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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-699

No. COA20-843

Filed 18 October 2022

Randolph County, Nos. 17CRS054146, 17CRS054147, 17CRS054183.

STATE OF NORTH CAROLINA

v.

AMBER SHAQUILLE DUNCAN, Defendant.

Appeal by Defendant from judgments entered 12 February 2020 by Judge Kevin M. Bridges in Randolph County Superior Court. Heard in the Court of Appeals 17 June 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Jaren E. Kelly, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

MURPHY, Judge.

¶ 1 Defendant appeals from judgments entered upon jury verdicts finding him guilty of armed robbery, two counts of second-degree kidnapping, possession of marijuana, and possession of marijuana paraphernalia. Defendant argues that the trial court erred by denying her motion to dismiss the marijuana-related charges. We find no error.

BACKGROUND

¶ 2 On 7 October 2019, a grand jury indicted Defendant for robbery with a dangerous weapon, feloniously receiving stolen goods or property, conspiracy to commit robbery with a dangerous weapon, and two counts of second-degree kidnapping. Defendant was also charged via arrest warrant with possession of marijuana and possession of marijuana paraphernalia.

¶ 3 After Defendant was found guilty of the possession of marijuana and possession of marijuana paraphernalia charges in District Court, Defendant appealed to Superior Court for a trial de novo. Defendant was arraigned and pleaded not guilty. Before trial, the State dismissed the charges of receiving stolen goods or property and conspiracy to commit robbery with a dangerous weapon.

¶ 4 The evidence at trial tended to show the following: On the morning of 29 August 2017, Taylor Ward, an employee at the game room of Clover's Business Center ("Clover's"), met her friend Cardela Golden at Clover's. About five to seven minutes after Ward and Golden sat down, Defendant came in and asked to use the bathroom, which Ward allowed. Defendant went into the bathroom and then exited Clover's.

¶ 5 Several minutes later, a man entered Clover's, pulled a gun, and ordered Ward and Golden into the office. While holding Ward and Golden at gunpoint, the man forced Ward to give him money from Clover's register and safe. He then ordered

Ward and Golden to return to the table, hand over their cell phones, and return to the office.

¶ 6 Once Ward and Golden heard the man leave, they called 911 and ran to lock the door. They watched the man get in the back seat of a white car with Defendant in the driver's seat. As the car pulled out of the parking lot, Golden got into her truck and pursued the white car until it got on the highway.

¶ 7 Sergeant Jason Trogdon of the Randleman Police Department heard a Be-On-The-Lookout alert for the car over the radio. Trogdon saw the car traveling northbound on the highway and pursued it. Trogdon pulled alongside the car and saw Defendant driving. When Trogdon activated his blue lights and sirens, the car stopped on the right side of the road. Trogdon directed Defendant to get out of the car and handcuffed her; the man fled and was apprehended after a pursuit.

¶ 8 Following Defendant's arrest, Sergeant Charles Burrow of the Asheboro Police Department searched the car pursuant to a warrant. At trial, Burrow testified that he found a "purple Crown Royal bag" in the console between the two front seats. Burrow opened the bag and found "a smaller pint-sized Mason jar that had some objects in it." According to Burrow, the jar "contained clear plastic baggies containing a green vegetable matter, which appeared to be marijuana." Burrow opened the jar and "the plastic baggies to confirm that it was -- it appeared to be marijuana." Burrow testified that he "had some training and experience in identifying marijuana" and

immediately knew the substance in the jar was marijuana based on his "years of experience in dealing with [C]annabis, marijuana, and multiple charges over the years." When Burrow examined the jar and its contents at trial, he again testified that the "green vegetable matter . . . appear[ed] to be marijuana." Burrow also explained that marijuana has a particular odor, which he described as unique and "[v]ery strong" with "an odd smell" that is "hard to explain . . . but if you smelled it several times, you'll recognize it." Burrow told the jury that he smelled that odor when he opened the jar.

¶ 9 In the back seat of the car, Burrow found a small digital scale; in the front passenger floorboard, he found a handgun and a grinder, which he described as "a little container that has teeth in it to grind tobacco products."

¶ 10 The trial court denied Defendant's motion to dismiss each charge for insufficient evidence at the conclusion of the State's evidence. Defendant did not testify and renewed her motion to dismiss, which the trial court denied. Following deliberations, the jury convicted Defendant of robbery with a firearm, two counts of second-degree kidnapping, possession of marijuana, and possession of marijuana paraphernalia. The trial court sentenced Defendant to consecutive prison terms of 51 to 74 months for robbery with a dangerous weapon, 20 to 36 months for one count of second-degree kidnapping, and 20 to 36 months for another count of second-degree kidnapping consolidated with possession of marijuana and possession of marijuana

paraphernalia. Defendant gave notice of appeal in open court.

¶ 11 On 1 April 2021, counsel for Defendant filed a no-merit brief in accordance with *Anders v. California*, 386 U.S. 738 (1967). On 1 November 2021, we ordered that,

> within 30 days of receipt of this Order, the Appellate Defender assign new appellate counsel to represent Defendant. Defendant's new appellate counsel shall have 60 days from the date of assignment to submit a new brief on the sole issue of whether there was sufficient evidence to support Defendant's convictions for possession of marijuana and marijuana paraphernalia. The State shall have 30 days from the filing of Defendant's new brief to file a response brief. Defendant shall have 15 days from the filing of the State's brief to file any reply brief.

After allowing the State three extensions of time and the State filing its brief on 1 June 2022, briefing closed on 16 June 2022 pursuant to our 1 November 2021 order.

ANALYSIS

¶ 12 Defendant argues that the trial court erred by denying her motion to dismiss the possession of marijuana and possession of marijuana paraphernalia charges for insufficient evidence. We disagree.

¶ 13 "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Mann*, 355 N.C. 294, 301 (2002) (quotation marks and citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* In

evaluating the sufficiency of the evidence, the court must view the evidence "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75 (1993).

> [T]o be submitted to the jury for determination of defendant's guilt, the evidence need only give rise to a reasonable inference of guilt. A motion to dismiss should be granted, however, where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt.

State v. Turnage, 362 N.C. 491, 494 (2008) (quotation marks and citations omitted). We review the denial of a motion to dismiss de novo. *State v. Golder*, 374 N.C. 238, 250 (2020).

¶ 14 Defendant argues that the trial court erred by denying her motion to dismiss the possession of marijuana and possession of marijuana paraphernalia charges for insufficient evidence because Burrow's identification of the substance found in the car as marijuana failed to raise more than a suspicion or conjecture of Defendant's guilt. Defendant argues that, "[s]ince 'marijuana' has been statutorily redefined in scientific and technical terms, it can only be identified with chemical analysis or another sufficiently reliable method."

¶ 15 A person who possesses marijuana, a Schedule VI controlled substance under the Controlled Substances Act, "shall be guilty of a Class 3 misdemeanor[.]" N.C.G.S. § 90-94(1) (2021); N.C.G.S. § 90-95(d)(4) (2021). To convict a defendant of this offense,

"the State must prove (1) that the defendant knowingly possessed a controlled substance and (2) that the substance was marijuana." *State v. Johnson*, 225 N.C. App. 440, 454-55 (2013). Further, it is a separate Class 3 misdemeanor in violation of N.C.G.S. § 90-113.22A for a person "to knowingly use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, or conceal marijuana or to inject, ingest, inhale, or otherwise introduce marijuana into the body." N.C.G.S. § 90-113.22A(a) (2021).

¶ 16 At the time of Defendant's alleged drug offenses, "marijuana" was defined as

> all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. The term does not include industrial hemp as defined in [N.C.G.S. §] 106-568.51, when the industrial hemp is produced and used in compliance with rules issued by the North Carolina Industrial Hemp Commission.

N.C.G.S. § 90-87(16) (2021). "Industrial Hemp" was defined as "[a]ll parts and varieties of the plant Cannabis sativa (L.), cultivated or possessed by a grower licensed by the Commission, whether growing or not, that contain a delta-9

tetrahydrocannabinol concentration of not more than three-tenths of one percent (0.3%) on a dry weight basis." N.C.G.S. § 106-568.51 (2017). Under these statutes, "[i]ndustrial hemp is a variety of the species Cannabis Sativa—the same species of plant as marijuana. The difference between the two substances is that industrial hemp contains very low levels of tetrahydrocannabinol ("THC"), which is the psychoactive ingredient in marijuana." *State v. Parker*, 2021-NCCOA-217, ¶ 27.

¶ 17 In this case, Burrow's testimony that the substance appeared to be marijuana was based on visual inspection, "the particular odor of marijuana," and Burrow's training and experience.

¶ 18 Our appellate courts have scrutinized the admissibility of opinion testimony identifying controlled substances based on visual examination methods. In *State v. Llamas-Hernandez*, the trial court admitted lay opinion testimony by detectives identifying as cocaine a "white powdery substance" found in the defendant's residence. 189 N.C. App. 640, 642-43 (2008), *rev'd per curiam for reasons stated in dissent*, 363 N.C. 8 (2009). According to the dissent adopted by the North Carolina Supreme Court, the trial court abused its discretion by admitting the detectives' testimony because the "white powder" had "no distinguishing characteristics . . . to support a lay opinion under [N.C.G.S. § 8C-1,] Rule 701 that the substance was cocaine." *Id.* at 654 (Steelman, J., concurring, in part, and dissenting, in part). The dissent noted and reasoned as follows: The Controlled Substances Act "describe[s] in

great detail the substances prohibited," including cocaine. *Id.* at 652 (citing N.C.G.S. § 90-90(1)(d) (2007)). "By enacting such a technical, scientific definition of cocaine, it is clear that the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance." *Id.* Additionally, the General Assembly has "set forth procedures for the admissibility of such laboratory reports." *Id.* at 652-53 (citing N.C.G.S. § 8-58.20 (2007); N.C.G.S. § 90-95(g), (g1) (2007)). Lastly, "[c]rack cocaine has a distinctive color, texture, and appearance[,]" and "[w]hile it might be permissible, based upon these characteristics, for an officer to render a lay opinion as to crack cocaine, it cannot be permissible to render such an opinion as to a non-descript white powder." *Id.* at 654.

¶ 19 In *State v. Ward*, the defendant was charged with controlled substance offenses based on pills found on his person, in his vehicle, and at his residence. 364 N.C. 133, 134 (2010). At trial, a State Bureau of Investigation crime lab chemist testified as an "expert in the chemical analysis of drugs and forensic chemistry." *Id.* at 136. Though the chemist conducted a chemical analysis on "about half of" the pills submitted to the lab, he identified the remaining pills "solely by visual inspection and comparison with information provided by Micromedex," a medical publication. *Id.* The chemist identified "Dihydrocodeinone, Hydrocodone, and Oxycodone, which are opium derivatives, and cocaine, Amphetamine, Alprazolam (Xanax), Diazepam (Valium), and Methylphenidate (Ritalin)" among the pills, and the defendant was convicted.

Id.

¶ 20 Our Supreme Court held that, under N.C.G.S. § 8C-1, Rule 702, the chemist's visual inspection methodology was not "sufficiently reliable to identify the substances at issue." *Id.* at 142. The Court gave three reasons for this conclusion: First, the Controlled Substances Act "provide[s] very technical and specific chemical designation[s] for the materials referenced therein." *Id.* (citing N.C.G.S. §§ 90-89 to 90-94 (2007)). "These scientific definitions imply the necessity of performing a chemical analysis to accurately identify controlled substances before the criminal penalties in N.C.G.S. § 90-95 are imposed." *Id.* Second, the General Assembly has criminalized conduct pertaining to both counterfeit and real controlled substances. *Id.* at 143, 694 S.E.2d at 744 (citing N.C.G.S. § 90-95(a)(1)-(2) (2007)). "By imposing criminal liability for actions related to counterfeit controlled substances, the legislature not only acknowledged that their very existence poses a threat to the health and well-being of citizens in our state, but that a scientific, chemical analysis must be employed to properly differentiate between the real and the counterfeit." *Id.* Third, the chemist's testimony was "lacking in sufficient credible indicators to support the reliability of his visual inspection methodology." *Id.* "Rather than demonstrating its proven reliability," the chemist's explanation of the methodology "focused on concerns for expediency and maximizing limited laboratory resources in light of the relative seriousness of the criminal charges." *Id.* at 145.

¶ 21 The Court in *Ward* broadly stated that

> the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required.

Id. at 147. Still, the Court stated that its holding was "limited to North Carolina Rule of Evidence 702" and "does not affect visual identification techniques employed by law enforcement for other purposes, such as conducting criminal investigations." *Id.* at 147-48.

¶ 22 The Supreme Court has since reiterated that "*Ward* focused solely upon the admissibility of the challenged evidence and did not address the sufficiency of the evidence to support the defendant's convictions in that case." *State v. Osborne*, 372 N.C. 619, 628 (2019).

> For purposes of examining the sufficiency of the evidence to support a criminal conviction, it simply does not matter whether some or all of the evidence contained in the record should not have been admitted; instead, when evaluating the sufficiency of the evidence, all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction in question. . . .

Id. at 630 (citations omitted). Consistent with *Osborne*, we must consider whether the evidence admitted by the trial court—including Burrow's testimony—constituted sufficient evidence that the substance was marijuana, regardless of whether Burrow's

testimony was properly admitted.

¶ 23 Burrow's testimony was the only evidence serving to identify the "green vegetable matter" as "marijuana" within the meaning of N.C.G.S. § 90-87(16). The State presented no chemical analysis of the substance, despite the fact that "marijuana" and "industrial hemp" are varieties of "the same species of plant," distinguished by their respective "delta-9 tetrahydrocannabinol concentration." *Parker*, 2021-NCCOA-217 at ¶ 27-28 (citing N.C.G.S. § 106-568.51(7) (2019) and discussing the difficulty of distinguishing marijuana from industrial hemp).

¶ 24 Our post-*Anders* review order allowed for Defendant "to submit a new brief on the sole issue of whether there was sufficient evidence to support Defendant's convictions for possession of marijuana and marijuana paraphernalia."[1] Our Supreme Court recently had an opportunity to succinctly instruct this Court and the trial courts that:

> [F]or purposes of examining the sufficiency of the evidence to support a criminal conviction, it simply does not matter whether some or all of the evidence contained in the record should not have been admitted; instead, when evaluating the sufficiency of the evidence, all of the evidence,

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[1] To the extent that Defendant asks us to re-examine our binding precedent regarding the need for expert testimony, rather than lay opinion testimony, to identify the form of the Cannabis plant that Defendant possessed, this is not an appropriate issue for consideration under a motion to dismiss for the sufficiency of the evidence. Further, the substance of Defendant's argument improperly asks us to go beyond the evidence in this case and "is based on documents, data, and theories that were neither presented to the trial court nor included in the record on appeal." *State v. Gray*, 259 N.C. App. 351, 356 (2018).

> regardless of its admissibility, must be considered in determining the validity of the conviction in question. For that reason, a reviewing court errs to the extent that it determines whether the evidence suffices to support a defendant's criminal conviction by ascertaining whether the evidence relevant to the issue of the defendant's guilt should or should not have been admitted and then evaluating whether the admissible evidence, examined without reference to the allegedly inadmissible evidence that the trial court allowed the jury to hear, sufficed to support the defendant's conviction.

Osborne, 372 N.C. at 630 (citations omitted).

¶ 25 As *Osborne* proceeded to observe, the difference between the admissibility and the sufficiency of evidence is crucial. *See id.* at 630-31 ("Aside from the fact that the dissenting judge [in *Llamas-Hernandez*] did not explain in detail why the appropriate remedy for the erroneous admission of the visual identification testimony would be a determination that the evidence did not suffice to support the defendant's conviction rather than a new trial and the fact that the issue actually in dispute between the parties related to admissibility rather than sufficiency, the remedial result reached in *Llamas-Hernandez* is inconsistent with numerous decisions of this Court[.]"). If evidence was improperly admitted, the remedy is a new trial; whereas, if the evidence is insufficient to survive a motion to dismiss, the remedy is vacatur of Defendant's conviction for all time. *Id.* at 631, n.4 ("To be absolutely clear, the appropriate remedy for prejudicial error resulting from the admission of evidence that should not have been admitted has traditionally been for the defendant to receive a new trial rather

than for the charges that had been lodged against that defendant to be dismissed for insufficiency of the evidence.”).

¶ 26 As Defendant’s re-briefing was constrained to the issue of the sufficiency of the evidence, Burrow’s lay opinion identification of marijuana must be considered when evaluating all of the evidence in the light most favorable to the State. *See id.* at 630, 831 S.E.2d at 335. Considering Burrow’s identification of “green vegetable matter” as marijuana, the State presented sufficient evidence that Defendant possessed marijuana and that the scales and grinder were marijuana paraphernalia.[2]

CONCLUSION

¶ 27 The State presented sufficient evidence that Defendant possessed marijuana and possessed marijuana paraphernalia.

NO ERROR.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).

[2] This is true despite Burrow’s apparent use of “marijuana” synonymously with “Cannabis” at one point in his testimony.