

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-707
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v.

Davidson County
No. 10 CRS 54301

DANA MICHAEL BERRIER

Appeal by Defendant from judgment entered 1 February 2011 by Judge Mark E. Klass in Davidson County Superior Court. Heard in the Court of Appeals 17 November 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Mercedes O. Chut, for Defendant.

BEASLEY, Judge.

Defendant appeals from judgment entered on her convictions for (1) trafficking in more than 4 grams but less than 14 grams of opium, (2) possession with intent to sell or deliver a schedule II controlled substance, and (3) intentionally maintaining a dwelling for keeping and selling controlled substances. For the following reasons, we find no error.

Detective M. Burns of the Davidson County Sheriff's Office Vice/Narcotics Unit was informed by two different subjects, arrested in January and May 2010 for drug charges, that Dana Michael Berrier (Defendant) was selling certain prescription pills. On 12 May 2010, Detective Burns and two other detectives met with a confidential informant who also stated that Defendant was in the business of selling pills. The confidential informant agreed to make a controlled purchase from Defendant's residence. After the controlled purchase, the informant turned over several oxycontin pills to Detective Burns. Based on these facts, Detective Burns requested a search warrant for Defendant's residence at 190 Beulah Hairston Road in Lexington, North Carolina.

The search warrant was issued, and while searching Defendant's home the detectives saw a small, locked safe and a locked black makeup case in the bathroom. Upon Detective Burns' request for keys to the safe and makeup case, Defendant handed the keys, which she kept on her necklace, to Detective Burns who opened the safe. Inside were one or two pill bottles, along with a locked black makeup case. The makeup case contained more bottles of pills.

A warrant was issued for Defendant's arrest on 7 June 2010. On 2 August 2010, Defendant was indicted on charges of trafficking in opium or heroin by possession, two counts of possession of a controlled substance with the intent to sell or deliver, and maintaining a place to keep a controlled substance. By motion dated 1 December 2010, Defendant moved to suppress the evidence seized from her home and the statements she made to police after the search. On 25 January 2011, Defendant filed a motion to compel release of the identity of the confidential informant who worked with the detectives. After a *voir dire* hearing outside the presence of the jury, the trial court denied both motions. On 1 February 2011, a Davidson County jury found Defendant guilty of (1) trafficking in more than 4 grams but less than 14 grams of opium, (2) possession with intent to sell or deliver a schedule II controlled substance, and (3) intentionally maintaining a dwelling for keeping and selling controlled substances. Judgment was entered against Defendant the same day, and she was sentenced to 70 to 84 months' imprisonment. From this judgment, Defendant now appeals.

I.

Defendant argues that the trial court committed constitutional error by denying her motion to suppress.

Defendant moved to suppress the evidence seized from her home by the detectives, alleging that the warrant was fatally overbroad and not supported by probable cause. The trial court denied this motion, and noted Defendant's objection. Defendant also filed a written objection to this ruling on 31 January 2011. During the trial, Defendant objected to Detective Burns' testimony about the general procedures for conducting a controlled buy of controlled substances. However, when Detective Burns testified regarding obtaining and executing the search warrant for Defendant's home, and the evidence seized from that search was admitted, Defendant failed to object.

A pretrial motion to suppress is a type of motion *in limine*, and our Supreme Court has stated that "a motion *in limine* [i]s not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial." *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000). See also *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007). Defendant did not renew her objection to dismiss the evidence seized from her home when it was offered at trial; as such, she has failed to preserve the issue for appeal.

Where a defendant fails to preserve an issue for appeal, our review is limited to plain error. See N.C.R. App. P. 10(a)(4). "To receive plain error review, a defendant must *specifically and distinctly* allege plain error in his assignments of error, and a failure to do so results in waiver of plain error review." *State v. McClary*, 157 N.C. App. 70, 74, 577 S.E.2d 690, 693 (2003) (internal quotation marks and citations omitted) (emphasis added). Defendant fails to argue plain error and accordingly we are unable to review this issue on the merits.

II.

Defendant next argues that the trial court erred in failing to make written findings of fact and conclusions of law supporting its denial of her motion to suppress. We disagree.

"Although the general rule is that the trial court must make findings of fact and conclusions of law after hearing a motion to suppress, findings are not required if there is no material conflict in the evidence[.]" *State v. Baldwin*, 161 N.C. App. 382, 386, 588 S.E.2d 497, 502 (2003). While the record here does not contain any written findings of fact or conclusions of law from the trial court supporting its decision to deny Defendant's motion to suppress, the dispute here is not

in the evidence, but in the scope and propriety of the search warrant. Thus, the trial court was not required to make findings of fact. See *id.* This argument is overruled.

III.

Defendant contends that the trial court erred in allowing testimony that was both inadmissible hearsay and violative of her Sixth Amendment right to confrontation. We disagree.

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(c) (2009), hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Defendant argues that information communicated by the confidential informant in this case is hearsay, because "[a]ny statements that tend to connect Ms. Berrier to a sale of opiates necessarily address the truth of the matter asserted." Because the contested testimony contains no verbal statements from the confidential informant, Defendant cites numerous cases where a declarant's conduct was found to be a nonverbal "statement" for the purposes of hearsay analysis.

The only conduct of the confidential informant, as described by Detective Burns, which could constitute a statement

is the act of returning from the Defendant's residence after the controlled purchase and turning over five pills to the detectives. However, testimony regarding this interaction was not introduced to prove the truth of the matter asserted - namely that Defendant sold the informant illegal drugs. In fact, Defendant was never charged in relation to these events. The purpose of the testimony regarding this controlled purchase was to establish Detective Burns' belief that controlled substances were sold by Defendant at her residence. Detective Burns' belief is relevant because he was the affiant who applied for the search warrant for Defendant's residence. The testimony was not being offered for its truth, and so is not hearsay; accordingly, Defendant's arguments are overruled.

IV.

Finally, Defendant asserts that the trial court erred in denying her motion to dismiss due to insufficiency of the evidence. Again, we disagree.

Our Supreme Court has clearly articulated the standard used when evaluating a motion to dismiss:

To withstand a motion to dismiss, the trial court need only determine whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. The trial court must examine the evidence in the light most

favorable to the State, giving the State the benefit of all reasonable inferences. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.

State v. Thomas, 350 N.C. 315, 343, 514 S.E.2d 486, 503 (1999) (internal quotation marks and citations omitted). Appellate review of a denial of a motion to dismiss for insufficient evidence is *de novo*. *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008).

Defendant argues in her motion to dismiss that the State failed to produce sufficient evidence to support all elements of the charged crimes. With regard to the charges of trafficking and maintaining a dwelling for the purposes of drug activity, Defendant asserts that the State failed to prove that she controlled the drugs found at the home, and as a consequence failed to show constructive possession. This argument is without merit. The evidence is uncontroverted that Defendant wore a chain around her neck with the keys to the locked boxes where most of the drugs were kept. It is irrelevant that the names of others were on the prescription bottles because Defendant possessed the keys, she clearly *controlled access* to the drugs. This evidence of control also supports a finding that Defendant had constructive possession over the drugs, as

"[c]onstructive possession exists when a person . . . has the intent and capability to maintain control and dominion over a controlled substance." *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983).

Defendant also argues that the State presented insufficient evidence of her intent to sell drugs, as required for the guilt of possession with intent to sell and deliver. However, the State presented Detective Burns' testimony regarding Defendant's response to the question of how many pills per month she sells. That evidence is sufficient to establish the element of intent to sell. Defendant's argument is overruled.

No Error.

Judges ERVIN and THIGPEN, JR. concur.

Report per Rule 30(e).