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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-38

Filed: 6 November 2018

Onslow County, Nos. 15 CRS 057350-52, 16 CRS 051123, 051125

STATE OF NORTH CAROLINA

v.

KENNETH WAYNE PILKINGTON

Appeal by defendant from judgments entered 14 July 2017 by Judge Ebern T. Watson III in Onslow County Superior Court. Heard in the Court of Appeals 3 October 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General M. A. Kelly Chambers, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.*

CALABRIA, Judge.

Where the evidence tended to show that defendant possessed a methamphetamine precursor chemical, specifically sulfuric acid, the trial court did not err in denying defendant's motion to dismiss. We find no error.

I. Factual and Procedural Background

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On 16 December 2015, detectives with the Onslow County Sheriff's Office searched the residence and property at 1137 Huffmantown Road in Richlands ("the property"), which was owned by Kenneth Pilkington ("defendant"). Defendant, along with his girlfriend Brittany Jones ("Jones"), was present at the time. During the search of the property, officers found various items associated with the manufacture of methamphetamine. Specifically, officers found a bottle of "Liquid Fire" drain cleaner in the kitchen, which was labeled "sulfuric acid" and contained sulfuric acid.

On 19 February 2016, officers returned to the property to conduct another search. Defendant and Jones were in the bathroom. Officers again found various chemicals, methamphetamine, and drug paraphernalia.

Based on the results of the 16 December 2015 search, defendant was indicted for two counts of trafficking in methamphetamine, one count of possession of drug paraphernalia, one count of manufacturing methamphetamine, three counts of possession of a methamphetamine precursor chemical (one count of which concerned possession of sulfuric acid), one count of possession of marijuana up to one-half ounce, and one count of possession of marijuana paraphernalia. Based on the results of the 19 February 2016 search, defendant was also indicted for four counts of possession of a methamphetamine precursor chemical (one count of which concerned possession of sulfuric acid), one count of felony conspiracy to commit possession with intent to manufacture, sell, and deliver methamphetamine, one count of possession of heroin,

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one count of possession with intent to manufacture, sell, and deliver a Schedule III controlled substance, one count of possession of marijuana paraphernalia, one count of possession with intent to manufacture, sell, and deliver methamphetamine, one count of possession with intent to manufacture, sell, and deliver marijuana, one count of possession of drug paraphernalia, one count of possession with intent to manufacture, sell, and deliver a Schedule IV controlled substance, one count of felony possession of a Schedule II controlled substance, and one count of maintaining a dwelling for the keeping and selling of controlled substances.

Prior to trial, the State declined to proceed on one of the charges of possession of a methamphetamine precursor chemical, as well as the charges of conspiracy, possession of heroin, possession with intent to manufacture, sell, and deliver a Schedule III controlled substance, possession of marijuana paraphernalia, possession with intent to manufacture, sell, and deliver a Schedule IV controlled substance, felony possession of a Schedule II controlled substance, and maintaining a dwelling for the keeping and selling of controlled substances. At the outset of trial, the State additionally voluntarily dismissed the charges of possession of marijuana up to one-half ounce, possession of marijuana paraphernalia, and possession with intent to manufacture, sell, and deliver marijuana.

At the close of the State's evidence, defendant moved to dismiss all of the remaining charges against him. Defendant made a general motion based on the

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insufficiency of the evidence, and then two specific motions – one with respect to the alleged precursor chemicals, which defendant argued were not adequately tested, and one with respect to the trafficking charges, based on a recent opinion of this Court. The trial court denied these motions. Defendant then testified on his own behalf, after which he renewed his motions to dismiss. The trial court again denied these motions.

The jury returned verdicts finding defendant guilty of all remaining charges. Specifically, the jury found defendant guilty of one count of trafficking in methamphetamine by manufacturing, one count of trafficking in methamphetamine by possession, one count of possession of drug paraphernalia, one count of manufacturing methamphetamine, and three counts of possession of a methamphetamine precursor chemical (pseudoephedrine, sulfuric acid, and lye), stemming from the 16 December 2015 search; and one count of possession with intent to manufacture, sell, and deliver methamphetamine, one count of possession of drug paraphernalia, and three counts of possession of a methamphetamine precursor chemical (sulfuric acid, Coleman fuel, and lye), stemming from the 19 February 2016 search.

For the various convictions, the trial court sentenced defendant to a minimum of 90 months and a maximum of 120 months, a minimum of 58 months and a maximum of 82 months, and a minimum of 13 months and a maximum of 25 months,

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to be served consecutively in the custody of the North Carolina Department of Adult Correction.

Defendant gave notice of appeal in open court.

II. Motion to Dismiss

In his sole argument on appeal, defendant contends that the trial court erred in denying his motion to dismiss the charge of possession of a methamphetamine precursor chemical, specifically sulfuric acid. We disagree.

A. Standard of Review

“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). “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), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

“‘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. Fritsch*, 351 N.C. 373,

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378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

B. Notice and Preservation of Appeal

As a preliminary matter, the State contends that defendant's notice of appeal was ineffective. The State argues that defendant's notice of appeal applied only to some of the charges against him, and that the charge at issue was not among them.

Subsequent to the trial court rendering its decision in open court, defendant pleaded guilty to four additional charges, which are not the subject of this appeal. Afterwards, defendant gave notice of appeal, as follows:

Yes, Your Honor. Yes, Judge, I would -- he just spoke to me. And, essentially, he gave me instruction to give notice of appeal to be -- I mean, it's my client's decision. He instructed me, and I'm informing the court that we give notice of appeal as to the first set of charges resulting -- first set of convictions resulting from the jury trial.

The State contends that this notice of appeal applies to the first set of defendant's convictions, only those resulting from the 16 December 2015 search, and not the second set, resulting from the 19 February 2016 search.

Defendant specifically spoke of the "convictions resulting from the jury trial[.]" as opposed to those resulting from his guilty pleas. Further, the trial court, in response to defendant's notice of appeal, stated that "the defendant has given notice of appeal in open court to the *convictions regarding the drug cases that he had been sentenced to during this same term of court.*" (Emphasis added.) It is therefore clear

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that when defendant gave notice of appeal in open court from the “first set of charges,” he was contrasting the ones for which he was convicted by a jury with those to which he pleaded guilty, and not separating the charges resulting from the two different searches. We therefore decline to find defendant’s notice of appeal defective.

The State further contends that this specific issue was not properly preserved for appeal. However, we note that defendant made a general motion to dismiss for insufficiency of the evidence at the close of the State’s evidence, and renewed his motions to dismiss – including the general motion – at the close of all the evidence. Accordingly, we hold that this appeal was properly preserved by motion.

C. Analysis

Among the indictments resulting from the 19 February 2016 search, defendant was charged with and ultimately convicted of possession of a methamphetamine precursor chemical, specifically sulfuric acid. On appeal, defendant contends that while officers discovered drain cleaner during this search, “no evidence suggested the drain cleaner was labeled ‘sulfuric acid,’ contained sulfuric acid, or was visually similar to sulfuric acid.” Defendant therefore argues that the State’s evidence with respect to this charge was insufficient.

Under our General Statutes, “it is unlawful for any person to . . . [p]ossess an immediate precursor chemical with intent to manufacture methamphetamine[.]” N.C. Gen. Stat. § 90-95(d1)(2)(a) (2017). Our Statutes further define “immediate

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precursor chemicals” by list, a definition which includes sulfuric acid. N.C. Gen. Stat. § 90-95(d2)(42). This Court has held that, unlike cases involving a controlled substance, no chemical analysis is required to support a defendant’s conviction of possession of a precursor chemical. *State v. Hooks*, 243 N.C. App. 435, 445-46, 777 S.E.2d 133, 141 (2015) (holding that a chemical analysis was not required to support a conviction for possession of pseudoephedrine, a precursor chemical).

Defendant concedes that, during the 19 February 2016 search, officers discovered a backpack containing drain cleaner. However, defendant contends that no evidence was presented that the drain cleaner contained sulfuric acid.

This is false. On cross-examination, defendant was shown the State’s exhibit 31, a bottle of “Liquid Fire.” When asked what it was, defendant responded, “Liquid Fire is sulfuric acid.” He explained that it was a drain cleaner. He further stated, “I had two bottles in a bag that I buried in the woods that I was going to use for making meth[.]” When asked about the two bottles, he acknowledged that they were involved in the case and contained sulfuric acid.

Defendant’s testimony appears to satisfy every point of sufficiency. By his own statement, the drain cleaner discovered by officers on 19 February 2016 contained sulfuric acid, which defendant intended to use to manufacture methamphetamine. This evidence, taken in the light most favorable to the State and giving the State the benefit of every reasonable inference, tends to support a determination that



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defendant possessed a methamphetamine precursor chemical, specifically sulfuric acid. We therefore hold that the trial court did not err in denying defendant's motion to dismiss.

NO ERROR.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).