NO. COA05-1239

NORTH CAROLINA COURT OF APPEALS

Filed: 05 July 2006

STATE OF NORTH CAROLINA

v. Richmond County
No. 05 CRS 50191

NAPOLEAN SKINNER

Appeal by defendant from judgments entered 19 May 2005 by Judge Michael E. Beale in Richmond County Superior Court. Heard in the Court of Appeals 19 June 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Fred Lamar, for the State.

Sue Genrich Berry for defendant-appellant.

STEELMAN, Judge.

Defendant, Napolean Skinner, appeals from his convictions for trafficking in cocaine by possession and trafficking in cocaine by transportation. For the reasons stated below, we find no error.

On 7 February 2005, defendant was indicted on charges of trafficking by possession of more than 200 grams but less than 400 grams of cocaine and of trafficking by transportation of more than 200 grams but less than 400 grams of cocaine. The State presented evidence at trial tending to show the following: Shortly after 9:00 p.m. on 15 January 2005, Deputy Mike Burns of the Richmond

County Sheriff's Office began following a vehicle that was traveling at fifty-eight miles-per-hour in an area with a speed limit of fifty miles-per-hour. He followed the vehicle onto an exit lane, but he unable to follow safely when the driver made a hard left back onto the highway. Deputy Burns radioed Deputy Warren Strong and requested he stop the vehicle.

Deputy Strong located the vehicle and directed the driver to pull off of the road. As he began approaching the vehicle on foot, the car door opened and the passenger jumped out and ran from the vehicle. Deputy Strong pursued the passenger, who was later identified as defendant, as he was running across an open field. As they approached a wooded area, Deputy Strong saw defendant throw some type of flimsy plastic bag into the tree line. As defendant did so, Deputy Strong saw two plastic bags containing a white substance fall to the ground. After apprehending defendant, Deputy Strong located and picked up two clear plastic bags, which contained a white substance he believed to be cocaine. He placed both bags into evidence. He did not recover the flimsy plastic bag which had contained those two bags. In the property report which was filled out on the night in question, Deputy Strong listed that he had seized 250.2 grams of cocaine from defendant. The cocaine had been weighed in its packaging.

Deputy Strong secured the evidence bag in his locker. During cross-examination, Deputy Strong testified there were other evidence bags in the locker, which contained off-white rock-like substances. After placing the two bags in an envelope, Deputy

Strong took them to the State Bureau of Investigation (SBI) for chemical analysis on 25 January 2005. On the accompanying request for examination of physical evidence, Deputy Strong described item number one as a "clear plastic bag/off-white rock-like substance[.]" He listed item number two as "clear plastic bags," but the "s" was marked out. Deputy Strong testified that the "s" was a typographical error and item two was only one clear plastic bag. He reiterated that he sent a grand total of two clear plastic bags to the SBI.

A forensic drug chemist with the SBI. testified she analyzed the white substance in each of the two bags and determined that each contained cocaine hydrochloride. She removed the evidence from its packaging to weigh it and determined each bag contained 123.8 grams of cocaine hydrochloride. During cross-examination, the forensic chemist testified that her lab report described item one as "two plastic bags containing off-white solid material" and item two as "plastic bag containing off-white solid material." When asked about item one being two bags, the forensic chemist stated: "[i]t was one bag that actually contained the off-white solid material."

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court denied the motion and defendant declined to present evidence. Defendant then renewed his motion to dismiss the charges, and the trial court again denied the motion. During the charge conference, defendant requested an instruction on the lesser included offense of possession of cocaine

under N.C. Gen. Stat. § 90-95(d)(2). The trial court denied defendant's requested jury instruction.

After receiving the trial court's instructions, the jury deliberated and subsequently found defendant guilty on both counts. The trial court imposed consecutive sentences with a combined term of 140 to 168 months imprisonment. Defendant appeals.

Defendant contends the trial court erred by overruling his request that the jury be instructed as to lesser included offenses of the crimes with which he was charged. He argues some of the State's evidence supported lesser charges and the evidence of quantity was disputed and contradicted. We disagree.

"When there is evidence of guilt of a lesser offense, a defendant is entitled to have the trial court instruct the jury with respect to that lesser included offense even though the defendant makes no request for such an instruction." *State v. Lang*, 58 N.C. App. 117, 118, 293 S.E.2d 255, 256 (1982). "However, when the State seeks a conviction only on the greater offense and tries the case on an all or nothing basis, the trial court needs to present an instruction on the lesser offense only when the defendant presents evidence thereof or when the State's evidence is conflicting." *State v. Ward*, 118 N.C. App. 389, 398, 455 S.E.2d 666, 671 (1995) (citations and internal quotation marks omitted). The "[m]ere possibility of the jury's piecemeal acceptance of the State's evidence will not support the submission of a lesser included offense." *State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988). "The sole factor determining the judge's

obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981).

Although defendant, through cross-examination of the State's witnesses, sought to cast doubt upon whether the bags recovered by Deputy Strong were the bags weighed and tested by the forensic chemist, he presented no evidence to the contrary. Both Deputy Strong and the forensic chemist explained the discrepancies between the descriptions of the evidence in Deputy Strong's request for examination of physical evidence and the chemist's lab report. The State's evidence that the two bags Deputy Strong recovered and the forensic chemist later tested contained a total of 247.6 grams of cocaine (two bags of 123.8 grams each) was not conflicting. Thus, the trial court properly denied defendant's request for jury instructions on lesser included offenses. This argument is without merit.

In his brief, defendant expressly abandoned his remaining assignment of error. Therefore, we need not address this matter.

NO ERROR.

Judges MCCULLOUGH and HUDSON concur.

Report per Rule 30(e).