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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-326

No. COA18-1150-2

Filed 6 July 2021

Mitchell County, Nos. 15 CRS 50346, 50474, 16 CRS 28

STATE OF NORTH CAROLINA

v.

HARLEY AARON ALLEN

Appeal by defendant by writ of certiorari from judgments entered 9 February 2018 by Judge Alan Z. Thornburg in Mitchell County Superior Court. Originally heard in the Court of Appeals 7 August 2019, with opinion issued 17 December 2019. On 16 April 2021, the Supreme Court reversed and remanded to the Court of Appeals for consideration of defendant's remaining argument on appeal.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Harley Aaron Allen appeals, by writ of certiorari, from judgments entered upon jury verdicts finding him guilty of selling buprenorphine, delivering buprenorphine, and possession of buprenorphine with intent to sell or deliver.

Defendant argued on appeal that the trial court erred by failing to conduct a competency hearing to determine his capacity to proceed at the time of trial, and that the trial court erred by denying his motion to dismiss because the State failed to produce substantial evidence identifying Defendant as the perpetrator of the charged crimes. By published opinion issued on 17 December 2019, a majority of this Court concluded over a dissent that “the trial court erred in failing to determine whether, *at the time of trial*, Defendant was competent to proceed[,]” requiring remand for further competency proceedings and for the correction of clerical errors. *State v. Allen*, 269 N.C. App. 24, 35, 837 S.E.2d 196, 203–04 (2019) (“*Allen I*”), *rev’d and remanded*, 2021-NCSC-38. The Supreme Court subsequently reversed *Allen I* and remanded to this Court for consideration of Defendant’s remaining argument on appeal, that the trial court erred by denying his motion to dismiss for insufficient evidence. *State v. Allen*, 2021-NCSC-38, ¶ 36 (“*Allen II*”).

¶ 2

After careful consideration of Defendant’s challenge to the trial court’s judgments in light of the remand instructions that we received from the Supreme Court, we conclude that Defendant received a fair trial, free from error. However, we remand to the trial court for correction of the clerical errors identified in *Allen I*.

I. Background

A. Factual Background

¶ 3 On 22 July 2015, Joshua Arrowwood¹ was working as a confidential informant for the Mitchell County Sheriff's Office. Captain Rick Wiseman of the Mitchell County Sheriff's Office advised Mr. Arrowwood to meet him to conduct a controlled purchase of narcotics on that date. Immediately prior to the controlled purchase, Captain Wiseman searched Mr. Arrowwood and determined that he did not have any money or contraband on his person. Captain Wiseman then gave Mr. Arrowwood \$50 of Mitchell County special funds and drove Mr. Arrowwood in his undercover vehicle to a grocery store in Spruce Pine, North Carolina.

¶ 4 Captain Wiseman parked his vehicle in the parking lot. Defendant arrived riding a Suzuki motorcycle. Captain Wiseman recognized Defendant and his motorcycle from a previous encounter. Mr. Arrowwood approached Defendant on foot. After the two men spoke "for just a second[,]" Captain Wiseman observed Defendant "reach in[to] his pocket, take something out, [and] hand it to Mr. Arrowwood." Captain Wiseman then saw "Mr. Arrowwood hand [Defendant] something back." Mr. Arrowwood immediately returned to Captain Wiseman's vehicle and handed him one round white pill and a portion of another white pill.

¶ 5 A forensic drug chemist employed by the North Carolina State Crime Laboratory subsequently identified the substance collected from Defendant during

¹ In the transcript, the confidential informant's surname is spelled as "Arrowwood," while the indictments refer to the informant as "Arrowood."

the controlled purchase as buprenorphine, an opium derivative.

B. Procedural History

¶ 6

On 22 October 2015, Defendant was arrested, and subsequently indicted, for the (1) sale, (2) delivery, and (3) possession with the intent to sell or deliver buprenorphine, a Schedule IV controlled substance; and for (4) keeping or maintaining a vehicle for the purpose of selling buprenorphine. *Allen I*, 269 N.C. App. at 25, 837 S.E.2d at 198. Defendant was also indicted for having attained the status of a habitual felon. *Id.* Between his arrest and trial, Defendant was involuntarily committed three times, and found incapable of proceeding at two separate hearings. *Id.* In June of 2017, a psychiatric report noted that Defendant was competent to proceed to trial, and on 23 August 2017, the trial court found that Defendant had regained his capacity to proceed to trial. *Id.*

¶ 7

Six months later, on 8 February 2018, Defendant's trial began in Mitchell County Superior Court before the Honorable Alan Z. Thornburg. *Id.* at 26, 837 S.E.2d at 198. Defense counsel made a motion to dismiss for insufficient evidence at the close of the State's evidence. Defense counsel renewed the motion to dismiss at the close of all evidence. At the conclusion of the trial, the jury found Defendant guilty of selling buprenorphine, delivering buprenorphine, and possession of buprenorphine with the intent to sell or deliver. *Id.* The jury found Defendant not guilty of keeping or maintaining a vehicle for the purpose of selling buprenorphine. *Id.* Defendant then

pleaded guilty to attaining the status of a habitual felon. *Id.* “The trial court arrested judgment on Defendant’s conviction for delivering a controlled substance, and sentenced Defendant for the remaining two convictions to concurrent terms of 58 to 80 months and 8 to 19 months in the custody of the North Carolina Division of Adult Correction.” *Id.* (footnote omitted).

¶ 8 “On 9 February 2018, Defendant filed a procedurally inadequate *pro se* notice of appeal. Thereafter, Defendant filed a petition for writ of certiorari asking this Court to review the merits of his appeal, which we allowed by order entered 10 July 2019.” *Id.* On appeal, Defendant argued that, “in light of his mental health history and prior findings of incompetence, the trial court erred by failing to hold a competence hearing” during the six months between when he was found competent and the commencement of trial. *Id.* at 26–27, 837 S.E.2d at 199. He further argued that the trial court erred by denying his motion to dismiss for insufficient evidence because the State failed to prove that he was the perpetrator of the charged crimes.

¶ 9 Defendant’s appeal was heard by this Court on 7 August 2019. *Id.* at 24, 837 S.E.2d at 197. By published opinion issued 17 December 2019, a majority of this Court concluded that “the trial court erred in failing to determine whether, *at the time of trial*, Defendant was competent to proceed.” *Id.* at 35, 837 S.E.2d at 203. Accordingly, we remanded the matter “for the trial court to conduct a hearing to determine Defendant’s competency at the time of trial,” and to correct certain clerical errors

appearing in the judgments. *Id.* at 35, 837 S.E.2d at 204. A dissenting judge would have held that Defendant received a fair trial, free from error, and remanded the matter to the trial court to correct the clerical errors.

¶ 10 On 17 January 2020, the State filed a notice of appeal based on the dissent with the Supreme Court of North Carolina. By an opinion filed 16 April 2021, the Supreme Court reversed the opinion of our Court, holding “that the trial court did not err by failing to conduct an inquiry into [D]efendant’s competence upon its own motion and that the Court of Appeals erred by reaching a contrary conclusion.” *Allen II*, 2021-NCSC-38, ¶ 36. The Supreme Court therefore remanded the matter to this Court for “consideration of [D]efendant’s challenge to the trial court’s decision to deny his motion to dismiss the charges that had been lodged against him for insufficiency of the evidence.” *Id.*

II. Discussion

¶ 11 Following the Supreme Court’s remand, the sole issue before this Court is Defendant’s argument that the trial court erred by denying his motion to dismiss for insufficient evidence because the State failed to present sufficient evidence that Defendant was the person who sold the buprenorphine to Mr. Arrowwood during the controlled purchase. We disagree.

A. Standard of Review

¶ 12 We review a 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). When conducting a de novo review, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). “When ruling on a defendant’s motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense.” *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (citation omitted). It is evidence that is “existing and real, not just seeming or imaginary.” *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). On appellate review, we “must consider the evidence in the light most favorable to the State. Thus, all conflicts in the evidence must be resolved in favor of the State and it must be given the benefit of every inference reasonably to be drawn in its favor.” *State v. Chapman*, 293 N.C. 585, 587, 238 S.E.2d 784, 786 (1977) (citation omitted).

B. Analysis

¶ 13 Defendant argued at trial, and now argues on appeal, that “[a]lthough [he] was present during the trial, neither [Captain] Wiseman nor any other person explicitly identified, or was even asked to identify, [Defendant] as the person described in [Captain] Wiseman’s testimony”; thus, the “State’s evidence was insufficient to

establish [Defendant]’s identity as the perpetrator of the crimes charged.” This argument lacks merit.

¶ 14 At trial, Captain Wiseman testified regarding his familiarity with Defendant prior to the controlled purchase:

Q. And I’m going to ask you now, if you will, Captain Wiseman, to take us back to the 22nd of July, 2015.

On that date, were you familiar with the defendant Harley Aaron Allen?

A. I had seen him before and I had made a traffic stop on him before.

¶ 15 Captain Wiseman later testified that, when Defendant arrived at the parking lot, Captain Wiseman recognized both Defendant and the Suzuki motorcycle he was driving:

Q. . . . At some point did Mr. Allen arrive?

A. He did.

Q. Was he driving any kind of a vehicle when he arrived?

A. He was riding a Suzuki motorcycle.

Q. Okay. Are you familiar with that vehicle? Had you ever seen it before?

A. I had seen it before, yes, sir.

Q. And when you saw it before, who was operating it?

A. Mr. Allen.

¶ 16 This testimony, taken in the light most favorable to the State, supports a

reasonable inference and constitutes “relevant evidence as a reasonable mind might accept as adequate to support a conclusion” that Defendant, who was recognized by Captain Wiseman, was the person who arrived at the parking lot and sold buprenorphine to Mr. Arrowwood during the controlled purchase. *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation omitted).

III. Conclusion

¶ 17 We therefore conclude that the trial court did not err by denying Defendant’s motion to dismiss for insufficient evidence. Accordingly, Defendant received a fair trial, free from error. However, in that clerical errors remain apparent in the judgments, we must remand the matter to the trial court for the limited purpose of correcting clerical errors in the judgments. *See Allen I*, 269 N.C. App. at 35, 837 S.E.2d at 203–04.

NO ERROR IN PART; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges DILLON and GRIFFIN concur.

Report per Rule 30(e).