NO. COA11-573
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v. Alamance County
No. 10 CRS 50563, 50564, 50565

DARNELL MAURICE THOMAS

Appeal by Defendant from judgments entered 27 October 2010 by Judge Orlando F. Hudson in Alamance County Superior Court. Heard in the Court of Appeals 27 October 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

Leslie C. Rawls, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Darnell Maurice Thomas ("Defendant") appeals his convictions for trafficking in cocaine, misdemeanor possession of marijuana, resisting a public officer, misdemeanor child abuse, and possession of a firearm by a felon. On appeal, Defendant contends that the trial court's comments to the jury interfered with the jury's deliberations and violated Defendant's constitutional right to an impartial jury.

Defendant further contends the trial court erred in denying his motions to dismiss the charges of resisting a public officer and misdemeanor child abuse. After careful review, we find no error.

I. Factual & Procedural Background

The State's evidence at trial tended to show the following. Staff Sergeant Mark Rascoe ("Sergeant Rascoe") testified that at approximately 10:23 p.m. on 28 January 2010, the Burlington Police Department received an anonymous phone call reporting child abuse at 1410 Cleveland Avenue, Apartment D3. Upon arriving at Apartment D3, Sergeant Rascoe knocked on the door and observed someone peeking through the blinds. Approximately four minutes later, Tiwala Michelle Manning opened the door. Sergeant Rascoe identified himself and asked whether she would be willing to speak with him. Ms. Manning motioned for Sergeant Rascoe to enter the apartment.

Sergeant Rascoe testified that based upon his prior experience, which includes training drug detection dogs in Burlington Police Department's K-9 unit, he immediately detected marijuana upon entering the apartment's living room. Sergeant Roscoe informed Ms. Manning the police had received a call reporting child abuse at that location. Ms. Manning responded

there was a two-year-old girl in the bedroom. Defendant entered the living room and identified himself as Donte Leray Span. Sergeant Rascoe informed Defendant he was investigating a reported child abuse and asked Defendant to see the child. As Sergeant Rascoe waited for Defendant to retrieve the child from the bedroom, he noted remnants of several marijuana cigarettes sitting in an ashtray on the living room floor. Defendant returned to the living room with a child, later identified as Defendant's daughter. The child was crying and appeared to be approximately two to three-years-old. Sergeant Rascoe inspected the child's legs, arms, back, belly, and face and found no signs of physical abuse.

At this time, Sergeant Rascoe shifted his investigation to the marijuana smoke he had detected upon entering the apartment and the marijuana cigarettes on the living room floor. Sergeant Rascoe asked Defendant's permission to search the apartment, and Defendant consented to the search. Sergeant Rascoe requested backup, and Corporal Drew Barker arrived shortly thereafter to assist Sergeant Rascoe in the search.

Corporal Barker remained in the living room with Defendant and Ms. Manning as Sergeant Rascoe began searching the kitchen area. Sergeant Rascoe retrieved a North Carolina identification

card from one of the kitchen's cabinets. The card identified Defendant as Darnell Thomas, not Donte Leray Span. Sergeant Roscoe continued his search of the cabinets and found a metal spoon containing a white residue. Sergeant Roscoe believed, based on his training and experience, that the spoon had been used to cook cocaine. Sergeant Rascoe also noticed a set of keys hanging on a hook beside the kitchen sink.

After finding no sign of controlled substances in the laundry room or the bathroom, Sergeant Rascoe proceeded to search the apartment's only bedroom. Sergeant Rascoe entered the bedroom's walk-in closet where he discovered a loaded handgun hidden underneath a pair of jeans. Defendant explained he owned the gun to protect himself and his daughter. Also in the closet, Sergeant Rascoe noticed a large number of rubber bands and sandwich bags with ripped corners. Sergeant Rascoe testified that in his experience, "corner baggies" are generally used for packaging cocaine or marijuana. Sergeant Rascoe's search of the bedroom also produced a black lock box, which he was eventually able to open with the keys he had observed hanging by the kitchen sink. The lock box contained two bags of cocaine, a rubber band, and money. Defendant explained the box

belonged to a friend, TJ, but was unable to provide further details.

Sergeant Rascoe asked Defendant to identify himself. Defendant identified himself as Darnell Thomas, and stated he had initially provided Sergeant Rascoe with a false name because he thought there might be warrants out for his arrest. Sergeant Rascoe placed both Defendant and Ms. Manning under arrest.

Sergeant Rascoe testified on cross-examination that another individual, Jimmy Davis, arrived at the apartment during the course of the investigation. Sergeant Rascoe determined at that time that Mr. Davis was the owner of the apartment. Sergeant Rascoe also testified Defendant's supplying a false name did not prevent or delay his child abuse investigation, nor did it hamper his marijuana investigation. Sergeant Rascoe further testified that the spoon found in the kitchen containing a white residue was never sent to the crime lab for testing.

On the State's redirect examination of Sergeant Rascoe, Sergeant Rascoe testified that, had he not discovered Defendant's identification card, he would have been required to take fingerprints to verify Defendant's identity, which "can take anywhere from 30 minutes to 2 days."

Agent Karen Stossmeister, a forensic scientist with the State Bureau of Investigation, testified that the bags found by Sergeant Rascoe inside the lock box contained approximately 40.9 grams of crack cocaine. Corporal Barker, also testifying as a witness for the State, stated on direct examination that both Defendant and Ms. Manning admitted to using marijuana. He also confirmed there was an ashtray in the apartment's living room containing the remnants of marijuana cigarettes and that Defendant had provided him with the same false name, Donte Span. Corporal Barker further testified that he had difficulty investigating the child's family situation because the child's relatives were not aware of a "Donte Span."

At the close of the State's evidence, Defense counsel moved to dismiss the State's charges against Defendant. Defense counsel contended the State's evidence did not support the resisting a public officer charge because the State offered no evidence indicating Defendant delayed the investigation by providing a false name. Defense counsel further asserted the State's evidence was insufficient to support the misdemeanor child abuse charge, contending there was "insufficient evidence that Mr. Thomas allowed a substantial risk of physical injury

upon [the minor child] other than by accidental means." The trial court denied Defendant's motion.

Defendant's evidence at trial tended to establish that Defendant did not live at 1410 Cleveland Avenue, Apartment D3. Defendant testified he was staying at the apartment with his daughter just for the night and that the apartment actually belonged to Mr. Davis. Defense counsel renewed his motion to dismiss the charges against Defendant at the close of all the evidence. The trial court denied Defendant's motion.

Following closing arguments, Judge Hudson instructed the jury on the law applicable to the five offenses for which Defendant was charged. Judge Hudson further instructed the jury that it "may not return a verdict until all 12 jurors agree unanimously as to what [their] verdict shall be" and that it "may not render a verdict by majority vote. It must be a unanimous vote." The jury deliberated for approximately one hour before returning to the courtroom shortly after 5:00 p.m. Judge Hudson instructed a deputy to collect the jury's verdict sheets and excused the jury for the day.

The following morning, out of the presence of the jury, Judge Hudson informed the parties that he had obligations in another county the next day and "[the jury] ought to know what

[the] revised schedule might be." He explained, "I like the jury to know how long they're going to be obligated as best I can," and proceeded to describe the comments he was about to make to the jury:

> What I would probably tell them is that if they do not have unanimous verdicts by our lunch time, which is 12:30, we'll probably take a shortened lunch. Instead of an hour and a half we'll just go for an hour. If they do not have verdicts by 5:00, I'll tell them that we will not meet on Thursday and they should prepared to be here Friday morning.

Judge Hudson inquired as to whether the prosecutor or defense counsel objected to these comments, and neither party objected.

Judge Hudson called the jurors into the courtroom and stated:

> All right. Mr. Foreman, members of the jury, I just want to keep you apprised as to what our potential schedule will be from now on. You all are in your deliberative process at this time and our schedule might be a little bit different from what it's been when we were in the trial portion of this case.
>
> First of all, I realize from the verdict sheets that the jury has reached unanimous verdicts on several charges. You might -- your time might be best spent to not revisit those and go ahead and spend your time on trying to reach verdicts on the other charges.
>
> If you don't have unanimous verdicts by our lunch time, which is 12:30, has been [sic],

> we'll probably take a shortened lunch. Probably won't go an hour and a half. Probably just go an hour.
>
> If when we come back after that hour we get around the 5:00 time and you have not reached a unanimous verdict, we will not hold court on Thursday. I'm obligated in another county. I cannot be in Alamance County on Thursday.
>
> That being the case, you might alert your or your family members that you may come back, if necessary Friday morning at 9:30.

Neither party objected to these comments. Judge Hudson returned the verdict sheets to the jury foreman and instructed the jury to continue its deliberations. After excusing the jury from the courtroom, Judge Hudson informed the prosecutor he was ready to hear the State's next case.

The jury deliberated for approximately two hours before returning a verdict of "guilty" on all charges. Judge Hudson entered judgment on 27 October 2010. Defendant timely filed a written notice of appeal with this Court on 2 November 2010.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b), as Defendant appeals from the Superior Court's final judgments as a matter of right.

III. Analysis

A. Judge Hudson's Comments to the Jury

Defendant first takes issue with the trial court's comments to the jury. Defendant contends Judge Hudson's remark that the jury's "time might be best spent to not revisit" charges for which it had already recorded verdicts on the verdict sheet coerced the jury into reaching a unanimous verdict in violation of Article I, § 24 of the North Carolina Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution.

Constitutional issues are not generally reviewable on appeal absent objection at trial. *See State v. Gainey*, 355 N.C. 73, 93, 558 S.E.2d 463, 477 (2002) ("Constitutional questions not raised and passed upon at trial will not be considered on appeal."). Defendant concedes he did not object to Judge Hudson's statements at trial but contends that he falls within a statutory exception to the objection requirement under N.C. Gen. Stat. § 15A-1446(d). N.C. Gen. Stat. § 15A-1446 (d)(12) provides that an error involving "[r]ulings and orders of the court, not directed to the admissibility of evidence during trial, when there has been no opportunity to make an objection or motion[,]" may serve as grounds for appellate review notwithstanding a defendant's failure to object at trial. N.C. Gen. Stat. § 15A-1446(d)(12) (2009). Defendant contends that

because the trial court "moved immediately to the next trial, [Defendant] had no opportunity to object and preserve this issue for review."

After examination of the transcript, we hold that defense counsel had the opportunity to object to Judge Hudson's comments and therefore Defendant fails to satisfy the requirements of N.C. Gen. Stat. § 15A-1446(d)(12). Although it is impossible for this Court to surmise from the transcript precisely *how much* time defense counsel had to object, it is clear that defense counsel did in fact have *some* opportunity to object to Judge Hudson's comments. Judge Hudson articulated the particular remark with which Defendant now takes issue less than mid-way through his recitation. Defense counsel remained silent as Judge Hudson concluded his comments, returned the verdict sheets to the jury foreman, instructed the jury to continue its deliberations, and notified the prosecutor he was ready to hear the State's next case. We cannot say this procession of events afforded Defendant *no* opportunity to raise objection. Accordingly, we hold Defendant failed to raise a timely objection at trial and failed to preserve this issue for appeal. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court

a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

Defendant asserts in the alternative that the trial court's comments to the jury amounted to plain error. N.C. R. App. P. 10(a)(4) provides that

> [i]n 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.

We find plain error

> only in exceptional cases where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done. Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error.

State v. Streater, 197 N.C. App. 632, 639, 678 S.E.2d 367, 372, *review denied*, 363 N.C. 661, 687 S.E.2d 293 (2009) (internal quotation marks and citations omitted). To prevail under the plain error standard, Defendant must show: (1) a different result probably would have been reached but for the error or (2)

the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial. *Id.*

Our Supreme Court has held that "plain error analysis *applies only to jury instructions and evidentiary matters*." *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002) (emphasis added). Moreover, "[t]he purpose of [a jury] instruction is to clarify the issues for the jury and to apply the law to the facts of the case." *State v. Harris*, 47 N.C. App. 121, 123, 266 S.E.2d 735, 737 (1980). In *State v. Ross*, "the trial court announced a recess, told the jurors not to discuss the case during the recess, and ruled that he would be sending the jury back for further deliberations." ___ N.C. App. ___, ___, 700 S.E.2d 412, 418 (2010). This Court held the trial court's comments were not jury instructions and declined to review for plain error. *Id.* ("As the plain error analysis is always to be applied cautiously and only in the exceptional case, we decline to apply a plain error review to the trial court's comments in this situation, as they were not jury instructions but instead were discretionary rulings by the trial court.") (internal quotation marks and citation omitted).

In the case *sub judice*, Judge Hudson's comments did not clarify issues for the jury, nor did they instruct the jury on

any point of law. Judge Hudson's purpose in delivering the challenged comments—as he stated to the parties prior to addressing the jury—was to inform the jury of the court's schedule for the remainder of the week. Judge Hudson instructed the jury on the applicable law the previous day, prior to the jury's commencement of deliberations, and the jury was not requesting clarification or additional instructions at the time in question. We hold that the trial court's comments to the jury were not jury instructions, and, exercising caution in our application of the plain error standard, *see Moss supra*, we decline to review for plain error on this issue.

B. Defendant's Motion to Dismiss: Resisting a Public Officer

Defendant next contends the trial court erred by denying his motion to dismiss the resisting a public officer charge.

In reviewing a motion to dismiss in a criminal trial, this Court 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's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a

conclusion." *State v. Cross*, 345 N.C. 713, 717, 483 S.E.2d 432, 434 (1997) (internal quotation marks omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. The evidence must be "considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* at 99, 261 S.E.2d at 117. In addition, "contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion." *Id.* The trial court should not inquire into the weight of the evidence but only "whether there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction." *Cross*, 345 N.C. at 717, 483 S.E.2d at 435 (internal quotation marks omitted).

N.C. Gen. Stat. § 14-223 makes it unlawful for any person to (1) willfully and unlawfully; (2) resist, delay, or obstruct; (3) a public officer; (4) who is discharging or attempting to

discharge a duty of his office. N.C. Gen. Stat. § 14-223 (2009). As this Court explained in *State v. Burton*,

> [t]he State does not have to prove that the officer was permanently prevented from discharging his duties by defendant's conduct. Instead, the State must prove only that the officer was obstructed or interfered with, and that such obstruction or interference was willful on the part of the defendant. To 'interfere' is to check or hamper the action of the officer, or to do something which hinders or prevents or tends to prevent the performance of his legal duty; and to 'obstruct' signifies direct or indirect opposition or resistace [*sic*] to the lawful discharge of his official duty.

108 N.C. App. 219, 225, 423 S.E.2d 484, 488 (1992) (internal quotation marks and citation omitted).

In the instant case, Defendant disputes only the second element under N.C. Gen. Stat. § 14-223. Defendant primarily relies upon Sergeant Rascoe's testimony on cross-examination that Defendant's act of giving a false name did not interfere with or delay the investigation. Defendant's challenge misconstrues the applicable standard of review on this issue. As outlined *supra*, the State need only present substantial evidence of each element of the charged offense. Sergeant Rascoe's subjective belief as to the effect of Defendant's actions is not relevant to whether there is sufficient evidence *in support* of this particular element.

This Court has specifically held that providing a false name to a police officer in the course of an investigation meets the substantial evidence requirement for resisting, delaying, or obstructing a public officer. *See, e.g., In re J.L.B.M.*, 176 N.C. App. 613, 626, 627 S.E.2d 239, 247 (2006) ("In this case, the State presented substantial evidence of each element of the allegation of resisting, delaying, or obstructing an investigation. In giving Officer Henderson a false name, the juvenile delayed the officer's investigation, including any attempt to contact the juvenile's parent or guardian."). Viewing the evidence in the light most favorable to the State, Defendant's concealment of his identity delayed investigation of the reported child abuse. Corporal Barker was initially unsuccessful in contacting a family member of the minor child; had Defendant revealed his identity from the outset, Sergeant Rascoe and Corporal Barker would have known that the child was Defendant's daughter and could have contacted family members in a more expeditious manner. Furthermore, although Sergeant Rascoe testified on cross-examination that Defendant did not impede him from checking the child for injuries, Sergeant Rascoe testified on redirect that but for discovering Defendant's identification card, the investigation could have been delayed

for days as police sought to ascertain Defendant's true identity. Accordingly, we hold the State presented substantial evidence that Defendant's actions impeded Sergeant Rascoe's investigation and the trial court did not err in denying Defendant's motion to dismiss this charge.

C. Defendant's Motion to Dismiss: Misdemeanor Child Abuse

Defendant further contends the trial court erred by denying his motion to dismiss the misdemeanor child abuse charge. We review a motion to dismiss a criminal charge for substantial evidence of each essential element of the charged offense and of the defendant being the perpetrator of such offense. *See Powell*, 299 N.C. at 98, 261 S.E.2d at 117.

N.C. Gen. Stat. § 14-318.2(a) provides:

> Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2(a) (2009). The State is required to prove only one of three distinct acts set forth in N.C. Gen. Stat. § 14-318.2(a). *State v. Fredell*, 17 N.C. App. 205, 208, 193 S.E.2d 587, 589 (1972). Namely, the State must introduce substantial evidence indicating "that the parent, by other than

accidental means, (1) inflicted physical injury upon the child; (2) allowed physical injury to be inflicted upon the child; or (3) created or allowed to be created a substantial risk of physical injury upon the child." *Id.* at 208, 193 S.E.2d at 590.

In the context of child neglect, this Court has held that conduct creating a substantial risk of harm may include alcohol abuse and the abuse of illegal substances. *In re D.B.J.*, 197 N.C. App. 752, 755, 678 S.E.2d 778, 780-81 (2009) (recognizing that such conduct may create a substantial risk of harm for purposes of finding child neglect); *see also In re T.S., III*, 178 N.C. App. 110, 113-14, 631 S.E.2d 19, 22-23 (2006) (recognizing that the abuse of illegal substances was a factor that supported the trial court's finding of neglect); *Powers v. Powers*, 180 N.C. App. 27, 43-44, 502 S.E.2d 398, 402 (1998) (holding that a mother's severe substance abuse problem supported the trial court's finding of child neglect). Furthermore, in *T.S.*, this Court considered the presence of a firearm in the home—when both parents were felon—a factor that supported the finding that the juvenile children were at a substantial risk of impairment. 178 N.C. App. at 113-14, 631 S.E.2d 19, 22-23.

Viewing the evidence in the light most favorable to the

State, Defendant and Ms. Manning smoked marijuana in a small apartment and in close proximity to Defendant's two-year-old daughter shortly before Sergeant Rascoe arrived at the apartment to investigate a report of child abuse. Defendant concealed his identity and retrieved his crying two-year-old daughter from the apartment's only bedroom where Sergeant Rascoe later discovered 40.9 grams of cocaine and a loaded firearm. This evidence indicates that Defendant exposed his two-year-old daughter to illegal substances and placed her in the presence of a deadly weapon while impeding a police investigation intended to assure the child's well-being. This is clearly evidence from which a reasonable mind could conclude Defendant's conduct created a substantial risk of injury to his daughter. Accordingly, we hold the trial court correctly denied Defendant's motion to dismiss the misdemeanor child abuse charge and Defendant's assignment of error is overruled.

IV. Conclusion

For the foregoing reasons, we find no error.

No error.

Judges THIGPEN and MCCULLOUGH concur.

Report per Rule 30(e).