IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-529

Filed: 6 November 2018

Mecklenburg County, Nos. 16 CRS 226550-552, -554-556, 17 CRS 5918

STATE OF NORTH CAROLINA

v.

ANTHONY MONELL SMITH

Appeal by defendant from judgments entered 3 and 4 October 2017 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. Mosteller, for the State.

William D. Spence for defendant.

ARROWOOD, Judge.

Anthony Monell Smith ("defendant") appeals from judgments entered on his convictions of sale of heroin, delivery of heroin, two counts of possession with intent to sell and deliver heroin, and attaining habitual felon status. For the following reasons, we find no error.

I. Background

A Mecklenburg County Grand Jury indicted defendant on 27 February 2017 for two counts of possession with intent to sell or deliver a controlled substance, two counts of sale of a controlled substance, two counts of delivery of a controlled substance, and attaining habitual felon status.

The matter came on for trial on 25 September 2017, the Honorable Eric L. Levinson presiding. The State's evidence tended to show as follows.

On 18 May 2016, an undercover detective of the Charlotte-Mecklenburg Police Department ("CMPD"), Detective William Whiting ("Detective Whiting") called defendant to arrange a purchase of one gram of heroin. Detective Whiting then met defendant at a designated location, and purchased the heroin from him. After the exchange took place, Detective Whiting gave the heroin to Detective Davis LaFranque ("Detective LaFranque"). Detective LaFranque took the heroin for preliminary testing, which indicated the substance contained heroin. Detective LaFranque then delivered the substance to CMPD's Property Control ("Property Control"). On 1 September 2016, CMPD Crime Lab Forensic Chemist Lillian Ngong ("Ngong") received the substance from Property Control and confirmed it was heroin.

On 31 May 2016, Detective Whiting called defendant to coordinate another purchase. He requested two grams of heroin from defendant. Defendant agreed, and met Detective Whiting at a designated location to complete the transaction. After Detective Whiting purchased the heroin, he secured it in an evidence envelope and

delivered it to Property Control. On 31 August 2016, Ngong received the substance from Property Control and confirmed it was heroin.

On 14 July 2016, arrest warrants were issued for defendant based on the 18 and 31 May 2016 transactions. Defendant was arrested on 22 July 2016, and interrogated by Detective LaFranque that same day. During the interrogation, defendant confessed to selling heroin.

On 19 July 2017, Detective LaFranque encountered defendant in a restroom at the Mecklenburg County courthouse prior to a pretrial readiness meeting for the instant case. Detective LaFranque "immediately recognized" defendant, who began to tell Detective LaFranque he knew "he was selling to an undercover," and that he needed "to turn himself in." Detective LaFranque then:

> told him, hey, -- he asked about doing some work. I told him that he needs to talk to the district attorney and his lawyer about it. I told him I was actually here for him, the pre-trial readiness meeting. He said that he just started a new job and he was just trying to get his life together, pretty much.

At the close of the State's evidence, defendant moved to dismiss the charges. The trial court denied the motion. Defendant did not present evidence. Defendant renewed his motion to dismiss, which the trial court again denied.

On 3 October 2017, the jury found defendant guilty on two counts of possession with intent to sell or deliver a controlled substance, one count of sale of a controlled substance, two counts of delivery of a controlled substance, and not guilty on one

count of sale of a controlled substance. The trial court arrested judgment on one of the delivery of a controlled substance counts.

The habitual felon phase of the trial took place on 4 October 2017. The jury found defendant guilty of being an habitual felon. The trial court consolidated all convictions for sentencing, and sentenced defendant to a mitigated-range term of 92 to 123 months imprisonment.

Defendant appeals.

II. Discussion

On appeal, defendant challenges the trial court's decision to allow Detective LaFranque to testify that defendant admitted his guilt immediately before the pretrial readiness meeting, and the trial court's denial of his motion to dismiss.

A. Plea Discussions

Defendant argues the trial court plainly erred by allowing Detective LaFranque to testify that defendant admitted his guilt prior to the pretrial readiness meeting. Specifically, he contends the confession should have been excluded from evidence as a plea discussion pursuant to Rule 410 of the North Carolina Rules of Evidence. Defendant alleges plain error because he did not object on this basis at trial. N.C.R. App. P. 10(a)(2), (a)(4) (2018).

Our Court may review an issue on appeal that was not preserved by objection noted at trial in a criminal case "when the judicial action questioned is specifically

and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4). To establish plain error, a defendant must show "that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Therefore, a "defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). Because plain error is to be applied cautiously and only in the exceptional case, plain error "will often be [error] that seriously affects the fairness, integrity or public reputation of judicial proceedings." *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012) (alteration, citation, and internal quotation marks omitted).

Rule 410 provides that "[a]ny statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" is inadmissible at trial. N.C. Gen. Stat. § 8C-1, Rule 410(4) (2017). Accordingly, statements made during plea negotiations "must be made in negotiations with a government attorney or with that attorney's express authority" in order to be excluded pursuant to Rule 410. *State v. Curry*, 153 N.C. App. 260, 263, 569 S.E.2d 691, 694 (2002) (citations and internal quotation marks omitted). Further, "conversations with government agents do not constitute plea discussions unless the defendant exhibits a subjective belief that he is negotiating a plea, and that belief is reasonable under the circumstances." *Id.*

(citations and internal quotation marks omitted). The trial court must examine "all of the objective circumstances" in the record "to determine whether the accused reasonably had such a subjective intent" to negotiate a plea. *Id.* (citation and internal quotation marks omitted).

Detective LaFranque first spoke with defendant during the 22 July 2016 interrogation. During the interrogation, Detective LaFranque asked defendant for information about other cases and told defendant that he would be willing to speak to the prosecutors about him. However, Detective LaFranque never promised defendant a plea deal, nor did he have the authority to offer one.

Subsequently, almost a year after Detective LaFranque interrogated defendant, defendant approached Detective LaFranque immediately prior to a pretrial readiness meeting, and confessed to selling drugs to an undercover officer. Nothing in the record suggests that plea bargaining took place, as defendant's confession was not in response to an offer to plead guilty, and did not take the form of an offer by defendant to plead guilty in exchange for a deal from the prosecution. *See id.* at 264, 569 S.E.2d at 694 ("Plea bargaining implies an offer to plead guilty upon condition.") (citations, internal quotation marks, and alteration omitted). Therefore, these circumstances are insufficient to substantiate a reasonable, subjective belief that defendant was negotiating a plea. Accordingly, Rule 410 did not bar the trial court from admitting Detective LaFranque's testimony that

defendant confessed that he knew he sold drugs to an undercover officer. Because the trial court did not err, defendant cannot establish plain error.

B. Motion to Dismiss

Next, defendant argues the trial court erred by denying his motion to dismiss because the State did not present sufficient evidence for the jury to find that the substances transferred from defendant to Detective Whiting on 18 and 31 May 2016 were heroin.

Our "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 defendant's motion for dismissal is properly denied when "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citations and internal quotation marks omitted). "In making its determination, the trial court must consider all evidence admitted . . . in the light most favorable to the State[.]" *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

All of the controlled substance crimes defendant was charged with committing required the State to show that the substances sold to Detective Whiting contained a controlled substance, to wit, heroin. *See State v. Fletcher,* 92 N.C. App. 50, 55, 373

S.E.2d 681, 685 (1988); *State v. Williams*, 200 N.C. App. 767, 772, 684 S.E.2d 898, 901 (2009). Defendant argues the State did not meet this burden because there were inconsistencies between Ngong's lab notes and the descriptions of the substances Detectives Whiting and LaFranque recorded in a CMPD database. Specifically, Ngong's lab notes refer to the substance from the May 18 transaction as "powder," and the substance from the May 31 transaction as a "rock-like substance," even though the detectives recorded that defendant sold Detective Whiting a "rock-like substance" on May 18, and a "powder" on May 31.

Despite this inconsistency, we hold there was substantial evidence that the substances contained heroin. Ngong testified that she used the laboratory's operating procedures to establish that the substances were in fact the substances given to Detective Whiting on 18 and 31 May 2016, and had not been tampered with prior to testing. She then used the laboratory's standard procedures to conclude the substances contained heroin. Therefore, the State provided substantial evidence that the substances at issue contained heroin through Ngong's testimony, and the trial court did not err when it denied defendant's motion to dismiss.

NO ERROR.

Chief Judge MCGEE and Judge ELMORE concur.

Report per Rule 30(e).