NO. COA12-1311
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

STATE OF NORTH CAROLINA

v. Rockingham County
No. 10 CRS 748

DAVID CLINTON DIVINIE,
Defendant.

Appeal by defendant from judgments entered 11 May 2012 by Judge W. Douglas Albright in Rockingham County Superior Court. Heard in the Court of Appeals 12 March 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Lisa Granberry Corbett, for the State.

Kevin P. Bradley for defendant-appellant.

GEER, Judge.

Defendant David Clinton Divinie appeals from his convictions for trafficking in opium by possession of more than 14 but less than 28 grams of oxycodone and trafficking in opium by delivery of more than 14 but less than 28 grams of oxycodone. Defendant primarily contends on appeal that the trial court should have granted his motion to dismiss the trafficking

charges because the expert testimony of an SBI drug analyst that the pills obtained from defendant contained oxycodone was based on only a chemical analysis of one pill from each sample. Because the State presented evidence that the sampling was appropriate, that the pills not tested were identical to the ones tested, and counterfeit pills could be detected by observation, we hold that the State presented sufficient evidence to defeat the motion to dismiss.

Facts

The State's evidence tended to show the following facts. On 17 September 2009, Lieutenant Adam John Inman of the Gibsonville Police Department, working in cooperation with the Reidsville Police Department, accompanied undercover a confidential informant to 608 Thomas Street to make a purchase of pills. Tabitha Sanchez greeted the men at the door at that address and told the men she was going to a pain clinic and could get them some pills. Defendant then arrived at the house, and he and Lieutenant Inman spoke about defendant's helping the men get narcotic pills for pain.

While they were still at the house, another man known as "Buck" drove up to the house in a truck, defendant went and spoke with Buck, and Buck then told Lieutenant Inman he had three pills that he would be willing to sell. Buck sold

Lieutenant Inman the three pills for $15.00, and Lieutenant Inman gave Buck a $20 bill. He told Buck to keep the change because he had seen Buck give defendant some pills for brokering the deal. Buck then told Lieutenant Inman that he could get him another 30 pills for $150.00.

Lieutenant Inman and the informant returned to a secured location where Reidsville Police Officers were waiting. Lieutenant Inman turned over the three pills, and the officers discussed the proposal to buy some more pills. After the decision had been made to make the purchase, the confidential informant called defendant to let him know they wanted to buy the 30 pills for $150.00.

Lieutenant Inman and the informant returned to 608 Thomas Street, and Lieutenant Inman gave Buck $150.00. Buck and defendant left to get the pills and returned about two hours later, driven by Ms. Sanchez. Defendant gave Lieutenant Inman a paper bag containing 26 oval yellow pills. After defendant asked Lieutenant Inman what he was going to give him for setting up the deal, Lieutenant Inman gave Buck an extra $10.00 to take care of defendant.

Lieutenant Inman turned the pills over to Sergeant Kathy Owens Osborne who had taken custody of the 3 pills from the first buy. Sergeant Osborne packaged the pills and placed them

in an evidence vault. The pills were sent to the North Carolina State Bureau of Investigation ("SBI") for analysis on 8 January 2010.

SBI drug analyst Karen Stossmeister opened the packages of the pills, examined the pills, and checked the marks on the pills against a pill identification database. Agent Stossmeister did not chemically analyze all the pills. Instead, she cut in half one pill from each package of pills, put it in a solvent, and performed a chemical analysis of the pill by chromatograph mass spectrometer. The three pills purchased during the first buy weighed 2.57 grams and the sample tested was composed of acetaminophen and oxycodone. The 26 pills purchased during the second buy weighed 22.51 grams and the sample pill tested from that batch was also composed of acetaminophen and oxycodone. All of the pills were the same in appearance. Agent Stossmeister testified that based upon her analysis all the pills contained oxycodone.

Defendant was indicted for one count of trafficking in opium or heroin by possession of more than 14 but less than 28 grams of oxycodone, one count of trafficking in opium or heroin by delivery to Lieutenant Inman of more than 14 but less than 28 grams of oxycodone, one count of trafficking in opium or heroin by transportation of more than 14 but less than 28 grams of

oxycodone, and one count of trafficking in opiates by sale of more than 14 but less than 28 grams of oxycodone to Lieutenant Inman. The jury convicted defendant of one count of trafficking by possession and one count of trafficking by delivery. The jury found defendant not guilty of one count of trafficking by transportation and one count of trafficking by sale.

The trial court sentenced defendant to a term of 90 to 117 months imprisonment for trafficking in opium by possession and a consecutive term of 90 to 117 months imprisonment for trafficking in opium by delivery. Defendant did not give oral notice of appeal at the trial, but attempted to have the case recalled five days later in order to orally notice his appeal to this Court.

Discussion

We first address whether defendant properly appealed. Under Rule 4(a) of the Rules of Appellate Procedure, a defendant may appeal in a criminal case either by "(1) giving oral notice of appeal at trial" or "(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment . . . ." Since defendant did not follow either procedure, he failed to timely appeal.

Defendant has, however, petitioned for writ of certiorari. Since it is apparent that defendant lost his appeal through no fault of his own, but rather as a result of an incomplete understanding of the appellate rules by his trial counsel, we exercise our discretion to allow defendant's petition and address the merits of defendant's appeal.

I

Defendant first contends on appeal that the trial court should have granted his motion to dismiss because the State presented insufficient evidence that all of the pills contained oxycodone. Defendant argues that the evidence of a trafficking amount of oxycodone was inadequate "where the State's expert analyzed only one of twenty-six pills weighing a total of 22.5 grams and the State's experts testified current scientific standards require no inferences are to be made about unanalyzed material." (Internal quotation marks omitted.)

"'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 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918

(1993)). "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).

Agent Stossmeister testified that she tested one half of a tablet from each of the purchased samples (the three-pill sample and the 26-pill sample) and confirmed the composition of the remainder of the sample by visual inspection:

> Q. And as part of your analysis, exactly what, in layman's terms, did you do to analyze these drugs to determine whether or not they contained controlled substances?
>
> A. First, I took the drugs out of the packaging material and I counted the tablets because they were whole tablets. I then placed the tablets onto the scales to determine what the weight was. And I recorded the weight in my note. I then recorded the markings in my notes and used the computer system to look up the markings to see what the item contained. And after that, I took a tablet and cut it in half and I essentially added a solvent to it and put it on the gas chromatograph mass spectrometer in order for it to confirm that the item contained what it said it was supposed to.

When questioned further about the number of tablets she tested, she testified: "I just took one tablet and cut it in half and analyzed the half."

Under cross examination, Agent Stossmeister gave the following testimony:

> Q. So the fact of the matter is that although they look the same, they may not be the same as far as what is contained within the pills?
>
> A. That's correct.
>
> Q. So you cannot say with any certainty today that the pills before you possess more than 14 but less than 28 grams of oxycodone or any other mixture containing opium or its derivative; correct?
>
> A. Well, at the time of analysis and the sampling method, and the fact that the pills look alike by color, shape, weight, and markings, and the fact that the one pill did contain oxycodone and acetaminophen, that yes, it does contain the controlled substance.
>
> Q. So you can say with certainty, to a chemical certainty, that those pills contain more than 14 but less than 28 grams of oxycodone?
>
> A. I can say that at least the one I tested does contain it, and the rest of the pills look exactly like it.

Agent Stossmeister also testified that since she had left the SBI laboratory, the testing protocols had changed to require that an analyst test a greater number of pills in each sample because of the possibility of counterfeit narcotics being present. She then agreed that "other than the two pills that you testified [about], out of the 29, you cannot state with 100 percent certainty that the remaining pills contain controlled substance[s.]"

However, Special Agent Robert Evans, the agent in charge of the Triad Regional Crime Lab in Greensboro, North Carolina, testified that in January 2010, when the pills in this case were tested, "the policy for analyzing a substance, pharmaceutical preparation of a substance, was to analyze one tablet of that." The analyst would also "look at the tablet markings that were on that tablet, along with the other tablets present, if there was more than one, and we would produce a laboratory report indicating that whatever the controlled substance might be was present, and the laboratory report would be released at that point."

Special Agent Evans then clarified the protocol changes that had occurred for the testing of pharmaceutical preparations:

> Q. What, if any, changes have been made to the SBI's policy regarding the analysis of pharmaceutical controlled substances since then?
>
> A. Currently, we are in the process of switching over to new sampling techniques, and we have been doing so for an extended period of time, ultimately, to get an accreditation under ISO 17025, which ISO 17025 indicates a standard of operation that allows us to operate in a manner consistent not only amongst labs not only in North Carolina but also laboratories across the country and around the world as well. *The only difference between our sampling technique at this point in time now, as well as when we switch over to ISO 17025, is that*

> *the report itself will have different information on it. The analysis itself will be exactly the same. In the case of our old sampling plan, if there were multiple tablets, one would be analyzed.* At this point in time and under ISO 17025, one tablet will still be analyzed. *The difference will occur in the laboratory report itself.*

(Emphasis added.)

Special Agent Evans explained that a report under the current protocols would include a statement saying that "one tablet was analyzed and found to contain, in this case, oxycodone" and the report would then give the weight of the tablet. According to Special Agent Evans, "[u]nderneath that would be, 25 tablets were visually examined, however, no chemical analysis was performed." The report would continue to give the weight of the 25 tablets, "[a]nd then the final statement under that would say the physical characteristics, including shape, color, and manufacturer's markings of all units were visually examined and found to be consistent with the pharmaceutical preparation, containing, in this case, oxycodone." Additionally, Special Agent Evans acknowledged that an additional statement that "no inferences are to be made about unanalyzed material" would also be included under the current protocols:

> Q. . . . In your definitions, the document you referred to of administrative

> sampling, the last sentence with respect to administrative sampling indicates that no inferences are to be made about unanalyzed material; is that correct?
>
> A. That is correct. And that is the purpose of putting a statement about the unanalyzed tablets having -- there [sic] is no inferences made. However, a statement is put down that they are consistent tablet markings, and on the actual tablet itself, are consistent with this particular preparation.

In arguing that this evidence is not sufficient to show that all of the pills contained oxycodone, defendant points to *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010). In *Ward*, an SBI special agent had not conducted any chemical testing of the tablets at issue, but rather had testified regarding the content of the tablets based solely upon a visual examination of the tablets. *Id.* at 136, 694 S.E.2d at 740. Our Supreme Court held: "[T]he expert witness testimony required to establish that the substances introduced here are in fact controlled substances must be based on a scientifically valid chemical analysis and not mere visual inspection." *Id.* at 142, 694 S.E.2d at 744. The Court noted further, however, that the scope of a chemical analysis is "dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *Id.* at 148, 694 S.E.2d at 747.

Following our Supreme Court's decision in *Ward*, this Court examined an argument similar to that made by defendant here in *State v. Dobbs*, 208 N.C. App. 272, 702 S.E.2d 349 (2010). In *Dobbs*, the State's evidence showed that a confidential informant for the Brunswick County Sheriff's Department purchased a quantity of tablets of prescription medication from the defendant at his barber shop. *Id.* at 273, 702 S.E.2d at 350. Those tablets were then sent to the SBI laboratory for analysis. *Id.* At trial, a drug chemist who worked in the SBI crime laboratory "first compared the tablets with information contained in a pharmaceutical database." *Id.* at 275, 702 S.E.2d at 351. She testified that "[e]ach tablet was similar in coloration and had an identical pharmaceutical imprint." *Id.* The database indicated that the pills were "a combination of hydrocodone and acetaminophen." *Id.* After the visual comparison and analysis, the chemist "performed a confirmatory test on one of the tablets, using a gas chromatograph mass spectrometer" that indicated the tested tablet was Dihydrocodeinone, an opiate derivative. *Id.*

On appeal, the defendant argued based on *Ward* that "the State [could not] rely upon a visual inspection of pills to determine that they are a controlled substance." *Id.* at 276, 702 S.E.2d at 351. After noting that the Supreme Court had held

in *Ward* that "the scope of a chemical analysis is 'dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration,'" *id.*, 702 S.E.2d at 352 (quoting *Ward*, 364 N.C. at 148, 694 S.E.2d at 747), this Court concluded that because the defendant did not cross-examine the chemist concerning the sufficiency of the sample that was chemically tested and did not argue that the sample was insufficient at the trial level, the defendant had failed to preserve the issue for appeal. *Id.*

The Court further held that even if the defendant had "preserved his argument that the State was required to test a sufficient number of pills to reach the minimum weight threshold for a trafficking offense," that "argument is without merit." *Id.* The Court noted that in the case of *State v. Myers*, 61 N.C. App. 554, 556, 301 S.E.2d 401, 402 (1983), "it was held that a chemical analysis test of a portion of the pills, coupled with a visual inspection of the remaining pills for consistency, was sufficient to support a conviction for trafficking in 10,000 or more tablets of methaqualone." *Dobbs*, 208 N.C. App. at 276, 702 S.E.2d at 352.

Dobbs is controlling in this case. Although in *Dobbs*, the defendant presented no evidence of proper sample size, here defendant, during cross-examination, elicited testimony

suggesting that under current protocols, Agent Stossmeister's decision to test only one pill would be insufficient. The State, however, also presented evidence from a current agent in charge of the Triad Regional Crime Lab that the current protocols would still provide for testing of one pill of the sample and visual examination of the remaining pills. Because, in contrast to *Ward*, the State presented evidence that Agent Stossmeister actually tested one pill from each bag, as well as visually examining them, and that this sample was an appropriate size, the State presented sufficient evidence to defeat the motion to dismiss.

Moreover, *Dobbs* held that *Myers* is still good law following *Ward* and, therefore, sampling followed by visual inspection, as was done here, is sufficient for the State to meet its burden of showing the content of pills. *See also State v. Riera*, 276 N.C. 361, 366, 172 S.E.2d 535, 539 (1970) (holding that testimony of chemist who "selected at random some of the capsules delivered to him for testing," sufficiently established that 100 or more tablets possessed by defendant also contained barbiturates); *State v. Wilhelm*, 59 N.C. App. 298, 303, 296 S.E.2d 664, 667 (1982) (holding that forensic chemistry expert could testify regarding composition of tablets in three separate bags when

expert had randomly selected one tablet from each bag and confirmed that tablets in each bag were uniform and identical).

Further, the State addressed the possibility of counterfeit pills. Special Agent Evans testified that "[t]ypically speaking, tablets that are clandestinely manufactured, or not manufactured by a pharmaceutical company, have inconsistencies in them, such as they will be different thicknesses. They may be different colorations. The markings may not be as crisp as they would be on an actual pharmaceutically-prepared tablet. In looking at these, it's our policy back when this case was analyzed, as well as our current policy, both indicate that you do have to have consistencies. If there's anything that's out of place when the analyst looks at it, then, yes, that would be taken into account." He then continued "[a]s far as clandestinely manufactured things, in a situation like this where the markings match up, the analysis matched up, that would not be an issue here."

As the State presented sufficient evidence that the method used by Agent Stossmeister was "sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration," *Ward*, 364 N.C. at 148, 694 S.E.2d at 747, given the circumstances of this case, we hold that the trial court properly denied defendant's motion to dismiss.

II

Defendant next contends that the trial court's failure to instruct the jury on the lesser included offenses of possession and delivery of oxycodone, as opposed to trafficking, was error. His argument is predominantly based upon his contention that Agent Stossmeister did not test a sufficient quantity of the pills in question, and, therefore, her testimony was insufficient positive proof of the elements of the crime charged and presented conflicting evidence as to the amount of oxycodone defendant had in his possession.

Defendant did not request the instruction at trial and, therefore, contends on appeal that the omission was plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted).

"The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the

jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements." *State v. Leroux*, 326 N.C. 368, 378, 390 S.E.2d 314, 322 (1990). The question in this case is whether there was conflicting evidence of the composition of the pills such that the weight of the oxycodone did not reach trafficking amounts.

Although defendant has suggested that because of the sampling method some of the pills might be counterfeit and thus the amount of oxycodone below trafficking limits, the record contains no evidence that the pills were counterfeit. At most, defendant's argument amounts to speculation regarding a hypothetical possibility. This speculation does not amount to a conflict in the evidence requiring submission of the lesser included offenses. Therefore, the trial court did not commit plain error in failing to instruct on those offenses.

III

Defendant next argues that the trial court's sentencing him to consecutive sentences for trafficking by possession and delivery where possession was inherent in the delivery constitutes an action beyond the allowable mandate of N.C. Gen. Stat. § 90-95(h)(4) (2011). He contends that a reading of that

statute that allows for a conviction on both charges under the facts of this case would render the statute unconstitutional based on the prohibition on double jeopardy contained in both the Constitution of the United States and that of North Carolina.

In essence, defendant makes a constitutional argument that was not raised before the trial court. The argument was not, therefore, preserved for appeal. *State v. Williams*, ___ N.C. App. ___, ___, 715 S.E.2d 553, 561 (2011) (holding that double jeopardy argument not raised in trial court is waived).

However, even if the issue were preserved, our Courts have held repeatedly that trafficking by possession and transportation are separate crimes and separately punishable even when the contraband involved is the same. *See, e.g., State v. Perry*, 316 N.C. 87, 104, 340 S.E.2d 450, 461 (1986) (holding "defendant may be convicted and punished separately for trafficking in heroin by possessi[on] . . ., trafficking in heroin by manufacturing . . ., and trafficking in heroin by transport[ation] . . . even when the contraband material in each separate offense is the same heroin"); *State v. Springs*, 200 N.C. App. 288, 295, 683 S.E.2d 432, 436 (2009) (holding that "a defendant is not subjected to double punishment if she is sentenced and convicted of both possession of a controlled

substance and possession of a controlled substance with intent to sell or deliver the same contraband"). Defendant has, therefore, failed to demonstrate any error.

IV

Defendant next contends that the trial court improperly imposed a consecutive sentence, as opposed to a concurrent sentence, in reaction to defendant's assertion of his innocence. Based on our review of the colloquy, we do not agree that the sentence was based on any improper consideration.

After defendant had been found guilty and after the trial court and the attorneys had addressed defendant's prior record level (level V), the State argued to the trial court, in connection with sentencing, the serious problems resulting from the increased prevalence of abuse of prescription medication. Defendant's counsel in turn argued that he believed the defendant's problems with alcohol had led to his behavior and that on the day of the offense, defendant had been found passed out in a church parking lot from some combination of alcohol and pills.

Defendant then asked to speak and talked about his efforts to address his issues with alcohol, including going to church and AA meetings, and his problems with back pain. Defendant's

counsel asked that the trial court require the Department of Correction to have defendant evaluated by the medical staff.

Then, as the trial court began to sentence defendant, defendant interrupted:

> THE DEFENDANT: Yes, sir. Excuse me. I would like to say something that, it wasn't really brought up until the last, sort of the last minute, and I found the paperwork on it here in my motion of discovery, and where Mr. Inman on his initial statement outside of my other motion to discovery explained, I've got it right here in a report from Ms. Owens, signed by Ms. Owens and Nancy Bennett. The pills that was turned over to Mr. Inman to start with was turned over by another person. And I got it plainly stated right here in my paperwork, and I just wanted to say that. I wasn't able to address that to the court because I chose not to testify, but I have it right here in the very paperwork.
>
> THE COURT: What are you telling me now?
>
> THE DEFENDANT: I did not. I was not the one that turned the 26---
>
> THE COURT: We're beyond that right now. The jury has spoken.
>
> THE DEFENDANT: I know it. But that is Mr. Inman's statement.
>
> THE COURT: Are you saying the officer didn't tell the truth? Is that what you're trying to say now?
>
> Counsel, you better talk to him.
>
> THE DEFENDANT: Yes, sir. How---

> THE COURT: Count one -- I thought I was going to see some remorse, but what I see is---
>
> THE DEFENDANT: Like I said---
>
> THE COURT: I'm going to take care of it right now. Count one, 90 to 117 months in the State Department of Correction, to be assigned to do labor as by law provided. Count two, 90 to 117 months in the State Department of Corrections, to be assigned to do labor as by law provided.
>
> Count two to run at the expiration, not concurrent. Consecutive sentences.

"It is well established that the decision to impose consecutive or concurrent sentences is within the discretion of the trial judge and will not be overturned absent a showing of abuse of discretion." *State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 497, 692 S.E.2d 145, 154 (2010). Nevertheless, our Supreme Court has explained in *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977):

> A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights.

Defendant contends that *Boone* supports his position that the remarks in this case indicated the trial court considered improper matter in its sentencing him to consecutive sentences.

In *Boone*, the trial court made statements at sentencing that indicated it had extended the defendant's sentence because of his rejection of a plea deal offered by the State and his demand for a jury trial. *Id.* The Court held those statements constituted an improper consideration and remanded the case for resentencing. *Id.* at 713, 239 S.E.2d at 465.

Here, a review of the entire sentencing hearing does not lead to the conclusion that the trial court based its sentence on any improper consideration. The trial court noted defendant's significant prior record, including the seriousness of his prior alcohol-related offenses, and explained in detail the court's concerns regarding the gravity of the problem posed by trafficking in prescription pain medications.

There is no indication that the trial court punished defendant for exercising his right to plead not guilty or to speak. Instead, it is apparent from the transcript that the trial court viewed defendant's remarks denying responsibility and suggesting that the officer was not telling the truth as showing a lack of remorse for conduct that the prosecutor and the trial court had both already described as being a significant societal issue.

Exercising the right to speak entails risk. If the trial court had heard an indication of remorse in defendant's words,

the court might have recognized that fact in imposing a shorter term or having the terms run concurrently. So too, the trial court was entitled to take into account what appeared to be a lack of remorse in ordering consecutive sentences. We see no grounds for concluding that the trial court based its sentence on impermissible considerations or abused its discretion.

V

Finally, defendant contends that the trial court erred in imposing a $100,000.00 fine in its written judgment and commitment without mentioning that fine in defendant's presence at sentencing. Defendant cites *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999), in which this Court held that a defendant has a right to be present when consecutive as opposed to concurrent sentences were imposed because that variance constituted a substantial change in the judgment, and the "[d]efendant had a right to be present at the time that sentence was imposed."

However, in this case, the statute under which defendant was sentenced -- N.C. Gen. Stat. § 90-95(h)(4) -- imposes the fine levied by the trial court as a nondiscretionary byproduct of being convicted of the offense. N.C. Gen. Stat. § 90-95(h)(4)(b) provides: "[S]uch person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90

months and a maximum term of 117 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000)." Imposition of mandatory fines as part of a sentence does not require the presence of the defendant. *See State v. Arrington*, ___ N.C. App. ___, ___, 714 S.E.2d 777, 782 (2011) (distinguishing *Crumbley* because fines imposed as a condition of probation were not discretionary, but were imposed as "a non-discretionary byproduct of the sentence that was imposed in open court").

No error.

Judges McGEE and DAVIS concur.

Report per Rule 30(e).