NO. COA13-79
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 11 CRS 84512
11 CRS 24722
12 CRS 24018

KEITH TYRONE TROXLER,
Defendant

Appeal by defendant from judgment entered 17 May 2012 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 15 August 2013.

Roy Cooper, Attorney General, by M. Elizabeth Guzman, Assistant Attorney General, for the State.

Glover & Petersen, P.A., by Ann B. Petersen for defendant-appellant.

DAVIS, Judge.

Defendant Keith Tyrone Troxler ("Defendant") appeals from his convictions of conspiracy to traffic in cocaine by possession and attempt to traffic in cocaine by possession. Specifically, he contends that the trial court erred in denying his motion to dismiss these charges for insufficient evidence.

After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State presented evidence at trial tending to establish the following facts: Detective Richard Alston ("Detective Alston"), a detective in the Greensboro Police Department's vice division, received a tip from a confidential informant that a man named Christopher Byrd ("Byrd") was interested in purchasing a kilogram of cocaine. Posing as a drug dealer, Detective Roberto Monge ("Detective Monge") - another vice detective with the Greensboro Police Department – called Byrd in April 2011 to "tr[y] to set up a deal." Although Detective Monge and Byrd had a cell phone conversation about Byrd buying "half a kilo" from Detective Monge, that transaction fell through when Byrd failed to call Detective Monge to arrange the details.

On 6 August 2011, Detective Monge received a voicemail message from Byrd indicating that Byrd had a "partner" – later identified at trial as Defendant – who was providing half of the money and was ready to purchase a kilogram of cocaine. Byrd agreed to the price and stated that he wanted to meet later that day to conduct the transaction. Throughout the afternoon, Detective Monge and Byrd exchanged several phone calls with Byrd delaying the meeting each time because he was unable to contact

Defendant. Ultimately, Detective Monge and Byrd postponed the deal.

On 9 August 2011, Byrd exchanged text messages with Detective Monge in which he stated that he had the money and would contact Detective Monge after he got off work that afternoon to arrange a time and place to meet. Byrd called Detective Monge at approximately 6:00 p.m., and the two men discussed meeting in the parking lot of a Wal-Mart store. During the conversation, Defendant got on the phone and told Detective Monge that he did not want to meet at the Wal-Mart parking lot because "[t]here's a lot of cameras up there" and he was "scared of the police[.]" As a result of this conversation, they did not meet that day.

The following day, Detective Alston was surveilling Byrd's workplace and saw a white Oldsmobile arrive at about 3:00 p.m. Byrd got inside, and the car drove away. The car's registration was run through the DMV's computer system, and the car was identified as being registered to Defendant.

Detective Monge spoke with Byrd several times after Byrd left work that day, and they initially decided to meet at a Sheetz gas station at 6:00 p.m. Detective Monge, however, subsequently changed the meeting location back to the Wal-Mart parking lot. Shortly after arriving at the Wal-Mart, Detective

Monge saw a white Oldsmobile pull in behind his vehicle. Defendant was driving, and Byrd was in the front passenger's seat.

Byrd got out of the Oldsmobile and approached the front passenger window of Detective Monge's car. After refusing to get inside, Byrd "flashed" the money to Detective Monge. When Detective Monge asked to take a closer look at the money, Byrd refused and told Detective Monge to go get the cocaine. Detective Monge, concerned that Byrd did not have all of the money, left the parking lot as if he was going to get the drugs. He then met with Detective Alston and decided not to take the drugs back to the parking lot and to instead arrest Byrd and Defendant.

When the "take-down" team took Byrd and Defendant into custody, they searched Defendant's car and found $15,350 in counterfeit bills in two vacuum-sealed packages. They also seized Byrd's and Defendant's cell phones and found text messages from Byrd to Defendant in which Byrd stated that the deal was "getting ready to go down" and that it was a "[d]one deal[.]"

Defendant was transported to the police station, where he waived his Miranda rights and agreed to speak with Detective Edward Buscino, Jr. ("Detective Buscino"). Defendant initially

denied knowing anything about the counterfeit money and drugs, claiming that he picked Byrd up and drove him to the Wal-Mart so that Byrd could purchase some televisions. When Detective Buscino told Defendant that the police had observed him and Byrd picking up the counterfeit money from another individual, Defendant finally admitted that he had driven Byrd to the Wal-Mart parking lot with the knowledge that Byrd was going to attempt to buy drugs with the counterfeit money. Defendant also stated to Detective Buscino that he had told Byrd that "he didn't think it was a good idea to go purchase drugs" in the Wal-Mart parking lot but that he had nevertheless driven Byrd to the Wal-Mart despite his misgivings.

Defendant was subsequently charged with conspiracy to traffic cocaine by possessing 400 grams or more, attempted trafficking in cocaine by possessing 400 grams or more, and having attained habitual felon status. Defendant pled not guilty, and the case proceeded to trial. At the close of all the evidence, Defendant moved to dismiss the two drug-related charges for insufficient evidence. The trial court denied both motions.

The jury found Defendant guilty of all the charged offenses. The trial court sentenced Defendant to 175 to 219 months imprisonment for the conspiracy charge and imposed a fine

of $250,000. The court consolidated the attempted trafficking and habitual felon charges into one judgment and sentenced Defendant to 88 to 115 months imprisonment as a Class C felon. Defendant gave oral notice of appeal in open court.

Analysis

Defendant's only argument on appeal is that the trial court erred in denying his motion to dismiss for insufficient evidence the charges of attempted trafficking in cocaine and conspiracy to traffic in cocaine. Whether the evidence is sufficient to withstand a motion to dismiss is a question of law that is reviewed *de novo* on appeal. *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). A defendant's motion to dismiss should be denied if there is substantial evidence of (1) each essential element of the offense charged; and (2) defendant being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "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 ruling on a motion to dismiss, the trial court is required to view all the evidence – whether direct, circumstantial, or both – in the light most favorable to the State, making all the reasonable inferences from the evidence in favor of the State. *State v. Kemmerlin*,

356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

I. Conspiracy to traffic in cocaine by possession

Defendant contends that the trial court erred in denying his motion to dismiss for insufficient evidence the charge of conspiring to traffic in cocaine by possessing 400 grams or more. "A criminal conspiracy is an agreement, express or implied, between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Burmeister*, 131 N.C. App. 190, 199, 506 S.E.2d 278, 283 (1998). Trafficking in cocaine by possession in violation of N.C. Gen. Stat. § 90-95(h)(3)(c) requires proof of (1) the Defendant's knowing possession of cocaine; and (2) the amount possessed being 400 grams or more. *State v. Diaz*, 155 N.C. App. 307, 319, 575 S.E.2d 523, 531 (2002), *cert. denied*, 357 N.C. 464, 586 S.E.2d 271, *and cert. denied*, 357 N.C. 659, 590 S.E.2d 396 (2003). Thus, to survive Defendant's motion to dismiss the State was required to provide substantial evidence "that Defendant entered into an agreement to traffic by possessing cocaine weighing [400 grams or more], and intended the agreement to be carried out at the time it was made." *State v. Jenkins*, 167 N.C. App. 696, 700,

606 S.E.2d 430, 433, *aff'd per curiam*, 359 N.C. 423, 611 S.E.2d 833 (2005).

Here, the State presented evidence that (1) Defendant and Byrd exchanged 43 text messages and phone calls between 8 and 10 August 2011 discussing the plan to purchase the "kilo" of cocaine from Detective Monge for $32,000; (2) on 10 August 2011, after picking up the counterfeit money, Defendant drove his car, with Byrd in the passenger seat, to the Wal-Mart parking lot, as agreed upon by the parties; and (3) Defendant, in his post-arrest statement, admitted that he was "aware of th[e] cocaine deal" and that although he shared with Byrd the fact that he did not "think it was a good idea to go purchase drugs" in the Wal-Mart parking lot, he drove with Byrd to the location anyway because he did not "think [they] would get caught."

This evidence is sufficient to permit the reasonable inference that Defendant entered into an agreement with Byrd to traffic in cocaine by possession of 400 grams or more. *See State v. Torres-Gonzalez*, __ N.C. App. __, __, 741 S.E.2d 502, 509 (2013) (holding that evidence was sufficient to establish conspiracy to traffic in cocaine by possession where undercover detective had set time and location for sale of cocaine, dealer and defendant arrived at location to look at money offered by detective, defendant told dealer to wait in parking lot where

drugs would be delivered, and he later told dealer to come back to house to pick up drugs to complete the sale).

Defendant points to his post-arrest statement to the law enforcement officer that once he was aware that Byrd intended to use the counterfeit money to purchase the drugs, Defendant "told Byrd that doing so was not a good idea." Thus, Defendant argues, "[t]elling the only other alleged conspirator that the substantive crime should not be committed is the antithesis of an agreement to commit the crime." Contrary to Defendant's argument however, the crime of conspiracy is the *agreement*, "not its execution," and thus "[a]s soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Bindyke*, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975). As discussed above, the State presented substantial evidence that Defendant conspired with Byrd to traffic in cocaine by possession as evidenced by Defendant's communications with Byrd regarding the planning of the "deal," his admitted awareness of the transaction, and his act of driving Byrd to the designated location to consummate the sale.

At best, Defendant's post-arrest statement suggests that he disagreed with Byrd as to how the transaction should be conducted - not whether it should be conducted at all. Moreover, as the State points out, Defendant, even after voicing

his disapproval about using the counterfeit money, nonetheless continued to drive Byrd to the Wal-Mart parking lot and remained present during the course of the transaction. Evidence of this conduct by Defendant shows the continued existence of the conspiracy. *See State v. Medlin*, 86 N.C. App. 114, 121-22, 357 S.E.2d 174, 178-79 (1987) ("Although the offense of conspiracy is complete upon formation of the unlawful agreement, the offense continues until the conspiracy comes to fruition or is abandoned.") Defendant's argument, therefore, lacks merit.

II. Attempt to traffic in cocaine by possession

Defendant also argues that the trial court erred in denying his motion to dismiss the attempt to traffic in cocaine by possession charge. "The two elements of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense." *State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971). As set out above, trafficking in cocaine by possession in violation of § 90-95(h)(3)(c) requires proof of (1) the defendant's knowing possession of cocaine; and (2) the amount possessed being 400 grams or more. *Diaz*, 155 N.C. App. at 319, 575 S.E.2d at 531.

Defendant challenges the sufficiency of the evidence to establish that Defendant committed an overt act – beyond mere

preparation – to possess 400 grams or more of cocaine.[1] "An overt act for an attempt crime 'must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation [;] [i]t must not be merely preparatory.'" *State v. Gartlen*, 132 N.C. App. 272, 275, 512 S.E.2d 74, 77 (1999) (quoting *State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971)). When, however, "'the design of a person to commit a crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.'" *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 616 (1984) (quoting 21 Am.Jur.2d Criminal Law § 159 (1981)).

Contrary to Defendant's argument, the evidence at trial established overt acts by Defendant going beyond the preparatory stages of trafficking by possession. Viewed in the light most favorable to the State (as is required in reviewing a trial court's denial of a motion to dismiss), the evidence shows that (1) Defendant, along with Byrd, obtained counterfeit money on

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[1] While Defendant – for the first time - makes a brief suggestion in his reply brief that there was also insufficient evidence of the "intent" element of this crime, he did not raise this issue in his principal brief. Therefore, pursuant to the North Carolina Rules of Appellate Procedure, this argument is not properly before us. *See* N.C. R. App. P. 28(h) ("Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief . . . .").

the way to the drug deal; (2) Defendant and Byrd arrived at the location where Defendant knew – based on prior conversations with Byrd and Detective Monge – that the drug transaction was to be conducted and parked his car behind Detective Monge's vehicle; (3) Defendant remained at the scene while Byrd attempted to purchase the cocaine with the counterfeit money; and (4) Defendant was found in his car waiting for Detective Monge to return with the kilogram of cocaine when the "take-down" team took Defendant and Byrd into custody.

This evidence was sufficient to support a reasonable inference by the jury that Defendant committed overt acts done for the purpose of trafficking in cocaine by possession. *See State v. Gunnings*, 122 N.C. App. 294, 296, 468 S.E.2d 613, 614 (1996) (finding sufficient evidence of overt act in attempt to possess cocaine where Defendant "dr[ove] to an area known for drug sales, approach[ed] people she believed were cocaine dealers, and exchang[ed] money for what she thought was cocaine").

Guided by this Court's decision in *Gunnings*, we hold that the State presented sufficient evidence of overt acts by Defendant in furtherance of his intent to traffic in cocaine by possessing 400 grams or more. Therefore, Defendant's argument is overruled.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).