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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-744

Filed: 7 March 2017

Pender County, Nos. 13 CRS 51596-51598; 15 CRS 00466

STATE OF NORTH CAROLINA

v.

JOHN ALLEN HILL, IV

Appeal by Defendant from judgment entered 15 March 2016 by Judge Charles H. Henry in Superior Court, Pender County. Heard in the Court of Appeals 26 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Melissa H. Taylor, for the State.

Joseph P. Lattimore for Defendant.

McGEE, Chief Judge.

John Allen Hill, IV (“Defendant”) appeals from judgments entered after a jury found him guilty of selling and delivering cocaine, possession of drug paraphernalia, conspiring to sell cocaine, and conspiring to deliver cocaine. We find no error in Defendant’s trial or sentence.

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I. Background

Lieutenant Randolph King (“Lieutenant King”) and Sergeant Chris Mantooth (“Sergeant Mantooth”) (collectively, “the officers”), of the Pender County Sheriff’s Office, were assigned to work in the narcotics unit on 1 June 2012. The officers were working with a confidential informant, Terrell Shiver (“Shiver”), on a “drug buy” sting operation involving a crack cocaine dealer known as “Squirmy.” Under the direction of the officers, Shiver called Squirmy, later identified as Dawaan Walker (“Walker”), and agreed to meet him in the parking lot of a local school to buy 3.5 grams of crack cocaine from him for \$200.00.

When Shiver arrived, Walker informed Shiver that he did not have the crack cocaine, but a man known as “Willie” would be along shortly to complete the drug transaction. When Willie arrived, he spoke with Shiver, briefly showed Shiver the cocaine, and left to weigh the drugs. Willie then returned, and the transaction occurred. Shiver testified that he had “not [previously] bought drugs from [Willie], per se,” but “knew of him” from parties he had attended in the past. At trial, Shiver identified “Willie” as Defendant. The transaction was surreptitiously recorded on video by Shiver, and was played for the jury at trial.

Defendant was convicted of selling cocaine, delivering cocaine, possession of drug paraphernalia, conspiring to sell cocaine, and conspiring to deliver cocaine. Defendant appeals.

II. Analysis

Defendant contends the trial court erred by: (1) permitting Lieutenant King to testify that the crack cocaine salesman depicted on the video was Defendant; (2) entering judgments against Defendant for the sale of cocaine and conspiracy to sell cocaine because the indictments charging those offenses were fatally defective, thereby divesting the trial court of jurisdiction; and (3) improperly instructing the jury on the sale of cocaine and the accompanying conspiracy charge, thereby allowing the jury to convict Defendant on a theory not contained in the indictments.

A. Lieutenant King's Testimony

Defendant first contends the trial court erred in permitting Lieutenant King to give lay opinion testimony regarding the identity of the cocaine salesman in the video recorded by Shiver. Defendant's argument rests on two exchanges that occurred at trial. The first exchange occurred during Shiver's testimony, shortly after the video of the drug transaction was admitted as evidence and played for the jury. After the video was played, the following colloquy occurred between the trial court and Defendant's counsel regarding the admissibility of future testimony by Lieutenant King related to the video:

[Defendant's Counsel]: . . . [T]he video itself is the best evidence, which is the objection I probably will have about the testimony from [Shiver] about what is on the video, because the video itself has been admitted as substantive evidence. And any interpretation of the video is invading

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the province of the jury. The jury can consider it for whatever it's worth.

And the same thing if Lieutenant King takes the stand and tries to interpret the point in time that he took these photos or whatever he took off the video –

THE COURT: Well, Shiver and [Lieutenant] King are two different arguments. . . . With regards to [Lieutenant] King, I would agree with you. . . . See, the witness who is there is testifying from his recollection and time, what was recorded to what his recollection is.

[Defendant's Counsel]: Right.

THE COURT: And [Lieutenant] King, however, is looking at the same thing the jury is looking at.

[Defendant's Counsel]: Right.

THE COURT: And you know, if [Lieutenant] King can say that's the defendant, well, . . . twelve jurors can say that, or they can conclude that's not him.

[Defendant's Counsel]: Right.

THE COURT: It doesn't matter what [Lieutenant] King thinks. We're just in the same position that [Lieutenant] King is. We're looking at the same video and we've reached a different conclusion.

The second exchange Defendant relies on occurred during the testimony of Lieutenant King:

[Prosecutor]: At some point in your investigation – you did a follow-up investigation in determining who was who; is that correct?

[Lieutenant King]: I did.

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[Prosecutor]: At some point in your investigation were you able to determine who Willie was?

[Defendant's Counsel]: Objection.

THE COURT: Approach the bench, please.

(A bench conference was held off the record.)

THE COURT: Overruled.

[Prosecutor]: Were you able to determine who Willie was?

[Lieutenant King]: I was.

[Prosecutor]: Who were you able to say Willie was?

[Lieutenant King]: John Allen Hill IV.

[Prosecutor]: Okay. No further questions, your Honor.

Defendant contends that the first exchange between Defendant's counsel and the trial court during Shiver's testimony was a correct statement of the law regarding lay opinion testimony. Defendant further contends that the trial court allowed Lieutenant King to give improper lay opinion testimony that identified Defendant as the person depicted in the video. As a preliminary matter, we note Defendant's counsel offered only a general objection to Lieutenant King's testimony, and did not state, in open court and on the record, a reason for his objection. The lack of a stated reason for an objection fails to preserve the issue for appeal, unless the reason for the objection was apparent from the context. *See* N.C.R. App. P. 10(a)(1) ("In order to

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preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection . . . stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.”); *see also State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (“A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence.” (citation omitted)). In this instance, the reason for the objection was not immediately apparent from the context. The prosecutor’s question: “At some point in your investigation were you able to determine who Willie was[,]” did not mention the video or ask Lieutenant King whether he identified anyone portrayed in the video. While Lieutenant King did testify regarding the video, that testimony came long before the prosecutor’s question quoted above, which was asked on redirect examination. Therefore, the basis for Defendant’s objection was not immediately apparent from the context, and this argument is unpreserved.

Assuming, *arguendo*, that Defendant’s argument was preserved, we do not find merit in his assertions. As noted, the prosecutor’s question regarding whether Lieutenant King was able to identify “Willie” as Defendant, and thereby identify Defendant as the cocaine salesman, was unconnected to Lieutenant King’s testimony regarding the video. The prosecutor’s question did not ask whether Lieutenant King was also able to identify the person depicted on the video, but instead referenced

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another method by which Lieutenant King could have come to know whether “Willie” was Defendant: Lieutenant King’s investigation. *See State v. Felton*, ___ N.C. App. ___, 782 S.E.2d 122, 2016 N.C. App. LEXIS 111, at *15-16 (2015) (unpublished) (finding no error in the admission of alleged lay opinion testimony when “[t]here [was] no indication in the record that [the witness]’ statement was solely based on his viewing of the surveillance tape” and could have come from other sources).

B. Fatal Indictments

Defendant argues the indictments charging him with selling cocaine and conspiracy to sell cocaine were fatally defective because they did not name, or correctly name, the person to whom the State believed the drugs were sold. This defect, Defendant argues, divested the trial court of jurisdiction to enter judgment on those offenses. An indictment “is a written accusation by a grand jury, filed with a superior court, charging a person with the commission of one or more criminal offenses.” N.C. Gen. Stat. § 15A-641(a) (2016). “North Carolina law has long provided that there can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court acquires no jurisdiction whatsoever, and if it assumes jurisdiction a trial and conviction are a nullity.” *State v. Partridge*, 157 N.C. App. 568, 570, 579 S.E.2d 398, 399 (2003) (citation, internal quotation marks and brackets omitted).

“An indictment is fatally defective if it wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty.” *Id.* (citation and quotation marks omitted). We discuss the two indictments, 13 CRS 51597 and 13 CRS 51598, in turn.

1. Superseding Indictment in 13 CRS 51597

The superseding indictment in case 13 CRS 51597 charged Defendant with, *inter alia*, the sale of cocaine, a violation of N.C. Gen. Stat. § 90-95(a)(1) (2015). Count one of the indictment, the portion charging Defendant with the sale of cocaine, reads:

The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above . . . [D]efendant named above unlawfully, willfully, and feloniously did sell to T. SHIVER a controlled substance, Cocaine, which is included in Schedule II of the North Carolina Controlled Substances Act.

The indictment alleged that the offense occurred on 1 June 2012 in Pender County. “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). Defendant argues that the failure to include Shiver’s full first name in the indictment rendered the indictment fatally defective. We disagree. The indictment identified “T. Shiver” as the person to whom Defendant sold cocaine, and the State presented evidence at trial that Defendant sold 3.5 grams of crack cocaine to a man named Terrell Shiver for \$200.00. We hold that

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this evidence conformed to the allegations in the indictment, and that the superseding indictment in 13 CRS 51597 was not fatally defective. We note that this Court has come to the same conclusion in an unpublished opinion. *See State v. Royster*, 208 N.C. App. 284, 702 S.E.2d 556, 2010 N.C. App. LEXIS 2335, at *3-4 (2010) (unpublished) (holding that an indictment which identified the person to whom the defendant sold cocaine as “T. Ross” was not fatally defective when the evidence showed that the defendant sold cocaine to “Terry Ross”).

This Court has held that the elements of an offense “need only be alleged” in an indictment “to the extent that the indictment (1) identifies the offense; (2) protects against double jeopardy; (3) enables the defendant to prepare for trial; and (4) supports a judgment on conviction.” *State v. Holliman*, 155 N.C. App. 120, 126, 573 S.E.2d 682, 687 (2002) (citation omitted). In his brief to this Court, Defendant appears to argue that the indictment in 13 CRS 51597 failed to protect against concerns regarding double jeopardy because there was a chance of “the specter of another indictment from this same event.” While Defendant has made this assertion, he has not provided a reason why this may be the case. The indictment alleged that Defendant sold cocaine to a “T. Shiver” in Pender County, North Carolina on 1 June 2012. We hold that the indictment adequately informed Defendant of the charges against him, allowed him to prepare for trial, and sufficiently identified the purchaser of his product to protect against any double jeopardy concerns.

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2. Indictment in 13 CRS 51598

The indictment in case 13 CRS 51598 charged Defendant with, *inter alia*, conspiracy to sell cocaine, a violation of N.C. Gen. Stat. § 90-98 (2015). Count one of the indictment, the portion charging Defendant with conspiracy to sell cocaine, reads:

The jurors for the State upon their oath present that on or about the date(s) of the offense shown and in the county named above . . . [D]efendant named above unlawfully, willfully, and feloniously did CONSPIRE WITH DAWAAN WALKER TO SELL COCAINE TO A RELIABLE CONFIDENTIAL INFORMANT, #12006.

Like the indictment in 13 CRS 51597, the indictment in 13 CRS 51598 also alleged that the offense occurred on 1 June 2012 in Pender County. Defendant argues the indictment was fatally defective because it failed to name the person to whom the cocaine was sold. This assertion, however, is contrary to settled precedent. This Court has held that “an indictment for *conspiracy* to sell or deliver a controlled substance need not name the person to whom the defendant conspired to sell or deliver.” *State v. Lorenzo*, 147 N.C. App. 728, 734, 556 S.E.2d 625, 628 (2001) (citation omitted). “Therefore, the indictment was sufficient despite the fact that it does not identify the person to whom defendant conspired to sell or deliver” cocaine, and was not fatally defective. *Id.*

C. Jury Instructions

In Defendant’s final argument, he contends the trial court erred in instructing the jury that the State was required to prove Defendant sold cocaine to “Terrell

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Shiver” when the indictment alleged Defendant sold cocaine to “T. Shiver.” Defendant argues the evidence, and the instruction, did not conform to the indictment. However, as we have held, the evidence presented at trial conformed to the allegations in the indictment, and the indictment in 13 CRS 51597 was not fatally defective. Therefore, the trial court did not err in instructing the jury that the State was required to prove that Defendant sold cocaine to “Terrell Shiver.”

NO ERROR.

Judges DAVIS and BERGER concur.

Report per Rule 30(e).