NO. COA09-272

NORTH CAROLINA COURT OF APPEALS

Filed: 15 September 2009

STATE OF NORTH CAROLINA

v. Wake County
No. 07 CRS 72176

JUAN CABRERA FLORES

Appeal by Defendant from judgment entered 11 August 2008 by Judge James C. Spencer in Superior Court, Wake County. Heard in the Court of Appeals 7 September 2009.

Attorney General Roy Cooper, by Assistant Attorney General Linda Kimbell, for the State.

Sofie W. Hosford for defendant-appellant.

WYNN, Judge.

Defendant Juan Cabrera Flores appeals from a conviction of trafficking in heroin by possession. He argues the trial court erred by denying his motion to dismiss and refusing to give a requested jury instruction. After carefully reviewing the record, we find no error.

The State's evidence tended to show that, on 8 October 2007, Defendant called a confidential police informant, with whom he had previously dealt, requesting his involvement in a proposed heroin transaction. According to the informant, Defendant proposed that the men would retrieve approximately $80,000 worth of heroin for

the informant to sell, and Defendant would retain only about $1,500 of the proceeds to fund a trip to Mexico. Upon receiving Defendant's proposition, the informant contacted and informed Detective Marbrey of the Raleigh Police Department.

Detective Marbrey and Sergeant Glendy of the Raleigh Police Department met the informant in a parking lot near the location the informant would later meet with Defendant. The officers placed a small listening device in the informant's shirt pocket and maintained surveillance of him while he met with Defendant at a nearby McDonald's Restaurant. Detective Marbrey heard Defendant tell the informant that "he had about two ounces [of heroin]" hidden at his former residence in Johnston County and that he wanted a ride that night to retrieve it. The informant told Defendant that he could not take him that night and instead offered to pay for his overnight stay at a motel with money the officers gave him. The informant drove Defendant to the motel and arranged to meet him there the next morning. After leaving Defendant, the informant met with the officers to plan for the next day.

The next morning, Detective Marbrey, Sergeant Glendy and Detective Michael Hendrix met with the informant at his residence. Detective Marbrey thoroughly searched the informant's person and automobile for contraband and found none. The officers again placed a listening device on the informant and sent him to meet Defendant at the motel. The officers followed the informant's car in three separate vehicles to the motel, and then to a small mobile home park in Johnston County. The informant stopped in front of

one of the mobile homes, and Detective Marbrey saw Defendant exit the vehicle and walk around the side of the home while the informant remained in the vehicle. Detective Marbrey subsequently saw Defendant get back into the vehicle carrying a glass jar. The officers followed the informant's vehicle back to the motel, where a fourth officer was waiting. The officers took Defendant into custody and searched the informant's vehicle when they arrived at the motel. They found a glass jar inside a black plastic bag on the back seat. Detective Hendrix opened the jar and saw a substance he believed was tar heroin wrapped in plastic. Indeed, the parties stipulated at the close of the State's evidence that the jar contained 51.0 grams of heroin, a schedule one controlled substance.

Defendant recalled a different version of events on 8 and 9 October 2007. Defendant testified that he called the informant on 8 October 2007 to ask for a ride to a Mexican store in Smithfield to pick up money for his trip back to Mexico. He denied discussing any drug transactions with the informant. Defendant stated that, after spending the night at the motel, the next morning the informant drove him to the store in Smithfield. When they arrived at the store, the informant immediately turned around and went back to Raleigh because he had to get to work. Defendant further testified that he had never previously seen the glass jar containing the heroin.

Defendant moved to dismiss the trafficking in heroin by possession charge at the end of the State's evidence and at the end

of all the evidence. The trial court denied both motions. Thereafter, the jury convicted Defendant of trafficking in heroin by possession, and the trial court imposed a 225 to 279 month term of imprisonment.

On appeal, Defendant argues the trial court erred by: (I) denying his motion to dismiss because the State failed to present sufficient evidence of each element of the offense; and (II) refusing to give a jury instruction limiting the jury's deliberations to the crime charged in the indictment.

I.

In his first argument, Defendant contends that the State presented insufficient evidence that he possessed the heroin in the glass jar. We disagree.

"[I]n order to survive a motion [to dismiss] there must be substantial evidence of all material elements of the offense." *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838 (1981); *see also State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991)("The trial court's function is to determine whether the evidence will permit a reasonable inference that the defendant is guilty of the crimes charged."). On a motion to dismiss, the court must consider the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). Contradictions and discrepancies in the evidence are to be disregarded and left for resolution by a jury. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

To withstand a motion to dismiss a charge of trafficking in heroin in violation of N.C. Gen. Stat. § 90-95(h)(4), the State must present sufficient evidence to prove that the defendant knowingly possessed the requisite quantity of the controlled substance. *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985). A person has possession of a narcotic substance when he has the power and intent to control its disposition or use. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). Circumstantial evidence, such as the defendant's acts and declarations that tend to show knowledge, may be sufficient to prove possession. *Weldon*, 314 N.C. at 406, 333 S.E.2d at 704.

In this case, the State presented evidence that Defendant contacted the informant and asked him to sell Defendant's heroin. Defendant asked the informant to take him to retrieve the heroin. The informant drove Defendant to his former home as directed, and a law enforcement officer saw Defendant get out of the vehicle, go around the mobile home, and return to the vehicle carrying a glass jar. Thereafter, the officers searched the informant's vehicle and found a glass jar containing 51.0 grams of heroin. The officers' testimony tended to establish that the glass jar had not been in the informant's vehicle or on his person prior to the trip to the mobile home. Accordingly, we hold that the State presented substantial evidence that Defendant knowingly possessed the glass jar containing the heroin, and therefore, the trial court correctly denied Defendant's motions to dismiss.

II.

In his second argument, Defendant contends that the trial court erred by refusing to give a special jury instruction mandating that the jury consider only the crime charged in the indictment. We disagree.

"[T]he trial court is not required to give a requested instruction in the exact language of the request. However, when the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance." *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976). "In order for the defendant to show error, he must show that the requested instructions were not given in substance and that substantial evidence supported the omitted instructions." *State v. Garvick*, 98 N.C. App. 556, 568, 392 S.E.2d 115, 122, *disc. review denied, appeal dismissed,* 327 N.C. 142, 394 S.E.2d 182, *aff'd per curiam*, 327 N.C. 627, 398 S.E.2d 330 (1990). Moreover, "[t]he defendant bears the burden, when challenging a jury instruction, to show that a different result would have been reached had the requested instruction been given, or at least that the jury was misled or misinformed." *State v. Williams*, 95 N.C. App. 627, 630, 383 S.E.2d 456, 458 (1989).

In this case, Defendant requested the trial court to give the following instruction:

> You are here to decide whether the state has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not

> on trial as a defendant in this case, except as you are otherwise instructed.

During the charge conference, Defendant's counsel acknowledged that the jury did not receive evidence of Defendant's prior alleged acts in Johnston County, but argued that the informant's testimony concerning prior drug transactions necessitated the requested instruction. The trial court declined to give the requested instruction, stating that its gist "is covered by [pattern instruction] 104.15." Accordingly, the trial court's jury instructions included this excerpt:

> Now evidence has been received in the case through [the informant] tending to show that the defendant committed other acts which the State contends are similar in nature to the offense charged. This evidence was received solely for the purpose of showing the identity of the person who committed the crime charged in this case, if it was committed, that the Defendant had knowledge, which is a necessary element of the crime charged in this case, that there existed in the mind of the Defendant a plan, scheme, system or design involving the crime charged in this case, and/or the absence of mistake. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received. [T 323-24]

See N.C.P.I.–Crim. 104.15 (2008).

We conclude, as the trial court ruled, that pattern instruction 104.15 adequately informed the jury that it could consider evidence of "similar acts" only for the enumerated limited purposes, and not for guilt or innocence of the crime charged. Accordingly, we hold that the trial court did not err by refusing to give Defendant's requested instruction.

No error.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).