IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1232

Filed: 18 July 2017

Mecklenburg County, Nos. 14 CRS 234649-50

STATE OF NORTH CAROLINA

v.

CHARLIE NORMAN, JR.

Appeal by defendant from judgment entered 17 May 2016 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 May 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

DAVIS, Judge.

Charlie Norman, Jr. ("Defendant") appeals from his conviction of misdemeanor possession of marijuana. On appeal, he argues that the trial court erred by (1) allowing an officer to testify as to his visual identification of a substance as marijuana; and (2) instructing the jury that the State was not required to introduce

evidence of chemical testing analysis to prove the substance at issue was marijuana. After careful review, we conclude that Defendant received a fair trial free from error.

Factual and Procedural Background

The State presented evidence at trial tending to show the following facts: At approximately 12:30 a.m. on 31 August 2014, Trooper Scott Powell with the North Carolina State Highway Patrol was traveling in a patrol vehicle on Highway 74 westbound toward downtown Charlotte. Trooper Powell testified that he observed a Honda CRV "cross[ ] the center line to the right, c[o]me back into his lane, and he did that three more times, and it immediately caught my attention."

Trooper Powell activated his vehicle's blue lights, and the Honda CRV pulled over to the shoulder of the highway. As he walked to the driver's side window of the vehicle, he observed Defendant sitting in the driver's seat and a woman later identified as Carol Bargfrede sitting in the passenger seat. When he approached the car, the window was rolled down and he could smell "a strong odor of alcoholic beverage coming from [Defendant's] breath." Trooper Powell asked Defendant "how much he had to drink that night" and Defendant responded that he was leaving a party and "he had a couple of beers." Trooper Powell also noticed that Defendant "had droopy eyes and glassy eyes."

Trooper Powell asked Defendant "to step out of his car so I could check him out, make sure he was okay." After Defendant did so, Trooper Powell searched him

to determine whether he had any weapons on his person. As he was searching Defendant, he felt "something soft" in a plastic bag that "felt like . . . oregano . . . ." He pulled the bag out of Defendant's pocket and discovered it was "a bag of green, leafy substance" that he recognized to be marijuana. Trooper Powell proceeded to issue Defendant two citations. The first citation stated that Defendant was "unlawfully and willfully operat[ing] a (motor) vehicle on a highway . . . while subject to an impairing substance" in violation of N.C. Gen. Stat. § 20-138.1, and the second citation stated that Defendant was in "possession of marijuana less than 1/2 ounce" in violation of N.C. Gen. Stat. § 90-95(a)(3).

The case was first tried by the Honorable Rebecca Tin in Mecklenburg County District Court on 17 June 2015. Judge Tin found Defendant guilty of impaired driving and possession of marijuana and sentenced him to 60 days imprisonment. Judge Tin then suspended the sentence and placed Defendant on unsupervised probation for 12 months. Defendant appealed his conviction to Mecklenburg County Superior Court.

On 16 and 17 May 2016, a jury trial was held before the Honorable Eric L. Levinson. The State presented testimony from Trooper Powell, and Bargfrede testified for the defense.

On 17 May 2016, the jury found Defendant guilty of possession of marijuana up to one half ounce and not guilty of driving while impaired. That same day, the

trial court sentenced Defendant to 15 days imprisonment but suspended the sentence and placed Defendant on unsupervised probation for 12 months. Defendant filed a timely notice of appeal.

Analysis

Defendant argues that the trial court erred by (1) allowing Trooper Powell to testify as to his visual identification of the marijuana he seized from Defendant on 31 August 2014; and (2) instructing the jury that the State was not required to prove the substance was marijuana through chemical analysis. We address each argument in turn.

I. Visual Identification of Marijuana

Defendant first argues that the trial court erred in admitting Trooper Powell's testimony identifying the substance as marijuana. We disagree.

Defendant was convicted of possession of marijuana up to one half ounce, a Class 3 misdemeanor. "To convict a defendant of Class 3 misdemeanor possession of marijuana, the State must prove (1) that the defendant knowingly possessed a controlled substance and (2) that the substance was marijuana." *State v. Johnson*, 225 N.C. App. 440, 454-55, 737 S.E.2d 442, 451 (citation omitted), *appeal dismissed*, 366 N.C. 566, 738 S.E.2d 395 (2013).

We have held that "marijuana is distinguishable from other controlled substances that require more technical analyses for positive identification." *State v.*

Mitchell, 224 N.C. App. 171, 179, 735 S.E.2d 438, 444, *appeal dismissed*, 366 N.C. 578, 740 S.E.2d 466 (2012). "It is well established that officers with proper training and experience may opine that a substance is marijuana." *Johnson*, 225 N.C. App. at 455, 737 S.E.2d at 451.

Moreover, "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*, 204 N.C. App. 451, 456, 694 S.E.2d 470, 475 (2010). Our caselaw makes clear that where an officer possesses proper training and experience in identifying marijuana he is permitted to give an opinion visually identifying a substance as marijuana. *See, e.g.*, *Johnson*, 225 N.C. App. at 455, 737 S.E.2d at 451 (no independent testing of marijuana required where officer who "had nearly 20 years of experience with the Highway Patrol, including over 300 hours of drug interdiction training and special training in the identification of controlled substances" identified this evidence); *State v. Cox*, 222 N.C. App. 192, 198, 731 S.E.2d 438, 443 (2012) (officers "testified that the substance was marijuana based on observation, training, and experience"), *rev'd on other grounds*, 367 N.C. 147, 749 S.E.2d 271 (2013); *Ferguson*, 204 N.C. App. at 457-58, 694 S.E.2d at 476 (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 he had received instruction in the identification

of marijuana"); *see also State v. Garnett*, 209 N.C. App. 537, 546, 706 S.E.2d 280, 286 (agent permitted to offer visual identification of substance as marijuana independently of SBI agent's expert analysis of substance), *disc. review denied*, 365 N.C. 200, 710 S.E.2d 31 (2011).

In the present case, Defendant argues that (1) Trooper Powell's testimony did not provide a sufficient foundation as to his training and experience in visually identifying marijuana; and (2) his opinion failed to meet the reliability standard of an expert witness required under Rule 702 of the North Carolina Rules of Evidence. As previously discussed, however, our caselaw makes clear that an officer does not have to be tendered as an expert witness in order to visually identify a substance as marijuana. *See Ferguson*, 204 N.C. App. at 456, 694 S.E.2d at 475. Therefore, Trooper Powell's testimony was admissible if he possessed sufficient training and experience to identify the substance he seized from Defendant as marijuana.

During his direct examination, Trooper Powell stated that he had worked at the State Highway Patrol for over two and a half years. He testified that he had "training and experience" that helped him identify the substance as marijuana because he had attended "patrol school" for a week during which he was able to "familiarize [himself] with [drugs], look at them, marijuana being one of them." When asked about his identification process for marijuana, he stated that "[i]t's got a very distinctive smell, not being mixed up with anything else I've ever smelled before. It's

green and plant-like, and you don't spend a great deal of time on it but once you get it in your hands and see a little bit, you just don't forget." Trooper Powell testified that marijuana has a "distinctive odor[,]" which was "unique" and reminded him of the smell of sausage. When asked how many times he had encountered marijuana during traffic stops, he responded "prior to this [case] probably a half dozen."

Based on this testimony regarding his training and experience, we cannot say that the trial court's decision to allow his identification testimony constituted reversible error. *See Cox*, 222 N.C. App. at 198, 731 S.E.2d at 443 (holding trial court did not err by allowing officers to identify green vegetable matter as marijuana "based on their observation, training, and experience").

II. Jury Instruction

Defendant next argues that the trial court's instruction to the jury on the charge of possession of marijuana was reversible error. We review challenges to jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

> This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury. If a party requests a jury instruction which is a correct statement of the law and which is

> supported by the evidence, the trial judge must give the instruction at least in substance.

State v. Cornell, 222 N.C. App. 184, 191, 729 S.E.2d 703, 708 (2012) (citation, ellipsis, and brackets omitted).

Defendant argues that the trial court erred by giving the following instruction to the jury:

> Ladies and gentlemen, I instruct you that a police officer experienced in the identification of marijuana may testify to his visual identification, and identification through smell of the evidence as marijuana.
>
> Now, it may be sufficient as it relates to the controlled substance of marijuana that the State does not have, nor does the State have the burden, of introducing a laboratory result or chemical testing when the controlled substance is identified as marijuana.

Defendant contends that this instruction — which was given at the State's request — was an incorrect statement of law. However, as noted above, the State is not required to offer evidence of chemical analysis in order to prove that a substance is marijuana. *See State v. Fletcher*, 92 N.C. App. 50, 57, 373 S.E.2d 681, 686 (1988) (lack of chemical analysis of marijuana did not render insufficient officer testimony identifying substance as marijuana); *see also Mitchell*, 224 N.C. App. at 179, 735 S.E.2d at 444 ("[T]he State is not required to submit marijuana for chemical analysis.").

While the trial court's instruction was not a model of clarity, we believe it nevertheless properly conveyed to the jury the proposition that where an officer has identified a substance as marijuana, the State is not additionally required to introduce evidence of a chemical analysis confirming that the substance was, in fact, marijuana. Therefore, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges HUNTER, JR. and MURPHY concur.

Report per Rule 30(e).