NO. COA01-587

NORTH CAROLINA COURT OF APPEALS

Filed: 5 March 2002

STATE OF NORTH CAROLINA

v. Durham County
Nos. 96 CRS 10719
96 CRS 17286 DANIEL JUNIOR JACKSON

Appeal by defendant from judgment entered 7 December 2000 by Judge Henry W. Hight in Durham County Superior Court. Heard in the Court of Appeals 4 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General William W. Stewart, Jr., for the State.

Brian Michael Aus for defendant appellant.

TIMMONS-GOODSON, Judge.

On 7 December 2000, a jury found Daniel Junior Jackson ("defendant") guilty of selling and delivering a counterfeit controlled substance and of being an habitual felon after considering evidence tending to show the following: On 12 December 1995, Investigator Tom Taylor ("Investigator Taylor") of the Durham Police Department was working undercover purchasing controlled substances. While Investigator Taylor was soliciting a purchase from another person, defendant approached the officer and offered to sell additional drugs to him. Investigator Taylor told defendant that he only had ten dollars left from his purchases, but

that he would be interested in obtaining either rock or powder cocaine. Defendant thereafter gave the officer a small piece of a hard substance. Investigator Taylor examined the substance and asked, "What is that? It looks like corn." Defendant responded, "No, no, that's crack. That there is crack." Investigator Taylor paid $10.00 to defendant, who then departed. Agents at the State Bureau of Investigation subsequently identified the substance as "nut meat" from the interior of a pecan.

Defendant presented no evidence at trial. Upon receiving the jury's guilty verdict, the trial court sentenced defendant to imprisonment for a minimum term of 107 months and a maximum term of 138 months. Defendant now appeals to this Court.

Defendant brings forward two assignments of error, arguing that the trial court erred in (1) its instructions to the jury and by (2) denying defendant's motion to dismiss. For the reasons stated herein, we find no error by the trial court.

Defendant first contends the trial court erred by re-instructing the jury as to the definition of a counterfeit controlled substance, which is set forth by statute as:

> Any substance which is by any means intentionally represented as a controlled substance. It is evidence that the substance has been intentionally misrepresented as a controlled substance if the following factors are established:
>
> 1. The substance was packaged or delivered in a manner normally used for the illegal delivery of controlled substances.
>
> 2. Money or other valuable property has been

> exchanged or requested for the substance, and the amount of that consideration was substantially in excess of the reasonable value of the substance.
>
> 3. The physical appearance of the tablets, capsules or other finished product containing the substance is substantially identical to a specified controlled substance.

N.C. Gen. Stat. § 90-87(6)(b) (1999). Further instruction by the trial judge followed the wording of the statutory definition, except for the following deviation, wherein the trial court stated that, "[i]t is also evidence that a substance is a counterfeit controlled substance if it is established by the evidence beyond a reasonable doubt that the defendant verbally represented a substance to be rock cocaine when the substance was not rock cocaine."

Defendant argues that the trial court's instruction does not appear in the statutory definition and that by so instructing, the trial court expanded the statutory definition of the term. Defendant also contends that the charge constituted an improper peremptory instruction. We disagree.

While it is fundamental that a penal statute must be construed narrowly, it is also fundamental that a criminal statute must be given its plain or ordinary meaning. *See State v. Gaines*, 332 N.C. 461, 469, 421 S.E.2d 569, 572-73 (1992), *cert. denied*, 507 U.S. 1038, 123 L. Ed. 2d 486 (1993). The statute in question defines a counterfeit controlled substance as any substance "which is **by any means** intentionally represented as a controlled substance." N.C.

Gen. Stat. § 90-87(6)(b) (emphasis added). The additional instruction by the trial court in the present case comports with the plain meaning of the definition of a counterfeit controlled substance as stated in section 90-87(6)(b). *See State v. Oakes*, 113 N.C. App. 332, 335, 438 S.E.2d 477, 479 (holding that, where the defendant represented to undercover officers that the substance he sold them was cocaine, "the State was required to prove only that the substance which defendant sold the officers was not cocaine in order to establish a violation of G.S. § 90-95(a)"), *disc. review denied*, 336 N.C. 76, 445 S.E.2d 43-44 (1994).

Further, "[a] peremptory instruction tells the jury that if it finds that the facts exist as all the evidence tends to show, it will answer the question put to it in the manner directed by the trial court." *State v. Carter*, 342 N.C. 312, 322, 464 S.E.2d 272, 279 (1995), *cert. denied*, 517 U.S. 1225, 134 L. Ed. 2d 957 (1996). Even when a peremptory instruction is given, jurors still have the right to reject the evidence if they question its credibility. *See State v. Huff*, 325 N.C. 1, 59, 381 S.E.2d 635, 669 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). The court's instruction in the case at bar did not amount to a peremptory instruction because it did not tell the jury to answer an issue in the manner indicated by the trial court if it found the facts existed as all the evidence tended to show. *See Carter*, 342 N.C. at 322, 464 S.E.2d at 279. We overrule defendant's first assignment of error.

Defendant's remaining contention is that the trial court erred

by denying his motion to dismiss the charge of sale and delivery of a counterfeit controlled substance. He argues the evidence did not satisfy the factors listed in the statutory definition. Again, we disagree with defendant.

Upon a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State and determine whether substantial evidence has been presented to prove every element of the offense charged and to identify the defendant as the perpetrator. *See State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). The offense of sale and delivery of a counterfeit controlled substance is proved by evidence tending to show that the substance the accused sold and delivered to another person was not a controlled substance as represented by the accused. *See Oakes*, 113 N.C. App. at 335, 438 S.E.2d at 479. Here, the evidence shows that defendant represented the substance he sold to Investigator Taylor to be crack cocaine, when in fact it was organic material. This evidence was sufficient to defeat the motion to dismiss, and we overrule defendant's second assignment of error.

In conclusion, we hold defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge McCULLOUGH concur.

Report per Rule 30(e).