NO. COA11-385
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v. Columbus County
No. 09 CRS 054038, 40-44, 46

KERMIT BERNARD WOOTEN

Appeal by defendant from judgments entered 4 October 2010 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 28 September 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General, Kathleen W. Waylett, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender, Anne M. Gomez, for defendant-appellant.

STEELMAN, Judge.

While it was error for the trial court to admit the search warrant and accompanying affidavit at trial, this did not rise to the level of plain error. The failure of defendant's counsel to object to the admission of the search warrant did not constitute ineffective assistance of counsel. Testimony by a deputy that the issuance of a search warrant required a finding

of probable cause by a judicial official did not rise to the level of plain error. The trial court did not err in denying defendant's motion to dismiss a charge of sale of cocaine where the informant paid defendant for the cocaine, but it was delivered to him by a third person. The jury's verdict was not ambiguous or subject to challenge on the grounds of lack of unanimity where the trial court failed to advise the jury as to the alleged date of one of the offense. There was sufficient evidence presented by the State for the charge of knowingly keeping or maintaining a dwelling for purposes of selling cocaine to be submitted to the jury. A deputy's testimony that defendant resided at a certain location did not rise to the level of plain error. The admission of evidence of firearms located at the residence did not rise to the level of plain error.

I. Factual and Procedural History

In 2009 James Kevin Pittman (Pittman) became a confidential informant for the Columbus County Sheriff's Department (Department). As a confidential informant, Pittman made a series of controlled purchases of crack cocaine from Kermit Wooten (defendant).

The first of these purchases took place on 3 November 2009. On that date, William Heath Little (Little), a narcotics investigator for the Department and another deputy met Pittman at a predetermined location. A thorough search of Pittman and his vehicle was conducted to insure that Pittman did not have any contraband. Defendant was equipped with a digital recorder to monitor his conversations. Little followed defendant to 585 McMillan Road (the residence), and watched as defendant pulled into the driveway. Pittman then purchased cocaine from Monique Powell (Powell), a woman with whom defendant had a romantic relationship. Pittman obtained defendant's telephone number, and told Powell to tell defendant that he would "get up with him." Pittman then met Little at a predetermined location, where Pittman and the vehicle were again searched, the cocaine Pittman had purchased was collected as evidence, and the digital recorder was returned to the Department.

On 5 November 2009, Pittman went back to the residence after following the same procedures, and purchased cocaine from defendant.

On 6 November 2009, Pittman placed two telephone calls to defendant. After determining that defendant was at home,

Pittman proceeded to the residence, where he made a controlled buy.

Another controlled buy was made on 9 November 2009. Pittman called defendant to let him know he was coming to the residence. When Pittman arrived defendant was working on four wheelers in the front yard. Defendant took Pittman's money, made a telephone call, told someone to get a "forty" ready, and instructed Pittman to go to the door of the residence to get the cocaine. Powell handed Pittman the cocaine.

On 12 November 2009, Pittman went to the residence, but no one was home. Pittman called defendant, and was told to meet him at Newman's Grocery. Pittman purchased cocaine from defendant there.

On 17 November 2009, Pittman called defendant to set up another buy. When Pittman arrived at the residence he purchased the cocaine from Powell.

Pittman made additional controlled buys of cocaine from defendant at the residence on 18 and 23 November 2009 and 1 December 2009.

On 3 December 2009, a search warrant was obtained for the residence. A controlled buy was made by Pittman from defendant.

Following the buy, defendant was detained and the search warrant was executed by the Sheriff's Department.

On 10 December 2009, defendant was indicted for sale and delivery of cocaine on 18 November 2009 in file number 09 CRS 054037; sale of cocaine on 5 November 2009 in file number 09 CRS 054038; sale of cocaine on 6 November 2009 in file number 09 CRS 054039; sale of cocaine on 9 November 2009 in file number 09 CRS 054040; sale of cocaine on 12 November 2009 in file number 09 CRS 054041; sale of cocaine on 23 November 2009 in file number 09 CRS 054042; sale of cocaine on 1 December 2009 in file number 09 CRS 054043; knowingly and intentionally keeping and maintaining a dwelling house at 585 McMillan Road (the residence) for keeping and selling cocaine on 3 December 2009 in file number 09 CRS 054044; felony possession of cocaine on 3 December 2009 in file number 09 CRS 054045; solicitation to commit the felony of selling and delivering cocaine on 9 November 2009 in file number 09 CRS 054046; and for being an habitual felon in file number 09 CRS 2782.

On 1 October 2010, the jury found defendant not guilty of the sale and delivery of cocaine in file number 09 CRS 054037; not guilty of the sale of cocaine in file number 09 CRS 054039; guilty of the sale of cocaine in file numbers 09 CRS 054038, 40,

41, 42, and 43; guilty of the lesser included offense of knowingly keeping and/or maintaining a dwelling for selling cocaine in file number 09 CRS 054044; not guilty of felony possession of cocaine in file number 09 CRS 054045; and guilty of solicitation to commit a felony in file number 09 CRS 054046. On 4 October 2010, the jury found defendant to be an habitual felon. On 4 October 2010, the trial court sentenced defendant as a prior felony record level III to a term of 100 to 129 months imprisonment for the sale of cocaine as an habitual felon in file number 09 CRS 054038. Another sentence of 100 to 129 months imprisonment was imposed for the sale of cocaine as an habitual felon in file number 09 CRS 054040. A third judgment imposed a sentence of 100 to 129 months imprisonment as a consolidated judgment for three counts of the sale of cocaine and one count of knowingly maintaining a dwelling for selling cocaine (a misdemeanor) in file numbers 09 CRS 054041, 42, 43, and 44 as an habitual felon. The three sentences were to be served consecutively.

Defendant appeals.

II. Admission of Search Warrant

In his first argument, defendant contends that the trial court committed plain error when it admitted the search warrant

and the supporting affidavit into evidence and allowed them to be published to the jury. In the alternative, defendant contends that his counsel was ineffective. We disagree.

A. Search Warrant

i. Standard of Review

Defendant failed to object to this evidence at trial. Our review of this argument is thus limited to plain error.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4). "In order to show plain error, a defendant must show that absent the error the jury probably would have reached a different verdict." *State v. Riley*, 159 N.C. App. 546, 551, 583 S.E.2d 379, 383 (2003) (quotation omitted). Plain error only applies when "the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation omitted) (emphasis in original).

ii. Analysis

The search warrant contained information about a confidential informant who provided Little with information and made controlled buys on behalf of the Department in October 2009, information about Pittman and his controlled buys, defendant's prior criminal record, and Little vouching for Pittman's credibility. "It is error to allow a search warrant together with the affidavit to obtain search warrant to be introduced into evidence because the statements and allegations contained in the affidavit are hearsay statements which deprive the accused of his rights of confrontation and cross-examination." *State v. Spillars*, 280 N.C. 341, 352, 185 S.E.2d 881, 888 (1972) (citation omitted). However, Pittman, Little, and other law enforcement officers involved in the investigation testified extensively at trial, assuring defendant's right to confrontation and cross-examination.

The only evidence contained in the search warrant that was not independently testified to and subject to cross-examination by defendant was that relating to the purchases made in October by another confidential informant and defendant's prior record. We hold that admission of this evidence does not rise to the level of plain error. The evidence of defendant's guilt was

overwhelming. Defendant was repeatedly recorded selling cocaine to Pittman, and the search of the residence produced evidence corroborating defendant's involvement in the sale of cocaine. The erroneous admission of the defendant's prior record and information about the October confidential informant did not rise to the level "that absent the error the jury probably would have reached a different verdict." *Riley*, 159 N.C. App. at 551, 583 S.E.2d at 383 (quotation omitted).

B. Ineffective Assistance of Counsel

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

As stated above, overwhelming evidence was presented of defendant's guilt at trial. Defendant was repeatedly recorded selling cocaine to Pittman, and the search of the residence

produced evidence corroborating defendant's involvement in the sale of cocaine. Based on this overwhelming evidence of guilt, any deficiency in the assistance provided to defendant by his counsel could not have affected the outcome of the trial and was not "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.***

This argument is without merit.

III. Finding of Probable Cause

In his second argument, defendant contends that the trial court erred by allowing Lieutenant Steve Worthington of the Columbus County Sheriff's Office to testify that the issuance of a search warrant means that a judicial official has found probable cause. We disagree.

Defendant argues that we may review this argument ***de novo***, because N.C. Gen. Stat. § 15A-1446(d)(14) provides for "appellate review even though no objection, exception or motion has been made in the trial division" when "[t]he court has expressed to the jury an opinion as to whether a fact is fully or sufficiently proved." However, "there is a material difference between the impact on the jury of evidence that a trial judge believed that the State's evidence was 'trustworthy and reliable' and evidence that the actions of the investigating

officers were supported by 'probable cause.'" *State v. Wade*, 198 N.C. App. 257, 273, 679 S.E.2d 484, 493 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 662, 686 S.E.2d 153 (2009). Further, the judge who signed the search warrant was not the same judge who presided over the trial. We hold that N.C. Gen. Stat. § 15A-1446(d)(14) does not apply in the instant case. Since no objection was made to this testimony during the trial, we review this argument for plain error.

We hold that any error in the admission of this testimony did not rise to the level of plain error. The testimony in question is as follows:

> Q. (State) Can you tell the jury how you go about procuring and executing [a search warrant]?
>
> A. (Lieutenant Worthington) Basically in the beginning of the investigation, we begin to try to attempt to gather up what's called probable cause. Once we have reached the burden of probable cause, that's when we would go before a judicial official, whether it be his Honor or a magistrate official, if he's not available, and have them go through and see what kind of evidence we may have at that point, and then they find either probable cause to sign this search warrant for us and let it be executed or denied.

This testimony did not even directly address whether or not any judge or magistrate had found probable cause in the instant case. Rather, the jury was left to infer from the issuance of a

search warrant that at some point a judge or magistrate had found probable cause in the instant case. Any error in the admission of this testimony did not rise to the level of plain error. As discussed previously in this opinion there was other overwhelming evidence of defendant's guilt. In light of this other evidence, absent Lieutenant Worthington's testimony, it is highly unlikely the jury would have reached a different verdict; therefore, any error did not rise to the level of plain error. *Riley*, 159 N.C. App. at 551, 583 S.E.2d at 383.

This argument is without merit.

IV. Motion to Dismiss Charge of Selling Cocaine

In his third argument, defendant contends that the trial court erred in denying defendant's motion to dismiss the charge of selling cocaine under N.C. Gen. Stat. § 90-95(a)(1) on 9 November 2009, file number 09 CRS 054040. We disagree.

A. Standard of Review

> 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.
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> . . . .
>
> In reviewing challenges to the sufficiency

> of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000) (quotation and citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

B. Analysis

On 9 November 2009, Pittman went to the residence. When Pittman arrived, defendant was working on four wheelers in the front yard. Defendant took Pittman's money, made a telephone call, told someone to get a "forty" ready, and instructed Pittman to go to the door of the residence to get the cocaine. Powell handed Pittman the cocaine at the door of the residence. Defendant argues that because the evidence showed that Powell, not defendant, transferred the cocaine, there is insufficient evidence that defendant sold cocaine to Pittman on 9 November 2009.

We first of all note that defendant was convicted of the sale of cocaine, not its delivery. *See State v. Freeman*, ___ N.C. App. ____, ____, 690 S.E.2d 17, 20 (2010), *disc. review improvidently allowed*, 365 N.C. 4, 705 S.E.2d 734 (2011).

We hold that the case of *State v. Fletcher*, 92 N.C. App. 50, 373 S.E.2d 681 (1988), is controlling. In *Fletcher* the defendant provided an undercover officer, Biggerstaff, with marijuana and alcohol.

> Biggerstaff then asked the defendant what he wanted for the "stuff" and the defendant replied that he did not want to sell it but would give it to her. Defendant's son, Bill, however, insisted that the merchandise was worth fifty dollars and Biggerstaff then gave a one-hundred dollar bill to Bill and Bill returned fifty dollars to her. Bill then passed the one-hundred dollar bill to the defendant. The defendant did not try to give Biggerstaff any money back after Bill had handed her the fifty dollars in change.

Id. at 52, 373 S.E.2d at 683.

In upholding the trial court's denial of defendant's motion to dismiss the charge of selling marijuana, this Court held:

> A sale in the context of this statute is a "*transfer* of property for a specified price payable in money." *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985) (emphasis in original) (*quoting State v. Albarty*, 238 N.C. 130, 132, 76 S.E.2d 381, 383 (1953)). The evidence shows defendant brought marijuana from his house to the place where Biggerstaff was waiting, knew she wanted to buy the marijuana, received fifty dollars in cash proceeds for the marijuana, and at no time made any verbal or physical efforts to return or reject the money. This evidence . . . taken in the light most favorable to the State, is sufficient to justify submitting the case to the jury on this charge.

Id. at 58, 373 S.E.2d at 686-87.

In the instant case, as in *Fletcher*, defendant did not directly exchange money for cocaine with Pittman. However, defendant was aware that Pittman was coming to his residence to purchase cocaine, defendant accepted money for the purchase of the cocaine, and facilitated the transfer of cocaine from his residence to Pittman. This evidence taken in the light most favorable to the State was sufficient to submit the charge of sale of cocaine on 9 November 2009 to the jury.

This argument is without merit.

V. Jury Unanimity

In his fourth argument, defendant contends that the trial court erred by failing to instruct the jury on the date associated with case number 09 CRS 054038 in response to a question by the jury. We disagree.

In the initial jury instructions, the trial court instructed the jury upon the charges without cross-referencing the case numbers with the dates of alleged offenses. After beginning deliberations the jury requested clarification as to the alleged dates for the various case numbers for all cases except 09 CRS 054037 (sale and delivery of cocaine on 18 November 2009). After conferring with counsel, the trial court

gave additional instructions on the dates corresponding to case numbers 09 CRS 054039-46, but failed to give any instructions pertaining to 09 CRS 054038. Defendant now contends that the jurors may have used different acts of selling cocaine to find defendant guilty in 09 CRS 054038, and that the verdict in that case was ambiguous. Specifically, defendant contends that

> the jury found [defendant] not guilty in case 09 CRS 54037 and guilty in case 09 CRS 54038. Because the jury instructions and verdict sheets did not link conduct on any particular dates to cases 09 CRS 54037 and 54038, there is no way to know what alleged conduct [defendant] was found not guilty of and what he was found guilty of for those charges. Thus, even if unanimous, the jury could have found [defendant] guilty of some conduct in 09 CRS 54038 that did not correspond to the allegations in the indictment.

We hold that there is nothing ambiguous about the jury's verdict in this case, and that there is no question about the jury's unanimity. First, the jury did not ask for an instruction as to the offense date associated with case number 09 CRS 054037; therefore, we can infer that the jury was clear as to what conduct was at issue in that case. Second, the jury received an instruction as to the offense dates for all the remaining case numbers with the exception of 09 CRS 054038. Having established all the other offense dates associated with

the particular case numbers, the jury could have readily determined the offense date associated with 09 CRS 054038 by process of elimination. The fact that the jury was able to satisfactorily determine the conduct in question in case number 09 CRS 054038 is evident in the fact that the jury did not ask any further questions or for any further clarification about the matter. There is nothing in the record to support defendant's suspicion that the jury remained confused about the dates of the offenses after the trial court provided the additional instructions. We agree with the State that "[d]efendant is simply speculating that, because case 09 CRS 054038 was not addressed in the judge's further instruction, the jury did not know that the case charged the sale of cocaine on November 5, 2009." We hold that there is no ambiguity concerning the jury's verdict in case 09 CRS 054038, and that the jury reached a unanimous verdict in this case.

This argument is without merit.

VI. Motion to Dismiss Charge of Knowingly Maintaining a Dwelling for Selling a Controlled Substance

In his fifth argument, defendant contends that the trial court erred in denying defendant's motion to dismiss the charge of knowingly maintaining a dwelling for selling a controlled substance. We disagree.

Our standard of review for a motion to dismiss was discussed in Section IV of this opinion.

> To obtain a conviction for knowingly and intentionally maintaining a place used for keeping and/or selling controlled substances under N.C. Gen. Stat. § 90-108(a)(7), the State has the burden of proving the defendant: (1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance.

State v. Frazier, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001) (citations omitted). Defendant only challenges whether there was sufficient evidence of the first element of the offense, whether he kept or maintained the residence in question. Because defendant does not challenge the sufficiency of the evidence as to his mental state, but only whether or not he maintained the residence, the fact that he was convicted of the lesser included of knowingly maintaining the residence does not affect our analysis.

> Whether a person "keep[s] or maintain[s]" a place, within the meaning of N.C. Gen. Stat. § 90-108(a)(7), requires consideration of several factors, none of which are dispositive. Those factors include: occupancy of the property; payment of rent; possession over a duration of time; possession of a key used to enter or exit the property; and payment of utility or repair expenses.

Id. (citations omitted).

We hold that there was sufficient evidence that defendant maintained the dwelling in question. Pittman made a series of controlled buys of cocaine from defendant at the residence over the course of one month. Defendant referred to the residence as his home. Pittman also referred to the residence as defendant's home in his conversations with defendant, and defendant did not correct Pittman. Defendant worked on and kept four wheelers at the residence. Men's clothing and toiletries were found in the residence. Defendant's exercise of control over the residence and the property located thereon, in combination with defendant's presence at the residence for minimum of a month, was sufficient evidence to support a finding that defendant knowingly kept or maintained the residence. The trial court did not err in denying defendant's motion to dismiss the charge of knowingly maintaining a dwelling for selling a controlled substance.

This argument is without merit.

VII. Little's Lay Opinion Testimony

In his sixth argument, defendant contends the trial court committed plain error when it did not intervene to prevent Little from testifying that defendant resided at 585 McMillan Road, because this testimony constituted improper lay opinion

testimony and tilted the scales, causing the jury to find defendant guilty of maintaining a dwelling for selling controlled substances. We disagree.

Defendant did not object to this testimony at trial; therefore, we will review its admission for plain error as defined previously in this opinion.

We hold that even assuming ***arguendo*** the admission of this testimony constituted error, it did not rise to the level of plain error. "In order to show plain error, a defendant must show that absent the error the jury probably would have reached a different verdict." ***Riley***, 159 N.C. App. at 551, 583 S.E.2d at 383 (quotation omitted). It is highly unlikely that absent Little's testimony that defendant resided at 585 McMillan Road the jury would have reached a different verdict. As discussed in section VI of this opinion there was ample evidence aside from Little's testimony that defendant resided at 585 McMillan Road, including defendant's own references to that location as his home, Pittman's statements to defendant that defendant resided there, and defendant's failure to correct these statements, defendant's storage and maintenance of four wheelers at the location, defendant's presence at that location over the period of one month, and men's clothing at the residence. Any

error in the admission of Little's testimony did not rise to the level of plain error.

This argument is without merit.

VIII. Admission of Firearms

In his seventh argument, defendant contends the trial court erred by admitting evidence of firearms and ammunition found at the residence. We disagree.

Defendant did not object to the admission of this evidence at trial; therefore, we will review its admission for plain error.

We hold that any error in the admission of evidence of firearms and ammunition found at the residence did not rise to the level of plain error. As previously discussed, there was overwhelming evidence of defendant's guilt. Defendant sold cocaine to Pittman, predominantly at the residence, over a period of one month. These sales took place in the context of controlled buys fully monitored and recorded by the Sheriff's Department. Absent the admission of the firearms evidence it is unlikely the jury would have reached a different verdict. *Riley*, 159 N.C. App. at 551, 583 S.E.2d at 383 (quotation omitted). Any error did not rise to the level of plain error.

This argument is without merit.

NO PREJUDICIAL ERROR.

Judges HUNTER, Robert C., and McCULLOUGH concur.

Report per Rule 30(e).