NO. COA11-228
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Guilford County
No. 09 CRS 71936

TAYARI RAFIKI MITCHELL,
Defendant.

Appeal by defendant from judgment entered 1 September 2010 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 12 September 2011.

Roy Cooper, Attorney General, by Scott A. Conklin, Assistant Attorney General, for the State.

Harrington, Gilliland, Winstead, Feindel & Lucas, LLP, by Anna S. Lucas, for defendant-appellant.

MARTIN, Chief Judge.

Defendant, Tayari Rafiki Mitchell, was indicted for misdemeanor possession of a Schedule VI controlled substance (marijuana) and felonious possession with intent to manufacture, sell, or deliver a Schedule I controlled substance (heroin). The jury returned verdicts of guilty of the crimes of possession of one-half of an ounce of marijuana or less and possession of

heroin. Defendant appeals from the judgment entered on the verdicts.

The evidence at defendant's trial tended to show that at around two o'clock in the afternoon on 4 March 2009, Officer Jerry Wall of the High Point Police Department was conducting surveillance of a convenience store on Greensboro Road for narcotics activity. Officer Wall noticed two automobiles arrive separately in the store parking lot. The two cars were positioned within five feet of each other and in such a way as to alert Officer Wall to possible illegal activity. Officer Wall then left his surveillance post and proceeded toward the vehicles; as he arrived he witnessed a female getting back into one car and a male walking from the driver's side door of the other car toward, and then into, the convenience store. Officer Wall positioned his car in a way to block both cars from leaving, but the car driven by the female was able to maneuver around him and drive away down Greensboro Road. She was pursued by other officers, who were unable to apprehend her. Officer Wall approached the passenger of the remaining car and asked him to exit the car. Officer Wall detected the odor of marijuana, and found a small amount of marijuana on the floorboard of the car. He detained the passenger.

Defendant, who had been inside the store during these events, came out of the store, returned to his car, and was detained by Officer Wall. Other officers arrived at the scene, and Officer Joe Beasley went into the store to view its video surveillance recorder. He observed a video of defendant reaching into his pocket and then walking over to, and reaching into, a drink cooler. Officer Beasley looked into the cooler and found packages of heroin and marijuana. The store's owner, Mr. Lee, informed the officers that the surveillance system, while recording properly, was unable to facilitate the downloading of the tape due to a broken USB function of the computer. Officer Wall then used his hand-held video camera to record a thirty-second segment from one of the surveillance cameras which showed defendant walking around the store and then placing something into the cooler in which the drugs were later found. The officers recorded the video by aiming the video camera at the computer screen and recording the images from the surveillance tape. After recording the video on the hand-held video camera, and checking again to make sure the video matched what they had viewed on the screen, the officers finalized the video recording by making sure it could not be recorded over. Evidence at trial showed the original recording was no longer

available due to the store's system automatically recording over itself, thereby deleting any previous recording, after seven days.

Defendant first contends the admission of the video recording of the convenience store surveillance tape violated the "best evidence rule." N.C.G.S. § 8C-1, Rule 1002, commonly known as the "best evidence rule," requires that "to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." N.C. Gen. Stat. § 8C-1, Rule 1002 (2009). A photograph, for purposes of this rule, "include[s] still photographs, x-ray films, video tapes, and motion pictures." N.C. Gen. Stat. § 8C-1, Rule 1001(2) (2009). However, an "original is not required, and other evidence of the contents of a . . . photograph is admissible" if the original has been lost or destroyed, unless the loss or destruction was in bad faith. N.C. Gen. Stat. § 8C-1, Rule 1004(1) (2009). Under Rule 1004, "'if failure to produce the original is satisfactorily explained, secondary evidence is admissible. . . . The rule recognizes no 'degrees' of secondary evidence.'" N.C. Gen. Stat. § 8C-1, Rule 1004

commentary (quoting Fed. R. Evid. 1004 advisory committee notes).

Defendant argues the admission of the videotape was inadmissible secondary evidence under Rule 1004(1) because the State put forth no reasonable effort to obtain the original video before the expiration of the seven-day time period before which the video surveillance was erased from the system. However, "'if failure to produce the original is satisfactorily explained, secondary evidence is admissible.'" N.C. Gen. Stat. § 8C-1, Rule 1004 commentary (quoting Fed. R. Evid. 1004 advisory committee notes). The State showed that at the time of the investigation, the function of the surveillance computer permitting the recording to be downloaded was not working properly and prevented the officers from obtaining the original surveillance video from the hard drive. Officer Wall testified as to each step he took in procuring the secondary video and Officer Beasley explained that the computer automatically erases video every seven days. Due to this, the original video was unavailable at trial and was not recoverable. This does not show that the State acted in bad faith.

"Admission of 'secondary' evidence means only that production of the original is excused." 2 Kenneth S. Broun,

Brandis & Broun on North Carolina Evidence § 257 (7th ed. 2011). Under Rule 1004, "[c]ontents may then be proved by a copy which a witness testifies is correct, or by the testimony of a witness who saw the original and remembers its contents." *Id.*

The State offered the testimony of both Officer Wall and Mr. Lee to authenticate the tape. Officer Wall testified that he recorded the footage of the video onto his own video camera, which was working properly. Officer Wall also testified that the images he recorded were fair and accurate representations of what he had previously viewed on the store's video system. Mr. Lee testified that the security system itself was working and recording accurately—only the USB part of the computer could not be used. Mr. Lee also testified that the video footage captured on the security system had not been altered in any way and was a fair and accurate depiction of his store. *See State v. Prentice*, 170 N.C. App. 593, 596, 613 S.E.2d 498, 501, *motion to dismiss allowed and disc. review denied*, 360 N.C. 74, 622 S.E.2d 628 (2005) (Proper authentication of videotape evidence includes "(1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes); (2) proper testimony concerning the checking and operation of the video camera and the chain of

evidence concerning the videotape; (3) testimony that the photographs introduced at trial were the same as those the witness had inspected immediately after processing (substantive purposes); or (4) testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area photographed." (internal quotation marks omitted)). Defendant's arguments with respect to this issue are overruled.

Defendant next contends the trial court erred by denying his motion to dismiss the charge of possession of one-half ounce of marijuana or less. Defendant specifically contends, because the substance was not chemically tested, there was insufficient evidence to prove the substance was marijuana. We disagree.

"To survive a motion to dismiss, the State must offer substantial evidence of each essential element of the offense and substantial evidence that defendant is the perpetrator." *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). Substantial evidence is "relevant evidence which a reasonable mind could accept as adequate to support a conclusion." *Id.* In deciding whether substantial evidence exists, the evidence must be viewed in the light most favorable to the State. *Id.*

In *State v. Fletcher*, 92 N.C. App 50, 56-57, 373 S.E.2d 681, 685-86 (1988), we held that expert testimony of a police officer is sufficient to determine that a substance is marijuana. However, "our appellate courts have never held that an officer must be tendered as an expert before identifying a particular substance as marijuana." *State v. Ferguson*, ___ N.C. App. ___, ___, 694 S.E.2d 470, 475 (2010). This Court has long held that testimony of an officer identifying a substance as marijuana is sufficient to establish that the substance is marijuana. *See In re Beddingfield*, 42 N.C. App. 712, 715, 257 S.E.2d 643, 645 (1979); *State v. Clark*, 30 N.C. App. 253, 254, 226 S.E.2d 398, 400 (1976).

In *Fletcher*, the officer was a narcotics investigator and had been a member of law enforcement for five years. 92 N.C. App. at 56, 373 S.E.2d at 685. Based on that and on her schooling and on-the-job training for the identification of marijuana, the officer testified, in her opinion, that the substance at issue was marijuana. *Id.* In *State v. Ferguson*, the testifying officer had been employed in law enforcement for eight years and had received drug interdiction training from the State Highway Patrol, the Drug Enforcement Agency, and the Bureau of Alcohol, Tobacco, and Firearms, during which time he

had received instruction in the identification of marijuana. ___ N.C. App. at ___, 694 S.E.2d at 476. This Court deemed that officer as much or more experienced than the testifying officer in *Fletcher* and therefore held his testimony sufficient to identify the substance as marijuana. *Id.*

Here, Officer Wall testified to being a member of the High Point Police Department for eight years and having received training from the Drug Enforcement Agency and the Police Law Institute as well as street narcotics training. At the time of trial, Officer Wall had been a member of the Street Crimes Unit in High Point for five years and had dealt with street-level narcotics on a regular basis. Officer Wall testified that, based on his experience with marijuana in the past, he was able to identify the substance in question as marijuana. Officer Wall's background and training are equal to the background and training of the testifying officers in *Fletcher* and *Ferguson* and his testimony was therefore sufficient to prove the substance found was marijuana.

No error.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).