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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-322

Filed: 17 November 2015

Lincoln County, Nos. 12 CRS 54203–04

STATE OF NORTH CAROLINA

v.

ANDREW CLAYTON LEDBETTER

Appeal by defendant from judgments entered 13 November 2014 by Judge Kenneth F. Crow in Lincoln County Superior Court. Heard in the Court of Appeals 22 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General Richard A. Graham, for the State.

David M. Black, P.A., by David M. Black, for defendant-appellant.

BRYANT, Judge.

Where, in the light most favorable to the State, there was sufficient evidence to show defendant had knowledge of the chemical composition of a mixture he possessed with the intent to sell or deliver and that he did sell and deliver the mixture, we affirm the trial court's ruling to deny defendant's motions to dismiss the charges against him and find no error in the judgment of the trial court.

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On 11 February 2013, a grand jury, convened in Lincoln County Superior Court, indicted defendant Andrew Clayton Ledbetter on six counts of violating General Statutes section 90-95(a)(1) by possession with intent to manufacture, sell or deliver a controlled substance: two counts as to ethylone (12 CRS 54201); two counts as to methylone (12 CRS 54206); and two counts as to methylenedioxyvalerone (MDPV) (12 CRS 54204). Defendant was also indicted on six counts of sell or delivery of a controlled substance: two counts as to ethylone (12 CRS 54202); two counts as to methylone (12 CRS 54205); and two counts as to MDPV (12 CRS 54203).

The matter came on for trial on 10 November 2013, during a criminal session of Lincoln County Superior Court, the Honorable Kenneth F. Crow, Judge presiding. The evidence presented at trial tended to show the following.

Allen Lingerfelt, a manager at A-1 Express Mart in the 600 block of East Main Street, testified that he was in charge of “ordering cigarettes, tobacco, beer, stuff for the store, inventory, [etc.]” In December 2011, Lingerfelt was approached by Detective Jason Munday, who was employed with the Lincoln Police Department, Narcotics Division. Law enforcement officers in the Lincoln Police Department were investigating whether bath salts sold in local convenience stores contained controlled substances. Lingerfelt informed Detective Munday that A-1 Express Mart sold bath salts and that the bath salts were supplied by defendant. Detective Munday

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testified that other stores in the area had also disclosed defendant's name as a person who distributed bath salts. Lingerfelt agreed to aid the detective in his investigation.

Lingerfelt testified that he met defendant in 2010. Defendant owned a distribution center named Indian Creek and became a vendor for A-1 Express Mart providing tobacco products. Later, defendant asked Lingerfelt if A-1 Express Mart was interested in selling bath salts. "And the first thing that I asked, you know, was, you know, 'Is it legal?' And he told me it was." When asked why he questioned the legality of selling bath salts, Lingerfelt testified that he did not know if users were snorting or smoking it, "but I had heard that people were getting high from it." Lingerfelt testified that defendant produced a report indicating that the ingredients were legal. On cross-examination by defendant, Lingerfelt provided the following testimony:

Q. What kind of piece of paper was it?

A. It looked like something from a lab.

Q. Okay. So did he describe to you what that piece of paper was?

A. I think he did, yes.

Q. He said it was a lab report?

A. Yes.

Lingerfelt purchased ten packets of bath salts for A-1 Express Mart from defendant once a week from September 2011 through January 2012.

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Q. After your initial conversation did you ever ask the defendant again if these bath salts were legal?

A. When the bath salts hit the news and it was being publicized, I did ask him. And I just wanted to make sure.

Q. And what was his response?

A. "Yes, it's legal."

On 24 January 2012, defendant arrived at A-1 Express Mart between 12:30 and 1:00 p.m. He entered the store, sold Lingerfelt ten packets of bath salts, and left. Detective Munday observed defendant, from across the street. After defendant left, Detective Munday confiscated the bath salts defendant sold to A-1 Express Mart and reimbursed the store for the cost. Detective Munday submitted the bath salts to the Iredell County Sheriff's Office laboratory. At trial, Lingerfelt identified the bath salt packets, labeled "Sextacy" and "Ocean Snow," as the bath salts that he purchased from defendant. Lingerfelt participated in another controlled buy of bath salts on 31 January 2012. Detective Munday also confiscated those bath salts and delivered them to the Iredell County Sheriff's Office laboratory.

Misty Icard, laboratory director and forensic chemist in the Iredell County Sheriff's Office Crime Laboratory, testified to the findings of her analysis of the bath salts delivered by Detective Munday. Icard testified as an expert in the field of forensic chemistry. During her forensic examination, Icard selected one packet labeled Ocean Snow and one labeled Sextacy. In testing the bath salt labeled Ocean

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Snow, Icard determined that the powder contained methylone and ethylone, a substitute of cathinone, a Schedule I controlled substance. Icard testified that substitutes for cathinone were also categorized as Schedule I substances provided the cathinone structure was altered in one of three ways. Icard testified that methylone and ethylone both utilized the base cathinone structure altered in such a way that they both met the criteria for categorization as a Schedule I controlled substance as set out in subsection J of General Statutes, section 90-95. In analyzing the bath salts labeled Sextacy, Icard determined the bath salts contained 3,4-Methylenedioxyprovalerone (MDPV), a Schedule I controlled substance pursuant to our North Carolina General Statutes.

Defendant did not present evidence but moved to dismiss all charges at both the close of the State's case-in-chief and all evidence. The motions were denied.

Following the jury charge, the jury deliberated, then returned guilty verdicts against defendant on all charges. However, the trial court arrested judgment on the charges of possession with intent to manufacture, sell or deliver ethylone, and sell or delivery of ethylone, and possession with intent to manufacture, sell or deliver methylone, and sell or delivery of methylone. As to the remaining charges, the trial court entered a consolidated judgment on counts arising from acts occurring on 31 January 2012 under docket number 12 CRS 54203 (one count of possession with intent to manufacture, sell or deliver MDPV, and one count of sell or delivery of

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MDPV); and in a separate judgment consolidated counts arising from acts occurring on 24 January charged under docket number 12 CRS 54204 (one count of possession with intent to manufacture, sell, and deliver MDPV, and one count of sale and delivery of MDPV). As to each judgment, the trial court sentenced defendant to an active term of 13 to 25 months, to be served consecutively. The trial court then suspended both sentences and placed defendant on supervised probation for 30 months. Defendant appeals.

On appeal, defendant's sole concern is whether the trial court erred in denying his motion to dismiss the charges for insufficiency of evidence to show that defendant knowingly possessed or knowingly sold a controlled substance.

Defendant, having been sentenced to probation only on the charges related to MDPV, argues that the trial court erred in denying his motion to dismiss the charges that he possessed with intent to manufacture, sell or deliver MDPV, and that he sold or delivered MDPV on 24 January and 31 January 2012. Specifically, defendant contends that because the evidence was insufficient to establish he knowingly sold and delivered a controlled substance, the trial court erred in failing to dismiss the charges against him. We disagree.

When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or

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conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. The trial court must decide only whether there is substantial evidence of each essential element of the offense charged and of the defendant's being the perpetrator of the offense.

State v. Chillo, 208 N.C. App. 541, 545, 705 S.E.2d 394, 397 (2010) (quoting *State v. Miller*, 363 N.C. 96, 98–99, 678 S.E.2d 592, 594 (2009)). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Nettles*, 170 N.C. App. 100, 103, 612 S.E.2d 172, 174 (2005) (citation and quotations omitted). “We review the denial of a motion to dismiss for insufficient evidence *de novo*.” *State v. Woodard*, 210 N.C. App. 725, 730, 709 S.E.2d 430, 434 (2011) (citation omitted).

“Except as authorized by [the North Carolina Controlled Substances Act, codified within Chapter 90, Article 5 of our General Statutes], it is unlawful for any person: (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]” N.C. Gen. Stat. § 90-95(a)(1) (2013); *see also State v. Moore*, 327 N.C. 378, 381, 395 S.E.2d 124, 126 (1990) (“[T]he language of N.C.G.S. § 90-95(a)(1) creates three offenses: (1) *manufacture* of a controlled substance, (2) *transfer* of a controlled substance by sale or delivery, and (3) *possession with intent to manufacture, sell or deliver* a controlled substance.”). “It is well-established that there are two essential elements of this charge: possession and

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intent.” *State v. Turner*, ___ N.C. App. ___, ___, 765 S.E.2d 77, 81 (2014), *review denied*, ___ N.C. ___, 768 S.E.2d 563 (2015).

Per North Carolina General Statutes, section 90-89 (Schedule I controlled substances), unless otherwise excepted “any material, compound, mixture, or preparation that contains any quantity of [3,4-Methylenedioxypropylvalerone (also known as MDPV)] having a stimulant effect on the central nervous system” is a Schedule I controlled substance. N.C. Gen. Stat. § 90-89(5)(i) (2013).¹

It is unchallenged that defendant was in possession of a mixture which contained MDPV (a controlled substance); defendant possessed the mixture containing MDPV with the intent to sell or deliver the mixture; and defendant did sell and deliver the mixture containing MDPV. Defendant contends that he did not know the mixture contained a controlled substance. But the evidence also includes testimony that Lingerfelt questioned defendant on more than one occasion regarding the legality of selling the bath salts; “I had heard that people were getting high from it.” In an effort to assuage Lingerfelt’s apprehension about potentially selling a controlled substance in A-1 Express Mart, Lingerfelt testified that defendant showed him a lab report regarding the contents of the bath salts.

Q. What kind of piece of paper was it?

¹ Pursuant to North Carolina’s 2011 Session Laws, General Statutes, section 90-89(5) was amended to include 3,4-Methylenedioxypropylvalerone (also known as MDPV) as a Schedule I controlled substance effective 1 June 2011. *See* 2011 N.C. Sess. Laws ch. 12 § 1. Defendant provided A-1 Express Mart with bath salts including Sextacy from September 2011 through January 2012.

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A. It looked like something from a lab.

Q. Okay. So did he describe to you what that piece of paper was?

A. I think he did, yes.

Q. He said it was a lab report?

A. Yes.

In the light most favorable to the State, the evidence indicates that defendant had knowledge of the chemical composition of the bath salt mixture he intended to sell or deliver, and that he did sell or deliver a mixture which contained a controlled substance. Therefore, as to the charges regarding possession with intent to manufacture, sell or deliver MDPV and possession with intent to sell or deliver MDPV, we affirm the trial court's ruling to deny defendant's motions to dismiss, and find no error in the judgment of the trial court. Accordingly, we overrule defendant's argument.

NO ERROR.

Judges GEER and TYSON concur.

Report per Rule 30(e).