NO. COA10-290

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Wake County
Nos. 07 CRS 36121
08 CRS 1738

ROBERT JUNIOR ROYSTER

Appeal by defendant from judgment entered 11 February 2009 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 11 October 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General LeAnn Martin, for the State.

David L. Neal for defendant-appellant.

ELMORE, Judge.

On 10 March 2008, defendant was indicted for possession with intent to sell and deliver cocaine, sale of cocaine, delivery of cocaine, and habitual felon. A jury found defendant guilty of possession with intent to sell and deliver cocaine, sale of cocaine, and delivery of cocaine. Subsequently, defendant entered a guilty plea to being a habitual felon. The trial court consolidated the charges into one judgment and sentenced defendant to 80 to 105 months' imprisonment.

On 19 January 2010, defendant filed a petition for writ of certiorari with this Court seeking review of the judgment entered

on 11 February 2009. On 28 January 2010, this Court allowed the petition for writ of certiorari.

The evidence tends to show that, on 3 January 2008, Terry Ross, an informant, had an arrangement with the Raleigh Police Department to go to a store on the corner of South Street and Saunders and purchase drugs from defendant. If defendant was not at the store, Ross was to walk up the street to defendant's home on 715 South Boylan Avenue and make the purchase.

At the police department, Ross was shown a picture of defendant by Detective P. McKeon. Ross was also patted down and wired for audio surveillance. Detective McKeon gave Ross money to purchase $20.00 worth of cocaine from defendant. Ross then went to the store where the police thought defendant may be located. Not finding defendant in the store, Ross proceeded to defendant's residence on Boylan Avenue. Ross went to the backyard of the residence, where he purchased $20.00 worth of cocaine from defendant. Afterwards, Ross met with Detective McKeon and gave him the package that he received from defendant. The substance was later examined by Agent Amy Bommer of CCBI who determined the substance was less than 0.1 grams of cocaine

On appeal, defendant raises the following issues: (1) whether the trial court erred in sustaining the State's objection to defendant's cross-examination of the informant about the informant's pending criminal charges in Wake County; (2) whether the trial court erred by entering judgment for both sale and delivery of a controlled substance arising out of a single

transaction; and (3) whether the indictment for sale and delivery of cocaine was fatally defective because it failed to accurately state the name of the person to whom the sale or delivery was purportedly made.

We first address defendant's argument that the indictment for sale and delivery of cocaine was fatally defective because it failed to accurately identify Terry Ross as the purchaser of the cocaine. "The law is settled in this state that an indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered, if that person is known." *State v. Wall*, 96 N.C. App. 45, 49, 384 S.E.2d 581, 583 (1989) (citations omitted). The State's proof must conform to the allegations in the indictment, and if the evidence fails to do so, the evidence is insufficient to convict the defendant of the charged crime. *Id.* Here, the indictment identified "T. Ross" as the person to whom the defendant sold and delivered cocaine, a controlled substance. The State presented evidence that Ross approached defendant and asked for $20.00 worth of cocaine, and that defendant gave Ross cocaine in exchange for the $20.00. We find the State's evidence conformed to the allegations in the indictment, and we hold that the indictment was not fatally defective.

We next address defendant's argument that he should have been allowed to cross-examine Ross about the criminal charges he had pending in Wake County. Defendant argues that this error entitles hime to a new trial. "The constitutional right to cross-examine a

witness includes the right to examine that witness about any pending criminal charges or any criminal convictions for which he is currently on probation." *State v. Ferguson*, 140 N.C. App. 699, 705, 538 S.E.2d 217, 222 (2000) (citing *State v. Prevatte*, 346 N.C. 162, 163-64, 484 S.E.2d 377, 378 (1997)). "This is so because the jury is entitled to consider, in evaluating a witness's credibility, the fact the State ha[d] a 'weapon to control the witness.'" *Id.* (quotation omitted).

We find *State v. Prevatte*, 346 N.C. 162, 484 S.E.2d 377 (1997), controlling. In *Prevatte*, the principal witness against the defendant had pending criminal charges at the time he testified. *Id.* at 164, 484 S.E.2d at 378. Defendant was not allowed to cross-examine the witness about the pending charges. *Id.* Relying on *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347(1974), our Supreme Court held that it was constitutional error not to allow the defendant to cross-examine the witness about the pending criminal charges and whether he had been promised anything in exchange for his testimony. *Prevatte*, 346 N.C. at 164, 484 S.E.2d at 378. The Supreme Court further concluded that *Davis* required the Court to hold that the error was not harmless. *Id.*

In this case, as in *Prevatte*, the principal witness against defendant had pending criminal charges, and defendant was not allowed to cross-examine the witness about the charges and whether he was promised leniency in exchange for his testimony. The jury should have been given the opportunity to consider the pending charges in evaluating Ross's credibility and whether the State had

a weapon to control Ross. "Not letting the jury do so was error." *Id*. Moreover, in accordance with *Prevatte*, we cannot hold that the error was harmless. Defendant is entitled to a new trial. We do not consider defendant's remaining argument because the questions posed may not recur at a new trial.

New trial.

Chief Judge MARTIN and Judge JACKSON concur.

Report per Rule 30(e).