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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-286

Filed: 20 September 2016

Cleveland County, No. 13 CRS 52153-54

STATE OF NORTH CAROLINA

v.

JOSHUA PINKNEY JOSEPH MEARS

Appeal by defendant from judgment entered 18 November 2014 by Judge James W. Morgan in Cleveland County Superior Court. Heard in the Court of Appeals 7 September 2016.

*Attorney General Roy Cooper, by Special Deputy Attorney General Richard H. Bradford, for the State.*

*Mary Kimbrough Cook for defendant-appellant.*

TYSON, Judge.

Joshua Pinkney Joseph Mears (“Defendant”) appeals from judgments entered upon the jury’s convictions of possession of an immediate precursor chemical, with intent to manufacture methamphetamine, and attempt to manufacture methamphetamine. We find no error.

I. Background

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Isaac Hannah, an enforcement officer with the North Carolina Wildlife Resources Commission, was on patrol in Cleveland County on the afternoon of 18 April 2013. Officer Hannah observed a Dodge truck parked on the left shoulder of Airport Road, facing toward him. Officer Hannah observed the driver of the truck throw a white object from the window, which appeared to be trash. Officer Hannah stopped to investigate.

The Dodge truck was equipped with an extended cab, which included a backseat passenger compartment. As he approached the truck, Officer Hannah noticed a strong chemical odor emanating from the truck. Officer Hannah asked the occupants for identification. After Officer Hannah determined Defendant had given him a false name, he walked to the passenger side of the truck to ascertain Defendant's true identity.

Defendant was seated in the backseat on the passenger side of the truck. The driver of the truck was Clinton Barnes. Michael Stager, the owner of the truck, was seated in the front passenger seat. Officer Hannah opened the front passenger door of the truck, where Stager was seated. In the floorboard of the front passenger seat, between Stager's feet, was a black bag. The bag was open, and Officer Hannah saw a hand-held propane torch and a can of Coleman propane gas. Beside the bag was a clear plastic bag containing balled up pieces of aluminum foil. Defendant exited the vehicle, gave Officer Hannah his correct name, and Officer Hannah handcuffed him.

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Officer Hannah was suspicious the items he observed in the front floorboard were used to manufacture methamphetamine and called for assistance. He removed the black bag from the truck. Officer Hannah found lithium batteries in a compartment of the black bag.

Cleveland County Sheriff's Lieutenant Chris Hutchins arrived at the scene to investigate. Lieutenant Hutchins had received special training in identifying "clandestine" methamphetamine labs. When he arrived, he observed a black bag and a camouflage bag. He searched through the camouflage bag and saw lithium batteries, a pipe cutter, and lye.

Lieutenant Hutchins searched the area around the truck and found a two-liter bottle located approximately ten yards into the adjoining woods, which contained a milky white substance. He believed the bottle was a "one-pot" methamphetamine lab.

Cleveland County Sheriff's Investigator Jonathan Owen also had received special training and was certified in identifying "clandestine" methamphetamine labs. Investigator Owen identified the contents from the two bags as items used to manufacture methamphetamine: aluminum foil, a source of gas, lithium batteries, a pipe cutter, hydrogen peroxide, cold packs (nitrogen source), lye, coffee filters, remnants of pills, bottles used as containers for gas generation, and muriatic acid (hydrochloric acid source). The muriatic acid was located in the rear seat of the truck.

Investigator Owen testified these items are used in the “one-pot” methamphetamine manufacturing process.

SBI Special Agent Chris Moody also arrived at the scene to assist in the investigation. Agent Moody testified as an expert witness in the methamphetamine manufacturing process. He testified the items found inside the truck were used in the “one-pot” method of manufacturing methamphetamine. Agent Moody tested and confirmed the presence of ammonia inside the two-liter bottle recovered from the nearby woods, and concluded that it was a methamphetamine lab.

Cleveland County Sheriff’s Investigator James Ladd interviewed Defendant. Defendant told Investigator Ladd that “[t]he owner of the truck makes the s--t.” Defendant stated he did not know the name of the owner of the truck, and that “he mixes the s--t up.”

Defendant further stated, “we didn’t know he was going to do all this s--t.” When Officer Hannah pulled up, Defendant stated Stager “started slinging stuff.” The audiotape of Investigator Ladd’s interview with Defendant was played for the jury.

Defendant also told Officer Ladd that he had been with Stager in the past when Stager traded methamphetamine for Sudafed, a required ingredient of methamphetamine. He stated that Stager “was mixing it” at his house, but had the

ability to make methamphetamine anywhere. Defendant told Investigator Ladd that he was with Stager and Barnes the first time he had smoked methamphetamine.

Investigator Ladd testified Barnes' wallet contained a card containing a recipe for methamphetamine. Defendant told Investigator Ladd the three of them were supposed to go camping. A tent and a lantern were also found inside the truck.

Defendant was tried before a jury on 17 November 2014. Barnes testified at Defendant's trial. He was serving a 23-37 month sentence for possession of methamphetamine precursor chemicals, pursuant to a plea agreement. Barnes testified he had known Defendant since elementary school. On 18 April 2013, Stager and Defendant picked Barnes up to go camping in the mountains.

The jury returned verdicts of guilty of possession of an immediate precursor chemical, with intent to manufacture methamphetamine, and attempt to manufacture methamphetamine. Defendant was sentenced to an active prison term of 19 to 32 months for the conviction of possession of the precursor chemical, and a concurrent term of 54 to 77 months for the conviction of attempt to manufacture methamphetamine. Defendant's appeal is before us by this Court's issuance of the writ of certiorari on 30 July 2015.

## II. Denial of Defendant's Motion to Dismiss

In his sole argument on appeal, Defendant argues the trial court erred by failing to dismiss the charge of possession of a methamphetamine precursor chemical

where the State failed to present substantial evidence that Defendant possessed lithium batteries, or was acting in concert with the others in the car who possessed the chemicals.

A. Standard of Review

When ruling upon a defendant's motion to dismiss, the trial court determines whether substantial evidence exists of: (1) each essential element of the offense charged; and, (2) whether defendant is the perpetrator of the crime. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "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, 78-79, 265 S.E.2d 164, 169 (1980) (citation omitted).

When considering a motion to dismiss, the court must review the evidence in the light most favorable to the State to determine whether substantial evidence was presented of each element of the offense. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). This Court reviews a trial court's denial of a defendant's motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

B. Analysis

Defendant challenges his conviction for possession of an immediate precursor chemical, with the intent to manufacture methamphetamine under N.C. Gen. Stat. § 90-95(d1)(2). The statute provides:

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(2) Except as authorized by this Article, it is unlawful for any person to:

a. Possess an immediate precursor chemical with intent to manufacture methamphetamine; or

b. Possess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine.

Any person who violates this subdivision shall be punished as a Class F felon.

N.C. Gen. Stat. § 90-95(d1)(2) (2015).

The statute lists forty-five “immediate precursor chemicals” to which subsection (d1) applies. N.C. Gen. Stat. § 90-95(d2) (2015). Included in this list is “[s]ources of lithium metal.” N.C. Gen. Stat. § 90-95(d2)(21). During the charge conference, the State requested “[s]ources of lithium metal” be the only precursor chemical submitted to the jury.

The court instructed the jury it could convict and find Defendant guilty of the crime, if the jury found Defendant, while “acting either by himself *or together with others* knowingly possessed lithium and intended to manufacture a controlled substance or knew or had reasonable cause to believe it would be used to manufacture a controlled substance.” (emphasis supplied).

Evidence tended to show the lithium batteries were found in a bag on the floorboard in front of the passenger seat of the truck, where Stager was seated.

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Defendant was present and seated on the backseat of Stager's truck. Defendant argues insufficient evidence was presented he was aware of the bag's contents, or that he acted in concert with Stager and Barnes with a common purpose to possess the lithium for the manufacture of methamphetamine. We disagree.

“Under the theory of acting in concert, a defendant need not do any particular act constituting some part of the crime. However, he must be ‘present at the scene of the crime’ and ‘act[] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.’” *State v. Diaz*, 155 N.C. App. 307, 575 S.E.2d 523, 528 (2002) (quoting *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979)), *cert. denied*, 357 N.C. 464, 590 S.E.2d 396 (2003).

Our Supreme Court's opinion in *State v. Diaz*, 317 N.C. 547, 346 S.E.2d 488 (1996) provides guidance. The issue before the Court was whether the State presented sufficient evidence that the defendant trafficked in marijuana. Law enforcement officers saw two men drive large trucks to the Long Shoal River in Hyde County. Two vehicles emerged from the area, a tractor-trailer with two occupants and a Buick Regal with four occupants. The tractor-trailer was carrying hundreds of bales of marijuana. A search of the Buick, which was equipped with a CB radio, revealed a rental agreement for the car in the name of the defendant and tidewater maps. The defendant was not present. Another nearby truck was also loaded with bales of marijuana. *Id.* at 548-49, 346 S.E.2d at 492.



Officers activated their blue lights and sirens, and approached the area near the river, where they observed numerous individuals run for the swamp. *Id.* at 549, 346 S.E.2d at 492. Watercrafts containing marijuana residue were on the water. One of them contained a notebook with a written code phrase, which included the word “Dias.”

Three days later, the defendant was found walking in an uninhabited area miles away. He was dirty, wet, and appeared exhausted. The defendant told law enforcement he had been in the swamp for several days. *Id.* Although the defendant was not found with or near any marijuana, our Supreme Court held the evidence was sufficient to support the jury’s conclusion that defendant “acted in concert with the traffickers to possess or transport” the marijuana. *Id.* at 552, 326 S.E.2d at 493.

Here, the State presented sufficient evidence tending to show Defendant, Barnes, and Stager acted together, and possessed lithium “knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture methamphetamine.” N.C. Gen. Stat. § 90-95(d1)(2)(b). The truck contained a strong chemical odor. Chemicals used in the manufacture of methamphetamine were located in both the front and back seats. Stager had a history of manufacturing methamphetamine, of which Defendant was well aware. Defendant had smoked Stager’s methamphetamine in the past. Defendant had been

present when Stager traded methamphetamine for Sudafed. Defendant initially gave a false name when approached by law enforcement.

When viewed in the light most favorable to the State, the evidence tends to show the three men shared a common plan or purpose to possess and use the materials inside Stager's truck to manufacture methamphetamine. The trial court properly denied Defendant's motion to dismiss. Defendant's arguments are without merit and overruled.

### III. Conclusion

The State presented sufficient evidence to withstand Defendant's motion to dismiss and to allow the jury to return guilty verdicts to convict Defendant of possession of an immediate precursor chemical, with the intent to manufacture methamphetamine under N.C. Gen. Stat. § 90-95(d1)(2). Defendant received a fair trial, free from errors he preserved and argued.

NO ERROR.

Judges CALABRIA and DAVIS concur.

Report per 30(e).