NO. COA12-1007
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

STATE OF NORTH CAROLINA

v. Hoke County
Nos. 10 CRS 51073
10 CRS 51074

LEWIS ELLERBEE, III,
Defendant.

Appeal by defendant from judgment entered 30 August 2011 by Judge James G. Bell in Hoke County Superior Court. Heard in the Court of Appeals 13 February 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

Winifred H. Dillon for defendant-appellant.

GEER, Judge.

Defendant Lewis Ellerbee, III appeals from the judgment entered on his convictions of selling cocaine, maintaining a vehicle to keep or sell a controlled substance, maintaining a dwelling to keep or sell a controlled substance, altering or destroying criminal evidence, and possession of drug paraphernalia. On appeal, defendant does not challenge his

convictions for selling cocaine, maintaining a dwelling, or possession of drug paraphernalia. He contends only that the trial court erred in failing to grant his motion to dismiss the two remaining charges.

We hold that the State presented sufficient evidence to support the charge of altering or destroying evidence when it showed that (1) defendant put a substance in his mouth and swallowed it as officers were trying to arrest him, (2) a tic tac container that had held a rock-like substance before the arrest was empty after the arrest, and (3) defendant used tic tac containers to store and transport cocaine. However, we agree with defendant that the trial court erred in failing to dismiss the charge of keeping and maintaining a vehicle -- a Dodge Caravan -- for the keeping or selling of cocaine because the State presented evidence of only a single drug transaction in the van, and the items found in the van were not sufficient to show that defendant was maintaining the van to keep or sell cocaine. We, therefore, reverse as to that charge. Since the trial court consolidated all the charges into a single judgment, we must remand for resentencing.

Facts

The State's evidence tended to show the following facts. In 2010, George Dobbins began working as a paid confidential

informant for Detective David Hayworth of the Raeford City Police Department doing controlled narcotics buys. In that capacity, Mr. Dobbins told Detective Hayworth that defendant was someone from whom he could purchase narcotics.

On 25 May 2010, Detective Hayworth and Detective Shelly Ray of the Hoke County Sheriff's Department met Mr. Dobbins at a church near his residence in preparation for a drug buy that Mr. Dobbins had arranged with defendant. Detective Hayworth told Mr. Dobbins that he would be purchasing $100.00 worth of crack cocaine. The detectives searched Mr. Dobbins, provided him with an audio and video recording device concealed in a keychain, and gave him $100.00 in cash. The detectives dropped Mr. Dobbins off in a Bojangles parking lot, and Mr. Dobbins walked to an adjacent Food Lion grocery store.

The detectives followed Mr. Dobbins to the Food Lion parking lot where they observed him walk to the entrance of the Food Lion and wait for defendant. Defendant ultimately arrived in a red Dodge Caravan minivan. Mr. Dobbins got into the passenger side of the van, he gave defendant $100.00, and defendant passed Mr. Dobbins a substance wrapped in the corner of a sandwich bag.

While Mr. Dobbins was in the car, he noticed that defendant had a tic tac container holding what appeared to be a rock of

crack cocaine. After defendant dropped Mr. Dobbins off at the entrance to the Food Lion parking lot, Mr. Dobbins walked back across the street toward the Bojangles. Mr. Dobbins called Detective Hayworth to let him know the buy was successful, and Detective Hayworth ordered other officers to stop and arrest defendant in the minivan.

Two other officers stopped defendant's vehicle as it drove away from the Food Lion parking lot. As they were pulling defendant over, both officers saw defendant lift his hand up to his face as if he was swallowing something. When defendant would not get out of the car, one of the officers tried to grab defendant's shoulder to pull him out of the car, but defendant began to struggle. As multiple officers wrestled defendant to the ground, they saw defendant was chewing a white pasty substance. Defendant ignored commands to spit out what he had in his mouth and would not open his mouth.

A search of defendant's person incident to the arrest uncovered $537.92. In the minivan, officers found three cell phones and $100.00 in cash with serial numbers that matched those of the bills given to the confidential informant. Officers also found an empty tic tac container.

Detective Hayworth obtained and had executed a warrant to search defendant's home. When officers arrived at the house,

there was one individual inside the house with a crack pipe, while another person also with a crack pipe drove up to the house. During the search of defendant's residence, officers seized plastic baggies, latex gloves, both single and double edged razor blades, various types of surveillance equipment used for monitoring the exterior and interior of the house, police scanners, a marijuana cigarette, brillo pads, an empty tic tac container, white colored powder in a capped bottle, crack pipes, and a receipt made out in defendant's name. In addition, officers seized a business card with defendant's name on it and a probation officer's business card with defendant's name on it.

After the minivan was impounded and a search warrant obtained, officers conducted a further search of the minivan and found defendant's wallet with his driver's license, an EBT card in the name of Julius Blue, a receipt with defendant's name on it, and other documents with defendant's name on them that were not seized. The minivan was titled in the name of William Hailey Ellerbee at a Sanford address.

Defendant was indicted for maintaining a vehicle to keep or sell a controlled substance, maintaining a dwelling place to keep or sell a controlled substance, sale or delivery of a controlled substance, altering or destroying criminal evidence, possession of drug paraphernalia, and resisting a public

officer. At trial, the State presented evidence that during searches of defendant's house subsequent to two previous arrests, officers seized tic tac containers containing crack cocaine. One of the State's witnesses also testified that when he purchased crack cocaine from defendant, defendant transported the cocaine in tic tac containers. The substance that defendant sold Mr. Dobbins was sent to the State Bureau of Investigation for testing, and it was determined to be .8 grams of a Schedule II cocaine-based controlled substance.

The jury convicted defendant of maintaining a vehicle to keep or sell a controlled substance, maintaining a dwelling place to keep or sell a controlled substance, sale or delivery of a controlled substance, destroying criminal evidence, and possession of drug paraphernalia. The jury found defendant not guilty of resisting a public officer. The trial court consolidated all of the charges into a single judgment and sentenced defendant to a presumptive-range term of 17 to 20 months imprisonment. Defendant timely appealed to this Court.

Discussion

Defendant contends on appeal that the trial court erred in denying his motion to dismiss the charges of destruction of evidence in violation of N.C. Gen. Stat. § 14-221.1 (2011) and keeping and maintaining a vehicle for the purpose of selling

controlled substances in violation of N.C. Gen. Stat. § 90-108(a)(7) (2011). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). The question for this Court is "'whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

"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). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

With respect to the charge of altering or destroying evidence, N.C. Gen. Stat. § 14-221.1 provides: "[A]ny person who alters, destroys, or steals any evidence relevant to any criminal offense or court proceeding shall be punished as a

Class I felon." The statute defines evidence as "any article or document in the possession of a law-enforcement officer or officer of the General Court of Justice being retained for the purpose of being introduced in evidence or having been introduced in evidence or being preserved as evidence." *Id.*

Defendant contends that because the State failed to prove that he swallowed a controlled substance, it could not prove that he destroyed anything that would be "retained for the purpose of being introduced in evidence." *Id.* The statute, however, prohibits the destruction of "*any evidence relevant to any criminal offense*." *Id.* (emphasis added).

Based on that language, our Supreme Court already rejected defendant's argument in *State v. Tate*, 300 N.C. 180, 265 S.E.2d 223 (1980). The defendant in *Tate* had been charged with destroying evidence in violation of N.C. Gen. Stat. § 14-221.1. 300 N.C. at 181, 265 S.E.2d at 224. Prior to its destruction, the material had tested positive for marijuana. *Id.* The trial court, however, granted the defendant's motion to suppress the test results as being unreliable. *Id.* at 184, 265 S.E.2d at 226.

The Supreme Court upheld the trial court's order suppressing the test results, leaving no evidence as to the nature of the destroyed material. *Id.* Nevertheless, the Court

held that the case could continue based on the language of the statute: the testing was "not a determination of the relevancy of this particular evidence when you consider that the statute makes it illegal to destroy evidence *no matter what that evidence is (a green vegetable material or actually marijuana) so long as it is 'evidence relevant to any criminal offense.'*" *Id.* at 185, 265 S.E.2d at 226 (emphasis added) (quoting N.C. Gen. Stat. § 14-221.1 (1997 Cum. Supp.)).

Thus, under *Tate*, it is immaterial that the State was unable to test the substance defendant swallowed. A reasonable juror could conclude that defendant swallowed the rock Mr. Dobbins saw in the tic tac container when purchasing the $100.00 worth of cocaine. The rock was in the container during the transaction, but when defendant was arrested moments later, the tic tac container was empty. The State presented evidence as well that defendant used tic tac containers to transport and store cocaine and that, moments before, defendant had possessed $100.00 worth of cocaine. Under these circumstances, a reasonable jury could find beyond a reasonable doubt that the substance defendant ingested was relevant to some criminal offense. *Tate* controls: we hold the trial court properly denied defendant's motion to dismiss the charge of destruction of evidence.

Turning to the second charge challenged on appeal, N.C. Gen. Stat. § 90-108(a)(7), in pertinent part, makes it illegal "[t]o knowingly keep or maintain any . . . vehicle . . . which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article[.]" Regarding the sufficiency of the evidence of a violation of this statute, this Court has explained:

> The statute thus prohibits the keeping or maintaining of a vehicle only when it is used for "keeping or selling" controlled substances. As stated by our Supreme Court in *State v. Mitchell*, *the word "'[k]eep' . . . denotes not just possession, but possession that occurs over a duration of time*." *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 30 (1994). Thus, the fact "[t]hat an individual within a vehicle possesses marijuana on one occasion cannot establish . . . the vehicle is 'used for keeping' marijuana; nor can one marijuana cigarette found within the car establish that element." *Id.* at 33, 442 S.E.2d at 30. *Likewise, the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance*. In this case, the State presented no evidence in addition to Defendant having been seated in a vehicle when the cocaine purchase occurred. As such, the trial court erred by failing to dismiss the charge of keeping and/or maintaining a motor vehicle for the sale and/or delivery of cocaine.

State v. Dickerson, 152 N.C. App. 714, 716-17, 568 S.E.2d 281, 282 (2002) (emphasis added).

Here, the State presented evidence of only a single drug transaction occurring in the Dodge Caravan minivan. The State presented evidence that another witness had purchased crack cocaine from defendant while in a vehicle driven by defendant, but the State presented no evidence identifying whether that particular vehicle was the minivan or some other car. Although Mr. Dobbins testified that every time he saw defendant, he was driving the minivan, Mr. Dobbins did not testify whether defendant was, on those occasions, using the minivan in connection with drug transactions. In addition, the contents of the minivan -- including three cell phones, an empty tic tac container, and the $100.00 from Mr. Dobbins -- are not sufficient additional evidence of use of the minivan over a period of time for drug transactions to take this case outside the rule set out in *Mitchell* and *Dickerson*. *See also State v. Lane*, 163 N.C. App. 495, 500, 594 S.E.2d 107, 111 (2004) ("The evidence in the case before us does not indicate possession of cocaine in the vehicle that occurred over a duration of time, nor is there evidence that defendant had used the vehicle on a prior occasion to sell cocaine.").

The State, however, points to *State v. Calvino*, 179 N.C. App. 219, 632 S.E.2d 839 (2006). In *Calvino*, the defendant acknowledged that he owned the van, but argued, in defense, that the "primary use" of the van was for his construction business and not for drugs. *Id.* at 222, 632 S.E.2d at 842. Further, an informant testified that he had sold the defendant cocaine on two occasions with the defendant requiring the informant to get into the van. *Id.* at 223, 632 S.E.2d at 842-43. Here, the evidence did not include multiple transactions, there was no evidence defendant owned the van, and there was no possible implicit admission that one of the uses for the van was to sell cocaine.

In short, the State simply did not elicit from its witnesses the evidence needed to show that defendant kept or maintained the Dodge Caravan minivan for the purpose of keeping or selling controlled substances. After considering the totality of the circumstances, we hold that the trial court erred in failing to dismiss this charge and, therefore, reverse as to that charge. Because the trial court consolidated all of the convictions into a single judgment, we must remand for resentencing.

No error in part; reversed and remanded in part.

Judges STEELMAN and ROBERT N. HUNTER, JR. concur.

Report per Rule 30(e).