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NO. COA13-122
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v.	Brunswick County
	Nos. 11 CRS 3477
ERSKIN HOWARD MOODY,	11 CRS 53615
Defendant.	11 CRS 53616

Appeal by defendant from judgments entered 27 September 2012 by Judge Thomas H. Lock in Brunswick County Superior Court. Heard in the Court of Appeals 29 October 2013.

Attorney General Roy Cooper, by Assistant Attorney General Ann W. Matthews, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kathleen M. Joyce, for defendant-appellant.

GEER, Judge.

Defendant Erskin Howard Moody appeals from judgments entered based upon his conviction for trafficking in an opium compound or derivative, selling hydrocodone, and possession of hydrocodone. Defendant primarily contends on appeal that a videotape of the drug buy and still photographs taken from that videotape were admitted without proper foundation. However,

even assuming without deciding that the evidence should have been excluded, defendant has failed to show sufficient prejudice given the totality of the evidence against defendant.

Facts

The State's evidence tended to show the following facts. On 27 May 2011, narcotics investigators with the Brunswick County Sheriff's Office and the Shallotte Police Department set up a "controlled buy," during which George Kirby, a confidential informant, would purchase Lorcet tablets from defendant. Before Kirby met defendant at the Hill's Shopping Center parking lot, officers searched Kirby and his vehicle, gave Kirby a camera with full audio and video, and supplied Kirby with bills to be used in the controlled buy. Kirby then drove his car to the shopping center parking lot, followed by officers who set up surveillance of the parking lot.

When defendant arrived in his truck, Kirby walked up to the truck and purchased 17 Lorcet pills from defendant. After completing the transaction, Kirby and defendant returned to their respective vehicles, and both vehicles exited the parking lot. Kirby drove to a predetermined location where he turned over the pills and recording equipment to the officers.

The State Bureau of Investigation Crime Lab confirmed the tablets purchased from defendant contained hydrocodone, a

Schedule III preparation of an opium derivative, and the weight of the tablets was 13.85 grams. Officers then notified the Department of Revenue that defendant had received money in exchange for the pills, and a tax bill was sent to defendant.

Defendant went to the Shallotte Police Department to inquire about the tax bill he had received for the sale of illegal narcotics. An officer informed defendant that the tax bill was generated after the police notified the Department of Revenue that a police informant had purchased from defendant four or more grams of an opium derivative that did not have tax stamps affixed. Defendant told the police that "he's not a drug dealer; he just sold his pills to help pay the bills."

When the State sought to introduce the surveillance video and four photograph stills from the video during Kirby's testimony, defendant objected on the grounds that the State had not laid a proper foundation. After the objection, Kirby testified that he had observed the video of the transaction; that the photos and video fairly and accurately depicted what he observed during the transaction; that the photos and video did not appear to have been changed or altered; and that they would aid in his testimony. The trial court overruled defendant's objections and admitted the surveillance video and photos into evidence.

The jury found defendant guilty of trafficking by possession of four grams or more of an opium compound or derivative, selling hydrocodone, and possession of hydrocodone. The trial court sentenced defendant to 70 to 84 months imprisonment for the trafficking conviction. The trial court consolidated the two remaining charges into a six- to eight-month sentence, suspended the sentence, and placed defendant on supervised probation for 30 months to be served following the active sentence. Defendant timely appealed to this Court.

Discussion

Defendant first contends that the trial court committed reversible error by admitting the videotape and still photographs into evidence because the State failed to lay a proper foundation for their admission. Generally, the rules governing the admissibility of photographs apply to videotapes. *State v. Strickland*, 276 N.C. 253, 258, 173 S.E.2d 129, 132 (1970). Videotapes may be admissible for illustrative and substantive purposes upon the laying of a proper foundation as noted in N.C. Gen. Stat. § 8-97 (2011), which states:

Any party may introduce a photograph, video tape [sic], motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation

solely for the purpose of illustrating the testimony of a witness.

On the other hand, this Court has held that "when a videotape depicts conduct of a defendant in a criminal case, its potential impact requires the trial judge to inquire carefully into its authenticity, relevancy, and competency[.]" *State v. Mason*, 144 N.C. App. 20, 25, 550 S.E.2d 10, 14 (2001) (internal quotation marks omitted). To lay the proper foundation for admission of a videotape as substantive evidence, the offeror must meet the standard articulated in *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988) (internal citations and quotation marks omitted), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990), which requires:

- (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed[] (illustrative purposes);
- (2) proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . . ;
- (3) testimony that the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing, (substantive purposes); or
- (4) testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area photographed.

In this case, assuming without deciding that a proper foundation was lacking, the erroneous admission of a videotape and photographs does not require reversal if the error is not

prejudicial. *Mason*, 144 N.C. App. at 27-28, 550 S.E.2d at 16. An error is not prejudicial unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C. Gen. Stat. § 15A-1443(a) (2011). The burden is on the defendant to show that he was prejudiced by the error in question. *Mason*, 144 N.C. App. at 28, 550 S.E.2d at 16.

Here, defendant has not shown prejudice given the testimony at trial. Kirby testified that he had known Sergeant Edwin Marti of the Shallotte Police Department for five years and defendant for 20 years; that he had participated in controlled buys of prescription drugs for Sergeant Marti on prior occasions; that he had discussed defendant with Sergeant Marti; that he met Sergeant Marti and other officers on 27 May 2011 at a middle school where he and his car were searched; that he was given money to purchase 20 Lorcet pills from defendant and provided a camera; that he purchased 17 Lorcet pills from defendant because defendant only had 17 pills; that the transaction took place at the Hill's Shopping Center; that as soon as he made the buy, he returned to the middle school as instructed; and that he turned over the pills and the video to Sergeant Marti.

Further, after defendant received a tax bill for the 17 Lorcet tablets he sold to Kirby, defendant asked Sergeant Marti about the bill. Defendant explained that he was not a drug dealer but just sold his prescription medications to supplement his income. In light of Kirby's testimony combined with defendant's admission that he sold his prescription medications, there is no reasonable possibility that had the challenged videotape and photos not been admitted, a different result would have been reached at trial.

Next, defendant contends that the trial court erred by denying his motion to dismiss the trafficking charges on the grounds that the General Assembly never intended N.C. Gen. Stat. § 90-95(h)(4) (2011), the trafficking in opium or heroin statute, to apply to the total weight of prescription pills but only to that portion of the medication which was a controlled substance. Defendant concedes that this Court rejected this argument in *State v. Ellison*, 213 N.C. App. 300, 713 S.E.2d 228 (2011), but notes that our North Carolina Supreme Court allowed the defendants' petition for discretionary review. *State v. Ellison*, ___ N.C. ___, 722 S.E.2d 593 (2012). However, four days after defendant filed his brief, our Supreme Court affirmed this Court's decision in *State v. Ellison*, ___ N.C. ___, ___, 738 S.E.2d 161, 164 (2013) (holding that "the opium trafficking

statute applies in cases involving tablets and pills of prescription pharmaceutical drugs"). The trial court, therefore, did not err in denying the motion to dismiss.

No error.

Judges ERVIN and DILLON concur.

Report per Rule 30(e).