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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-363

Filed: 4 December 2018

Randolph County, Nos. 14CRS003032, 056023

STATE OF NORTH CAROLINA

v.

TAMMY LORENE STEPHENS, Defendant.

Appeal by Defendant from judgment entered 17 August 2017 by Judge Vance Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana M. Badwan, for the State.

Gilda C. Rodriguez for the Defendant.

DILLON, Judge.

Tammy Lorene Stephens ("Defendant") appeals from a judgment entered upon a jury verdict finding her guilty of driving while impaired and for possession with intent to sell and deliver a Schedule IV controlled substance. For the reasons contained herein, we find no error.

I. Background

On 13 December 2014, Defendant was driving in Asheboro when she was stopped by a detective. During the stop, the detective discovered a pill bottle containing a number of Klonopin pills and $16.00. Defendant was then driven to the hospital for a blood test, which indicated the presence of various controlled substances including marijuana, oxycodone, and diazepam.

Defendant was indicted for (1) driving while impaired and (2) possession with intent to sell and deliver Klonopin, a Schedule IV controlled substance. Defendant was found guilty by a jury of both charges and was placed on supervised probation for a period of eighteen (18) months. Defendant gave notice of appeal in open court.

II. Analysis

On appeal, Defendant argues that the trial court erred when it denied her motion to dismiss both charges. We disagree.

When ruling on a motion to dismiss, the trial court "must determine whether there is substantial evidence of each element of the offense charged and substantial evidence that the defendant is the perpetrator." *State v. Rasor*, 319 N.C. 577, 585, 356 S.E.2d 328, 333 (1987). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). However, the evidence must be examined in the

light most favorable to the State, giving it the benefit of all reasonable inferences which can be drawn therefrom. *Rasor*, 319 N.C. at 585, 356 S.E.2d at 333.

We review the trial court's ruling on a motion to dismiss *de novo*. *State v. Mckinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982).

A. Insufficient Evidence to Prove Intent

Defendant was found guilty of possession with intent to sell and deliver a Schedule IV controlled substance pursuant to Section 90-95(a)(1) of our General Statutes. N.C. Gen. Stat. § 90-95(a)(1) (2014). Defendant concedes that she was in possession of Klonopin, a Schedule IV substance, as she had a valid prescription for it; but she argues on appeal that there was insufficient evidence that she had any intent to sell and deliver the Klonopin. *See State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985) (stating that the "intent" prong of the crime "is the gravamen of the offense").

Intent may be proved by direct evidence or, most ordinarily, circumstantial evidence from which it may be inferred. *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974). Circumstantial evidence to prove intent may be in the form of (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, (4) the presence of cash, or (5) the presence of drug paraphernalia. *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005).

This Court has treated these forms of circumstantial evidence as factors when making a fact-specific inquiry, looking at the totality of the circumstances, into whether a defendant, in fact, had the intent to sell and deliver the controlled substance. *See State v. Morgan*, 329 N.C. 654, 659-60, 406 S.E.2d 833, 835-36 (1991). For example, in *State v. Wiggins*, the evidence was insufficient to establish the defendant's intent to sell or deliver where there was seven ounces of marijuana but no paraphernalia. *State v. Wiggins*, 33 N.C. App. 291, 294-95, 235 S.E.2d 265, 268 (1977). In *State v. King*, the defendant's possession of seventy (70) tablets of phenobarbital, absent other factors supporting an intent to sell, was insufficient to withstand a motion to dismiss for insufficient evidence of intent to sell. *State v. King*, 42 N.C. App. 210, 213, 256 S.E.2d 247, 249 (1979). In *State v. Alston*, the evidence was sufficient to establish an intent to sell where the defendant possessed 4.27 grams of cocaine in separate envelopes and had large rolls of cash. *State v. Alston*, 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988). In *State v. Rich*, the defendant's intent to sell or deliver drugs was established where the defendant possessed twenty (20) grams of cocaine, had a chemical used for diluting cocaine, and one hundred (100) small plastic bags in close proximity to the cocaine. *State v. Rich*, 87 N.C. App. 380, 382-83, 361 S.E.2d 321, 323-24 (1987).

In the present case, the evidence was not particularly strong that Defendant had an intent to sell the Klonopin; and we readily admit that it would have been

reasonable for a jury to have acquitted her of the charge. Defendant had a valid prescription for Klonopin and had only sixteen dollars in cash, not large rolls of cash.

We conclude, however, that the evidence was sufficient to go to the jury: There was sufficient evidence from which a reasonable jury could find that Defendant possessed the Klonopin with the intent to sell. Specifically, the evidence in the light most favorable to the State showed as follows: Defendant was driving late at night in an area where drug crimes are prevalent. Defendant was prescribed Klonopin and had filled a prescription for sixty (60) pills the day before. However, the following day, when Defendant was stopped by the detective, Defendant only had thirty-seven (37) pills in her prescription bottle. Two of these pills were wrapped in cellophane paper inside the bottle. Defendant told the detective that she had left fifteen (15) of the pills with her mother at home but otherwise was unable to account for the other missing pills. The blood test performed on Defendant did not reveal the presence of Klonopin in her system, though the presence of other controlled substances was detected. Finally, a nail file was found in Defendant's vehicle, which the State suggested was used as drug paraphernalia.

We note that Defendant offers a number of innocent explanations for the above circumstances. However, we must give the State every reasonable inference when evaluating the sufficiency of the evidence. In this light, we conclude that there was more than a mere suspicion that Defendant had the intent to sell or deliver the

controlled substance. The evidence was sufficient to allow the jury to make the call. Thus, Defendant's motion to dismiss was properly denied.

B. Insufficient Evidence to Prove Appreciable Impairment

Defendant also argues that the State did not present sufficient evidence that she was appreciably impaired within the meaning of N.C. Gen. Stat. § 20-138.1(a)(1) (2014) and, therefore, her motion to dismiss the driving while impaired charge should have been granted. We disagree.

The elements of driving while impaired are: (1) driving a vehicle (2) upon any highway, street, or public vehicular area within the State (3) while under the influence of an impairing substance. N.C. Gen. Stat. § 20-138.1(a)(1) (2014).

To be "under the influence of an impairing substance" means an individual has consumed "a sufficient quantity of intoxicating beverage or taken a sufficient amount of narcotic drugs, to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both these faculties." *State v. Carroll*, 226 N.C. 237, 241, 237 S.E.2d 688, 691 (1946). Therefore, it is not enough that an individual has had a drink or has consumed a drug. *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 793 (1970). The consumption of the impairing substance must be in conjunction with "faulty driving . . . or other conduct indicating an impairment of physical or mental faculties." *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965). "Other

conduct indicating impairment" may be demonstrated by the opinion of a lay person who personally observed the individual or by the "opinion of a law enforcement officer" who observed the circumstances and scene. *State v. Rich*, 351 N.C. 386, 396-99, 527 S.E.2d 299, 304-06 (2000).

At trial, an expert in forensic toxicology testified for the State and presented results of a blood test performed on Defendant. The blood test indicated the presence of various substances: THCA, oxycodone, diazepam, and nordiazepam. We note, however, that the mere presence of these substances does not constitute impairment, much less, appreciable impairment. THCA, while a metabolite of marijuana, is non-impairing. Oxycodone is a Schedule II impairing drug, known as Percocet when prescribed, which a witness testified that Defendant was prescribed and had taken approximately twenty-four (24) hours before the traffic stop. Diazepam and nordiazepam, a metabolite of the diazepam, were also present, but no description or explanation of these drugs and their effects were entered into evidence. While no evidence of exact quantities or amounts of oxycodone, diazepam, and nordiazepam was entered into evidence, it is noted that these substances *did* show up in Defendant's blood results, which indicates only that the amounts were above the limit of detection.

Additionally, the detective who stopped Defendant testified that, in his opinion, Defendant was appreciably impaired when he pulled her over. The detective

based this opinion on his personal observations that Defendant was driving erratically, had red, glassy eyes, slurred speech, a dry mouth, and unsure footing. The detective's personal observations and testimony of Defendant's faulty driving and impaired presentation, in conjunction with the presence of THCA, oxycodone, diazepam, and nordiazepam in Defendant's blood, tend to show that Defendant was under the influence of an impairing substance.

Therefore, when viewed in the light most favorable to the State, we conclude that the evidence presented was sufficient to allow the jury to make the call on whether Defendant was driving while impaired. The motion to dismiss was properly denied.

III. Conclusion

The evidence in this case was not overwhelming. However, we conclude that the State presented evidence sufficient to allow both charges to be submitted to the jury. Therefore, we conclude that the trial court did not err in denying Defendant's motions to dismiss.

NO ERROR.

Judge STROUD concurs.

Judge BERGER concurs in separate opinion.

Report per Rule 30(e).

BERGER, Judge, concurring in separate opinion.

I concur with the majority opinion. However, because Defendant failed to properly preserve her argument on appeal concerning possession with intent to sell or deliver a Schedule IV controlled substance, I would dismiss.

"It is well established that the law does not permit parties to swap horses between courts in order to get a better mount before an appellate court. Consequently, when a defendant presents one argument in support of her motion to dismiss at trial, she may not assert an entirely different ground as the basis of the motion to dismiss before this Court." *State v. Chapman*, 244 N.C. App. 699, 714, 781 S.E.2d 320, 330 (2016) (citation and quotation marks omitted).

At trial, Defendant specifically argued in her motion to dismiss that

> the courts have very clearly, clearly held, *State v. Ward*, *State v. Neighbors*, *State v. Meadows*, that controlled substances defined by their chemical composition can only be identified through chemical analysis and not through visual inspection. We have no chemical analysis of State's Exhibit No. 2 here. Nothing in the world except visual inspection. *Ward* and its progeny of cases here all firmly hold that it's an absolute requirement for the State to prove any possession of a controlled substance that is defined by its chemical analysis which is what we have here now. It should be dismissed.

However, on appeal, Defendant swaps horses and argues the State presented insufficient evidence from which intent to sell or deliver could be inferred.

Because Defendant argues a completely different theory on appeal, I would dismiss.