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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-474

Filed: 5 January 2016

Sampson County, No. 11 CRS 53357

STATE OF NORTH CAROLINA

v.

DANNY ROBERT AYCOCK

Appeal by defendant from judgment entered 17 September 2014 by Judge Phyllis Gorham in Sampson County Superior Court. Heard in the Court of Appeals 28 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Laura H. McHenry, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant-appellant.

BRYANT, Judge.

Where the trial court properly denied defendant's request for an instruction on the lesser included offense of attempt, we find no error.

On 1 December 2011, Sampson County Sheriff Deputies Josuph Frischman and Dewayne Barber were conducting surveillance of a car wash in an attempt to serve warrants on Melvin Emmanuel ("Emmanuel"). The deputies observed Emmanuel drive up in a white pickup truck, exit his truck, and drive away in a

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Pontiac Bonneville. The deputies followed Emmanuel as he turned into a nearby Burger King parking lot.

Upon pulling up directly behind the Pontiac, the deputies saw Emmanuel in the driver's seat and defendant, Danny Robert Aycock, sitting in the front passenger seat. Deputy Frischman approached the Pontiac on the driver's side and Deputy Barber approached on the passenger's side. Emmanuel and defendant were leaning towards the middle of the vehicle. Deputy Frischman immediately removed Emmanuel from the car, and placed him under arrest on the outstanding warrants against him. As Deputy Barber removed defendant from the Pontiac, he noticed an unmarked orange pill bottle on the center console of the car. The bottle contained forty-four pills, later determined to be Vicodin.

Defendant was transported to the Sampson County Sheriff's Department. After waiving his *Miranda* rights, defendant told the deputies that he used to work at the car wash with Emmanuel, that he knew Emmanuel sold pills, and that he was meeting with Emmanuel that day to purchase 44 pills for \$90.00. Defendant further stated that when Emmanuel saw the deputies approaching, Emmanuel threw the bottle of pills at defendant and said, "take this s**t."

On 1 December 2011, defendant was charged with trafficking by possession of more than 14, but less than 28 grams, of an opiate mixture. Subsequently, on 27 May 2014, defendant was indicted by the Sampson County grand jury on the offense of

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trafficking a mixture containing an opium derivative by possessing 14 grams or more, but less than 28 grams. The case came on for trial before the Honorable Phyllis M. Gorham, Superior Court Judge, and a jury, at the 15 September 2014 criminal term of Sampson County Superior Court.

On 17 September 2014, the State rested its case against defendant. Immediately thereafter, defendant moved to dismiss the charge against him. The trial court denied defendant's motion to dismiss the trafficking charge. Defendant elected not to testify or present any evidence.

Once all of the evidence had been presented, the trial court conducted a charge conference. During the charge conference, defendant requested an instruction on the lesser included offense of attempted trafficking by possession. The trial court denied the request. The court instructed the jury on trafficking by possession, acting in concert, and actual and constructive possession. The jury found defendant guilty of trafficking by possession and the trial court sentenced defendant to 90 to 117 months of imprisonment. Defendant appeals.

On appeal, defendant contends the trial court erred by failing to instruct the jury on the lesser included offense of attempted trafficking. Defendant asserts the instruction was warranted because the State failed to show he possessed the pills. We disagree.

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“[A] lesser included offense instruction is required if the evidence would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater.” *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citations and quotation marks omitted). “Where the State’s evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense.” *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985) (citation omitted). “[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) (citations omitted).

Defendant was charged with trafficking by possession in violation of N.C. Gen. Stat. § 90-95(h)(4), which states in part: “Any person who . . . possesses four grams or more of opium or opiate, or any . . . derivative . . . of opium or opiate . . . shall be guilty of a felony which felony shall be known as ‘trafficking in opium or heroin.’” N.C. Gen. Stat. § 90-95(h)(4) (2013). Attempt may be charged where there is “an intent to commit the substantive offense and an overt act which goes beyond mere preparation but falls short of the completed offense.” *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), *cert. denied*, 511 U.S. 1088, 159 L. Ed. 2d 252 (2004) (citation omitted). Defendant asserts that he never possessed the pills and, therefore, he did not complete the offense of trafficking by possession.

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“Possession of a controlled substance may be actual or constructive. A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use.” *State v. Ferguson*, 204 N.C. App. 451, 459, 694 S.E.2d 470, 477 (2010) (quotation marks and citations omitted). A person has constructive possession of a controlled substance “when, while not having actual possession, he has the intent and capability to maintain control and dominion over [the controlled substance.]” *Id.* (quoting *State v. Beaver*, 317 N.C. 643, 648 S.E.2d 476, 480 (1986)).

Here, the charge against defendant is not based on contradictory evidence (or testimony by the police), but instead on defendant’s statement to the deputies and direct evidence of defendant’s constructive possession of the pills. Defendant admitted that he was in the car to buy the pills from Emmanuel. Thus, defendant had the intent to control the use and disposition of the pills. Further, defendant admitted Emmanuel threw the bottle of pills at defendant, at which time Emmanuel surrendered his exclusive control over the pills and defendant gained the capability to control the pills. Based on these facts, we hold the trial court properly denied defendant’s request for an instruction on the lesser included offense of attempt.

NO ERROR.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).