21 February 2003 meeting was the sale of gold necklaces. Defendant testified he went to McDonald's prior to their meeting and was eating when Chavis sat down in his car. Defendant stated as Chavis got into his car, Chavis placed what appeared to be his keys on the car floor. Citing the food from McDonald's as the culprit, defendant denied the items in his mouth were drugs as the police accused.

On 17 August 2004, following a jury verdict of guilty on all counts, defendant was sentenced within the presumptive range to a minimum term of 90 months and a maximum term of 117 months in the North Carolina Department of Correction. Defendant appeals.

I. N.C. R. App. P. 28(b)(6):

As a preliminary matter, we note though defendant assigns 14 errors in the record, four of those are not argued within his

brief. Thus, those errors, number one, three, seven, and nine, are abandoned according to N.C. R. App. P. 28(b)(6) (2005).

II. Court Commentary:

Defendant first argues he is entitled to a new trial because the trial court improperly expressed an opinion about his case. Specifically, during jury *voir dire*, in response to two juror admissions a relative or friend had previously been charged with a drug-related offense, the trial court commented "there is a lot of difference between marijuana and heroin." This comment initiated the response, "yeah, I guess so" from one of the jurors.

N.C. Gen. Stat. § 15A-1222 (2003) provides "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." Though the statute expressly includes "trial," such a prohibition on judicial comment also is "violated when the trial judge inadvertently communicate[s] his opinion of the facts in the case by his remarks or questions to prospective jurors during the *selection of the jury*." *State v. Carriker*, 287 N.C. 530, 534, 215 S.E.2d 134, 137 (1975) (emphasis added). Although defendant did not object to the judicial comment, "[a] defendant's failure to object to alleged expressions of opinion by the trial court...does not preclude his raising the issue on appeal." *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989).

Defendant cites *Carriker* as a substantially similar case where a judge's commentary in a marijuana case was determined to be prejudicial. In *Carriker*, 287 N.C. at 531-32, 215 S.E.2d at 136,

the trial court, in the presence of the jury panel but prior to the defendant's case being called, stated marijuana was a habit forming drug which led to robbery to get money and those charged with such offenses get religion once they arrive at court. In the instant case, however, the trial court merely commented that there was a distinction to be drawn between marijuana and heroin as they were different narcotics. There is no comment in the record by the trial court characterizing heroin as habit forming or that its use either led to further criminal activity or to some religious awakening. Thus, the instant case is dissimilar to the facts of *Carriker*, and consequently, because the trial court commentary was not prejudicial, this assignment of error is overruled.

III. Post-Arrest Silence:

Defendant next argues the trial court erred in admitting references to his post-arrest silence. However, defendant failed to object in the trial court. Where a defendant fails to object, he may nonetheless make the alleged mistake "the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4) (2005). Notably, "plain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence." *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000), writ denied, 358 N.C. 157, 593 S.E.2d 84 (2004). Here, because defendant specifically and distinctly contends the trial court's error is

plain error and since the issue is the trial court's ruling on the admissibility of evidence, plain error review is appropriate.

Plain error review is used "cautiously and...in the exceptional case where...it can be said the claimed error is...fundamental...,...prejudicial,...[and] so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). Because the plain error rule only applies in truly exceptional cases, "the appellate court must be 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) (emphasis added). Put another way, "the appellate court must determine that the error in question tilted the scales and caused the jury to reach its verdict convicting the defendant." *Id.* (internal quotation marks omitted).

Assuming, *arguendo*, error occurred in admitting the evidence regarding defendant's post-arrest silence, such an admission fails to rise to the level of plain error. A full review of the record and transcript reveals the issue of defendant's post-arrest silence arose primarily as a result of defense counsel's cross-examining both Husketh and Greene. "A defendant is not prejudiced...by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2003). Furthermore, though the State did reference defendant's post-arrest silence during the direct examination of Green, other substantial evidence pointed to defendant's commission of the offense including: the police searched Chavis and his vehicle for

narcotics and other currency prior to Chavis driving his car from the K-Mart to the Wynnsong to meet defendant; Chavis and his car were drug free from the time he drove to the Wynnsong until he entered defendant's car; the police maintained consistent visual surveillance of Chavis during his drive from the K-Mart to the Wynnsong; and, after police arrested Chavis, they found heroin in defendant's car. This considerable evidence of defendant's guilt is separate and distinct from any possible error regarding the inclusion of testimony referencing defendant's post-arrest silence. Thus, because admission of this evidence fails to rise to the level of plain error, this assignment of error is overruled.

IV. Hearsay:

Defendant next argues the admission of Husketh's testimony regarding what Chavis said about defendant is inadmissible hearsay. However, defendant also failed to object to this and as a result again argues plain error. Though defendant argues plain error, substantial evidence exists, as delineated immediately above, of his guilt separate and apart from any possible trial court mistake in including this potential hearsay testimony. Consequently, as this trial court determination fails to amount to plain error, this assignment of error is overruled.

V. Indictment:

The defendant next argues the indictment failed to allege an essential element and thus the judgment is not supported by the indictment. Specifically, defendant contends that *knowledge* is an essential element of drug trafficking and possession and that,

absent its inclusion, the convictions must be vacated. We disagree.

"[A]n indictment, whether at common law or under a statute...must allege...all the essential elements of the offense endeavored to be charged." *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). Although defendant in the instant case failed to object, "when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208 (2001), *cert. denied*, 357 N.C. 579, 589 S.E.2d 130 (2003).

In *State v. Chesson*¹, 150 N.C. App. 439, 563 S.E.2d 643 (2002), this Court addressed this very issue. There, the defendant argued that failing to allege *knowingly* in the indictment was defective. *Id.* at *1. This Court disagreed, noting first that the indictment was couched in the language of the applicable statute, N.C. Gen. Stat. § 90-95 (2003), alleging the defendant "unlawfully, willfully, and feloniously" violated the statute. *Id.* at *1. This Court held the indictment was sufficient to charge the crime. *Id.* at *1. The indictment here, couched in the language of N.C. Gen. Stat. § 90-95, alleged defendant "unlawfully, willfully, and feloniously" possessed and transported heroin and "unlawfully, willfully, and feloniously" possessed with intent to sell or

¹This case is an unpublished opinion reported pursuant to N.C. R. App. P. 30(e).

deliver heroin. Thus, under the rationale expressed in *Chesson*, *supra*, the indictment in the instant case was sufficient to charge defendant and thus, this assignment of error is overruled.

VI. Jury Deliberations and Jury Instructions:

Defendant next argues the trial court erred both by permitting the continuation of jury deliberations for an unreasonable length of time and by failing to instruct the jury pursuant to N.C. Gen. Stat. § 15A-1235 (2003). First, defendant contends that nine hours of jury deliberation, coupled with two notes from the jury to the judge complaining of an inability to reach a verdict, concluding in the judge twice asking the jury to continue its deliberations, resulted in an unlawful coercion of guilty verdicts. We disagree.

N.C. Gen. Stat. § 15A-1235(c) provides, in part, the trial court "may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals." N.C. Gen. Stat. § 15A-1235(c) (2003). "In determining whether a trial court's actions are coercive, an appellate court must look to the totality of the circumstances." *State v. Dexter*, 151 N.C. App. 430, 433, 566 S.E.2d 493, 496, *aff'd*, 356 N.C. 604, 572 S.E.2d 782 (2002). Under a totality of the circumstances approach, factors to gauge include:

whether the court conveyed an impression to the jury that it was irritated with them for not reaching a verdict, whether the court intimated to the jury that it would hold them until they reached a verdict, and whether the court told the jury a retrial would burden the court system if the jury did not reach a verdict.

State v. Beaver, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988). Thus, for example, if a juror feels "he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict," *State v. Roberts*, 270 N.C. 449, 451, 154 S.E.2d 536, 538 (1967), defendant is entitled to a new trial.

Here, the jury deliberated for six hours on Friday without reaching unanimity. The jury returned on Monday where, in the morning, a note was passed to the judge from the jury describing their inability to reach a unanimous verdict. The judge brought the jury back and encouraged them to continue deliberations. This same process was repeated a second time at noon on Monday. At approximately 2:40 p.m. on that Monday, the jury returned its guilty verdicts.

Nine hours of jury deliberation over one and a half days is not an unreasonable length of time for the jury to return a unanimous verdict. Furthermore, and in accordance with the factors cited in *Beaver, supra*, the record reveals: no irritation between the judge and the jury during the deliberations or when the notes were passed; no intimation by the judge to the jury that they must reach a unanimous verdict at all costs; and, no communication from the judge to the jury that a retrial would burden the court system. Therefore, the trial court did not require the jury to deliberate for an unreasonable length of time.

Second, defendant further contends the trial court failed to instruct the jury pursuant to N.C. Gen. Stat. § 15A-1235 whereby

| [b]efore the jury retires for deliberation, the judge *may* give an instruction which informs the jury that...[n]o juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

N.C. Gen. Stat. § 15A-1235(b)(4) (2003) (emphasis added).

In *State v. Ward*, 301 N.C. 469, 478-79, 272 S.E.2d 84, 90 (1980) our Supreme Court reasoned compliance with N.C. Gen. Stat. § 15A-1235 requires instructing the jury with regard to the necessity of unanimity as to their collective guilty or not guilty verdict. See N.C. Gen. Stat. § 15A-1235(a) (2003) (providing "[b]efore the jury retires for deliberation, the judge *must* give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty") (emphasis added). However, unlike 15A-1235(a), abidance respecting the above-quoted permissive 15A-1235(b)(4) language is not mandatory. This is especially true when in *Ward*, as in the instant case, defendant failed to request such an instruction. *Id.*

The record reveals the trial court expressly provided the 15A-1235(a) instruction before sending the jury to engage in their deliberations. The 15A-1235(b)(4) instruction, absent a timely request, was not necessarily warranted. Thus, the statutory

command was followed and in accordance with *Ward, supra*, this assignment of error is overruled.

VII. Motion to Dismiss:

Lastly, defendant argues the trial court erred when it denied his motion to dismiss the charges of felony trafficking in heroin by possession, felony trafficking in heroin by transportation, and felony possession of heroin with the intent to sell or deliver. We note first, however, that in his brief, defendant argues only that the State presented insufficient evidence that he possessed the heroin. However, defendant failed to argue either the "intent to sell or deliver" element of the possession with the intent to sell or deliver charge or the trafficking in heroin by transportation charge. Thus, according to N.C. R. App. P. 28(b)(6) (2005), these arguments are abandoned.

"In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom." *State v. Gainey*, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996). In ruling on the motion, the trial court must "determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-9, 265 S.E.2d 164, 169 (1980). If

substantial evidence exists, "whether direct, circumstantial or both--to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

"The elements that the State must prove to establish possession of narcotics with the intent to sell or deliver are '(1) defendant's possession of the drug, and (2) defendant's intention to sell or deliver the drug.'" *State v. Thorpe*, 326 N.C. 451, 454, 390 S.E.2d 311, 313 (1990) (quoting *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985)). In order to illustrate trafficking by possession, a "defendant's conviction must be based upon his *knowing possession* of the drugs." *State v. Rosario*, 93 N.C. App. 627, 636, 379 S.E.2d 434, 439 (1989) (emphasis added). We note again that defendant failed to argue either the "intent to sell or deliver" element of the possession with the intent to sell or deliver charge or the trafficking in heroin by transportation charge. Thus, the remaining central question before this Court is whether the defendant possessed heroin.

"Possession of contraband can be either actual or constructive." *State v. McNeil*, 359 N.C. 800, 806, 617 S.E.2d 271, 275 (2005). Specifically, "[a]n accused has possession of contraband material within the meaning of the law when he has both the power and the intent to control its disposition or use." *State v. Davis*, 25 N.C. App. 181, 183, 212 S.E.2d 516, 517 (1975). Furthermore, "'where possession of the premises is nonexclusive,

constructive possession of the contraband materials may not be inferred without other incriminating circumstances.'" *State v. Harrington*, __ N.C. App. __, __, 614 S.E.2d 337, 344-45 (2005) (quoting *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984)). Notably, "[o]ur Court has...held that constructive possession can be inferred when there is evidence that a *defendant had the power to control the vehicle where a controlled substance was found.*" *State v. Baublitz*, __ N.C. App. __, __, 616 S.E.2d 615, 621 (2005) (emphasis added).

Here, defendant did not exclusively possess his automobile where the heroin was found. However, not only did he have the power to control his automobile, but there also existed other numerous incriminating circumstances including: the police searched Chavis and his vehicle for narcotics and other currency prior to Chavis driving his car from the K-Mart to the Wynnsong to meet defendant; Chavis and his car were drug free from the time he drove to the Wynnsong until he entered defendant's car; the police maintained consistent visual surveillance of Chavis during his drive from the K-Mart to the Wynnsong; and, after police arrested Chavis, they found heroin in defendant's car. All the above incriminating circumstances more than adequately attest to his non-exclusive, constructive possession of the contraband. Consequently, defendant's motion to dismiss was properly denied and this assignment of error is overruled.

We hold defendant received a fair trial, free of prejudicial error.

No error.

Judges WYNN and LEVINSON concur.

Report per Rule 30(e).