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NO. COA07-1006

NORTH CAROLINA COURT OF APPEALS

Filed: 5 August 2008

STATE OF NORTH CAROLINA

v.

RODERICK MONTA JENKINS

Transylvania County
Nos. 06 CRS 1669-71,
06 CRS 1673-75

Appeal by defendant from judgments dated 26 January 2007 by Judge James U. Davis in Transylvania County Superior Court. Heard in the Court of Appeals 4 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General Edwin Lee Gavin, III, for the State.

Crumpler Freeman Parker & Witt, by Vincent F. Rabil, for defendant-appellant.

BRYANT, Judge.

Roderick Monta Jenkins (defendant) appeals from a judgment dated 26 January 2007 and entered consistent with jury verdicts finding him guilty of three counts of possession with intent to sell and deliver cocaine and three counts of sale of cocaine. We find no prejudicial error.

Facts

Dwight Monach (Monach) testified for the State that after he was caught with marijuana in his car, he worked with Detective Chuck Hutchison for a year as an informant. Monach assisted Detective Hutchison by contacting suspected drug dealers and

arranging drug buys from the dealers. Monach testified that on 12 July 2006, he and another confidential informant (the C.I.) met defendant at his residence on Whitmire Street to perform an arranged buy from defendant. Before going to defendant's house, Monach met with Detective Hutchison, Detective Eddie Gunter, the C.I., and one other individual at an arranged location. During the meeting, Detective Gunter outfitted Monach with a pair of sunglasses that were equipped with a microcamera in the center. Detective Gunter also gave Monach two listening devices: one was strapped around Monach's waist and the other was placed inside his vehicle. After the meeting, Monach and the C.I. drove to defendant's residence.

When Monach and the C.I. arrived at defendant's residence, Monach pulled up in front of the house. The C.I. exited Monach's vehicle and entered defendant's residence. After approximately one minute, the C.I. returned to Monach's vehicle with defendant. The three individuals, Monach, defendant, and the C.I., went into defendant's home. Once inside, defendant asked Monach how much cocaine he wanted to purchase. Previously, Detective Hutchison had given Monach \$100.00 of marked and photographed money. When defendant ask Monach "how much" he wanted, Monach responded by saying he wanted "\$100." Defendant only had three rocks of cocaine that were worth a total of \$50.00, which defendant gave to Monach in exchange for money. Afterwards, Monach was given defendant's telephone number, and Monach and the C.I. left defendant's home.

Monach testified that he used defendant's telephone number on two other occasions: 17 July and 19 July 2006. On both occasions, Monach telephoned defendant to arrange drug buys. After each drug buy, Monach delivered the drugs to Detective Hutchison. The drugs were delivered to the State Bureau of Investigation (SBI) for analysis. On each occasion, the drugs proved to be cocaine base with a weight of 0.2 grams, 0.3 grams, and 0.5 grams respectively.

On 7 August 2006, a grand jury indicted defendant on three counts of possession with intent to sell or deliver cocaine, three counts of sale or delivery of cocaine, and two counts of maintaining a dwelling for keeping and selling cocaine. An ancillary indictment also charged defendant with obtaining the status of an habitual felon for each indictment. On 26 January 2007, at the close of the State's evidence, the trial court dismissed the charges of maintaining a dwelling. The jury found defendant guilty of three counts of sale of cocaine and three counts of possession with intent to sell and/or deliver cocaine. Defendant pled guilty to obtaining the status of an habitual felon. Defendant appeals.

Defendant raises four issues on appeal: (I) whether the trial court erred by allowing evidence of defendant's prior drug sale; (II) whether the trial court erred by denying defendant's motion to dismiss the sale of cocaine charges; (III) whether defendant's counsel was ineffective for not objecting to testimony regarding unrelated gang activity or prior arrests; and (IV) whether the

trial court committed plain error by submitting a verdict sheet for sale of cocaine after giving instructions on sale or delivery of cocaine.

I

Defendant argues the trial court erred by allowing the State to introduce evidence of defendant's prior drug sale because the evidence violated North Carolina Rule of Evidence 404(a) and (b), Rule 403, and was inadmissible hearsay. We disagree.

At trial, Monach testified that on 12 July 2006, Detective Hutchison paired Monach with the C.I. in order for Monach to "take over" and make buys from defendant. Monach testified the C.I. told him he was "making buys" from defendant, but he wanted to "get out of it" and wanted Monach to take over. Defendant argues the trial court erred by admitting this testimony because it failed to make findings that the prior drug sale was relevant and not unduly prejudicial. We note that the trial court, upon defendant's objection, gave a limiting instruction to the jury to consider the evidence not for the truth of the matter, but only as an explanation as to how the defendant and the witness came together. Nevertheless, even assuming *arguendo* the trial court erred, as defendant argues, by admitting Monach's testimony, defendant must establish that he was prejudiced by such error. N.C. Gen. Stat. § 15A-1443(a) (2007) ("A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.").

Here, defendant has failed to establish that, absent the alleged error, a different result would have been reached at trial. The State presented substantial evidence, including Monach's testimony and surveillance video of the actual "buys," that defendant sold cocaine to Monach on three separate occasions. Because defendant has failed to show prejudice under N.C.G.S. § 15A-1443(a), this assignment of error is overruled.

II

Defendant argues the trial court erred by denying his motion to dismiss two of the indictments alleging sale of cocaine because there was insufficient evidence of any monetary transfer. We disagree.

In determining whether a motion to dismiss for insufficiency of the evidence should have been granted, this Court must determine whether there is substantial evidence of each essential element of the offense charged and that defendant is the perpetrator of the offense. *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). In doing so, the evidence must be considered in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992).

Pursuant to N.C. Gen. Stat. § 90-95(a)(1), it is unlawful to sell or deliver a controlled substance. N.C. Gen. Stat. § 90-95(a)(1) (2007). "To prove sale and/or delivery of a controlled substance, the State must show a transfer of a controlled substance by either sale or delivery, or both." *State v. Carr*, 145 N.C. App.

335, 341, 549 S.E.2d 897, 901 (2001). "[T]he 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." *Id.* at 343, 549 S.E.2d at 902.

Here, the evidence tended to show that on two occasions (17 July and 18 July), defendant engaged in sale transactions by first accepting \$100.00 from Monach, going to another location and retrieving cocaine, and bringing cocaine back to Monach. This is clearly evidence that on those two occasions defendant gave Monach cocaine rocks in exchange for \$100.00. Additionally, the evidence showed that on 12 July (the first transaction), defendant gave Monach cocaine rocks in exchange for \$50.00. The evidence presented in this case is sufficient to show that defendant received compensation in exchange for the cocaine he gave to Monach. Therefore, this assignment of error is overruled.

III

Defendant argues he received ineffective assistance of counsel (IAC) because defendant's trial counsel failed to object to references regarding defendant's alleged gang activities and prior arrests. We disagree.

Generally, IAC claims should be considered via motions for appropriate relief and not on direct appeal. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, "IAC claims brought on direct [appeal] will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without

such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). In this case, defendant's IAC claim can be decided by review of the materials contained in the record on appeal.

"Attorney conduct that falls below an objective standard of reasonableness and prejudices the defense denies the defendant the right to effective assistance of counsel." *Id.* at 167, 557 S.E.2d at 525. Having reviewed the statements regarding gang activity and defendant's prior arrests, we conclude defendant has failed to meet his burden. Assuming *arguendo* that defendant's counsel was deficient for failing to object to testimony regarding gang activity and prior arrests, defendant cannot show prejudice. While defendant argues that "evidence that [defendant] may have been a gang member surely led one or more jurors to resolve doubts in the State's favor," this is speculative and nowhere supported by the record. On the contrary, the record reveals substantial evidence in the form of testimony and video that defendant, in exchange for compensation, sold cocaine on three occasions.

Defendant also argues admission of the statements was plain error. However, because defendant did not allege plain error in his assignment of error, he has waived plain error review. *State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994). Additionally, we decline defendant's invitation to invoke Rule 2 of the Rules of Appellate Procedure to review for plain error as we

have already addressed defendant's argument. Defendant's assignment of error is overruled.

IV

Defendant argues the trial court committed plain error by submitting a verdict sheet only for sale of cocaine after giving an instruction on sale and/or delivery of cocaine. We disagree.

Because defendant did not object to the verdict sheets at trial, he has the burden to show that any error amounted to plain error. *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135-36, cert. denied, 543 U.S. 1023, 160 L. Ed. 2d 500 (2004). In order to show plain error, a defendant must show there was an error and that it had a probable impact on the jury's verdict. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983). In this case, defendant has failed to meet his burden. At trial, the State presented substantial evidence that defendant sold cocaine to Monach. Although defendant argues two of the three "transactions" were not actual "sales," we have already addressed the substance of defendant's argument and reiterate that by transferring the cocaine to Monach in exchange for \$100.00 and a "bump," defendant committed the offense of sale of cocaine.

Additionally, defendant argues he received ineffective assistance of counsel because defendant's trial counsel raised no objection to the verdict sheet. As stated previously, defendant must show that "counsel's performance was so deficient as to deprive him of his right to be represented and that absent the deficient performance by defense counsel, there would have been a

different result at trial" in order to prevail on an IAC claim. *State v. Strickland*, 346 N.C. 443, 455, 488 S.E.2d 194, 201 (1997). Again, defendant cannot meet his burden of showing that had his counsel objected to the verdict sheets, a different result would have been reached. Because of the overwhelming evidence that defendant sold cocaine to Monach on three separate occasions, even if defendant's counsel had objected to the form of the verdict sheets, we are certain the jury would have reach the same result. This assignment of error is overruled.

NO PREJUDICIAL ERROR.

Judges WYNN and JACKSON concur.

Report per Rule 30(e).