IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-491

Filed: 17 March 2015

Randolph County, Nos. 11 CRS 51515-17

STATE OF NORTH CAROLINA

v.

FREDDIE ALLEN PHILEMON

Appeal by defendant from judgment entered 17 October 2013 by Judge Richard W. Stone in Randolph County Superior Court. Heard in the Court of Appeals 8 October 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Tenisha S. Jacobs, for the State.

Mary March Exum for defendant.

McCULLOUGH, Judge.

Freddie Allen Philemon ("defendant") appeals from judgment entered upon his convictions for three counts of trafficking in methamphetamine by transportation and three counts of trafficking in methamphetamine by possession. For the following reasons, we find no error in part and reverse in part.

I. Background

Defendant was arrested on 17 March 2011 and later indicted by a Randolph County Grand Jury on 11 July 2011 on charges of trafficking in methamphetamine. Specifically, defendant was indicted on three counts of trafficking in methamphetamine for transporting 28 grams or more but less than 200 grams of methamphetamine and three counts of trafficking in methamphetamine for possessing 28 grams or more but less than 200 grams of methamphetamine; one count of each offense based on events occurring 8, 9, and 17 March 2011.

On 10 April 2012, defendant submitted notice of an entrapment defense. Defendant's case then came on for jury trial in Randolph County Superior Court on 15 October 2013, the Honorable Richard W. Stone, Judge presiding.

The evidence presented at trial tended to show that defendant worked as a dump truck driver for Andrews Hauling & Grading ("Andrews") from 2006 through the time of his arrest. As a dump truck driver, defendant would haul dirt, asphalt, and other construction debris from construction job sites. In September 2010, Jimmy McDowell was hired by Andrews to operate an excavator at job sites. In this role, McDowell was responsible for loading trucks. Consequently, defendant and McDowell would often see each other on job sites; sometimes as many as 10 to 15 times a day.

Although defendant and McDowell did not have a relationship, they both recognized each other from years prior when they worked together as long-haul truck drivers for Wayne Transportation ("Wayne"). In response to questions about their

time at Wayne, both defendant and McDowell admitted to using methamphetamine to stay awake on long routes. In fact, defendant testified that using methamphetamine was commonplace among Wayne truck drivers while he worked there.

Concerning their encounters while working at Andrews, McDowell testified that every time defendant would back his truck up to the excavator to be loaded, "a big ole puff of smoke would come out of the truck. And finally [defendant] offered [him] some to smoke." McDowell recalled that defendant was holding a pipe, but McDowell did not know what was in the pipe.

Unbeknownst to defendant, McDowell was in contact with the Randolph county Sherriff's Department in early 2011 about working as a confidential source. Detective David Joyce testified that the Sherriff's Department was initially unfamiliar with defendant and was interested in using McDowell to investigate local gang activity, but when McDowell was questioned whether there was anyone else he could get drugs from, McDowell identified defendant and stated he could purchase methamphetamine. At that time, Detective Joyce assigned Detective Justin Trogdon to be the case manager.

Detective Trogdon testified about buy-bust operations at trial. He explained that law enforcement will usually perform several buys from a target using a confidential source before arresting the target at a subsequent buy. Detective

Trogdon indicated this was the plan when he first met with McDowell on 1 or 2 March 2011 to debrief him for information.

Following the meeting, McDowell contacted defendant by telephone and arranged a meeting on 2 March 2011 at which time McDowell was able to purchase one gram of methamphetamine from defendant. Detective Trogdon indicated the purpose of this small purchase was to test McDowell's credibility and reliability, as well as to see if defendant would show up with methamphetamine. When the initial buy was successful on 2 March 2011, McDowell, working with law enforcement, proceeded to set up additional buys for larger quantities of methamphetamine.

On 8 March 2011, McDowell purchased 28.09 grams of methamphetamine from defendant. On 9 March 2011, McDowell purchased 34.06 grams of methamphetamine from defendant. On 17 March 2011, defendant was arrested while attempting to sell 149.98 grams of methamphetamine to McDowell. McDowell was compensated for each buy.

When defendant took the stand, defendant admitted to selling methamphetamine to McDowell and testified about his source from Georgia. Defendant, however, presented evidence in support of his entrapment defense. Specifically, defendant testified that McDowell repeatedly asked him if he could get methamphetamine. Although defendant acknowledged that he did not say "no," defendant testified that he had no intention of getting methamphetamine for McDowell. Defendant, however, testified that he changed his mind when McDowell

told him he was in financial trouble and would lose his home if he could not make quick money.

Yet, contrary to defendant's testimony, McDowell denied having to beg defendant to get methamphetamine, denied telling defendant that he was in financial trouble, and testified that he did not own a house at the time.

Defendant moved to dismiss the case at the close of all the evidence.[1] The trial court denied defendant's motion. Citing testimony regarding associated uncertainty in the weighing of the methamphetamine recovered, defendant then requested that the trial court give an instruction on the lesser included offense of felonious possession of methamphetamine for the charge stemming from 8 March 2011. The trial court denied defendant's request and instructed the jury on the trafficking charges and defendant's entrapment defense.

On 17 October 2013, the jury returned verdicts finding defendant guilty of all the trafficking offenses charged. The trial court consolidated the offenses for judgment, sentenced defendant to a term of 70 to 84 months imprisonment, and imposed a $50,000 fine. Defendant gave notice of appeal in open court following sentencing.

[1] We acknowledge there is no record that defendant moved to dismiss the case at the close of the State's evidence. However, there was an unrecorded bench conference at the close of the State's evidence and when making his motion at the end of all the evidence, defendant indicated he was "renewing" his motion to dismiss and the trial court did not contradict his statement. Thus, for the purposes of this opinion, we assume a motion to dismiss was made during the unrecorded bench conference at the close of the State's evidence.

II. Discussion

On appeal, defendant raises the following issues: whether the trial court erred in (1) denying his motion to dismiss, (2) refusing his request for an instruction on a lesser included offense, and (3) imposing an unlawful sentence.

A. Motion to Dismiss

Defendant first argues the trial court erred in denying his motion to dismiss the trafficking charges because the evidence established entrapment as a matter of law. "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). Yet, at the outset of our analysis, we address the State's contention that defendant failed to preserve the argument for appeal.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2015). In this case, defendant submitted notice of an entrapment defense prior to trial and elicited evidence in support of that defense at trial. At the close of all the evidence, defendant then moved to dismiss the trafficking charges. Defendant's motion was raised as follows:

> THE COURT: Do you want to be heard on your motion at the close of all the evidence?

> [DEFENDANT]: Yes, sir. I will renew my motion and -- just a moment, Your Honor please. And I don't want to be heard further. I was --
>
> THE COURT: Okay.
>
> [DEFENDANT]: -- contemplating talking about entrapment as a matter of law, but I don't believe I'll do that.

On appeal, the State specifically contends defendant waived the argument because he failed to specify the grounds for his motion to dismiss at trial. Defendant, on the other hand, contends his mere reference to entrapment as a matter of law was sufficient to preserve his argument. We agree with the State.

As the State asserts, defendant's exchange with the trial court tends to show that he deliberately chose not to address entrapment as a matter of law as a basis for his motion to dismiss. As a result, we hold defendant failed to properly preserve his argument for appeal. Nevertheless, defendant has requested that, if we determine his argument was not properly preserved, we review the issue pursuant to our authority under N.C. R. App. P. 2. *See* N.C. R. App. P. 2 (2015) ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative . . . ."). For purposes of judicial economy, we grant defendant's request and address the entrapment issue raised by defendant on appeal.

"Entrapment is the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him." *State v. Stanley*, 288 N.C. 19, 27, 215 S.E.2d 589, 594 (1975) (citation and quotations omitted).

> The defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.

State v. Walker, 295 N.C. 510, 513, 246 S.E.2d 748, 749-50 (1978). "[T]he fact that government agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct was the product of the creative activity of law-enforcement officials." *Stanley*, 288 N.C. at 30, 215 S.E.2d at 596 (citations, quotations, and emphasis omitted).

"Ordinarily, the issue of whether a defendant has been entrapped is a question of fact which must be resolved by the jury." *State v. Hageman*, 307 N.C. 1, 30, 296 S.E.2d 433, 450 (1982). " 'The court can find entrapment as a matter of law only where the undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action he was not predisposed to take.' " *Stanley*, 288 N.C. at 32, 215 S.E.2d at 597 (quoting *State v. Campbell*, 110 N.H. 238, 241, 265 A.2d 11, 14 (1970)). "Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where

the police merely afford the defendant an opportunity to commit the crime." *Hageman*, 307 N.C. at 31, 296 S.E.2d at 450. "Defendant bears the burden of proving the affirmative defense of entrapment." *State v. Branham*, 153 N.C. App. 91, 99, 569 S.E.2d 24, 29 (2002).

In this case, defendant argues there was uncontradicted evidence of entrapment as a matter of law. Specifically, defendant contends there was no evidence that he was predisposed to commit the crime and the evidence shows the criminal design and intent to commit the crime originated with law enforcement. Defendant further contends McDowell persuaded him to commit the crime by repeatedly asking him to purchase methamphetamine and preying upon his willingness to help.

In support of his contentions, defendant points to testimony that McDowell became upset when he observed defendant smoking something at work and defendant offered it to him. Without knowing for certain what the substance was, McDowell told the Sherriff's Department that he could get methamphetamine from defendant. McDowell admitted he got paid for making buys for the Sherriff's Department.

Defendant also points to his own testimony in support of his position. Although defendant acknowledges that he never told McDowell he would not get methamphetamine, defendant testified that he initially determined in his mind not to do so. Yet, defendant testified McDowell continued to ask him to get methamphetamine every time they encountered each other on job sites and even

began calling him at home. Defendant stated McDowell eventually induced him to act by telling him that he needed money or he would lose his home. Defendant testified he did not want to see McDowell lose his house so he decided to help McDowell out. Defendant indicated that it was not until that time that he made calls and found a source to supply methamphetamine.

However, contrary to defendant's assertion that the evidence was uncontradicted, in response to questioning by the State, McDowell denied contacting and bothering defendant prior to 2 March 2011 and denied having to beg defendant for methamphetamine. McDowell stated that he did not have a relationship with defendant and denied ever telling defendant that he needed money or was in financial trouble, indicating he did not have a house at the time and defendant was not someone with whom he would discuss his financial troubles.

McDowell further testified about the buy-bust transactions with defendant on 2, 8, 9, and 17 March 2011. McDowell indicated that defendant never seemed to have a problem talking about methamphetamine on the phone and recalled a specific conversation in which defendant told him about his source in Georgia, bragging that the methamphetamine was the best "stuff" around. When asked why he thought he could buy methamphetamine from defendant, McDowell responded "[c]ause he had offered it to me at Andrews."

Based upon a review of the evidence in this case, we find substantial jury issues concerning defendant's entrapment defense.

What is more, the record tends to show that defendant agreed there were substantial jury issues concerning entrapment at trial. In response to the State's objection to an entrapment instruction during the charge conference, the trial court rehashed the evidence tending to disfavor entrapment, explaining,

> You know, the evidence is pretty overwhelming. It's not an isolated sale. It's -- there's no relationship with the undercover witness. There's no special bond. He never said no. There's really no reason why he had -- from the evidence why he had to be in the middle of this if it was just the matter of giving the guy a name. He fronted the money. He skimmed the deal. He was paid with a half gram for doing the deal on one of them and he skimmed six [grams] off the other.

At that point, defendant acknowledged the court made "good jury arguments for the case[,]" but argued the evidence warranted an instruction on entrapment because when viewed in the light most favorable to his case, it showed defendant was induced to act by persistent persuasion. Defendant also acknowledged that the fact that he provided methamphetamine to McDowell on four separate occasions was evidence to be considered by the jury, but maintained the evidence did not render the entrapment defense unavailable. After further discussions in chambers, the trial court agreed to instruct the jury on entrapment.

Considering the evidence and defendant's later acknowledgement that there were issues for jury consideration, we hold the trial court did not err in denying defendant's motion to dismiss. Just as we held in *Branham*, we hold the evidence in this case "may have been sufficient to raise the issues of inducement, and lack of

predisposition to commit the offenses, but fell short of compelling a conclusion of entrapment as a matter of law." 153 N.C. App. at 102, 569 S.E.2d at 30 (quotation marks and citation omitted). Thus, the issue of entrapment was properly submitted to the jury and the trial court did not err in denying defendant's motion to dismiss based on entrapment as a matter of law.

B. Instruction on Lesser Included Offense

In the second issue raised by defendant on appeal, defendant argues the trial court erred in denying his request for an instruction on the lesser included offense of felonious possession of methamphetamine. Defendant contends the instruction was warranted with respect to the charges in the first indictment because evidence of the weight of the methamphetamine recovered from the buy on 8 March 2011 was uncertain and contradictory.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

Under North Carolina law, "[a]ny person who sells, manufactures, delivers, transports, or possess 28 grams or more of methamphetamine . . . shall be guilty of a felony . . . known as 'trafficking in methamphetamine[.]' " N.C. Gen. Stat. § 90-

95(h)(3b) (2013). Proving the weight of the methamphetamine is an element of the offense, s*ee State v. Cardenas*, 169 N.C. App 404, 409, 610 S.E.2d 240, 243 (2005), and the State "must either offer evidence of its actual, measured weight or demonstrate that the quantity is so large as to permit a reasonable inference that its weight satisfied this element." *State v. Mitchell*, 336 N.C. 22, 28, 442 S.E.2d 24, 27 (1994).

In this case, defendant focuses on the weight of methamphetamine recovered from the 8 March 2011 buy and contends the evidence was tenuous. The State, on the other hand, argues the trial court did not err in denying defendant's motion for an instruction on the lesser included offense of felonious possession of methamphetamine because, "taking the evidence in the light most favorable to the State, the State, through the laboratory reports and testimony associated therewith, presented sufficient evidence [of actual, measured weight from which] a reasonable jury could find that [d]efendant possessed 28 grams or more of meth during the 8 March 2011 buy."

While we agree with the State that the evidence was sufficient for a jury to find defendant guilty of trafficking, the issue before this Court is not whether the trial court properly denied a motion to dismiss, as the State seems to argue, but whether there was evidence from which the jury could find defendant guilty of felonious possession of methamphetamine and acquit him of the trafficking charges. We hold there was such evidence.

In this case, a forensic scientist with the North Carolina State Crime Laboratory testified concerning the weight of methamphetamine recovered. She testified that the weight of the methamphetamine recovered from the 8 March 2011 buy "came out to be 28.09, plus or minus zero-point-two (0.2) grams." She further explained that while "the number that is produced and the number that is recorded is the most probable and most accepted correct number[,]" there is an associated uncertainty as a result of various factors, including human error, the temperature of the room, and the humidity level.

In a prior case in which this Court reviewed whether the trial court erred in denying a motion to dismiss trafficking charges based on questionable evidence as to the weight of an illegal substance, this Court recognized that "[t]he weight element becomes more critical as the State's evidence of weight approaches the minimum weight charged." *State v. Gonzalez*, 164 N.C. App. 512, 515, 596 S.E.2d 297, 299 (2004). We find this statement applies equally when determining whether instructions on lesser included offenses should be given.

Upon review of the present case, we recognize that this case is one of those rare cases in which the weight of the methamphetamine at issue is so near the amount statutorily required for trafficking that, considering the associated uncertainty, the jury could determine that defendant transported or possessed less than the 28 grams required for trafficking. Thus, while the evidence is sufficient for the jury to find defendant guilty of trafficking, it does not preclude a jury finding that defendant was

merely guilty of felonious possession of methamphetamine. As a result, we hold the trial court erred in refusing defendant's request to issue an instruction on the lesser included offense of felonious possession of methamphetamine for the charges stemming from the 8 March 2011 buy and we reverse those convictions.

We note, however, that defendant's sentence is unaffected by this decision because all of defendant's trafficking convictions were consolidated for judgment.

C. Sentencing

In the third and final issue on appeal, defendant argues the trial court erred by imposing a sentence of 70 to 84 months imprisonment. Specifically, defendant contends the sentence imposed exceeded that authorized in N.C. Gen. Stat. § 15A-1340.17 (2011) for a Class F felony with no prior record points. Defendant also argues the trial court erred by imposing a $50,000 fine and failing to issue credit for time he spent under house arrest.

Yet, since initially raising the issue on appeal, defendant has withdrawn his argument and conceded that N.C. Gen. Stat. § 90-95(h) governs sentencing for the trafficking offenses in this case. The pertinent portion of that statute provides the following:

> (3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or any mixture containing such substance shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine" and if the quantity of such substance or mixture involved:

> a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

N.C. Gen. Stat. § 90-95(h)(3b)(a) (2011). The trial court did not err in sentencing defendant in accordance with the statute.

III. Conclusion

For the reasons discussed above, we hold the trial court did not err when it denied defendant's motion to dismiss or sentenced defendant. The trial court did err, however, when it refused to issue an instruction on the lesser included offense of felonious possession of methamphetamine for the offenses stemming from the 8 March 2011 buy.

No error in part and reversed in part.

Judge CALABRIA concurs.

Judge STEELMAN concurs with a separate opinion.

Report per Rule 30(e).

Judge STEELMAN, concurring in the result.

I concur in the result reached by the majority opinion, but write separately because I disagree with the analysis of the motion to dismiss issue.

In a criminal case, in order to preserve the issue of the denial of a motion to dismiss for appellate review, a defendant must make the motion to dismiss at the close of the State's evidence. *See State v. Boyd*, 162 N.C. App. 159, 162, 595 S.E.2d 697, 699 (2004) (holding that, where defendant failed to make a motion to dismiss at the close of the State's evidence, a motion at the conclusion of all of the evidence did not preserve the issue for appeal).

In the instant case, defendant did not make a motion to dismiss at the close of the State's evidence. On the morning of 17 October 2013, the State rested at about 10:30 a.m., and the trial court took the morning recess. At the conclusion of the recess, with the jury outside of the courtroom, Judge Stone inquired: "Anything before we bring the jury in?" Both counsel answered in the negative. At that point, defendant took the witness stand and testified. At the close of all of the evidence, counsel for defendant stated that he was renewing his motion, as described in the majority opinion.

"Appellate review is based solely upon the record on appeal; it is the duty of the appellant[ ] to see that the record is complete. This Court will not engage in speculation as to what arguments may have been presented . . . before [the trial

court]." *McKoy v. Beasley*, 213 N.C. App. 258, 265, 712 S.E.2d 712, 716-17 (2011) (quotations and citations omitted); *see also Cty. of Durham v. Roberts*, 145 N.C. App. 665, 671, 551 S.E.2d 494, 498 (2001) (holding that "this Court can judicially know only what appears in the record"). It is the responsibility of the parties to present a complete record from the trial court to the appellate court. An appellate court cannot reach a decision based upon a guess as to what may have happened before the trial court. The majority speculates that defense counsel made a motion to dismiss at the close of the State's evidence at an unrecorded bench conference. I cannot emphasize strongly enough that it is the duty of the trial judge and trial counsel to preserve in the record *all* motions by the parties, and *all* rulings by the court.

It should further be noted that, in *Boyd*, at the conclusion of all of the evidence, counsel for the defendant stated, "We would rest and renew our motions to dismiss; and, re-adopt our arguments, special [sic] as they relate to the sale, conspiracy, contributing to the delinquency of a minor; and, the engaging a minor in drug trafficking." *Boyd*, 162 N.C. App. at 162, 595 S.E.2d at 699. Under the logic of the majority, the *Boyd* court would have been required to presume that somehow there was a motion to dismiss at the close of the State's evidence. In *Boyd*, this Court did no such thing. Instead, it held that defendant could not renew a non-existent motion at the close of all of the evidence. *Id.* *Boyd* is squarely on point on this issue, and is controlling precedent. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). In the instant case, having failed to move to dismiss the charges against defendant

at the close of the State's evidence, counsel for the defendant "could not renew a nonexistent motion at the close of all evidence." *Boyd*, 162 N.C. App. at 162, 595 S.E.2d at 699. This argument should be dismissed.

I disagree with the majority's invocation of Rule 2 of the North Carolina Rules of Appellate Procedure to consider this issue. Rule 2 authorizes this Court "[t]o prevent manifest injustice" to suspend or vary the provisions of the appellate rules. Since defendant's entrapment argument in the context of his improper motion to dismiss has no merit, there can be no "manifest injustice" to defendant in dismissing this argument. The majority now invokes "judicial economy" as a basis for applying Rule 2. "Judicial economy" is not to be found in the text of Rule 2.

Finally, the majority opinion spends considerable time discussing the testimony of the defendant in analyzing his motion to dismiss based upon entrapment. The majority opinion fails to take into account our standard of review of the denial of a motion to dismiss at the close of all of the evidence:

> Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration.

State v. Evans, ___ N.C. App. ___, ___, 747 S.E.2d 151, 156 (2013) (quoting *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990)).