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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-648

No. COA20-714

Filed 16 November 2021

Surry County, Nos. 17 CRS 52306–08; 18 CRS 17

STATE OF NORTH CAROLINA

v.

DERRICK RAY SIMMONS

Appeal by defendant from judgment entered 26 June 2019 by Judge Angela B. Puckett in Surry County Superior Court. Heard in the Court of Appeals 8 September 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Colleen M. Crowley, for the State.

Shawn R. Evans for defendant.

DIETZ, Judge.

¶ 1 Defendant Derrick Ray Simmons appeals his convictions for possession with intent to sell or deliver cocaine, possession of marijuana, and possession of methamphetamine. Simmons argues that the trial court erred by denying his motion to dismiss the possession with intent to sell or deliver charge because the State failed to present sufficient evidence that he intended to sell or deliver the cocaine. Simmons

also argues that the trial court erred by not allowing him to introduce evidence that his father, who was present at the scene, discarded and concealed a crack pipe and marijuana during the investigation, which Simmons argues is evidence of third-party guilt.

¶ 2 As explained below, the State presented sufficient evidence, considering the totality of the circumstances and taking the evidence in the light most favorable to the State, from which a reasonable jury could infer that Simmons had the requisite intent to sell or deliver the cocaine. The trial court also properly excluded Simmons's proffered evidence of third-party guilt because that evidence did not directly implicate his father in the charged offenses and was not inconsistent with Simmons's guilt of those charges. Accordingly, we find no error in the trial court's judgment.

Facts and Procedural History

¶ 3 In 2017, Mount Airy police officers responded to a report of a man attempting to break into a vehicle in a Walmart parking lot. Officer Johnson arrived on the scene and located a man named Michael walking out of the Walmart and into the parking lot. Michael matched the description of the person attempting to break into the vehicle. Michael told Officer Johnson that he had arrived at the Walmart in the red Chevy Cavalier that was the subject of the police report, along with his son's girlfriend Jessica, and that they were meeting his son, Defendant Derrick Simmons. Michael explained that he had mistakenly set off the car alarm when he returned

from the store and tried to open the car door.

¶ 4 Officer Whitaker went inside the Walmart to locate Jessica and Simmons to determine whether Michael had permission to use the vehicle, which was not registered to him. Whitaker located Jessica and Simmons and asked them to come outside to identify the vehicle.

¶ 5 Officer Whitaker conducted a check to see if Simmons had any outstanding warrants and dispatch informed him that Simmons had an arrest warrant. Whitaker advised Simmons that he was under arrest and handcuffed him. Whitaker then brought Simmons to the Chevy Cavalier where officers performed a search of Simmons incident to his arrest. Officers found a large amount of cash, approximately four inches thick and in small denominations, totaling $465. There were 10 twenties, 18 tens, 12 fives, and 25 ones. Officer Whitaker also found the keys to the Chevy Cavalier on Simmons.

¶ 6 A third officer, Corporal Robertson, arrived and detected an odor of marijuana coming from the car, as did Officer Johnson when he again approached the car. The officers then searched the vehicle. Inside, they discovered a small nylon gym bag that contained 23.1 grams of marijuana, four baggies that contained 9.7 grams of a white powdery substance they suspected to be cocaine, a baggie containing a crystal-like substance they suspected to be methamphetamine, and a set of digital scales. The officers conducted field tests on the scene, which indicated that the powdery

substance was cocaine and the crystal-like substance was methamphetamine.

¶ 7 After completing the search of the car, Simmons told Officer Whitaker that he had "nothing to do with the car" and that "his girl drove him to Walmart." Officer Whitaker told Simmons he would talk to him after he spoke with Jessica and Michael. The officer later returned, gave Simmons a *Miranda* warning, and asked about the suspicious items found in the vehicle. Simmons initially denied knowing anything about them. Whitaker told Simmons that Michael and Jessica also could be arrested and charged because of the drugs in the vehicle. Simmons then stated, "I own up to it. I ain't gonna let nobody fall."

¶ 8 The State charged Simmons with possession with intent to sell or deliver marijuana, possession with intent to sell or deliver cocaine, felony possession of methamphetamine, and attaining habitual felon status.

¶ 9 At trial, a forensic scientist from the State Crime Lab testified that he analyzed the two largest bags of suspected cocaine. The testing confirmed one bag to be cocaine with a weight of 2.9 grams. The other bag tested positive for methamphetamine and weighed 4.07 grams. The bag of the crystal-like substance tested positive for methamphetamine and weighed .98 grams. The remaining two bags of suspected cocaine were not analyzed.

¶ 10 At the close of the State's evidence, Simmons moved to dismiss the possession with intent to sell or deliver cocaine charge, arguing that there was insufficient

evidence of intent to sell or deliver, and that only the lesser offense of possession of cocaine should be submitted to the jury. The trial court denied the motion.

¶ 11 Simmons testified in his defense. He explained that he walked to the Walmart to meet Jessica and Michael, and that he did not drive there or have the keys to the car in his possession. He testified that the cash the officers found on him was for his mother's rent and he was trying to get a money order. Simmons asserted that he was just trying to protect his father and Jessica when he said, "I own up to it," and that he was not admitting the drugs were his. On cross-examination, the State asked Simmons about his prior convictions for possession of cocaine, maintaining a vehicle for the sale of a controlled substance, and conspiracy to sell or deliver a controlled substance.

¶ 12 At the close of the evidence, Simmons renewed his motion to dismiss and the trial court again denied the motion.

¶ 13 The jury convicted Simmons of possession with intent to sell or deliver cocaine, possession of methamphetamine, misdemeanor possession of marijuana, and attaining habitual felon status. The trial court consolidated the charges in a single judgment and sentenced Simmons to a term of 97 to 129 months in prison. Simmons appealed.

Analysis

I. Denial of motion to dismiss

¶ 14 Simmons first argues that the trial court erred by denying his motion to dismiss the charge of possession with intent to sell or deliver cocaine. He contends that the State failed to produce substantial evidence of his intent to sell or deliver.

¶ 15 "This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On a motion to dismiss, "the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

¶ 16 Possession with intent to sell or deliver has three elements: "(1) possession; (2) of a controlled substance; with (3) the intent to sell or deliver that controlled substance. N.C. Gen. Stat. § 90-95(a)(1)." *State v. Blakney*, 233 N.C. App. 516, 519,

756 S.E.2d 844, 846 (2014). Although intent to sell or deliver "may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred." *State v. Yisrael*, 255 N.C. App. 184, 188, 804 S.E.2d 742, 744 (2017), *aff'd per curiam*, 371 N.C. 108, 813 S.E.2d 217 (2018). Intent may be inferred from "(1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *State v. Wilkins*, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809–10 (2010). "Although quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver, it must be a substantial amount." *Yisrael*, 255 N.C. App. at 188, 804 S.E.2d at 744. Whether such circumstantial evidence is sufficient to show intent to sell or deliver is a fact-specific inquiry that examines the totality of the circumstances. *State v. Coley*, 257 N.C. App. 780, 788–89, 810 S.E.2d 359, 365 (2018).

¶ 17 Here, the State presented evidence that the drugs found in Simmons's possession were packaged into several different baggies instead of a single package and that the baggie that was analyzed and confirmed to be cocaine weighed 2.9 grams. At least one of the baggies was confirmed to be cocaine and two other baggies, weighing approximately 2.7 grams together, were suspected to be cocaine based on appearance or field tests. In the gym bag containing the various baggies of drugs, officers found a set of digital scales. Simmons also had a "large wad" of cash when

officers searched him, totaling $465 and made up of 65 small denomination bills.

¶ 18 This evidence, taken together, constitutes substantial evidence of the intent element. *Rose*, 339 N.C. at 192, 451 S.E.2d at 223. Simmons focuses on case law holding that only one or two grams of cocaine ordinarily is not a "substantial" amount for purposes of inferring intent. *State v. Nettles*, 170 N.C. App. 100, 105–06, 612 S.E.2d 172, 175–76 (2005). But here, the State's evidence showed that there were multiple, separate baggies containing confirmed or suspected cocaine, totaling 5.63 grams. "Even where the amount of a controlled substance is small, the method of packaging is evidence from which the jury may infer an intent." *State v. Alston*, 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988). Likewise, officers recovered digital scales along with the seized drugs, which is additional evidence that can support an inference of intent to sell or deliver. *Blakney*, 233 N.C. App. at 520, 756 S.E.2d at 847. Finally, Simmons had $465 in cash in a large stack of small denomination bills which, again, can support an inference of intent to sell. *Wilkins*, 208 N.C. App. at 732, 703 S.E.2d at 809–10.

¶ 19 In sum, viewing all of the evidence in the light most favorable to the State, there was substantial evidence from which a reasonable jury could infer that Simmons possessed the cocaine with the intent to sell or deliver it. Accordingly, the trial court properly denied the motion to dismiss.

II. Exclusion of evidence of third-party guilt

¶ 20 Simmons next argues that the trial court erred by refusing to allow him to introduce evidence of third-party guilt. Specifically, he contends that the trial court should have allowed him to present evidence that his father, who was present at the scene, "discarded and concealed a crack pipe and marijuana during the course of the investigation."

¶ 21 "The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000). To be relevant, "the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *Id.* Although "a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard appliable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991).

¶ 22 When evidence is proffered to show that "someone other than the defendant committed the crime charged," it must "(1) point directly to the guilt of some specific person and (2) be inconsistent with the defendant's guilt." *State v. McNeill*, 326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990). Evidence of third-party guilt is admissible only if the evidence satisfies both prongs of this test. *State v. May*, 354 N.C. 172, 176–77, 552 S.E.2d 151, 154–55 (2001).

¶ 23 Here, Simmons sought to introduce evidence that, after he was placed in the patrol car, officers found a crack or meth pipe and some marijuana on the ground during their investigation in the parking lot, near where Simmons's father Michael had been standing. The evidence included Corporal Robertson's testimony that he found the pipe and the marijuana as well as video footage from officers' body and dash cams that appeared to show Michael making a dropping motion that may have been him throwing those items on the ground. No one was charged with possession of marijuana or drug paraphernalia in relation to those discarded items.

¶ 24 The trial court stated that it did not believe Simmons's proposed evidence was admissible because the "standard that I must find must point directly to the guilt of another party and be inconsistent with the defendant's guilt. What's being presented to me at this point does not appear to do so." The trial court allowed Simmons to make an offer of proof to preserve the issue, noting "I'll hear from you but I don't see how the fact that [Michael] may have drugs excludes your client's guilt." After Simmons made his offer of proof, the trial court ruled, "the Court is still going to deny the motion. The Court finds that it is not relevant."

¶ 25 Based on the evidence in the trial record, the trial court's evidentiary ruling was proper. *McNeill*, 326 N.C. at 721, 392 S.E.2d at 83. The charges against Simmons were based entirely on the drugs and related items found inside the car and the cash seized from Simmons. The challenged third-party evidence did not directly point to

Michael's guilt and was not inconsistent with Simmons's guilt. It raised only the possibility that Michael committed drug possession offenses unrelated to the charged crimes. *Id.*; *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 279–280 (1987).

¶ 26 Simmons also contends that the trial court improperly referenced *State v. McCoy*, 228 N.C. App. 488, 745 S.E.2d 367 (2013), when declining to admit the challenged evidence and that the facts of *McCoy* are distinguishable from those in this case. But viewing the trial court's statements and ruling in context, the trial court referenced *McCoy* only as a source for the applicable standard in determining the relevance of evidence of third-party guilt. The trial court was not acting under any misapprehension of the law in evaluating this evidentiary question.

¶ 27 Finally, even assuming the refusal to admit this evidence was error, Simmons has not shown prejudice. Given the other evidence connecting Simmons to the drugs seized from the vehicle, including his own admissions and the cash seized from him, there is no reasonable possibility that, had this evidence been admitted, the jury would have reached a different result. *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001).

Conclusion

¶ 28 For the reasons discussed above, we find no error in the trial court's judgment.

NO ERROR.

Judges INMAN and GRIFFIN concur.

Report per Rule 30(e).