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NO. COA06-64

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

STATE OF NORTH CAROLINA

v.

Pitt County  
Nos. 04CRS56466, 56467, 56468

WILLIE ARTHUR HARDY

Appeal by Defendant from judgments entered 19 August 2005 by Judge Alma L. Hinton in Superior Court, Pitt County. Heard in the Court of Appeals 17 October 2006.

*Attorney General Roy Cooper, by Assistant Attorney General M. Lynne Weaver, for the State.*

*Thomas R. Sallenger for Defendant.*

McGEE, Judge.

Willie Arthur Hardy (Defendant) was convicted of one count of trafficking in cocaine by delivery, one count of trafficking in cocaine by sale, and one count of trafficking in cocaine by possession in violation of N.C. Gen. Stat. § 90-95(h). The trial court sentenced Defendant to three consecutive sentences of a minimum of thirty-five months and a maximum of forty-two months in prison. Defendant appeals.

Detective Ben Buck (Detective Buck), a narcotics investigator with the Pitt County Sheriff's Department, testified that shortly before 7 February 2002, he was contacted by the Beaufort County

Sheriff's Department regarding a confidential informant, Jimmy Mayo (Mayo). Detective Buck stated that because of the close proximity of Pitt County and Beaufort County, law enforcement officers from the two sheriff's departments worked together. Detective Buck met with Mayo on the morning of 7 February 2002 to arrange for Mayo to participate in a drug buy for the Pitt County Sheriff's Department later that day. Detective Buck testified that he searched Mayo to ensure that Mayo was not hiding any drugs which Mayo could later say he purchased at the target house. At the same time, Detective Buck placed on Mayo a wire to record Mayo's conversations, and a transmitter so officers could hear Mayo's conversations. Detective Buck instructed Mayo to purchase an ounce and a half of crack cocaine from Defendant and gave Mayo \$1,500.00 to make the purchase. Detective Buck and other officers from the Pitt County Sheriff's Department then returned to their vehicles and set up surveillance.

Carlton Ray Jones (Jones) arrived at Mayo's house in a burgundy Mitsubishi at 12:56 p.m. on 7 February 2002. Jones drove Mayo to Defendant's house while under constant surveillance by numerous officers. After Jones and Mayo arrived at Defendant's house, Detective Buck heard a conversation over the wire between Mayo and Defendant. Although Detective Buck was not familiar with Defendant, Mayo later identified Defendant as the person with whom Mayo was speaking. After an hour passed with no drug transaction occurring, Detective Buck sent a uniformed deputy to Defendant's residence to make sure "everything was okay." After another hour,

Jones and Mayo left Defendant's house and returned to Mayo's house. Detective Buck then picked up Mayo and drove to another location for a briefing. Mayo reported that Defendant was waiting for the drugs to arrive and that, when the uniformed deputy arrived, Defendant became scared. Mayo said Defendant then instructed him to return on his four-wheeler at 6:00 p.m. to complete the sale. Detective Buck searched Mayo again, and Mayo returned the \$1,500.00 he had received to purchase the drugs.

Detective Buck testified that at 5:15 p.m., he and another detective picked Mayo up at his residence, re-wired Mayo, and gave him \$1,800.00 to purchase the drugs. Mayo was taken back to his house at 5:45 p.m., and the recording devices were turned on. The officers saw Mayo leave his house on his four-wheeler at 5:53 p.m. Mayo arrived at Defendant's house and had a brief conversation with Defendant. Mayo realized he had left the digital scale that Detective Buck had provided him back at his house. Detective Buck testified that the officers watched Mayo return to his house in the burgundy Mitsubishi, retrieve the scale, and return to Defendant's house. At 6:36 p.m., Detective Buck heard Defendant tell Mayo to "check the dope out" and heard Defendant count out \$1,500.00. The officers observed Mayo leave Defendant's home and drive his four-wheeler back to his house. Detective Buck met with Mayo, retrieved the cocaine, removed the recording equipment, and recovered the \$300.00 Mayo had not spent. Detective Buck testified that as a result of this transaction, Defendant was arrested approximately two years later. The delay in arresting defendant avoided

revealing Mayo as an informant and allowed Mayo to participate in additional drug buys for law enforcement. The portion of the tape containing the drug transaction was played for the jury.

Detective Buck admitted on cross-examination that when Defendant was arrested, no drugs, nor any of the money used in the 7 February 2002 transaction, were recovered from Defendant.

Mayo testified for the State about the events of 7 February 2002. Mayo testified that when he and Jones arrived at Defendant's house, Defendant informed Mayo that Defendant did not have an ounce and a half of cocaine as Mayo had requested. Defendant told Mayo that Defendant would call one of his runners to bring more cocaine. Mayo testified that he waited at Defendant's restaurant and bar, located behind Defendant's home, for several hours before leaving without purchasing any cocaine. Mayo said he returned to Defendant's house later that afternoon on his four-wheeler. Mayo testified that he recognized Defendant from living in the same neighborhood. Mayo testified that a runner arrived and handed something to Defendant around 5:30 or 6:00 p.m. Mayo followed Defendant into the men's bathroom, where Defendant gave Mayo the cocaine for the money. Defendant counted the money, while Mayo weighed the cocaine. Mayo identified the portion of the tape which was played for the jury as a recording of the conversation that Mayo had with Defendant in the bathroom of Defendant's bar.

Robert Evans (Agent Evans), a special agent with the State Bureau of Investigation, testified as an expert in forensic chemistry. Agent Evans testified that he analyzed the substance

recovered from Mayo on 7 February 2002 and identified it as cocaine. He also determined that the weight of the cocaine, without its packaging, was forty grams.

At the close of the State's evidence, Defendant moved to dismiss each of the charges for insufficiency of evidence. Defendant presented no evidence and renewed his motion to dismiss at the close of all evidence. Defendant assigns as error the trial court's denial of his motion to dismiss each of the charges against him. For the reasons stated below, we find no error.

#### I. Standard of Review

When a defendant moves to dismiss based on insufficiency of evidence, the trial court must determine whether there is substantial evidence of each element of the crime charged and of the defendant being the perpetrator. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Alston*, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998). In reviewing the trial court's decision, "[t]he evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citations omitted).

#### II. Trafficking Under the Controlled Substances Act

N.C. Gen. Stat. § 90-95(h)(3) (2005) provides that "[a]ny

person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony . . . known as 'trafficking in cocaine[.]'" This Court has noted

Subsection (h) was added to G.S. 90-95 in response to a growing concern regarding the gravity of illegal drug activity in North Carolina and the need for effective laws to deter the corrupting influence of drug dealers and traffickers. The purpose behind G.S. 90-95(h) is to deter trafficking in large amounts of certain controlled substances.

*State v. Proctor*, 58 N.C. App. 631, 635, 294 S.E.2d 240, 243, *disc. review denied*, 306 N.C. 749, 295 S.E.2d 484 (1982), *Procter v. State*, *cert. denied*, 459 U.S. 1172, 74 L. Ed. 2d 1016 (1983) (internal citation and quotation omitted). Accordingly, the statute mandates different punishments depending upon the amount of cocaine involved. N.C.G.S. § 90-95(h)(3)a-d. Further, "[s]ale, manufacture, delivery, transportation, and possession of 28 grams or more of cocaine as defined under N.C.G.S. § 90-95(h)(3) are separate trafficking offenses for which a defendant may be separately convicted and punished." *State v. Garcia*, 111 N.C. App. 636, 641, 433 S.E.2d 187, 190 (1993). Defendant does not dispute that the total weight of the cocaine recovered from Mayo was forty grams.

#### A. Trafficking by Sale

Defendant contends his motion to dismiss the charge of trafficking by sale should have been granted because the State failed to offer any evidence that Defendant possessed any cocaine with the intent to sell it. This Court has held "that the term 'sale,' in the context of the North Carolina Controlled Substances

Act, means the exchange of a controlled substance for money or any other form of consideration." *State v. Carr*, 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001) (interpreting N.C.G.S. § 90-95(a)(1)). Through the trial testimony of Detective Buck, Mayo, and Agent Evans, the State presented sufficient evidence that Defendant exchanged cocaine for money. On direct examination of Mayo, the following exchange occurred:

[The State]: And . . . when you were in the bathroom, who did you see in possession of the crack cocaine?

[Mayo]: [Defendant].

. . .

[The State]: And who did you give the money to and who gave you the crack cocaine?

[Mayo]: [Defendant].

[The State]: And who handed you the crack cocaine?

[Mayo]: [Defendant].

[The State]: Who delivered it to you?

[Mayo]: [Defendant].

We find the State presented sufficient evidence to withstand Defendant's motion to dismiss the charge of trafficking in cocaine by sale.

#### B. Trafficking by Delivery

N.C. Gen. Stat. § 90-87(7) (2005) defines delivery as "the actual[,] constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." Mayo's testimony, recounted above, that he

entered a bathroom with Defendant, at which time Defendant gave Mayo forty grams of cocaine in exchange for \$1,500.00, was sufficient evidence for the jury to find delivery by Defendant. Therefore, the trial court properly denied Defendant's motion to dismiss the charge of trafficking in cocaine by delivery.

#### C. Trafficking by Possession

Lastly, Defendant challenges the sufficiency of the evidence on the charge of trafficking in cocaine by possession. Defendant contends that although Mayo delivered forty grams of cocaine to Detective Buck, the State failed to present sufficient evidence that the cocaine originated from Defendant. We disagree.

"Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be knowingly possessed." *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (citation omitted). A defendant "has possession of the contraband material . . . when he has both the power and intent to control its disposition or use." *Id.*

It is well established in North Carolina that possession of a controlled substance may be either actual or constructive. A person is said to have constructive possession when he, without actual physical possession of a controlled substance, has both the intent and the capability to maintain dominion and control over it.

*State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991) (citations omitted), *aff'd per curiam*, 331 N.C. 113, 413 S.E.2d 798 (1992).

In the present case, Mayo testified that Defendant possessed



the cocaine Mayo purchased. The jury also heard a recording of the drug transfer. Defendant challenges this evidence on the ground that Mayo had criminal charges pending against him which provided him an incentive to set up another individual to curry favor with law enforcement. This argument properly goes to the weight of Mayo's testimony and does not render the State's evidence insufficient. Accordingly, the trial court did not err in denying Defendant's motion to dismiss the charge of trafficking in cocaine by possession.

No error.

Judges WYNN and McCULLOUGH concur.

Report per Rule 30(e).