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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-779

Filed: 16 May 2017

Yancey County, Nos. 13 CRS 50288, 50348

STATE OF NORTH CAROLINA

v.

STEVEN JOSEPH HUGHES

Appeal by defendant from judgments entered 27 August 2014 by Judge Gary Gavenus in Yancey County Superior Court. Heard in the Court of Appeals 7 February 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Peggy S. Vincent, for the State.*

*Morgan & Carter PLLC, by Michelle F. Lynch, for defendant-appellant.*

BRYANT, Judge.

Where the indictment against defendant was stated in the language of the charging statute, the indictment was not fatally defective, and where there was sufficient evidence of defendant's possession of precursor chemicals and trafficking by possession of methamphetamine to submit the matters to the jury, the trial court did not err in failing to grant defendant's motion to dismiss for insufficient evidence.

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Defendant Steven Joseph Hughes was indicted by a grand jury convened in Yancey County for manufacture of methamphetamine, possession of a chemical precursor for methamphetamine with intent to manufacture methamphetamine, possession of drug paraphernalia, trafficking in methamphetamine by manufacturing, and trafficking in methamphetamine by possession. The matter came on for trial during the 25 August 2014 session of criminal superior court for Yancey County, the Honorable Gary Gavenus, Judge presiding.

At trial, the evidence showed that on 9 May 2013, Detective Brian Shuford, with the Yancey County Sheriff's Department, responded to a residence located at 79 Silver Springs Road in Burnsville to investigate a larceny of a vehicle from a nearby business. Dressed in plainclothes but with his badge and his gun visible, Detective Shuford approached the residence. On the ground under the carport eave, Detective Shuford observed batteries which had been split open, empty bottles, tubing, coffee filters, and trash bags. Having received training in the detection of clandestine laboratories and recognition of precursor chemicals for the manufacturing of methamphetamine, Detective Shuford recognized the articles as potentially contributing to "[t]he manufacturing of methamphetamine in a one type pot method." Defendant came to the door and spoke with the detective. Shortly thereafter, defendant stated that he needed to use the restroom. Detective Shuford asked if he could wait for defendant inside the residence. "He said absolutely that is fine, you

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can come in and you can look wherever you need to look.” In the basement, Detective Shuford observed “what appeared . . . to be like a one pot or shake and bake lab in a plastic bottle sitting just inside the door of the basement.” Also in the basement was a cold compress “which I know contains ammonium nitrate,” Coleman camp fuel, tubing coffee filters, and “some sort of acid, like concrete cleaner”—items Detective Shuford associated with methamphetamine production.

Detective Shuford informed defendant that one thing necessary for making methamphetamine that he did not see “was the actual Sudafed or the Ephedrine that goes into the methamphetamine or the bi-product of that or the wrappers that they came out of.” Defendant stated that his friend Jody Hoyle had taken Sudafed packaging with him the previous night. After exiting the residence, Detective Shuford contacted other law enforcement officers in the Sheriff’s Office about his observations and his suspicion that methamphetamine was being made “in the one pot method.”

A search warrant was obtained, and upon arrival, other law enforcement officers began processing the scene. One item that was removed to a staging area was a pink tote bag containing “[s]ome straws, some baggies, some metal tins, some black smoking pipes, and . . . some scales, a small set of digital scales.”

Agent Miguel Cruz-Quinones testified as an expert in the field of forensic science of drug chemistry. He was called to the scene “to conduct an inventory of the

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items, consistent with the manufacturing of clandestine laboratory for methamphetamine and also collect and seize evidence from the scene for the analysis in the lab.” He examined a clear plastic Coca-Cola bottle that contained a “clear liquid mixed with grayish suspended black particles, mixed with black chunks of a solid material and the plastic strip inside,” which he described as “a one pot reaction vessel[,] . . . the container in which all the ingredients are mixed in order for the reaction to take place and produce the finished product, which is methamphetamine.”

Agent Cruz-Quinones testified that the liquid weighed 40.01 grams and

based on my training and experience and the physical evidence at the scene, and my analysis of the liquid in the laboratory, I concluded that this is a clandestine laboratory crime scene using the 45 minute method, also known as one pot or shake and bake. And the liquid was found to contain methamphetamine.

Testifying in his own defense, defendant admitted that he had been using methamphetamine on average twice a month ever since 2000. But though he used methamphetamine, defendant denied ever making it. Defendant testified that the items law enforcement officers found such as lye, muriatic acid, and Coleman camp fuel were used for legitimate purposes; other items—a cold compress, drain-out (sodium hydroxide), sodium nitrate, and Transchem—defendant said he never purchased. Defendant admitted that the night before Detective Shuford arrived at his residence, his friends were there, and one of them was making methamphetamine.

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The jury returned guilty verdicts against defendant on the charges of possession of precursor chemicals with the intent to manufacture methamphetamine, possession of drug paraphernalia, and trafficking by possession of twenty-eight grams or more but less than 200 grams of a mixture containing methamphetamine. Defendant was found not guilty of manufacturing methamphetamine and not guilty of trafficking by manufacturing. In accordance with the jury verdicts, the trial court entered judgment against defendant. The charges of possession of methamphetamine precursor chemicals and possession of drug paraphernalia were consolidated and defendant was sentenced to a term of 28 to 43 months. For trafficking by possession of methamphetamine, defendant was sentenced to a consecutive term of 70 to 93 months. Defendant appeals.

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On appeal, defendant questions (I) whether the trial court lacked jurisdiction over the charge of possession of drug paraphernalia and (II) whether the trial court erred in denying defendant's motion to dismiss the charges of possession of precursor chemicals and trafficking by possession of methamphetamine.

*I*

Defendant first argues that the trial court lacked jurisdiction to enter judgment against him on the charge of possession of drug paraphernalia where the indictment was fatally defective. Defendant contends that where the indictment

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identifies the drug paraphernalia but fails to allege a specific drug, it is fatally defective. We disagree.

“Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment.” N.C. Const. art. I, § 22. “A valid warrant or indictment is an essential of jurisdiction.” *State v. King*, 285 N.C. 305, 308, 204 S.E.2d 667, 669 (1974) (citation omitted). “An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense.” *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984). “It is a universal rule that no indictment, whether at common law or under a statute, can be good if it does not accurately and clearly allege all the constituent elements of the offense charged.” *State v. Morgan*, 226 N.C. 414, 415, 38 S.E.2d 166, 167 (1946) (citation omitted). “[A]n indictment for a statutory offense is generally sufficient when it charges the offense in the language of the statute.” *State v. McKoy*, 196 N.C. App. 650, 654, 675 S.E.2d 406, 410 (2009) (citing *State v. Penley*, 277 N.C. 704, 707, 178 S.E.2d 490, 492 (1971)). “[W]e review the sufficiency of an indictment *de novo*.” *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009) (citation omitted).

In *Coker*, 312 N.C. 432, 323 S.E.2d 343, the defendant contended the citation charging him with impaired driving failed to satisfy statutory and constitutional

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requirements because it did not adequately inform him of the charge against him: in part, it “fail[ed] to specify an impairing substance.” *Id.* at 434, 323 S.E.2d at 346. The Court observed that the offense of impaired driving as defined by General Statute, section 20-138.1 was committed by a person “driv[ing] any vehicle upon any highway, any street, or any public vehicular area within this State: . . . [w]hile under the influence of an impairing substance[.]” *Id.* at 434, 323 S.E.2d at 346 (emphasis added). Comparing the charging citation with the language of the statute, the Court held “that the meaning of driving while ‘subject to an impairing substance’ is so clear and distinct that a person of common understanding would know what is intended. We therefore reject [the] defendant’s argument to the contrary.” *Id.* at 435–36, 323 S.E.2d at 347.

In the matter before us, defendant was charged with violating North Carolina General Statutes, section 90-113.22:

It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to . . . process, prepare, . . . package, . . . store, contain, or conceal a controlled substance . . . which it would be unlawful to possess . . . or otherwise introduce into the body *a controlled substance* . . . .

N.C. Gen. Stat. § 90-113.22(a) (2015).

On 12 August 2013, a grand jury indicted defendant on the following charge:

[Defendant did] [*k*]nowingly use and possess with intent to use drug paraphernalia, including 3 assorted metal tins, assorted plastic baggies, digital scales, 3 short cut yellow

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and white drinking straws, 8 glass smoking pipes, and a pink zipper bag, *to process, prepare, package, store, contain, conceal and introduce into the body a controlled substance which it would be unlawful to possess.*

(Emphasis added). Defendant contends “that an indictment must . . . list the actual controlled substance the State is alleging the paraphernalia is to be used in conjunction with, in order to be facially valid.”

Our Court has required that where the indictment names the specific containers or the objects used to package, store, conceal, etc., the controlled substances, the State is required to present evidence of the specific containers at a trial on possession of drug paraphernalia. *State v. Satterthwaite*, 234 N.C. App. 440, 759 S.E.2d 369 (2014); *State v. Moore*, 162 N.C. App. 268, 274, 592 S.E.2d 562, 566 (2004). However, defendant provides no authority for the proposition that an indictment for possession of drug paraphernalia must list the actual controlled substance, and we are aware of none.

Consistent with our Supreme Court’s holding in *Coker*, in the instant case the indictment against defendant was properly based on the statutory language and sufficient to apprise him of the charge. Defendant’s argument is overruled.

*II*

Next, defendant argues the trial court erred in denying his motion to dismiss the charges of possession of precursor chemicals and trafficking by possession of methamphetamine because the State failed to present substantial evidence for each

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charge. Specifically, defendant challenges the sufficiency of evidence as to his possession of (A) lithium and hydrochloric acid and (B) a Coca-Cola bottle whose contents tested positive for methamphetamine.

A

“When considering a motion to dismiss, if the trial court determines that a *reasonable* inference of the defendant’s guilt *may* be drawn from the evidence, it must deny the defendant’s motion and send the case to the jury . . . .” *State v. Matias*, 354 N.C. 549, 551, 556 S.E.2d 269, 270 (2001) (citation omitted).

When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State’s favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. . . . However, so long as the evidence supports a reasonable inference of the defendant’s guilt, a motion to dismiss is properly denied . . . .

*State v. Chillo*, 208 N.C. App. 541, 545, 705 S.E.2d 394, 397 (2010) (quoting *State v. Miller*, 363 N.C. 96, 98–99, 678 S.E.2d 592, 594 (2009)).

Pursuant to General Statutes, section 90-95, “it is unlawful for any person to: . . . [p]ossess an immediate precursor chemical with intent to manufacture methamphetamine . . . .” N.C. Gen. Stat. § 90-95(d1)(2)a. (2015). Immediate precursor materials include hydrochloric acid (muriatic acid) and sources of lithium metal. *Id.* § 90-95(d2)(18), (21).

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Defendant argues that because the State failed to present evidence of the chemical composition of the substances alleged to be precursor materials, there was insufficient evidence to submit the possession charge to the jury. Defendant cites *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010), wherein our Supreme Court considered whether a substance could be identified as a controlled substance based upon visual inspection or whether a chemical analysis that identified the composition of the substance was required. The *Ward* Court held that “the expert witness testimony required to establish that the substances introduced [into evidence] [were] in fact controlled substances must be based on a scientifically valid chemical analysis and not mere visual inspection.” *Id.* at 142, 694 S.E.2d at 744. Defendant argues that this reasoning extends to the sufficiency of evidence to establish possession of precursor materials.

We appreciate defendant’s argument; however, this Court has stated “[t]he necessity of performing chemical analysis is limited to *controlled substances*.” *State v. Hooks*, \_\_\_ N. C. App. \_\_\_, \_\_\_, 777 S.E.2d 133, 141, *review denied, cert. denied*, 368 N.C. 605, 780 S.E.2d 561 (2015). In *Hooks*, this Court considered the denial of a defendant’s motion to dismiss thirty-five counts of possession of pseudoephedrine, a precursor chemical to methamphetamine. At trial, the State presented evidence that the defendant purchased pseudoephedrine, a witness who observed the defendant “cooking meth,” as well as empty Sudafed and Sufedrin blister packs and empty boxes

found at the defendant's residence. *Id.* at \_\_\_, 777 S.E.2d at 140. On appeal, the defendant argued that because there was no chemical analysis identifying pseudoephedrine, there was insufficient evidence he possessed the precursor. Stating that chemical analysis was only necessary to establish controlled substances, this Court noted that "N.C. Gen. Stat. § 90-87 defines 'controlled substance' as 'a drug, substance, or immediate precursor *included in Schedules I through VI* of [the North Carolina Controlled Substances Act].'" *Id.* (alteration in original) (emphasis added) (quoting N.C. Gen. Stat. § 90-87(5) (2013)). As pseudoephedrine was not listed within Schedules I through VI of N.C. Gen. Stat. §§ 90-89 through 90-94, it was not a controlled substance requiring proof of chemical composition. *Id.* Therefore, this Court overruled the defendant's argument. *Id.* at \_\_\_, 777 S.E.2d at 141.

Turning to the record before us, we note that neither lithium nor hydrochloric acid are among the substances listed in Schedules I through VI of the North Carolina Controlled Substances Act. *See* N.C. Gen. Stat. §§ 90-89-90-94 (2015). Thus, chemical analysis is not required. *Hooks*, \_\_\_ N.C. App. at \_\_\_, 777 S.E.2d at 140. Defendant's argument is overruled.

Defendant further contends that there was insufficient evidence presented on the charge of possession of precursor materials where no lithium was found inside the residence. Furthermore, evidence of defendant's possession of hydrochloric acid was as an ingredient listed on a product label for a substance labeled "Transchem"

along with a chemical field test of the Transchem liquid that resulted in a positive response for the presence of an acid.

Again, “[w]hen considering a motion to dismiss, if the trial court determines that a *reasonable* inference of the defendant’s guilt *may* be drawn from the evidence, it must deny the defendant’s motion and send the case to the jury . . . .” *Matias*, 354 N.C. at 551, 556 S.E.2d at 270 (citation omitted).

At trial, Detective Shuford testified that when he approached the door to defendant’s residence, he observed batteries split open lying on the ground within four feet of the door. Based on his law enforcement training in clandestine laboratories, Detective Shuford testified to his suspicion that defendant was making methamphetamine:

[T]he active ingredient that you use to make the methamphetamine is the lithium strip inside of the lithium battery . . . . The fact that the batteries were split open or busted open, there is really no other use to have batteries, along with the tubing and the filters and that sort of thing.

Agent Miguel Cruz-Quinones, testified as an expert in the field of forensic science of drug chemistry:

Q. When you are examining a scene in the field like this, which could be a clandestine laboratory, do you look for precursor chemicals?

A. Yes.

Q. And what type of items do you look for?

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- A. Well, besides looking for the one pot, container containing liquid mixed with solid material. I also look for on the precursors I look for sodium hydroxide, which is commonly found in drain openers, also I look for solvents, such as Coleman fuel, which is one of the more common ones. I also look for lithium batteries. Lithium batteries are a source for lithium, used in the manufacturing of methamphetamine. I also look for finished product. And all the household chemicals as well, for example muriatic acids, sulfuric acid, those are the most commonly found ingredients.
- Q. Is hydrochloric acid a precursor chemical?
- A. Hydrochloric acid is a precursor chemical . . . .
- Q. Do you find hydrochloric acid by itself, or do you find it in other substances from which hydrochloric acid is removed?
- A. I found a bottle, white bottle which has name Transchem. . . . [I]t is a plastic bottle one gallon containing yellowish liquid and was almost full. And it was tested for ph, it was acidic. This product based on the label contained muriatic acid, or also known as hydrochloric acid. And it is a chemical used in the manufacture of methamphetamine . . . [a]nd precursor chemical in North Carolina General Statute.

Agent Cruz-Quinones further testified with the aid of pictures taken at the scene that he observed a clear, plastic bottle containing a clear liquid mixed with grayish suspended black particles, mixed with black chunks of a solid material and a white plastic strip. “[B]lack solid chunks of material is, based on my training and experience is lithium, the lithium that is used in the manufacturing of

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methamphetamine.” At the scene Agent Cruz-Quinones observed a two-battery pack of lithium batteries, with only one battery still in the pack. Agent Cruz-Quinones also tested a liquid weighing 40.01 grams that tested positive for methamphetamine.

Upon review of the record, the trial court had sufficient evidence to develop a reasonable inference of defendant’s guilt on the charge of possession of precursor materials, specifically, lithium and hydrochloric acid, with the intent to manufacture methamphetamine and thus, properly denied defendant’s motion to dismiss. *See Matias*, 354 N.C. at 551, 556 S.E.2d at 270. Therefore, as to this point, defendant’s argument is overruled.

B

Next, defendant argues that there was insufficient evidence that he possessed the liquid weighing 40.01 grams, which tested positive for methamphetamine and was found outside of his residence.

“To prove that a defendant possessed contraband materials, the State must prove beyond a reasonable doubt that the defendant had either actual or constructive possession of the materials.” *Hooks*, \_\_\_ N.C. App. at \_\_\_, 777 S.E.2d at 140 (citation omitted).

Constructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession

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which may be sufficient to carry the case to the jury on a charge of unlawful possession[, but] . . . the State must show other incriminating circumstances before constructive possession may be inferred.

*Matias*, 354 N.C. at 552, 556 S.E.2d at 270–71 (alterations in original) (citations omitted).

While the record indicates that Agent Cruz-Quinones took inventory of the bottle containing methamphetamine outside of defendant’s residence, law enforcement officers had removed a number of items from the residence to a staging area outside prior to Agent Cruz-Quinones arrival. However, upon entry into defendant’s residence, Detective Shuford testified to observing a “one pot” methamphetamine laboratory:

A. . . . [W]hen we had entered the basement I saw a typical one pot, what appeared to me to be like a one pot or shake and bake lab in a plastic bottle sitting just inside the door of the basement.

Q. Describe for the jury how that would appear?

A. It could appear several different ways. You can use any kind of plastic bottle that will actually create a very tight seal, and then typically in that bottle you have a certain amount, it varies by lab a certain amount of solid or sludge looking substance in the bottom of that container, and then a liquid, a separate layer that is on top of that sludge layer.

Q. And is that what you observed there in the basement?

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- A. I did and along with some other chemicals that are known to be precursors and other items.

Where methamphetamine was found on defendant's premises and incriminating evidence of precursor materials for manufacturing methamphetamine was observed inside defendant's residence, the trial court had sufficient evidence of both actual and constructive possession of methamphetamine to deny defendant's motion to dismiss. *See Matias*, 354 N.C. at 552, 556 S.E.2d at 270–71. Accordingly, defendant's argument is overruled.

AFFIRMED.

Judges HUNTER, JR., and DIETZ concur.

Report per Rule 30(e).