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NO. COA01-1527

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v.

JAFET GALVAN GOMEZ

Guilford County
Nos. 00 CRS 99072
00 CRS 99073

Appeal by defendant from judgment entered 14 June 2001 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Samuel L. Bridges for defendant-appellant.

THOMAS, Judge.

Defendant, Jafet Galvan Gomez, appeals convictions of trafficking in more than 400 grams of cocaine by possession, possession of cocaine with intent to sell or deliver, and conspiracy to traffic in cocaine. The trial court consolidated the offenses for judgment and sentenced defendant to prison for 175 to 219 months. For the reasons discussed herein, we find no error.

At trial, Greensboro Police Officer Brian A. Bissett testified that he began surveillance of a Days Inn motel on Seneca Road on 9 August 2000, based on a tip from a confidential informant. Bissett

obtained a motel registration card indicating that Jose Espinoza had checked into Room 233 at 11:45 a.m. on 9 August 2000, paying in cash and requesting no maid service. Bissett saw Ruben Diaz and Espinoza arrive at Days Inn by car and proceed to Room 233, where they were admitted into the room by an unobserved party.

On 11 August 2000, Arturo Gonzalez Ortuno checked into room 244 under the name Arturo Gonzalez, pre-paying in cash for five nights. The registration card listed an Eagle Vision automobile, which motor vehicle records revealed was registered to Ortuno. Bissett observed Diaz go from Room 233 to Room 244. Ortuno and three other individuals came out of Room 244 and left the motel in Ortuno's vehicle.

On 12 August 2001, Bissett examined the trash collected from room 244 and found a receipt for \$400 of Inositol, a compound often used to "cut" or "step on" cocaine prior to sale. Bissett also found a receipt for a set of digital scales and a piece of paper with the calculation "24,500 X 6 = 147,000." Bissett stated that \$24,500 corresponded to the street value of a kilogram of cocaine in the Greensboro area. Bissett saw defendant and Ortuno leave the motel area in Ortuno's Eagle Vision. When they returned, the two men entered room 233 for several minutes before returning to room 244. Based on his observations, Bissett enlisted Officers Richard Kyle Shearer, Darren Koonce, and Jon Marsh to expand the scope of the surveillance.

Shearer testified that he was positioned in an adjacent parking lot in an unmarked vehicle, and was assigned to observe the

movements of the occupants of Rooms 233 and 244 as they went on and off of the motel property. After receiving a radio call from another officer, Shearer followed an Eagle automobile from the parking lot to Graham, North Carolina, without incident. At approximately 3:00 p.m. on 12 August 2000, Shearer observed the Eagle turn onto JJ Drive traveling south. The car stopped 400 to 500 yards from Shearer's position. With the aid of binoculars, Shearer saw Ortuno and defendant exit the vehicle and open the trunk. They moved items in the trunk, looked around, and drove the car another thirty yards. Defendant walked down an embankment into a wooded area. Ortuno shifted items in the trunk until defendant motioned to him. Ortuno removed a "rather large" object from the trunk, put it under his arm and joined defendant. Ten seconds later, they walked back to the car without the object and drove away. Shearer radioed his observations to Bissett. After receiving a report that defendant and Gomez were back in the hotel room, Shearer and Bissett searched the wooded area below the embankment and found a boot box which held two packages containing 2003.2 grams of cocaine hydrochloride mixed with Inositol. They saw no other objects resembling the item carried by Ortuno. Shearer proceeded to the motel, where he arrested Diaz and Espinoza.

During Koonce's testimony, the prosecutor introduced a videotape recorded by Koonce, which reflected his surveillance of Room 233 and the adjoining parking lot during the afternoon of 12 August 2000. The tape showed Ortuno enter a white Cavalier, remove

an object, and walk away with defendant. The tape later showed the defendant and Ortuno leave the parking lot in the Eagle Vision, turning right onto JJ Drive. At this point, Shearer "picked up the surveillance" of the car until it reappeared in the parking lot. The tape showed defendant and Ortuno speaking with Diaz on the balcony of Room 233. Ortuno retrieved a bag from the trunk of the Cavalier and entered Room 233 briefly with defendant before they returned to Room 244. Defendant and Ortuno then returned to the parking lot. Ortuno leaned into the passenger side of the Eagle before the men entered the white Cavalier and drove to the west side of the building. The tape showed defendant with a white bag driving away from the motel in the Cavalier. Ortuno left with a blue bag in the Eagle. Upon the vehicles' departure, Koonce monitored Room 244 until Shearer arrived to arrest Diaz and Espinoza.

Marsh testified that he was assigned to follow the Eagle Vision when it left the motel on 12 August 2000. He initially tailed the vehicle as it traveled eastward on Interstate 40, eventually stopping at a strip mall at Highway 54 and Chapel Hill Road. Marsh saw a male remove something from the trunk of the vehicle and carry it into the store. He then followed the Eagle Vision back to the motel. Later, Bissett notified Marsh of the cocaine recovered from the woods off of JJ Drive. When the two cars left the motel parking lot, Marsh was contacted by Bissett and stopped the Eagle Vision on Interstate 40. Following Ortuno's arrest, Marsh searched the vehicle and found a "pretty thick" stack

of money wrapped in a blue apron.

Bissett obtained Espinoza's consent to search Room 233 and found three kilograms of cocaine "in plain view in the nightstand." A search of Room 244 yielded \$24,954 in cash and a gun.

Ortuno testified pursuant to a plea agreement, claiming defendant offered him \$6,000 to help move "some packages of marijuana" that were being brought to defendant from Winston-Salem by his friends "Ruben Diaz and Jose." Ortuno met with defendant at his hotel room at the Best Western in Burlington. Diaz and Jose arrived with the packages and checked into a second room. As defendant inspected the packages, Ortuno saw that they contained cocaine and protested that he had agreed to assist with marijuana. Defendant responded that Ortuno could not back out now, because he knew what they were doing. When defendant acted as though he was reaching for his pistol, Ortuno relented.

Ortuno drove defendant in Ortuno's Eagle Vision to a Motel 8, where Ortuno rented a room with money supplied by defendant. They went back to the Best Western where defendant announced to Diaz and Jose that they were changing hotels. Diaz and Espinoza transported the packages in the trunk of a white Cavalier to the Motel 8, where defendant rented a second room for Diaz. The following day, defendant and Ortuno again changed hotels, moving to a Howard Johnson's next to the Motel 8. Defendant received a telephone call from a man named Salamon and told Ortuno to take him to Salamon's place of business in Burlington. Defendant took two packages of cocaine from the Cavalier, and they drove to Salamon's business.

After inspecting the cocaine, Salamon told defendant that "it was not all right[,]" and refused to accept it. Defendant put the cocaine in a boot box and returned with it to the hotel. Defendant told Diaz that he would not help him move the cocaine, because it was "not all right." Defendant eventually agreed to try again if they "wait[ed] for a couple of days." He told Ortuno to hide the cocaine in some woods next to the hotel. Ortuno drove with defendant to the wooded area. Ortuno walked a few steps with the boot box before giving it to defendant, who searched for a hiding place in "the most wooded part." Defendant then ordered Ortuno back to the Howard Johnson's and told him to retrieve a bag from the white Cavalier which contained the three remaining packages of cocaine.

When they returned to the room, Ortuno asked to be paid. Defendant took money wrapped in a blue apron from the trunk of the Cavalier and gave it to Ortuno, who wrapped the bundle in a chain and hid it in his car next to the driver's seat. Defendant left the hotel in the Cavalier. Ortuno drove eastward on Interstate 85, where he was stopped and arrested by police, who seized the \$6,000 and the chain.

Before his first appearance in court, Ortuno waited in a room with defendant, Diaz and Espinoza. Defendant asked Ortuno to take all of the blame for the drugs "because . . . [defendant] had had problems in California and in Atlanta for the same, and . . . some people from federals [sic] in Atlanta were looking for him[.]"

By defendant's first assignment of error, he argues the trial

court erred by denying his motion to dismiss the charges at the conclusion of all the evidence. We disagree.

In reviewing the denial of the motion to dismiss, this Court must determine whether the evidence, when viewed in the light most favorable to the State, is sufficient to allow a reasonable juror to find defendant guilty of each essential element of the offense beyond a reasonable doubt. See *State v. Jones*, 147 N.C. App. 527, 545, 556 S.E.2d 644, 655 (2001), *appeal dismissed and disc. rev. denied*, 355 N.C. 351, 562 S.E.2d 427 (2002). The State is entitled to all favorable inferences reasonably drawn from the evidence. *State v. Tucker*, 347 N.C. 235, 243, 490 S.E.2d 559, 563 (1997), *cert. denied*, 523 U.S. 1061, 140 L. Ed. 2d 649 (1998). Moreover, testimony tending to support the State's case is deemed credible. See *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001) (citing *State v. Gibson*, 342 N.C. 142, 463 S.E.2d 193 (1995)).

Trafficking in cocaine by possession requires proof that defendant knowingly possessed more than 400 grams of cocaine. N.C. Gen. Stat. § 90-95(h)(3) (1999); *State v. Williams*, 136 N.C. App. 218, 220, 523 S.E.2d 428, 430 (1999). "An accused has possession of a controlled substance within the meaning of the law when he has both the power and intent to control its disposition or use." *State v. Matias*, 143 N.C. App. 445, 448, 550 S.E.2d 1, 3 (citing *State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976)), *aff'd*, 354 N.C. 549, 556 S.E.2d 269 (2001). Possession of cocaine with intent to sell or deliver contains the additional element of an intent to sell or deliver the drug. *State v. Carr*, 145 N.C. App.

335, 341, 549 S.E.2d 897, 901 (2001). The conspiracy charge requires a showing that defendant entered into an agreement with at least one other person to traffic in cocaine. *State v. Holmes*, 120 N.C. App. 54, 64, 460 S.E.2d 915, 921, *disc. review denied*, 342 N.C. 416, 465 S.E.2d 545 (1995).

The State adduced ample evidence that defendant controlled the disposition and use of the two kilograms of cocaine he delivered to Salamon and later hid in the woods. Ortuno's testimony is sufficient to show defendant's possession of more than 400 grams of cocaine, his intent to sell or deliver the cocaine to Salamon and his entry into an agreement with Diaz and Espinoza to do so. See generally, *State v. Reagan*, 35 N.C. App. 140, 143, 240 S.E.2d 805, 808 (1978). Moreover, the receipts for Inositol and digital scales, the substantial quantity of the cocaine, and the large amounts of cash found in Ortuno's car and the two motel rooms provided additional evidence of an intent to sell and of conspiracy. See *State v. Morgan*, 329 N.C. 654, 659, 406 S.E.2d 833, 835 (1991) (drug quantity); *State v. Jones*, 97 N.C. App. 189, 202, 388 S.E.2d 213, 220 (1990) (cash and scales); *State v. Harrison*, 93 N.C. App. 496, 499, 378 S.E.2d 190, 192 (1989) (cutting agents). We therefore reject defendant's argument.

By defendant's second assignment of error, he argues the trial court committed plain error in allowing Shearer, Koonce, Marsh, and Bissett to offer in-court identifications of him without a proper foundation. He also cites as plain error the court's admission of Ortuno's testimony relating out-of-court statements allegedly made

to Ortuno by defendant while awaiting trial. However, defendant offers “no explanation, analysis or specific contention in his brief supporting the bare assertion” of plain error. *State v. Allen*, 141 N.C. App. 610, 617, 541 S.E.2d 490, 496 (2000) (quoting *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000), cert. denied, 532 U.S. 997, 149 L. Ed. 2d 641 (2001)), appeal dismissed and disc. review denied, 353 N.C. 382, 547 S.E.2d 816 (2001). “By failing to provide argument in support of plain error, defendant has thereby waived appellate review” of these issues. *Id.* (citing N.C.R. App. P. 10(c)(4)).

NO ERROR.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).