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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1129

Filed 4 June 2024

Wake County, Nos. 21CRS216656–910

STATE OF NORTH CAROLINA

v.

KEVIN GOMEZ, Defendant.

Appeal by defendant from judgment entered 18 May 2023 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 14 May 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Emily Jo Urch, for the State-appellee.

Gilles Law, PLLC, by Michelle Abbott, for defendant-appellant.

GORE, Judge.

A Wake County grand jury indicted Kevin Gomez (“defendant”) on one count of trafficking in fentanyl by possession and one count of trafficking in fentanyl by transportation. After a trial held in Superior Court, Wake County, the jury found defendant guilty of each charge. The trial court sentenced defendant to 90 months minimum to 120 months maximum active prison time on each count. Defendant gave

oral notice of appeal in open court. This Court has jurisdiction hear defendant's appeal pursuant to N.C.G.S. §§ 7A-27(b) and 15-1444(a) (2023).

Defendant presents one issue on appeal—whether the trial court plainly erred by omitting a jury instruction on whether defendant knew that the drug he possessed and transported was fentanyl. Upon review, we discern no error.

Defendant visited the North Carolina State Fair on 18 October 2021. As defendant walked through a security station near the entrance, a security officer noticed a small plastic bag with “blue pills” fall to the ground from underneath defendant's shorts. Officers detained defendant, secured the bag, and called the Wake County Sheriff's Office for assistance. Based on their training, experience, and a cursory internet search, officers on duty believed the pills to be oxycodone hydrochloride.

A few minutes later, officers conducted a search incident to arrest, and a second bag of blue pills fell to the floor from defendant's person. They elected not to count the pills at that time to avoid accidental exposure to fentanyl. Officers processed defendant and sent the two bags to the City-County Bureau of Identification lab (“CCBI”) for testing. The first bag contained 132 pills and the second bag contained 81 pills. The CCBI tested the pills and the samples tested positive for fentanyl.

Defendant was arrested carrying a counterfeit driver's license, as well as the driver's license of another individual who was not defendant, \$206.00 cash in small bills, and two cell phones. Defendant stated the pills were his for personal use.

Defendant did not testify at trial but moved to dismiss both trafficking charges at the close of the State's evidence, renewing said motion at the close of all evidence. He argued there was no evidence presented that he *knowingly* had custody and control of fentanyl. At the charge conference, there was discussion and review of Footnote 6 to N.C.P.I. (Crim) 260.17 and 260.30, which states: "If the defendant contends that the defendant did not know the true identity of what the defendant [possessed/transported], add this language to the first sentence: 'and the defendant knew that what the defendant [possessed/transported] was [fentanyl].'" N.C.P.I. (Crim) 260.17 and 260.30 (2023). Defendant did not specifically request the instruction in Footnote 6. The trial court declined to instruct the jury according to Footnote 6, and the instructions used respectively included the language "knowingly possessed fentanyl" and "knowingly transported fentanyl" as essential elements of the crimes charged. N.C.P.I. (Crim) 260.17 and 260.30.

On appeal, defendant asserts the trial court erred by failing to instruct the jury using Footnote 6 of the North Carolina Pattern Jury Instructions 260.17 and 260.30. Defendant argues his knowledge of the fentanyl was a determinative issue of fact argued throughout trial, and that the State's own evidence placed defendant's knowledge in dispute. Defendant concedes, however, that he failed to object to the jury instruction, and thus, he requests plain error review.

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must

establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518 (2012) (citations and internal quotations marks omitted).

Defendant argues our Supreme Court’s decision in *State v. Boone*, 310 N.C. 284 (1984) *overruled on other grounds by State v. Oates*, 366 N.C. 264 (2012), compels us to reverse his conviction and grant him a new trial. We disagree.

Knowledge is a mental state and may be proved by the conduct and statements of the defendant, by statements made to him by others, by evidence of reputation which it may be inferred had come to his attention, and by circumstantial evidence from which an inference of knowledge might reasonably be drawn.

Boone, 310 N.C. at 294–95. In *Boone*, our Supreme Court determined that the trial court was required to give the requested jury instruction on knowledge because:

[the] defendant . . . denied any knowledge of the fact that the marijuana was [in the trunk of his automobile]. [The] [d]efendant *testified* that . . . a duffel bag was placed in the trunk of his car at the request of [a second person] . . . ; that [the second person] did not show [the] defendant what was in the bag; and, that [the] defendant did not own the bag nor did he know what was in it. Thus, [the] defendant has raised *a determinative issue of fact*—whether he knew that the marijuana was in the trunk of his car.

Boone, 310 N.C. at 293–94 (emphasis added). Similarly, in *State v. Lopez*, 176 N.C. App. 538 (2006), we acknowledged *Boone* in observing that “[o]ur courts have previously awarded new trials for the failure to properly instruct the jury . . . when

the defendant had presented evidence that he lacked knowledge of the true contents of the package.” *Lopez*, 176 N.C. App. at 546 (emphasis added).

In our case, however, defendant did not testify, nor did he present any other evidence tending to show he lacked knowledge of the true identity of what he possessed/transported. While defendant argues he contested the element of knowledge in his motion to dismiss, he also acknowledges that “a motion to dismiss is not evidence.” *See State v. Collins*, 345 N.C. 170, 173 (1996) (“[I]t is axiomatic that the arguments of counsel are not evidence.”). Moreover, “[w]hether the State presented substantial evidence of each essential element of the offense is a question of law[.]” *State v. Golder*, 374 N.C. 238, 250 (2020), not fact—and actual or constructive possession of fentanyl “gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.” *State v. Harvey*, 281 N.C. 1, 12 (1972). Defendant’s actual possession of fentanyl is not in dispute, nor does he argue on appeal that the State’s evidence was, as a matter of law, insufficient to withstand a motion to dismiss.

Accordingly, defendant failed to raise a determinative issue of fact as to whether he knowingly possessed or transported fentanyl. We, therefore, discern no error—let alone plain error—in the trial court’s failure to include Footnote 6 to N.C.P.I. (Crim) 260.17 and 260.30 in its instruction to the jury.

NO ERROR.

STATE V. GOMEZ

Opinion of the Court

Judges MURPHY and GRIFFIN concur.

Report per Rule 30(e).