IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-104

No. COA21-234

Filed 15 February 2022

Henderson County, No. 20 JB 47

IN THE MATTER OF: L.J.J.

Appeal by Juvenile from Orders entered 19 August 2020 by Judge Kimberly Gasperson-Justice in Henderson County District Court. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General LeeAnne N. Lawrence, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for juvenile-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Juvenile-Appellant (Juvenile) appeals an Adjudication Order, finding Juvenile sold and delivered a controlled substance and adjudicating him delinquent, and a Disposition Order placing him on six months of probation, among other conditions. The Record reflects the following:

¶ 2 On 19 February 2020, Deputy Mitch Jacobsen (Deputy Jacobsen) of the Henderson County Sheriff's Office, and School Resource Officer at West Henderson

High School, encountered a student (Student) "staggering" and "not acting his normal self" while playing basketball. Based on his training and experience, Deputy Jacobsen believed Student was "under the influence of something." Deputy Jacobsen told Student to "come to the office" to discuss Student's condition. On the way to the office, Deputy Jacobsen observed Student "stick something down the [crotch] of his pants." Deputy Jacobsen patted Student down and discovered a "red pen that had notebook paper stuck inside." Inside the notebook paper was "what appeared to [Deputy Jacobsen] with [his] training and experience, as a Xanax bar[.]" Student alleged that Juvenile had sold Student what Student believed to be three Xanax pills.

¶ 3 On 25 February 2020, a Juvenile Petition was filed charging Juvenile with Sale and Delivery of a schedule IV controlled substance. Juvenile's case came for an adjudicatory and dispositional hearing on 19 August 2020 in Henderson County District Court. Student testified as the State's first witness. Student testified he bought, what he thought were, three Xanax "bars" from Juvenile. According to Student, he believed the pills were Xanax because: "They are like this big. And there's multiple kinds actually. But the ones that I got were the bars. They're like this big, and they have, like, split into three sections." After taking two of the pills, Student was "pretty messed up during the school day." Student recalled: "Stumbling around. I remember I collapsed once. I was rocking back and forth in my chair in the classroom. That's all I really remember from that day." Student testified he

arranged to buy the pills from Juvenile by messaging through Snapchat on Student's cell phone.

¶ 4 Deputy Jacobsen testified as to the events including when he found what he believed to be Xanax on Student. The State never offered, and the trial court never accepted, Deputy Jacobsen as an expert witness. Defense counsel objected to Deputy Jacobsen identifying the pill as Xanax because "[Deputy Jacobsen] needs to describe, you know, what the actual item was. I think lack of foundation just to maybe have a conclusion that it was the Xanax bar. And then also not providing any foundation on how he would know what a Xanax bar is." The trial court overruled the objection. According to Deputy Jacobsen, he believed the pill was Xanax because he had:

> dealt with it from my five years at West Henderson High School. I have seen them. They -- this one looks like all of the other ones I've seen, a small white pill with three places or, I'm sorry, two places on the pill where you can cut them in half -- thirds. Just with my training and experience and my time at West Henderson High School and dealing with it, I come to recognize it.

Deputy Jacobsen indicated the pill found on Student was "in evidence at the Henderson County Sheriff's Office" but that it had not been tested.

¶ 5 At the close of the State's evidence, defense counsel moved to dismiss the charge stating:

> I don't believe in the light most favorable to the State that my client -- or they have proved that my client even possessed a Xanax or a Schedule IV, let alone sold the Schedule IV. I don't think there's any testimony or any evidence that that pill was, in

> fact, a Schedule IV substance. There's no -- I don't believe there's a lab report, there's anything related to what that substance is. There's just a, what, testimony from an officer saying what it appears to be. However, there's nothing that the State has provided to prove actually what it is.

The trial court denied the Motion.

¶ 6 Juvenile's mother (Mother) testified on Juvenile's behalf. Mother testified she came to the school after Juvenile had been searched and was handed a bag of "ibuprofen" school officials had found in Juvenile's backpack. Mother searched Juvenile's "e-mails and Snapchats and Instagrams" and found no record of Juvenile arranging to sell Student anything. Mother searched Juvenile's bedroom and found nothing. Mother also made Juvenile take a home drug test, and Juvenile "passed it."

¶ 7 At the close of all the evidence, defense counsel moved the trial court again to dismiss the Petition stating:

> There's nothing that was indicating that my client possessed nor sold any -- anything, let alone a Schedule IV substance. We don't know what the substance is. There was nothing that was proven or presented today on what this substance is, Your Honor. Furthermore, my client did not -- there was nothing that was found on my client. There was a bag of ibuprofen which is consistent with my client's story that he gave him some ibuprofen because he has -- because he has migraines. So at this time, Your Honor, I would ask that you dismiss his petition at this time.

The trial court concluded:

> Well, we don't have a lab report. I think there is ample evidence to show that the juvenile was in possession of at least one pill that matched the same pill or pills that the witness testified that he

> purchased from the juvenile. And the effects that both Deputy Jacobsen and the juvenile describe as being what the effects of what he took were, such that I think that there is proof beyond a reasonable doubt that the juvenile is responsible for the sale of Schedule IV.

The trial court proceeded to disposition. The trial court ordered:

> Based on his prior record and what he has been found to be responsible for, the Court would find a most severe level deposition would be a Level II. That -- that the juvenile be placed on probation for six months.

On 19 August 2020, the trial court entered its written Adjudication Order. The trial court adjudicated Juvenile delinquent and ordered the matter proceed to disposition. The same day, the trial court entered its written Disposition Order. The trial court placed Juvenile on probation for a period of six months with conditions. Juvenile filed written Notice of Appeal from the trial court's Adjudication and Disposition Orders on 27 August 2020.

Issue

¶ 8 The dispositive issue on appeal is whether the trial court erred in denying Juvenile's Motion to Dismiss where there was insufficient evidence the pill was, in fact, a controlled substance.

Analysis

¶ 9 Juvenile argues the trial court erred in denying his Motions to Dismiss because the lay opinion testimony was insufficient to establish the pill in question was Xanax

beyond a reasonable doubt. Juvenile also contends, and the State concedes, Deputy Jacobsen's identification of the pill as Xanax was improper lay opinion and, therefore, inadmissible. "We review a trial court's denial of a [juvenile's] motion to dismiss *de novo*." *In re S.M.S.*, 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009) (citation omitted). As in adult criminal prosecutions, "[w]here the juvenile moves to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile's] being the perpetrator of such offense." *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (citation and quotation marks omitted). "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, 78-79, 265 S.E.2d 164, 169 (1980) (citation omitted). "To prove sale and/or delivery of a controlled substance, the State must show a transfer of a controlled substance by either sale or delivery, or both." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citation omitted).

¶ 10 Juvenile contends the State could not prove Juvenile sold or delivered a controlled substance to Student because the evidence was insufficient to prove the pill in question was Xanax. "In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. Osborne*, 372 N.C. 619, 626, 831 S.E.2d

328, 333 (2019) (citation and quotation marks omitted). "Moreover, both competent and incompetent evidence that is favorable to the State must be considered by the trial court in ruling on a defendant's motion to dismiss." *Id.* (citation and quotation marks omitted).

¶ 11 Recently, in *State v. Osborne*, the North Carolina Supreme Court clarified to what extent evidence of controlled substances, not chemically analyzed by the State, was sufficient to survive the defendant's motion to dismiss. 372 N.C. 619, 831 S.E.2d 328. In *Osborne*, the defendant was charged with possession of heroin after law enforcement officers were called when the defendant overdosed. *Id.* at 620, 831 S.E.2d at 329. The evidence tended to show that several experienced officers visually identified the substance found in the defendant's hotel room as heroin, the substance returned two positives during field testing of the substance, and the defendant told officers she had ingested heroin. *Id.* at 631, 831 S.E.2d at 336-37. The Court noted confusion in our precedent as to whether expert testimony presenting scientific, chemical analysis was required for the State to survive a motion to dismiss.

¶ 12 The *Osborne* Court noted this confusion stems from the Supreme Court's holding in *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010), where the Court stated:

> We acknowledge that controlled substances come in many forms and that we are unable to foresee every possible scenario that may arise during a criminal prosecution. Nevertheless, the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. Unless the State

> establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required. This holding is limited to North Carolina Rule of Evidence 702.

Id. at 629, 831 S.E.2d at 335 (quoting *Ward*, 364 N.C. at 147, 694 S.E.2d at 747). However, the *Osborne* Court explained *Ward* addressed only the admissibility of testimony visually identifying controlled substances, not whether such evidence was sufficient to survive a defendant's motion to dismiss. *Id.* at 629-30, 831 S.E.2d at 335. Therefore, "absence of an admissible chemical analysis of the substance that defendant allegedly possessed does not necessitate a determination that the record evidence failed to support" a conviction, and the only remaining question was "whether, when analyzed in accordance with the applicable legal standard, the evidence adduced at defendant's trial sufficed to support her conviction." *Id.* at 631, 831 S.E.2d at 336. Turning to the evidence in *Osborne*, the Court held the evidence—even if inadmissible because there was no valid chemical analysis and when viewed in its entirety—was substantial and sufficient to survive the Defendant's motion to dismiss. *Id.* at 631-32, 831 S.E.2d at 337.

¶ 13 However, even when inadmissible evidence is considered at the motion to dismiss stage, 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, the motion to dismiss must be allowed. This is true even though the

suspicion aroused by the evidence is strong." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citations omitted). Here, even considering the inadmissible evidence in this case, the evidence was insufficient to survive Juvenile's Motion to Dismiss.

¶ 14 First, the testimony in this case falls short of the evidence in *Osborne*. Here, the only evidence as to the identity of the pill was Student's testimony he believed the pill looked like Xanax, the alleged effect of the pill on Student, and Deputy Jacobsen's testimony the pill he recovered from Student looked like other pills he had seen that were Xanax. Unlike in *Osborne*, there is no evidence in the Record of any positive field tests of the pill in question and no evidence Juvenile ever admitted to ever possessing Xanax. Student's and Deputy Jacobsen's lay opinion testimony—inadmissible under *Ward*—was the only evidence as to whether the pills in question were, in fact, Xanax.

¶ 15 Although, again, *Ward* only addressed whether opinion testimony, without chemical analysis, as to the identity of an alleged controlled substance was admissible, it is instructive in determining whether such testimony is sufficient to raise more than mere conjecture or suspicion—even strong suspicion—as to a substance's identity to survive a motion to dismiss. The reason such testimony is inadmissible to establish a substance's identity is because it is legally insufficient, without more, to convince a jury the substance is a controlled substance. *See Ward*,

364 N.C. at 147, 694 S.E.2d at 747 ("Because the method of proof at issue is not sufficiently reliable for criminal prosecutions, we cannot conclude, as the State argues, that the deficiencies of Special Agent Allcox's visual identification process only affect the amount of weight the jury assigns to his testimony. Adopting that view would circumvent the fundamental issue at stake, that is, the reliability of the evidence, and would risk a greater number of false positive identifications."). As such, it must surely follow that if lay visual identification testimony is inadmissible because standing alone it is not sufficiently reliable for a criminal prosecution, that standing alone, such testimony also cannot be sufficient to secure a criminal conviction. This is precisely because such testimony—without more—can raise but mere suspicion or conjecture as to the identity of the alleged substance.

¶ 16 Moreover, the only additional evidence in this case supporting denial of the Motions to Dismiss was testimony Student acted strangely after allegedly ingesting the pill. However, there was no evidence that the behaviors Student allegedly displayed were consistent with someone who had taken Xanax, or any causal relation between the behavior and the ingestion of the pill. In other words, there is no evidence tying the pill to the alleged behavior beyond mere suspicion and conjecture.

¶ 17 Thus, unlike in *Osborne*, the evidence in this case was not substantial evidence sufficient to establish the pill in question was a controlled substance. Therefore, the Juvenile's Motions to Dismiss for insufficient evidence should have been allowed.

Consequently, the trial court reversibly erred by denying Juvenile's Motions to Dismiss.[1]

Conclusion

¶ 18 Accordingly, for the foregoing reasons, we reverse the trial court's Adjudication and Disposition Orders.

REVERSED.

Chief Judge STROUD concurs. Judge GORE concurs in result only.

Report per Rule 30(e).

[1] Juvenile also separately argues the trial court erred by: allowing Deputy Jacobsen to identify the pill as Xanax because such testimony was improper lay opinion; failing to make certain findings of fact regarding Juvenile's guilt and showing that the trial court considered factors required by our statutes; and in delegating certain conditions of his probation to the court counselor. For its part, the State concedes the trial court erred in allowing Deputy Jacobsen to identify the pill as Xanax. However, because of our decision here, we do not reach these issues.