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NO. COA09-1326

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

STATE OF NORTH CAROLINA

v.

JEROME TIUJAN THOMPSON

Davidson County
Nos. 08-CRS-60846, 60849;
09-CRS-571

Appeal by defendant from judgment entered 14 May 2009 by Judge Tanya T. Wallace in Davidson County Superior Court. Heard in the Court of Appeals 10 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna Sumpter, for the State.

Carol Ann Bauer for defendant appellant.

HUNTER, JR., Robert N., Judge

Jerome Tiujan Thompson ("defendant") appeals his convictions of possession with intent to sell and deliver ("PWISD") cocaine, possession of drug paraphernalia and PWISD marijuana. Defendant also pled guilty to an habitual felon status, which is not a subject of this appeal. On appeal, defendant asserts that the trial court erred (1) by admitting hearsay testimony from a witness who had allegedly supplied defendant with cocaine in the past and (2) by denying defendant's motion to dismiss on grounds of insufficient evidence. Defendant also argues ineffective assistance of counsel, because counsel failed to argue that defendant was not

the actual possessor of the controlled substances seized. After review, we find no error.

I. Factual Background

The State's evidence tended to show the following: On 12 November 2008, Vice Narcotics Detective Rusty Fritz ("Fritz"), in conjunction with other law enforcement officers, participated in a controlled purchase of narcotics at defendant's residence located at 707 Marsh Street in Thomasville, North Carolina. Defendant was not the sole occupant of the home. Fritz provided a confidential informant ("informant") with fifty dollars in cash, consisting of two twenty-dollar bills, and one ten-dollar bill. The serial numbers of the bills were recorded, and the bills were photocopied by Fritz. Informant carried a listening device so that law enforcement could monitor the sale. Fritz asked informant to go into the house and purchase fifty dollars worth of crack cocaine. Informant drove to the Marsh Street residence, whereupon defendant came out of the house and went to the passenger side of the car. After a short while, defendant returned to the house and informant's vehicle left the driveway. Subsequently, informant met with Fritz who took possession of the purchased item and interviewed informant. The item purchased was a white, rock-like substance consistent in appearance with crack cocaine, and being an amount consistent with personal use. Based on the information obtained from the informant, Fritz obtained a search warrant to search defendant and the Marsh Street residence at 10:50 p.m. that evening.

Law enforcement officers executed the search and found four people in the house - an 80-year-old woman and a twelve-year-old child were in the living room, and defendant and a woman identified as Regina Inman ("Inman") were found in a bedroom. Immediately upon entering the house, Fritz advised all persons in the house of their *Miranda* rights. Several items were seized at this time, including: an envelope addressed to defendant; mail located in the bedroom where defendant was located; torn plastic baggies; digital scales; one hundred and sixty-seven dollars; a box of sandwich baggies; marijuana; and two rock-like substances that had the appearance of cocaine. One of the rocks was found in a drawer in defendant's bedroom, and the other was found underneath a dresser in another bedroom.

At the scene, officers weighed the marijuana and cocaine-like rocks in their packaging - the marijuana totaled 6 grams and the cocaine-like rocks totaled 5.3 grams. Officers field-tested one of the baggies seized, and results showed that the bag was positive for cocaine. The rock-like substances were sent to the State Bureau of Investigation for analysis. In addition, two twenty-dollar bills and a ten-dollar bill with serial numbers identical to those given to informant were found in defendant's wallet. After law enforcement officers executed the search warrant, an inventory of the items seized was left with Ingram, the person deemed to be in control of the residence.

At trial, over defense counsel's objection, Fritz testified that while conducting the search, he told defendant that he could

help himself out by assisting in the investigation. Defendant stated that he did want to help and asked what he needed to do. Fritz testified that he subsequently told defendant that he understood that a Hispanic male had been his supplier in the past. Defendant said he no longer dealt with that person. Defendant agreed to accompany Fritz to the police station to make telephone calls and see if he could arrange to purchase cocaine. These calls proved unproductive and defendant was subsequently arrested.

Fritz further testified that based on his experience, the off-white, rock-like substances that were seized were crack cocaine, and the amount seized was greater than what would be typical for personal use. Moreover, he testified that the six small bags of seized marijuana were tied on each end with a knot, which is consistent with packaging for sale. Laboratory analysis confirmed that the rocks seized were cocaine and that one rock weighed .04 grams and the other weighed 4.04 grams.

The week before trial, defendant approached an investigator in the District Attorney's office, Johnny Marks ("Marks"). Defendant voluntarily made the following statements to Marks - "The drugs are not mine. I bought the drugs for another dude and I am going to talk to him when I leave here to see if he is going to own up to the drugs[,] and "I took the blame that day because I bought the drugs and he needs to take responsibility for the drugs because I bought them for him." Marks also spoke with Inman who gave a statement that the drugs were hers.

At the conclusion of the State's evidence, defendant made a motion to dismiss, which was denied by the trial court. Defendant did not present any evidence at trial.

During closing arguments, defense counsel told the jury that the search warrant was served on Inman because she was in "apparent control of the residence." In addition, defense counsel contended that if the drugs were defendant's, or if law enforcement thought they belonged to defendant, then the inventory sheet would have been left with defendant, not Inman.

After being properly instructed, the jury found defendant guilty of possession with intent to sell and deliver cocaine, possession of drug paraphernalia, and possession with intent to sell and deliver marijuana. Defendant also pled guilty to attaining habitual felon status. Defendant was sentenced to 116 to 149 months' imprisonment with a consecutive term of 120 days for the misdemeanor possession of drug paraphernalia charge. Defendant timely filed his appeal as of right with this Court.

II. Arguments on Appeal

On appeal, defendant contends that the trial court erred (1) by admitting hearsay testimony from a witness who allegedly supplied defendant with cocaine in the past and (2) by denying defendant's motion to dismiss on grounds of insufficient evidence. In addition, defendant contends that he received ineffective assistance of counsel. We review defendant's contentions *de novo*. *State v. Miller*, ___ N.C. App. ___, 676 S.E.2d 546, 552, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (2009).

III. Objection on Hearsay Grounds

Defendant first contends that Fritz's testimony at trial regarding the Hispanic male who allegedly supplied defendant cocaine in the past, was inadmissible hearsay. After review of the evidence and the specific testimony of Fritz, we conclude that the trial court did not err.

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801(c) (2009). Hearsay testimony is inadmissible except if allowed by statute or by the rules of evidence. N.C. Gen. Stat. § 8C-1, Rule 802(c) (2009).

During direct examination by Assistant District Attorney Alan Martin ("Martin"), the following colloquy ensued:

[Fritz]: The conversation, the way we normally operate we give people an opportunity to help themselves out when they are in trouble or we found some kind of drugs or something, we normally ask if they want to assist in any way in helping us. Telling us where they get their drugs from, or who else may have drugs or something along them lines.

[Martin]: And did you have such conversation with Mr. Thompson?

[Fritz]: I did.

[Martin]: What happened after you - You initiated this conversation?

[Fritz]: Correct.

[Martin]: Tell us what you said to him and then how he responded.

[Fritz]: I basically asked Mr. Thompson if he wanted to help his self out of this situation. He stated he did want to help his self out. He asked me what he would have to do. I told him, provide us with some information of where he was getting his drugs or -

[Defense Counsel]: Objection.

Court: Overruled.

[Martin]: Continue?

[Fritz]: Of where he was getting his drugs from. Or if there was anybody in the surrounding area or if he knew where we could get any more drugs. He just kind of had regular conversation then about he was just basically the main storage. I made mention that I had received information in the past of a Hispanic male that was supplying Mr. Thompson with his Cocaine.

[Defense Counsel]: Objection, move to strike.

Court: Overruled.

[Martin]: Proceed.

[Fritz]: Of a Hispanic male that was supplying Mr. Thompson with his Cocaine in the past. I made mention that to Mr. Thompson to tell me about the Hispanic that he was getting his Cocaine from, and Mr. Thompson stated that he no longer dealt with that Hispanic male. He hadn't dealt with him in several months.

Defendant contends that this testimony is hearsay and that this evidence was not relevant to prove the crimes for which defendant was on trial.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence more probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2009). Defendant's argument that this evidence

is inadmissible as irrelevant and prejudicial is without merit. The State clearly asserts that the evidence in question is relevant and admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009), as the evidence tended to show defendant's motive, intent and plan to possess controlled substances for the purposes of delivery. The relevant part of the rule states as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of *motive, opportunity, intent, preparation, plan, knowledge, identity*, or absence of mistake, entrapment or accident[.]

N.C.G.S. § 8C-1, Rule 404(b) (emphasis added).

Moreover, this Court has stated:

Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." Further, Rule 404(b) allows for the admission of both subsequent and prior acts of defendant.

State v. Mack, 188 N.C. App. 365, 656 S.E.2d 1 (2008) (emphasis added) (citation omitted).

Defendant's prior dealings with this Hispanic male supplier are relevant to show defendant's motive, intent, and common plan or scheme. The conversation with Fritz is also relevant to show why defendant accompanied law enforcement officers to the station without being immediately arrested after the search. Furthermore, Fritz's testimony that he received information about defendant's

previous dealings with a Hispanic male drug dealer is not hearsay, because the statement was not offered to prove the truth of the matter asserted pursuant to N.C.G.S. § 8C-1, Rule 801(c). A reading of the transcript clearly shows that these statements illustrate defendant's motive, intent, and common plan or scheme. As such, Fritz's testimony was properly admitted and does not constitute hearsay.

Additionally, defendant contends that Fritz's testimony was highly prejudicial and should have been excluded on the basis that its probative value was outweighed by the danger of unfair prejudice. See N.C. Gen. Stat. § 8C-1, Rule 403 (2009). With regard to this argument, we note that defendant volunteered a statement to Marks the week before trial, stating that he bought the drugs for someone else and he was going to talk to him when he left Marks to see if this person was going to own up to the drugs. Furthermore, defendant stated, "I took the blame that day because I bought the drugs and he needs to take responsibility for the drugs because I bought them for him."

In addition, the overwhelming physical evidence against defendant included the following: digital scales, one hundred and sixty-seven dollars (\$167.00), a box of sandwich baggies, marijuana and two rock-like substances that a lab report indicated was cocaine. Given this substantial evidence, defendant's argument that admission of Fritz's testimony is unduly prejudicial is without merit. Accordingly, we hold that the trial court did not err.

IV. Motion to Dismiss based on Insufficient Evidence

Defendant next challenges the trial court's dismissal of his motion to dismiss the charges of possession with intent to sell or deliver marijuana and cocaine. Defendant contends that the State failed to produce sufficient evidence that he constructively or actually possessed the contraband found in the Marsh Street residence. We disagree.

The test for sufficiency of the evidence in a criminal trial is whether there is substantial evidence to support a finding (1) of each essential element of the offense charged, and (2) that the defendant committed the offense. *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Vick*, 341 N.C. 569, 461 S.E.2d 655 (1995). The trial court need only satisfy itself that the evidence is sufficient to take the case to the jury; the court need not be concerned with the weight of the evidence. *State v. Sokolowski*, 351 N.C. 137, 143, 522 S.E.2d 65, 69 (1999).

In considering a criminal defendant's motion to dismiss for insufficiency of the evidence, the evidence is to be considered in the light most favorable to the State. The State is entitled to every reasonable inference to be drawn therefrom. *Golphin*, 352 N.C. at 458, 533 S.E.2d at 229; *State v. Williams*, 127 N.C. App. 464, 490 S.E.2d 583 (1997). Review of the sufficiency of the evidence to withstand a defendant's motion to dismiss is the same whether the evidence is direct, circumstantial, or both. *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835 (1981). In the present case,

it is clear from the transcript that there was sufficient evidence to survive defendant's motion to dismiss.

Defendant was indicted for possession of cocaine with intent to sell or deliver, possession of drug paraphernalia, possession of marijuana with intent to sell or deliver, maintaining a place to keep a controlled substance, and attaining habitual felon status. On appeal, defendant solely contends that the State did not present sufficient evidence to support the charges of possession of marijuana with intent to sell or deliver and possession of cocaine with intent to sell or deliver. The elements of possession of cocaine or marijuana with intent to sell or deliver require proof of either actual or constructive possession of the contraband. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). Specifically he asserts that the State's evidence did not demonstrate that he was in actual or constructive possession of the marijuana and cocaine found in the dwelling. This argument is not persuasive.

After reviewing the transcript, we note that the State presented ample evidence to demonstrate that defendant constructively possessed the controlled substances seized during the search. Our Supreme Court has stated that "[t]he State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.'" *State v. Harvey*, 281 N.C. 1, 13, 187 S.E.2d 706, 714 (1972) (citation omitted). In

order to show constructive possession, the State must establish that defendant had the power and intent to control the disposition of the controlled substances. *Id.*

In the present case, law enforcement officers obtained a search warrant for the Marsh Street residence after observing defendant deliver cocaine to an informant during a controlled drug purchase. Moreover, while conducting a search of the residence on the same date as the controlled purchase, officers found mail addressed to defendant, marijuana, two rocks of crack cocaine, digital scales, and baggies in the bedroom of the home. Upon searching defendant in one of the bedrooms, the exact amount of money given for the controlled purchase was found in defendant's wallet. Defendant also indicated his desire to work with Fritz and other officers in the hopes of obtaining leniency. Defendant chose not to present evidence during his case-in-chief. Viewing all of the evidence presented at trial in the light most favorable to the State, we conclude that the State met its burden of demonstrating that defendant was in constructive possession of the controlled substances which were seized during the lawful search. We hold that the trial court did not err in denying defendant's motion to dismiss.

V. Ineffective Assistance of Counsel

Defendant last contends that he received ineffective assistance of counsel at trial in violation of his constitutional right to counsel. We conclude that defendant fails to meet the

prevailing standard set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

To obtain relief for ineffective assistance of counsel, a defendant must demonstrate initially that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this standard, defendant must prove the following: First, that his "counsel's performance fell below an objective standard of reasonableness as defined by professional norms[;]" and second, that "the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error." *State v. Lee*, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998) (citing *Strickland*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984)). On this issue, this Court has held that, "[i]neffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics." *State v. Brindle*, 66 N.C. App. 716, 718, 311 S.E.2d 692, 693-94 (1984).

Here, defendant argues that his counsel's performance was deficient, because he did not specifically argue in support of the motion to dismiss that defendant was not in possession of the controlled substances at issue. Defendant presents no evidence that counsel's decision to focus on the element of intent, as opposed to the element of possession, was anything but a tactical decision. Defendant even stipulates in his brief, that counsel conducted a vigorous defense on his behalf. As such, defendant has not met the burden of proving that counsel's performance fell below an objective standard of reasonableness. Furthermore, defendant

has not shown that the outcome of his trial would have been any different if counsel's argument supporting the motion to dismiss for insufficient evidence had been presented differently to the trial judge.

We conclude that the overwhelming physical evidence produced at trial tended to show that defendant was in constructive possession of the items seized. Thus, merely failing to specifically contest the element of constructive possession during the motion to dismiss did not create any significant probability that the trial outcome would have been different.

VI. Conclusion

For the reasons stated herein, we conclude that defendant received a trial free of prejudicial error.

No error.

Judges HUNTER, Robert C., and CALABRIA concur.

Report per Rule 30(e).