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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-535

Filed: 15 January 2019

Durham County, No. 16 CRS 60372

STATE OF NORTH CAROLINA

v.

KYLEE DAWN FORD, Defendant.

Appeal by Defendant from judgment entered 30 August 2017 by Judge R. Allen Baddour, Jr., in Durham County Superior Court. Heard in the Court of Appeals 20 December 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb, for the State.

The Epstein Law Firm, PLLC, by Drew Nelson, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Kylee Dawn Ford (“Defendant”) appeals from the trial court’s judgment entered upon jury verdicts finding her guilty of trafficking in heroin by possession, conspiracy to traffic in heroin, possession with intent to sell or deliver a Schedule I controlled substance, and maintaining a dwelling to keep or sell a controlled substance. On appeal, Defendant argues the trial court erred by denying her motion

to dismiss the charge of maintaining a dwelling to keep or sell heroin at the close of the State's evidence for insufficiency of the evidence. Defendant waived her right to challenge the denial of the motion to dismiss because she introduced evidence in her defense. Therefore, we dismiss the appeal.

I. Factual and Procedural History

On 12 December 2016, at approximately 4:43 p.m., law enforcement officers with the Chapel Hill Police Department responded to a call of an armed robbery occurring at the Red Roof Inn located on Highway 15-501. Upon arriving, officers spoke with the victim, William Riddle ("Riddle"), who was standing in the lobby of the hotel. Riddle informed officers he had just been robbed of \$60.00 by Devyn Ford ("Devyn"), Defendant's daughter. Defendant had met Devyn online. Riddle stated that Devyn told him she was staying there with her mother because they did not have any money, and she had stolen heroin from someone in West Virginia and was trying to sell it in North Carolina. Riddle also told the officers that Devyn asked him to help her sell the heroin.

The officers went to the hotel room where Riddle said the robbery occurred and knocked on the door. After several minutes, Devyn opened the door. Officers found Defendant and an adult male in the room. Officers asked all three individuals to step outside of the room. Defendant told officers that her two-year-old grandson was also in the room.

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While talking with the officers, Defendant stated she and Devyn had been at the hotel for the past two weeks. Devyn denied having any drugs and gave the officers consent to search the room. During the search, officers found multiple knives on the dresser, a coin purse containing a plastic baggie of a small amount of heroin, torn baggies typically used to package drugs, and, inside the hotel room safe, a large bag containing 55.65 grams of heroin. Officers arrested Devyn and Defendant. Officers later executed a search warrant at the hotel room and seized two digital scales, two glass smoking pipes, a silver marijuana grinder, several metal razor blades, several small baggies, ID cards, and mobile phones.

On 3 January 2017, a grand jury indicted Defendant on charges of trafficking in heroin by possession; trafficking in heroin by manufacture; conspiracy to traffic in heroin; possession with intent to manufacture, sell, or deliver a Schedule I controlled substance; and maintaining a dwelling to keep or sell a controlled substance. At the conclusion of the State's evidence, Defendant moved to dismiss the charges. Defendant argued the State did not present evidence Defendant "maintained" the hotel room. The trial court dismissed the charge of trafficking by manufacturing, but denied the motion as to the remaining charges.

Defendant testified on her own behalf. She had used drugs in the past and was on probation due to drug related convictions from Pennsylvania, but she had been clean since her release from prison in 2011. After getting out of prison, she moved

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to West Virginia with Devyn and her grandson. Two months before they were arrested, Defendant kicked Devyn out of the house because she found out Devyn was using heroin. Defendant testified Devyn stayed in different hotels around the West Virginia area before going to North Carolina. She drove back and forth from West Virginia to North Carolina to visit her grandson and to bring Devyn money and clothes, but she had been back home in West Virginia packing up her house “for at least two and a half weeks” prior to their arrest and she had just arrived in North Carolina the night before they were arrested. She “was down to no money” because she had “pretty much took every penny that [she] had saved over the last five years and [gave] it to [Devyn] to pay for hotels rooms and where she was.”

At the close of all evidence, Defendant renewed her motion to dismiss. The trial court denied the motion. The jury found Defendant guilty of trafficking in heroin by possession, conspiracy to traffic in heroin, possession with intent to sell or deliver a Schedule I controlled substance, and intentionally maintaining a dwelling to keep or sell a controlled substance. The trial court consolidated the convictions for judgment and sentenced Defendant to a 225 to 282 months imprisonment. Defendant gave oral notice of appeal.

II. Jurisdiction

On 25 May 2018, Defendant filed a petition for writ of *certiorari* with this Court, seeking review of the 30 August 2017 judgment. Defendant acknowledges her

oral notice of appeal did not comply with Appellate Rule 4 because it was made after the jury verdict, but prior to sentencing. *See* N.C. R. App. P. 4(a)(1) (2018); *see also State v. Robinson*, 236 N.C. App. 446, 448, 763 S.E.2d 178, 179 (2014) (noting the defendant failed to give timely notice of appeal where “trial counsel gave notice of appeal in open court following the jury’s verdict, but failed to give notice of appeal following entry of the trial court’s final judgment”). In our discretion, we allow Defendant’s petition for writ of *certiorari* for the purpose of considering her argument on appeal.

III. Analysis

Defendant contends the trial court erred by denying her motion to dismiss the charge of maintaining a dwelling for the purpose of keeping a controlled substance at the close of the State’s evidence.

However, under Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure:

(3) **Sufficiency of the Evidence.** In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant’s motion for dismissal or judgment in case of nonsuit made at the close of State’s evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

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N.C.R. App. P. 10(a)(3) (2018). “Our courts have consistently held that when a defendant presents evidence at trial, he waives his right on appeal to assert the trial court’s error in denying the motion to dismiss *at the close of the State’s evidence.*” *State v. Davis*, 101 N.C. App. 409, 411, 399 S.E.2d 371, 372 (1991) (emphasis added).

Here, Defendant specifically limited her argument on appeal to the denial of her motion to dismiss “at the close of the [S]tate’s evidence.” However, Defendant presented evidence at trial by testifying in her defense. Therefore, under Appellate Rule 10, Defendant waived her right to appeal the trial court’s decision to deny her motion to dismiss at the close of the State’s evidence. *See Davis*, 101 N.C. App. at 411, 399 S.E.2d at 372. Defendant has not asserted any error by the trial court in denying her motion to dismiss at the close of all evidence. Accordingly, Defendant’s appeal is dismissed.

IV. Conclusion

For the foregoing reasons, we dismiss Defendant’s appeal.

DISMISSED.

Chief Judge McGEE and Judge INMAN concur.

Report per Rule 30(e).