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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-84

Filed: 15 December 2020

McDowell County, Nos. 18 CRS 000569, 18 CRS 000570

STATE OF NORTH CAROLINA

v.

SHANNON NICOLE MILLS, Defendant.

Appeal by Defendant from judgments entered 22 May 2019 by Judge J. Thomas Davis in Superior Court, McDowell County. Heard in the Court of Appeals 22 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Christopher R. McLennan, for the State.

Daniel J. Dolan for Defendant.

McGEE, Chief Judge.

Shannon Nicole Mills ("Defendant") appeals from the trial court's judgments entered after a jury found her guilty of possession with intent to sell and deliver marijuana, possession of methamphetamine, and possession of drug paraphernalia. Defendant argues the State failed to prove constructive possession and that the trial court committed plain error by admitting evidence that underwent a material change.

For the reasons discussed below, we find no substantive error, but remand for correction of a clerical error.

I. Factual and Procedural Background

This case arises from an officer's discovery of controlled substances inside a purse allegedly belonging to Defendant. The evidence at trial tended to show that, on 26 December 2017, Officer Brandi Davis ("Officer Davis"), of the Marion Police Department ("MPD"), responded to a call about a domestic disturbance at a residence in the Clinchfield section of Marion, North Carolina. The residence consisted of a house and a fenced-in yard. Upon arrival, Officer Davis testified she observed an SUV parked on the outside of the fence, between the residence and a vacant building. Officer Davis also saw three individuals, Ms. Crystal Frady, Mr. William Messer, and Defendant. Ms. Frady was sitting in the passenger seat of the SUV and Mr. Messer was standing outside the vehicle. Defendant was "walking towards the [SUV]" from inside the fenced-in yard, next to the house. Officer Davis approached Defendant and asked "what's going on?" Officer Davis testified Defendant explained that "her and her sister were arguing, and she was getting her property from [the residence] and then she was leaving."

Officer Davis saw the rear driver side door of the SUV was open and the SUV was "filled with other property." The back seat contained personal property, including two purses, female clothing, shoes and makeup. The trunk of the SUV was

also filled with women's personal property. Officer Davis searched the two purses. The first purse was located behind the passenger seat, where Ms. Frady was sitting, and the second purse was located behind the driver's seat. The first purse contained "a notebook and another form of identification that said Crystal Frady and then it gave her address." Officer Davis testified that the second purse had a keychain attached which read "Shannon" – Defendant's first name – and contained a firearm, approximately $250 in cash, a set of electric scales, approximately 250 plastic baggies of varying sizes, white pills, marijuana, and a hypodermic syringe with a clear liquid inside. Officer Davis arrested Defendant for possession of controlled substances.

In order to submit the clear liquid inside the hypodermic syringe for testing, Officer Davis testified she transferred the liquid contents of the hypodermic syringe into a vial, secured the vial in a sealed evidence bag, and placed the bag in the MPD's temporary evidence locker. Officer Davis needed to transfer the liquid contents into a vial because the Western North Carolina State Crime Laboratory (the "Laboratory") could not test syringes. Lieutenant Stephan Jenkins ("Lieutenant Jenkins"), an evidence custodian with the MPD, removed the sealed evidence bag from the temporary evidence locker and hand-delivered the bag to the Laboratory for testing.

When the Laboratory analyzed the vial the material was no longer liquid. It was a white crystalline material. The Laboratory determined the substance in the

vial was less than 0.1 grams of methamphetamine, and issued a report stating its findings (the "Laboratory Report").

Defendant was indicted on 29 October 2018 for possession with intent to sell and deliver marijuana, possession of methamphetamine, failure to appear on a felony, possession of drug paraphernalia, and simple possession of Oxycodone, a Schedule II controlled substance.

Defendant received a "Notice of Intent to Use Chemical Analyst's Report and Chain of Custody Statement Chapter 90 Controlled Substances" (the "Notice of Intent") on 25 February 2019, notifying Defendant that the State intended to introduce the Laboratory Report "without the testimony of the chemical analyst" and a chain of custody statement "without the personal appearance in court of [each] person signing the statement." Defendant did not file a written objection to the Notice. The vial tested by the Laboratory was introduced into evidence at trial without testimony from the analyst. The State presented evidence that the vial contained less than 0.1 grams of methamphetamine through the testimony of Lieutenant Jenkins and by offering the chain of custody statement and the Laboratory Report as evidence. Defendant did not ask and the State did not offer an explanation for why the material originally collected by Officer Davis was in a liquid state, but was a white crystalline material when analyzed by the Laboratory.

At the close of the State's evidence, Defendant moved to dismiss all charges. The trial court granted Defendant's motion to dismiss the charges of failure to appear and simple possession of Oxycodone. The jury returned verdicts of guilty for possession with intent to sell and deliver marijuana, possession of drug paraphernalia, and possession of methamphetamine. The trial court entered judgment on the jury's verdicts and sentenced Defendant to consecutive sentences of 6 to 12 months for possession of methamphetamine and 6 to 12 months for possession with intent to sell and deliver marijuana and possession of drug paraphernalia. The sentences were suspended for 30 months and Defendant was placed on supervised probation. Defendant gave oral notice of appeal.

II. Analysis

Defendant asserts three arguments on appeal. First, Defendant contends the trial court erred in denying her motion to dismiss because the State failed to prove constructive possession. Second, Defendant argues the trial court committed plain error by admitting evidence that underwent a material change. Third, Defendant contends, and the State concedes, the trial court committed a clerical error in the written judgment for possession of methamphetamine. We address each argument in turn.

A. *Constructive Possession*

Defendant first contends the trial court erred in denying her Motion to Dismiss because "[t]he most the State has shown [for possession] is that the defendant had been in an area where [s]he could have committed the crimes charged," citing *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976) (holding evidence that the defendant was occasionally near where contraband was found was insufficient to show any form of possession where the evidence did not otherwise link the defendant to the contraband). We disagree. The State presented sufficient evidence to lead a reasonable jury to conclude Defendant constructively possessed the contents of the purse displaying a keychain with Defendant's name.

We review the trial court's denial of a motion to dismiss *de novo*. *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018). In deciding a motion to dismiss, the trial court must view the evidence "in the light most favorable to the State." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). The trial court's inquiry is limited to a determination of "'(1) each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant being the perpetrator of such offense.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "'Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.'" *Chekanow*, 370 N.C. at 493, 809 S.E.2d at 549 (citation omitted). "Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, 'then it is for the

jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.'" *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation omitted).

Under the offenses of possession with intent to sell or deliver marijuana and possession of methamphetamine "it is unlawful for any person: (1) [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance; (2) [t]o create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance; (3) [t]o possess a controlled substance." N.C. Gen. Stat. §§ 90-95 (a)(1), (a)(3) (2019). Under the offense of possession of marijuana paraphernalia "[i]t is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia[.]" N.C. Gen. Stat. §§ 90-113.22(a) (2019).

Each offense requires the State to prove possession and possession may be actual or constructive. *State v. Minor*, 290 N.C. 68, 73, 224 S.E.2d 180, 184 (1976). A defendant constructively possesses contraband when she does not have actual possession of the contraband but has "'the intent and capability to maintain control and dominion over it.'" *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation omitted). A finding of constructive possession requires analysis of the totality of the circumstances. *Id.* If a defendant does not have exclusive possession of the location where incriminating evidence is found, "'the State must show other

incriminating circumstances before constructive possession may be inferred.'" *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001) (citation omitted).

This Court considers a "broad range" of factors to determine whether the State presented sufficient "other incriminating circumstances" to show constructive possession. *State v. McNeil*, 359 N.C. 800, 812, 617 S.E.2d 271, 279 (2005). "Two of the most common factors are 'the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found.'" *State v. Bradshaw*, 366 N.C. 90, 94, 728 S.E.2d 345, 348 (2012) (citation omitted). "No one factor controls[.]" *Chekanow*, 370 N.C. at 496, 809 S.E.2d at 552. This evidence "is for the jury to weigh, not the trial court, and it is certainly not for the appellate courts to reweigh." *Id.* at 499, 809 S.E.2d at 554. Furthermore, "[c]ontradictions and discrepancies [in the evidence] do not warrant dismissal of the case but are for the jury to resolve." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

The evidence in this case shows that Defendant neither had actual possession of the contraband discovered by Officer Davis, nor did Defendant have exclusive possession of the location where the contraband was found. Therefore, the State was required to show Defendant constructively possessed the contraband through evidence of other incriminating circumstances.

Defendant compares her case to our Supreme Court's prior decisions in *State v. Minor* and *State v. Slaughter*. In *Minor*, our Supreme Court held that the State's

evidence was insufficient to show the defendant constructively possessed a field of marijuana plants, because the evidence showed only that the defendant "had been a visitor at an abandoned house [near the field]" and that defendant was arrested while sitting on the hood of a car he did not own and two marijuana leaves were found inside the car. *Minor*, 290 N.C. at, 74–75, 224 S.E.2d at 185. Similarly, in *Slaughter*, the Supreme Court held that there was insufficient evidence of constructive possession where evidence that the State restrained the defendant and placed the defendant in the room where contraband was found was the only evidence placing the defendant in the proximity of the contraband. *State v. Slaughter*, 365 N.C. 321, 718 S.E.2d 362, 362 (2011) (reversing the Court of Appeals for the reasons stated in the dissent); *State v. Slaughter*, 212 N.C. App. 59, 70–71, 710 S.E.2d 377, 384, *rev'd*, 365 N.C. 321, 718 S.E.2d 362 (2011). In each of these cases, the evidence showed only that the defendant was physically present at a location nearby where contraband was found and failed to otherwise establish a connection between the defendant and the contraband.

The evidence in this case is distinguishable from that in *Minor* and *Slaughter* because it placed Defendant within a reasonable proximity to the contraband and established a connection tending to show that Defendant had dominion and control over the contraband. Although Defendant was not the registered owner of the SUV and was not inside the SUV when Officer Davis arrived at the scene, Officer Davis

encountered Defendant as Defendant walked towards the SUV from inside of the residence's fenced-in yard. Officer Davis did not request that Defendant move closer to the SUV and did not otherwise cause Defendant to be in its proximity. Proximity is determined "in terms of space and time[,]" *Chekanow*, 370 N.C. at 497, 809 S.E.2d at 553, and, in this case, Defendant was found near the SUV immediately prior to Officer Davis's discovery of the contraband.

Further, Defendant's stated reason for being nearby the SUV indicated that the personal property behind the driver's seat was hers, including the contraband in the purse, because Defendant informed Officer Davis that "her and her sister were arguing, and she was getting her property from [the residence] and then she was leaving." The back doors to the SUV were open. The back seat and trunk were filled with women's clothing, shoes, and makeup—items a reasonable person would expect someone to take with them as they left a residence. The purse in the back seat of the SUV was found amongst these items, displayed a keychain with Defendant's name on it, and contained each item of incriminating contraband. *See Miller*, 363 N.C. at 100, 678 S.E.2d at 595 (finding sufficient evidence of constructive possession where evidence identifying the defendant was found in the same place as the contraband).

Contrary to Defendant's assertions, the State's evidence did not leave the jury to "sail in a sea of conjecture and surmise." *Minor*, 290 N.C. at 75, 224 S.E.2d at 185. Rather, the State's evidence guided the jury's understanding of the scene when

Officer Davis arrived and demonstrated Defendant's dominion and control over the purse where the contraband was found. Viewing the evidence in the light most favorable to the State, the evidence presented at trial was sufficient to lead a reasonable jury to conclude Defendant had control over the purse and its contents that she had removed from her sister's residence and had placed in the SUV.

B. *Material Change*

Defendant next argues the trial court plainly erred by admitting the vial containing 0.1 grams of methamphetamine ("Exhibit 1C") at trial because the chain of custody statement did not account for the location of the evidence after 8 June 2018, the material in the vial was different from the material collected, and the State improperly relied on the Laboratory Report and chain of custody statement without the testimony of an authenticating witness.[1] We disagree.

Defendant states that she did not object to the admission of Exhibit 1C at trial and requests this Court conduct a plain error review. "In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4). This Court may review unpreserved arguments

[1] We acknowledge at the outset that Defendant requested delivery of Exhibit 1C to this Court for our review. The record on appeal reflects this request. We decline to review Exhibit 1C in its physical form because it is not required to reach our conclusion.

regarding evidentiary issues for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). In doing so, we examine the entire record to decide whether a fundamental error occurred at trial which had a probable impact on the jury's finding of guilt. *Id.* "It is generally prejudicial error for the trial court to instruct the jury on a theory of [the] defendant's guilt that is not supported by the evidence." *State v. Poag*, 159 N.C. App. 312, 322, 583 S.E.2d 661,668, *disc. review denied*, 357 N.C. 661, 590 S.E.2d 857 (2003).

"[A] two-pronged test must be satisfied before real evidence is properly received into evidence." *State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984). "The item offered must [1] be identified as being the same object involved in the incident and it must [2] be shown that the object has undergone no material change." *Id.* (citing *State v. Barfield*, 298 N.C. 306, 336 259 S.E.2d 510, 533 (1979)). "Whether the substance in question has undergone a material change is subject to the exercise of the trial court's sound discretion." *State v. Carr*, 122 N.C. App. 369, 374, 470 S.E.2d 70, 74 (1996) (citing *State v. Taylor*, 332 N.C. 372, 388, 420 S.E.2d 414, 423–24 (1992)). A detailed chain of custody is only required if "the evidence offered is not readily identifiable or is susceptible to alteration and there is a reason to believe that it may have been altered." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392; s*ee State v. Kistle*, 59 N.C. App. 724, 726, 297 S.E.2d 626, 627 (1982). "Further, any weak links in a chain of custody relate only to the weight to be given evidence and not to its

admissibility." *Id.* (citing *State v. Montgomery*, 291 N.C. 91, 103, 229 S.E.2d 572, 580 (1976)).

N.C. Gen. Stat. §§ 90-95(g) and (g1) provide for admission of a North Carolina State Crime Laboratory report without the testimony of the analyst who prepared the report, and admission of a chain of custody statement without the testimony of each person signing the statement, where

> (1) [t]he State notifies the defendant at least 15 business days before the proceeding [or trial] at which the [document] would be used of its intention to introduce the [document] into evidence under this subsection and provides a copy of the [document] to the defendant, and
>
> (2) [t]he defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding that the defendant objects to the introduction of the report into evidence.

N.C. Gen. Stat. § 90-95(g) (2019); *see also* N.C. Gen. Stat. § 90-95(g1)(3) (providing an almost identical procedure for admission of chain of custody statements). A finding of plain error may occur if the record is unclear as to whether notice was properly given. *State v. Baldwin*, 161 N.C. App. 382, 388, 588 S.E.2d 497, 503 (2003).

We hold the State presented sufficient evidence that Exhibit 1C as it was offered at trial was the same substance Officer Davis discovered in the syringe inside the purse, as well as an adequate chain of custody for admission of Exhibit 1C. Officer Davis identified Exhibit 1C as the same vial she received and placed into evidence. **)** In preparing the vial for analysis, Officer Davis testified that she recovered a new,

clean vial from a locked evidence locker. Officer Davis then emptied the contents of the syringe into that vial. She placed the vial into an evidence bag. She then placed the evidence bag in an envelope and labeled the envelope with the Laboratory's address. Lieutenant Jenkins testified that he transported the evidence in his vehicle to the Laboratory, and delivered the evidence to an evidence technician at the Laboratory. He testified that upon delivering the envelope to the Laboratory, the evidence was in a sealed envelope initialed by Officer Davis. Lieutenant Jenkins and Officer Davis testified that the evidence was properly sealed and did not appear to be tampered with in any way. The chain of custody statement admitted at trial shows that Lieutenant Jenkins hand-delivered the envelope containing Exhibit 1C to Evidence Control on 9 January 2018. The envelope remained with Evidence Control until 8 June 2018, when it was hand-delivered to the Laboratory for testing.

Defendant specifically contends that, despite the chain of custody being printed on 4 September 2018, the chain of custody statement fails to account for Exhibit 1C's location after 8 June 2018. Defendant argues "[t]here is nothing to show where [Exhibit 1C] went after 8 June 2018." This argument lacks merit. Each new entry in a chain of custody statement catalogues when a change of custody occurs with respect to the item, be it a change of precise location or a change of possession. There is no need to make a new entry on the chain of custody to note that the custody of an item has not changed. The fact that "there is nothing to show where [Exhibit 1C]

went after 8 June 2018" can reasonably be assumed to show that Exhibit 1C remained in the custody of the Laboratory and did not change custody after that date. As Defendant recognizes in her brief, the Laboratory Report admitted at trial showed results completed on 16 October 2018, suggesting that Exhibit 1C remained with the Laboratory and the Laboratory's testing of Exhibit 1C was completed ten months after its arrival at the Laboratory. The State provided sufficient information to establish a complete chain of custody and "any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility." *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392.

Further, the trial court properly admitted the Laboratory Report and the chain of custody statement into evidence without witness testimony because the record reflects that the State provided proper notice of its intention to admit the records without "calling unnecessary witnesses" pursuant to N.C. Gen. Stat. §§ 90-95(g) and (g1). The State provided notice to Defendant that it intended to admit the documents without witness testimony through the Notice of Intent on 25 February 2019, more than 15 business days before trial on 21 May 2019. The State served Defendant with a copy of the Laboratory Report and the chain of custody statement at that time. Defendant did not file a written objection with the trial court, or serve any objection on the State, at least five business days before the proceeding. N.C. Gen. Stat. §§ 90-95(g)(2), (g1)(3)(b). Therefore, Defendant's failure to file an objection "shall be

deemed waived and the report [and statement] shall be admitted into evidence[.]" N.C. Gen. Stat. §§ 90-95(g), (g1).

It was not error, much less plain error, for the trial court to admit Exhibit 1C despite its admittedly different physical form. The State provided an adequate chain of custody for Exhibit 1C and, otherwise, properly submitted the Laboratory Report and chain of custody statement into evidence. Defendant did not object to the physical form of the substance in Exhibit 1C at trial; however, had Defendant brought the change of form to the jury's attention, the fact that the substance had changed from liquid to solid form would have gone to the weight given to the evidence by the jury, not its admissibility. Even assuming it was error to admit Exhibit 1C into evidence, the Laboratory Report showed that the substance discovered in the purse was methamphetamine. We cannot say that the jury probably would have reached a different result had Exhibit 1C not been admitted.

C. *Clerical Error*

Lastly, Defendant contends and the State concedes the trial court committed a clerical error in the written judgment for possession of methamphetamine. At trial the Court stated:

> As to the remaining charge, second count, in File Number 18CRS570, possession of methamphetamine, it will be a Class I felony. It will be a Level 1 for sentencing purposes. It will be a six month minimum, 17 month maximum, per the department of corrections. It will run consecutive to the first sentence – the first judgment that I just entered.

> *It will also be suspended for 30 months with supervised probation.*

(emphasis added). However, in the written judgment, the trial court failed to check "supervised" under "Suspension of Sentence" and to indicate the duration of the probation.

We agree that a clerical error occurred in the written judgment and we remand for correction of the written judgment to properly indicate that Defendant's Class I felony sentence for possession of methamphetamine in 18 CRS 000570 is suspended for a period of 30 months of supervised probation. *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." (internal marks and citations omitted)).

III. Conclusion

We hold that the State presented sufficient evidence of constructive possession of marijuana, methamphetamine, and drug paraphernalia found in the purse to submit the issue to the jury. We also hold that the State established an adequate chain of custody to prove the sample admitted as Exhibit 1C was the same sample initially recovered by Officer Davis on the date of Defendant's arrest. Further, it was not error to admit the Laboratory Report and chain of custody statement without

witness testimony pursuant to N.C. Gen. Stat. §§ 90-95(g), (g1). We find no error in the trial court's decisions, but remand the judgment to the trial court for correction of the clerical error in its sentencing consistent with this opinion.

NO ERROR IN PART; REMANDED IN PART.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).