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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-716-2

Filed: 7 January 2020

Wayne County, No. 15 CRS 050319

STATE OF NORTH CAROLINA

v.

RAMELLE MILEK LOFTON, Defendant.

Appeal by Defendant from judgment entered 20 July 2016 by Judge Martin B. McGee in Superior Court, Wayne County. Originally heard in the Court of Appeals 22 January 2018 and opinion filed 1 May 2018. Remanded to the Court of Appeals by the Supreme Court for further consideration by opinion filed 10 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Allison A. Angell, for the State.

William D. Spence for Defendant.

McGEE, Chief Judge.

Ramelle Milek Lofton (“Defendant”) was indicted 2 May 2016 on charges of manufacturing a controlled substance pursuant to N.C. Gen. Stat. § 90-95(a)(1), possession of marijuana, and possession of drug paraphernalia. These charges arose

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out of events that occurred on 20 January 2015, when officers from the Goldsboro Police Department executed a search warrant for Defendant's residence.

The officers discovered loose marijuana seeds and stems, a marijuana grinder, a digital scale, cigar wrappers, and clear plastic bags with green residue in the drawers of a dresser in a bedroom in Defendant's residence. In a closet in the same bedroom, the officers found aluminum foil lining each inner wall, a light hanging from a clothing rod, a blue plastic container that had dirt in its corners, a container lid into which circular holes had been cut, and a stack of punctured styrofoam cups. The officers also seized a bag of fertilizer, planting rocks, and a book containing instructions for growing marijuana from inside the closet. Defendant was never present in the home while the officers completed their search, but at some point his mother arrived. The officers informed Defendant's mother why they were there and asked her to have Defendant come to the police department.

Defendant voluntarily went to the police department later in the afternoon on 20 January 2015 and made a statement to an officer. In his statement, Defendant asserted that he did not grow marijuana but confessed that he had attempted to do so five or six years prior. Defendant stated that the equipment seized by the officers was his and that he set it up in the closet because he sometimes thought about growing marijuana again. Defendant explained that, though he did not grow marijuana personally, others came to his home to sell marijuana to him and he sometimes sold marijuana to his friends when he had it available. The officer reduced

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Defendant's statement to writing, which Defendant then signed and dated as accurate.

Defendant was tried at the 18 July 2016 criminal session of Wayne County Superior Court. Defendant offered no evidence at trial, but made a motion to dismiss the charge of manufacturing marijuana based on an insufficiency of the State's evidence. The trial court denied Defendant's motion. The jury was instructed on possession of marijuana and drug paraphernalia, as well as manufacturing a controlled substance and the lesser included offense of attempting to manufacture a controlled substance. *See State v. Clark*, 137 N.C. App. 90, 96–97, 527 S.E.2d 319, 323 (2000) (noting our Courts' frequent recognition that an attempt is generally a lesser-included offense of the underlying charge).

The jury found Defendant guilty on 20 July 2016 on the charges of attempting to manufacture a controlled substance and possession of marijuana. He was acquitted on the charge of possession of drug paraphernalia. Defendant appeals.

This case is before this Court for a second time. In our prior opinion, this Court reversed Defendant's conviction for attempted manufacturing of marijuana without reaching the merits of Defendant's appeal, holding only "that the indictment charging Defendant with manufacturing marijuana was fatally defective." *State v. Lofton*, ___ N.C. App. ___, ___, 816 S.E.2d 207, 208 (2018). The Supreme Court reversed, instructing this Court on remand to "[consider] [D]efendant's challenge to the

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sufficiency of the evidence to support his attempted manufacturing marijuana conviction.” *State v. Lofton*, ___ N.C. ___, ___, 827 S.E.2d 88, 93 (2019).

We now reach the merits of Defendant’s appeal. Defendant argues solely that “[t]he trial court erred in denying [his] motion to dismiss the charge of attempting to manufacture a controlled substance[.]”¹ In so arguing, Defendant challenges the sufficiency of the State’s evidence at trial supporting the elements of the charge. We disagree.

“[I]n reviewing the denial of a motion to dismiss, we must examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime,” *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982), or of a lesser-included offense of the crime charged, *State v. Robbins*, 309 N.C. 771, 774, 309 S.E.2d 188, 190 (1983) (citations omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Phillips*, 365 N.C. 103, 133, 711 S.E.2d 122, 144 (2011) (quotation and citation omitted). The weight of the evidence and witness credibility are not properly considered in review of a motion to dismiss; rather, the Court is “concerned only about whether the evidence is sufficient for jury consideration[.]” *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 456 (2000) (citation omitted).

¹ We note that Defendant has not challenged his conviction for possession of marijuana on appeal. Therefore, we do not address that conviction herein and the conviction is unaffected by this opinion.

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N.C. Gen. Stat. § 90-95(a)(1) makes it a crime “[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]” N.C. Gen. Stat. § 90-95(a)(1) (2013). “Manufacture” is defined as “the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means[.]” N.C. Gen. Stat. § 90-87(15) (2013). Marijuana is a Schedule VI controlled substance under North Carolina law. N.C. Gen. Stat. §§ 90-94, 90-95(b)(2) (2013).

A defendant indicted for a crime may also be convicted of an attempt to commit the charged crime. *State v. Stokes*, 367 N.C. 474, 480, 756 S.E.2d 32, 37 (2014) (citing N.C. Gen. Stat. § 15-170 (2013)); N.C. Gen. Stat. § 90-98 (2013) (“[A]ny person who attempts or conspires to commit any offense defined in [Section 90-95] is guilty of an offense that is the same class as the offense which was the object of the attempt”). “The two elements of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense.” *State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971) (citations omitted). A defendant’s commenced, overt act “must approach sufficiently near to [the intended offense] to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.” *State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971) (quotation and citation omitted).

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In the present case, Defendant was indicted on the manufacturing charge by the following relevant language:

[O]n or about the 20th day of January, 2015 in Wayne County, [Defendant] unlawfully, willfully and feloniously did manufacture a controlled substance in violation of the North Carolina Controlled Substances Act, by producing, preparing, propagating *and* processing a controlled substance. The controlled substance in question consisted of marijuana[.]

(Emphasis added). Therefore, to sufficiently support a conviction for attempt to manufacture marijuana, the State's evidence must have shown that Defendant (1) intended to produce, prepare, propagate, and/or process marijuana,² and (2) took some overt act beyond mere preparation to accomplish that intent.

At trial, the State offered into evidence Defendant's statement to police as well as the materials gathered from his bedroom. Defendant contends that the State's evidence failed to show an overt act beyond mere preparation, citing this Court's opinion in *State v. Addor*, 183 N.C. 687, 110 S.E. 650 (1922). In *Addor*, the defendants

² Though the indictment alleges that Defendant manufactured a controlled substance "by producing, preparing, propagating *and* processing," we note that this language did not require the State to prove all four methods of manufacturing. *State v. Montgomery*, 331 N.C. 559, 569, 417 S.E.2d 742, 747 (1992) (citation omitted) ("The use of a conjunctive in the indictment does not require the State to prove various alternative matters alleged."). Nor does the risk of jurors differing on the method of manufacture implicate concerns with unanimity. *State v. Moore*, 327 N.C. 378, 383, 395 S.E.2d 124, 127 (1990).

In the prior appeal in this case, the Supreme Court held that Defendant's indictment was sufficient to render jurisdiction over a conviction for manufacturing marijuana by producing, propagating, and/or processing and remanded to this Court to consider whether the State's evidence was sufficient to support a conviction under any one of the three proper theories. *Lofton*, ___ N.C. at ___, 827 S.E.2d at 93. Therefore, our analysis looks only to whether the evidence was sufficient to show that Defendant attempted to produce, propagate, or process marijuana.

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were charged with attempting to manufacture alcohol after police found them in possession of a coffee mill, empty barrels capable of holding liquid, and loose meal and bran. *Id.* at 688, 110 S.E.2d at 650. The defendants admitted to police that they had intended to manufacture alcohol and had arranged the coffee mill and empty barrels in a swamp in preparation to do so, but were not yet able to secure a still to actually begin the process. *Id.*

The Supreme Court held that the evidence did not support a conviction for attempt to manufacture alcohol because the defendants had not undertaken an overt act beyond preparation in furtherance of the crime. *Id.* at 690, 110 S.E.2d at 651–52. In so holding, the *Addor* Court explained that “[b]etween preparation for the attempt and the attempt itself there is a wide difference. The preparations consist in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement towards the commission after the preparations are made.” *Id.* at 690, 110 S.E. at 651 (quotation and citation omitted). Though the *Addor* defendants had acquired some materials and arranged them to begin the process, they were still missing a vital piece and had not yet been able to make any direct movements towards the manufacture of alcohol. *Id.*

Defendant reasons that his actions were like those of the defendants in *Addor*, as he had merely collected and arranged the materials necessary to manufacture marijuana. However, the case presently before us is distinguishable from *Addor*, as

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a reasonable juror could conclude from the evidence that Defendant had performed some additional, direct movement towards producing marijuana.

The defendants in *Addor* had acquired most of the items required to manufacture alcohol and had begun to arrange the items to do so, but there was no evidence that any actual production had, or possibly could have, begun. Indeed, material in the Court's decision was the fact that the defendants had not acquired a still and, therefore, "the perpetration of the alleged crime was at the time obviously impossible." *Addor*, 183 N.C. at 690, 110 S.E. at 652. In this case, Defendant had obtained all necessary materials for the manufacture of marijuana and had arranged the materials in his closet to create a functional growing space—the blue bin was arranged with light overhead, holes cut out of the top, and the closet walls were lined with tin foil. The notebook found in the closet with the blue bin contained instructions regarding proper timing and pH levels to produce marijuana. An officer testified at trial that these items arranged in this way represented a "marijuana grow" system.

There was dirt and other residue in the bottom of the blue bin and styrofoam cups, allowing a reasonable inference that these items had been used for the intended purpose of manufacturing marijuana. The smell of fresh marijuana was present in the room, and the officers found loose marijuana throughout the residence and marijuana seeds in a dresser drawer.

We find Defendant's statements to law enforcement particularly relevant. Defendant stated:

I, [Defendant], do not grow marijuana, but I have attempted to grow marijuana. The last time that I attempted to grow marijuana was five to six years ago.

. . .

I only sold marijuana at all. If a friend asked for a blunt or gram I will [sell] it to him if I have it.

The night before last or last night I sold to a friend. I sold him loose marijuana for four dollars. . . . People normally come to my house to sell to me.

My marijuana equipment in the closet had cups, fertilizer, rocks, blue bin, lights hanging up and aluminum foil on the wall. When I attempted [five or six years ago] to grow marijuana I put the cups in the blue bin, I put the rocks in the cups and the seed on top of the rocks.

I think [I] just splashed some water up there. I put the lights there in case I grow marijuana because I thought about it. . . . I will try to stop smoking.

Defendant admitted that he did attempt to grow marijuana using the items found in his closet approximately five or six years ago, and explained that he understood how to use those items to produce marijuana. He further stated that he personally smokes, and sometimes sells, marijuana.

Viewed in the light most favorable to the State, there was sufficient evidence from which the jury could determine that Defendant had attempted to manufacture marijuana. Defendant admitted to acquiring the equipment and book for the purpose of growing marijuana; he admitted to constructing the “grow” space in his closet for that same purpose; he admitted that he had attempted to grow marijuana using the equipment in the past, which was supported by the condition of the equipment and

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the residual dirt; he admitted that he wanted to grow marijuana because he smokes it; and he admitted that he would sometimes sell marijuana. Planting marijuana in a specially constructed “grow” space, then tending to the marijuana—whether seeds or plants—by watering and fertilizing it, is sufficient evidence from which a jury could reasonably find Defendant made “direct movement towards” producing marijuana. Although Defendant stated that his “attempt” to grow marijuana had been made, then abandoned, five or six years prior, it was for the jury to make determinations of credibility, the weight of the evidence, or evidentiary discrepancies. *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 456. The evidence, viewed in the light most favorable to the State, was sufficient to survive Defendant’s motion to dismiss. We hold the trial court did not err in denying Defendant’s motion to dismiss.

NO ERROR.

Judges TYSON and HAMPSON concur.

Report per rule 30(e).