NO. COA01-1355

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Buncombe County
Nos. 99 CRS 61001-02

YVONNE MARIE FOUNTAIN

Appeal by defendant from judgment entered 27 April 2000 by Judge Robert D. Lewis in Buncombe County Superior Court. Heard in the Court of Appeals 15 July 2002.

Attorney General Roy Cooper, by Assistant Attorney General David J. Adinolfi II, for the State

David G. Belser for defendant-appellant.

WALKER, Judge.

On 3 January 2000, defendant was indicted on two counts of selling cocaine. The case was tried at the 26 April 2000 Criminal Session of Buncombe County Superior Court.

The State presented evidence at trial which tended to show the following: On 14 May 1999, Investigator Robert Johnson of the Burke County Narcotics Task Force was working undercover in Buncombe County, North Carolina. At approximately 1:45 p.m., Investigator Johnson met with a confidential informant at the River Ridge Shopping Center in Asheville, North Carolina. Investigator

Johnson testified that the informant called the defendant from a payphone and told her they were waiting at the shopping center and that they had money to purchase drugs. Fifteen to twenty minutes later, defendant arrived in a black Chrysler automobile. Investigator Johnson and the informant got into the car with defendant, and defendant was introduced to Investigator Johnson as Yvonne Fountain. Defendant drove the car behind the restaurant and businesses at the shopping center, where Investigator Johnson and defendant completed a pre-arranged drug transaction. Investigator Johnson handed defendant $250.00 in currency, and defendant gave Investigator Johnson twelve rocks of crack cocaine. Investigator Johnson identified the defendant in open court as the person who was driving the Chrysler and who sold him the crack cocaine.

Subsequently, a second drug transaction was arranged between defendant and Investigator Johnson. On 2 July 1999, Investigator Johnson called defendant at her place of employment, Pedro's Porch, a restaurant in Asheville, North Carolina, and told her he was "on the way over." Investigator Johnson went to the restaurant and sat in a booth, while a second agent, Agent Paula Ray, sat at the bar. Soon thereafter, defendant came out of the kitchen where she was working and sat down at the table with Investigator Johnson. Investigator Johnson asked defendant, "Are we going to do it here," and defendant responded "Yes" and slid a napkin across the table to Investigator Johnson. Wrapped in the napkin were thirteen rocks of crack cocaine. Investigator Johnson wrapped the money in a napkin as well and pushed it back across the table to her. Defendant also

gave Investigator Johnson her phone number. Investigator Johnson testified that he recognized defendant as the same person from the 14 May 1999 drug transaction. Agent Ray also identified defendant in court as the person who sat with Investigator Johnson at the restaurant.

Defendant testified and denied the allegations, stating that she did not go to the River Ridge Shopping Center on 14 May 1999. Defendant further testified that she was preparing to give her boyfriend a party that day and had loaned her car to a friend. Zondra Lewis, a friend of the defendant, corroborated defendant's testimony. Defendant also testified that she was working at Pedro's Porch on 2 July 1999; however, she never met with Investigator Johnson nor participated in any drug transaction. Krystyna Nowinski, the owner of Pedro's Porch, testified that defendant was working on 2 July 1999 at the time the drug transaction took place and that defendant would rarely be out on the floor.

Defendant was convicted of selling cocaine to Investigator Johnson on charges stemming from the 2 July 1999 transaction, but she was found not guilty on the charge from the 14 May 1999 transaction. Defendant was sentenced to a term of thirteen to sixteen months in prison. The sentence was suspended and defendant was placed on supervised probation for thirty-six months. Defendant appeals.

Defendant's sole argument on appeal is that the trial court committed plain error by instructing the jury that the facts, as

alleged by the State, would constitute a sale of a controlled substance. The trial court instructed the jury as follows:

> So for you to find this Defendant guilty of Sale of a Controlled Substance, the State has to prove these essential elements from the evidence beyond a reasonable doubt.
>
> *First, that this Defendant, Ms. Fountain, knowingly sold cocaine to Mr. Johnson. Of course, the described conditions at the River Ridge and at the Pedro's Porch, those circumstances, if the State has so satisfied you beyond a reasonable doubt, would constitute a sale of a material, a Controlled Substance.*

(Emphasis added). Defendant contends that the trial court's instructions amounted to a conclusive presumption that the evidence presented by the State, if proven beyond a reasonable doubt, established the element of sale. Defendant argues that this presumption would conflict "'with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.'" *Sandstrom v. Montana*, 442 U.S. 510, 522, 61 L. Ed. 2d 39, 50 (1979)(*quoting Morissette v. United States*, 342 U.S. 246, 274-75, 96 L. Ed. 288, 306-07 (1952)).

After careful review of the record, briefs and contentions of the parties, we find no error. Initially, we note that defendant did not object to the jury instruction at trial. Thus, "our review of the record is limited to determining whether the giving of the instruction in question amounted to plain error." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002). "Under a plain error analysis, defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would

have reached a different result." *Id.* Our Supreme Court has further stated that "even when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'" *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983)(*quoting Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)); *see also Jones*, 355 N.C. at 125, 558 S.E.2d at 103.

Defendant was charged with sale of cocaine. "[T]he term 'sale' is not defined under the North Carolina Controlled Substances Act." *State v. Carr*, 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001). This Court has held that "the term 'sale,' in the context of the North Carolina Controlled Substances Act, means the exchange of a controlled substance for money or any other form of consideration." *Id.* In the instant case, the evidence presented by the State shows that on two occasions defendant gave Investigator Johnson rocks of crack cocaine in exchange for $250.00--once at the River Ridge Shopping Center and once at Pedro's Porch restaurant. Thus, the trial court's instruction, that the "described conditions," if proven beyond a reasonable doubt constituted a sale of a controlled substance, was accurate. Furthermore, we emphasize that the trial court instructed the jury that the "described conditions" would constitute a sale "*if* the State has so satisfied you beyond a reasonable doubt." (Emphasis added). Thus, the trial court did not direct the jury to make any finding on any element of the State's case and the determination of

defendant's guilt or innocence remained solely with the jury. In fact, the jury found that defendant was not guilty of the charges stemming from the 14 May 1999 transaction. Accordingly, we conclude the trial court did not commit plain error.

No error.

Judges THOMAS and BIGGS concur.

Report per Rule 30(e).