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NO. COA01-377

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

STATE OF NORTH CAROLINA

v.

Cabarrus County
Nos. 00 CRS 6637, 6638

MONTREAL ONTARIO BARBER

Appeal by defendant from judgment entered 19 September 2000 by Judge C. Preston Cornelius in Cabarrus County Superior Court. Heard in the Court of Appeals 30 January 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Charles J. Murray, for the State.

Baucom & Robertson, by Scott C. Robertson, for defendant-appellant.

WALKER, Judge.

At the end of 1999, the Concord Police Department conducted an undercover drug investigation through the use of undercover agents from other jurisdictions attempting to buy controlled substances. The current Chief of Police of the Gibson Police Department, D.M. Bates, while he was with the China Grove Police Department, was one such undercover agent during this investigation.

On 30 November 1999, Bates was working undercover in his vehicle and talking with two individuals regarding the possibility of his purchasing cocaine from them. He testified that, while he was talking with these two individuals, the defendant approached his vehicle and "had dialogue with me about not purchasing the cocaine from these other individuals, that it was in fact fake." Defendant then entered Bates' vehicle and directed him to drive approximately two miles up the street. Defendant exited the vehicle, went into a residence, and returned with a twenty dollar piece of cocaine which he sold to Bates. After the sale, Bates went through a police photograph book and picked out the photograph of the defendant as the individual who approached him and sold him the cocaine.

Bates further testified that, on 7 December 1999, he was working undercover in the same area when defendant again approached and offered to sell him cocaine. Defendant sold Bates twenty dollars worth of cocaine which the defendant had on him at the time. Although he could identify the defendant from the prior cocaine transaction, he again went through the police photograph book and picked out the photograph of the defendant as the individual who sold him the cocaine.

The vehicles used in these undercover investigations contained video cameras to attempt to record the cocaine transactions and the individuals involved. Over defendant's objection, the trial court allowed the State to show the jury a copy of the videotape recording of the two transactions involved here.

Defendant called his wife, Lessie Barber, who testified that the defendant was home babysitting their children on the two days in question. Defendant did not testify. The jury found the defendant guilty of two counts of possession with intent to sell cocaine and two counts of sale of cocaine.

We first address the defendant's contention that the trial court erred in admitting the videotape recording into evidence and showing it to the jury. As to the admissibility of a videotape recording, "[r]elevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1999). Here, the videotape recording was used to corroborate the testimony of Bates as to the identity of the perpetrator. Despite defendant's assertion that he is not depicted on either videotape recording, this was a jury determination based on Bates' testimony and the jury's own comparisons. As defendant has failed to cite any authority to the contrary, we hold that the trial court did not err in allowing the videotape recording to be shown to the jury.

Defendant also contends that the trial court erred in denying his motion to dismiss because there was insufficient evidence to establish him as the perpetrator. A motion to dismiss should only be granted when, after taking the evidence in a light most favorable to the State, the State fails to present sufficient evidence of every element of the crime. *State v. McDowell*, 329

N.C. 363, 389, 407 S.E.2d 200, 214 (1991). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citing *State v. Cutler*, 271 N.C. 379-383, 156 S.E.2d 679, 682 (1967)).

Here, Bates testified that he was in close proximity to the perpetrator of the crime for extended periods of time on two separate occasions. After each occasion, he identified the defendant as the perpetrator from a photographic array. At trial, Bates also identified the defendant as the perpetrator based on his observations at the time of the sale. Furthermore, the videotape recording was shown to the jury to corroborate Bates' testimony as to identity. After a careful review of the record, we find there was sufficient evidence to establish the defendant as the perpetrator.

Defendant also filed a motion for appropriate relief with this Court contending he was denied effective assistance of counsel at his trial. The record before this Court is insufficient to enable us to address defendant's motion. Therefore, we remand this matter to the trial court for a hearing on the defendant's motion for appropriate relief.

In conclusion, there was no error in defendant's trial. The defendant's motion for appropriate relief is remanded to the trial court for hearing.

No error in the trial; motion for appropriate relief is remanded.

Judges MCGEE and BIGGS concur.

Report per Rule 30(e).