IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1994

FILED

September 26, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9407-CR-00247
	)	
	)	Greene County
v.	)	
	)	Hon. James E. Beckner, Judge
	)	
JAMES C. GREENE, JR.,	)	(Attempt to possess cocaine)
	)	
Appellant.	)	

For the Appellant:

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, James C. Greene, Jr., was convicted in a jury trial in the Greene County Criminal Court of attempting to possess cocaine, a Class B misdemeanor. He was sentenced to six months in the county jail and fined five hundred dollars. In this appeal as of right, he contends that the evidence against him is insufficient to support his conviction for attempt and that the trial court erred by refusing to grant a mistrial after the state referred to inadmissible hearsay in its opening argument. We conclude that the evidence is sufficient and that the defendant was not prejudiced by the failure to grant a mistrial.

At trial, Mike Long, an agent from the Third Judicial Drug Task Force, testified that on May 24, 1995, he saw the defendant arrive at the George Clem School where a man who was later identified as James Lee approached the driver's side of the defendant's truck, talked to the defendant and then got into his truck. The agent said that he followed the two men to the Charray Inn and saw Mr. Lee exit the truck and enter a motel room. He saw Mr. Lee return to the defendant's truck carrying something a short time later and then followed the two men until they were pulled over in a grocery store parking lot. Long said that he began to chase Lee on foot when, before the defendant's truck came to a complete stop, Lee exited the defendant's truck with a cellophane bag containing powdered cocaine. Long said that during the pursuit Lee ripped open the bag and threw it to the ground. Long testified that after he apprehended Lee he searched the defendant's truck and found the type of glass vial that is used to consume crack cocaine.

Jeff Seals, a task force agent, testified that he picked up surveillance of the defendant at the Charray Inn and that he assisted a patrol car in stopping the defendant by pulling in front of him to block him. He said that he saw Lee exit the truck

running and that he was with Long when he found the glass vial in the defendant's truck.

Another agent with the task force, John Jones, testified that he was riding with Agent Long during the surveillance and that he retrieved the bag Lee threw to the ground and was able to scrape some of its contents from the asphalt. He said that he recovered 2.5 grams of cocaine, which was approximately one-third of the bag's original contents. David Holloway, a Tennessee Bureau of Investigation forensic chemist, confirmed that the glass vial found in the defendant's truck contained crack cocaine residue and that the bag contained powdered cocaine.

Testifying for the defense, Lee stated that the glass vial and the bag of cocaine were his and that the defendant did not know he had them. He said that he agreed to sell the defendant a gram and a half of crack cocaine for one hundred and fifty dollars but that he did not receive any money from the defendant. On cross-examination, Lee testified that before entering the Charray Inn, he told the defendant that he was going to get the cocaine. He said that when he returned to the defendant's truck he told him that he needed a ride to the store to get some baking soda. He said that the defendant had rented a room at a motel and that he planned to use the room to cook the baking soda with some of the cocaine to make crack.

The defendant, his father and his wife all testified that the defendant was addicted to cocaine and that he had sought treatment. The defendant's business partner, Jim Edds, said that he knew about the defendant's problems with cocaine but had never seen him intoxicated. Mr. Edds also testified that around 5:00 p.m. on May 24, 1993, he asked the defendant to hire some laborers to help set tobacco the next day.

Although the defendant testified that he went to George Clem School for the sole purpose of hiring some laborers to help set tobacco, he admitted that he agreed to purchase one hundred and fifty dollars worth of crack cocaine from Lee. He denied knowing that Lee was actually getting the cocaine at the Charray Inn but said that he gave Lee a ride to the Charray Inn and thought that Lee went to the motel to arrange getting some cocaine. The defendant denied that he was taking Lee to get baking soda when he was stopped and arrested. He said that Lee was supposed to take the cocaine back to George Clem School and that he planned to reunite with Lee later at a motel to purchase crack. He also testified that the glass vial found in his truck did not belong to him and that he saw it for the first time at the preliminary hearing. The defense concluded its case by calling several witnesses who testified that the defendant has a reputation of being truthful and honest.

I

In his first issue the defendant contends that the state did not prove beyond a reasonable doubt that he had taken a substantial step, beyond mere preparation, toward the commission of the offense of simple possession. Although he admits agreeing to buy crack cocaine from Lee, the defendant argues that his actions did not constitute a substantial step towards possessing cocaine because he neither paid for nor took possession of any cocaine and because he had no intention of possessing the cocaine until it was in rock form. He compares this case to Dupuy v. State, 204 Tenn. 624, 325 S.W.2d 238 (Tenn. 1959), in which a conviction for attempt to procure a miscarriage was reversed. Our supreme court concluded that the defendant had not taken an overt act beyond mere preparation, even though the defendant had agreed to perform the abortion, had accompanied the woman to a motel room, and had prepared all the instruments necessary to perform the abortion.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

The defendant was convicted of attempted possession of a controlled substance. Knowingly possessing or casually exchanging a controlled substance is an offense under T.C.A. § 39-17-418, and the following definition of criminal attempt is provided by T.C.A. § 39-12-101:

> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
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> . . .
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.
>
> (b) Conduct does not constitute a substantial step under subdivision (a)(3) unless the person's entire course of action is corroborative of the intent to commit the offense.

Dupuy is cited in the Sentencing Commission Comments to the attempt statute for the proposition that mere preparation is insufficient to show an attempt. Thus, the state had the burden of proving beyond a reasonable doubt that the defendant took a substantial step, not just preparation, toward knowingly possessing cocaine.

The defendant contends that the state failed to meet its burden because the defendant neither took possession of nor paid for any cocaine and only agreed to purchase the cocaine in crack form. We disagree. The evidence showed that the defendant approached Lee, agreed to buy a gram and a half of cocaine from him, and drove him to pick up the cocaine. Lee said that he told the defendant that he was going into the Charray Inn to get cocaine, and the defendant actually had cocaine in his truck when the officers tried to pull him over. Certainly this evidence is sufficient for the jury to conclude that the defendant's actions went beyond mere preparation and that his entire course of action was corroborative of his intent to commit the offense. The fact that the cocaine was never manufactured into crack is of no consequence under the facts in this case. Possession of cocaine in any form is an offense and the evidence supports the conclusion that the defendant knowingly aided Lee's possession of cocaine in the defendant's car in order that the defendant could ultimately have some crack cocaine.[1] This constituted more than a substantial step toward his possession of cocaine.

II

The defendant also contends that the trial court erred by refusing to grant a mistrial when the state referred to excluded evidence in its opening statement. Upon the defendant's motion in limine, the trial court ordered the state before trial not to introduce evidence that surveillance of the defendant before his arrest resulted from information received from informants that the defendant was involved in illegal activity. Nevertheless, near the beginning of his opening statement, the prosecutor made the following statement, "On May 14, 1993, last year, the Third Judicial Drug Task Force had information that a James Lee and Jimmy Greene were dealing drugs." Arguing

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[1]The fact that the jury acquitted the defendant of felonious possession of cocaine does not foreclose us, as a matter of law, from viewing the evidence in the light most favorable to the state in terms of the defendant knowing the cocaine was in his car. We need only consider whether the evidence presented supports the guilty verdict actually returned. See Wiggins v. State, 498 S.W.2d 92, 93-94 (Tenn. 1973); cf. State v. Devitt, 215 Tenn. 146, 384 S.W.2d 26 (1964).

that the statement put him in an impossible position in which he would have to prove that the statement was both false and prejudicial, the defendant objected to the relevance of the statement and moved for a mistrial. Although it overruled the motion for a mistrial, the trial court sustained the objection and stated to the jury, "I'll ask the jury to disregard that statement and not consider it for any purpose. You should know that is not a proper statement."

The prosecutor's mention of excluded evidence was improper. In fact, it is particularly inappropriate to present purported criminal activity by the defendant that is similar to the offense charged and on trial for the so-called purpose of "setting the scene." See 2 John William Strong, McCormick On Evidence, § 249, at 104 (4th ed. 1992). Ordinarily, a violation of a court order of exclusion by introduction of information carrying such a potential for prejudice should be remedied by the grant of a mistrial when the violation occurs before the taking of evidence has begun. Not only does it carry the potential to taint the whole proceedings, but a trial court has no ability to determine what proof will be introduced so as to obviate any potential harm. Thus, a greater risk for waste of judicial resources may occur by holding the trial than by granting a mistrial and selecting a new jury.

However, under the particular facts in this case, we conclude that the defendant was not harmed by the prosecutor's statement. As soon as the statement was made, the defense forcefully denounced it as both false and improper. The trial court sustained the objection and asked the jury to disregard the statement and not consider it for any purpose. In the opening statement, the defense bluntly stated that the police did not have information that he was dealing drugs, but that he was going to buy cocaine from Lee. In fact, the defense elicited in cross-examination of a task force agent that the only information the police had was that the defendant was going to purchase cocaine from Lee. It is significant, as well, that the defendant testified that he

was a cocaine abuser and intended to buy cocaine from Lee, a position he would have to assert regardless of the prosecutor's comment. Also, the jury acquitted the defendant of possession with intent to sell or deliver. Under the particular circumstances in this case, we conclude that the inappropriate statement did not cause such improper prejudice to the defendant that a mistrial was required. See Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).

In consideration of the foregoing, and the record as a whole, the judgment of conviction is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

_____
Jerry Scott, Presiding Judge

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John H. Peay, Judge