IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-411

Filed: 5 January 2016

Mecklenburg County, No. 11CRS227974

STATE OF NORTH CAROLINA

v.

RAUL OLIVEROS, Defendant.

Appeal by Defendant from judgment entered 13 March 2012 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 2015.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Adrian W. Dellinger, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for the Defendant.

DILLON, Judge.

Raul Oliveros ("Defendant") appeals from a jury verdict convicting him of trafficking in heroin.

I. Background

In June 2011, two officers from the Charlotte-Mecklenburg police department encountered Defendant who was sitting in his parked vehicle with a female passenger ("Ms. Rodarte"). The officers discovered balloons containing heroin in Ms. Rodarte's

pocket. The officers also observed Defendant in the driver's seat of his vehicle attempting to hide a bag containing heroin-filled balloons behind his back. Defendant was subsequently indicted for trafficking in heroin.

Defendant was tried by a jury and found guilty of trafficking in heroin by possession of more than 14 grams and less than 28 grams of heroin. He was sentenced to 90 to 117 months. Defendant timely appealed.

II. Analysis

Defendant makes two arguments on appeal, which we address in turn.

A. Acting in Concert

Defendant first argues that the trial court erred by giving a jury instruction on "acting in concert." Defendant contends that the evidence did not warrant this instruction because Ms. Rodarte did not do the acts necessary to constitute the crime. We disagree.

We review challenges to the trial court's decisions regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "An instruction about a material matter must be based on sufficient evidence." *Id*.

Our Supreme Court has stated: "[t]he principle of concerted action need not be overlaid with technicalities. It is based on the common meaning of the phrase 'concerted action' or 'acting in concert.' To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose."

State v. Joyner, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979). Under this principle, it matters not whether the defendant did all, some, or none of the actions which would constitute the commission of the crime so long as he was present when the crime was committed and that he was acting with another where the acts of both, taken together, constitute the crime. *Id.* at 356-57, 255 S.E.2d at 395.

In determining the sufficiency of the evidence to warrant a concerted action instruction, the evidence must be viewed in the light most favorable to the party seeking the instruction, which, in this case, is the State. *See State v. Watkins*, 283 N.C. 504, 509, 196 S.E.2d 750, 754 (1973). Here, when viewed in the light most favorable to the State, the evidence tended to show as follows: Defendant and Ms. Rodarte were conversing in a parked car in an area known for drug activity. Defendant attempted to conceal a bag containing balloons full of a substance which was later shown to be over 14 grams of heroin. Ms. Rodarte lied to the officers about her identity. She was found to be in actual possession of several balloons, similar to the balloons actually possessed by Defendant, which contained a substance which she admitted to the officers to be contraband. The officers also discovered packages of empty balloons and a calculator in the area where Ms. Rodarte had been sitting. Ms. Rodarte was found to be in possession of $440.00 in cash, and Defendant was found to be in possession of $65.00 in cash. Based on these facts, we hold that the State presented sufficient evidence tending to show that Defendant and Ms. Rodarte acted

together for a common scheme or plan to traffic in heroin by possession. *See Joyner*, 297 N.C. at 356-57, 255 S.E.2d at 395. Therefore, the trial court did not err in submitting this instruction to the jury. This argument is overruled.

B. Repetition of Jury Instructions

Defendant's second argument on appeal is that the court erred in its response to a question asked by the jury after they had begun deliberations. The jury submitted three questions to the trial judge; however, Defendant challenges only the trial court's response to its second query:

> [I]f [Defendant] knew [Ms. Rodarte] possessed the drugs[,] is that enough to qualify as constructive possession?

In response to this question, the trial court proposed to re-read the definition of trafficking, which contained the instruction on acting in concert. Defendant objected.

On appeal, Defendant argues that the trial court's repetition of the trafficking definition was improper and prejudicial because it was (1) not responsive to the jury's question, (2) unnecessary, and (3) included the acting in concert instruction, which Defendant contends was improperly given in the first instance. We disagree.

Trafficking by possession requires "knowing possession," which can be proved by a showing that: (1) the defendant had actual possession; (2) the defendant had constructive possession; or (3) the defendant acted in concert with another to commit the crime. *State v. Garcia*, 111 N.C. App. 636, 639-40, 433 S.E.2d 187, 189 (1993). Although the acting in concert theory is not generally applicable to possession

offenses; *see State v. James*, 81 N.C. App. 91, 97, 344 S.E.2d 77, 81 (1986); our courts have instructed juries on both constructive possession and acting in concert in possession cases. *See Garcia*, 111 N.C. App. at 640, 433 S.E.2d at 189.

In response to all three questions posed by the jury, the trial court re-read the constructive possession instruction followed by the definition of trafficking. The mere fact that a trial court repeats an "otherwise proper instruction" does not constitute error. *State v. McDougald*, 336 N.C. 451, 461, 444 S.E.2d 211, 217 (1994). As discussed in Part A of this opinion, it was proper for the trial court to give the instruction on acting in concert. Our Supreme Court has awarded a new trial based on correct instructions only when "the instructions in their totality were so emphatically favorable to the [appellee]" that such action was necessary to protect the rights of the appellant. *Wall v. Stout*, 310 N.C. 184, 190, 311 S.E.2d 571, 575 (1984). We are unable, though, to conclude that the facts of this case rise to that standard, especially in light of the fact that constructive possession and acting in concert are two avenues by which the jury was permitted to find that Defendant "knowingly possessed" heroin. *See Garcia*, 111 N.C. App. at 639-40, 433 S.E.2d at 189. The trial court's repetition of both instructions directly responded to the jury's inquiries. Accordingly, Defendant's second argument is overruled.

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

NO ERROR.

Judges GEER and HUNTER, JR., concur.

Report per Rule 30(e).