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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-589

Filed 07 March 2023

Randolph County, Nos. 20 CRS 50356-58

STATE OF NORTH CAROLINA

v

HAMILTON COZART, JR., Defendant.

Appeal by Defendant from sentence entered 25 August 2022 by Judge Paul Ridgeway in Randolph County Superior Court. Heard in the Court of Appeals 25 January 2023.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Terence Steed, for State-appellee.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.*

FLOOD, Judge.

Hamilton Cozart, Jr. (“Defendant”) argues the trial court erred in denying his motion to dismiss the charge of trafficking in opiates by possession and, in the alternative, that he received ineffective assistance of counsel. As we explain in

further detail below, Defendant's first argument is not preserved for appellate review, and Defendant did not receive ineffective assistance of counsel.

### **I. Factual and Procedural Background**

On 29 January 2020, Asheboro police obtained and executed a search warrant for Defendant and his residence. The search warrant was based on a confidential informant's narcotic purchases, which were made at Defendant's residence, and a trash pull from Defendant's residence, which yielded cocaine residue. At approximately 4:00 p.m., undercover police officers went to sit outside of Defendant's residence to confirm his presence. An officer observed Defendant exit his residence, approach a vehicle occupied by three people, have a brief interaction with them, and then walk back towards the residence. At this point, the officers initiated their execution of the search warrant.

The officers knocked on the door of the residence and were greeted by Defendant's sister, Evelyn Washington ("Washington"). The officers advised her that they had a search warrant, and she called into the residence, requesting that "T.O." come to the front door. Defendant came to the door and was placed in handcuffs. Another male, Larry Jerome Williams, was found asleep on a couch in the back bedroom, and he was also detained and placed in handcuffs.

In the bathroom, the officers found a plastic baggy of marijuana swirling inside the still-running toilet, empty plastic baggies sitting on top of the trash can, a vial of suspected cocaine on the right side of the toilet, and suspected crack rocks laying on

the floor. In Washington's bedroom, the officers found three small baggies of what appeared to be marijuana, a loose baggy of marijuana, and drug paraphernalia. In Defendant's bedroom, officers found a bottle containing sixty pills hidden inside a coffee mug. A portion of the label identifying who was prescribed the medication was scratched off, but the legible portion of the label read "Oxycodone Hydrochloride" and identified a "10mg" dosage. A later laboratory test confirmed the pills to be oxycodone. After the search, the officers arrested Defendant and transported him to Randolph County Jail.

On 8 April 2020, a Randolph County Grand Jury indicted Defendant for: (I) possession of oxycodone hydrochloride with intent to manufacture, sell, or deliver in violation of N.C. Gen. Stat. § 90-95(a)(1); (II) possession of oxycodone hydrochloride with intent to manufacture, sell, or deliver a Schedule II controlled substance within 1,000 feet of a public park in violation of N.C. Gen. Stat. § 90-95(e)(10); (III) possession of cocaine with intent to manufacture, sell, or deliver in violation of N.C. Gen. Stat. § 90-95(a)(1); and (IV) trafficking of opium or heroin by possession of at least four grams but less than fourteen grams of opiates in violation of N.C. Gen. Stat. § 90-05(h)(4).

On 23 August 2021, these matters came on for trial at Randolph County Superior Court. After the State rested, Defendant's trial counsel moved to dismiss charges I, II, and III. The trial court denied this motion. After the close of evidence,

Defendant's trial counsel renewed its motion to dismiss the three charges. The trial court again denied the motion.

On 25 August 2022, the jury found Defendant guilty of possession with intent to sell and deliver oxycodone hydrochloride; possession with intent to sell and deliver cocaine; and trafficking by possession of opioids. Defendant was acquitted of possession with intent to sell and deliver oxycodone hydrochloride within 1,000 feet of a public park. The trial court arrested judgment for the conviction of possession with intent to sell and deliver oxycodone hydrochloride, and consolidated the remaining two offenses into a single trafficking judgment. The trial court sentenced Defendant to seventy to ninety-three months and imposed a \$50,000 fine, as required by N.C. Gen. Stat. § 90-95(h)(4)(a). Defendant timely appealed.

## **II. Jurisdiction**

“It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required[.]” *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004) (citation and quotation marks omitted).

## **III. Analysis**

On appeal, Defendant argues (1) “[w]here the State failed to present evidence that the pills [Defendant] possessed contained opiates, the trial court erred in denying his motion to dismiss the charge of trafficking in opiates by possession[.]” and (2) “[i]n the alternative, [Defendant] received ineffective assistance of counsel.”

**A. Denial of Defendant's Motion to Dismiss**

Defendant argues, to sustain a conviction for trafficking in opiates and per N.C. Gen. Stat. § 90-95(h)(4), it was incumbent upon the State to demonstrate that oxycodone hydrochloride is an opiate. Defendant further contends, although the State's expert identified the tablets found by the police, the expert never testified that oxycodone hydrochloride is an opiate, and the State therefore failed to offer any evidence of an essential element of the charged offense. As such, according to Defendant, the trial court erred in denying his motion to dismiss. Additionally, Defendant contends, by moving to dismiss charges I–III, he preserved this evidentiary issue for appellate review.

“We review the trial court's denial of a motion to dismiss *de novo*.” *State v. Summey*, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013) (citation omitted). In reviewing, we must determine “whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 2d 150 (2000). “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) (citations omitted). “When considering [the] defendant's motion to dismiss, 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.” *Summey*, 228 N.C. App. at 733, 746 S.E.2d at 406 (citation and quotation marks omitted).

1. Preservation

Defendant argues, per *State v. Golder*, Defendant preserved for appeal his motion to dismiss because “merely moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of evidence for appellate review.” 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020).

Under Rule 10(a)(3),

A defendant may make a motion to dismiss the action[] . . . at the conclusion of all the evidence, irrespective of whether [the] defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all evidence, [the] defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(a)(3) (2021). In *Golder*, the defendant was charged with, *inter alia*, obtaining property worth over \$100,000 by false pretenses in violation of N.C. Gen. Stat. § 14-100. *Golder*, 374 N.C. App. at 240, 839 S.E.2d at 784. The defendant moved to dismiss this charge and other charges at the close of the State’s evidence, and again moved to dismiss the charges after close of all evidence. *Id.* at 242, 839 S.E.2d at 786. The defendant argued the State failed to present sufficient evidence he obtained

property with a value of \$100,000 or more, but the defendant did not specifically argue the State failed to prove he obtained a thing of value. *Id.* at 243, 839 S.E.2d at 786. On appeal, this Court reasoned the defendant's second motion to dismiss narrowed the scope of his objection of his first motion, and the only evidentiary issue preserved for review was the actual value of the property obtained. *State v. Golder*, 257 N.C. App. 803, 813, 809 S.E.2d 502, 509 (2018). Our Supreme Court reversed this Court's decision and concluded, "Rule 10(a)(3) does not require that the defendant assert a specific ground for a motion to dismiss for insufficiency of evidence[.]" and "Rule 10(a)(3) provides that a defendant preserves all insufficiency of evidence issues for appellate review simply by making a motion to dismiss the action at the proper time." *Golder*, 374 N.C. at 245–46, 839 S.E.2d at 788.

Here, in moving for dismissal of the State's charges, Defendant's trial counsel stated:

At this time, I'd make a motion to dismiss. Even in the light most favorable to the State, I don't believe they have reached their burden. That would be with respect to possession of cocaine, . . . and possession with intent to sell, manufacture or deliver a Schedule [II] controlled substance, . . . and within a thousand feet of a park.

At the close of all evidence, Defendant's trial counsel provided he "would like to renew [his] motion." In neither motion did Defendant's trial counsel challenge the trafficking of heroin or opium charge. This differs from the facts of *Golder*, where the defendant moved to dismiss for insufficiency of evidence as to one element of the

charge, but did not make an evidentiary challenge as to another element of the charge. *See Golder*, 374 N.C. at 245–46, 839 S.E.2d at 788. Defendant, unlike the defendant in *Golder*, did not challenge the relevant charge in his motion to dismiss.

Although Defendant was not required to assert a specific ground for his motion to dismiss to preserve the related evidentiary issues on appeal, he *was* required to challenge a specific charge (trafficking of opium or heroin) if he wanted it to be preserved for appellate review. Defendant’s assertion that his counsel’s motion to dismiss the other three charges preserved the evidentiary issues of the trafficking charge for appellate review is incongruous with *Golder* and Rule 10(a)(3). As provided in Rule 10(a)(3), “if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all evidence, [the] defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.” N.C. R. App. P. 10(a)(3) (2021). Defendant failed to move to dismiss the charge for trafficking of heroin and opium; therefore, the related evidentiary matters are not preserved for our review.

## 2. Sufficiency of Evidence

Assuming, *arguendo*, Defendant’s argument is preserved for appellate review, Defendant’s argument is still unmeritorious. N.C. Gen. Stat. § 90-95(h) (2021) provides:

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium, opiate, or opioid, or any salt, compound, derivative, or



preparation of opium, opiate, or opioid . . . shall be guilty of a felony which felony shall be known as “trafficking in opium, opiate, opioid, or heroin” and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than [fourteen] grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 93 months in the State’s prison and shall be fined not less than fifty thousand dollars (\$50,000)[.]

“This crime has two elements: (1) knowing possession (either actual or constructive) of (2) a specified amount of [opium, opiate, opioid, or] heroin.” *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987) (citations omitted). Under N.C. Gen. Stat. § 90-90(1)(a)(14) (2021), “Oxycodone” is specifically defined as a Schedule II substance; it falls under the category of “[o]pium, opiate, or opioid and any salt, compound, derivative, or preparation of opium and opiate[.]”

Here, the State presented evidence that Defendant possessed oxycodone. The police officers who conducted the search of Defendant’s residence testified to finding a bottle labeled as “Oxycodone Hydrochloride” that contained sixty pills; the State’s expert testified that the pills contained oxycodone; and the State’s expert prepared a laboratory report as to her findings, which was submitted to the trial court as evidence. N.C. Gen. Stat § 90-95(h)(4)(a) makes it a felony to knowingly possess four grams or more, but less than fourteen grams, of an opium, opiate, or opioid. *See Keys*, 76 N.C. App. at 352, 361 S.E.2d at 288. Per N.C Gen. Stat. Section 90-90(1)(a)(14), “opium, opiate, or opioid” includes oxycodone. Considering the evidence in the light

most favorable to the State, the State presented sufficient evidence that Defendant knowingly trafficked opium by possession in violation of N.C. Gen. Stat § 90-95(h)(4)(a), and the State was not required to present evidence that oxycodone is an opiate. The trial court did not err in denying Defendant's motion to dismiss.

### **B. Ineffective Assistance of Counsel**

Defendant argues, "[i]n the event this Court concludes trial counsel's motion to dismiss was insufficient to preserve the above argument for appellate review, [Defendant] received ineffective assistance of counsel." Specifically, Defendant contends, per *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), trial counsel's failure to properly preserve Defendant's sufficiency argument for appellate review prejudiced Defendant.

Under *Strickland*, a defendant must satisfy a two-part test to show ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). To demonstrate prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S.

at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. “[T]here is no reason for a court deciding an ineffective assistance of counsel claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

As explained above, even if Defendant’s sufficiency of evidence argument were preserved for appellate review, the State presented sufficient evidence of Defendant’s guilt such that the trial court did not err in denying Defendant’s motion to dismiss. Had Defendant’s trial counsel moved to dismiss the charge for trafficking by possession of opioids, the result of the proceeding would have been the same. Thus, Defendant was not prejudiced and did not receive ineffective assistance of counsel.

#### **IV. Conclusion**

Defendant’s sufficiency of the evidence argument is not preserved for appellate review, and Defendant has failed to demonstrate that he received ineffective assistance of counsel.

DISMISSED in part, AFFIRMED in part.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).