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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-273

Filed 17 December 2024

Cabarrus County, Nos. 21 CRS 53444-45

STATE OF NORTH CAROLINA

v.

ARTANSAL FINELL PHILLIPS, Defendant.

Appeal by defendant from judgments entered 3 August 2023 by Judge Eric C. Morgan in Cabarrus County Superior Court. Heard in the Court of Appeals 25 September 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Hillary F. Patterson, for the State.

Attorney Phoebe W. Dee for defendant-appellant.

THOMPSON, Judge.

Artansal Phillips (defendant) appeals his convictions of trafficking in opioid, for which he received a sentence of 225 to 282 months in prison, and the consolidated convictions of trafficking in cocaine, manufacturing cocaine, maintaining a dwelling for keeping and selling controlled substances, and misdemeanor possession of drug paraphernalia, for which he received a sentence of 70 to 93 months, said sentences to

run consecutively. On appeal, defendant contends that the trial court should have dismissed the trafficking in opioid charge due to insufficiency of the evidence which resulted in a fatal variance between the indictment and the facts that were proven at trial. Defendant further questions whether the case should be remanded to the trial court to address the failure of the written judgment to correspond with the trial court's findings at sentencing or if remand for the correction of clerical errors would be sufficient. After careful review, we find that the trial court properly denied defendant's motion to dismiss the trafficking in opioid charge, and that defendant failed to establish a clerical error in the 21 CRS 53444 judgment.

I. Factual Background and Procedural History

On 9 September 2021, the Concord Police Department (CPD), with the assistance of the Kannapolis Police Department (KPD), executed a search warrant of defendant's home at 164 Austin Run Court in Kannapolis.

Major Todd McGee (McGee) of the CPD was at the scene and in charge of the execution of the search warrant. McGee and defendant had interacted on occasions prior to 9 September 2021 and during the search of his residence, defendant asked to speak with McGee. Defendant told McGee that his wife had notified him after she left the house that morning that law enforcement was present, and defendant admitted to McGee that he flushed what he had in the house because he did not want to go to jail for the "little bit of stuff" he had in the house. Defendant further told McGee to "[l]eave [his] workout room alone[.]" because defendant had "just got it together[.]"

Based on defendant's comments, McGee and the officers searching the residence decided to pay particularly close attention to the exercise room in defendant's home. Upon further inspection of the room, Detective Angel Gonzales (Gonzales) noticed a loose shelf on the wall and was able to see a portion of a plastic bag protruding from the shelf. Gonzales pried the shelf away from the wall and, upon opening the shelf, found (1) a bag of fentanyl, (2) a bag of powder cocaine, (3) a bag of crack cocaine, (4) a bag of cocaine, (5) pressed fentanyl tablets, and (6) residual powder.

In addition to the drugs located in defendant's residence, investigators also found, *inter alia*, a digital scale, razor blades, Ziploc bags, and some Pyrex dishes containing a residue that later tested positive as being cocaine base—all items law enforcement believed to be evidence of drug crimes.

Defendant was arrested on 9 September 2021 and on 13 September 2021, defendant was charged in two separate indictments: in Cabarrus County file number 21 CRS 53444, defendant was charged with trafficking in cocaine by possessing more than 400 grams (count I), trafficking opium or heroin by possessing more than four but less than fourteen grams (count II), and manufacturing cocaine (count III); in Cabarrus County file number 21 CRS 53445, defendant was charged with maintaining a vehicle or dwelling place for keeping or selling controlled substances (count I), and possession of drug paraphernalia (count II). On 25 October 2021, defendant was charged through a superseding indictment in 21 CRS 53444 with trafficking by possession between 200 and 399 grams of cocaine (count I), trafficking

by possession more than four but less than fourteen grams of opium (count II), manufacturing cocaine base by cooking hydrochloride cocaine (count III), and possession of more than twenty-eight grams of opioid (count IV).

Defendant's case came on for trial on 31 July 2023. The jury subsequently found defendant guilty of trafficking in cocaine, trafficking in opioids, manufacturing cocaine, maintaining a building for the purpose of unlawfully keeping controlled substances, and possessing drug paraphernalia. The trial court sentenced defendant, as a prior record level V, to 225 to 282 months in prison for trafficking in opioids, as well as a consecutive sentence of 70 to 93 months in prison in a separate judgment which consolidated the remaining charges. Defendant gave oral notice of appeal in open court.

II. Discussion

A. Motion to Dismiss

On appeal, defendant first contends that the trial court erred by denying his motion to dismiss the trafficking in opioid charge because the State presented no evidence that defendant possessed opioid, and there was, therefore, a fatal variance between the indictment and the evidence presented during defendant's trial. We conclude that the trial court did not err in denying defendant's motion to dismiss, and that defendant's fatal variance argument lacks merit.

This Court reviews 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). "In doing so, 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 defendant[] being the perpetrator of such offense.” *Id.* (internal quotation marks and citation omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (internal quotation marks and citation omitted). Furthermore, when a trial court considers a 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.” *Id.* (citation omitted).

Here, defendant was indicted for, *inter alia*, trafficking opium or heroin in violation of N.C. Gen. Stat. § 90-95, which states that

[a]ny 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 (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as ‘trafficking in opium, opiate, opioid, or heroin[.]’

N.C. Gen. Stat. § 90-95(h)(4) (2023). Under North Carolina law, fentanyl is included in the list of “opiates or opioids” that fall within Schedule II of the North Carolina Controlled Substances Act (Controlled Substances Act). N.C. Gen. Stat. § 90-90(2)(h) (2023). Moreover, fentanyl derivatives are a subcategory of “opiates or opioids” that

fall within Schedule I of the Controlled Substances Act. N.C. Gen. Stat. § 90-89(1a). Therefore, fentanyl—and its derivatives—are opioids that fall squarely within the meaning of N.C. Gen. Stat. § 90-95.

During trial, the State presented sufficient evidence that defendant possessed more than twenty-eight grams of opioid. The State called Detective Gonzales as a witness. Gonzales testified about (1) being the lead investigator during the search of defendant's residence, (2) finding, *inter alia*, the bag of fentanyl (State's Exhibit 11A) and fentanyl tablets (State's Exhibit 11E) inside the hidden compartment of the floating shelf in defendant's home gym, and (3) fentanyl being a synthetic opioid.¹ The State also presented witness testimony from Brittnee Meyers (Meyers)—an expert in forensic drug chemistry—who was responsible for testing and analyzing the contraband seized during the search of defendant's home. While Meyers was testifying, the State introduced and published to the jury State's Exhibits 15 and 16—lab reports containing the results of Meyers' testing. State's Exhibit 15 indicated that "Item 1" was found to contain more than 164 grams of fentanyl and ANPP.² State's Exhibit 15 also indicated that 1 of the 117 round, pink tablets was tested, and the test results confirmed that the tablet contained para-fluorofentanyl³ and fentanyl.

¹ State's Exhibits 11A through 11F were photographs of the drug paraphernalia and contraband seized during the search of defendant's house and were admitted into evidence.

² Meyers testified that ANPP is a precursor chemical used in the manufacturing of fentanyl, and during the synthesis process some of the ANPP does not get fully converted and is left behind. Moreover, ANPP is a Schedule II opiate or opioid. N.C. Gen. Stat. § 90-90(2)(h1).

³ Para-fluorofentanyl is a Schedule I opiate or opioid. N.C. Gen. Stat. § 90-89(1)(qq).

Moving on to State's Exhibit 16, 26 of 116 of the round, pink tablets were resubmitted "in order to have more analysis performed on more tablets," and the results indicated that, based on "a hypergeometric sampling plan with 95% confidence that at least 90% of the round, pink tablets, contain[ed]" para-, meta-, or ortho-fluorofentanyl (fentanyl derivative),⁴ and fentanyl. The pink, round tablets weighed more than eight grams.

Therefore, the State presented evidence which established that defendant possessed approximately 172 grams (combined weight of the fentanyl powder and fentanyl tablets) "of opium, opiate, opioid, or any salt, compound, derivative, or preparation of opium, opiate, or opioid[.]" N.C. Gen. Stat. § 90-95(h)(4), because fentanyl and its derivatives are classified as opiates or opioids according to the Controlled Substances Act. N.C. Gen. Stat. § 90-89(1)(qq) and § 90-90(2)(h)-(h1). Moreover, defendant did not object to the proposed jury instruction regarding the trafficking in opioid charge, and the jury instruction given by the trial court matched the proposed instruction. Thus, we conclude that the trial court did not err in denying defendant's motion to dismiss the trafficking opioid charge because the State presented substantial evidence to establish each essential element of N.C. Gen. Stat.

⁴ Meyers testified that the "para-," "meta-," or "ortho-" refers to a "positional isomer." A "positional isomer is just the way the molecules are arranged on the structure itself[.]" and "depending on where the little roots sit on the molecule, determines whether or not it's a para[,] meta[,] or ortho." Regardless, "[t]he actual[]chemical of the drug is the same[,] [] just the way that [the] molecules arrange is different."

§ 90-95(h)(4), and that defendant was the perpetrator of the offense. *Summey*, 228 N.C. App. at 733, 746 S.E.2d at 406. As such, there was no fatal variance between the indictment and jury instruction.

As an alternative to his fatal variance argument, defendant raised an ineffective assistance of counsel argument. Defendant argues that his trial counsel failed to (1) specifically argue “that there was a fatal variance between the charge alleged in count IV of 21 CRS 53444” (i.e., Trafficking, Opium or Heroin in violation of N.C. Gen. Stat. § 90-95), and (2) object to the instructions for trafficking in opioid or request that the jury be instructed on the statutory definition of opioid.

However, because we have already concluded that there was no fatal variance between the count IV charge and the jury instruction given regarding this charge, defendant has necessarily failed to “demonstrate that a fundamental error occurred at trial.” *State v. Walton*, 237 N.C. App. 89, 90, 765 S.E.2d 54, 55 (2014) (citation omitted). Thus, defendant’s alternative argument lacks merit and defendant did not receive ineffective assistance of counsel based on the argument raised in his appeal.

B. Clerical Error

Defendant’s second argument is that the judgment in 21 CRS 53444 contains a clerical error. We disagree.

“A clerical error has been defined as an error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination.” *State v. Mohamed*, 205 N.C. App. 470, 484,

696 S.E.2d 724, 735 (2010) (internal quotation marks, brackets, ellipsis, and citation omitted). On appeal, when “a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.” *Id.* (internal quotation marks and citation omitted).

Here, defendant contends that the judgment for 21 CRS 53444 contains a clerical error because the “judgment reflects that the judgment is for ‘Off.’ (or offense) number 52[,]” and “[i]t is common practice for judgments to provide offense numbers whereby 51 corresponds with count I of the indictment, 52 corresponds with count II, etc.” While defendant claims that is common practice, he points to no authority that illustrates that the court *must* follow this procedure. Furthermore, the record speaks the truth. The State proceeded to trial on one count of trafficking in opioids, a unanimous jury found defendant guilty on one count of trafficking in opioids, and defendant received one valid sentence for trafficking in opioids. Thus, we decline to remand the judgment in 21 CRS 53444 because defendant has failed to establish that the judgment contains a clerical error.

III. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying defendant’s motion to dismiss the trafficking in opioids charge, and we conclude that defendant’s fatal variance argument lacked merit. Furthermore, we decline to remand defendant’s 21 CRS 53444 judgment because he failed to establish a clerical

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error. Accordingly, we conclude defendant received a fair trial, free of reversible error.

NO ERROR.

Chief Judge DILLON and Judge MURPHY concur.

Report per Rule 30(e).