NO. COA01-1404

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Cumberland County
No. 00 CRS 60709

ANTHONY MERCADO SCOTT

Appeal by defendant from judgment entered 30 March 2001 by Judge D. Jack Hooks, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 22 July 2002.

*Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.*

*Public Defender Ronald D. McSwain, by Assistant Public Defender Joe Coffey, Jr., for defendant-appellant.*

WALKER, Judge.

Defendant appeals his conviction for felony possession of cocaine. We find no error.

The prosecution's evidence tended to show that on 15 June 2000, Officer G.L. Sapp of the Spring Lake Police Department responded to a call from Sergeant William Finchum, who was working undercover on Pine Tree Lane with the department's narcotics unit. Officer Sapp saw defendant sitting on a picnic table and approached him. When defendant stood up, Officer Sapp told him he was under arrest on an outstanding warrant. Defendant began backing away.

Officer Sapp asked defendant to "do it the easy way" and cooperate. Defendant turned around, jumped a fence, and fled. He ran toward Sergeant Finchum, who was positioned behind a nearby trailer. Sergeant Finchum observed defendant coming around the corner of the trailer and looking backward toward Officer Sapp as he ran. As he came within nine feet of Sergeant Finchum, defendant "threw what [Sergeant Finchum] observed to be a small balled up plastic bag" under the wooden steps of the trailer. Defendant turned, saw Sergeant Finchum in front of him, and tried to elude him. After subduing and handcuffing defendant, Sergeant Finchum searched under the steps and recovered a plastic sandwich bag containing fourteen individually-wrapped rocks of crack cocaine. Also under the steps were "candy bar wrappers, leaves, dirt, styrofoam cups, [and] baby diapers," but no other pieces of plastic. Sergeant Finchum had no doubt that the plastic bag he found was the same object he saw defendant throw down. Officer Sapp also saw defendant make the throwing motion but did not see anything leave his hand.

Defendant was charged with possession of cocaine with intent to sell or deliver. The trial court submitted this offense to the jury in addition to the lesser included offense of possession of cocaine. The jury returned a guilty verdict on the lesser included offense of possession of cocaine.

In his first assignment of error, defendant alleges the trial court erred in submitting to the jury the lesser included offense of possession of cocaine. He points to Sergeant Finchum's unrebutted expert testimony that the cocaine found by police was

packaged for sale into fourteen individual units. Where all the evidence pointed to the crime charged in the indictment, defendant avers the jury should have been instructed only on the offense of possession with intent to sell or deliver.

"The trial court must instruct the jury regarding a lesser included offense when the evidence would permit a jury rationally to find [the accused] guilty of the lesser offense and acquit him of the greater." *State v. Wilder*, 124 N.C. App. 136, 140-41, 476 S.E.2d 394, 397 (1996)(citations and internal quotation marks omitted). "In borderline cases, prudence dictates submission of the lesser offenses." *State v. Vestal*, 283 N.C. 249, 253, 195 S.E.2d 297, 299, *cert. denied*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973). As a general matter, "if the court charges on a lesser included offense when all the evidence tends to support a greater offense, the error is favorable to the defendant and he is without standing to challenge the verdict." *Id.* at 252, 195 S.E.2d at 299. "[W]here there is no reasonable possibility that a verdict more favorable to defendant would have occurred absent an erroneous instruction on a lesser offense not supported by the evidence, the error occasioned by such instruction is harmless." *State v. Ray*, 299 N.C. 151, 164, 261 S.E.2d 789, 797 (1980). Thus, a trial court will not be reversed for electing to instruct on a lesser included offense unless the evidence adduced by the parties somehow rules out guilt for the lesser included offense. *See id.* at 168, 261 S.E.2d at 799.

The crimes of possession of cocaine and possession of cocaine with intent to sell or deliver are separated by the single element of an intent to sell or deliver the cocaine. *See State v. Aiken*, 286 N.C. 202, 206, 209 S.E.2d 763, 766 (1974). There are cases in which a defendant's intent to sell or deliver is manifest, as when he actually sells the drug to a police officer. *State v. Pavone*, 104 N.C. App. 442, 447, 410 S.E.2d 1, 4 (1991). Usually, however, mental processes such as intent defy direct provenance and must be shown circumstantially by inference. *State v. Kendrick*, 9 N.C. App. 688, 691, 177 S.E.2d 345, 347 (1970).

Here, the State sought to raise an inference of defendant's intent based on the manner in which the cocaine was packaged. It is true that packaging and/or quantity of a drug may permit an inference that the possessor intends to sell or deliver the drug. *See State v. Taylor*, 117 N.C. App. 644, 653, 453 S.E.2d 225, 230 (1995); and *State v. Mitchell*, 27 N.C. App. 313, 316, 219 S.E.2d 295, 298 (1975), *disc. rev. denied*, 289 N.C. 301, 222 S.E.2d 701 (1976). However, the method of packaging involved in the present case does not compel a finding of intent to sell. It stands to reason that those who purchase drugs for personal use will come into possession of contraband which has been packaged for sale in such a manner. The quantity of cocaine at issue here--1.3 grams--is not so large as to conclusively rule out defendant's possession for personal use. Absent unequivocal evidence of defendant's intent to sell or deliver the cocaine, we cannot say the trial court committed reversible error in instructing the jury on the

lesser included offense of felony possession. Moreover, even assuming error below, we find no reasonable possibility that defendant would have been acquitted absent the challenged instruction. Accordingly, defendant's assignment of error is overruled.

Defendant next claims the trial court erred in denying his motion to dismiss the charge based on a lack of substantial evidence that he possessed the cocaine found by Sergeant Finchum. In order to withstand a motion to dismiss, the State must offer substantial evidence of each essential element of the offense and of defendant's identity as the perpetrator. *See State v. Riddle*, 300 N.C. 744, 746-47, 268 S.E.2d 80, 81 (1980). "Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Morgan*, 111 N.C. App. 662, 665, 432 S.E.2d 877, 879 (1993). In reviewing the trial court's ruling on a motion to dismiss, we view the evidence in the light most favorable to the State, including all favorable inferences that may reasonably be drawn therefrom. *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993)(*citing State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971)).

Sergeant Finchum testified that he saw defendant throw a plastic bag under the steps of the trailer. He looked under the steps and found a plastic bag containing fourteen rocks of crack cocaine. Although dead leaves and refuse were also under the steps, there were no additional plastic bags or objects resembling the item discarded by defendant. Inasmuch as the arresting officer

observed defendant in actual possession of the contraband, the evidence is sufficient to sustain the jury's verdict.

No error.

Judges THOMAS and BIGGS concur.

Report per Rule 30(e).