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NO. COA11-898
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STATE OF NORTH CAROLINA

v.

Mecklenburg County
Nos. 10 CRS 204377-78, 20518

LAWRENCE COLLINS JOHNSON

Appeal by defendant from judgment entered 22 March 2011 by
Judge W. Robert Bell in Mecklenburg County Superior Court.
Heard in the Court of Appeals 23 January 2012.

*Attorney General Roy Cooper, by Special Deputy Attorney
General Joseph E. Herrin, for the State.*

James N. Freeman, Jr., for defendant-appellant.

ERVIN, Judge.

Defendant Lawrence Collins Johnson appeals from a judgment based upon his convictions for possessing cocaine with the intent to sell or deliver and selling cocaine and his plea of guilty to having attained the status of an habitual felon. On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the charges on the grounds that they lacked sufficient evidentiary support and committed plain error by admitting evidence that an undercover police officer

identified Defendant as the individual involved in the controlled substance transaction in question. After careful consideration of Defendant's challenges to the trial court's judgment, we conclude that Defendant is not entitled to any relief from those judgments on appeal.

I. Factual Background

A. Substantive Facts

On 28 January 2010, Officer M.D. Pittman of the Charlotte-Mecklenburg Police Department was working in an undercover capacity. On that evening, Officer Pittman arranged to buy twenty dollars' worth of crack cocaine from a man he encountered on the street. After the man got into Officer Pittman's unmarked car and Officer Pittman gave him twenty dollars, the man walked over to the porch of a nearby house. As the man did that, Officer Pittman made a U-turn and parked his car at the end of the street. Shortly thereafter, the man returned to Officer Pittman's vehicle and gave Officer Pittman what appeared to be crack cocaine. When the man walked away from the car, Officer Pittman signaled other officers to arrest him. After the arrest, Officer Pittman identified Defendant as the man who had sold him crack cocaine a few minutes earlier. In addition, Officer Pittman identified Defendant as the seller during his trial testimony. According to a criminalist employed by the

Charlotte-Mecklenburg crime laboratory and accepted by the trial court as an expert in the field of chemistry, the substance that Defendant sold to Officer Pittman was cocaine.

B. Procedural History

On 29 January 2010, magistrate's orders charging Defendant with possessing cocaine with the intent to sell or deliver within 300 feet of property on which a childcare facility was located and selling cocaine within 300 feet of property on which a childcare facility was located were issued. On 8 February 2010, the Mecklenburg County grand jury returned bills of indictment charging Defendant with possessing cocaine with the intent to sell or deliver within 1,000 feet of property on which a childcare facility was located and selling cocaine within 1,000 feet of property on which a childcare facility was located. On 5 April 2010, the Mecklenburg County grand jury returned a bill of indictment charging Defendant with having attained habitual felon status.

The charges against Defendant came on for trial before the trial court and a jury at the 21 March 2011 criminal session of the Mecklenburg County Superior Court. On 22 March 2011, the jury returned verdicts convicting Defendant of possessing cocaine with the intent to sell or deliver and selling cocaine. At that point, Defendant entered a plea of guilty to having

attained habitual felon status. Based upon the jury's verdicts and Defendant's admission, the trial court consolidated Defendant's convictions for judgment and sentenced Defendant to 110 to 141 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Sufficiency of the Evidence

In his first challenge to the trial court's judgment, Defendant argues that the trial court erred by denying his dismissal motion. More specifically, Defendant argues that the evidence did not suffice to show that he was the person with whom Officer Pittman dealt on 28 January 2010. We disagree.

"When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.'" *State v. García*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)), cert. denied, 543 U.S. 1156, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005). "In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable

inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

"The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001). "To prove sale and/or delivery of a controlled substance, the State must show a transfer of a controlled substance by either sale or delivery, or both." *Id.*

The record in this case clearly reflects that the State presented substantial evidence tending to show Defendant's guilt of both charges. Officer Pittman testified that Defendant agreed to sell him twenty dollars' worth of crack cocaine, that Defendant took twenty dollars from him, and that Defendant brought cocaine to him a short time later. Officer Pittman positively identified Defendant as the individual involved in the transaction in question shortly after the sale occurred and at trial. Although Defendant argues that the credibility of Officer Pittman's identification was suspect, such arguments are more appropriately directed to the jury than to a reviewing court. As a result, we hold that the evidence elicited at trial, taken in the light most favorable to the State, more than

suffices to prove each element of the offenses Defendant was convicted of committing and Defendant's identity as the individual who committed those offenses.

B. Admissibility of Identification Testimony

Secondly, Defendant contends that the trial court committed plain error by allowing Officer Pittman to testify concerning his out-of-court identification of Defendant as the individual with whom he engaged in a cocaine transaction on 28 January 2010. More particularly, Defendant contends that Officer Pittman's identification resulted from and was tainted by an impermissibly suggestive "show-up." We do not find Defendant's argument persuasive.

In his brief before this Court, Defendant acknowledges that he did not object to Officer Pittman's testimony at trial. For that reason, Defendant further concedes that we must review the admission of the challenged testimony using a "plain error" standard of review. N.C. R. App. P. 10(a)(4). Plain error is "'a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). As a result, a defendant is entitled to relief on plain error grounds "only if the error was so fundamental that,

absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

"Identification procedures which are so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification violate a defendant's right to due process." *State v. Grimes*, 309 N.C. 606, 609, 308 S.E.2d 293, 294 (1983) (citation omitted). "Whether a substantial likelihood [of misidentification] exists depends on the totality of the circumstances." *State v. Fisher*, 321 N.C. 19, 23, 361 S.E.2d 551, 553 (1987). The relevant circumstances include:

(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and confrontation.

State v. Powell, 321 N.C. 364, 369, 364 S.E.2d 332, 335, *cert. denied*, 488 U.S. 830, 109 S. Ct. 83, 102 L. Ed. 2d 60 (1988) (citations omitted).

After applying the applicable criteria to the facts contained in the present record, we conclude that Defendant cannot demonstrate prejudicial error, much less plain error, stemming from the admission of Officer Pittman's identification testimony. Officer Pittman had two face-to-face encounters with

Defendant during a relatively brief period of time and spent a total of three to four minutes with him. Shortly after Defendant's arrest, Officer Pittman drove by Defendant as he stood a short distance away in a well-lit area and identified Defendant as the individual from whom he had purchased cocaine. In addition, Officer Pittman independently identified Defendant at trial without showing any uncertainty about either identification. As a result, after considering the totality of the circumstances, we hold that Defendant has failed to demonstrate that he is entitled to relief from the trial court's judgment based upon the admission of the challenged identification testimony.

III. Conclusion

Thus, for the reasons set forth above, we conclude that neither of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judges ROBERT C. HUNTER and STEPHENS concur.

Report per Rule 30(e).