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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-832

Filed 06 June 2023

Cleveland County, Nos. 20 CRS 1261–62

STATE OF NORTH CAROLINA

v.

BOBBY DEAN ABEE, III, Defendant.

Appeal by Defendant from judgment entered 25 March 2022 by Judge George C. Bell in Cleveland County Superior Court. Heard in the Court of Appeals on 21 March 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

Wyatt Early Harris Wheeler LLP, by Stanley F. Hammer, for Defendant-Appellant.

CARPENTER, Judge.

Bobby Dean Abee, III (“Defendant”) appeals from judgment after a jury convicted him of conspiracy to sell and possession of narcotics. On appeal, Defendant argues the trial court erred by: (1) denying Defendant’s motion to dismiss the charges of conspiracy to sell narcotics and possession of narcotics; and (2) not intervening *ex*

mero motu during the State's cross-examination of Defendant. After careful review, we discern no error.

I. Factual & Procedural Background

On 8 September 2020, a Cleveland County grand jury indicted Defendant with conspiring to sell narcotics, in violation of N.C. Gen. Stat. § 90-98; possessing narcotics, in violation of N.C. Gen. Stat. § 90-95(a)(3); and attaining the status of habitual felon, in violation of N.C. Gen. Stat. § 14-71. The State tried Defendant's case before a jury and the Honorable Judge George C. Bell in Cleveland County Superior Court on 24 and 25 March 2022.

Evidence at Defendant's trial tended to show the following. On 28 May 2020, during an undercover drug operation, Cleveland County Sheriff's deputies entered a home located in Kings Mountain, North Carolina (the "Home"). At the Home, the deputies expected to find Darren Riddle and Justin Riddle, who they believed to be the operators of a suspected drug enterprise. The deputies, however, found Defendant, along with Justin Riddle, inside the Home. Upon seeing the deputies entering the Home, Defendant immediately shut Darren Riddle's bedroom door. During their search of the Home, the deputies eventually seized 36.98 grams of heroin, a pistol, and drug paraphernalia, all from Darren Riddle's bedroom.

When Detective Derek Toney arrived at the Home, Defendant was not handcuffed and was sitting on the living room couch. Lieutenant Chris Hutchins, who was at the scene on 28 May 2020, also testified Defendant was sitting, not

handcuffed, on the living room couch. Lieutenant Hutchins further testified that “[Defendant] had a plastic baggie in his hand, and he was putting the plastic baggie in between the couch cushion and the couch to hide or conceal whatever was in his hand.” After witnessing Defendant attempt to conceal a bag in between couch cushions, Lieutenant Hutchins pulled Defendant off the couch and found a plastic bag of what appeared to be heroin. The bag was eventually shown to contain 3.1 grams of heroin.

The deputies took Defendant to the Sheriff’s Office, where Defendant admitted to Investigator Mitchell Hinson that he formerly lived at the Home. Defendant then admitted to Investigator Hinson that he bought heroin from Justin Riddle, that the bag found in between the couch cushions was his and contained heroin, and that “Justin gave him the dope for bringing him customers.”

On 25 March 2022, the jury convicted Defendant of felony possession of a controlled substance, conspiracy to sell a controlled substance, and attaining the status of habitual felon. Defendant orally appealed in open court.

II. Jurisdiction

This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether the trial court: (1) erred in denying Defendant’s motion to dismiss the charges of conspiracy to sell narcotics and possession of narcotics; and (2) plainly erred by failing to intervene *ex mero motu*

during the State's cross-examination of Defendant.

IV. Analysis

A. Motion to Dismiss

In his first argument, Defendant contends the trial court erred by denying his motions to dismiss the charges of conspiracy to sell narcotics and possession of narcotics. Specifically, Defendant argues his admission was not sufficiently corroborated to satisfy the rule of *corpus delicti*. We disagree.

“Upon defendant’s motion for dismissal, 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. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). “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).

1. Conspiracy

“A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means.” *State v. Lowery*, 318 N.C. 54, 71, 347 S.E.2d 729, 740 (1986). To satisfy the agreement prong of conspiracy, “[a] mutual, implied understanding is sufficient” *State v. Johnson*, 164 N.C. App. 1, 17, 595 S.E.2d 176, 185 (2004) (quoting *State v. Bindyke*,

288 N.C. 608, 615–16, 220 S.E.2d 521, 526 (1975)). Further, “the situation of the parties and their relations to each other, together with the surrounding circumstances and the inferences deducible therefrom, may furnish ample proof of conspiracy even in the face of positive testimony to the contrary.” *State v. Horton*, 275 N.C. 651, 660, 170 S.E.2d 466, 472 (1969). Selling heroin is an “unlawful act.” N.C. Gen. Stat. § 90-95(a)(1) (2021); *see Lowery*, 318 N.C. at 71, 347 S.E.2d at 740.

Here, Investigator Hinson testified that Defendant admitted “Justin [Riddle] gave him the dope for bringing him customers.” This admission alone is relevant evidence that “a reasonable mind might accept” to meet both prongs of conspiracy: (1) Defendant agreed with another person, Justin; (2) to help commit an illegal act, to sell heroin. *See Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169; *Lowery*, 318 N.C. at 71, 347 S.E.2d at 740; *see also* N.C. Gen. Stat. § 90-95(a)(1).

Also, galvanizing Defendant’s confession, Defendant and Justin Riddle were both inside the Home, in which deputies confiscated 36.98 grams of heroin. This evidence, coupled with Defendant’s confession that “Justin gave him dope for bringing him customers[,]” is substantial evidence because it is “relevant evidence” that “a reasonable mind might accept as adequate to support a conclusion” that Defendant agreed with Justin Riddle to commit the unlawful act of selling heroin. *See Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169; *Lowery*, 318 N.C. at 71, 347 S.E.2d at 740; N.C. Gen. Stat. § 90-95.

Therefore, because there is substantial evidence “of each essential element of [conspiracy to sell a controlled substance]” and of “[Defendant] being the perpetrator of such offense[,]” the trial court did not err in denying Defendant’s motion to dismiss his conspiracy charge. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

2. Possession

Heroin is a controlled substance and is illegal to possess under N.C. Gen. Stat. 90-95(a)(3) (2021). “Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be knowingly possessed.” *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977). “An accused’s possession of narcotics may be actual or constructive. He has possession of the contraband material . . . when he has both the power and intent to control its disposition or use.” *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972).

Here, Lieutenant Hutchins witnessed Defendant stuff a bag, which was later proved to contain heroin, between the cushions of the couch on which Defendant was sitting. Defendant later admitted to Investigator Hinson that the bag of heroin was his, and that he purchased the heroin from Justin Riddle. An eyewitness account of Defendant stuffing the bag in the couch is relevant evidence of actual possession of the bag because Defendant had “both the power and intent to control its disposition or use.” *See Harvey*, 281 N.C. at 12, 187 S.E.2d at 714.

Also, Investigator Hinson testified that Defendant admitted to knowing the bag contained heroin, which is evidence Defendant “knowingly possessed” the heroin.

See Rogers, 32 N.C. App. at 278, 231 S.E.2d at 922. Eyewitness testimony of a deputy sheriff combined with Defendant's confession at the Sheriff's Office is "substantial evidence" because it is "relevant evidence" that "a reasonable mind might accept as adequate to support a conclusion" that Defendant illegally possessed heroin. *See Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169.

Therefore, because there is substantial evidence "of each essential element of [possession of a controlled substance]" and of "[Defendant] being the perpetrator of such offense[,]" the trial court did not err in denying Defendant's motion to dismiss his possession charge. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

3. *Corpus Delicti*

Next, Defendant asserts his possession and conspiracy convictions violate the rule of *corpus delicti*. We disagree.

"It is well established in this jurisdiction that a naked, uncorroborated, extrajudicial confession is not sufficient to support a criminal conviction." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986). *Corpus delicti* requires "that there be corroborative evidence, independent of defendant's confession, which tend[s] to prove the commission of the charged crime." *Id.* at 531, 342 S.E.2d at 880. "Importantly, the *corpus delicti* rule applies where the confession is the only evidence that the crime was committed; it does not apply where the confession is the only evidence that the defendant committed it." *State v. Ballard*, 244 N.C. App. 476, 479, 781 S.E.2d 75, 77–78 (2015).

Here, there was evidence apart from Defendant's confession that supported both Defendant's possession and conspiracy convictions: Defendant was found in a home containing 36.98 grams of heroin; Defendant closed the door to the room containing the heroin; and Lieutenant Hutchins witnessed Defendant stuff a bag of heroin between couch cushions. This evidence, in addition to his confession, support Defendant's convictions. Thus, *corpus delecti* does not apply here because Defendant's confession was not "the only evidence that the crime[s were] committed." *See Ballard*, 244 N.C. App. at 479, 781 S.E.2d at 77–78.

B. Cross-Examination

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). To find plain error, first, this Court must determine that an error occurred at trial. *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Second, the defendant must demonstrate the error was "fundamental," which means the error "had a probable impact on the jury's finding that the defendant was guilty" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320–21 (2015) (internal quotations and citations omitted). Notably, "the plain error rule . . . is always to be applied cautiously and only in the exceptional case" *State v. Odom*,

307 N.C. 655, 660–61, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

North Carolina “adheres to the ‘wide-open’ rule of cross-examination” *State v. Penley*, 277 N.C. 704, 708, 178 S.E.2d 490, 492 (1971). Thus, “[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” N.C. Gen. Stat. § 8C-1, Rule 611(b) (2021). Further, specific instances of a witness’s conduct may be examined on cross-examination to attack the witness’s credibility. N.C. Gen. Stat. § 8C-1, Rule 608(b) (2021). Credibility is “[t]he quality that makes something (as a witness or some evidence) worthy of belief.” *Credibility*, Black’s Law Dictionary (11th ed. 2019).

Here, Defendant challenges two instances of the trial court’s failure to intervene *ex mero motu* during the State’s cross-examination. Specifically, Defendant argues that “were-they-lying” questions are impermissible. The first challenged portion of the State’s cross-examination of Defendant is as follows:

Q: Okay. Did you—you were here for Investigator Hutchins testifying, correct?

A: Yes.

Q: Do you remember him testifying that you were sitting on the couch, and you were shoving something in the cushion? Do you remember him saying that?

A: Yes.

Q: And you’re saying that’s not what happened.

A: Yes, that’s not what happened.

Q: And you’re saying he never saw a baggie in your hand.

A: No. No, there was never a bag in my hand.

Q: And he never asked, “What are you doing?”

A: I didn’t say that.

Q: Well, did he? Did he ever say that to you, “What are you doing?”

A: He could have.

Q: Okay. And you never said nothing?

A: I could have, but there was never a baggie in my hand.

Q: There was never a baggie. So, he lied?

A: Yes.

Defense counsel did not object to this line of questioning. Later in the State’s cross-examination of Defendant, concerning Defendant’s confession to Investigator Hinson, the following exchange occurred:

Q: And you maintained—maintain that those statements that you made, you lied because you were scared?

A: Yes.

Q: How do we know you’re not lying today because you don’t want to get in trouble?

A: Because I’m under oath.

Q: Okay. So you would lie to the police about possessing drugs, but you wouldn’t lie to us today?

A: No. I mean, wouldn’t you? If you was facing a lot of time, wouldn’t you? I mean, they done told me they was going to let me go if I’d admit to something and help them out.

Q: Okay.

Defense counsel did not object to this line of questioning either. The two specific questions at issue, as set forth above, are: (1) “So, [Investigator Hutchins] lied?” and (2) “So you would lie to the police about possessing drugs, but you wouldn’t lie to us today?” In the first question, in order to examine Defendant’s credibility as a witness, the State asked Defendant who was lying: he or Investigator Hutchins. And the second question is simply an overt examination of Defendant’s credibility.

Even assuming without deciding that such questioning is impermissible, Defendant still has not established plain error on this issue.

As the State questioned Defendant about whether he lied to Investigator Hutchins and whether he lied about possessing heroin, the State asked whether Defendant was worthy of belief, and thus the State examined Defendant's credibility. Therefore, the State's questioning of Defendant was permissible because specific instances of a witness's conduct may be examined on cross-examination to attack the witness's credibility. *See* N.C. Gen. Stat. §§ 8C-1, Rules 611(b), 608(b); *Penley*, 277 N.C. at 708, 178 S.E.2d at 492.

Accordingly, the trial court did not reversibly err in allowing the State's questioning. *See Odom*, 307 N.C. at 660–61, 300 S.E.2d at 378; *Towe*, 366 N.C. at 62, 732 S.E.2d at 568.

V. Conclusion

We hold the trial court did not err by denying Defendant's motion to dismiss the charges of conspiracy to sell narcotics and possession of narcotics. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455. We also hold the trial court did not plainly err by failing to intervene *ex mero motu* during the State's cross-examination of Defendant. *See Odom*, 307 N.C. at 660–61, 300 S.E.2d at 378.

NO ERROR.

Judge RIGGS concurs.

Judge MURPHY concurs in Part IV-A and concurs in result only in Part IV-B.

STATE V. ABEE

Opinion of the Court

Report per Rule 30(e).