

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-311

Filed 19 December 2023

McDowell County, Nos. 20 CRS 51264-65

STATE OF NORTH CAROLINA

v.

KEVIN BRIAN LOFTIS, SR., Defendant.

Appeal by defendant from judgment entered 29 April 2022 by Judge Marvin P. Pope in McDowell County Superior Court. Heard in the Court of Appeals 20 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Michelle B. Harris, for the State.

Gilda C. Rodriguez for defendant-appellant.

PER CURIAM.

Shortly after midnight on 20 August 2020, Defendant Kevin Brian Loftis, Sr., was pulled over by an officer from the Marion Police Department because the registration tag on his vehicle (a Chevrolet truck) was registered to a different vehicle (a Ford truck). During the stop, officers discovered illegal substances on Defendant's person (a Tic Tac container containing fifty-one tablets of oxycodone and a plastic bag

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containing methamphetamine), glass smoking pipes, and stacks of cash bound with rubber bands totaling nearly \$5,000.

Defendant was charged with possession of methamphetamine, trafficking oxycodone, maintaining a vehicle for keeping and selling controlled substances, and possession of drug paraphernalia. Following a jury trial, Defendant was found guilty of all charges and sentenced to a minimum of seventy months and a maximum of ninety-three months. Defendant appeals.

Defendant argues the trial court erred when it denied Defendant's request for a jury instruction on possession of a controlled substance as a lesser-included offense of trafficking. We disagree.

We review *de novo* the trial court's denial of a requested jury instruction. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Our Supreme Court has stated the following regarding the inclusion of jury instructions for lesser-included offenses:

An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater. . . . the trial court need not submit lesser degrees of a crime to the jury when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.

State v. Brichikov, 383 N.C. 543, 554, 881 S.E.2d 103, 112 (2022) (cleaned up).

The lesser-included crime of possession of an opioid (in this case, oxycodone) is

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escalated to the crime of trafficking when there are *four or more grams* of the substance. *See* N.C. Gen. Stat. §§ 90-95(d)(2), (h)(4)(a)-(c) (2020).

Here, Defendant contests the weight of the oxycodone found in the Tic Tac container, claiming the total weight could be less than four grams due to scientific uncertainty when weighing the tablets. However, the State's evidence was positive as to the weight element of the crime, and there was no conflicting evidence. The State's forensic chemist testified that the total combined weight of the fifty-one tablets was nearly seven grams. She stated that the one tablet which she analyzed weighed 0.12 grams, plus or minus 0.06 grams, and that the remaining fifty tablets she weighed separately weighed 6.63 grams, plus or minus 0.06 grams. Further, she testified that it was impossible for the total weight of the tablets to be less than four grams.

Thus, the trial court was not required to give an instruction on the lesser-included offense of possession, which would only be applicable if the tablets weighed less than four grams, and the trial court did not err in denying Defendant's request.

NO ERROR.

Panel consisting of Judges DILLON, MURPHY, and GORE.

Report per Rule 30(e).