

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-873

Filed: 15 August 2017

Wake County, No. 15 CRS 224056

STATE OF NORTH CAROLINA

v.

ASAI AH BEN YISRAEL

Appeal by defendant from judgment entered 13 April 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 20 April 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary L. Lucasse, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

TYSON, Judge.

Asaiah Ben Yisrael (“Defendant”) appeals from a judgment entered upon a jury’s verdict finding him guilty of possession with intent to sell or deliver marijuana.

We find no error.

I. Background

Raleigh Police Officer Dennis Brandenburg was employed as the school resource officer at Enloe Magnet High School. On 30 October 2015 at approximately 10:00 a.m., Officer Brandenburg observed a white Chevrolet Impala vehicle pull into

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the front entrance of the school and illegally park in the fire lane. Officer Brandenburg recognized the vehicle as belonging to Malik Jones (“Jones”), a former Enloe student, who had previously been banned from the school’s grounds for marijuana possession.

Officer Brandenburg believed Jones was driving the vehicle. He pulled in behind the vehicle and activated the blue lights on his marked patrol car. Officer Brandenburg approached the car and intended to ask Jones why he was illegally present on school property after being banned. When he reached the driver’s side, Officer Brandenburg saw Defendant was the driver and was alone in the car. Officer Brandenburg did not recognize Defendant. Defendant, who was twenty years old, told Officer Brandenburg that he did not possess a driver’s license, but presented an identification card.

At trial, Jones testified he had allowed Defendant to borrow his car the night before so that Defendant could “go out.” Jones had allowed Defendant to borrow his car on four or five prior occasions.

While speaking with Defendant, Officer Brandenburg noticed a strong odor of marijuana emanating from inside the vehicle. The odor of marijuana prompted Officer Brandenburg to detain Defendant and search both him and the car.

Officer Brandenburg recovered \$1,504.00 in cash and a small “dime bag” of marijuana from inside Defendant’s pockets. The officer explained a “dime bag” is

normally a gram of marijuana. The “dime bag” of marijuana was packaged in a cut corner of a plastic bag, which, according to Officer Brandenburg, is how a “dime bag” is normally sold. A small amount of marijuana is placed into each corner of a “baggie,” and the corners are tied off and cut.

Officer Brandenburg also found two larger bags of marijuana in the center console of the Impala. Subsequent analysis of the three bags of marijuana determined that the weight of the “dime bag” was 0.69 grams, and the weight of the two larger bags was 4.62 grams and 5.57 grams.

Officer Brandenburg recovered no empty baggies or scales from inside the car or from Defendant. Jones’ driver’s license was also found in the center console. Officer Brandenburg also recovered a loaded .40-caliber Glock handgun in the glove compartment, which was later determined to have been stolen. Jones testified at Defendant’s trial and denied he owned the drugs or the stolen and loaded handgun found inside his car.

Defendant was indicted and tried upon charges of felonious possession with intent to sell or deliver marijuana and felonious possession of a weapon on educational property. Prior to trial, Defendant conceded he possessed the two bags of marijuana recovered from the center console of the vehicle. When questioned by the trial court during a *Harbison* hearing, Defendant stated he understood and agreed with defense counsel’s decision to concede this fact before the jury. *See State*

v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). In his initial brief before this Court, Defendant argued insufficient evidence was presented that he constructively possessed the marijuana recovered from the center console. Defendant subsequently filed a reply brief and expressly withdrew this argument due to the stipulation he had entered at the *Harbison* hearing.

The jury returned a verdict of not guilty on the charge of possession of a weapon on educational property, but found Defendant guilty of possession with intent to sell or deliver marijuana. The trial court sentenced Defendant to a suspended term of six to seventeen months' imprisonment and placed him on supervised probation for twenty-four months. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Possession with Intent to Sell or Deliver Marijuana

Defendant argues the trial court erred by denying his motion to dismiss. Defendant asserts the State failed to present sufficient evidence of his intent to sell or deliver marijuana and the evidence shows the marijuana in Defendant's possession was for personal use. We disagree.

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A. Standard of Review

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). “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.” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). “In making its determination, 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.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995) (emphasis supplied).

B. Evidence of Defendant’s Intent to Sell or Deliver

“The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance.” *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citing N.C. Gen. Stat. § 90-95(a)(1)).

While intent [to sell or deliver] may be shown by direct evidence, it is often proven by circumstantial evidence from

which it may be inferred. [T]he intent to sell or [deliver] may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia. Although quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver, it must be a substantial amount.

State v. Wilkins, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809-10 (2010) (citations and internal quotation marks omitted).

On numerous occasions, this Court has applied these four and other related factors to determine whether the evidence was sufficient to permit the jury to infer the defendant possessed a controlled substance with the intent to sell or deliver and overcome the defendant's motion to dismiss.

1. Quantity of Illegal Drugs

In some cases, the amount of the controlled substance recovered, standing alone, is sufficient to allow the jury to find the defendant possessed the requisite intent to sell or deliver. *See, e.g., State v. Morgan*, 329 N.C. 654, 660, 406 S.E.2d 833, 836 (1991) (one ounce or 28.3 grams of cocaine "was sufficient evidence to support the inference that defendant intended to deliver or sell the cocaine"); *cf. State v. Wiggins*, 33 N.C. App. 291, 294-95, 235 S.E.2d 265, 268 (evidence insufficient to support an inference the defendant intended to sell or deliver where 215.5 grams of marijuana was seized without evidence of any packaging paraphernalia related to rolling or weighing), *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977).

Here, a total of 10.88 grams of marijuana was recovered from Defendant's person and inside the vehicle's console. The two baggies inside the console contained a total of 10.19 grams, while the "dime bag" recovered from inside Defendant's pocket contained .69 grams of marijuana. The amount of marijuana found on Defendant's person and inside the vehicle's console might not be sufficient, standing alone, to support an inference that Defendant intended to sell or deliver marijuana. *See Wilkins*, 208 N.C. App. at 731-32, 703 S.E.2d at 810 (Because the quantity of marijuana "alone is insufficient to prove that defendant had the intent to sell or deliver[,] . . . we must examine the other evidence presented in the light most favorable to the State."). Defendant's admitted possession, together with other surrounding circumstances and evidence recovered, were sufficient to overcome Defendant's motion to dismiss and permit the jury to infer Defendant had the intent to sell or deliver marijuana.

2. Packaging of Illegal Drugs

The 10.88 grams of marijuana was packaged in three plastic bags. The two bags recovered from the center console contained a similar amount of marijuana (4.62 and 5.57 grams), and were considerably larger than the "dime bag" found upon Defendant's person. Officer Brandenburg testified one gram of marijuana, or a "dime bag," has a street value of twenty to twenty-five dollars.

The dissenting opinion cites the testimony of Officer Brandenburg, and discusses the “quality” of marijuana contained in the two bags found in the center console. Officer Brandenburg testified:

They were in larger bags, and if memory serves me right, they were more of what I would consider remnant marijuana, from where – if you were to bag up the dime bags, this would be the remnant stuff that didn’t have as many buds and stuff in it as the regular marijuana, or the sellable marijuana.

Officer Brandenburg also testified the marijuana in the two larger bags “would typically need to be divided up into smaller bags to be sold.”

The dissenting opinion concludes the clear implication of Officer Brandenburg’s testimony was that the “remnant marijuana” he found in the console was “not of a quality typically offered for sale.” The equal or stronger implication of Officer Brandenburg’s testimony is that Defendant possessed marijuana for sale. Marijuana that is not “sellable” is unlikely to be “useable.” It seems that an individual who purchases marijuana from a dealer solely for personal use would have no reason to possess the remnant or “unsellable” marijuana. The presence of two larger bags of marijuana containing “remnant” marijuana suggests the bags had been obtained in bulk and partially picked through for packaging “regular” or “sellable” marijuana. Defendant also possessed a dime bag of marijuana, which is how Officer Brandenburg testified that marijuana is packaged to sell. The packaging and possession of both the “sellable” and “unsellable” marijuana is evidence which raises

an inference and from which the jury could determine Defendant had the intent to sell marijuana.

3. Large Quantity of Unsourced Cash

While the amount and packaging of the marijuana arguably might raise an issue whether Defendant possessed for personal use or the intent to sell or deliver, these factors are for the jury to decide and are not solely determinative of whether the charge was properly submitted to the jury. The uncontroverted evidence also shows Defendant, twenty years old, was carrying a large amount of cash (\$1,504.00) on his person and was on the grounds of a high school while possessing illegal drugs. The cash found upon Defendant was also presented as evidence for the jury to view, and the prosecutor stated during his closing argument that the denominations of the cash consisted of ten, twenty, and one-hundred dollar bills.

The presence of cash is another factor that case precedents require us to consider to determine whether possession of illegal drugs with the intent to sell or deliver may be inferred. *Id.* at 731, 703 S.E.2d at 809-10; *see also State v. Alston*, 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988) (holding the large amount of cash on the defendant's person supported an inference that the defendant had the intent to sell or deliver the 4.27 grams of cocaine packaged in twenty separate envelopes).

4. Stolen and Loaded Handgun

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A stolen and loaded handgun was also recovered from inside the glove compartment of the vehicle. Jones denied any connection to the handgun. While the presence or possession of a firearm is not specifically listed as a *Wilkins* factor to determine intent to sell or deliver a controlled substance, *see Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 809-10, this Court has specifically recognized: “As a practical matter, firearms are frequently involved for protection in the illegal drug trade.” *State v. Smith*, 99 N.C. App. 67, 72, 392 S.E.2d 642, 645 (1990), *cert. denied*, 328 N.C. 96, 402 S.E.2d 824 (1991).

The dissenting opinion does not recognize the presence of the stolen and loaded firearm in the glove compartment of the vehicle Defendant was driving as relevant to our consideration of whether Defendant’s intent can be inferred, and views the packaging of the marijuana and cash recovered from Defendant as the only pertinent factors. Neither the Supreme Court of North Carolina nor this Court has ever recognized the factors set forth in *Wilkins* as exclusive.

This Court has specifically determined “the presence of a gun was relevant to the possession [of cocaine with intent to manufacture, sell, or deliver] and trafficking charges.” *State v. Boyd*, 177 N.C. App. 165, 171, 628 S.E.2d 796, 802 (2006); *see also State v. Willis*, 125 N.C. App. 537, 543, 481 S.E.2d 407, 411 (1997) (recognizing the “common-sense association of drugs and guns”).

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On numerous occasions our federal courts have also recognized the nexus between the presence or use of a firearm and the intent to sell or deliver controlled substances. *See, e.g., United States v. White*, 969 F.2d 681, 684 (8th Cir. 1992) (“Because a gun is ‘generally considered a tool of the trade for drug dealers, [it] is also evidence of intent to distribute.’” (quoting *United States v. Schubel*, 912 F.2d 952, 956 (8th Cir. 1990))); *United States v. Rush*, 890 F.2d 45, 49-52 (7th Cir. 1989) (A loaded firearm found in a car defendant was approaching when arrested was relevant to show possession of heroin with intent to distribute, because the weapon was a “tool of the trade,” and was an “essential part of the crime of possession with intent to distribute.”); *United States v. Dunn*, 846 F.2d 761, 764 (D.C. Cir. 1988) (A loaded firearm found on the couch near the defendant was a “tool of the narcotic trade,” and supported inference of intent to distribute where defendant constructively possessed drugs recovered from inside the house.).

The presence of a stolen and loaded handgun, a “tool of the trade for drug dealers,” inside the vehicle and readily accessible to Defendant, is certainly relevant to and is another factor the court should consider in determining whether Defendant had the intent to sell or deliver an illegal substance. *White*, 969 F.2d at 684; *Boyd*, 177 N.C. App. at 171, 628 S.E.2d at 802. The registered owner of the vehicle testified neither the drugs nor the stolen and loaded firearm belonged to him.

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Despite our precedents, the dissenting opinion does not consider the additional presence of the stolen and loaded firearm as an intent factor and cites this Court's decision in *Wilkins* to vote to reverse the jury's verdict. In *Wilkins*, the defendant possessed 1.89 grams of marijuana, contained within three separate "tied off" bags. *Wilkins*, 208 N.C. App. at 730, 703 S.E.2d at 809. The defendant also carried \$1,264.00 in cash. *Id.* The defendant testified that he had purchased the marijuana for personal use. *Id.* He further testified that approximately \$1,000.00 of the cash recovered was money his mother had given him for a cash bond because he was "on the run," and the remaining \$264.00 was from a check he had cashed. *Id.*

This Court considered the amount and packaging of the marijuana and the presence of explained cash on the defendant's person, and determined the evidence was insufficient to permit the jury to determine whether the defendant intended to sell or deliver the marijuana. *Id.* at 732-33, 703 S.E.2d at 810.

Wilkins is distinguishable from the facts and circumstances before us. In *Wilkins*, the defendant possessed only a small fraction of the amount of marijuana that Defendant possessed here, and the value of the marijuana was only thirty dollars. *Id.* at 732, 703 S.E.2d at 810. Here, no legitimate source is in the record for the \$1,504.00 multi-denominations of cash recovered from Defendant's person and introduced before the jury.

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The dissenting opinion also cites *State v. Nettles*, 170 N.C. App. 100, 612 S.E.2d 172, *disc. review denied*, 359 N.C. 640, 617 S.E.2d 286 (2005). In that case, officers found 1.2 grams of crack cocaine, consisting of four or five rocks, rolled in a napkin under the floor mat of a vehicle parked in the defendant's yard. *Id.* at 104, 612 S.E.2d at 175. The defendant was inside the house with \$411.00 in cash on his person. *Id.* This Court determined the evidence was insufficient to show intent to sell or deliver the cocaine. *Id.* at 108, 612 S.E.2d at 177.

This Court explained that the defendant was not carrying a large amount of cash; the defendant stated the source of the cash was part of the money he had received from cashing his social security check; the officers could not state whether the money was in the defendant's pocket or wallet; and, the officers did not discover any other money on the premises. *Id.* at 107, 612 S.E.2d at 176-77. Here, Defendant was carrying a significantly larger amount of cash, consisting of ten, twenty, and hundred-dollar bills, with the marijuana and a stolen and loaded handgun.

The following cumulative factors were present in this case, which distinguish it from *Wilkins* and *Nettles*: (1) possessing illegal drugs on high school grounds where Defendant was not a student; (2) possessing "unsellable" remnant marijuana in two larger bags near a "dime bag" of "sellable" marijuana; (3) driving a vehicle owned by Jones, who had been banned from the school for possession of drugs; (4) driving the vehicle without a driver's license; (5) illegally parking the vehicle in a fire lane near

the school's entrance at 10:00 a.m.; and, (6) with the presence of a stolen and loaded handgun inside the vehicle.

The presence of the stolen and loaded firearm in this case is relevant to ruling on Defendant's motion to dismiss, even though the jury returned a verdict of not guilty of possessing a weapon on educational property. We review the totality of the evidence on Defendant's motion to dismiss in the light most favorable to the State to determine its sufficiency to submit the charge to the jury. *Rose*, 339 N.C. at 192, 451 S.E.2d at 223. The jury's ultimate determination on the separate crime is not relevant to whether the trial court properly denied Defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana and submitted the charge to the jury.

"In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury[.]" *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

This quantity of illegal drugs and its packaging, together with Defendant's access to Jones' vehicle since the previous evening; his illegal presence on high school grounds; the large amount of unsourced cash on Defendant's person; and the stolen and loaded handgun is sufficient to support a reasonable inference that Defendant intended to sell or deliver the marijuana he admittedly possessed, when reviewed in

the light most favorable to the State. Jones, the owner of the vehicle, denied ownership of either the marijuana or the handgun. Defendant's argument is overruled. The trial court's ruling on Defendant's motion to dismiss is affirmed.

IV. Conclusion

The cumulative evidence, properly viewed in the light most favorable to the State, is sufficient for the trial court to submit and permit the jury to consider the intent element of possession with intent to sell or deliver marijuana. The trial court did not err and correctly denied Defendant's motion to dismiss.

We find no error in the denial of Defendant's motion to dismiss, the jury's conviction, or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judge DILLON concurs.

Chief Judge McGEE dissents with separate opinion.

McGEE, Chief Judge, dissenting.

Because I believe “[t]he evidence in this case, viewed in the light most favorable to the State, indicates that [D]efendant was a drug user, not a drug seller[,]” *State v. Wilkins*, 208 N.C. App. 729, 733, 703 S.E.2d 807, 811 (2010), I respectfully dissent.

I do not believe the evidence constituted substantial evidence of the intent to sell element of possession with intent to sell or deliver (“PWISD”). Specifically, (1) the amount of marijuana recovered was *de minimis*, and suggestive of possession for personal use rather than intent to sell; (2) the undisputed testimony was that the vast majority of the marijuana was not of typically “sellable” quality; (3) the packaging was likewise more consistent with personal use; (4) Defendant did not have scales, baggies, or other paraphernalia to prepare the marijuana for sale; (5) there was no testimony indicating that Defendant’s actions were suggestive of an intent to sell marijuana; (6) the cash recovered, though some evidence of an intent to sell, was not of such quantity to overcome the lack of additional supporting evidence, and there was no testimony explaining the relevance of the cash to any intent to sell; (7) the gun recovered from the glove compartment was introduced as evidence in support of the possession of a firearm on educational property charge, not in support of PWISD, and there was no testimony linking the gun to any intent to sell; (8) even considering the gun, the totality of the evidence is more suggestive of possession for personal use than for sale; and (9) the additional factors relied upon by the majority opinion have minimal to no relevance to the contested issue.

I. *Facts*

In addition to the facts included in the majority opinion, I also note the following. Officer Brandenburg testified that he saw Jones' Impala "pull[] into the main entrance, what we call the car loop, the car pool loop, of the school, which goes right to the front entrance of the school." The Impala parked in the "fire lane" of the car pool loop, which Officer Brandenburg testified was "very common." Officer Brandenburg determined that Defendant, and not car owner Jones, was the sole occupant. Officer Brandenburg did not know Defendant prior to this interaction and he testified Defendant said he was there to pick up a friend, a student at Enloe. Officer Brandenburg knew the student, and saw him looking out of the school at Defendant while Defendant was detained.

Though Defendant did indicate during the *Harbison* hearing that he was going to admit to possession of all the marijuana, Defendant did *not* admit at trial or in closing that he was guilty of possessing the 10.19 grams recovered from the center console of Jones' vehicle. Defendant's attorney, apparently having changed his trial strategy, argued in his opening statement that Defendant was "guilty of one thing and that's for having a dime bag of marijuana in his pocket." In closing, Defendant's attorney argued that "[Defendant] just has his own one bag for personal use. And that's what is called possession of marijuana. So we would ask you to find him guilty of possession of marijuana." Defendant moved to dismiss the charges against him at

the close of the State's evidence and all the evidence, specifically focusing on the absence of sales-related paraphernalia, such as "baggies" and "scales." For the purposes of Defendant's motion to dismiss, I assume Defendant possessed the entire 10.88 grams of marijuana recovered from both his person and the Impala. The trial court denied Defendant's motions.

II. *Analysis*

We must determine whether there was substantial evidence that Defendant had the intent to sell marijuana. As noted by the majority opinion, intent to sell can be inferred from "(1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 809–10 (citation omitted). These factors ("*Wilkins* factors") seem to have first appeared in their current form in *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005), an opinion that examined earlier case law. In prior opinions, the presence of firearms was not considered in the intent to sell analyses, even when firearms were recovered. *See State v. Smith*, 99 N.C. App. 67, 73–74, 392 S.E.2d 642, 646 (1990); *State v. King*, 42 N.C. App. 210, 212–13, 256 S.E.2d 247, 248–49 (1979).

Traditionally, the three *Wilkins* factors that appear to have been most influential have been the amount of the substance, its packaging, and the presence of paraphernalia used in portioning and packaging the substance for sale. *See King*,

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42 N.C. App. at 212–13, 256 S.E.2d at 248–49; *State v. Sanders*, 171 N.C. App. 46, 48, 50 and 56-57, 613 S.E.2d 708, 710, 711 and 715, *aff'd per curiam*, 360 N.C. 170, 622 S.E.2d 492 (2005) (suspiciously packaged diazepam, marijuana residue in multiple locations, “plastic baggies with corners ripped off,” scales, evidence defendant was not personally using diazepam, and other evidence recovered not sufficient to prove intent when there was no officer testimony stating certain evidence was “indicative of an intent to sell rather than personal use”); *State v. Roseboro*, 55 N.C. App. 205, 210, 284 S.E.2d 725, 728 (1981) (“while the quantity of cocaine was small, there was evidence of the presence of drug paraphernalia (two sets of scales, one beside a pouch of cocaine, and an abundance of Ziploc bags) sufficient for the charge of possession with intent to sell to go to the jury”).

The evidence in a number of these cases was stronger than in the present case, and I note that in *Sanders*, our Supreme Court affirmed the majority opinion’s analysis *per curiam*, including the importance of testimony demonstrating evidence presented at trial is more suggestive of an intent to sell than personal use. In the present case, there was no such testimony, and the State and the majority opinion primarily rely on factors not contained in *Wilkins* or other binding precedent. I do not contend the *Wilkins* factors are exclusive, but I do believe they have been established as more relevant to our analysis than other potential evidence.

A. Quantity

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McGEE, C.J., dissenting

In order for the amount of a controlled substance to be considered a relevant factor in determining an intent to sell, “it must be a substantial amount.” *Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 810 (quotation marks and citation omitted). The closer the amount of a controlled substance approaches the amount required for a trafficking conviction, the more relevant is the amount in suggesting an intent to sell. *State v. Morgan*, 329 N.C. 654, 659-60, 406 S.E.2d 833, 836 (1991) (citations omitted).¹ N.C. Gen. Stat. § 90-95(h)(1) sets out the smallest quantity of marijuana required for a charge of “trafficking in marijuana[,]” which amount is in excess of ten pounds. Defendant in this case was found to have been in possession of 10.88 grams of marijuana — approximately 0.38 ounces or 0.024 pounds. Ten pounds equals approximately 4,536 grams, or about *417 times* the 10.88 grams recovered from Defendant’s person and Jones’ Impala. Defendant possessed 0.0024% of the requisite amount of marijuana for trafficking. This Court has deemed an amount of cocaine that was relatively much *greater* than the amount of marijuana recovered in the present case as a “*de minimis*” amount:

defendant possessed four to five crack cocaine rocks which weighed 1.2 grams, or .04% of the requisite amount for

¹ The majority opinion cites *Morgan* for the statement that “one ounce or 28.3 grams of cocaine ‘was sufficient to support the inference that defendant intended to deliver or sell the cocaine[.]’” I note that according to *Morgan*: “The General Assembly has determined that twenty-eight grams of cocaine evinces an intent to distribute that drug on a large scale. N.C.G.S. § 90–95(h)(3) (1990). As in *Williams*, we are satisfied that the full ounce defendant had conspired with Mr. Queen to possess ‘was a substantial amount and was more than an individual would possess for his personal consumption.’” *Morgan*, 329 N.C. at 660, 406 S.E.2d at 836 (citations omitted). For trafficking purposes, one ounce of cocaine is equivalent to ten pounds of marijuana. See N.C. Gen. Stat. § 90-95(h)(1) (2015).

trafficking. Therefore, under our Supreme Court's holding in *Morgan*, it cannot be inferred that defendant had an intent to sell or distribute from such a de minimis amount alone. The State was required to present either direct or circumstantial evidence of an intent to sell.

Nettles, 170 N.C. App. at 106, 612 S.E.2d at 176 (citation omitted). In the present case, Defendant possessed 0.0024% of the requisite amount of marijuana for trafficking. For purposes of the trafficking statutes, as compared to the amount of cocaine recovered in *Nettles*, the amount of marijuana recovered in the present case is over sixteen times *less* than the amount of cocaine recovered in *Nettles* – 10.88 grams of marijuana must be considered *de minimis*. *Id.*; *see also State v. Wiggins*, 33 N.C. App. 291, 294–95, 235 S.E.2d 265, 268 (1977) (citations omitted) (215.5 grams of marijuana, “without some additional evidence, is not sufficient to raise an inference that the marijuana was for the purpose of distribution”). 10.88 grams of marijuana was clearly insufficient “to raise an inference that the marijuana was for the purpose of distribution.” *Id.*

The majority opinion attempts to compare the amount of marijuana recovered in the present case to that recovered in certain other cases, such as *Wilkins*. The relevant issue is not whether the amount of marijuana recovered in the present case was more or less than the amount of marijuana recovered in some other case wherein insufficient evidence of intent to sell was found; the issue is whether the amount recovered *in the present case* was substantial enough to provide some evidence of

intent to sell. Since the amounts found in *Wilkins*, *Nettles*, and the present case are all *de minimis*, the amounts recovered do not support a finding of an intent to sell. I find no relevant difference between the 1.89 grams of marijuana involved in *Wilkins*, 208 N.C. App. at 730, 703 S.E.2d at 809, and the 10.88 grams recovered in the present case, as both are *de minimis*, and substantially less than has been determined by this court to be consistent with personal use. *See Wiggins*, 33 N.C. App. at 294–95, 235 S.E.2d at 268.

In its attempt to distinguish this case from *Wilkins*, the majority opinion notes that the value of the marijuana in *Wilkins* was approximately \$30.00.² However, the value of the marijuana is directly tied to the amount of the marijuana. The evidence in this case shows only that Defendant possessed a small amount of marijuana, consistent with personal use. *See Nettles*, 170 N.C. App. at 107–08, 612 S.E.2d at 177; *State v. Turner*, 168 N.C. App. 152, 158-59, 607 S.E.2d 19, 24 (officer testified ten rocks of crack cocaine, weighing 4.8 grams, with value of \$150.00 to \$200.00, was more than personal consumption amount; this Court held that testimony was insufficient to support intent to sell).

B. Packaging

The majority opinion focuses almost exclusively on this dissent's discussion of the "quality" of the marijuana as testified to by Officer Brandenburg in its

² The true value of all the marijuana recovered in the present case was not established at trial.

“packaging” analysis. However, this dissenting analysis is primarily focused elsewhere, and I would reach the same conclusion even assuming *arguendo* that all the marijuana was of “sellable” quality. This Court has analyzed the packaging prong of PWISD as follows:

“The method of packaging a controlled substance, as well as the amount of the substance, may constitute evidence from which a jury can infer an intent to distribute.” *State v. Williams*, 71 N.C. App. 136, 139, 321 S.E.2d 561, 564 (1984) (holding that the trial court did not err in denying defendant’s motion to dismiss where “[t]he evidence at trial showed that the [27.6 grams of] marijuana . . . was packaged in seventeen separate, small brown envelopes known in street terminology as ‘nickel or dime bags’”); see also *In re I.R.T.*, 184 N.C. App. 579, 589, 647 S.E.2d 129, 137 (2007) (“Cases in which packaging has been a factor have tended to involve drugs divided into smaller quantities and packaged separately.”); *State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31, 35 (2004) (finding an intent to sell or deliver where defendant possessed 5.5 grams of cocaine separated into 22 individually wrapped pieces); *aff’d*, 359 N.C. 800, 617 S.E.2d 271 (2005). The State has not pointed to a case, nor have we found one, where the division of such a small amount of a controlled substance constituted sufficient evidence to survive a motion to dismiss. Moreover, the [small amount of marijuana] was divided into only three separate bags. While small bags may typically be used to package marijuana, it is just as likely that defendant was a consumer who purchased the drugs in that particular packaging from a dealer. Consequently, we hold that the separation of [the small amount] of marijuana into three small packages, worth a total of approximately \$30.00, does not raise an inference that defendant intended to sell or deliver the marijuana.

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Wilkins, 208 N.C. App. at 732, 703 S.E.2d at 810 (citation omitted) (emphasis added); *see also Morgan*, 329 N.C. at 659, 406 S.E.2d at 835.

The cases cited in *Wilkins* involved defendants found in possession of large numbers of pre-packaged smaller units of contraband ready for individual sale. In order for the number of pre-packaged units to support an inference of an intent to sell, it must be a number large enough to suggest the units were not purchased for personal use. For example, in an unpublished opinion, this Court held that 10.98 grams of marijuana, packaged in *thirteen* individual bags, was insufficient to prove intent to sell. *In re N.J.*, 230 N.C. App. 140, 752 S.E.2d 255 (2013) (unpublished) (there was insufficient evidence to determine if marijuana was possessed for personal use, or sale, where juvenile admitted that he possessed *thirteen individually wrapped bags of marijuana*, weighing a total of 10.98 grams).

In the present case, as in *Wilkins*, the marijuana was only divided into three bags, but one was a single “dime bag” found in Defendant’s pocket, while the other two were “relatively small” plastic bags found in the center console of the car. There were no additional empty bags or containers into which this marijuana could have been divided for sale, nor any scale with which to measure the marijuana for sale. Officer Brandenburg testified that he had arrested people pursuant to his duties as a school resource officer, and that typically it was the small “dime-sized” bags that were brought on school grounds for sale, and that “[n]ormally [the] dime-sized bag[s]

[are found] inside of another bag or a capsule. Recently . . . medical capsules has been the new way to do it. But they'll be the little dime bag inside bigger packages." Officer Brandenburg also responded: "Yes, ma'am" when he was asked: "[W]hen you talk about the dime bags and how they – when they're sold they will be inside some larger container, there would often be multiple packages of dime bags in that larger container[.]" The following colloquy occurred between Defendant's attorney and Officer Brandenburg:

Q. Because a drug seller will take – will have larger bags of marijuana, put them in a smaller bag, reweigh them – weigh them on a scale to determine the correct amount of marijuana is being sold and then sell it to someone, correct?

A. That's what I've heard, yes, ma'am.

Q. Okay. So in that sense, if you see plastic – a box of plastic baggies in the car and you see scales in the car, you assume it's indicative of drug selling, correct?

A. Yes, ma'am.

Q. And you did not see a scale or a plastic – a box full of plastic baggies in this car, correct?

A. I do not remember seeing that, no, ma'am.

. . . .

Q. [T]hose two big bags would typically need to be divided up into smaller bags to be sold, correct?

A. Yes, ma'am.

Q. And to do that you would need multiple plastic baggies

and scales, correct?

A. That would be correct.

In Officer Brandenburg’s opinion, the marijuana recovered from the console was not “regular” or “sellable marijuana” and, even had it been “sellable,” no scales were found in the car with which to divide the marijuana, nor was any separate packaging found in the car with which to re-package the marijuana for sale. *See Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 177 (evidence not substantial in part because there was no “drug paraphernalia typically used in the sale of drugs found on the premises”). In short, “[t]here was *no testimony* that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs.” *Id.* at 107, 612 S.E.2d at 176 (emphasis added).

Assuming, *arguendo*, that the quality of the marijuana is an appropriate factor to consider in the packaging analysis, the majority opinion, adopting the State’s argument on appeal, states: “The packaging and possession of both the ‘sellable’ and ‘unsellable’ marijuana is evidence which raises an inference and from which the jury could determine Defendant had the intent to sell marijuana.” The majority opinion reaches this conclusion based upon its contentions that: “Marijuana that is not ‘sellable’ is unlikely to be ‘useable[;]” a person “would have no reason to possess the remnant or ‘unsellable’ marijuana[;]” and that the presence of the “larger bags of marijuana containing ‘remnant’ marijuana suggests the bags had been obtained in

bulk and partially picked through for packaging ‘regular’ or ‘sellable’ marijuana.” There was no testimony supporting this reasoning, and no such argument was made to the trial court or the jury. *Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711; *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176. Further, two bags of marijuana containing 4.62 and 5.57 grams of marijuana constitute a *de minimis* amount wholly consistent with personal use, not “bulk” purchases. Marijuana of all qualities can be used, and would be unlikely to be thrown out; however “remnants” would be difficult to sell. The absence of scales and additional baggies suggests that to the extent the larger bags had been “partially picked through,” it was to obtain the higher quality marijuana for personal use, and not for the purpose of repackaging and sale.

Even assuming, *arguendo*, the larger bags had been picked through at some earlier time to obtain the quality marijuana for sale, if the remaining marijuana in the larger bags was not “sellable” at the time Defendant was arrested, that would only constitute evidence that Defendant – or someone – had possessed that marijuana in the *past* with the intent to sell it, and did sell it. However, “unsellable” marijuana is, by definition, not indicative of a *present* intent to sell that particular *unsellable* marijuana. Though the State could have attempted to do so, Defendant was not indicted for having already sold the marijuana.

C. Cash

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This Court had stated that “unexplained cash is only one factor that can help support the intent element.” *Wilkins*, 208 N.C. App. at 732, 703 S.E.2d at 810 (citation omitted). In both *Wilkins* and the present case, reasonably large amounts of cash were recovered – \$1,264.00 and \$1,504.00, respectively. “As with a large quantity of drugs, we determine that the presence of cash, alone, is insufficient to infer an intent to sell or distribute.” *I.R.T.*, 184 N.C. App. at 589, 647 S.E.2d at 137. In a case cited by the majority opinion “[t]he police . . . searched defendant’s person, and seized large rolls of currency totaling \$10,638.00” along with cocaine. *State v. Alston*, 91 N.C. App. 707, 708, 373 S.E.2d 306, 308 (1988). This Court justified holding that the evidence in *Alston* was sufficient to support a conclusion that the defendant had the intent to sell cocaine as follows:

State’s evidence showed that there was, at the most, 4.27 grams of cocaine³ contained in the envelopes found in the building. The cocaine was packaged, however, in twenty separate envelopes. Even where the amount of a controlled substance is small, the method of packaging is evidence from which the jury may infer an intent to sell. The cash [\$10,638.00] found on defendant’s person also supports such an inference.

Alston, 91 N.C. App. at 711, 373 S.E.2d at 310 (citation omitted). Neither the amount of the drugs, the packaging, nor the cash recovered in the present case are similar to

³ Although this Court treated the amount of cocaine in *Alston* as “small,” 4.27 grams constituted approximately 15.00% of the amount required for the lowest grade of “trafficking” cocaine, as opposed to the amount of marijuana found in the present case, which was 0.0024% of the amount required for a trafficking charge. N.C.G.S. § 90-95(h)(3)(a.). For trafficking purposes, the amount of cocaine involved in *Alston* was 6,250 times greater than the amount of marijuana involved in this case.

those factors in *Alston*. The majority opinion argues that because the amount of cash recovered in *Nettles* was less than that recovered in the present case, *Nettles* is distinguishable. However, this Court in *Wilkins* analogized the facts before it with those in *Nettles* as follows:

The present case is *similar* to *Nettles* where this Court held that possession of a small amount of crack cocaine along with \$411.00 and a safety pin, which is typically used to clean a crack pipe, was insufficient to support a charge of possession with intent to sell or deliver. This Court held that “[v]iewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller.” We believe the totality of the circumstances in this case compels the same conclusion. Defendant possessed a *very small amount of marijuana* that was *packaged in three small bags* and he had *\$1,264.00 in cash* on his person. The evidence in this case, viewed in the light most favorable to the State, indicates that defendant was a drug user, not a drug seller.

Wilkins, 208 N.C. App. at 733, 703 S.E.2d at 810–11 (citations omitted) (emphasis added). The implication in *Wilkins* is that if \$411.00 was not “a large amount of cash” for the purposes of determining an intent to sell, then neither was \$1,264.00. In line with *Wilkins*, I do not believe that the difference in the amounts of cash recovered in *Nettles* and the present case constitutes a strong distinguishing factor between the two cases.

The majority opinion further attempts to distinguish *Nettles* on the bases that in that case “the officers could not state whether the money was in the defendant’s pocket or wallet,” and no other money was discovered on the premises. I see no

relevance attached to whether the cash in *Nettles* was recovered from the defendant's wallet or pocket, and there is *no difference* concerning whether cash was recovered from any additional locations, since in neither *Nettles* nor the present case was any additional cash recovered. See *State v. Barnhart*, 220 N.C. App. 125, 127–28, 724 S.E.2d 177, 179 (2012) (citations omitted) (emphasis added) (“When reviewing a challenge to the denial of a defendant’s motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines ‘whether the State presented substantial evidence in support of each element of the charged offense.’ ‘Substantial evidence is *relevant evidence* that a reasonable person might accept as adequate, or would consider *necessary to support a particular conclusion.*”).

Further, the majority opinion attempts to distinguish *Wilkins* and *Nettles* from the present case by drawing a distinction between “explained” cash and “unexplained” cash. The majority opinion states that “no legitimate source is in the record for the \$1,504.00 multi-denominations of cash recovered from Defendant’s person and introduced before the jury[.]” whereas in *Wilkins* and *Nettles* the defendants gave innocent explanations for possessing relatively large amounts of cash. No such distinction between explained and unexplained cash is made in these opinions, and any such distinction is irrelevant when reviewing the trial court’s denial of a motion to dismiss based upon insufficient evidence. The majority opinion relies on language in the fact section of *Wilkins* to support its assertion that this Court

factored “the presence of *explained* [‘legitimate source’] cash on the defendant’s person” in reaching its conclusion that the defendant’s motion to dismiss should have been granted. (Emphasis added). However, in the analysis portion of the opinion, this Court *did not address the defendant’s testimony concerning the provenance of the cash*, instead reasoning:

In addition to the packaging, we must also consider the fact that defendant was carrying \$1,264.00 in cash. “However, *unexplained cash* is only one factor that can help support the intent element.” Upon viewing the evidence of the packaging and the cash “cumulatively,” we hold that the evidence is insufficient to support the felony charge.

Id. at 732–33, 703 S.E.2d at 810 (citations omitted) (emphasis added).

Initially, contrary to the majority opinion’s characterization of the cash in *Wilkins* as “explained cash,” this Court in *Wilkins* clearly characterized the \$1,264.00 as “unexplained cash” in its PWISD analysis. *Id.* For the purposes of a motion to dismiss, any large amount of cash found on a defendant is unexplained, regardless of what the defendant says, unless there is uncontroverted evidence establishing the provenance of the cash. Appropriately, this Court in *Wilkins* did *not* consider the defendant’s explanation of how he had come by the \$1,264.00, and it treated this cash as “unexplained” because this Court was *required* to treat the \$1,264.00 as “unexplained cash.” Factoring the defendant’s self-serving testimony explaining why he was carrying a large amount of cash would be violative of our standard of review on a motion to dismiss, as *Wilkins* recognized. *Id.* at 732, 703 S.E.2d at 810 (“we must

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examine the other evidence presented in the light most favorable to the State”). The same standard of review applies to the fact, noted in the majority opinion, that the defendant in *Wilkins* “testified that he had purchased the marijuana for personal use.” The defendant’s testimony in this regard was irrelevant in *Wilkins*, and has no relevance in attempting to distinguish the facts of *Wilkins* from the facts of the present case.

Further, in *Wilkins* the \$1,264.00 was recovered in denominations of “60 \$20.00 bills, one \$10.00 bill, nine \$5.00 bills, and nine \$1.00 bills.” *Wilkins*, 208 N.C. App. at 730, 703 S.E.2d at 809. These are smaller denominations consistent with what a drug dealer might accumulate when selling packages of marijuana. In the present case, the majority opinion contends that the cash recovered from Defendant “consist[ed] of ten, twenty, and hundred-dollar bills[.]” However, contrary to the assertions of the State and the majority opinion, there is *no record evidence* of the denominations comprising the \$1,504.00 recovered from Defendant. There was no testimony about the denominations of the bills, nor what denominations commonly indicate drug sales. In its closing argument, the State contended the “\$1500 [was comprised of] twenties, hundreds, tens, small denominations, big denominations[.]” However, the State’s closing argument is not record evidence. *State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004) (citation omitted) (“it is axiomatic that the arguments of counsel are not evidence”).

The majority opinion's attempt to distinguish *Nettles* fails for the same reasons discussed above. I do not believe this Court considered the defendant's explanation of where the cash came from in its analysis and, as stated above, it would have been inappropriate for it to have done so. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). I also note that Officer Brandenburg testified that he *never asked* Defendant where the \$1,504.00 came from. "[G]iven the fact that neither the amount of marijuana nor the packaging raises an inference that [D]efendant intended to sell the drugs, the presence of [\$1,504.00] as the only additional factor is insufficient to raise the inference." *Wilkins*, 208 N.C. App. at 733, 703 S.E.2d at 810.

D. Non-*Wilkins* factors

The majority opinion relies heavily on evidence not related to the factors set forth in *Wilkins* and, while I do not dispute that non-*Wilkins* factors may be relevant to an intent to sell analysis, I do not believe they generally carry the same weight. The majority opinion states:

The following cumulative factors were present in this case, which distinguish it from *Wilkins* and *Nettles*: (1) possessing illegal drugs on high school grounds where Defendant was not a student; (2) possessing "unsellable" remnant marijuana in two larger bags near a "dime bag" of "sellable" marijuana; (3) driving a vehicle owned by Jones, who had been banned from the school for possession of drugs; (4) driving the vehicle without a driver's license; (5) illegally parking the vehicle in a fire lane near the school's entrance at 10:00 a.m.; and, (6) with the presence of a stolen and loaded handgun inside the vehicle.

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I believe the factors in *Wilkins* have been primarily relied upon in intent to sell cases because they either relate directly to the controlled substance itself – packaging, labeling, storage, quantity; or constitute evidence that is inextricably associated with sale or delivery of the controlled substance – the actions of the defendant (such as suspicious hand-to-hand transactions), *see, e.g., State v. Stokley*, 184 N.C. App. 336, 337, 646 S.E.2d 640, 642 (2007); suspiciously large amounts of cash (which is often found on people who have been selling significant amounts of illegal drugs), *see, e.g., Alston*, 91 N.C. App. at 708, 711, 373 S.E.2d at 308, 310; and, most importantly, drug paraphernalia used for preparing the drugs for sale (such as scales for weighing and multiple bags or other containers for individual packaging), *see, e.g., State v. Williams*, __ N.C. App. __, __, 774 S.E.2d 880, 889 (2015).

I presume the majority opinion’s additional factors are not included among the *Wilkins* factors because this Court has determined that, generally, the probative value of non-*Wilkins* factors in determining intent to sell or deliver is less than that of the chosen factors. Concerning the additional “factor” relied upon by the majority opinion that *Jones* had been banned from Enloe for drug possession, as supporting evidence of *Defendant’s* criminal intent, is improper. Endorsing this approach would essentially allow the State to present prior bad act evidence *of a third party* as proof that *the defendant acted in conformity with the third party’s prior bad act*. *See* N.C. Gen. Stat. § 1A-1, Rule 402(b) (2015). The fact that a defendant is not in possession

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of a valid driver's license is not relevant in determining the defendant's intent to sell marijuana. Concerning the fact that Defendant had stopped the car in a fire lane, absent evidence that this behavior had been observed in relationship to prior drug transactions at Enloe, or similar evidence, it is also irrelevant. The fire lane was directly in front of the school, and part of the "car pool lane" where students were regularly picked up. Officer Brandenburg testified that people regularly parked in that fire lane and, when they did so, he would ask them to move if they were still in their vehicles, as Defendant was. The State did not rely on any of these alleged "factors" in its prosecution of Defendant for PWISD. There was no testimony that any of this evidence was indicative of, or related to, any intent to sell, nor were any of these "factors" argued to the jury as such. *Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711; *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176.

Concerning Defendant's presence on school property, the testimony of both Officer Brandenburg and Jones supports Defendant's statement to Officer Brandenburg that he was in the car pool lane because he was going to pick up his friend Wilson, a student at Enloe. Officer Brandenburg, who personally knew Wilson, testified that when he was outside with Defendant: "I could see [Wilson] through the main door windows of the school looking out at us." Jones testified that after Defendant was arrested, Defendant told him he went to Enloe to pick up Wilson. There was no evidence that Defendant's behavior was inconsistent with that of other

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visitors to the school, and Officer Brandenburg testified to no suspicious activity on the part of Defendant from which he could infer an intent to sell marijuana. *See Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176 (“Defendant’s actions were not similar to the actions of a drug dealer.”). Defendant did not interact with *anyone* before he was approached by Officer Brandenburg, and the fact that Defendant was not a student at Enloe does not show an intent to sell.

Again, the State neither solicited evidence, nor argued to the jury, that *any* of the above non-*Wilkins* factors supported an inference that Defendant had the intent to sell. *Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711; *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176. Further, the State did not attach any significance to the above evidence in its argument on appeal concerning intent to sell.

Concerning the handgun recovered from the glove compartment of Jones’ car, I do not contend that recovery of a weapon can never be relevant to PWISD, I simply do not believe its relevance in the present case, combined with the other relevant evidence, was sufficient to survive Defendant’s motion to dismiss. The State neither presented testimony suggesting that the presence of the gun in the glove compartment of Jones’ Impala was indicative of an intent to sell on Defendant’s part, nor made any such argument to the jury. If the jury considered the gun in its intent to sell deliberation, it would have had to have done so on its own initiative, which could have been improper. *See State v. Mitchell*, 336 N.C. 22, 29-30, 442 S.E.2d 24,

28 (1994); *Smith*, 99 N.C. App. at 71–72, 392 S.E.2d at 645. Because the State did not present testimony in support of this argument, nor make this argument to the jury, I presume the jury acted appropriately.⁴

The majority opinion, in arguing for greater relevance of the handgun in our analysis, relies in part on a statement in *Smith*: “As a practical matter, firearms are frequently involved for protection in the illegal drug trade.” *Smith*, 99 N.C. App. at 72, 392 S.E.2d at 645. It is important to place this quote in context. In *Smith*, upon searching the two defendants’ residence, officers found, *inter alia*, four “nickel” bags of marijuana; rolling papers; “a bag of marijuana in a photograph holder;” \$355.00; 0.22 grams of cocaine in a “bottle labeled ‘manitol[;]’” a box of plastic baggies; “seventeen individual baggies” with 2.1 grams of cocaine divided between them, all located in a larger bag; three pistols; and “some scales.” *Smith*, 99 N.C. App. at 70, 392 S.E.2d at 644.

One of the defendants in *Smith* was “charged with felonious possession of a firearm by a convicted felon.” *Id.* at 69, 392 S.E.2d at 643. Both the defendants were charged with PWISD. *Id.* “The trial court granted defendant Smith’s motion to sever the firearm possession charge” from the PWISD charges. *Id.* Therefore, the three

⁴ In light of Defendant’s acquittal for possessing a firearm on educational property, we now know that the jury did not improperly consider the gun in its intent to sell analysis. I do not contend that the not guilty verdict on the charge of possession of a firearm was relevant to Defendant’s motion to dismiss the PWISD charge. The jury’s ultimate determination that the State had not proved Defendant possessed the gun in the glove compartment cannot serve to retroactively support Defendant’s motion to dismiss.

pistols recovered from the residence *were not introduced as evidence of intent to sell* in the PWISD portion of the trial. However, at the PWISD portion of the trial an officer testified that three guns were found in the residence. The defendants in *Smith* first argued that admission of this testimony “was irrelevant and unduly prejudicial” during the PWISD portion of the trial. *Id.* at 71, 392 S.E.2d at 644. In deciding the defendants’ first argument, this Court first held the defendants’ argument was not properly preserved, then further reasoned:

We think that the testimony concerning the guns was relevant to “illustrate the circumstances surrounding [defendant Crawford’s] arrest.” *We also cannot say that it is totally irrelevant to . . . the charges of possession with intent to sell or deliver cocaine or marijuana. As a practical matter, firearms are frequently involved for protection in the illegal drug trade.*

We recognize the highly inflammatory nature of raising the issue of firearms before the jury, and that the probative value of the testimony concerning the guns may have been outweighed by the possibility of undue prejudice. In this case, however, if there was error in admitting the testimony, it was harmless to the defendants since the evidence against them was ample.

Smith, 99 N.C. App. at 71–72, 392 S.E.2d at 645 (citations omitted) (emphasis added).

This analysis was *solely* limited to whether the defendants were *prejudiced* by the admission of the gun evidence during the PWISD portion of the trial, and had *no connection* to the defendants’ second argument, which concerned *the sufficiency of the evidence* to support PWISD. Further, this Court in *Smith* recognized that evidence

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of the presence of firearms in a trial for PWISD could be “highly inflammatory” and “that the probative value of the testimony concerning the guns may have been outweighed by the possibility of undue prejudice.” *Id.* at 72, 392 S.E.2d at 645. The portion of the analysis cited by the majority opinion is also *dicta*. In the part of its opinion where this Court addressed the defendants’ argument that the State has failed to present sufficient evidence of intent to sell, the recovery of the firearms was *not* considered, *nor even mentioned*. *Id.* at 73, 392 S.E.2d at 646.⁵

In the present case, Defendant’s charge of possession of a firearm on educational property was not severed from his charge of PWISD, so the jury was not prevented from hearing evidence of the gun recovered from the glove compartment of Jones’ Impala prior to deliberating the PWISD charge. However, the questions, testimony, and arguments made at trial indicate the evidence of the firearm was presented solely in support of the charge of possession of a firearm on educational property, and not in support of PWISD. *See Sanders*, 171 N.C. App. at 50, 613 S.E.2d at 711 (emphasis added) (“In particular, the dissent points out that the thirty diazepam pills were found inside a cellophane cigarette package inside a plastic bag.

⁵ I note that this Court has, in the past, improperly stated that *Smith* includes a firearm related holding relevant to PWISD. *See State v. Boyd*, 177 N.C. App. 165, 171, 628 S.E.2d 796, 802 (2006) (“*See State v. Smith*, . . . (holding that trial court could properly determine that evidence of a gun was relevant to the charge of possession with intent to sell or deliver cocaine because “[a]s a practical matter, firearms are frequently involved for protection in the illegal drug trade”)). There is no such holding in *Smith*, however the majority opinion relies on this language from *Boyd* in support of its argument.

However, *no officer testified that the packaging of the pills was indicative of an intent to sell rather than personal use.*)⁶. There is no evidence that the trial court considered the gun at all when it denied Defendant's motion to dismiss the PWISD charge. It appears, as in *Smith*, that the State presented the gun evidence solely in support of the possession of a firearm charge. Because this argument *was not made at trial*, Defendant had no opportunity to object to it and argue that the jury should be prohibited from considering the evidence of the gun in its intent to sell deliberations, pursuant to N.C. Gen. Stat. § 1A-1, Rule 403, or for any other reason.

The State's arguments in closing made in support of the intent prong of PWISD indicate that the gun had *not* been introduced as evidence of Defendant's intent to sell:

In this case you can look at the denominations of currency in [D]efendant's pocket,⁶ the evidence that you've heard testimony of with relation to the street value of these drugs Those are things that you can all – you can add together and say that those are circumstantial pieces of evidence that showed his intent to sell and deliver the marijuana.

The fact that he is out of school, the fact that he is out of school at 10:00 in the morning on a Friday as a 20-year-old man who is not enrolled there, not a student there and says he's there to pick up someone else who they tried to locate and can't.⁷ What can you infer from that? Was he really

⁶ Again, because there is no record evidence of the denominations, we cannot consider the State's characterization of the cash recovered on appeal.

⁷ Officer Brandenburg's testimony was that while he was detaining Defendant at the school, he saw Wilson, the friend Defendant claimed he was picking up, and that they seemed to communicate

there to pick somebody up, or was he there to do something else?

....

In this case you're looking at the circumstances under which this evidence was recovered to determine what you think [Defendant]'s intent was, if he, in fact, possessed it.

....

But [the marijuana was] packaged individually. If you're using for yourself, why have them in separate bags, *the separate packaging, the cash*, the location of the items. Those are things that you can look at and draw inferences from to conclude [D]efendant's intent, that his intent was to distribute marijuana. It could very well be that his intent was to distribute marijuana that day at the school. He said he was there to pick somebody up.

The State, in closing, did not argue any relevance related to the amount of marijuana recovered, the gun, or that the cash was "unexplained."

The majority opinion also cites *Boyd* and *State v. Willis*, 125 N.C. App. 537, 481 S.E.2d 411 (1997) in support of its argument for the relevance of the gun recovered from Jones' Impala. As noted above, the "holding" in *Smith* upon which the *Boyd* Court relied does not exist. Further, *Boyd* stands for the proposition that *on the facts of that case*, the gun was relevant to PWISD, and that the trial court did not *abuse its discretion* in ruling that the probative value of the gun was not outweighed by its prejudicial effect. *Boyd*, 177 N.C. App. at 171-72, 628 S.E.2d at

in some manner at a distance, but that when Officer Brandenburg later tried to locate the friend at the school, he could not.

802-03. The trial court in the present case was never asked to make any rulings pursuant to Rules 401 or 403, presumably because the gun *was never presented as evidence in support of PWISD*, the trial was not bifurcated, and the gun was clearly relevant and probative with respect to Defendant's possession of a firearm charge.

Willis did not involve any issue of intent to sell. This Court mentioned the "common-sense association of drugs and guns" in its analysis concerning whether the officers in that case were justified in conducting a more thorough search of the defendant, because the defendant had just left a known drug house, was acting nervously, and the "sudden lunge of [the defendant's] hand into the interior of his jacket during the [initial] pat-down" put the officers in reasonable concern for their safety. *Willis*, 125 N.C. App. at 543, 481 S.E.2d at 411. Based upon this reasoning, this Court held: "At that point, the situation became fluid and volatile, and Detective Sholar reacted reasonably and proportionately in searching and emptying the jacket pocket." *Id.* at 543-44, 481 S.E.2d at 412. That drug dealers are known to sometimes carry weapons is not in dispute. This fact does not make every firearm found in proximity to a defendant automatically relevant or admissible in a PWISD trial.

The majority opinion cites federal cases in support of its argument that "[d]espite our precedents, the dissenting opinion does not consider the additional presence of the stolen and locked firearm as an intent factor." Initially, the majority opinion has cited only one North Carolina precedent, *Boyd*, that considered the

presence of a gun as an intent factor. The federal cases are not binding precedent in the matter before us. Further, I reiterate that I do consider firearms as *potential* “intent factors,” but based upon North Carolina precedent, I do not believe it is *per se* proper to consider possession of a firearm in every PWISD case, nor do I believe possession of a firearm should generally be given the same weight as the established *Wilkins* factors. Finally, because the State did not introduce the gun recovered from Jones’ Impala as evidence of Defendant’s intent to sell, Defendant had no opportunity to make a Rule 403 objection.

“Quality” is not a *Wilkins* factor, but in the proper case I believe it can be considered in an intent to sell analysis. Concerning the quality of the marijuana in the present case, I rely on the uncontroverted testimony of Officer Brandenburg. As the majority opinion acknowledges concerning the two bags of marijuana found in the console, Officer Brandenburg testified:

They were in larger bags, and if memory serves me right, *they were more of what I would consider remnant marijuana*, from where – if you were to bag up the dime bags, *this would be the remnant stuff that didn’t have as many buds and stuff in it as the regular marijuana, or the sellable marijuana.*

Officer Brandenburg’s testimony implies that the “remnant marijuana” he found in the console was not “regular” or “sellable marijuana.” At a minimum, his testimony strongly implies that the “remnant marijuana” recovered from the console was not of a quality typically offered for sale. However, I would still vacate Defendant’s

conviction if the *de minimis* 10.19 grams of marijuana was in fact quality “sellable marijuana” and not low-quality “remnant stuff.”

E. Totality of the Evidence

The majority opinion devotes a significant portion of its analysis attempting to distinguish the facts in the present case from those in *Wilkins* and *Nettles* by focusing on individual differences between specific factors, and I have already addressed a number of those arguments. However, it is the totality of the evidence in each case that must be considered, and I do not rely solely on *Wilkins* in support of my “vote to reverse the jury’s verdict.” This Court considered *Wilkins* and *Nettles* in a very recent unpublished opinion, *State v. Carter*, __ N.C. App. __, __ S.E.2d __, 2017 WL 3027550 (2017) (unpublished), and then vacated the defendant’s conviction for PWISD. I find the facts and reasoning in *Carter* relevant to our analysis. In *Carter*, police recovered from the defendant 0.63 grams of methamphetamine in five separate baggies “or .0225% of the minimum amount to presumptively constitute trafficking[,]” “two unlabeled pill bottles containing fifty-two (52) tablets of oxycodone,” \$431.00, a syringe, and two cell phones. *Id.* at *1-3. This court in *Carter* compared the facts before it to those in *Wilkins* and *Nettles*:

We find the evidence at hand *substantially similar* to that in *Wilkins* and *Nettles*. *The State presented no evidence* that the 0.63 grams of methamphetamine, a very small amount, possessed by Defendant “was more than a drug user normally would possess for personal use.” *No evidence was presented that the manner in which the*

methamphetamine was packaged [five separate baggies] was more consistent with Defendant intending to sell rather than having previously used the methamphetamine. The \$431.00 found on Defendant was almost two-thirds less than the \$1,264.00 found insufficient in Wilkins to support an inference of intent to sell.⁸ There was no evidence of other drug paraphernalia consistent with an intent to sell methamphetamine such as weighing scales, chemicals, or empty plastic baggies.⁹

Id. at *3 (emphasis added).

I find the evidence before us substantially similar to that in *Carter*, and would likewise find it “substantially similar to that in *Wilkins* and *Nettles*.” *Id.* The amount of drugs recovered in *Nettles* and *Carter* was relatively *greater* than that recovered in the present case, though I would characterize the amounts recovered in all four cases as *de minimis*. The amount of cash recovered in each instance was significant, but not highly unusual. “There was no testimony that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs [in any of the four cases].” *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176. Paraphernalia was found with the drugs in *Nettles* and *Carter*, but “[t]here was no evidence of other drug paraphernalia consistent with an intent to sell . . . such as weighing scales, chemicals, or empty

⁸ \$431.00 is slightly *more* than the amount of money recovered in *Nettles*.

⁹ In a footnote, this Court in *Carter* stated: “We note that the detectives found two cell phones when they searched Defendant. However, the State made no argument in its brief on appeal concerning the significance of Defendant’s possession of these cell phones; and, therefore, we do not consider their significance either.” *Carter*, 2017 WL 3027550 at *3, n. 1. I would note, in the present case, the State did not argue the significance of a number of the facts relied upon by the majority opinion, and I do not believe we should consider them.

plastic baggies.” *Carter*, 2017 WL 3027550 at *3. No paraphernalia, consistent with an intent to sell or not, was found in *Wilkins* or the present case. The only potentially relevant difference that I can find between the facts in *Wilkins*, *Nettles*, *Carter*, and the present case, is the gun recovered from the glove compartment of Jones’ Impala. However, for all the reasons discussed above, I do not believe the recovery of this gun serves to transmute this case from one lacking substantial evidence of an intent to sell into one including it.

III. *Conclusion*

At trial, the State presented evidence that Defendant was in possession of \$1,504.00 and a small amount of marijuana, packaged in a manner consistent with personal use. The State also argues on appeal that we should consider the firearm recovered from the Impala, even though this evidence was not presented to the jury as evidence of any intent to sell. “The State points to no other [relevant] evidence or circumstances that in any way suggest that [D]efendant had an intent to sell or deliver the [marijuana].” *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24. “[W]hen 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, the motion to dismiss must be allowed.” *Id.* at 158–59, 607 S.E.2d at 24 (citation omitted). This is true even if “the suspicion so aroused by the evidence is strong.” *State v. Dulin*, __ N.C. App. __, __, 786 S.E.2d 803, 807 (2016) (citation omitted). I do not find

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the suspicion aroused by the evidence in the present case to be strong. I reach the same conclusion when fully considering the gun recovered from the glove compartment of Jones' Impala, and assuming the marijuana recovered from the center console was all "sellable."

The jury was also instructed on the lesser-included offense of possession of marijuana, Defendant admitted at trial that he possessed the marijuana, and the jury necessarily found that Defendant possessed the marijuana by convicting him of PWISD. "Consequently, [I would] vacate [D]efendant's sentence [of PWISD] and remand for entry of a judgment 'as upon a verdict of guilty of simple possession of marijuana.'" *Wilkins*, 208 N.C. App. at 733, 703 S.E.2d at 811 (citation omitted).