Cite as 2024 Ark. App. 63

ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-23-281

GEORGE FOWLER APPELLANT V. STATE OF ARKANSAS APPELLEE	Opinion Delivered January 31, 2024 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, GREENWOOD DISTRICT [NO. 66GCR-22-99] HONORABLE STEPHEN TABOR, JUDGE AFFIRMED; REMANDED TO CORRECT SENTENCING ORDER

WENDY SCHOLTENS WOOD, Judge

George Fowler appeals the Sebastian County Circuit Court sentencing order convicting him of possession of methamphetamine with purpose to deliver, possession of drug paraphernalia, and possession of marijuana and sentencing him to an aggregate of sixty-six years' imprisonment. In addition to challenging the sufficiency of the evidence to support the convictions, Fowler argues that the circuit court erred in allowing the testimony of a drug-task-force officer during the sentencing hearing. We affirm.

On April 22, 2022, officers with the Barling Police Department conducted a traffic stop of a vehicle occupied by Fowler and Mona Gray. Methamphetamine, paraphernalia, and marijuana were discovered during the stop, and additional methamphetamine was subsequently found at Fowler's home. Fowler was charged as a habitual offender with possession of methamphetamine with the purpose to deliver pursuant to Arkansas Code

Annotated section 5-64-420(b)(3) (Supp. 2023) (greater than 10 grams but less than 200 grams), possession of drug paraphernalia (second offense) pursuant to Arkansas Code Annotated section 5-64-443(a)(2) (Supp. 2023), and possession of marijuana pursuant to Arkansas Code Annotated section 5-64-419(b)(5)(A) (Supp. 2023) (less than four ounces).

Prior to the jury trial, the court heard arguments on Fowler's motion in limine, which sought to prevent the State from introducing evidence seized at his home following the traffic stop. He argued that the drugs found at his home were "too attenuated both temporally and geographically" from the traffic stop. The State argued that testimony would reveal that the drugs found at the home were all part of the same crime. As the result of counsel's statements of the anticipated testimony, the court reserved a ruling until it heard the testimony at trial but indicated that if "those are the facts, then I expect it will be admissible." After the State announced that it planned to reference those facts in its opening statement, the circuit court stated, "Okay. Well, I think you can – if you have stated the facts correctly, then it would be – those facts would be admissible at trial."

At trial, Officer Joshua Aden of the Barling Police Department testified that drug-task-force officers contacted him about stopping a vehicle. The vehicle was stopped after the driver, Gray, failed to use a turn signal. When Officer Aden approached the vehicle, he saw Fowler digging though Gray's purse. Officer Aden said that after Gray exited the vehicle, she initially denied having any illegal narcotics on her person but then pulled marijuana from her back pocket. Officer Aden testified that Gray said she was scared and did not want to get in trouble, at which time she pulled a bag of methamphetamine from the front of her

pants, stating that Fowler had placed the bag there when they were getting pulled over. Officer Aden said that Gray again denied that there were any other drugs in the car but later said there was marijuana. During a search of the vehicle, a bag of marijuana was discovered in the center console, and a pipe was found in Gray's purse. Officer Aden testified that Gray said she had lied to the officers because she was scared, did not want to get in trouble, and did not want Fowler to hurt her. Officer Aden said that Gray told the officers that there were more narcotics at Fowler's home. Fowler was transported to the Sebastian County Detention Center, and Gray went with the drug-task-force officer to Fowler's home.

Reserve Officer Hunter Bruce, who was working with Officer Aden, testified that Fowler was rummaging through a bag in his lap when they initiated the traffic stop. Officer Bruce stated that Fowler looked at him, immediately locked the door, refused to show his hands, and would not identify himself once he was removed from the vehicle.

Gray, who married Fowler the month before the trial, testified that she moved into Fowler's home in Lavaca about a month before the traffic stop, but they were not in a romantic relationship at that time. Gray explained that after lunch on April 22, she and Fowler went to several stores before going to the Emily Hotel to see a friend named Bruno. There, she saw Fowler had methamphetamine on a scale but was unaware he had drugs on him prior to that time. They returned home to cook dinner. Gray said that as they left home to take dinner to Bruno at the hotel, Fowler handed her a black zippered bag and told her to put it in the wheel well of a white car in the yard. Gray claimed she did not know what was in the bag and had never seen it. After she had put the bag in the wheel well, she then

drove back to the hotel with Fowler in the passenger seat. While at the hotel this second time, Gray saw Fowler hand something to Bruno and heard a discussion about money.

Gray testified that when they left the hotel, she was pulled over after turning onto the highway. She explained that as they were getting pulled over, Fowler told her that she needed "to hold something and lifted [her] shirt and put a bag down [her] pants." She was unaware of what Fowler put down her pants. Gray acknowledged that when police first asked, she denied there were drugs in the car, explaining that she was scared because Fowler had been physical with her in the past. She said that when asked again, she pulled out a "big, plastic bag" of what looked like methamphetamine. Gray also said that she told the officers there was marijuana in the console that belonged to her; however, she could not recall what she pulled out of her pocket. Gray further testified that the officers asked her if there were any drugs back at the house, and she told them yes. She stated that as Fowler was putting the bag of methamphetamine down her pants, he told her that there were two more ounces of methamphetamine at the house. She returned to the house with the officers and retrieved the black zippered bag from the wheel well of the car, which was not operational.

On cross-examination, Gray acknowledged pulling a small bag of "weed" from her pocket. She admitted lying to police multiple times during the encounter but said that the third time they asked whether there were any drugs, she got nervous and "pulled everything out." When asked about telling the officers that she did not see Fowler sell "dope" to Bruno, Gray claimed that she never saw them exchange money. As to her relationship with Fowler,

she said that it became romantic after he bonded her out of jail, he begged her not to testify against him, and she promised she would not.

Lieutenant Stephen Becker of the Barling Police Department testified that he was at the hotel when he saw Fowler and Gray park the car, get out, go into the hotel, and leave after a short period of time. Lieutenant Becker was personally familiar with the hotel because it was known for drug activity, and he surveilled the hotel a couple of times a month. He said that he alerted Officer Aden that if he could get probable cause, it may be a "decent stop." Lieutenant Becker and another officer went to the subsequent traffic stop. Lieutenant Becker said that he saw Officer Bruce having trouble with Fowler's noncompliance, so he stepped in to assist. Like the other officers, Lieutenant Becker said that Gray initially denied having anything illegal on her, but then she ended up giving him marijuana, which she pulled from her front pocket. When asked if she had anything else illegal, Gray told Lieutenant Becker no. Lieutenant Becker testified that after he Mirandized her, Gray removed a bag from her underwear, which he described as a bag containing two smaller bags of methamphetamine. Lieutenant Becker said Gray told them that Fowler made her put it in her pants as they were being pulled over and that there were more drugs that belonged to Fowler back at the residence.

After Gray told them about the drugs at the residence, Lieutenant Becker said they called Deputy Coby Miner of the Sebastian County Sheriff's Department Drug Task Force, who met them at the house. Lieutenant Becker drove Gray's car to the house. When he arrived, Gray and the officers were already at the parked car where Gray had retrieved the

drugs. Lieutenant Becker stated that there were several baggies of what appeared to be methamphetamine, "brownish-looking tar stuff in tin foil, and a bunch of packages of pills that [were] packaged by group." Lieutenant Becker said that, in his experience, the amount and the individual packaging of the drugs were indicative of distribution of narcotics as opposed to personal use.

Officer Dalton Waggoner with the Barling Police Department testified that he was working drug interdiction on April 22 and watching the Emily Hotel, which was known for drug activity. Like Lieutenant Becker, he watched Fowler and Gray pull up, go inside briefly, and return to the vehicle. Once he arrived at the traffic stop, he also saw that Fowler was not complying with officers. Officer Waggoner's account of the interaction with Gray was virtually identical to Lieutenant Becker's. He added that he heard Gray say that there were two more ounces of methamphetamine that belonged to Fowler at their house. With Gray in his vehicle, he and Deputy Miner drove to the residence, where she pulled a black zippered bag out of the wheel well. Officer Waggoner said the bag contained three or four separate baggies of what appeared to be methamphetamine. The tags on the car where the black zippered bag was found was registered to Dana Fowler. Officer Waggoner also said that the quantity of methamphetamine was more typical of a drug dealer than for personal use.

Deputy Miner of the Sebastian County Sheriff's Department testified that he was assigned to the drug task force on April 22 when he made contact with Fowler and Gray after the traffic stop. From his experience, he thought that the quantity of the suspected methamphetamine and the packaging was more typical of someone selling it.

Megan Kuchinski, a forensic chemist with the Arkansas State Crime Laboratory, tested the substance removed from the console of the vehicle and determined it was 27.6 grams of marijuana; the substance found in the bag taken out of Gray's pants and determined it was 17.0919 grams of methamphetamine; and the white crystalline substance found in the wheel well at the residence and determined it was 64.99 grams of methamphetamine. While there were other substances found in the vehicle and residence, they were not tested because the crime lab tests only to the highest charge.

The State presented several additional witnesses, whose testimony is not relevant to issues on the appeal, and then rested. Fowler moved for directed verdict on the charges of possession of methamphetamine with purpose to deliver and possession of drug paraphernalia. Fowler argued only that there was no evidence that he possessed the methamphetamine or the paraphernalia. He asserted that the methamphetamine found during the traffic stop was on Gray's person and that the methamphetamine found at his home was "too attenuated temporally and geographically" for Fowler to have been in possession of it on the sole basis of Gray's testimony that it belonged to him. He further argued that the baggies were found on Gray's person, the only testimony that Fowler was in possession of the baggies came from her, and she was not credible. The circuit court denied the motion. The defense rested without calling any witnesses and renewed its motion for directed verdict, which was denied.

I. *Sufficiency of the Evidence*

Fowler first challenges the sufficiency of the evidence to support the convictions for possession of methamphetamine and possession of drug paraphernalia.[1] To determine whether evidence is sufficient to support a conviction, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Walden v. State*, 2023 Ark. App. 177, at 5, 664 S.W.3d 443, 446. We affirm if the evidence is substantial. *Id.*, 664 S.W.3d at 446. Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Id.*, 664 S.W.3d at 446.

A person commits Class A felony possession of methamphetamine with purpose to deliver if he possesses more than 10 but less than 200 grams of methamphetamine with purpose to deliver. Ark. Code. Ann. § 5-64-420(a), (b)(3) (Supp. 2023). Purpose to deliver may be shown from other factors, including whether the person possesses the means to weigh, separate, or package methamphetamine; the methamphetamine is separated and packaged in a manner to facilitate delivery; or the person possesses at least two other controlled substances in any amount. Ark. Code. Ann. § 5-64-420(a)(1), (3), (5). A person commits Class D felony possession of drug paraphernalia if the person possesses the drug paraphernalia with the purpose to use the drug paraphernalia to inject, ingest, inhale, or

[1]Although Fowler's point on appeal mentions the marijuana conviction, he makes no argument pertaining to it. Moreover, any sufficiency argument for the marijuana conviction is not preserved because Fowler failed to address it in his motion for directed verdict. *Garner v. State*, 2020 Ark. App. 101, at 3, 594 S.W.3d 145, 148.

otherwise introduce into the human body a controlled substance or to store, contain, conceal, or weigh a controlled substance if the controlled substance is methamphetamine. Ark. Code. Ann. § 5-64-443(a)(2)(A).

Fowler challenges the sufficiency of the evidence on appeal by first pointing out that at the traffic stop, the drugs and paraphernalia were found on Gray and that Gray lied to the officers multiple times at the stop; therefore, she lacked credibility. He then argues that to prove that he possessed the drugs and paraphernalia, the State had to boost Gray's credibility by introducing evidence of the methamphetamine and paraphernalia found in the disabled car at his home. He further contends that "the [c]ircuit court extended the allowed testimony of [Gray] so far that it went beyond its purpose, and instead, was used to bol[ster] her credibility on the witness stand . . . ."

While Fowler's stated point on appeal is a challenge to the sufficiency of the evidence, in the discussion in his brief, he conflates the sufficiency argument with an evidentiary argument. These are two separate arguments. And Fowler's "evidentiary challenge" to the admissibility of the methamphetamine and paraphernalia found at his home is not well taken. He makes no reference to the standard of review applicable to an evidentiary challenge. He does not state that the circuit court erred in denying his motion in limine. Thus, to the extent that Fowler raises an evidentiary argument, we hold that he fails to develop it or cite convincing authority in support of it, and we affirm. *Pokatilov v. State*, 2017 Ark. 264, at 12, 526 S.W.3d 849, 858 (affirming one of the appellant's points on appeal

because he neither developed his argument nor cited convincing authority in support of his assertion; the court stated it "will not develop arguments for parties").

Turning to Fowler's sufficiency argument, he contends that there is a lack of substantial evidence to support his convictions because Gray was not credible, explaining that the State's case hinged on her credibility. It is well settled that the credibility of witnesses is an issue for the jury and not this court. *Cluck v. State*, 365 Ark. 166, 171, 226 S.W.3d 780, 784 (2006). The jury is responsible for weighing the evidence and assessing the credibility of witnesses. *Jenkins v. State*, 2020 Ark. App. 45, at 5, 593 S.W.3d 51, 54. The jury may believe all or part of any witness's testimony and is responsible for resolving questions of conflicting testimony and inconsistent evidence. *Id.*, 593 S.W.3d at 54.

Here, the evidence demonstrated that Fowler physically possessed the methamphetamine and baggies used to store the methamphetamine. Gray testified that after the police activated their blue lights, Fowler shoved the methamphetamine, which was packaged in plastic bags, into her pants. This package consisted of several plastic bags and contained over seventeen grams of methamphetamine. The package retrieved from the wheel of the car at Fowler's home, which Gray placed there at Fowler's request, contained more bags and over sixty grams of methamphetamine. In *Warren v. State*, 2010 Ark. App. 226, at 2, this court held that testimony of the passenger in Warren's car that she saw Warren throw contraband out the window during a police chase was sufficient to show that Warren had actual possession of cocaine, noting that the inconsistencies in the passenger's testimony were for the jury to resolve. *Id.* at 2. The jury was entitled to believe Gray's testimony that

Fowler possessed the drugs and paraphernalia. *Stuart v. State*, 2020 Ark. App. 131, at 5–6, 596 S.W.3d 552, 555. Considering the evidence in the light most favorable to the State, we hold that substantial evidence supports the verdicts.

II. *Sentencing Hearing*

After introducing Fowler's prior convictions, the State called Commander Cody Elliott to testify during the sentencing phase about the harm caused to the community by drug dealers. Fowler objected that Commander Elliott was not involved in this or any other case involving Fowler and had nothing relevant to offer the jury concerning sentencing Fowler "regarding these circumstances or his history." The circuit court allowed the testimony, indicating that it was "routine" in its jurisdiction.

On appeal, Fowler contends that the circuit court erred in allowing Commander Elliott's testimony during the sentencing phase of trial because it exceeded the scope of Arkansas Code Annotated section 16-97-103 (Supp. 2023). Although the State argues that Fowler failed to preserve his argument by not referencing section 16-97-103 at trial, we disagree. Fowler objected to the relevancy of Commander Elliott's testimony, and the statute itself addresses evidence that may be relevant in a sentencing hearing.

The plain language of section 16-97-103 indicates that, while evidence introduced during the sentencing phase may include the expressly listed evidence, the list is not exhaustive. Ark. Code Ann. § 16-97-103 ("may include, but is not limited to"); *Crawford v. State*, 362 Ark. 301, 305, 208 S.W.3d 146, 149 (2005). In other words, the circuit court is not obligated to limit evidence during the sentencing phase to only those categories listed

under section 16-97-103. *Crawford*, 362 Ark. at 305, 208 S.W.3d at 149. It has been held that our rules of admissibility and exclusion must govern the introduction of evidence in the sentencing phase of trial, but is has also been stated that, pursuant to section 16-97-103, certain evidence is admissible at sentencing that would not have been admissible at the guilt phase of the trial. *Id.* at 306, 208 S.W.3d at 149.

We review a circuit court's decision to admit evidence in the sentencing phase of a trial for an abuse of discretion. *Gillean v. State*, 2015 Ark. App. 698, at 28, 478 S.W.3d 255, 272. We will reverse a sentencing decision only if the defendant can show that he was prejudiced by the erroneously admitted evidence. *Id.*, 478 S.W.3d at 272.

Fowler asserts that Commander Elliott's testimony does not fall within the parameters of what is allowed during the sentencing phase in a criminal trial and was so prejudicial and inflammatory that his case should be remanded for a new sentencing hearing. The State responds that Fowler cannot establish prejudice because he was not sentenced to the maximum sentence. A defendant who is sentenced within the statutory range—and short of the maximum sentence—cannot establish prejudice. *Tate v. State*, 367 Ark. 576, 583, 242 S.W.3d 254, 260–61 (2006) (declining to decide alleged sentencing-phase error because the defendant received less than the maximum sentence and therefore could not establish a prejudicial error). The State asserts that because Fowler's sentences did not also include a fine, which would have been permissible, he was not given the maximum sentence. We agree.

See Wilcoxon v. State, 2022 Ark. App. 458, at 16, 655 S.W.3d 686, 697[2] (stating that although Wilcoxon was sentenced to the maximum term of imprisonment for his criminal-attempt conviction, he was not also ordered to pay a fine; therefore, Wilcoxon was not sentenced to the maximum sentence allowable for the offense); *see also State v. Smith*, 368 Ark. 620, 624, 249 S.W.3d 119, 122–23 (2007) (holding that Smith could not show prejudice from the sentence itself where she was sentenced to a term of 180 months in prison and a fine of $7,500, and the maximum sentence she could have received for the offense was twenty years in prison and a $15,000 fine); *Swint v. State*, 356 Ark. 361, 365–66, 152 S.W.3d 226, 229 (2004) (holding that the defendant could not establish prejudice from the sentence itself where he was sentenced to five years in prison and a fine of $1,000 and the statutory range permitted a sentence of one to six years in prison and a fine of $900 to $5,000).

As a habitual offender having committed four or more felonies, the maximum sentence for possession of methamphetamine with purpose to deliver as charged was sixty years' imprisonment and a fine not to exceed $15,000, and the maximum sentence for possession of drug paraphernalia was six years' imprisonment and a fine not to exceed $10,000.[3] The maximum sentence for the marijuana offense as charged was up to one year in prison and a fine not to exceed $2500. Here, the jury sentenced Fowler to the maximum terms of imprisonment for his convictions, but it did not sentence him to pay any fines.

[2]Petition for review denied on January 26, 2023.

[3]A defendant convicted of a Class A felony, a Class D felony, or a Class A misdemeanor may be sentenced to pay a fine not to exceed $15,000, $10,000, or $2,500, respectively. Ark. Code Ann. § 5-4-201 (Repl. 2013).

Because Fowler was not sentenced to the maximum allowable, he cannot establish prejudice from the admission of Commander Elliot's testimony during sentencing. Therefore, we do not reach the merits of his sentencing-hearing argument.

III. *Sentencing Order*

Finally, we note that there is a clerical error in the sentencing order. Fowler was charged as a habitual offender with four or more prior felony convictions. These convictions were introduced at the sentencing hearing, and the jury sentenced Fowler as a habitual offender. However, the boxes on the sentencing order that would indicate Fowler was sentenced as a habitual offender are not checked. The circuit court is free to correct a clerical error to have the judgment speak the truth. *Carter v. State*, 2019 Ark. App. 57, at 17, 568 S.W.3d 788, 798. Thus, we affirm Fowler's convictions but remand to the circuit court with instructions to correct the sentencing order.

Affirmed; remanded to correct sentencing order.

VIRDEN and GLADWIN, JJ., agree.

Dusti Standridge, for appellant.

Tim Griffin, Att'y Gen., by: *Joseph Karl Luebke*, Ass't Att'y Gen., for appellee.