IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1096

Filed: 15 December 2020

Union County, Nos. 17 CRS 50549, 18 CRS 731

STATE OF NORTH CAROLINA

v.

MONTRELL LAMONT STEVENSON

Appeal by defendant from judgment entered 18 March 2019 by Judge Jeffery K. Carpenter in Union County Superior Court. Heard in the Court of Appeals 28 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General James M. Wilson, for the State.

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for defendant-appellant.

BRYANT, Judge.

Where the evidence was sufficient to survive a motion to dismiss and allow the jury to decide whether defendant was guilty of sell of a Schedule II controlled substance and possession with intent to sell or deliver a Schedule II controlled substance, we hold no error in the trial court's denial of defendant's motion to dismiss.

Where the evidence was not sufficient to survive a motion to dismiss the charge of maintaining a vehicle for the purpose of keeping or selling a controlled substance, we vacate defendant's conviction for the misdemeanor offense.

On 27 March 2017, defendant Lamont Montrell Stevenson was indicted on charges of sell and delivery of a Schedule II controlled substance, possession with intent to sell and deliver a Schedule II controlled substance, and feloniously maintaining a vehicle/dwelling/place for keeping and selling a controlled substance. On 14 March 2019, defendant's case was tried before a jury in Union County Superior Court; the Honorable Jeffrey K. Carpenter, Judge presiding.

The evidence presented at trial tended to show that on 8 October 2016, FBI Special Agent Jason Milhone and his task force partner Union County Sheriff's Office Detective Mike Black parked their unmarked law enforcement vehicle in a Food Lion parking lot located at 7868 Idlewild Road. Special Agent Milhone and Detective Black were providing support for a law enforcement surveillance team conducting a drug investigation nearby. Special Agent Milhone parked the unmarked vehicle away from the store at the far end of a parking row two spaces away from a Buick LeSabre—with two occupants—leaving one empty spot between. Thereafter, a blue Chevy Impala, with a single occupant, maneuvered her vehicle into the empty parking space between. Defendant exited the LeSabre and approached the driver's side of the Chevy Impala, and the driver rolled her window down. Special Agent

Milhone and Detective Black began taking video footage of the incident. Defendant dropped a small, white rock-like substance into the driver's hand. The driver placed the rock-like substance into a napkin, folded it, and placed it into her bra. The driver then handed defendant money, and defendant returned to the LeSabre. The law enforcement officers recorded the license plates of both the Buick LeSabre and the Chevy Impala. The LeSabre was later confirmed to be registered to defendant.

The Chevy Impala pulled out of the Food Lion parking lot and Special Agent Milhone and Detective Black followed the vehicle to a nearby residence. Once the Chevy Impala parked, the officers parked behind the vehicle and approached the driver, Ms. Debra Brandon, while she was still sitting in the vehicle. Special Agent Milhone observed the Brandon stick a silver pipe under her thigh. Special Agent Milhone collected the metal pipe, a napkin that was sitting on the center console, and a white, rock-like substance from the inside of the pipe in the Brandon's possession.

A forensic scientist working with the State Crime Lab (admitted as an expert in the field of forensic chemistry as it relates to the analysis of controlled substances) determined that the white, rock-like substance weighed less than a tenth of gram and had a cocaine base—a Schedule II controlled substance.

On 3 February 2017, defendant was arrested and charged with felonies relating to the drug transaction witnessed by Special Agent Milhone and Detective Black on 8 October 2016.

At the close of the State's evidence, defendant moved to dismiss the charges against him and his motion was denied. Defendant did not present any evidence but renewed his motion to dismiss.

Following the trial court's instructions, the jury found defendant guilty of selling a Schedule II controlled substance, guilty of possession with intent to sell or deliver a Schedule II controlled substance, and guilty of a lesser-included offense, misdemeanor maintaining a vehicle for keeping or selling a controlled substance. Defendant pled guilty to attaining habitual felon status.

In accordance with the jury verdicts, the trial court entered a consolidated judgment against defendant for the offenses of possession with intent to sell or deliver a Schedule II controlled substance, and misdemeanor maintaining a vehicle/dwelling/place for keeping or selling a controlled substance, and in accordance with his habitual felon status, the court sentenced defendant to an active term of 59 to 83 months. The court entered a second judgment for the offense of selling a Schedule II controlled substance and in accordance with his habitual felon status, sentenced defendant to an active term of 67 to 93 months, to be served concurrently. Defendant gave oral notice of appeal in open court. Moreover, on 21 March 2019, defendant filed a pro se notice of appeal.

On appeal, defendant argues the trial court erred by denying his motion to dismiss (I) the charges of sell of a Schedule II controlled substance and possession with intent to sell or deliver a Schedule II controlled substance and (II) the charge of maintaining a vehicle for the purpose of keeping or selling a controlled substance.

I

Defendant argues the trial court erred by denying his motion to dismiss the charges of sell of a Schedule II controlled substance and possession with intent to sell or deliver a Schedule II controlled substance. Specifically, defendant argues that because the State failed to establish the item handed to Brandon by defendant and the cocaine recovered from the pipe in Brandon's vehicle were the same, there was insufficient evidence to prove defendant possessed and transferred a Schedule II controlled substance. We disagree.

"[T]his Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Blankenship*, 259 N.C. App. 102, 112, 814 S.E.2d 901, 910 (2018) (citation omitted); *see also State v. Golder*, 374 N.C. 238, 246, 839 S.E.2d 782, 788 (2020) ("Rule 10(a)(3) provides that a defendant preserves all insufficiency of the evidence issues for appellate review simply by making a motion to dismiss the action at the proper time."). In response to a motion to dismiss, a court must consider "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[] being the perpetrator of such offense.

If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). "Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citing *State v. Patterson*, 335 N.C. 437, 449–50, 439 S.E.2d 578, 585 (1994)). The evidence is to be considered in the light most favorable to the State, with all reasonable inferences benefitting the State. *See State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993); *see also State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (holding that if this Court finds a "reasonable inference of defendant's guilt may be drawn from the circumstances[] . . . it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy them beyond a reasonable doubt that the defendant is actually guilty. . . ." (second alteration in original) (citations omitted)).

Pursuant to our General Statutes, "it is unlawful for any person: (1) To . . . sell or deliver, or possess with intent to . . . sell or deliver, a controlled substance[.]" N.C. Gen. Stat. § 90-95(a)(1) (2019); *see also State v. Neal*, 196 N.C. App. 100, 103, 674 S.E.2d 713, 716 (2009). To obtain a conviction of possession with intent to sell or deliver, the State must prove defendant was in possession of a substance; that the substance was a controlled substance; and that there was an intent to distribute or sell the controlled substance. *See Neal*, 196 N.C. App. at 103, 674 S.E.2d at 716.

Special Agent Milhone gave the following unchallenged testimony:

> I observed [defendant] with his hand – she had her hand out like this (indicating). He had his hand cupped and starts putting a white little small rock like substance into her hand. She then handed the money to him at that point, and he took it out of her hand. They talked briefly and he walked back to the car.

Special Agent Milhone further testified that Brandon folded the "white little small rock" into a napkin which she put into her bra. After following Brandon as she left the Food Lion parking lot and drove to a residence a short distance away, Special Agent Milhone approached Brandon who was still sitting in the driver's seat of her vehicle.

> [SPECIAL AGENT MILHONE:] So, when I approached the vehicle, the window was rolled up. Her head was looking down. . . . Immediately I saw her stick something under her leg or thigh. . . .
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> . . . .
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> . . . She put a silver pipe underneath her leg.
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> . . . .
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> . . . A small metal pipe that has a bowl on the top. It's the kind you use for smoking substances.

Special Agent Milhone testified that the napkin Brandon had folded into her bra was lying on the center console of the vehicle. Inside the pipe, the law enforcement officer confiscated a "white rock like substance." The white, rock-like substance was submitted to the State Crime Lab for forensic examination.

Brittnee Meyers, a forensic scientist assigned to the drug chemistry unit of the State Crime Lab, conducted a chemical analysis of the substance to determine the presence of drugs. At trial, Meyers was admitted to testify as an expert in the field of forensic chemistry specifically as it relates to the analysis of controlled substances. "I identified [the substance] as being cocaine based, a schedule II controlled substance, with a net weight of material weighing less than a tenth of a gram."

Taken in the light most favorable to the State, along with all reasonable inferences, the evidence was sufficient to support a reasonable inference that defendant was in possession of the controlled substance and had the intent to sell or distribute the controlled substance. *See Barnes*, 334 N.C. at 75, 430 S.E.2d at 918; *Neal*, 196 N.C. App. at 103, 674 S.E.2d at 716. Accordingly, we hold the trial court did not err by denying defendant's motion to dismiss the charges of sell of a Schedule II controlled substance and possession with intent to sell or deliver a Schedule II controlled substance.

II

Defendant contends that the trial court erred by denying defendant's motion to dismiss the charge of maintaining a vehicle for the purpose of keeping or selling a controlled substance. Specifically, defendant argues that there was insufficient evidence to prove defendant was keeping or maintaining a vehicle for the purpose of keeping or selling cocaine. We agree.

As in Issue I, we review the denial of defendant's motion to dismiss de novo. *Blankenship*, 259 N.C. App. at 112, 814 S.E.2d at 910.

Under General Statutes, section 90-108, it is unlawful for any person "[t]o knowingly keep or maintain any . . . vehicle, . . . which is resorted to by persons using controlled substances . . . for the purpose of using such substances, or which is used for the keeping or selling of the same . . . ." N.C. Gen. Stat. § 90-108(a)(7) (2019).

In *State v. Rogers*, our Supreme Court reasoned that "when subsection 90-108(a)(7) speaks of 'the keeping . . . of' drugs, it is referring to the storing of drugs." 371 N.C. 397, 403, 817 S.E.2d 150, 155 (2018).

> [*State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994)] held, and we reaffirm . . . that subsection 90-108(a)(7) does not "create a separate crime simply because the controlled substance was temporarily in a vehicle." *Id.* at 33, 442 S.E.2d at 30. In other words, merely possessing or transporting drugs inside a car—because, for instance, they are in an occupant's pocket or they are being taken from one place to another—is not enough to justify a conviction under the "keeping" element of subsection 90-108(a)(7). *See id.* at 32-33 & n.1, 442 S.E.2d at 30 & n.1.

Id. at 405, 817 S.E.2d at 156;[1] *see also State v. Miller*, 264 N.C. App. 517, 524, 826 S.E.2d 562, 566–67 (2019) ("As restated in *Rogers*, the State must produce other incriminating evidence of the 'totality of the circumstances' and more than just

[1] *But cf. Rogers*, 371 N.C. at 405, 817 S.E.2d at 156 (affirming the result reached in *Mitchell* but disavowing *Mitchell*'s interpretation of "the keeping . . . of [drugs]" to mean "possession that occurs over a duration of time.").

evidence of a single sale of illegal drugs or 'merely having drugs in a car (or other place)' to support a conviction under this charge." (citation omitted)).

In the instant case, in the light most favorable to the State, the evidence is sufficient to indicate that defendant possessed or transported the controlled substance inside the Buick LeSabre to reach the Food Lion parking lot. However, under the totality of the circumstances, the evidence is insufficient to justify a conviction under the "keep" element of section 90-108(a)(7). *See Roger*, 371 N.C. at 405, 817 S.E.2d at 156. Therefore, we hold the record does not reflect sufficient evidence to establish that defendant was keeping or maintaining the Buick LeSabre "for the purpose of using [controlled] substances, or . . . for the keeping or selling of the same . . . ." N.C.G.S. § 90-108(a)(7). Accordingly, we vacate defendant's conviction for misdemeanor maintaining a vehicle/dwelling/place for keeping or selling a controlled substance, and remand for entry of judgment and resentencing on the remaining convictions.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges BERGER and BROOK concur.

Report per Rule 30(e).