NO. COA12-23
NORTH CAROLINA COURT OF APPEALS

Filed: 16 October 2012

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 09 CRS 225452;
10 CRS 64271

RAMONE DANGELO CUNNINGHAM

Appeal by Defendant from judgment entered 24 May 2011 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 August 2012.

Attorney General Roy Cooper, by Assistant Attorney General Scott K. Beaver, for the State.

Michael E. Casterline, for Defendant.

BEASLEY, Judge.

Ramone Dangelo Cunningham (Defendant) appeals from judgment entered on his conviction for felony possession of cocaine. For the following reasons, we find no error.

On 26 May 2009, Detectives Hetrick and Shipman of the Charlotte-Mecklenburg Police Department set up surveillance across the street from Breakroom Pool Hall, investigating a tip from a confidential informant (CI) that Adrian McCorey was known

to sell drugs in the parking lot of the pool hall. The detectives observed McCorey loitering in the parking lot of the pool hall with Ramone Cunningham (Defendant). Detectives Hetrick and Shipman reported seeing Defendant toss a small, white object on the ground near the back of a nearby vehicle. Thereafter, investigating officers found a small bag containing cocaine near the back of the vehicle, in a location consistent with where they observed Defendant toss the object. Subsequently, Defendant was arrested and indicted for possession with intent to sell or deliver cocaine.

Defendant filed and the trial court denied motions requesting the trial court to compel the State to release the identity of the CI. Defendant was convicted of possession of cocaine and having attained habitual felon status. For these convictions, Defendant was sentenced to between 133 and 169 months imprisonment. From this judgment, Defendant filed notice of appeal.

Defendant first argues that the trial court erred in failing to compel the State to divulge the identity of the CI. Specifically, Defendant contends that the CI could have provided favorable testimony for his defense and that, pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), the State is

required to disclose exculpatory evidence. In *Brady*, the United States Supreme Court determined that "[a]n accused has a constitutional right to disclosure of evidence that would tend to exculpate him." *State v. McEachern,* 114 N.C. App. 218, 222, 441 S.E.2d 574, 576 (1994) (citing *Brady,* 373 U.S. at 87, 10 L. Ed. 2d at 218).

"To establish a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *State v. McNeil*, 155 N.C. App. 540, 542, 574 S.E.2d 145, 147 (2002) (citation omitted). Although "[m]ateriality does not require a demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal[,]" a defendant must establish materiality by "show[ing] that the government's suppression of evidence would undermine confidence in the outcome of the trial." *State v. Williams*, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008) (citation and quotation marks omitted). Accordingly, "[e]vidence is considered material only if there is a reasonable probability of a different result had the evidence been disclosed to the defense." *McNeil*, 155 N.C.

App. at 542, 574 S.E.2d at 147 (citation and internal quotation marks omitted).

Defendant argues that the State had a duty to disclose the identity of the CI because the CI could have testified that he had never seen Defendant, and did not know Defendant. Defendant claims that this evidence would be favorable to his defense because it would indicate that Defendant is not involved in McCorey's drug dealing activities. Defendant contends that the State committed a *Brady* violation because (1) the State suppressed the identity of the CI by objecting to Defendant's motion seeking the information; (2) the CI could provide evidence that would be favorable to Defendant because it would demonstrate that Defendant is not involved in McCorey's drug dealing activities; and (3) the evidence would have been material to demonstrating that Defendant was not involved in drug dealing. Defendant cites *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002) for the proposition that the State must disclose identities of informants where there is a reasonable probability that Defendant could have interviewed the informants and uncovered "information [that] could have swayed the jury to reach a different outcome." *Id.* at 252, 559 S.E.2d at 767. In *Canady*, the informants whose identities were suppressed by the

State had given the State the names of five individuals who were purported to be involved in a murder case. *Id.* The Court determined that the defendant in *Canady* could have used the information to investigate possible alternative suspects, thereby casting doubt in the minds of the jurors. *Id.*

Here, there is no such reasonable probability that the CI would provide information that could alter the outcome of Defendant's trial. Even assuming, *arguendo*, that the CI would testify that he had never seen Defendant before, there is no reason to believe that information would lead to a different verdict. While such evidence could rebut the theory that Defendant was involved in *selling* drugs with McCorey, the jury convicted Defendant of *possession* of a controlled subject, as opposed to trafficking. In order to establish possession of a controlled substance, the State must only prove that Defendant "ha[d] both the power and intent to control its disposition or use." *State v. Tisdale*, 153 N.C. App. 294, 297, 569 S.E.2d 680, 682 (2002). Defendant's argument is overruled.

Defendant next argues that the trial court erred in denying his motion to dismiss where the evidence presented by the State was inherently incredible and contradictory. "The denial of a motion to dismiss for insufficient evidence is a question of

law, which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Thaggard*, 168 N.C. App. 263, 280-81, 608 S.E.2d 774, 786 (2005) (citation and quotation marks omitted). Defendant contends that the State's evidence was contradictory because Detectives Hetrick and Shipman first testified that they could not positively identify the object thrown by Defendant in the pool hall parking lot, but later testified that they were certain that Defendant possessed the bag of cocaine recovered from the ground. Defendant further argues that it would be impossible for the detectives to observe Defendant tossing the bag of cocaine and to then identify the recovered cocaine as the object that was thrown.

This Court has determined that

> [e]vidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. If substantial evidence, whether direct, circumstantial, or both, supports a finding that the offense charged has been committed and that the

> defendant committed it, the motion to dismiss should be denied and the case goes to the jury.

Id. (citations omitted). Furthermore, "[i]n considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *Id.* (citations omitted). Defendant's argument that Detectives Hetrick's and Shipman's testimonies were contradictory and thus his motion to dismiss should have been granted is without merit. Both detectives stated that they are certain that the bag of cocaine recovered from the parking lot is the same object that they saw in Defendant's possession. Also, the detectives stated that Defendant tossed the object onto the ground in the parking lot in a location consistent with where the bag of cocaine was recovered. When considered in the light most favorable to the State, this evidence is sufficient to allow a reasonable juror to infer that Defendant possessed the bag of cocaine.

Although the jury is typically charged with weighing the credibility of evidence so long as substantial evidence exists, this rule does not apply "where the testimony is inherently incredible and in conflict with the physical conditions established by the State's own evidence." *State v. Begley*, 72 N.C. App. 37, 43, 323 S.E.2d 56, 60 (1984). Defendant points to

State v. Miller, 270 N.C. 726, 154 S.E.2d 902 (1967), where witness testimony was deemed inherently incredible when the witness observed the defendant at night from a distance of at least 286 feet.

We find the instant case to be more analogous to *State v. Brewer*, 328 N.C. 515, 402 S.E.2d 380 (1991), than to *Miller*. The *Brewer* Court determined that the testimony of a locomotive engineer driving a train at the time of a collision with the defendant's car "was not so inherently incredible as to require the judge to take the case from the jury" when the engineer, who was a half mile away, claimed to have witnessed the defendant drive a car onto railroad tracks then slowly back the vehicle up so that the front seat was centered over the tracks before exiting the vehicle, leaving the passenger to be struck and killed by the oncoming train. *Id.* at 518-20, 402 S.E.2d at 383-84.

Here, Detectives Shipman and Hetricks observations occurred during daylight hours from a distance of 50 yards or less and both detectives testified that their view was not obstructed or compromised in any way. As a marked patrol car approached Defendant and McCorey, Detective Hetrick was driving his vehicle behind the patrol car. He saw Defendant toss an object, which

he described as round, white, and small, but bigger than a quarter, toward the rear tire of a nearby vehicle. Detective Shipman was positioned across the street from the pool hall, at a distance of approximately forty or fifty yards and observed Defendant toss an object to the ground toward the rear of the nearby vehicle. Later, investigators discovered a bag of cocaine, the only such bag in the case, in a location consistent with the description offered by the detectives. Based on the detectives' testimonies and the physical evidence provided by the State, we cannot say that the detectives' observations are inherently incredible. Accordingly, the trial court properly denied Defendant's motion to dismiss, leaving the jury to weigh the evidence.

Defendant next argues that he is entitled to a new sentencing hearing because the trial court incorrectly calculated his prior record level, resulting in an erroneous sentence. Defendant claims that his prior conviction of a federal firearms charge should have been categorized as a Class I felony, rather than a Class G felony as the trial court determined. We disagree.

In a sentencing hearing, a defendant's prior record level is "determined by calculating the sum of the points assigned to

each of the offender's prior convictions[.]" *State v. Burgess*, ___ N.C. App. ___, ___, 715 S.E.2d 867, 869 (2011) (citation omitted). The record level is then used to determine a defendant's sentence. *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). If a defendant has a prior felony conviction from a jurisdiction other than North Carolina, the conviction is typically classified as a Class I felony. *Burgess*, ___ N.C. App. at ___, 715 S.E.2d at 869. However, "'[i]f the State proves by the preponderance of the evidence that an offense classified as . . . a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.'" *Id.* (quoting N.C. Gen. Stat. § 15A-1340.14(e) (2011)) (citation omitted).

"The trial court's assignment of a prior record level is a conclusion of law which we review *de novo*." *State v. Wright*, ___ N.C. App. ___, ___, 708 S.E.2d 112, 125, *disc. review denied*, 365 N.C. 200, 710 S.E.2d 9 (2011) (internal quotation marks omitted). "Whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state

offense to those of the North Carolina offense." *Burgess*, ___ N.C. App. at ___, 715 S.E.2d at 870 (citation omitted). This Court has determined that the State has the burden of demonstrating the substantial similarity of an out-of-state conviction to a North Carolina crime, and that copies of the relevant statutes can serve as evidence. *State v. Rich*, 130 N.C. App. 113, 117, 502 S.E.2d 49, 52 (1998).

Defendant was convicted in 2005 of a federal charge under 18 U.S.C. 922(g)(1): Convicted Felon in Possession of a Firearm and/or Ammunition. The State provided copies of the relevant federal statute and analogous North Carolina statute to the trial court. Thereafter, the trial court relied upon these statute copies to conclude that the federal firearm charge was substantially similar to North Carolina's charge of possession of a firearm by a felon and that the prior conviction constituted a Class G felony. Although the State consented to a Class I classification,

> the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question . . . to be resolved by the trial court, and stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.

Wright, ___ N.C. App. at ___, 708 S.E.2d at 125 (citation

omitted).

Although the record does not reveal the trial court's analysis of the relevant statutes, the trial court requested copies of the federal statute and the North Carolina statute for the purpose of determining Defendant's prior record level. Pursuant to N.C. Gen. Stat. § 15A-1340.14(f)(4) (2011), a prior conviction can be proven by any method "found by the court to be reliable" and certainly comparing the relevant statutes would be an appropriately reliable method for the trial court to employ. The federal statute under which Defendant was convicted provides that it is unlawful for any person who has been convicted of "a crime punishable by imprisonment for a term exceeding one year" to possess any firearm or ammunition in interstate commerce. 18 U.S.C. 922(g)(1) (2011). The analogous North Carolina statute provides that "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care or control any firearm[.]" N.C. Gen. Stat. § 14-415.1(a) (2011). In North Carolina, a felony is defined, in part, as an offense which could warrant imprisonment. N.C. Gen. Stat. § 14-1 (2011). Therefore, a person convicted of a crime resulting in imprisonment for over a year must be a felon in North Carolina. Accordingly, we find that the statutes are

substantially similar and Defendant is therefore not entitled to a new sentencing hearing.

Defendant's final argument is that his conviction for having attained habitual felon status should be reversed because his conviction for the underlying offense, cocaine possession, was the result of the preceding errors. Because Defendant's earlier arguments have no merit, his habitual felon status conviction is likewise affirmed.

No Error.

Judges HUNTER, Robert C. and GEER concur.

Report per Rule 30(e).