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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-258

Filed: 7 August 2018

Mecklenburg County, No. 16-CRS-014131

STATE OF NORTH CAROLINA

v.

TRAVIS RYAN YOUNG, Defendant.

Appeal by defendant from judgment entered 25 October 2017 by Judge Todd Pomeroy in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 August 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Rebecca E. Lem, for the State.*

*James R. Parish for defendant-appellant.*

BERGER, Judge.

Travis Ryan Young (“Defendant”) appeals from judgment entered upon his convictions for trafficking opium or heroin and attempting to obtain a controlled substance by forgery. After review, we conclude that Defendant received a fair trial free from error.

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On May 9, 2016, Defendant was indicted for (1) trafficking opium or heroin, by possessing more than four but less than fourteen grams of oxycodone, and (2) attempting to obtain oxycodone by forgery. Defendant was tried before a jury from October 23 through October 25, 2017, at which the State's evidence tended to show the following: On December 6, 2015, Defendant presented a prescription for 120 pills of oxycodone at a Walmart pharmacy in Charlotte. The Walmart pharmacist queried the North Carolina Controlled Substances Reporting System database for the name and date of birth on the prescription received from Defendant, but that search found no such individual. The pharmacist called the doctor's office where the prescription had allegedly been written and was informed that the prescription was not legitimate. The pharmacist then notified police of Defendant's use of a fraudulent prescription.

Officer Ann Kanos ("Officer Kanos") of the Charlotte-Mecklenburg Police Department responded to the loss-prevention manager's office at Walmart with other officers to view live-stream video inside the store. On the video, Officer Kanos observed Defendant return to the pharmacy to wait for his prescription. The officers made contact with Defendant while he was continuing to wait at the pharmacy. Officer Kanos noticed that Defendant was sweating profusely and shaking, and so she moved Defendant to a bench because she feared he would pass out. As Officer Kanos was reviewing the prescription that Defendant had provided, another officer noticed a black box near Defendant. One of the officers picked up the box and five or

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six pills fell out onto the floor. The pills and the black box were seized, and Officer Kanos placed Defendant under arrest.

At trial, Andrew Oprysko (“Mr. Oprysko”), a forensic chemist with the Charlotte-Mecklenburg Police Department Crime Lab, was admitted as an expert witness and testified that he had tested the evidence seized from Defendant. In his testing, he had counted forty-two individual tablets, each having the same markings and appearance, and weighing 4.25 grams in total. He testified that this total weight could have a .03 gram variance above or below his measured value. Mr. Oprysko also analyzed each of the forty-two pills and found oxycodone present in all of them.

During the charge conference, Defendant requested an instruction for the lesser-included offense of felony possession, contending that there was evidence to support this charge rather than the trafficking charge. The trial court denied this request. Defendant was convicted of both charges, sentenced to a term of seventy to ninety-three months in prison, and ordered to pay a \$50,000.00 fine. Defendant gave oral notice of appeal.

Defendant asserts that the trial court erred in denying his request to instruct the jury on trafficking’s lesser-included offense of felony possession of oxycodone. We disagree.

A jury instruction on a lesser-included offense must be given

if a defendant requests it and the instruction is correct in law and supported by the evidence. In determining

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whether the evidence supports an instruction requested by a defendant, the evidence must be interpreted in the light most favorable to him. The trial judge making the decision must focus on the sufficiency of the evidence, not the credibility of the evidence. Failure to give the requested instruction where required is a reversible error.

*State v. Reynolds*, 160 N.C. App. 579, 581, 586 S.E.2d 798, 800 (2003) (citations omitted), *disc. review denied*, 358 N.C. 548, 599 S.E.2d 916 (2004).

However, “[w]here the State’s evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required.” *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citations omitted). We review a 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).

The crime of trafficking in opium, N.C. Gen. Stat. § 90–95(h)(4), contains two essential elements. Defendant must engage in the: (1) knowing possession (either actual or constructive) of (2) a specified amount of opium. N.C. Gen. Stat. § 90–95 (h)(4) also applies to trafficking in pharmaceutical preparations containing opium derivatives. Simple possession of opium is a lesser-included offense of trafficking in opium.

*State v. Hunt*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 790 S.E.2d 874, 878, (*purgandum*) *disc. review denied*, 369 N.C. 197, 795 S.E.2d 206 (2016). To qualify as *trafficking* in opium, as opposed to mere *possession* of opium, the specified amount of the opium that was knowingly possessed must be four grams or more. N.C. Gen. Stat. § 90-95 (h)(4).

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Here, Defendant acknowledged the State introduced evidence that would support an instruction on trafficking opium because the weight of the oxycodone seized from Defendant, when weighed by the State's expert, was 4.25 grams. However, Defendant argues that the evidence of the amount of oxycodone he possessed could reasonably be interpreted to show that he possessed less than four grams. If this were true, the trial court would have been required to instruct the jury on the lesser-included offense of simple possession.

Specifically, Defendant argues that the testimony of Mr. Oprysko established the possibility that the .03 gram variance could have set the low end of the weight variance below four grams. To make this argument, Defendant cites Mr. Oprysko's cross-examination testimony in which he affirmed that, had each tablet been weighed individually, assuming each tablet weighed .1 gram, and taking into account the possible variance of .03 grams, the low end of the weight variance could have been 2.94 grams as the total weight of the 42 pills.

However, this was a hypothetical scenario, not evidence of actual weight. Mr. Oprysko did not weigh each pill individually, but instead weighed all 42 pills together. He testified that he knew with scientific certainty that the weight of the pills was between 4.22 grams and 4.28 grams. Defendant neither introduced evidence that the pills weighed less than four grams, nor questioned the accuracy of the expert's findings as to the weight of the pills.

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Because there was *only* evidence that showed the weight of the oxycodone pills to be more than four grams, the amount required for trafficking, Defendant was not entitled to an instruction on simple possession.

NO ERROR.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).