

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1998 SESSION

STATE OF TENNESSEE,	*	C.C.A. NO. 02C01-9710-CR-00405
Appellee,	*	SHELBY COUNTY
VS.	*	Hon. L. T. Lafferty, Judge
GEORGE ROSE,	*	(Direct Appeal - Possession of
Appellant.	*	Controlled Substance)

CONCURRING OPINION

I concur in the results reached by Judge Smith but write separately to underscore why the failure to charge the jury on simple possession did not result in reversible error. In this instance, the state's proof was that the defendant's possession of the cocaine was incidental to the sale. The defense theory was that the defendant did not own, possess, or sell cocaine. The defendant testified that Edna Strickland knocked on his window and told him she was "trying to buy some dope." He testified that she asked him where to get dope and, when he said he did not know, she threw money in the window. He picked it up and threw it out the window. The state's proof, of course, was that the defendant dispensed the illegal drugs in exchange for money.

Under these circumstances, the defendant was either guilty of the sale of the drug or nothing at all. Neither the state nor the defendant theorized simple possession or casual exchange. Thus, the trial court properly refused to instruct the jury on the lesser offense. The instruction on the statutory inferences was not mandated by the proof presented by either side.

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Gary R. Wade, Judge