NO. COA10-102

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v. Cherokee County
No. 07 CRS 50728

SHELDON TRENT BATEMAN,
Defendant.

Appeal by defendant from judgment entered 2 April 2008 by Judge Dennis J. Winner in Cherokee County Superior Court. Heard in the Court of Appeals 13 September 2010.

Roy Cooper, Attorney General, by William P. Hart, Jr., Assistant Attorney General, for the State.

Leslie C. Rawls, for defendant-appellant.

MARTIN, Chief Judge.

On 23 January 2009, this Court issued a writ of certiorari to review a judgment entered upon a jury verdict finding defendant Sheldon Trent Bateman guilty of trafficking in opium or heroin in violation of N.C.G.S. § 90-95(h)(4). We find no error.

The evidence tended to show that, on 18 May 2007 at approximately 3:30 p.m., Trooper Kenneth Dwayne Hyde of the North Carolina Highway Patrol was dispatched to investigate a single-vehicle accident on U.S. Highway 19, just east of Andrews, North Carolina. Trooper Hyde arrived at the scene and found defendant and his wife, Jennifer Bateman, standing outside of a

vehicle that ran off of the road and came to a rest off of the left shoulder after striking a ditch. Defendant and Mrs. Bateman told the trooper that they were returning home after picking up their young child from school when the vehicle ran off the road.

At the scene, Trooper Hyde observed that defendant "was swaying side to side," that his speech was "mushed" and "[h]is words were sticking together," and that he was "very slow in his responses" to questions. In addition, according to the trooper, Mrs. Bateman had difficulty standing and "kept going to sleep[and was] almost passing out." As Trooper Hyde spoke with Mrs. Bateman, he observed that "her speech was very slurred, very mumbled, was not making sense with her statements." He also testified that he asked Mrs. Bateman to sit in his vehicle to write out her account of the accident, and that, as she was doing so, "her pen just went across the page, and she fell asleep." Based on his observations, and because both defendant and Mrs. Bateman stated that Mrs. Bateman was driving at the time of the accident, Trooper Hyde placed Mrs. Bateman under arrest for driving while impaired and transported her to the Cherokee County jail. Once she arrived at the jail, Mrs. Bateman told Trooper Hyde that defendant had actually been driving the vehicle at the time of the accident.

Trooper Hyde then drove to defendant's residence to speak with defendant about the information that had been provided by Mrs. Bateman. Defendant acknowledged that he had been driving the vehicle at the time of the accident. Because defendant appeared to be "in the same state that he was when [Trooper Hyde] had talked to

[defendant] at the accident scene," Trooper Hyde asked defendant whether he was in possession of any impairing substances, which defendant denied. With defendant's consent, the trooper searched defendant's person. In defendant's right front pocket, Trooper Hyde found a clear plastic container with "numerous pills" of different colors. The plastic container in which the pills were found was later identified as a "pill crusher," which is used to crush pills into powder form. Defendant stated that he had a prescription for the pills but that he did not have it with him. The trooper placed defendant under arrest and transported him to the Cherokee County jail.

At the trooper's request, Agent Rocky Burrell with the Cherokee County Multi-Agency Narcotics Unit interviewed defendant at the county jail that evening. Agent Burrell similarly observed that defendant "was kind of droggy [sic]," where "his eyes were kind of closing as if someone was very tired or sleepy." Agent Burrell also stated that defendant slurred his speech. Over defendant's objection, Agent Burrell testified that he "formed the opinion that [defendant] had consumed some type of an impairing substance so as to appreciably impair his mental and physical faculties." Defendant also told Agent Burrell that he had a prescription for MS Contin and that he had "saved these pills for a year." Subsequent chemical analysis of the pills found in defendant's possession revealed that the pills included 5.6 grams of the Schedule III controlled substance Lortab and a total of

10 grams of the Schedule II controlled substance morphine, a derivative of opium.

Defendant presented evidence that the pill container and its contents belonged to his mother, who had been in the vehicle earlier in the day, and that his daughter found the pill container his mother left behind on the floorboard of the vehicle and handed the container to defendant shortly before the accident. Defendant testified that, just prior to the accident, he placed the pill container on his lap with the intention of returning the container and its contents to his mother, and claimed that he was not truthful with the investigators about to whom the pills belonged because he "was afraid it would get [his] mother in trouble for not having [the pills] in the container."

Defendant was indicted for trafficking in opium or heroin by possessing more than 4 grams but less than 14 grams of opium in violation of N.C.G.S. § 90-95(h)(4), possessing a Schedule III controlled substance in violation of N.C.G.S. § 90-95(d)(2), and possessing drug paraphernalia identified as a "pill crusher" in violation of N.C.G.S. § 90-113.22. On 2 April 2008, the trial court entered its judgment upon the jury's verdicts finding defendant guilty of trafficking in opium or heroin and of possessing drug paraphernalia. Defendant was sentenced to 70 to 84 months imprisonment for the trafficking conviction, and was placed on supervised probation for 18 months for the drug paraphernalia possession charge, which was ordered to begin at the

expiration of his term of imprisonment and after serving an additional 45 days in custody for the drug paraphernalia offense.

Defendant first contends the trial court erred by admitting the testimony of Trooper Hyde and Agent Burrell indicating that, in their opinion, defendant was impaired, because defendant argues the evidence was not relevant to the offenses at issue and that any probative value of this testimony was outweighed by the danger of unfair prejudice. However, defendant fails to direct this Court's attention to any place in the transcript where he objected to the admission of this testimony based on its relevance. Instead, the only stated ground for his objections in the transcript was that the testimony lacked a proper foundation. "Where defendant relies upon one theory at trial as the ground to exclude evidence, [he] cannot argue a different theory for its exclusion on appeal." *State v. Howell*, 169 N.C. App. 741, 747, 611 S.E.2d 200, 204, *disc. review denied*, 360 N.C. 71, 622 S.E.2d 500 (2005). Because defendant's objection at trial was based on a different basis from that argued on appeal, "we must hold that defendant has not properly preserved the issue for review and we will not consider his argument." *See State v. Battle*, 172 N.C. App. 335, 338, 615 S.E.2d 733, 735 (2005), *supersedeas denied*, 361 N.C. 168, 641 S.E.2d 7 (2006), *aff'd in part and remanded in part on other grounds*, 182 N.C. App. 169, 641 S.E.2d 352 (2007).

Defendant next contends the evidence presented was insufficient to support the conviction on trafficking in opium or

heroin in violation of N.C.G.S. § 90-95(h)(4). However, "[a] defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial." N.C.R. App. P. 10(b)(3) (amended Oct. 1, 2009). In the present case, at the close of the State's evidence, defendant moved to dismiss the charge of possession of a Schedule III controlled substance in violation of N.C.G.S. § 90-95(d)(2), which the trial court granted. However, both at the close of the State's evidence and at the close of all of the evidence, defense counsel disclaimed any interest in moving to dismiss the remaining two charges, including the trafficking in opium or heroin charge. Specifically, at the close of the State's evidence, defense counsel stated:

> Your Honor, with respect to the motion at the close of the State's evidence with respect to 07 CRS 50729, the charge of Possession of Schedule III Controlled Substance, the defendant would have a motion to dismiss, there being no evidence to establish that the defendant possessed what amounts to, either by chemical name as noted in the indictment, Lortab, or by compound the drug contained as a Schedule III, no evidence submitted to the jury what a Schedule III was. *I think they presented some evidence with respect to the other two counts*.

(Emphasis added.) Then, at the close of all of the evidence, when the trial court asked defense counsel if he "ha[d] any motions [he] want[ed] to make," counsel replied: "No, Your Honor, I don't have any motions with respect to the two charges." Because defendant failed to preserve this argument for appellate review, we overrule this assignment of error. Defendant's remaining assignments of

error for which he presents no argument in his brief are deemed abandoned. N.C.R. App. P. 28(b)(6) (amended Oct. 1, 2009) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

No error.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).