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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-412

Filed: 15 November 2016

Guilford County, No. 14 CRS 090317

STATE OF NORTH CAROLINA

v.

ALFRED BUTLER, JR.

Appeal by Defendant from judgment entered 8 September 2015 by Judge Eric C. Morgan in Superior Court, Guilford County. Heard in the Court of Appeals 3 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Regina T. Cucurullo, for the State.

Sharon L. Smith for Defendant.

McGEE, Chief Judge.

Alfred Butler, Jr. ("Defendant") appeals from judgment after a jury found him guilty of possession of more than one and one-half ounces of marijuana. On appeal, Defendant contends the trial court erred in denying his motion to dismiss that charge, arguing the State failed to provide substantial evidence of an essential element of the offense, being Defendant's possession of the marijuana. We conclude that the facts,

when viewed in the light most favorable to the State, provided substantial evidence of Defendant's possession. Accordingly, we find no error.

I. Background

Deputy Thomas Gordy ("Deputy Gordy") of the Guilford County Sheriff's Office was conducting routine parcel interdiction at the FedEx air hub in Greensboro, North Carolina on 24 October 2014. At trial, Deputy Gordy explained that, during routine interdiction, law enforcement officers look for suspicious packages as they are unloaded from airplanes and travel down a conveyer belt. Deputy Gordy testified that a package with a handwritten label or one with excessive taping or glue on the seams may be deemed suspicious. That day, Deputy Gordy noticed a "plain brown box" that piqued his interest because it was taped at all of the seams. Deputy Gordy picked up the box from the conveyer belt, and noticed it was "center heavy," solidly packed, and possibly double-boxed. He also noticed a chemical smell emanating from the box.

Deputy Gordy examined the shipping label that showed the box had been shipped from "Jung Lee, Explore Korea" at an address in Los Angeles, California, to a "Mr. Groen" at 5717 Bramblegate Road, Unit H, in Greensboro. Deputy Gordy testified that, in his experience, Los Angeles was considered a "source area" for incoming drugs. He then "ran" the two addresses on the shipping label in "databases made available . . . through law enforcement," and discovered that the address in Los

Angeles did not exist, and that a "Mr. Green"[1] did not live at the address in Greensboro. Deputy Gordy was also unable to confirm the existence of "Jung Lee" or an "Explore Korea" in Los Angeles. Deputy Gordy concluded that, in his opinion, there was a "very high probability" the box contained narcotics. Based on this suspicion, Deputy Gordy transported the box to the sheriff's office for a "free air sniff" by a dog in the K-9 unit trained in detecting narcotics. The dog failed to "alert" on the box.

Despite the dog's failure to alert, Deputy Gordy was still convinced the box contained narcotics, so he decided to conduct a "knock and talk" at the Greensboro address listed on the shipping label, along with the assistance of three other law enforcement officers. Deputy Gordy, in plain clothes and carrying the package, knocked on the door of the Greensboro address, and Defendant answered. At trial, Deputy Gordy described the encounter:

> I told [Defendant] that I was a neighbor and that the box had been delivered to my house by accident and asked him if he lived there and if this was his address and told him that the box was misdelivered to me.
>
> [Defendant] then took the box and looked at it, held it for several seconds, looked around the parking lot, asked me where I lived, had several questions about the box -- who is it addressed to, where's it coming from. Again, the whole time he's looking around the parking lot.

[1] At trial, Deputy Gordy testified he believed the recipient's name on the package, "Mr. Groen," was a typographical error, and that it should have read "Mr. Green." It is unclear from the transcript why he made this determination, or whether Deputy Gordy determined whether a "Mr. Groen" lived at the Greensboro address.

> [Defendant] then handed me back the box and attempted to walk back into his residence and said "Nah, I don't know anything about it."

Deputy Gordy testified that Defendant "was extremely nervous. He was looking around the parking lot as much as he was looking at the box, like he was looking for unmarked cars or undercover police officers or somebody, you know, watching." Deputy Gordy testified that Defendant had the package in his possession for approximately thirty seconds and, at one point, "almost turned around like he was gonna go back in the residence with it, and then he kinda stopped and turned and looked back around the parking lot again. Then he said 'Nah, I don't know anything about it' and tried to hand [Deputy Gordy] the box back." At that point, Deputy Gordy identified himself as law enforcement and the other officers, who were uniformed and who had been observing from an unmarked police vehicle, approached.

Upon further questioning, Deputy Gordy provided a slightly different version of events regarding Defendant's refusal of the package:

> [Prosecutor:] And by this time -- or during the course of your -- the brief moments of interaction you had with [Defendant] when he was asking you those questions and then took the box and then turned back around, was it during that time that the other officers were approaching?
>
> [Deputy Gordy:] It is.
>
> [Prosecutor:] Okay. And they would've been dressed in their -- with their protective vests and their insignia reading "Sheriff's Department."
>
> [Deputy Gordy:] Yes, sir.

> [Prosecutor:] And that's when he tried to give the box back to you.
>
> [Deputy Gordy:] Yes, sir.

The other officers, who had been observing the interaction from inside an unmarked vehicle, confirmed the latter account. Deputy C.L. O'Bryant testified he and the other officers exited their vehicle and approached Defendant after observing him take possession of the box and "turn as if he was gonna take the box back inside." Likewise, Deputy L.J. Tucker testified that he and the other officers exited the vehicle and approached after "[Defendant] took the package like he turned to go back inside the apartment."

Deputy Gordy further testified that, after the uniformed officers approached, Defendant responded by turning around, placing his hands behind his back, and stating "all right. Let's go."[2] Deputy Gordy handcuffed Defendant, but informed him that he was not under arrest. A small crowd of onlookers began to gather, so Deputy Gordy suggested the interaction continue inside Defendant's residence, and Defendant agreed. An initial search of the house, which was conducted for officer safety, revealed a small amount of marijuana on a coffee table in the living room. Defendant stated that "what was on the table was his," but maintained he "didn't

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[2] We note that Defendant disagrees with this, and other, characterizations of his actions during the encounter. However, in reviewing the trial court's denial of Defendant's motion to dismiss, we set out the facts in the light most favorable to the State, as the non-moving party.

know anything about the box." Deputy Gordy asked for Defendant's permission to open the box. Defendant initially denied his consent to do so, but later relented after consenting to a full search of his residence. Deputy Gordy opened the box, which contained "six approximately one-pound bundles of high-grade marijuana."

Defendant was indicted on 15 December 2014 on one count of possession with intent to sell or deliver marijuana, and one count of felony possession of marijuana. Defendant's trial began on 20 July 2015. At the close of the State's evidence, and again at the close of all of the evidence, Defendant moved to dismiss the charges against him for insufficient evidence. Both of Defendant's motions were denied. After deliberation, the jury found Defendant not guilty of possession of marijuana with intent to sell or deliver, but found him guilty of felony possession of marijuana. Defendant appeals.

II. Analysis

In his sole argument on appeal, Defendant argues the trial court erred by denying his motion to dismiss the charge of felony possession of marijuana. 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) (citation omitted).

> A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime.

State v. Hooks, ___ N.C. App. ___, ___, 777 S.E.2d 133, 138 (2015). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 348 (2012) (citation omitted). As explained by our Supreme Court:

> The term "substantial evidence" simply means that the evidence must be existing and real, not just seeming or imaginary. The trial court's function is to determine whether the evidence will permit a *reasonable inference* that the defendant is guilty of the crimes charged. In so doing the trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence. It is *not* the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss.

State v. Vause, 328 N.C. 231, 236-37, 400 S.E.2d 57, 61 (1991) (emphasis in original) (internal citations and quotation marks omitted); *see also State v. Patino*, 207 N.C. App. 322, 327, 699 S.E.2d 678, 682 (2010).

In the present case, Defendant was convicted of felony possession of marijuana pursuant to N.C. Gen. Stat. § 90-95(d)(5) (2015). "A defendant possesses marijuana within the meaning of section 90-95 when he has 'both the power and intent to control its disposition or use.'" *State v. Nowell*, 144 N.C. App. 636, 645, 550 S.E.2d 807, 813 (2001) (quoting *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)); *see also State v. Diaz*, 155 N.C. App. 307, 314, 575 S.E.2d 523, 528 (2002) (noting that actual possession of a controlled substance occurs "if it is on his person, he is aware of its

presence, and either by himself or with others, he has the power and intent to control its disposition or use.”). Likening the facts of his case to the facts present in *State v. Wheeler*, 138 N.C. App. 163, 530 S.E.2d 311 (2000) and *State v. Nowell*, 144 N.C. App. 636, 550 S.E.2d 807 (2001), Defendant argues the State failed to provide sufficient evidence of Defendant’s possession because he affirmatively rejected the box and handed it back to Deputy Gordy, and thus did not have the power and intent to control the disposition or use of the marijuana contained therein.

In *Wheeler*, an undercover officer sat down in the back seat of a car next to the defendant, and handed him a package of cocaine. *Wheeler*, 138 N.C. App. at 164, 530 S.E.2d at 312. The defendant then handed the cocaine to another of the car’s occupants, who tested it and determined he did not want to purchase the cocaine because it was of poor quality. *Id.* On appeal, this Court held that the State failed to provide substantial evidence of the defendant’s possession of the cocaine. *Id.* In so holding, we stated that “[t]he handling of [drugs] for inspection purposes does not constitute possession . . . , as [the defendant] did not have the power and intent to control its disposition or use.” *Id.* at 165, 530 S.E.2d at 313.

In *Nowell*, this Court held that the State failed to present substantial evidence that the defendant possessed roughly fifty pounds of marijuana found on the kitchen counter of a friend’s residence. 144 N.C. App. at 645, 550 S.E.2d at 813-14. The facts tended to show that the defendant placed money on the kitchen counter, stated he

was “going to smoke some of the marijuana” that was on the counter, and was near the counter when officers entered the residence as part of a police raid. *Id.* This Court held that evidence, viewed in the light most favorable to the State, “[did] not show [the defendant] had both the power and intent to control the marijuana located in [a friend’s] residence at the time law enforcement officers entered the residence.” *Id.* at 646, 550 S.E.2d at 814.

While we recognize the evidence in this matter is conflicting, we believe that, when viewed in the light most favorable to the State – as we are required to do – the facts in the present case are distinguishable from those in *Wheeler* and *Nowell* and are sufficient to affirm the trial court’s denial of Defendant’s motion. Deputy Gordy’s initial narrative of events suggested that Defendant rejected the box and returned it to him *before* the uniformed officers approached. However, upon further questioning, Deputy Gordy also testified that Defendant turned towards his residence holding the box, and only turned back towards Deputy Gordy and attempted to reject the box *after* he saw uniformed officers approaching him. The latter narrative of events was confirmed by officers in the unmarked vehicle, who testified that Defendant had taken possession of the box and “turn[ed] as if he was gonna take the box back inside.” Defendant’s possession of the box and turn towards his residence evidences a “power and intent to control” the box’s disposition or use in a manner greater than simply

passing a drug to another person, as in *Wheeler*, or being near the drugs at the time of a raid, as in *Nowell*.

Viewing the evidence in the light most favorable to the State, as we must, the evidence tended to show that Defendant accepted the box from Deputy Gordy and was returning to his residence with the box in his possession. This evidence is sufficient to show that Defendant had "both the power and intent to control [the marijuana's] disposition or use," *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714, and permitted "a reasonable inference that the defendant is guilty of the crime[] charged." *Vause*, 328 N.C. at 236-37, 400 S.E.2d at 61.

III. Conclusion

The trial court denied Defendant's motion to dismiss the charge of possession of marijuana because, in its view, the State provided substantial evidence of Defendant's possession of the marijuana contained in the box. Viewing the evidence in the light most favorable to the State, we agree and, therefore, affirm the trial court's denial of Defendant's motion to dismiss the charge of possession of marijuana. Defendant received a trial free of error.

NO ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).