IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-608

No. COA21-789

Filed 6 September 2022

Onslow County, Nos. 17 CRS 56861, 16 CRS 51743, 19 CRS 114

STATE OF NORTH CAROLINA

v.

SAMUEL BOSWELF

Appeal by defendant from judgments entered 21 April 2021 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 24 August 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Katherine M. McCraw, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant.

ARROWOOD, Judge.

¶ 1 Samuel Boswell ("defendant"), also known as Samuel Boswelf,[1] appeals from judgments finding him guilty of possession with intent to manufacture, sell, or deliver

[1] Throughout the record, defendant is referred to as both "Samuel Boswell" and "Samuel Boswelf." The transcript indicates that defendant's name is indeed "Samuel Boswell." Because the judgments from which defendant appeals use the last name "Boswelf," we do the same on the cover page of this opinion.

cocaine ("PWIMSD"), PWIMSD marijuana, selling cocaine, manufacturing cocaine, and obtaining habitual felon status. For the following reasons, we find defendant received a fair trial free from error.

I. Background

¶ 2 On 3 February 2016, Jacksonville Police Detectives Justin Morris ("Detective Morris") and Timothy Carr ("Detective Carr") arranged a controlled purchase with Natasha Simmons ("Simmons"), a confidential informant who had personally known defendant for several years. The detectives gave Simmons 100 dollars to purchase crack cocaine from defendant and provided her a pocketbook equipped with audio-video recording devices to use during the transaction.

¶ 3 Simmons made her way to 1714 Hargett Street by being driven by her sister and entered a residence while Detective Morris and Detective Carr "provid[ed] active surveillance across the street." During the transaction, the detectives were able to listen to Simmons's conversation with defendant through the recording devices. At first, Simmons and defendant discussed marijuana, such as "testing marijuana, the type of marijuana, and how [one] would know about getting [one's] money's worth if . . . spending a certain amount of money, a certain product[.]" Then, defendant handed a quantity of marijuana over to Simmons, and the two discussed "the grade of it, how good it was, . . . the smell of it." Simmons "smelled [the marijuana] and . . . gave it back" to defendant."

¶ 4 At some point during the transaction, Simmons withdrew money from her pocketbook and told defendant, " 'I'll give you this and I want you to give me that for this and I want some hard' "; Simmons explained during trial that "hard" is a term used to indicate crack cocaine. Simmons then gave defendant the money in exchange for a substance she believed to be crack cocaine. The transaction lasted about twelve minutes in total, after which Simmons exited the residence, got into her sister's car, and met the detectives. Simmons then handed over "roughly a gram" of crack cocaine and returned the recording devices.

¶ 5 Detective Morris "continued to receive information" from Simmons regarding defendant in the days that followed. On 17 March 2021, Simmons was "hanging out" outside the "Sandy Run" apartment complex at 270 Coleman Drive with a group of people that included defendant. The apartment in question belonged to an individual named "Ricky" who referred to defendant as his nephew, and Simmons knew everyone in that group to use crack cocaine. At some point, defendant stated he was going to "serve the people" and that he needed an instrument with which to cook crack cocaine. Simmons then left and retrieved a Pyrex dish for defendant to use for cooking. Simmons eventually informed Detective Morris that "defendant was attempting to cook suspected crack cocaine in an apartment in Sandy Run, which is about 1.4 miles away from the initial investigation location" on Hargett Street.

¶ 6 Officers began to do "some active surveillance . . . in the general vicinity of Sandy Run" and witnessed "unusual coming and going from the residence" in question. Officers "continued to receive information" from Simmons, who "stated that she had been requested to provide a Pyrex dish or glass cookware to . . . defendant[,]" that defendant "was going to cook a quantity of suspected crack cocaine[,] and that multiple individuals in the area were waiting to be . . . served or getting crack cocaine." Based on this information, Detective Morris filed an application for a search warrant, alleging there was probable cause to believe several items, including controlled substances and paraphernalia, located at 270 Coleman Drive constituted evidence of PWIMSD crack cocaine.

¶ 7 In the early morning hours of 18 March 2016, a group of officers, including Detective Morris and Detective Carr, entered the residence. Detective Morris found defendant lying on a couch beside a coffee table, upon which there were "roughly a quarter-ounce of suspected crack cocaine[,]" a small jar containing suspected marijuana, a razor blade, and a small bag of suspected cocaine. Another woman was also found in the residence at this time. While officers confronted defendant, defendant made the following "spontaneous utterance": " 'It's all mine. It's not hers. She's just chilling. She's just one of my girls.' " After defendant was detained, Detective Morris took a second look at the suspected crack cocaine on the coffee table and noticed "[i]t was wet[,]" which indicated to Detective Morris that the suspected

crack cocaine "was fresh." Detective Morris also found "a Glad bag with another jar of marijuana found inside that bag" and "a small bag of . . . suspected marijuana located in a . . . blazer jacket in a linen closet."

¶ 8 In total, the 18 March 2016 search produced the following: two "mason jar[s] of marijuana[,]" "cocaine[,]" a plastic bag containing cocaine, a plastic bag containing marijuana, a "glass smoking device[,]" a "partially burned marijuana cigar[,]" a digital scale, an "LG Tracfone[,]" a "Samsung Galaxy Note 4[,]" and a "Century Link bill[.]" Officers also found the Pyrex dish that Simmons had provided defendant.

¶ 9 Between July 2018 and January 2019, defendant was indicted on charges of PWIMSD cocaine, selling cocaine, and delivering cocaine resulting from the events that occurred on 3 February 2016; on charges of PWIMSD cocaine, PWIMSD marijuana, maintaining a place to keep controlled substances, and manufacturing cocaine resulting from the events that occurred on 18 March 2016; and on two counts of obtaining habitual felon status.

¶ 10 The matter came before the Onslow County Superior Court, Judge Henry presiding, on 12 April 2021. Before the trial commenced, the State moved for joinder, to which the defense objected, arguing there was insufficient evidence that the events that took place on 3 February 2016 and 18 March 2016 were transactionally connected. After hearing both arguments, the trial court granted the State's motion for joinder, concluding that the offenses at issue constituted "a single scheme or

plan[.]" Notably, defendant's trial counsel did not, at any point of the trial proceedings, make a motion to sever the charges following the State's successful motion for joinder.

¶ 11 The matter proceeded to jury trial. The State provided numerous exhibits, including search warrant photos of 270 Coleman Drive, two jars containing "suspected marijuana[,]" a small bag of "suspected cocaine[,]" a small bag of "suspected marijuana[,]" a "[g]lass smoking device[,]" a "[m]arijuana blunt[,]" two cell phones, a digital scale, and a DVD containing the audio-video recording of the controlled purchase that took place on 3 February 2016 between Simmons and defendant. The State also provided testimony from, among others, Detective Morris, Detective Carr, and Simmons; witness testimony was consistent with the above stated-facts.

¶ 12 At the close of the State's evidence, the State dismissed the charge of maintaining a place to keep a controlled substance. Then, the defense moved to dismiss all charges, and the trial court denied the motion. Defendant did not offer any evidence. At the close of all evidence, the defense renewed its motion to dismiss, which was once again denied.

¶ 13 The jury returned guilty verdicts on all remaining charges. The trial court arrested judgment on the charge of delivery of cocaine and sentenced defendant to a consolidated sentence of 101-to-134 months active imprisonment for selling cocaine

and PWIMSD cocaine and to a consolidated sentence of 89-to-119 months for PWIMSD marijuana, PWIMSD cocaine, and manufacturing cocaine, to run consecutively. Defendant gave notice of appeal in open court.

II. Discussion

¶ 14 On appeal, defendant argues that the trial court erred in granting the State's motion for joinder and in denying defendant's motion to dismiss the PWIMSD marijuana charge.[2]

A. Motion for Joinder

¶ 15 Defendant argues that the trial court erred in granting the State's motion for joinder with respect to the offenses arising from 3 February 2016 and 18 March 2016 due to a lack of a transactional connection. However, this argument has been waived.

¶ 16 "Section 15A-927 of our General Statutes requires a criminal defendant to file a motion to sever charges prior to trial or, if the grounds for severance are not known before trial, file a motion to sever no later than the close of the State's evidence." *State v. Yarborough*, 271 N.C. App. 159, 164, 843 S.E.2d 454, 459 (2020) (citation omitted). "A defendant waives his right to severance if the motion is not made at the

[2] Defendant also makes a third argument on appeal, stating that, if this Court were to determine that his trial counsel did not preserve for appeal the sufficiency of the evidence issue—the basis of defendant's second argument—then defendant suffered ineffective assistance of trial counsel. Defendant does not, however, state how his trial counsel may have faltered. Because we determine the sufficiency of the evidence issue was properly preserved on appeal, we do not reach defendant's third argument.

appropriate time." *Id.* (citations and quotation marks omitted). In *Yarborough*, the defendant "made no motion to sever, either before or during trial, but merely objected to the State's motion for joinder." *Id.* Under these circumstances, the defendant waived his right to raise the severance issue on appeal, and the Court, in its discretion, declined to review the issue under Rule 2 of our Rules of Appellate Procedure. *Id.*

¶ 17 The same occurred in the case *sub judice*. Here, when the State moved for joinder, defendant's counsel opposed the motion. Thereafter, throughout the entirety of the trial proceedings, defendant's trial counsel neither renewed the objection to joinder nor made a motion for severance of the charges. Accordingly, defendant waived his right to raise the issue of severance and that issue is not properly before us. *See id.*

B. Motion to Dismiss

¶ 18 Defendant next argues the trial court erred in denying his motion to dismiss the PWIMSD marijuana charge because there was insufficient evidence of the intent element to sell or deliver marijuana. Rather, defendant argues, the evidence only tends to show that defendant was a user, rather than a seller, of marijuana.

¶ 19 "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Blagg*, 377 N.C. 482, 2021-NCSC-66, ¶ 10 (citation

omitted). Under N.C. Gen. Stat. § 90-95(a)(1), "[t]he offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citations omitted).

¶ 20 "[I]n ruling upon the sufficiency of evidence in cases involving the charge of possession with intent to sell or deliver, . . . our case law demonstrates that this is a fact-specific inquiry in which the totality of the circumstances in each case must be considered unless the quantity of drugs found is so substantial that this factor—by itself—supports an inference of possession with intent to sell or deliver." *Blagg*, ¶ 15 (citation and quotation marks omitted) (ellipses in original).

¶ 21 "In cases which focus on the sufficiency of the evidence of a defendant's intent to sell or deliver a controlled substance, direct evidence may be used to prove intent, but appellate courts must often consider circumstantial evidence from which the defendant's intent may be inferred." *Id.* (citation omitted). "Such an inference can arise from various relevant factual circumstances, including (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity [of the controlled substance] found, and (4) the presence of cash or drug paraphernalia." *Id.* (citation and quotation marks omitted) (alteration in original).

¶ 22 In *State v. Coley*, this Court reasoned that, "[v]iewed in isolation, the relatively small quantity of marijuana discovered in the vehicle" at issue "would not be enough to support an inference that [the] Defendant possessed the drugs with the intent to sell or deliver." *State v. Coley*, 257 N.C. App. 780, 789, 810 S.E.2d 359, 365 (2018) (citation omitted). "However, given the additional presence of the digital scale and the large number of sandwich bags found in [the] Defendant's vehicle," the Court was "satisfied that the State's evidence was sufficient to create a question for the jury." *Id.* "Despite [the] Defendant's testimony that he only utilized the scale and sandwich bags in connection with his own personal marijuana use, a rational jury could have found his explanation to lack credibility." *Id.*

¶ 23 The circumstances here are analogous. Here, the record indicates that, on 18 March 2016, defendant was found in a home from which the police seized two jars of marijuana, a bag of marijuana, a "marijuana cigar[,]" two cell phones, and a digital scale; this was in addition to the plastic bag of cocaine, a glass smoking device, and free-standing cocaine that were also seized at the scene. During this search, defendant uttered: " 'It's all mine.' " Furthermore, on 3 February 2016, when Simmons met with defendant to purchase crack cocaine, the two also discussed "getting [one's] money's worth" for marijuana and the quality of the marijuana in defendant's possession in detail.

¶ 24 Even assuming *arguendo* that the quantity of the marijuana at issue, unspecified in the record, is insufficient *by itself* to support an inference of intent to sell or deliver the controlled substance, the *totality* of the circumstances was "sufficient to create a question for the jury." *See id.* "[A] rational jury could have found" that defendant possessed the requisite intent to sell or distribute marijuana. *See id.* Accordingly, the trial court did not err in denying defendant's motion to dismiss with respect to the PWIMSD marijuana charge.

III. Conclusion

¶ 25 For the foregoing reasons, we conclude that defendant received a fair trial free from error.

NO ERROR.

Judges TYSON and GRIFFIN concur.

Report per Rule 30(e).