NO. COA00-1521

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v. Durham County
No. 99 CRS 23420, 23421, 23422

HIRAM A. LYNCH,
Defendant.

Appeal by defendant from judgments entered 28 July 2000 by Judge David Q. LaBarre in Durham County Superior Court. Heard in the Court of Appeals 9 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for the State.

Kevin P. Bradley, for the defendant-appellant.

HUDSON, Judge.

Defendant appeals his convictions for possession of cocaine with intent to sell or deliver within 300 feet of the boundary of real property used for an elementary school, sale of cocaine, and conspiracy to sell cocaine. Defendant was convicted by a jury on all three charges and sentenced on 28 July 2000 to 46-65 months imprisonment for the possession with intent charge, 20-24 months for the sale, and 20-24 months for the conspiracy.

We begin with a brief summary of the facts. Detective Marshall Crutchfield of the Durham County Sheriff's office

testified during defendant's trial that he participated in a "buy/bust operation" in the city of Durham for the Sheriff's Anti-crime and Narcotics Division. Detective Crutchfield and Durham police officer Tracy Bobbitt drove to Barnes Avenue on 15 October 1999 as part of the Sheriff's program to crack down on local drug dealers in Durham. Detective Crutchfield testified that from the car he "asked the gentleman that was walking down the street southbound did he know where I could get a twenty (a specific quantity of crack cocaine)." The individual, later identified as the defendant, pointed down the street, and then walked toward a heavyset man in a Carolina Panthers jacket. The officers observed the two men engage in a transaction. According to Detective Crutchfield, the defendant then brought him a rock of crack cocaine, for which he gave defendant a marked twenty dollar bill.

Crutchfield and Bobbitt left the area, radioed the "takedown team" with the description of the two men, and returned to identify them after their arrest. The officers from the "takedown team" discovered the marked twenty dollar bill in the possession of the man in the Carolina Panthers jacket, identified as Cleveland Alston. The arresting officer, Jack Cates, measured the distance between the location of the crack cocaine purchase and Eastway Elementary School as 218 feet. On 21 February 2000, the grand jury indicted defendant on charges of: (1) possession of cocaine with the intent to sell or deliver within 300 feet of the boundary of real property used for an elementary school, (2) sale of cocaine, and (3) conspiracy to sell cocaine. A jury convicted defendant on

all three charges, and following sentencing, defendant appealed to this Court.

On appeal, defendant argues first that the State failed to prove that defendant was twenty-one years of age or older, which is an element of the crime of possession of cocaine with intent to sell or deliver within 300 feet of the boundary of real property used for an elementary school. This offense is defined in N.C. Gen. Stat. § 90-95 (1999), which prohibits the sale or delivery of a controlled substance by "[a]ny person 21 years of age or older . . . on property used for an elementary or secondary school or within 300 feet of the boundary of real property used for an elementary or secondary school." N.C.G.S. § 90-95(e)(8). The trial judge instructed the jury that the offense was: (1) defendant knowingly possessed cocaine, a controlled substance, (2) defendant intended to sell or deliver the cocaine, and (3) defendant was within 300 feet of property used for an elementary or secondary school. He did not mention the age requirement of N.C.G.S. § 90-95. Defendant did not object at trial to the court's instructions, and therefore, any alleged error is subject to plain error review. N.C. R. App. Proc. 10(c)(4) (1999); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). We also note that defendant has not reproduced the entire jury charge in the Record on Appeal, as required by N.C. R. App. Proc. 9(a)(3)(f) (1999). However, in our discretion under Rule 2, we proceed to review this issue. N.C. R. App. Proc. 2 (1999).

The State's uncontroverted evidence indicates that when

Officer Cates, a Durham police officer and Special Federal agent with the Bureau of Alcohol, Tobacco, and Firearms, booked defendant, defendant gave him his birth date as 6 March 1969, and stated that he was thirty years of age. Defendant himself testified during direct-examination that he was thirty-one years old at the time of the July 2000 trial. Clearly, defendant was at least twenty-one years of age at the time he was arrested in October 1999. Although the trial court erred by failing to instruct the jury that it must find the defendant to have been twenty-one years or older to convict him of possession of cocaine with intent to sell or deliver within 300 feet of the boundary of real property used for an elementary school, the evidence plainly and without contradiction indicated that defendant was thirty years old at the time of the offense. We are not persuaded "that absent the error the jury would have reached a different verdict" in this charge, and thus, we conclude there was no plain error. *State v. Brown*, 327 N.C. 1, 21, 394 S.E.2d 434, 446 (1990). Defendant's first assignment of error is overruled.

In his second assignment of error, defendant contends that the trial court abused its discretion by allowing the State to cross-examine the defendant concerning his failure to subpoena and call corroborating witnesses. During cross-examination, the following exchange took place between the prosecutor and defendant:

> Q Okay. So the officers who identified you as the guy that--
> A (Interposing) Jeffries--Jeffries knew me from across the street.
> Q Officer Jeffries isn't here.
> A That's why I'm wondering where is he at.

Q Okay. Well, now you understand that you have the power to subpoena witnesses to come in and testify for you, don't you?
A I mean, I--the police against me, I guess, they ain't going to testify with me.
Q Well, now, you know that you can subpoena anybody to come in and testify in your behalf?
MR. BRADLEY: Objection.
THE COURT: Overruled.
A My understanding you got everybody else here, you know, why y'all don't have the arresting officer here.
Q Okay. And you also don't have the guy that you gave the ride to here, do you?
A No, I do not.
Q And you don't have Cleveland Alston here?
MR. BRADLEY: Objection.
A Cleveland Alston?
THE COURT: Overruled.
A I can't--What is he suppose to testify against me? I mean, that's what he's trying to do.
MR. MOORE: Okay. Nothing further, Your Honor.

Defendant argues that by allowing this exchange, the court compromised his right to a fair jury trial by permitting the inference that defendant "could not be believed absent calling witnesses who in reality were not present at the relevant time or were unavailable for [defendant's] defense." Defendant objected to and the trial court overruled his objections at the time this testimony was elicited. "The scope of cross-examination rests largely in the trial judge's discretion, and his ruling thereon will not be held as reversible error unless it is shown that the verdict was improperly influenced thereby." *State v. Carver*, 286 N.C. 179, 181, 209 S.E.2d 785, 787 (1974) (permitting cross-examination of the defendant as to defendant's failure to subpoena specific witnesses). Here, the State's evidence indicated that

defendant sold Durham officers a rock of crack cocaine. The officers positively identified defendant minutes after the transaction. We do not believe that the court erred or abused its discretion by allowing this cross-examination. *See, e.g., State v. Ford*, 323 N.C. 466, 470, 373 S.E.2d 420, 422 (1988) (allowing prosecutor to rebut defendant's claimed defense by pointing out that defendant has not presented evidence to support the defense); State *v. Thompson*, 293 N.C. 713, 717-18, 239 S.E.2d 465, 468-69 (1977) (permitting the State to cross-examine defendant about the whereabouts of witnesses who could have corroborated defendant's story). Defendant's second assignment of error is overruled.

In his third assignment of error, defendant contends that the evidence was insufficient to convict defendant of possession of cocaine with intent to sell or deliver within 300 feet of the boundary of real property used for an elementary school, because "there was no evidence that the elementary school property was in use at the time of the alleged crime." Defendant argues that because the crime occurred around midnight, there was no indication that the school was in use at that time. The statute prohibits the use or sale of controlled substances "on property *used* for an elementary or secondary school or within 300 feet of the boundary of real property used for an elementary or secondary school." N.C.G.S. § 90-95(e)(8) (emphasis added). A plain reading of the statute would not allow defendant's interpretation. "If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it

is reasonable to do so." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). The statute in question, N.C.G.S. § 90-95(e)(8), refers to property used for a school, not property currently in use or with school in session at the time of the crime. To read the statute as defendant suggests would be contrary to its plain meaning. Defendant's third assignment of error is overruled.

No prejudicial error.

AFFIRMED.

Judges WYNN and THOMAS concur.

Report per Rule 30(e).