IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-245

Filed: 15 November 2016

Greene County, Nos. 13 CRS 50223, 14 CRS 50-51, 53

STATE OF NORTH CAROLINA

v.

JAMAR VONZELL BYNES

Appeal by defendant from judgment entered 11 September 2015 by Judge W. Douglas Parsons in Greene County Superior Court. Heard in the Court of Appeals 25 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Robert K. Smith, for the State.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant.

DIETZ, Judge.

Defendant Jamar Vonzell Bynes challenges his conviction for possession with intent to sell or deliver marijuana. Bynes was in prison on unrelated charges when he met Ladasia Hill in the prison visitation room. Hill smuggled approximately 50 grams of marijuana into the prison in a condom attached to her hip and attempted to give the drugs to Bynes during the visit. The drugs accidentally dropped to the floor where a correctional officer discovered them.

Bynes argues that there was insufficient evidence to show his intent to sell or deliver the marijuana. We reject this argument because the State presented evidence that Hill communicated with another inmate, arranged for a specific time and place for the delivery of the marijuana with that other inmate, and was paid by that other inmate for delivery of the marijuana. That evidence, combined with the amount of marijuana seized, which a correctional officer testified was unusually large for recreational use within a prison, was sufficient for the jury to find intent.

Bynes also argues that the trial court committed plain error by instructing the jury that they could stay an extra hour past 5:00 p.m. on the first day of deliberations. As explained below, we find no error, and certainly no plain error, in the trial court's instructions.

Facts and Procedural History

On 6 April 2013, Ladasia Hill visited Bynes while he was an inmate at Maury Correctional Institution. Correctional officers detained Bynes during that visit after discovering a package of marijuana underneath the table where Bynes and Hill were sitting.

Hill testified that she brought the marijuana to Bynes at the request of another inmate, Ramel Troy, who paid Hill for the drugs and helped her plan how to smuggle the drugs into the prison. Hill, who had not previously met Bynes, viewed a photo of Bynes online before her visit so she would recognize him.

Hill hid a condom containing marijuana on her hip as she went through security. Before entering the visitation room, she placed the package in her hand, concealed by a sweater. She spotted Bynes in the visitation room and went to hug him. They attempted to exchange the package during the hug but it dropped to the floor. They then sat down at a table.

A correctional officer discovered the drugs under the table where Bynes and Hill were sitting and confiscated it. The State Crime Laboratory determined the package contained 55.13 grams of marijuana.

The State indicted Bynes for possessing a controlled substance in a penal institution, possession with intent to sell or deliver a controlled substance, conspiracy to possess a controlled substance in a penal institution, and attaining habitual felon status. A jury convicted Bynes of the drug offenses and he pleaded guilty to attaining habitual felon status. The trial court sentenced Bynes to 77 to 105 months in prison. Bynes timely appealed.

Analysis

Bynes raises two arguments on appeal. First, he argues that the trial court erred in denying his motion to dismiss the charge or possession with intent to sell or deliver. Second, he argues that the trial court committed plain error by making remarks that coerced the jury. We address these arguments in turn.

I. Denial of motion to dismiss

Bynes first argues that the trial court erred by denying his motion to dismiss the possession with intent to sell or deliver a controlled substance charge. He contends that the State failed to produce substantial evidence that he intended to sell or deliver the marijuana he received from Hill. As explained below, we reject this argument.

"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. Powell,* 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "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, 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).

The criminal statute under which the State convicted Bynes requires proof of three elements beyond a reasonable doubt: (1) possession; (2) of a controlled substance; (3) with the intent to sell or deliver that controlled substance. *See* N.C. Gen. Stat. § 90-95(a)(1); *State v. Blakney*, 233 N.C. App. 516, 519, 756 S.E.2d 844, 846 (2014). Bynes challenges only the intent element.

Here, the State presented substantial evidence on the element of intent. First, the State presented evidence that Hill worked with another inmate, Ramel Troy, to smuggle marijuana into the prison. Hill testified that Troy reached out to her about smuggling marijuana into the prison and the two had "[a] hundred, two hundred" phone calls. During these calls, Troy told Hill where to go to get the marijuana and explained to her how to package it. Troy mailed Hill the prison visitation application, told her how to fill it out, what day to visit, and how to get through prison security with the marijuana on that day. Troy also sent Hill money to buy the marijuana and additional money to cover some of her personal expenses.

When correctional officers found the marijuana and arrested Bynes in the visitation room, he had not given Hill any money and there is no evidence Bynes previously had given Hill any money. Likewise, Hill had only one phone conversation with Bynes, which occurred the day before she was to visit the prison on 6 April 2013. This evidence is sufficient for the jury to conclude that Bynes obtained the marijuana

with the intent to deliver it to Ramel Troy. *See State v. Pevia*, 56 N.C. App. 384, 289 S.E.2d 135 (1982).

In addition, Correctional Lieutenant Priscilla Sutton testified that the amount of marijuana that Bynes possessed, 55.13 grams, is an amount much larger than usually found with inmates for recreational use in prison. Although in other contexts this Court has been reluctant to find this amount of marijuana alone sufficient to indicate intent to sell or deliver, *see State v. Wiggins*, 33 N.C. App. 291, 294, 235 S.E.2d 265, 268 (1977), the fact that Bynes was incarcerated, and that possession of such a large amount of marijuana was unusual for an inmate, is sufficient for the jury to infer intent to sell or deliver here, in light of the evidence supporting the inference that Bynes intended to deliver the drugs to Troy. *See State v. King*, 42 N.C. App. 210, 213, 256 S.E.2d 247, 249 (1979).

In sum, viewing all this evidence in the light most favorable to the State, there was substantial evidence to support the charge that Bynes possessed the smuggled marijuana with the intent to sell or deliver it to others. Accordingly, the trial court properly denied the motion to dismiss.

II. Jury Coercion

Bynes next contends that the trial court committed plain error by making remarks to the jury that inadvertently rushed a verdict. We disagree.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.*

"[A] trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous." *State v. Holcomb*, 295 N.C. 608, 614, 247 S.E.2d 888, 892 (1978). In deciding whether a judge's comments "forced a verdict or merely served as a catalyst for further deliberation, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury." *State v. Alston*, 294 N.C. 577, 593, 243 S.E.2d 354, 364-65 (1978). "Some of the factors considered in [previous] cases in judging the totality of the circumstances are whether the court conveyed an impression to the jury that it was irritated with them for not reaching a verdict, whether the court intimated to the jury that it would hold them until they reached a verdict, and whether the court told the jury a retrial would burden the

court system if the jury did not reach a verdict." *State v. Beaver*, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988).

In this case, the jury was sent to deliberate at 3:49 p.m. on 10 September 2015. The jury returned to the courtroom at 5:00 p.m. after the foreperson informed the bailiff that she needed to collect her keys from her office across the street from the courthouse before the office was locked. The following exchange then occurred between the trial court and the foreperson:

The Court:	My question to you is this, it's now the hour of five o'clock. Is this jury making progress in this case? Don't tell me --
[Foreperson]:	Are we making progress? No.
The Court:	You're not making progress towards a verdict?
[Foreperson]:	No. I don't think so.
The Court:	Well, after an hour and eight minutes, that does not surprise me.

The court then held a bench conference, and later continued its exchange with the foreperson:

The Court:	If I let you stay another hour, do you think the jury can continue to deliberate and reason with each other?
[Foreperson]:	Yes, Your Honor, we'll try.
The Court:	I think what I'm asking is, everybody's got schedules. Would the jury like to

> stay another hour today, I'm not going to keep you past that, and if you don't want to stay today, I'm not going to keep you today. We'll resume another -- you know, another time.
>
> Juror No. 1: I think an hour.
>
> [Foreperson]: Are you all okay with that? Yes, sir.
>
> The Court: You'd like to stay today?
>
> [Foreperson]: Yes, sir.

The jury then retired to resume deliberations at 5:05 p.m. At 5:23 p.m., the court announced that the jury had reached a unanimous verdict.

The trial court's instructions were not coercive. The court expressed to the jury that it was not surprised they had yet to make progress after just over an hour of deliberation. The court offered the jury an opportunity to deliberate longer that evening or to return for more deliberations on another day. And the court emphasized that it would not require them to deliberate for an unreasonable amount of time if they chose to continue with deliberations that evening. The transcript indicates that the jury foreperson consulted the jurors about staying to continue deliberating for around an hour that evening. No juror indicated that he or she did not wish to continue deliberations.

As in past cases where this Court found no coercion, the trial court "was at all times polite to the jury; it did not intimate it would be displeased with them if the

jury failed to reach a verdict; [and] it did not threaten to hold them on the jury for any length of time if they did not reach a verdict." *Beaver*, 322 N.C. at 465, 368 S.E.2d at 608. Accordingly, we find no error in the trial court's instructions to the jury, and certainly no plain error.

Conclusion

For the reasons discussed above, Bynes received a fair trial free of error.

NO ERROR.

Judges HUNTER, JR. and McCULLOUGH concur.

Report per Rule 30(e).