

NO. COA10-57

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

STATE OF NORTH CAROLINA

v.

Guilford County

No. 08 CRS 87209, 09 CRS 23084

HESHIMU JERMAINE CARTER

Appeal by Defendant from judgments entered 11 August 2009 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 18 August 2010.

Attorney General Roy Cooper, by Assistant Attorney General Teresa L. Townsend, for State

Lynn Norton-Ramirez, for Defendant.

ERVIN, Judge.

Defendant Heshimu Jermaine Carter appeals from judgments sentencing him to a minimum term of ten months and a maximum term of twelve months imprisonment in the custody of the North Carolina Department of Correction based on a jury verdict convicting him of possession of cocaine with the intent to sell or deliver and to a minimum term of twenty months and a maximum term of twenty-four months imprisonment in the custody of the North Carolina Department of Correction based upon a jury verdict convicting him of the sale or delivery of cocaine on the grounds that (1) the trial court erred in admitting evidence that Defendant sold drugs to a confidential informant, (2) Defendant received ineffective assistance of counsel, and (3) the evidence presented at trial was

insufficient to support conviction. After careful consideration of Defendant's arguments, in light of the record and the applicable law, we find no error.

I. Factual Background

A. Substantive Facts

In 2007, Dennis Whitaker agreed to assist the High Point Police Department by participating in controlled purchases of narcotics. In return for his cooperation, Mr. Whitaker was promised that he would not receive an active sentence in connection with certain pending drug charges that also constituted a violation of his probation.

On 12 December 2007, Detectives McFarland and Nordstrum of the High Point Police Department requested Mr. Whitaker's services as a confidential informant. On that date, Detectives McFarland and Nordstrum met with Mr. Whitaker, searched his car and his person, provided him with a recording device and forty dollars in official funds, and instructed him to go to 506-A Vale Street for the purpose of purchasing cocaine. At the Vale Street address, Mr. Whitaker met a woman who told him that there was no crack cocaine at that location; however, the woman offered to take him to another place where he could procure the cocaine that he was seeking.

Mr. Whitaker and the woman then drove to 914 Amos Street, which was four or five blocks from the Vale Street address. At 914 Amos Street, an African-American male offered to sell Mr. Whitaker crack cocaine, but realized that he did not have enough cocaine to make the sale that Mr. Whitaker wanted to effectuate. At that

point, the woman grabbed twenty dollars from Mr. Whitaker's hand. Mr. Whitaker watched the woman walk into the living room, hand the money to Defendant in exchange for crack cocaine, and return with the drugs.

At that point, Mr. Whitaker left the apartment and traveled directly to a predetermined location, where he met Detectives McFarland and Nordstrum. Upon meeting Detectives McFarland and Nordstrum, Mr. Whitaker described his purchase and told the investigating officers that he purchased cocaine from "Mr. Hesh." Detective McFarland showed a single photograph of Defendant to Mr. Whitaker and asked Mr. Whitaker if the man in the picture was the same individual from whom he had just purchased cocaine. In response, Mr. Whitaker confirmed that the cocaine he purchased came from Defendant.

B. Procedural History

On 30 April 2008, a warrant for arrest charging Defendant with possession of cocaine with the intent to sell and deliver cocaine was issued. On 14 July 2008, the Guilford County grand jury returned a bill of indictment charging Defendant with possession of cocaine with intent to sell and deliver. On 6 April 2009, the Guilford County grand jury returned a bill of indictment charging Defendant with the sale and delivery of cocaine. The cases against Defendant came on for trial at the 10 August 2009 session of the Guilford County Superior Court. At trial, Defendant stipulated that the substance obtained by investigating officers from Mr. Whitaker was crack cocaine. The State presented the testimony of

five witnesses: Detectives McFarland and Nordstrum, Mr. Whitaker, and two other High Point police officers. Defendant, on the other hand, did not present any evidence. At the conclusion of the trial, the jury returned a verdict finding Defendant guilty of both charges. After determining that Defendant had accumulated nine prior record points and should be sentenced as a level IV offender, the trial court sentenced Defendant to a minimum term of twenty months and a maximum term of twenty-four months imprisonment in the custody of the North Carolina Department of Correction for the sale and delivery of cocaine and to a consecutive minimum term of ten months and a maximum term of twelve months imprisonment in the custody of the North Carolina Department of Correction based upon his conviction for possessing cocaine with the intent to sell and deliver. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Admissibility of Prior Bad Acts Testimony

First, Defendant contends that the trial court erred by admitting Mr. Whitaker's testimony concerning prior drug purchases that he made from Defendant. Defendant contends that, although Mr. Whitaker's testimony concerning Defendant's prior drug sales was admitted to "show identity of the defendant as the perpetrator of the crime," there were "no unusual facts or particularly similar circumstances" sufficient to justify admission. We conclude, however, that the trial court properly admitted the challenged

evidence for the purpose of establishing Mr. Whitaker's ability to identify Defendant.

N.C. Gen. Stat. § 8C-1, Rule 404(b), provides that evidence of prior crimes or other bad acts, while not admissible to prove character, may "be admissible for other purposes, such as proof of . . . identity." "Rule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Berry*, 356 N.C. 490, 505, 573 S.E.2d 132, 143 (2002) (citing *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990), *cert. denied*, 421 S.E.2d 360, 1992 N.C. LEXIS 569 (1992)). In order for evidence to be admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b), it "must be offered for a proper purpose, must be relevant, must have probative value that is not substantially outweighed by the danger of unfair prejudice to the defendant, and, if requested, must be coupled with a limiting instruction." *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991), *disc. review denied*, 331 N.C. 287, 417 S.E.2d 256 (1992). The purposes for which evidence of prior bad acts can be properly admitted are not limited to those delineated in the rule itself. *State v. Young*, 317 N.C. 396, 412 n.2, 346 S.E.2d 626, 635 n.2 (1986) (citing *State v. Morgan*, 315 N.C. 626, 637, n.2 340 S.E.2d 84, 91 n.2 (1986)). "If [the evidence] is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally

proves the defendant guilty of another crime.'" *State v. McClain*, 240 N.C. 171, 177, 81 S.E.2d 364, 368 (1954) (quoting *State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1 (1939)).

In *State v. Weaver*, 318 N.C. 400, 348 S.E.2d 791 (1986), the Supreme Court upheld the admissibility of testimony detailing a witness' pattern of purchasing stolen tools from the defendant. The witness whose testimony was at issue in *Weaver* had agreed to work as a confidential informant in order to avoid being charged with larceny or possession of stolen goods. *Id.* at 401, 348 S.E.2d at 792. During a controlled buy, the witness purchased stolen tools from the defendant. *Id.* At trial, the State sought to admit testimony concerning the witness' prior purchases of stolen tools from the defendant. *Id.* In upholding the trial court's decision to admit the challenged evidence, the Supreme Court held that "the evidence of prior dealings between [the witness] and the defendant was relevant to the question of [the witness'] certainty in identification of the defendant as the one with whom he dealt." *Id.* at 404, 348 S.E.2d at 794.

Here, as in *Weaver*, the State sought to offer evidence that Mr. Whitaker had previously purchased cocaine from Defendant for the purpose of proving that Mr. Whitaker was capable of identifying Defendant as the person from whom he obtained cocaine at 914 Amos Street. During an extensive *voir dire* examination, Mr. Whitaker testified that he had purchased crack cocaine from Defendant on eight previous occasions. Each of these previous purchases occurred within three years of the purchase that underlay the

charges at issue in this case. In addition, four of the eight purchases were conducted at, or just outside, the residence at 914 Amos Street. Two of the remaining four purchases were conducted near Mr. Whitaker's car, which was, at the time of these purchases, situated less than a half-block from the 914 Amos Street residence; the remaining two purchases occurred inside a residence located approximately four or five blocks from 914 Amos Street. Finally, Mr. Whitaker testified that each of these eight purchases involved direct communication with Defendant instead of being conducted through an intermediary. Even though the trial court indicated, at the conclusion of the *voir dire* examination of Mr. Whitaker, that it would admit testimony concerning all eight of these prior cocaine purchases, Mr. Whitaker only testified before the jury concerning four of them.

Although Mr. Whitaker's testimony did not establish that the eight earlier cocaine purchases were all identical in every respect to the 12 December 2007 purchase, evidence of those purchases was still relevant to the issue of Mr. Whitaker's ability to identify the Defendant. The fact that each of the eight previous purchases occurred without the involvement of an intermediary indicates that Mr. Whitaker interacted directly with Defendant and was, therefore, capable of identifying Defendant as the person who sold him crack cocaine on 12 December 2007. The issue of whether Defendant was the perpetrator of the offenses with which he had been charged was clearly a critical one, given that Defendant's trial counsel asserted in his opening statement that "drugs were sold to Dennis

Whitaker, but what's going to be at issue . . . is whether the drugs were sold by my particular client." Thus, the trial court did not err by admitting Mr. Whitaker's testimony concerning his prior drug purchases from Defendant.

B. Ineffective Assistance of Counsel

Next, Defendant argues that his trial counsel failed to provide him with the effective assistance guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 23 of the North Carolina Constitution because his trial counsel: (1) failed to provide the trial court with case law supporting his request for the exclusion of "other bad acts" evidence; (2) failed to move to suppress, obtain a ruling on his pretrial suppression motion, object during trial, and provide the trial court with legal authority supporting the exclusion of evidence of Mr. Whitaker's pretrial identification of Defendant; (3) failed to object to the admission of hearsay testimony; (4) failed to object to alleged expert testimony; (5) failed to properly challenge the credibility of Detective McFarland; and (6) improperly referred to Defendant's lack of an alibi during his closing argument and failed to object to another improper prosecutorial argument. Although we will address each of Defendant's allegations individually, we conclude that Defendant was not prejudiced by any of the alleged deficiencies in his trial counsel's performance, so that he is not entitled to appellate relief based upon his ineffective assistance claims.

To successfully prove ineffective assistance of counsel, a defendant must satisfy the two-pronged test articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that [counsel's] deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 80 L. Ed. 2d at 693. In order to prove the necessary prejudice, the defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to "undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696, 80 L. Ed. 2d at 699, 104 S. Ct. at 2069. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697, 80 L. Ed. 2d at 699. Ineffective assistance of counsel claims raised 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), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

1. Admission of 404(b) Evidence

According to Defendant, his trial counsel's failure to provide the trial court with legal authority supporting his objection to the admission of evidence of Defendant's prior drug transactions with Mr. Whitaker amounted to deficient representation that prejudiced Defendant. In essence, Defendant alleges that, had Defendant's trial counsel advanced his objection in an appropriate manner, the trial court would have excluded the evidence of these prior drug sales, a development that would have resulted in Defendant's acquittal. We are unable to agree that Defendant is entitled to appellate relief based on this contention.

Prior to ruling on Defendant's objection to the admission of evidence concerning Mr. Whitaker's prior drug transactions with Defendant, the trial court asked whether either party wished to submit any appellate decisions or other authorities for its consideration. Neither the State nor Defendant tendered any legal materials to the trial court in response to this request. Despite criticizing his trial counsel's failure to submit legal materials in support of his objection to the admission of the challenged "other bad acts" evidence, Defendant has failed to cite any decisions that support the exclusion of the testimony in question in his brief on appeal. For that reason, we are unable to discern the nature of the materials that Defendant believes that his trial

counsel should have presented to the trial court and are unwilling to conclude that Defendant's trial counsel provided deficient performance in the absence of some indication that there were supportive materials available that could have been submitted to the trial court. In addition, the record reflects that the trial court "pulled up" some cases and reviewed them prior to rendering a decision, so that the trial court made an informed decision at the time that it admitted the challenged evidence. Finally, as we have already noted, the trial court did not commit any error of law by deciding to admit the disputed "other bad acts" evidence. As a result, at a minimum, we conclude that Defendant was not prejudiced by the manner in which his trial counsel contested the admission of the evidence of Defendant's prior drug sales to Mr. Whitaker.

2. Admission of Identification Evidence

Next, Defendant contends that his trial counsel was ineffective because he failed to move to suppress Defendant's pretrial identification by Mr. Whitaker, failed to obtain a ruling on such a pretrial motion, failed to object to the admission of this identification testimony during the trial, and failed to provide the trial court with legal authorities supporting the exclusion of the evidence of this pretrial identification evidence. According to Defendant, the pretrial identification procedure "[u]ndoubtedly" gave rise to a substantial likelihood of irreparable misidentification, so that, but for his trial counsel's failure to properly object to the admission of evidence relating to the pretrial identification of Defendant by Mr. Whitaker, the

challenged evidence would have been excluded and Defendant would not have been convicted. We disagree.

The record reveals that, prior to trial, Defendant's counsel filed a motion *in limine* seeking the exclusion of evidence of Mr. Whitaker's pretrial identification of Defendant. The trial court deferred ruling on this issue until it actually arose at trial. During the direct examination of Detective McFarland, the State requested a bench conference for the purpose of discussing the admissibility of Mr. Whitaker's pretrial identification of Defendant before Defendant had an opportunity to object. After acknowledging Defendant's objection, the trial court allowed the presentation of evidence that Detective McFarland showed Mr. Whitaker a single photograph of Defendant and that Mr. Whitaker confirmed that the man depicted in the photograph was the same person that sold him crack cocaine.

Where a pretrial identification procedure is so "impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification," the admission of evidence stemming from that identification violates an individual's right to due process. *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983) (citations omitted). Whether a pretrial identification procedure is impermissibly suggestive depends upon the totality of the circumstances. *Id.* at 164, 301 S.E.2d at 95 (citing *Simmons v. United States*, 390 U.S. 377, 19 L. Ed. 2d 1247 (1968)). Even if a pretrial identification procedure is impermissibly suggestive, the witness' identification testimony is still admissible so long as

there is no "substantial likelihood of irreparable misidentification." *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984) (citations omitted).

The factors to be considered in evaluating the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Harris, 308 N.C. at 164, 301 S.E.2d at 95 (citations omitted).

Mr. Whitaker testified that, at the time of the cocaine purchase at 914 Amos Street, he had an unobstructed view of the Defendant. Within thirty minutes after leaving the location at which the purchase occurred, Mr. Whitaker met with Detectives McFarland and Nordstrum at a predetermined location and told them that he had purchased crack cocaine from "Mr. Hesh." At that point, Detective McFarland showed Mr. Whitaker a single photograph of Defendant, leading Mr. Whitaker to identify the man in the picture as the person that had sold him crack cocaine. The available record evidence shows that there was no substantial likelihood that the procedure employed in this instance was impermissibly suggestive or would result in a substantial risk of irreparable misidentification because the picture was shown to Mr. Whitaker almost immediately following his interaction with Defendant and after Mr. Whitaker mentioned Defendant by name. Furthermore, the record evidence suggests that Mr. Whitaker had purchased drugs from Defendant on prior occasions, thus bolstering

his ability to identify Defendant. Mr. Whitaker had ample opportunity to observe the identity of the person from whom he purchased cocaine at 914 Amos Street. For all of these reasons, we do not believe that the procedures utilized in this instance necessitated the exclusion of Detective McFarland's testimony that Mr. Whitaker identified a photograph of Defendant as the individual from whom he purchased cocaine. As a result, we conclude that any failure on the part of Defendant's trial counsel to adequately object to the presentation of evidence concerning Mr. Whitaker's pretrial identification of Defendant did not prejudice Defendant.

3. Hearsay Testimony

Next, Defendant contends that his trial counsel provided him with deficient representation by failing to object to hearsay testimony given by Detective McFarland and by subsequently eliciting hearsay testimony from that same witness. We disagree.

First, Defendant alleges that his trial counsel failed to object to the admission of testimony by Detective McFarland concerning a prior statement of Mr. Whitaker despite the fact that Mr. Whitaker had not testified by the time that the statement in question was admitted into evidence. According to well-established North Carolina law, prior consistent statements are admissible for the purpose of corroborating a witness' trial testimony. *State v. Medley*, 295 N.C. 75, 78, 243 S.E.2d 374, 376 (1978). The only requirement for the admission of such statements is that they be "generally consistent" with the witness' testimony. *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d. 277, 284 (1983) (citation

omitted). It is immaterial whether the prior consistent statement is admitted before or after the witness' testimony. *State v. Joyce*, 97 N.C. App. 464, 470, 389 S.E.2d 136, 140 (citations omitted), *disc. review denied*, 326 N.C. 803, 393 S.E.2d 902 (1990), *cert. denied*, 339 N.C. 619, 454 S.E.2d 263 (1995). After carefully comparing Detective McFarland's testimony concerning Mr. Whitaker's statement with Mr. Whitaker's trial testimony, we conclude that the prior statement at issue here did, in fact, corroborate Mr. Whitaker's subsequent trial testimony and was admissible for corroborative purposes. The fact that evidence of Mr. Whitaker's prior statement was admitted before Mr. Whitaker testified does not render evidence of his prior statement inadmissible. As a result, the failure of Defendant's trial counsel to object to Detective McFarland's testimony concerning Mr. Whitaker's prior statement did not prejudice Defendant.

Second, Defendant contends that his trial counsel provided him with deficient representation by failing to object to Detective McFarland's testimony concerning the contents of an audio recording of the cocaine purchase. On cross-examination, Detective McFarland testified that the audio recording made during the controlled buy was not very clear and that only "general conversation" could be heard. According to Defendant, the admission of this testimony allowed the jury to consider inadmissible hearsay and prejudiced him because "it served to bolster and corroborate Mr. Whitaker's subsequent testimony to the detriment of [Defendant]." On the contrary, however, we conclude that this portion of Detective

McFarland's testimony tended to benefit Defendant because it indicated that Detective McFarland was unable to hear Mr. Whitaker's conversations during the cocaine purchase clearly so that the jury was necessarily forced to rely solely upon Mr. Whitaker's description of the events that occurred at 914 Amos Street in order to return a guilty verdict. The fact that Detective McFarland was unable to testify that the audio recording of the cocaine purchase contained anything other than "general conversation" tended to facilitate, rather than hamper, the implementation of Defendant's strategy of challenging the adequacy of the State's attempt to prove his identity as the other participant in the underlying drug transaction. At an absolute minimum, it is not reasonably probable that the outcome of Defendant's trial would have been different had the evidence in question been excluded. As a result, we conclude that trial counsel's failure to object was not prejudicial to Defendant.

4. "Expert" Testimony

In his fourth argument, Defendant contends that his trial counsel performed deficiently because he failed to object to "expert" opinion testimony by Detectives McFarland and Nordstrum concerning Defendant's "street name." In support of this contention, Defendant argues that the challenged testimony provided a "corroborating [] link between Mr. Whitaker's 'Mr. Hesh'" and Defendant and made a significant contribution to the jury's decision to convict him. We do not believe, however, that the challenged testimony rendered an expert opinion, so that any

failure on the part of Defendant's trial counsel to object did not prejudice Defendant.

Expert testimony is admissible when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" N.C. Gen. Stat. § 8C-1, Rule 702(a). A police officer does not "testify as an expert witness" in the event that he "testifie[s] concerning his personal knowledge" of an individual's known nicknames. *State v. Willis*, 309 N.C. 451, 455, 306 S.E.2d 779, 782 (1983). The record clearly established that both Detectives McFarland and Nordstrum had experience in dealing with confidential informants, such as Mr. Whitaker, and possessed extensive knowledge of the names of local drug dealers. The testimony of Detectives McFarland and Nordstrum to the effect that Defendant went by the name "Hesh" was not expert opinion testimony. Instead, it amounted to a statement of ordinary factual information about which they possessed the required personal knowledge. Thus, because the testimony concerning Defendant's street name was admissible, trial counsel's failure to object did not prejudice Defendant.

5. Cross-Examination of Detective McFarland

Next, Defendant argues that his trial counsel's cross-examination of Detective McFarland was deficient because he failed to attack the witness' apparent "lack of knowledge of Mr. Whitaker's pending crimes." Essentially, Defendant contends that, had his trial counsel exploited this "lack of knowledge," Detective

McFarland's credibility would have been undermined and Defendant would have been acquitted. Once again, we disagree.

Assuming, for purposes of discussion, that Defendant's trial counsel had attacked Detective McFarland's recollection of Mr. Whitaker's "pending crimes," the benefit to be gained from undermining the credibility of Detective McFarland in this way would have been minimal. The parties stipulated that the substance Mr. Whitaker purchased was crack cocaine. Thus, the only contested issue at trial was whether Defendant was the individual who sold Mr. Whitaker crack cocaine. The critical evidence upon which the State based its attempt to obtain Defendant's conviction was Mr. Whitaker's testimony that he purchased crack cocaine from Defendant. The extent to which Defendant successfully demonstrated that Detective McFarland lacked complete knowledge of Defendant's "pending crimes" would have had little or no bearing on the jury's evaluation of Mr. Whitaker's credibility. Thus, we conclude that the failure of Defendant's trial counsel to exploit Detective McFarland's recollection of Mr. Whitaker's "pending crimes" did not prejudice Defendant.

6. Closing Arguments

Finally, Defendant argues that his trial counsel provided him with deficient representation because he mentioned the issue of Defendant's alibi, or lack thereof, during his closing argument. According to Defendant, had his trial counsel not made this comment, the outcome at Defendant's trial would have been different. We do not find Defendant's argument persuasive.

During the State's closing argument, the prosecutor told the jury that they "did not hear any alibi for the defendant." An objection lodged by Defendant's counsel was sustained, and the trial court immediately gave a curative instruction to the jury. Later, Defendant's trial counsel briefly revisited the prosecutor's assertion. He said, "[n]ow, [the prosecutor] started talking about the defendant with some sort of alibi. Again, that doesn't prove anything in this case." Defendant contends that the making of this statement constituted deficient representation because the trial court sustained his earlier objection and instructed the jury to disregard the prosecutor's statement, so that his trial counsel's decision to mention the absence of alibi evidence in his own final argument inevitably led the jury to improperly treat Defendant's decision not to testify as an admission of guilt.

On appeal, "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002). Even though the trial court sustained Defendant's objection to the prosecutor's comment and instructed the jury to disregard it, the subject of Defendant's lack of alibi evidence had been broached in the jury's presence. Instead of ignoring this fact, trial counsel apparently attempted to further repair the damage by emphasizing the point made in the trial court's curative instruction. Even if we were to question this decision, we cannot find that the conduct

of Defendant's trial counsel prejudiced Defendant in light of the overwhelming evidence of his guilt.

In addition, Defendant contends that his trial counsel erroneously failed to object to a prosecutorial statement made during the State's closing argument to the effect that defense counsel's job was to "cloud and confuse what's going on here." He alleges that such a statement was "improper" and only served to "demean[] the role of defense counsel and portray[] him as [a] dishonest trickster." Assuming, without deciding, that the prosecutor's statement was improper, we conclude that it did not, in light of the overwhelming evidence of guilt, prejudice Defendant.

7. Sufficiency of the Evidence

Finally, Defendant argues that the trial court erred by denying his motion to dismiss both charges at the close of the State's evidence on the grounds that the testimony of the confidential informant, standing alone, was insufficient to support his convictions. More specifically, Defendant argues that, had his trial counsel successfully obtained the exclusion of the prior drug sales and the other challenged portions of the testimony of Detectives McFarland and Nordstrum, the only evidence before the jury would have been the testimony of a confidential informant seeking to escape his own pending drug charges. According to Defendant, this evidence did not suffice to support his convictions. We disagree.

When a defendant moves for dismissal, the trial court is to determine only whether there

is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Whether evidence presented constitutes substantial evidence is a question of law for the court. *Id.* at 66, 296 S.E.2d at 652. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

State v. Vause, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). In ruling upon a dismissal motion predicated on the alleged insufficiency of the evidence, the trial court is to consider the evidence in the light most favorable to the State. *Id.* at 237, 400 S.E.2d at 61 (citing *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

The elements of felonious possession with intent to sell a controlled substance are (1) possession of a substance; (2) the substance must be a controlled substance; and (3) an intent to sell the controlled substance. *State v. Fletcher*, 92 N.C. App. 50, 55, 373 S.E.2d 681, 685 (1988) (citing *State v. Carey*, 59 N.C. App. 99, 116, 296 S.E.2d 473, 483-84 (1982)). The only elements at issue in this case are the first and third, given that the parties stipulated that the substance Mr. Whitaker purchased was, in fact, crack cocaine, a schedule II controlled substance. For that reason, in order to withstand a dismissal motion, the State must have presented substantial evidence that Defendant possessed the crack cocaine and that he had the intent to sell it.

Moreover, "[t]he offense of [sale or] delivery [of a controlled substance] under [N.C. Gen. Stat. §] 90-95(a)(1) is

complete when there has been a transfer of a controlled substance.” *State v. Pevia*, 56 N.C. App. 384, 387, 289 S.E.2d 135, 137 (citing *State v. Dietz*, 289 N.C. 488, 499, 223 S.E.2d 357, 364 (1976)), *cert. denied*, 306 N.C. 391, 294 S.E.2d 218 (1982). For that reason, the elements of the sale or delivery of a controlled substance are that the defendant (1) transferred (2) a controlled substance (3) to a third person. Once again, since Defendant stipulated that the substance that Mr. Whitaker obtained was crack cocaine, the only elements at issue for purposes of Defendant’s challenge to the sufficiency of the evidence to support his conviction are his identity as the perpetrator and whether a transfer to a third person occurred.

“A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use.” *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002) (citing *State v. Crawford*, 104 N.C. App. 591, 600, 410 S.E.2d 499, 504 (1991)). In order to prove the necessary intent, “[t]he State may rely upon ordinary circumstantial evidence.” *Fletcher*, 92 N.C. App. at 58, 373 S.E.2d at 686 (citing *Casey*, 59 N.C. App. at 118, 296 S.E.2d at 484). The evidence presented at trial, taken in the light most favorable to the State, was sufficient to prove that Defendant both possessed and had the intent to sell the crack cocaine that Mr. Whitaker delivered to Detective McFarland. Furthermore, the same evidence sufficed to support a finding that Defendant transferred a

controlled substance to Mr. Whitaker. Mr. Whitaker testified that, after entering the residence at 914 Amos Street, he witnessed a woman take money from his hand, walk over to Defendant, exchange that money for a bag of crack cocaine, and bring the crack cocaine to him. As a result, Mr. Whitaker's testimony was sufficient to support both of Defendant's convictions. The credibility of Mr. Whitaker's account of his transaction with Defendant was an issue properly decided by the jury rather than the trial court. As a result, we conclude that the State's evidence was sufficient to support the conclusion that Defendant possessed crack cocaine with the intent to sell or deliver it and that he sold the crack cocaine in question to Mr. Whitaker.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by admitting Mr. Whitaker's testimony concerning his prior drug transactions with Defendant; that Defendant is not entitled to appellate relief based on the allegedly deficient performance of his trial counsel, with the allegedly deficient acts considered separately or in conjunction with one another;¹ and that the record contains sufficient evidence

¹ In addition to the alleged instances of deficient performance discussed in the text, Defendant also challenges the failure of his trial counsel to seek dismissal of the charges that had been lodged against him on the grounds that the four and a half month delay between the date of the alleged drug transaction and the date of Defendant's arrest violated his right to a speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the North Carolina Constitution. The right to a speedy trial does not, however, attach until the point in time at which the defendant is arrested, *United States v. Marion*, 404 U.S. 307, 320, 30 L. Ed. 2d 468, 479

to support Defendant's convictions. Therefore, since there were no errors of law in the proceedings leading to the entry of the trial court's judgments, those judgments should remain undisturbed.

NO ERROR.

Judges McGEE and STROUD concur.

Report per Rule 30(e).

(1971) (stating that "it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision" of the state and federal constitution). Instead, the primary constitutional protection from undue pre-indictment or pre-arrest delay originates from the due process guarantee found in the Fourteenth Amendment to the United States Constitution and in Article I, Section 23 of the North Carolina Constitution, *United States v. Lovasco*, 431 U.S. 783, 790, 52 L. Ed. 2d 752, 759 (1977), which utilizes a much more stringent standard for establishing a violation than that applicable under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the North Carolina Constitution. As a result of the fact that Defendant's reliance on the speedy trial guarantees of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the North Carolina Constitution is misplaced, he is not entitled to relief because his trial counsel failed to file a motion seeking the dismissal of the charges against him on speedy trial grounds.