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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-729

No. COA21-276

Filed 21 December 2021

Haywood County, Nos. 19 CRS 230-31

STATE OF NORTH CAROLINA

v.

CLIFFORD NATHANIEL WARREN

Appeal by defendant from judgment entered 28 October 2020 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 1 December 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Katherine A. Murphy, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant.

ARROWOOD, Judge.

¶ 1

Clifford Nathaniel Warren (“defendant”) appeals from judgment convicting him of possession with intent to sell or deliver methamphetamine and conspiracy to possess with intent to sell or deliver methamphetamine. Defendant argues the trial court erred in denying his motion to dismiss the charge of conspiracy and in

sentencing him in the aggravated range. For the following reasons, we hold the trial court did not err in denying defendant’s motion nor in sentencing him in the aggravated range.

I. Background

¶ 2 On 11 July 2018, “close to midnight[,]” Waynesville Police Department Detective Evan Davis (“Detective Davis”)¹ was observing a Shell gas station in Waynesville. The gas station was located in an area from which the police department had received “several complaints” and where Detective Davis had previously observed “some drug activity” that led to “some arrests”

¶ 3 Detective Davis witnessed “a white car[,]” occupied by two men, pull into the gas station parking lot. Once the white car had parked, the two men walked into the gas station store, where they interacted with a third man. Detective Davis recognized the third man to be Heath Underwood (“Underwood”), whom he had “arrested” previously for possession of meth[.]”

¶ 4 After “[a]pproximately ten minutes or less,” the two men exited the gas station store and got back into the white car. When the white car left the gas station parking lot, Detective Davis “g[o]t behind it” and followed. Detective Davis thought the white

¹ At trial, Detective Davis testified that he had been a detective with the Waynesville Police Department for “almost two years[,]” but was serving as an officer with the Tactical Anti-Crime Unit on 11 July 2018.

car was speeding, so he “initiated” his “blue lights” and pulled it over. Once both vehicles had stopped, Detective Davis quickly recognized the driver of the white car to be Timothy Shuler (“Shuler”), whom Detective Davis knew through “[p]rior traffic stops and prior arrests.” When Detective Davis approached and shined his flashlight into the white car, he also recognized the passenger to be defendant.² During this traffic stop, Detective Davis observed defendant being “very fidgety, moving around the car a lot and . . . putting his hand down . . . toward his lap, towards the floorboard area of the passenger side of the car.”

¶ 5

Officer Jason Reynolds (“Officer Reynolds”) arrived at the location to assist with the traffic stop, and Detective Davis asked him to “keep an eye on [defendant], just kind of watch him,” after relaying his observations of defendant’s behavior. Detective Davis asked for permission to search the white car, which Shuler granted. Then, Detective Davis called for his sergeant and the sergeant’s “K-9 partner.” The vehicle search ultimately yielded: “a wallet with a lot of cash in it” that belonged to defendant, a glass pipe, digital scales, ledgers that read “pay” and “owe[,]” rubber bands, tape, marijuana, ammunition, “quite a bit of cash in [defendant]’s boot[,]” and “a white crystalline substance” on both Shuler’s and defendant’s persons, later identified by the State Crime Laboratory as methamphetamine. Officer Reynolds

² Detective Davis did not explain why he recognized defendant, but stated that he knew him.

also noted, in particular, that the money contained in defendant’s wallet was “put in there i[n] just an awkward way, unorganized, folded bills here and there.”

¶ 6 Both Shuler and defendant were arrested in the early morning hours of 12 July 2018, and defendant was charged with one count each of possession with intent to manufacture, sell, or distribute methamphetamine, and conspiracy to possess with intent to manufacture, sell, or distribute methamphetamine. On 1 April 2019, defendant was indicted on these same two counts, as well as one count of obtaining habitual felon status.

¶ 7 On 30 July 2019, the State provided defendant notice of its intent to “prove the following aggravating factor[]” at trial:

The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration.

¶ 8 The matter came on for trial in Haywood County Superior Court, Judge Letts presiding, during the trial court’s 26 October 2020 criminal session. At trial, Officer Reynolds testified that, based on his “training and experience[,]” the evidence seized from the vehicle search—“a crystalline substance packaged separately” along with “large amounts of cash folded up in such a small manner[,]” as well as scales and

ledgers—was “consistent” with the sale of drugs.

¶ 9 At the close of the State’s evidence, defendant moved to dismiss the charges. Specifically, as to the charge of possession, defendant argued there was “no showing that there was any intent by [defendant] to manufacture, sell or deliver.” As to the conspiracy charge, defendant argued the State did not show there had been an “agreement” with Shuler to manufacture, sell, or deliver methamphetamine.

¶ 10 The trial court granted defendant’s first motion to dismiss insofar as “the manufacture” of methamphetamine but denied the motion as it related to the “selling or delivering[.]” The trial court then denied defendant’s motion to dismiss the charge of conspiracy. Thereafter, defendant did not present any evidence and, prior to closing arguments, renewed both motions to dismiss, which the trial court denied.

¶ 11 The jury returned guilty verdicts for both charges of possession with intent to sell or deliver methamphetamine and conspiracy to possess with intent to sell or deliver methamphetamine. Then, the trial transitioned into its second phase, in which the trial court addressed defendant’s habitual felon charge and the State alleged the existence of an aggravating factor.

¶ 12 Just before the State presented its evidence, defendant’s trial counsel argued that, because he had just learned that day that the State intended to introduce evidence of a past probation violation in Jackson County, as opposed to a past probation violation in Haywood County that the State and defendant had previously

discussed, defendant had received insufficient notice of the aggravating factor. The trial court “overruled” defendant’s “objection[,]” finding that the State’s written notice of intent to use an aggravating factor had been properly filed, with “the appropriate box . . . checked” on the form, and thus concluding there was no prejudice to defendant and defendant had received appropriate notice.

¶ 13 At the close of the State’s evidence, defendant “renew[ed] [his] motion . . . as to the notice requirement in regards to the aggravating factors[,]” which the trial court denied. The jury ultimately found the State had shown the existence of an aggravating factor. The trial court sentenced defendant in the aggravated range and entered concurrent sentences of 144 to 185 months’ imprisonment. Defendant gave notice of appeal on 3 November 2020.

II. Discussion

¶ 14 Defendant argues the trial court erred in denying his motion to dismiss the charge of conspiracy and in sentencing him in the aggravated range. We disagree.

A. Motion to Dismiss Conspiracy Charge

¶ 15 Defendant contends the trial court should have granted his motion to dismiss the charge of conspiracy because the State failed to introduce sufficient evidence to establish that there had been an agreement between defendant and Shuler to sell or deliver methamphetamine.

¶ 16 “We review a trial court’s denial of a motion to dismiss *de novo*.” *State v.*

Thomas, 268 N.C. App. 121, 131, 834 S.E.2d 654, 662 (2019) (citation omitted), *disc. review denied*, 374 N.C. 434, 841 S.E.2d 531 (2020).

“A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was the perpetrator of the crime.”

Id. at 131-32, 834 S.E.2d at 662 (citation omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 132, 834 S.E.2d at 662 (citation and quotation marks omitted).

¶ 17 “A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means.” *State v. Garrett*, 246 N.C. App. 651, 656, 783 S.E.2d 780, 785 (2016) (citation and quotation marks omitted). “A conspiracy does not require proof of an express agreement; rather, proof of circumstances which point to a mutual implied understanding to commit the unlawful act is sufficient to prove conspiracy.” *Id.* (citation and quotation marks omitted).

¶ 18 Here, the State presented evidence tending to show defendant, together with Shuler, had arrived at a gas station where Detective Davis had “been involved in some drug activity” and “where some arrests ha[d] been made” At the gas station, defendant and Shuler interacted with Underwood, whom Detective Davis had

previously arrested for possession of methamphetamine. A vehicle search of the white car in which Shuler and defendant were seated produced methamphetamine on both Shuler's and defendant's persons, a glass methamphetamine pipe, digital scales, ledgers, ammunition, and lots of "awkward[ly]" folded cash belonging to defendant. Furthermore, defendant was very fidgety throughout the traffic stop. Lastly, Officer Reynolds's testimony at trial provided that, based on training and experience, all of this evidence taken together was consistent with the sale of drugs.

¶ 19 Viewed in the light most favorable to the State, here, the "circumstances" surrounding defendant's arrest "point[ed] to a mutual implied understanding to commit the unlawful act" of selling or delivering methamphetamine. *See id.*; *see also State v. Jenkins*, 167 N.C. App. 696, 701, 606 S.E.2d 430, 433 (finding the "evidence was sufficient to submit a charge of conspiracy to traffic in cocaine by possession to the jury" where: the defendant was found seated in a pickup truck with two other individuals and there was a pile of money on the driver's lap, a pistol in the driver-side door, and a bag of drugs between the defendant and the other passenger), *aff'd*, 359 N.C. 423, 611 S.E.2d 833 (2005); *cf. State v. McClaude*, 237 N.C. App. 350, 354, 765 S.E.2d 104, 108 (2014) (finding the evidence was insufficient to support a charge of conspiracy to traffic in cocaine, despite the driver being "visibly nervous" and "the presence of cocaine" in the vehicle, because the "defendant and [the driver] never conversed, no cash was found in the vehicle or linked to [the driver,] . . . neither

person possessed a weapon[.]” the “defendant admitted his own intent to sell cocaine[.]” and the driver “was merely driving the vehicle because [the defendant] did not have a license.”).

¶ 20 Thus, the trial court did not err in denying defendant’s motion to dismiss the charge of conspiracy.

B. Notice of Intent to Use Aggravating Factor

¶ 21 Defendant contends the State failed to provide adequate notice of its intent to use the aggravating factor, and thus the trial court erred in sentencing him in the aggravated range. Specifically, defendant claims “[t]he week of the trial, the State told [defendant’s] trial counsel it intended to prove the probation violation in a Haywood County case and provided specific file numbers”; then, “[l]ater in the week, on the day of the aggravating factor phase, the State informed trial counsel it was not using the Haywood County case[.] because it was overturned in the Court of Appeals[.]” and would “[i]nstead . . . us[e] a Jackson County case.” Thus, defendant argues this change prejudiced him.

¶ 22 “We review this argument *de novo*[.]” *State v. Wright*, 265 N.C. App. 354, 356, 826 S.E.2d 833, 835 (2019).

¶ 23 Under N.C. Gen. Stat. § 15A-1340.16(a6), the State must do the following when it intends to introduce an aggravating factor against a defendant at trial:

The State must provide a defendant with written notice of

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its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

N.C. Gen. Stat. § 15A-1340.16(a6) (2019).

¶ 24 Subsection (d) therein states that the following, among others, constitutes an aggravating factor:

The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration

N.C. Gen. Stat. § 15A-1340.16(d)(12a).

¶ 25 Here, the record reflects that the State followed all statutory requirements imposed by N.C. Gen. Stat. § 15A-1340.16: it gave defendant notice of its intent to introduce an aggravating factor at defendant's trial over a year before the trial date and in its written notice checked the box illustrating the factor it sought to establish, which is identical to that laid out in subsection (d)(12a), namely that:

The defendant has, during the 10-year period prior to the commission of the offense for which the defendant is being sentenced, been found by a court of this State to be in

willful violation of the conditions of probation imposed pursuant to a suspended sentence or been found by the Post-Release Supervision and Parole Commission to be in willful violation of a condition of parole or post-release supervision imposed pursuant to release from incarceration.

¶ 26 Nowhere within N.C. Gen. Stat. § 15A-1340.16 nor in our case law has it been held that the State must specify the exact case, or which county, it intends to use as evidence of an aggravating factor at trial, nor does the associated form require or otherwise leave room for such specificity.

¶ 27 Therefore, the State followed all statutory requirements and provided adequate notice to defendant of its intent to use an aggravating factor at trial. In turn, the trial court did not err in sentencing defendant in the aggravated range.

III. Conclusion

¶ 28 Accordingly, we conclude the trial court did not err in denying defendant's motion to dismiss the charge of conspiracy nor in sentencing him in the aggravated range.

NO ERROR.

Judges TYSON and GRIFFIN concur.

Report per Rule 30(e).