IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-674

Filed: 7 March 2017

Pasquotank County, No. 14 CRS 50957

STATE OF NORTH CAROLINA

v.

RODNEY JAMES TYRELL BROOKS

Appeal by defendant from judgments entered 13 January 2016 by Judge Milton F. Fitch, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 20 February 2017.

Attorney General Roy Cooper[1], by Assistant Attorney General Jill F. Cramer, for the State.

Edward Eldred, for defendant-appellant.

CALABRIA, Judge.

Rodney James Tyrell Brooks ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of possession with intent to sell and deliver cocaine, and sale and delivery of cocaine. For the following reasons, we find no error.

[1] When the briefs and records in this case were filed, Roy Cooper was Attorney General. Joshua H. Stein was sworn in as Attorney General on 1 January 2017.

Deputy Louis Dimino ("Deputy Dimino") with the Gates County Sheriff's Office provided undercover assistance to the Elizabeth City Police Department ("ECPD") in 2013 by making controlled drug purchases in various areas of the city. On 6 December 2013, Deputy Dimino was assisting ECPD in his undercover capacity and was instructed to pick up a confidential informant ("C.I.") at a given location. Driving his personal Ford Mustang, Deputy Dimino picked up the C.I., who sat in the passenger seat of the vehicle. The C.I. made a phone call and directed Deputy Dimino to drive to the local Wal-Mart. Once in the parking lot, the C.I. made a second phone call and directed Deputy Dimino to drive to defendant's home.

Deputy Dimino parked his vehicle on the street outside defendant's home. Defendant walked out of the house, approached the passenger side of the vehicle, and handed "a clear plastic bag containing off-white rock-like substance," which was later determined to be cocaine, to the C.I. Deputy Dimino reached over the C.I. and handed defendant two fifty dollar bills. Defendant left and the C.I. handed the bag containing the cocaine to Deputy Dimino. Deputy Dimino then dropped off the C.I. and reported back to ECPD where he turned in the cocaine to the detectives covering the controlled buy.

Defendant was indicted on possession with intent to sell and deliver cocaine and sale and delivery of cocaine on 15 July 2014. The matter came on for trial on 13 January 2016. At the close of the State's evidence, defendant moved to dismiss the

charges arguing that the evidence presented showed the cocaine was given to the C.I., not Deputy Dimino, and that there was a gap in the chain of custody. The trial court denied his motion. Defendant did not present any evidence, and renewed his motion to dismiss, which the trial court again denied. The jury found defendant guilty of possession with intent to sell and deliver cocaine and sale and delivery of cocaine. The trial court sentenced defendant to consecutive sentences of 17 to 30 months and 10 to 21 months of imprisonment. Defendant appeals.

Defendant argues the trial court erred in denying his motion to dismiss the charge of sale and delivery of cocaine because the State presented insufficient evidence that defendant sold or delivered cocaine to Deputy Dimino, as alleged in the indictment.[2] We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith,* 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citations omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

[2] Defendant did not present any argument on appeal regarding the denial of his motion to dismiss the possession with intent to sell and deliver cocaine charge, and thus this issue is abandoned. *See* N.C.R. App. P. 28(b)(6).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

Section 90-95 of our General Statutes provides that "it is unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" N.C. Gen. Stat. § 90-95(a)(1) (2015). "The law is settled in this state that an indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered, if that person is known." *State v. Wall*, 96 N.C. App. 45, 49, 384 S.E.2d 581, 583 (1989) (citations omitted). "[W]here the bill of indictment alleges a sale to one person and the proof tends to show only a sale to a different person, the variance is fatal." *State v. Ingram*, 20 N.C. App. 464, 466, 201 S.E.2d 532, 534 (1974).

Defendant's indictment alleged he "unlawfully, willfully and feloniously did sell and deliver to Deputy Lois [sic] Dimino, a controlled substance, cocaine" in violation of N.C. Gen. Stat. § 90-95. Defendant contends the State presented

substantial evidence defendant delivered cocaine to the C.I., but that the evidence raised only a "mere suspicion" defendant sold cocaine to Deputy Dimino, and thus the trial court should have allowed his motion to dismiss. Defendant cites *State v. Wall* to support his position.

In *Wall*, this Court held the trial erred in denying the defendant's motion to dismiss based on a fatal variance in the indictment. *Wall*, 96 N.C. App. at 50, 384 S.E.2d at 583. The defendant was indicted for the sale and delivery of cocaine to undercover officer Robert McPhatter. The State's evidence tended to show that McPhatter gave a woman named Riley money to purchase cocaine from the defendant at his nightclub. McPhatter observed Riley approach the defendant and give him the money, and saw the defendant hand Riley the cocaine. Riley then returned to McPhatter and gave him the drugs. *Id.* at 47, 384 S.E.2d at 581-82. There was no substantial evidence the defendant knew Riley was buying the cocaine for McPhatter, and this Court held the motion to dismiss should have been allowed. *Id.* at 50, 384 S.E.2d at 583.

The instant case is readily distinguishable from *Wall*. Here, Deputy Dimino had direct contact with defendant during the sale by handing defendant the money for the cocaine. The State's evidence showed Deputy Dimino and the C.I. were sitting in Deputy Dimino's personal vehicle when defendant walked out of his house. Defendant walked up to the passenger window and handed the C.I. the bag of cocaine.

Deputy Dimino reached over the C.I. and handed defendant two fifty dollar bills, which defendant accepted. The C.I. then handed the cocaine to Deputy Dimino. Taken in the light most favorable to the State and giving the State the benefit of every reasonable inference, this is substantial evidence defendant sold cocaine to Deputy Dimino. Therefore, the trial court did not err in denying defendant's motion to dismiss the sale or delivery charge.

NO ERROR.

Chief Judge McGEE and Judge DILLON concur.

Report per Rule 30(e).