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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-527

Filed: 16 June 2020

Wake County, No. 17 CRS 201983

STATE OF NORTH CAROLINA

v.

RAMEEN SWINDELL

Appeal by Defendant from Judgments entered 12 October 2018 by Judge Michael J. O’Foghludha in Wake County Superior Court. Heard in the Court of Appeals 4 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Charles Whitehead, for the State.

Jarvis John Edgerton, IV for the defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Rameen Swindell (Defendant) appeals from Judgments entered 12 October 2018 upon his convictions of Trafficking in Heroin by Possession of 4 or More but Less than 14 Grams, Possession with Intent to Sell or Deliver Heroin, and Misdemeanor Possession of Marijuana. The Record reflects the following:

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On 19 January 2017, a confidential informant (CI) contacted Detective Michael Mitchell (Detective Mitchell) of the Raleigh Police Department and informed him heroin sales were taking place near Raleigh Beach Road and Old Milburnie Road. Detective Mitchell called for surveillance of the area and instigated a controlled buy with the CI through a middleman. Sergeant Larry Marshburn (Sergeant Marshburn) was surveilling the area and witnessed the middleman walk up to a newer model Chevrolet Tahoe, conduct a “hand-to-hand” transaction, and return to the CI’s vehicle. Sergeant Marshburn followed the Tahoe to 1016 Old Milburnie Road. Detective Mitchell arranged another controlled buy with the CI and middleman on 24 January 2017. Sergeant Marshburn conducted surveillance that day and witnessed an individual wearing a dark hoodie and New York Yankees hat, later identified as Defendant, meet with the middleman and make an exchange in what he testified was another “hand-to-hand transaction.”

On 28 January 2017, the CI informed Detective Mitchell a new batch of heroin had arrived in town, and Detective Mitchell relayed the report to Sergeant Marshburn. On 1 February 2017, Sergeant Marshburn was surveilling 1016 Old Milburnie Road when he observed the same individual from the 24 January controlled buy exit the house and conduct another hand-to-hand transaction with occupants in a red Chevrolet Tahoe. A marked car stopped the Tahoe and recovered heroin. The same day, Detective Mitchell obtained a search warrant for 1016 Old

Milburnie Road, which officers with Raleigh Police and SWAT executed at 1:00 p.m. that afternoon.

Inside the house, SWAT found Defendant and another individual, Stuart Alston. Defendant was placed under arrest and taken to the Raleigh Police Investigative Campus. SWAT officers informed Detective Mitchell they saw a gun in one of the bedrooms and a backpack in the refrigerator. After SWAT secured the residence, Detective Mitchell began his search in the kitchen. Detective Mitchell took the backpack out of the refrigerator and cut off a small lock that was attached to the main compartment zippers. Detective Mitchell opened the backpack and discovered seventy “what appeared to be bricks of heroin.” Detective Mitchell testified a “brick” of heroin consists of individually packaged dosage units of heroin or “bindles.” Ten bindles bound together is referred to as a “bundle.” In turn, five bundles packaged together constitutes a brick. Thus, each brick of heroin contains fifty individual dosage units or bindles. The seventy bricks found by Detective Mitchell would therefore contain approximately 3,500 dosage units or bindles of heroin. The bricks were wrapped up in pages from pornographic magazines and New Jersey Powerball tickets. Each individual bindle was packaged in a wax bag. Of the individually packaged bindles in the backpack, 1,204 were stamped with “Power Hour,” 1,199 with “Eagles,” 32 with “Selfie,” 66 with “Blue Dolphinidae,” and 997 stamped with “Deadpool.”

Detective Mitchell continued his search of the kitchen where he found a bag containing around twenty-two grams of marijuana and a digital scale. [T p. 109-10]. Detective Heckman, who was assisting Detective Mitchell with the search, found a Cheez-It box on top of the refrigerator that contained a suspected “310 bindles of heroin.” The bindles in the Cheez-It box were also wrapped in pornographic paper and lottery tickets and were individually stamped with “Deadpool” and “Goldmine.” In addition to the handgun first reported by SWAT, the detectives’ search uncovered two additional handguns, several boxes of ammunition, and almost \$17,000.00 in cash from a safe under the bed. The items were seized and taken to the Raleigh Police Investigative Campus for processing and testing. The suspected heroin contained in the backpack and Cheez-It box was sent to the Raleigh/Wake City-County Bureau of Identification (CCBI) where forensic chemist Laura Wiley (Agent Wiley) sorted, weighed, and tested the substances.

Detective Mitchell interviewed Defendant at the investigative campus. During the course of the interview, Defendant told Detective Mitchell he “only [had] access to the heroin that was found in the Cheez-It box.” Defendant described himself as a worker who “goes out and makes the sales.” Defendant “answer[ed] the phone when buyers call for heroin” and met the buyers at a “bridge across the street.” Defendant told Detective Mitchell he “[knew] the backpack was full of heroin, but he did not have the key.” Defendant refused to “snitch on anyone” and would not identify the

owner of the backpack. On 5 June 2017, Defendant was indicted on charges of Trafficking in Heroin by Possession of 28 Grams or More, Maintaining a Dwelling, Possession with Intent to Sell or Deliver (PWISD) Marijuana, and PWISD Heroin.

Defendant's case came on for trial on 8 October 2018. During the trial, Detective Mitchell described the contents of the backpack and Cheez-It box to the jury and showed it the packaging and examples of the various stamps used to identify dosage units. Agent Wiley testified the backpack contained 3,498 individual dosage units. From a representative sample of those units, Agent Wiley used hypergeometric sampling methods and concluded, with ninety-five percent certainty, the amount of heroin in the dosage units recovered from the backpack exceeded 29.03475 grams.¹ Agent Wiley testified that for statistical purposes, her sampling method uses an average weight of 0.02 grams per dosage unit but that in the Deadpool samples she weighed, the smallest unit weighed contained 0.0034 grams and the largest contained 0.048 grams. Agent Wiley conceded the 310 dosage units in the Cheez-It box were not weighed or tested. However, Agent Wiley testified it is CCBI policy to stop testing substances once the existence of substances is determined to reach the statutory weight for an offense.²

¹ Defendant concedes Agent Wiley's testing allowed her to conclude with ninety-five percent certainty that the backpack contained enough dosage units of heroin to exceed a weight of 29.03475 grams.

² Under the trafficking statute at issue in the present case, the highest offense is established "if the quantity of such controlled substance or mixture involved . . . [i]s 28 grams or more[.]" N.C. Gen. Stat. § 90-95(h)(4)(c) (2019).

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After Agent Wiley testified, defense counsel moved to dismiss all charges against Defendant for insufficiency of the evidence. The trial court granted the motion with respect to the charge of Maintaining a Dwelling but denied Defendant's request as to the charges of Trafficking Heroin by Possession, PWISD Marijuana, and PWISD Heroin. During the trial court's charge conference, the State requested the trial court instruct the jury solely on the charge of Trafficking in Heroin by Possession of 28 Grams or More and not on the two lesser-included offenses. The trial court, however, determined "a reasonable jury [could] conclude taking all the inferences, including inferences in the light most favorable to the defendant, that the amount of drugs that was actually possessed was less than 28 or even less than 14." Defendant did not object at trial to the inclusion of the lesser-included offenses, and the trial court instructed the jury on all three levels of Trafficking in Heroin by Possession.

The jury returned verdicts finding Defendant guilty of Trafficking in Heroin by Possession of 4 or More but Less than 14 Grams, PWISD Heroin, and misdemeanor Possession of Marijuana. Prior to sentencing, defense counsel orally moved to dismiss the charge of Trafficking in Heroin by Possession of 4 or More but Less than 14 Grams for lack of substantive evidence, which the trial court denied. The trial court consolidated Defendant's Trafficking in Heroin and PWISD Heroin convictions and sentenced Defendant to seventy to ninety-three months active sentence. The trial court entered Defendant's Misdemeanor Possession of Marijuana concurrently and

recommended work release as well as any available educational or vocational training. Defendant gave Notice of Appeal in open court.

Issue

The sole issue on appeal is whether the trial court committed plain error when it instructed the jury on the two lesser-included offenses of Trafficking in Heroin by Possession of 28 Grams or More.

Analysis

Our Supreme Court “has elected to review unpreserved issues for plain error when they involve . . . errors in the judge’s instructions to the jury[.]” *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996); N.C.R. App. P. 10(a)(4) (2019). “Under the plain error rule, 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).

Defendant was convicted of Trafficking in Heroin by Possession of 4 Grams or More but Less than 14 Grams under N.C. Gen. Stat. § 90-95(h)(4), which provides:

Any person who . . . possesses four grams or more of . . . heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as “trafficking in opium, opiate, opioid, or heroin” and if the quantity of such controlled substance or mixture involved:

- a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 93 months in the State’s prison . . . ;

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- b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 120 months in the State's prison . . . ;
- c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 282 months in the State's prison

N.C. Gen. Stat. § 90-95(h)(4) (2019).

On appeal, Defendant argues it was plain error for the trial court to instruct the jury on the two lesser-included offenses of Trafficking in Heroin. Defendant contends when the jury found Defendant not guilty of Trafficking in Heroin by Possession of 28 Grams or More, it necessarily rejected the State's argument Defendant possessed the backpack and, further, that because the contents of the Cheez-It box were not chemically tested, there was no factual basis to support the instructions of the lesser-included offenses. Defendant further contends he was prejudiced by the inclusion of the lesser-included offense instructions because they "provided the jury with an opportunity to return a compromise verdict."

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citation omitted). "The test is whether there is the presence, or absence, of *any* evidence in the record which might convince a rational trier of fact to convict the

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defendant of a less grievous offense.” *Id.* at 562, 572 S.E.2d at 772 (emphasis added) (citation and quotation marks omitted). Our Supreme Court has cautioned: “The trial court should refrain from indiscriminately or automatically instructing on lesser included offenses. Such restraint ensures that [t]he jury’s discretion is . . . [channeled] so that it may convict a defendant of [only those] crime[s] fairly supported by the evidence.” *State v. Taylor*, 362 N.C. 514, 530, 669 S.E.2d 239, 256 (2008) (alterations and omission in original) (citations and quotation marks omitted). However, as detailed here, there is ample “evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense,” in this case Trafficking in Heroin by Possession of 4 Grams or More but Less than 14 Grams. *Millsaps*, 356 N.C. at 562, 572 S.E.2d at 772 (citation and quotation marks omitted).

In the present case, Sergeant Marshburn described witnessing Defendant complete two “hand-to-hand” transactions for the sale of heroin. In his interview with Detective Marshall, Defendant stated he “only [had] access to the heroin that was found in the Cheez-It box”³ but that “he kn[ew] the backpack was full of heroin, but he did not have the key.” Defendant told Detective Mitchell he “answers the phone when buyers call for heroin” and meets buyers at a bridge “across the street.” Agent

³ Defendant concedes in brief “he made an out-of-court statement to the effect that the Cheez-It box contained heroin[;]” however, Defendant argues this statement did not address the weight of the substance.

Wiley testified extensively about her examination of the contents of the backpack and, that through hypergeometric sampling, she determined with ninety-five percent certainty the backpack contained 29.03475 grams of heroin.

It is uncontested that the contents of the Cheez-It box were not chemically tested; however, the evidence reflects the bundles located inside the seized backpack were packaged in pornographic paper and lottery tickets and the individual bindles were stamped with, among others, “Deadpool.” Likewise, the 310 bindles retrieved from the Cheez-It box featured “Deadpool” stamps, and the larger bundles were wrapped in pornographic paper and lottery tickets. By multiplying the number of bindles in the Cheez-It box (310) by an average weight of 0.02 grams, there was sufficient evidence for the jury to estimate the Cheez-It box contained around 6.2 grams of heroin.⁴ Based on this evidence, the trial court concluded, with no objection by Defendant, “a reasonable jury [could] conclude taking all the inferences, including inferences in the light most favorable to the defendant, that the amount of drugs that was actually possessed was less than 28 or even less than 14.”

We conclude, as did the trial court, “the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater.” *Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771. Therefore, the trial court did not err when it instructed the jury as to the two lesser-included offenses to Trafficking

⁴ Agent Wiley testified for sampling purposes the average weight of a bindle is 0.02 grams.

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in Heroin by Possession of 28 Grams or More. Thus, because we conclude the trial court did not err, much less commit plain error, we do not reach Defendant's argument he was prejudiced by the submission of the lesser-included offenses to the jury.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial.

NO ERROR.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).