NO. COA14-584

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Johnston County
No. 13 CRS 52989, 52990

PHABIEN DARRELL MCCLAUDE

Appeal by defendant from judgments entered 15 January 2013 by Judge Reuben F. Young in Johnston County Superior Court. Heard in the Court of Appeals 8 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

McCOTTER ASHTON, P.A., by Rudolph A. Ashton, III, for defendant.

ELMORE, Judge.

On 14 January 2014, a jury unanimously found defendant guilty of misdemeanor possession of marijuana, possession of cocaine with the intent to sell and/or deliver (PWISD cocaine), and conspiracy to sell and/or deliver cocaine (conspiracy). The trial court sentenced defendant to consecutive active prison terms of 15-27 months based on the PWISD cocaine conviction and 15-27 months based on the conspiracy conviction. For the

possession of marijuana conviction, defendant received a suspended sentence of 20 days imprisonment and was placed on supervised probation for 8 months to be served upon his release from prison. Defendant appeals. After careful consideration, we vacate the conspiracy conviction and remand for resentencing.

I. Facts

On 11 June 2013, Johnston County Deputy Sheriff Billy Britt was on patrol duty at the intersection of N.C. 96 North and N.C. 42 West when he noticed a vehicle cross the center line of the road on two separate occasions. As a result of the traffic violation, Deputy Britt conducted a traffic stop of the vehicle. Deputy Britt approached the vehicle, and he smelled a strong odor of marijuana emanating from the vehicle. He asked the occupants whether any marijuana was inside the vehicle, and Phabien Darrell McClaude (defendant), who was located in the front passenger seat, indicated that he and the driver, Jonathan Hall, had previously smoked marijuana in the car. Upon Deputy Britt's request, defendant and Hall exited the vehicle, and Deputy Britt conducted a protective search of defendant's person. Deputy Britt found a small bag of marijuana in defendant's trouser pocket and subsequently handcuffed

defendant. Both Hall and defendant became visibly nervous, but they indicated that nothing else was inside the vehicle.

Thereafter, Deputy Britt conducted a search of the vehicle. As he began to search the center of the vehicle, Hall appeared increasingly discomposed as he "wring[ed] and twist[ed] . . . all around," and shuffled and tapped his feet. Deputy Britt then pulled out the ashtray and could see the floor panel beneath the center console. Deputy Britt found a black box underneath the console, and after opening the box, he found 7.2 grams of a substance that was later determined to be powder cocaine. At this point, Hall started to walk away from the scene, forcing another deputy to place him in handcuffs.

Deputy Britt re-approached defendant, who then began to make voluntary statements. Defendant proceeded to inform Deputy Britt that he had outstanding child support warrants, concealed marijuana in his underwear, and was "just trying to make a [sic] enough money to pay for . . . child support[.]" Deputy Britt then placed defendant under arrest and transported him to the Johnston County Jail. In relevant part, the State charged defendant with PWISD marijuana, PWISD cocaine, and conspiracy.

At trial, defendant made motions to dismiss these charges for insufficient evidence, each of which was denied by the trial

court. Defendant also attempted to present evidence by calling Hall as a witness but was unable to locate him. Defendant requested that he be given additional time to locate Hall, but the trial court denied the request. During jury deliberations, defendant found Hall and made a motion to the trial court to reopen the evidence so that Hall could testify, but the trial court denied defendant's motion. The jury returned with verdicts of guilty of misdemeanor possession of marijuana, PWISD cocaine, and conspiracy.

II. Analysis

a.) Motion to Dismiss the Conspiracy Charge

Defendant argues that the trial court erred by denying defendant's motion to dismiss the conspiracy charge for insufficient evidence. Defendant contends the State presented insufficient evidence to establish that he and Hall made an agreement to sell and deliver cocaine. We agree.

"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). "'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, 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 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "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), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

To withstand a motion to dismiss the charge of conspiracy to sell and/or deliver cocaine, the State must provide substantial evidence that: 1.) The defendant and at least one other person entered into an agreement; 2.) The agreement was to commit the crime of the sale and/or delivery of cocaine; and 3.) The defendant and the other person(s) intended that the agreement be carried out at the time it was made. N.C.P.I.-Crim. 202.80. However, "the State need not prove an express

agreement; evidence tending to show a mutual, implied understanding will suffice. Nor is it necessary that the unlawful act be completed. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citations and quotation marks omitted).

The State directs us to *State v. Worthington*, in support of the proposition that defendant and Hall had "a mutual implied understanding" sufficient to establish a conspiracy. In *Worthington*, this Court indicated that the State can prove a conspiracy by showing "a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703 (1987) (citation and internal quotation marks omitted). Based on this principle, we held that the State presented sufficient evidence of a conspiracy to withstand a motion to dismiss despite the absence of any evidence of "an express agreement between the defendants[.]" *Id.* at 162, 352 S.E.2d at 703. However, the facts in *Worthington* are markedly dissimilar to those at issue here.

In *Worthington*, an undercover S.B.I. Agent purchased cocaine from the co-conspirator, law enforcement officers discovered the money used to buy the cocaine in the possession of both the defendant and the co-conspirator, the co-conspirator's name and phone number were written in a notebook found in the defendant's residence, the notebook listed "payments and balances for dated transactions[,]" and the co-conspirator "repeatedly referred to 'his man,' the manner in which 'his man' liked to arrange a drug deal, and 'his man's' ability to transact a half-pound cocaine deal." *Id.* at 152-163, 352 S.E.2d at 697-703. The evidence in *Worthington* that unerringly indicated an implied understanding between the co-conspirator and the defendant is simply lacking in this case.

Instead, we find *State v. Euceda-Valle* controlling. 182 N.C. App. 268, 276, 641 S.E.2d 858, 864 (2007). In *Euceda-Valle* this Court held that the State failed to present substantial evidence of the existence of a conspiracy because "mere suspicion" or a "mere relationship between the parties or association" is insufficient. *Id.* at 276, 641 S.E.2d at 864-65 (citation and internal quotation marks omitted). In that case, an officer conducted a traffic stop. *Id.* at 270-71, 641 S.E.2d at 860-61. The defendant and alleged co-conspirator were seated

inside the vehicle, both individuals were nervous, an odor of air-freshener emanated from the vehicle, and after a canine sniff and search of the vehicle, officers located 4.98 kilograms of cocaine hydrochloride in the trunk. *Id.* Importantly, we observed that the State provided no evidence of "conversations between the two men; unusual movements or actions by defendant and/or [alleged co-conspirator]; large amounts of cash on alleged [co-conspirator]; the possession of weapons; or anything else suggesting an agreement." *Id.* at 276, 641 S.E.2d at 864.

Similarly, defendant and Hall never conversed, no cash was found in the vehicle or linked to Hall despite the presence of cocaine, and neither person possessed a weapon. Although Hall was visibly nervous throughout the encounter and made some unusual movements indicating that he might have known that cocaine was in the vehicle, such evidence does not amount to substantial evidence of an agreement to commit the crime of the sale and/or delivery of cocaine. Hall stated only that "[w]e smoked weed and that's it." Moreover, while defendant admitted his own intent to sell cocaine by stating, "I was just trying to make a [sic] enough money to pay for this . . . child support, I got a hookup and I was able to cut it good[,]" nothing expressly or impliedly connected Hall to defendant's admission of his

intent to sell the cocaine. In fact, defendant said Hall was merely driving the vehicle because he did not have a license.

Thus, the State did not present sufficient evidence of an agreement to support the conspiracy charge. *See State v. Benardello*, 164 N.C. App. 708, 711, 596 S.E.2d 358, 360 (2004) (holding that the evidence was insufficient to establish the existence of conspiracies to commit murder or to shoot into occupied properties because a phone conversation, the only evidence supporting a conspiracy, discussed resolving a money issue but made "no mention of shooting, killing or violence of any kind"); *compare State v. Jenkins*, 167 N.C. App. 696, 701, 606 S.E.2d 430, 433-34 *aff'd,* 359 N.C. 423, 611 S.E.2d 833 (2005) (ruling that the State presented substantial evidence of the existence of a conspiracy to traffic in cocaine when the defendant was in a truck with two individuals, 79.3 grams of cocaine were located in the vehicle, one of the occupants possessed thousands of dollars in cash, and officers found a loaded firearm in the vehicle). Accordingly, the trial court erred by denying defendant's motion to dismiss the conspiracy charge.

b.) Motion to Dismiss the PWISD Cocaine Charge

Next, defendant argues that the trial court erred by denying his motion to dismiss the PWISD Cocaine charge for insufficiency of the evidence. We disagree.

In order to withstand a motion to dismiss the charge of PWISD Cocaine, the State must present substantial evidence that defendant possessed a controlled substance with the "intent to sell or distribute the controlled substance." *State v. Richardson*, 202 N.C. App. 570, 572, 689 S.E.2d 188, 191 (2010) (citation and internal quotation marks omitted). Possession of a controlled substance can be actual or constructive. *State v. Nettles*, 170 N.C. App. 100, 103, 612 S.E.2d 172, 174 (2005). "A person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citation omitted). Additionally, the State must demonstrate "other incriminating circumstances before constructive possession may be inferred." *Nettles*, 170 N.C. App. at 103, 612 S.E.2d at 174 (citation and internal quotation marks omitted).

Here, defendant contests the sufficiency of the State's evidence as it relates to the elements of "possession" and the "intent to sell or distribute." However, the evidence shows

that Deputy Britt observed defendant in the passenger seat reaching towards the center of the car before the traffic stop, and he located the cocaine in the center console of the vehicle, between the driver and passenger's seat. Moreover, defendant admitted to actually possessing and intending to sell the cocaine, since he stated, "[m]an, I don't sling dope anymore, I was just trying to make a [sic] enough money to pay for this . . . child support, I got a hookup and I was able to cut it good." Based on Deputy Britt's training and experience, he interpreted this slang to mean "buying an amount of -- in this case cocaine and adding other ingredients to it in some way, shape or form to make it a larger amount." Defendant also revealed to Deputy Britt that he bought one gram of cocaine "and was able to make it into twelve."

Thus, defendant's own statements coupled with his conduct indicate that he bought and possessed the cocaine, diluted it, and intended to sell the controlled substance in order to pay child support. Accordingly, the trial court did not err by denying defendant's motion to dismiss the PWISD cocaine charge.

c.) Request for Additional Time to Locate a Witness and Motion to Reopen Evidence

Defendant also argues that the trial court erred by denying both his request for additional time to locate Hall and his

motion to reopen the evidence so that Hall could testify. We disagree.

The standard of review regarding whether a trial court should grant a recess due to a missing witness is reviewed for an abuse of discretion. *State v. Elliott*, 25 N.C. App. 381, 383, 213 S.E.2d 365, 367-68 (1975). Similarly, "[b]ecause there is no constitutional right to have one's case reopened, the decision to reopen a case is strictly within the trial court's discretion." *State v. Hoover*, 174 N.C. App. 596, 599, 621 S.E.2d 303, 305 (2005). This broad discretion stems from the trial court's "inherent authority to supervise and control trial proceedings." *State v. Davis*, 317 N.C. 315, 318, 345 S.E.2d 176, 178 (1986).

The relevant facts show that after defendant's motions to dismiss were denied, the trial court took a 15 minute break at 10:34 a.m. and excused the jury. During this time, defendant's attorney notified the trial court that he was attempting to make contact with a potential witness, Hall. Hall was not under subpoena but had been present in the courtroom earlier in the day. The prosecutor told the trial court that he had spoken with Hall's attorney who stated that his client was not going to testify. The trial court nevertheless allowed defendant's

attorney a “few minutes” to locate Hall. Defendant’s attorney was unsuccessful and informed the trial court that he had been unable to locate Hall. The jury returned at 11:03 a.m. and defendant stated that he would not present any evidence. The trial court, defendant, and the State then conducted the charge conference outside the presence of the jury. After the charge conference, defendant’s attorney requested additional time to locate Hall, and the following colloquy occurred:

> DEFENDANT’S ATTORNEY: We can’t get any additional time to get our witnesses here?
>
> TRIAL COURT: I thought the witness was not going to testify.
>
> DEFENDANT’S ATTORNEY: Plus you’ve already closed the evidence.
>
> TRIAL COURT: I guess the answer to that question is no. Did you talk to his lawyer?
>
> DEFENDANT’S ATTORNEY: I did speak to his lawyer. His lawyer is in Harnett County.
>
> TRIAL COURT: Okay.

The jury re-entered the courtroom at 11:38 a.m. to hear closing arguments and receive jury instructions. The jury started deliberations at 12:29 p.m. At some point during deliberations, defendant’s attorney learned that Hall had returned (although Hall was not in the courtroom), so he made a

motion to reopen the evidence so that Hall could testify. The trial court denied the motion, stating:

> Let the record reflect that the witness was earlier here in the courtroom prior to both sides resting. He left this courtroom and did not return.
>
> Let the record further reflect that this witness, as I understand, was not under subpoena to be here but was here this morning on his own, left on his own, and that the Court has been advised that the jury has reached a verdict with regards to this matter. The motion by defense to reopen this case so that the witness can testify is hereby denied.

The trial court did not abuse its discretion by denying both defendant's request for additional time to locate Hall and his motion to reopen the evidence. The trial court acted within its authority to expedite the trial proceedings in light of credible information that Hall had not been subpoenaed (and thus not required to be present), and Hall's attorney had indicated that Hall would not be testifying. Moreover, defendant had ample opportunity to locate Hall during trial. Approximately 30 minutes elapsed from the time defendant's attorney made the trial court aware of his efforts to contact Hall until the moment at which he requested additional time to locate Hall. Over 1.5 hours later, just as the jury reached a verdict,

defendant's attorney made a motion to reopen the evidence, although Hall was still absent from the courtroom.

Additionally, defendant carries the burden of establishing prejudicial error. *See* N.C. Gen. Stat. § 15A-1443 (2013) (requiring that in non-constitutional matters, defendant show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises").

On appeal, defendant fails to advance any argument in his brief to the effect that he was prejudiced as a result of the trial court's denial of his request for additional time and motion to reopen evidence. Thus, defendant's arguments necessarily fail. *See Davis*, 317 N.C. at 318-19, 345 S.E.2d at 178 (holding that the trial court did not err by denying the defendant's motion to reopen evidence so that he could play a tape for the jury "where counsel for the defense, after more than adequate opportunity, failed timely to produce the necessary equipment to play the tape[,]" and even if the trial court erred, the defendant could not establish prejudicial error).

III. Conclusion

In sum, we hold that the trial court did not err by denying defendant's: 1.) motion to dismiss the PWISD charge, 2.) request for additional time to locate a witness, and 3.) motion to reopen the evidence. However, the trial court erred by denying defendant's motion to dismiss the conspiracy charge for insufficient evidence. Thus, we vacate the conspiracy conviction and remand for resentencing.

No error, in part, vacated and remanded, in part.

Judges BRYANT and ERVIN concur.