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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-775

Filed: 6 March 2018

Cleveland County, Nos. 10 CRS 50118–20

STATE OF NORTH CAROLINA

v.

JESSIE EDWARD JEFFERIES

Appeal by defendant from judgments entered 19 August 2015 by Judge Gregory R. Hayes in Cleveland County Superior Court. Heard in the Court of Appeals 10 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Douglas W. Corkhill, for the State.

Morgan & Carter PLLC, by Michelle FormyDuval Lynch, for defendant.

DIETZ, Judge.

Defendant Jessie Edward Jefferies appeals from several drug trafficking convictions. The State charged Jefferies after an informant, wearing a recording device, bought drugs at a location tied to Jefferies while he was present.

As explained below, the trial court properly admitted lay witness identifications of Jefferies by two witnesses involved in making the recording of the

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controlled drug buys, and properly admitted phone records tying Jefferies to the location of those drug sales. The trial court also properly denied Jefferies's motion to dismiss the charge of maintaining a dwelling for the sale of controlled substances.

Finally, we decline to address Jefferies's argument that he did not understand he was waiving his Confrontation Clause rights under the Sixth Amendment when he stipulated to the admission of an SBI report concluding that the drugs involved in the controlled sales were crack cocaine. That fact-intensive constitutional question cannot be raised for the first time on appeal. We therefore find no error in the trial court's judgments.

Facts and Procedural History

In 2009, Defendant Jessie Jefferies lived in a modular home at 139 Ebenezer Road in Kings Mountain. Law enforcement identified that home as a drug trafficking location. An informant working with Officer Martin of the Cleveland County Sheriff's Office made controlled drug buys at 139 Ebenezer Road on 12 October 2009 and 16 November 2009.

The informant followed the same protocol for both controlled buys. First, she spoke with Jefferies to make arrangements and request specific amounts of cocaine. Before each purchase, law enforcement wired the informant with recording devices so that Officer Martin could listen in on the transactions in real time. When the informant arrived at the home, she dealt directly with one of Jefferies's housemates,

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Todd Willie Bell, although Jefferies also was present. Bell would give the informant the drugs, the informant would pay Bell, and Bell would hand over the money to Jefferies. After each controlled buy, the informant gave the drugs to Officer Martin while law enforcement debriefed her.

In January 2010, Officer Martin and other law enforcement officers executed a search warrant at 139 Ebenezer Road. They found crack cocaine, crack pipes, and money in Bell's room. Law enforcement also found a phone bill with Jefferies's name and phone number.

Officer Martin also called Jefferies to inform him of the search of 139 Ebenezer Road. Jefferies told Officer Martin that he wanted to be present for the search and that he would come over. He never did.

On 12 April 2010, the State indicted Jefferies on two counts of possession with intent to sell and deliver cocaine, two counts of sale of cocaine, and felony maintaining a dwelling for keeping or selling controlled substances. Jefferies went to trial in August 2015. The State's evidence included currency exchanged during the 16 November 2009 transaction and an evidence bag from that same transaction containing two "off-white, rock-like substances." The State also submitted a lab report from the State Bureau of Investigation identifying the drugs from the controlled buys as cocaine.

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Before trial, Jefferies, his counsel, and the Assistant District Attorney signed a joint stipulation allowing admission of the SBI lab report, which the trial court accepted. Although law enforcement never determined who owned the 139 Ebenezer Road home, the State produced Cleveland County records showing that Jefferies made several 911 calls from that address.

Bell testified at trial, admitting that he paid rent to Jefferies by selling cocaine and worked as his middleman in drug deals at the home. He could not remember whether Jefferies was there for the controlled buys with the informant. Both the informant and Officer Martin testified about the October and November 2009 controlled buys at 139 Ebenezer Road. The informant added that she made additional drug buys with Jefferies present at that address, which she usually arranged by calling Jefferies ahead of time.

The State introduced the video recordings of both controlled buys, which were played for the jury. The footage in both videos was too dark and “staticky” to show the transactions, but the audio was clear. In court, Officer Martin identified a loud laugh in the first video and a voice saying “Come on back” in the second video as Jefferies’s. The informant did not identify Jefferies in the videos before the jury, but she testified that she had identified Jefferies in both videos at an earlier viewing with the District Attorney.

At the end of the State’s evidence, Jefferies moved to dismiss the felony charge of maintaining a dwelling, but the trial court denied the motion. The jury convicted Jefferies on the drug charges and the lesser-included offense of misdemeanor maintaining a dwelling. The defendant received two consecutive 21 to 26 month sentences on the felonies and a concurrent 120-day sentence on the misdemeanor. Jefferies did not appeal the judgments but later filed a petition for a writ of certiorari, which this Court allowed.

Analysis

I. Lay witness identification

Jefferies first challenges the trial court’s admission of lay witness testimony identifying him in the recordings of the drug transactions. This Court reviews the admission of lay witness opinion testimony for abuse of discretion. *State v. Patterson*, __ N.C. App. __, __, 791 S.E.2d 517, 520 (2016). Under that standard, we can reverse the trial court’s decision only if it “lacked any basis in reason or was so arbitrary that it could not have been the result of a reasoned decision.” *Id.* at __, 791 S.E.2d at 520–21.

Under Rule 701 of the North Carolina Rules of Evidence, lay opinion testimony must be based on “personal knowledge.” *State v. Bunch*, 104 N.C. App. 106, 110, 408 S.E.2d 191, 194 (1991). Lay identifications of a defendant from an audio or video recording generally are admissible if (1) the testimony is based on the witness’s

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perceptions and knowledge, (2) the testimony assists rather than invades the jury's fact-finding function, and (3) the testimony's helpfulness outweighs its possible prejudice to the defendant. *State v. Belk*, 201 N.C. App. 412, 415, 689 S.E.2d 439, 441 (2009).

Jefferies challenges the testimony of two witnesses who identified him on the recording of the drug transactions: the State's informant who wore the recording device and Officer Martin who monitored the recording in real time. We hold that the trial court properly admitted the testimony of both witnesses. First, during the investigation, the informant met and spoke to Jefferies over the phone and in person many times. She identified Jefferies in both recordings when she viewed them with the District Attorney. Similarly, Officer Martin listened in on the two controlled buys in real time and took notes of what she heard at the time. Officer Martin also called Jefferies on the night that law enforcement executed the search warrant, giving her another opportunity to familiarize herself with Jefferies's voice.

These facts demonstrate that both witnesses identified Jefferies based on their personal knowledge of him acquired independently of the recording and that this personal knowledge put them in a better position to identify Jefferies than the jury listening to the audio of the recording. Moreover, the State produced other evidence corroborating these witnesses' testimony, including testimony from Jefferies's middleman in the drug sales, evidence connecting Jefferies to the location of the drug

transaction, and the money and drugs exchanged in a controlled drug purchase. This distinguishes this case from *Belk*, where the State relied entirely on the lay witness's identification of the defendant in a video. 201 N.C. App. at 418, 689 S.E.2d at 443.

Under the circumstances, we hold that the trial court acted well within its sound discretion by admitting the identification testimony of these lay witnesses.

II. Rule 401 and Rule 403 objections

Jefferies next argues that the trial court violated Rules 401, 403, and 404(b) of the Rules of Evidence when it admitted evidence of his phone bill discovered during the January 2010 search. Because we disagree with Jefferies's characterization of this evidence as "evidence of other crimes," we only address this issue under Rules 401 and 403.

Relevant evidence generally is admissible at trial unless excluded by another provision of the Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 402. Evidence is relevant if it tends to make a fact at issue more or less probable. *Id.* Rule 401. Nevertheless, courts may exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice." *Id.* Rule 403.

We review Rule 401 relevancy determinations *de novo*, but must give deference to the trial court's ruling. *State v. Tadeja*, 191 N.C. App. 439, 444, 664 S.E.2d 402, 407 (2008). The trial court's Rule 403 determination is reviewed for abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

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Applying these standards of review, we hold that the trial court properly admitted Jefferies's phone bill. The phone bill was relevant to show that Jefferies knowingly used the 139 Ebenezer Road address for the keeping or selling of controlled substances. *See State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d. 24, 30 (1994). To be sure, the January 2010 search occurred almost two months after the informant's last controlled purchase with Jefferies. But that time lapse does not render the phone bill irrelevant or substantially more prejudicial than probative. The State presented evidence that Jefferies placed a number of 911 calls from that phone number from the 139 Ebenezer Road address, and when Officer Martin called Jefferies on that number to inform him law enforcement planned to search the home at 139 Ebenezer Road, Jefferies said he wanted to be present (although he never actually arrived during the search).

In light of these facts, the trial court properly concluded that the phone bill was relevant because it tied Jefferies to the location where the drug transactions occurred. The court likewise did not abuse its discretion when it determined that this evidence was not so prejudicial that it should be excluded under Rule 403.¹

¹ We reject Jefferies's Rule 404(b) argument because the phone bill was not evidence of "other crimes, wrongs, or acts" used to prove Jefferies's character. The phone bill was direct evidence of one of the essential elements of the offense of maintaining a dwelling for the sale of controlled substances.

III. Motion to dismiss

Jefferies next challenges the denial of his motion to dismiss the charge of maintaining a dwelling for the sale of controlled substances. When reviewing a motion to dismiss, courts must determine whether there is “substantial evidence” that the defendant committed the essential elements of the charged offense. *State v. Sprouse*, 217 N.C. App. 230, 235, 719 S.E.2d 234, 239 (2011). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.*

Here, Jefferies contends that the State failed to present substantial evidence that he maintained the 139 Ebenezer Road home for selling drugs. To survive Jefferies’s motion to dismiss, the State had the burden of proving that Jefferies (1) knowingly (2) kept or maintained (3) a dwelling (4) which is used for keeping or selling (5) controlled substances. *Mitchell*, 336 N.C. at 31, 442 S.E.2d at 29; N.C. Gen. Stat. § 90-108(a)(7).

As discussed above, the State presented sufficient evidence of each of these essential elements. A State witness admitted to selling drugs in the home to pay rent to Jefferies to live there and to working as Jefferies’s middleman in drug sales at the home. The informant working with law enforcement testified that she purchased drugs at that location with Jefferies present. Officer Martin testified that she monitored those drug sales in real time through a recording device, and the jury

viewed the audio and video of those transactions. This evidence readily permits a reasonable juror to conclude that the State satisfied all the essential elements of maintaining a dwelling for the sale of controlled substances.

IV. Admission of the SBI lab report

Finally, Jefferies challenges the admission of the SBI lab report concluding that the drugs purchased in the controlled buys were crack cocaine. Jefferies stipulated to the admission of this evidence but argues on appeal that he did not understand that stipulating to the admission of that evidence waived his Confrontation Clause rights under the Sixth Amendment. He contends that the trial court should have explained his Confrontation Clause rights to him and asks this Court to review the trial court's failure to engage in that colloquy under the plain error standard of review.

We decline to do so. Unlike issues concerning evidentiary rules and instructions to the jury, which can be reviewed for plain error, *see* N.C. R. App. P. 10(a), “[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.” *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001).

To be sure, this Court recently indicated that some constitutional arguments concerning the admissibility of evidence or instructions to the jury can be reviewed for plain error. *State v. Miller*, __ N.C. App. __, __, 795 S.E.2d 374, 376 (2016), *disc.*

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rev. allowed, __ N.C. __, 802 S.E.2d 732 (2017). But this case is distinguishable because the issue here—whether a defendant represented by counsel knowingly and voluntarily waived Confrontation Clause rights by stipulating to the admission of evidence—is not one concerning the admissibility of evidence. Instead, it is precisely the sort of fact-intensive constitutional question, involving what Jefferies understood and what his counsel discussed with him, that must be raised and preserved in the trial court or later pursued in a motion for appropriate relief where a court equipped to find facts can address it. *See* N.C. Gen. Stat. § 15A-1415(b).

In short, Jefferies waived his Confrontation Clause rights by stipulating to the admission of this evidence at trial. To the extent Jefferies contends he did not understand he was waiving this constitutional right when he stipulated to the admission of this evidence, he must raise that issue through a motion for appropriate relief.

Conclusion

For the reasons described above, we find no error in the trial court’s judgments.

NO ERROR.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).