NO. COA13-53
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

IN THE MATTER OF:

N.J.

Durham County
No. 11 JB 87

Appeal by Juvenile N.J. from orders entered 22 August 2012 by Judge Pat D. Evans in Durham County District Court. Heard in the Court of Appeals 14 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Hannah Hall, for Respondent.

STEPHENS, Judge.

Procedural History and Evidence

On 27 February 2011, between 6:00 and 7:00 p.m., Officers Christopher Tidwell ("Tidwell") and Kimbell ("Kimbell"),[1] dressed

[1] Kimbell's first name is not included in the record. In addition, Kimbell's last name is spelled in the trial court order and in portions of the State's brief with an "a," as

in full uniform, conducted a foot patrol through a housing complex owned by the Durham Housing Authority ("DHA"). Tidwell and Kimbell were attempting to locate trespassers listed on the DHA trespass list and remove them from the complex. While on patrol, the officers observed a group of two males and two females sitting on an electrical box. The sun was still up. The officers approached the group and observed that the two males, later identified as J.J. and Respondent N.J., were "about fourteen or fifteen years old." As the officers approached, one of the group members tossed a "toboggan"[2] to the ground.

Tidwell asked if anyone in the group was on the DHA trespass list and if anyone lived on the DHA property. J.J. replied that he lived on the property with a parent. Tidwell asked J.J. if he had any weapons on him and if J.J. would stand and consent to being searched. J.J. gave verbal consent to be searched. During the search, Tidwell felt a large bump in the pockets of J.J.'s jeans and asked him if the bump was marijuana. J.J. responded that it was. Tidwell detained J.J.; he placed

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"Kimball." However, the majority of the parties' briefs, the entire transcript, and the prior opinion of this Court all spell Kimbell's last name with an "e." Accordingly, we use the latter.

[2] In this case, the term "toboggan" refers to a "stocking cap." *See generally* Merriam-Webster's Collegiate Dictionary 1313 (11th ed. 2004) (providing the varying definitions of the word "toboggan").

J.J. in handcuffs, walked him to the sidewalk, and "had him sit down."

While Tidwell was detaining J.J., Kimbell frisked Respondent and the two females to determine if they had any weapons. Kimbell found neither weapons nor contraband. Respondent and the two females were then "asked to sit back down" on the electrical box. Kimbell asked them to verify their addresses. At the same time, Tidwell retrieved the toboggan and felt a large bump inside the cap. Tidwell reached in and found thirteen individually wrapped bags of "leafy matter," which he believed to be marijuana. Seven bags, weighing a total of 5.62 grams, were chemically analyzed.[3] Tidwell asked the group to whom the "marijuana" belonged, and Respondent replied that it was his.

On 14 March 2011, Respondent was charged by juvenile petition with possession of a controlled substance with intent

[3] The record contains a slight discrepancy regarding the weight of the marijuana possessed by Respondent. The State Bureau of Investigation ("SBI") analyst testified at the hearing that she analyzed seven of thirteen bags, or 5.62 grams, of marijuana. The other six bags did not weigh enough to warrant a different criminal charge and, thus, were not tested. Contrary to the SBI analyst's testimony, however, the juvenile petition alleges that Respondent possessed seven bags of marijuana, which weighed 7.9 grams. Though the record does not explain this incongruity, the point was not raised on appeal, and it does not materially affect our analysis of the issues discussed in this opinion.

to manufacture, sell, or deliver. An adjudication hearing was held in Durham County District Court on 3 August 2011. At the hearing, Respondent's counsel moved to suppress Tidwell's testimony that Respondent admitted to owning the marijuana. During *voir dire*, Tidwell testified that neither he nor Kimbell read Respondent his rights before asking questions regarding the toboggan.

The juvenile court denied Respondent's motion to suppress. Respondent admitted the allegation of possession with intent to sell or deliver marijuana, but reserved his right to appeal the denial of his motion to suppress. The trial court adjudicated Respondent delinquent and entered a Level 2 disposition.

Respondent appealed the denial of his motion to suppress. On 19 June 2012, this Court vacated the adjudication and disposition orders and remanded the matter to the juvenile court to articulate its rationale for denying Respondent's motion to suppress by providing supporting findings of fact and conclusions of law. *In re N.J.*, __ N.C. App. __, 728 S.E.2d 9 (2012).

On 22 August 2012, the juvenile court re-heard the matter regarding Respondent's motion to suppress Tidwell's testimony. After hearing Respondent's argument, the juvenile court adopted

the State's proposed written order denying Respondent's motion to suppress. Respondent admitted the allegation of possession with intent to sell or deliver marijuana, preserving his right to appeal the denial of his motion to suppress. The trial court adjudicated Respondent delinquent and entered a Level 2 disposition. Respondent appeals.

Discussion

On appeal of the denial of his motion to suppress, Respondent argues that: (1) the juvenile court's finding that "[he] and the two others were asked to sit back down on the electrical box" is unsupported by the evidence,[4] (2) Respondent's admission that the marijuana belonged to him was obtained as the result of an improper custodial interrogation, (3) the juvenile court erred by failing to inform Respondent of his right to remain silent prior to accepting his admission of guilt, (4) the juvenile court erred by failing to affirmatively state that the allegations of the juvenile petition were proven "beyond a reasonable doubt," (5) the juvenile court erred by failing to

[4] Included in this first argument is the assertion that the trial court failed to consider the totality of the circumstances in its findings of fact, which prohibited it from properly "[m]aking a [c]ustody [d]etermination." Because this point is related to Respondent's argument on custodial interrogation, we address it in the second half of Section II.

make any written or oral findings to demonstrate that it considered certain required factors in entering its Level 2 disposition, (6) the juvenile court's findings were insufficient to support extending Respondent's probation, (7) the juvenile court erred by failing to make any findings of fact in support of its restitution order, and (8) the State failed to provide a sufficient factual basis to establish that Respondent intended to sell or deliver the marijuana. We affirm the trial court on issues one and two, vacate and remand on issue eight, and refrain from addressing issues three through seven.

I. The Juvenile Court's Finding of Fact that Respondent Was "Asked to Sit Back Down"

"In reviewing a trial judge's findings of fact, we are strictly limited to determining whether the . . . underlying findings . . . are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

In its 22 August 2012 order, the juvenile court found that "[Respondent] and the two other[juveniles] were asked to sit back down on the electrical box" shortly before Tidwell asked them to identify the owner of the marijuana. Respondent argues

that this finding is not supported by the evidence because some elements of the transcript suggest that it is unclear whether Respondent was "asked" to sit down. In particular, Respondent notes that Tidwell, the only officer present at the suppression hearing, "admittedly did not know what Kimbell said to the kids when he searched them." This is incorrect.

At no point in the pages of the transcript cited by Respondent does Tidwell state that he did not know what Kimbell said to the juveniles. In fact, when Tidwell was asked whether "the [Respondent and the other juveniles] were asked to sit back down [after the *Terry* [5] frisk]," he responded: "Yes . . . . They were still seated on the electrical box after they were done – after we were done determining if they had any weapon[s] on them." This is competent evidence to support the trial court's finding that Respondent and the others were "asked" to sit down. To the extent that there is evidence in the transcript to the contrary or evidence suggesting that Tidwell was not aware of the nature of Kimbell's statement, his direct answer to the

[5] *See generally Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 909 (1968) (holding that there is a "narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime").

above question nonetheless constitutes competent evidence sufficient to support the trial court's finding. *See Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.") (citation and quotation marks omitted). Accordingly, Respondent's first argument is overruled.

II. Custodial Interrogation

A. Respondent's Admission of Guilt

Respondent next argues that the trial court erred in denying his motion to suppress because his admission to the officers that the marijuana belonged to him was obtained via custodial interrogation, which occurred in violation of N.C. Gen. Stat. § 7B-2101 and *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). We disagree.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C.

132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

In its 22 August 2012 order, the trial court found the following pertinent facts:

> 1. [Respondent] was 15 years old . . . .
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> . . .
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> 5. [J.J.] consented to a search of his person for officer safety. A [*Terry*] frisk was conducted. [J.J.] was found to have actual possession of marijuana and was placed in custody as a result. He was handcuffed and removed from the other three persons that were sitting on the electrical box.
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> 6. [Respondent] and the two others was [sic] searched and found not to be in actual possession of any contraband. [Respondent] and the two others were asked to sit back down on the electrical box.
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> 7. Officer Kimball [sic] began to verify the addresses of all three remaining persons. Officer Tidwell retrieved the [toboggan] and found it held thirteen individually wrapped packages of marijuana.
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> 8. With this discovery, Officer Tidwell asked whose marijuana it was.
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> 9. [Respondent stated] that it was his.
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> 10. [Respondent] was not advised of his *Miranda* rights prior to this response to the officer's question.

> 11. The officers then put [Respondent] in custody based upon his statement.

Given those findings, the trial court made the following relevant conclusions of law:

> 1. [Respondent] was not in custody at the time he admitted the marijuana belonged to him.
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> 2. [Respondent] was[, therefore,] not entitled to ***Miranda*** warnings at the time he made the incriminating statement that the marijuana belonged to him . . . .
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> 3. The [c]ourt additionally considers how a reasonable person of the age and maturity of this juvenile would objectively consider these circumstances. This [c]ourt [comes to its conclusion] given that [Respondent] was [fifteen] years old at the time[] and [given that Respondent] observed [J.J.] being found in possession of marijuana [before J.J.] was immediately handcuffed and removed. Further, [this court considers] that [Respondent] was found not to be in possession of any contraband, . . . he was allowed to sit back down on the electrical box, [and] at the time the officer inquired about the marijuana, [Respondent] had no reason to believe he was already in custody of the officers or under arrest for anything. In fact, a reasonable [fifteen] year old would likely have concluded that[,] if he stayed silent, he may have [had] an opportunity to leave undetected. Up until that point, the officers had not found him to be trespassing, in possession of any drugs, or certainly not to be in possession with intent to manufacture, sell, or deliver drugs, so a reasonable [fifteen] year old in his position would have no reason to believe he was in custody.

. . .

N.C. Gen. Stat § 7B-2101 provides that "[a]ny juvenile *in custody* must be advised" of the following rights "prior to questioning":

> (1) That the juvenile has a right to remain silent;
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> (2) That any statement the juvenile does make can be and may be used against the juvenile;
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> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
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> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

Section 7B-2101 (emphasis added). These protections are rooted in the landmark decision of the United States Supreme Court in *Miranda*, which "was conceived to protect an individual's Fifth Amendment right against self-incrimination in the inherently compelling context of custodial interrogations by police officers." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001).

> Before warnings are required under *Miranda* and [N.C. Gen. Stat.] § 7B-2101(a), [however,] a juvenile must be in custody. The appropriate inquiry for determining whether a defendant is in custody is, based on the totality of the circumstances,

> whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. This determination involves an objective test, based upon a reasonable person standard, and is to be applied on a case-by-case basis considering all the facts and circumstances. While no single factor controls the determination of whether an individual is in custody for purposes of *Miranda*, our appellate courts have considered such factors as whether a suspect is told he or she is free to leave, whether the suspect is handcuffed, whether the suspect is in the presence of uniformed officers, and the nature of any security around the suspect. Furthermore, so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.

State v. Yancy, __ N.C. App. __, __, 727 S.E.2d 382, 385 (2012) (citations, quotation marks, and brackets omitted).

> Circumstances supporting an objective showing that one is "in custody" might [also] include a police officer standing guard at the door[or] locked doors . . . . The subjective belief of the defendant as to his freedom to leave is not in and of itself determinative. Furthermore, our Supreme Court has held that an objective "free to leave test" is broader than, and not synonymous with, the appropriate test for determining the custody issue.
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> . . .
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> An individual's . . . age, standing alone, [is] not determinative of whether he is "in

> custody" for purposes of *Miranda* and [N.C. Gen. Stat.] § 7B-2101(a). . . . Instead, an individual's . . . age [is a] factor[] to be considered when determining whether a knowing and intelligent ***waiver*** of rights has been made. The rights protected by *Miranda* and . . . § 7B-2101(a) only apply to custodial interrogations[, not stops]. As such, the question of whether those rights have been waived is irrelevant unless the individual was in custody.

In re J.D.B., 196 N.C. App. 234, 239–41, 674 S.E.2d 795, 799–800, ***affirmed***, 363 N.C. 664, 672, 686 S.E.2d 135, 140 (2009) (upholding this Court's determination that the juvenile was not in custody when he was questioned, but declining to "include consideration of the age . . . of an individual subjected to questioning by police" in the test for custody), ***reversed and remanded***, ***J.D.B. v. N.C.***, 564 U.S. __, __, __, 180 L. Ed. 2d 310, 318, 329 (2011) (stating that courts "cannot ignore" a child's age when determining whether the child is "in custody"; noting that age is not necessarily "a determinative, or even a significant, factor in every case," however; and remanding to the courts of this State to determine whether the juvenile was in fact "in custody," taking the juvenile's age into account) [hereinafter ***J.D.B.***].[6] Accordingly,

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[6] ***J.D.B.*** has no further history. We note, however, that this Court, by taking the juvenile's age into account as *one factor*

> [a] determination as to whether . . . an individual subjected to questioning by law enforcement officers [is] in custody requires the trial court to [ask] whether a reasonable person in the position of the questioned individual would believe himself to be in custody or . . . deprived of his freedom of action in some significant way."

In re D.A.C., __ N.C. App. __, __, 741 S.E.2d 378, 381–82 (2013) (citations omitted) [hereinafter *D.A.C.*].

In his brief, Respondent argues that he was questioned in violation of *Miranda* and section 7B-2101 while "in custody" because "[n]o [r]easonable 15-[y]ear-[o]ld [c]hild [w]ould [b]elieve [h]e [c]ould [w]alk [a]way [f]rom [q]uestioning by [t]wo [a]rmed and [u]niformed [p]olice [o]fficers [a]fter [b]eing [p]atted [d]own, [d]irected [w]here to [s]it and [s]tand, and [s]eeing [h]is [c]ompanion [a]rrested [a]fter [o]fficers [c]onducted [a] . . . [s]earch." In support of that argument, Respondent asserts that his freedom of movement was "control[led]" and points out that "[t]he officers did not tell any of the kids they were free to terminate questioning or walk

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in its analysis, correctly articulated the standard eventually laid down by the United States Supreme Court in its 2011 opinion. *See J.D.B.*, 196 N.C. App. at 239–41, 674 S.E.2d at 799–800.

away from the electrical box where they were instructed to sit."[7] We are unpersuaded.

The issue of whether a juvenile is "in custody" under section 7B-2101 and *Miranda* has come before this Court on a number of occasions. In *J.D.B.*, this Court determined that a thirteen-year-old juvenile *was not* in custody for purposes of *Miranda* when he was (1) "escorted from class and into a conference room by a uniformed school resource officer," (2) questioned in a room with an investigator, two school officials, and a school resource officer, (3) "the door was closed, but not locked," (4) the juvenile was not searched or handcuffed, (5) the juvenile "only began speaking with [the investigator] after agreeing to answer questions," (6) the interview lasted approximately thirty to forty-five minutes, and (7) the juvenile left when the school bell rang. 196 N.C. App. at 239–40, 674 S.E.2d at 799–800. One year later, In *In re L.I.*, we determined that a juvenile *was* in custody when she was placed in investigative detention, handcuffed, and placed in the backseat of a patrol car. 205 N.C. App. 155, 160, 695 S.E.2d 793, 798

[7] The record does not establish that Respondent and the two females were "instructed to sit." As determined in the previous section of this opinion, the trial court found that Respondent was "asked" and, therefore, *not directed*, to sit down.

(2010) [hereinafter *L.I.*]. Shortly thereafter, in *In re K.D.L.*, we determined that a twelve-year-old juvenile *was* in custody when he was detained by a school resource officer and school officials, "accused of drug possession, frisked, transported in a police cruiser [to the principal's office], and interrogated nearly continuously from 9:00 a.m. to 3:00 p.m. with a police officer in the room . . . ." 207 N.C. App. 453, 461, 700 S.E.2d 766, 772 (2010) (noting that "[b]eing frisked and transported in a police cruiser" is similar to the experience of an arrestee and pointing out that "a reasonable person is likely to associate it with the experience of being under arrest"). More recently, in *D.A.C.*, we determined that a fourteen-year-old juvenile *was not* "in custody" when (1) he was "asked" by two officers to step outside, (2) he was questioned by the officers in an open area of his yard while his parents remained inside the house "with the door shut," (3) the conversation occurred in broad daylight and lasted for about five minutes, (4) the juvenile only answered one "simple, straightforward question" — "did you do it?," (5) only one officer was in uniform, but both were armed, (6) the juvenile was not placed under arrest, handcuffed, or searched, and (7) the juvenile was never told

that he was free to leave or advised of his rights. __ N.C. App. at __, __, 741 S.E.2d at 380, 382.

In this case, the evidence presented at the suppression hearing was that the conversation between Respondent and the two officers occurred in the daylight hours of the early evening, outside the residential area where Respondent's friend, J.J., lived. The juveniles and officers were not in an enclosed space. There were two officers present, both armed and in uniform. After one officer discovered marijuana on Respondent's friend during a *Terry* frisk, the friend was detained, handcuffed, and directed to sit down on the sidewalk. At the same time, Respondent was frisked and then "asked" to sit back down on a nearby electrical box. Afterward, Officer Tidwell discovered marijuana in the toboggan on the ground and asked Respondent and the two other juveniles, collectively, to whom the marijuana belonged. This was the only question directed to the juveniles after they were asked to sit down. The record does not indicate how long the entire process lasted, but there is nothing to suggest — and Respondent does not allege — that it went on for longer than such period as is necessary to effectuate a reasonable stop.

This evidence is competent to support the trial court's findings of fact and, therefore, those findings are conclusive on appeal. Accordingly, we affirm the trial court's conclusion that the circumstances of this case are not sufficiently similar to those of an arrest to establish in the mind of a reasonable fifteen-year-old juvenile that he was "in custody" for purposes of *Miranda* and section 7B-2101. While Respondent may or may not have subjectively felt "free to leave," the circumstances of this case do not objectively suggest that a reasonable fifteen-year-old juvenile would have believed he was under arrest. Indeed, the fact that Respondent's friend, J.J., had just been detained, handcuffed, and directed to sit on the sidewalk would have indicated to a reasonable fifteen-year-old juvenile that his friend was under arrest and he was not. Unlike J.J., Respondent was never handcuffed. Further, though Respondent was frisked, he was not searched. The entire process took place in an open area, while the sun was still up, and the juveniles were only asked one question. Indeed, the question asked was directed to *all three* juveniles, as a group, not just Respondent. For these reasons, we conclude that the trial court's findings of fact support its conclusion that Respondent was not "in custody"

at the time he admitted ownership of the marijuana. Therefore, Respondent's argument is overruled.

B. Totality of the Circumstances

Respondent also argues that the trial court's order is erroneous because the court failed to "make necessary findings to demonstrate that it considered all of the relevant circumstances [in this case]." Specifically, Respondent asserts that the trial court's order is in error because it "made no findings of fact regarding the search of [Respondent's] person, the lack of consent by [Respondent], the restrictions placed on [Respondent]'s freedom of movement, or the fact that both officers were armed and wearing police uniforms." In support of this argument, Respondent quotes a section of *J.D.B.* in which the United States Supreme Court stated that courts must consider "all of the circumstances surrounding the interrogation." *J.D.B.*, __ U.S. at __, 180 L. Ed. 2d at 322.

Because we have already determined that the trial court's findings of fact were based on competent evidence and sufficient to support its conclusion that Respondent was not "in custody," we need not address this argument. We note, however, that "[w]here . . . there is no material conflict in the evidence presented at the suppression hearing, specific findings of fact

are not required. In that event, the necessary findings are implied from the admission of the challenged evidence." *L.I.*, 205 N.C. App. at 158, 695 S.E.2d at 797. Excepting Respondent's alleged failure to consent to the *Terry* frisk by Kimbell, the specific points raised by Respondent are undisputed. Accordingly, the trial court had no obligation to make explicit findings on those points. *See id.* Further, we note that the issue of the validity of the *Terry* search was not raised at the suppression hearing, and Officer Kimbell did not testify regarding that matter. Therefore, to the extent such a finding might have affected the trial court's calculus, the issue was not properly preserved at trial and could not be considered on appeal. *See* N.C.R. App. P. 10(a)(1). This argument is overruled.

III. Factual Basis to Support Adjudication of Intent to Sell or Deliver Marijuana

Third, Respondent argues that the State failed to provide sufficient information to establish a factual basis for his admission of guilt as to possession of a controlled substance with the intention to sell or deliver that substance, an essential element of the offense charged in the petition. We agree.

The juvenile court may accept an admission by a juvenile "only after determining that there is a factual basis for the

admission." N.C. Gen. Stat. § 7B-2407(c). This factual basis may rest upon any of the following: (1) a statement of facts by the prosecutor, (2) a written statement of the juvenile, (3) sworn testimony which may include reliable hearsay, or (4) a statement of facts by the juvenile's attorney. *Id.* If the State fails to provide information in compliance with N.C. Gen. Stat. § 7B-2407 to establish a sufficient factual basis for admitting the juvenile's plea, the juvenile court must vacate the admission of guilt and the disposition based thereon. *In re D.C.*, 191 N.C. App. 246, 248, 662 S.E.2d 570, 572 (2008).

Intent to sell or deliver a controlled substance may be shown by direct or circumstantial evidence. *State v. Wilkins*, 208 N.C. App. 729, 731, 703 S.E.2d 807, 809 (2010). When reviewing circumstantial evidence, a court may consider, *inter alia*, (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity of the substance found, and (4) the presence of cash or drug paraphernalia on the defendant's person. *Id.* at 731, 703 S.E.2d at 809–10 (citation and quotation marks omitted).

In this case, the State's evidence shows that Tidwell found thirteen individually wrapped bags of marijuana in a toboggan that had been thrown away as officers approached. Respondent

admitted that the marijuana belonged to him. Seven of the thirteen bags were chemically analyzed and contained 5.62 grams of marijuana. The other six bags were not chemically analyzed and had a gross weight of 5.36 grams. The total weight of the marijuana found in the toboggan was 10.98 grams. No weapons, money, or drug paraphernalia was found in Respondent's possession.

Quantity alone may be sufficient to support an inference of intent to sell or deliver. If so, however, "it must be a substantial amount." *Id.* at 731, 703 S.E.2d at 810 (citation and quotation marks omitted). In the present case, only 10.98 grams of "leafy substance" were found in the toboggan. Alone, this does not show that Respondent had the intent to sell or deliver marijuana. *See State v. Wiggins*, 33 N.C. App. 291, 295, 235 S.E.2d 265, 268, *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977) (holding that, without some additional evidence, possession of 215.5 grams of marijuana was insufficient to raise an inference that the marijuana was kept for the purpose of distribution).

When considering facts other than weight, the method and type of packaging may also be used to infer the defendant's intent to sell or deliver. *State v. Williams*, 71 N.C. App. 136,

139-40, 321 S.E.2d 561, 564 (1984) (holding that 27.6 grams of marijuana packaged in seventeen separate, small envelopes known as "[n]ickel or dime bags" constituted evidence from which a jury could infer intent to sell or deliver). In its brief, the State specifically notes that the marijuana found in the toboggan was separated into thirteen smaller packages and argues that this form of packaging constitutes sufficient evidence that Respondent intended to sell or deliver the controlled substance.

Although packaging is a factor to be taken into account when determining whether a defendant intended to sell or deliver a controlled substance, this Court has pointed out that, when such packaging is discovered, "it is just as likely that [the] defendant was a consumer who purchased the drugs in that particular packaging from [the] dealer." *Wilkins*, 208 N.C. App. at 732, 703 S.E.2d at 810. Thus, packaging is not determinative. There is simply no way to know, without more evidence, whether the person possessing the packages purchased them for personal use or with the intent to effectuate a sale or delivery of the drugs. *See id.* In this case, there was no evidence presented at the hearing that the amount of marijuana seized from Respondent, less than half an ounce, was more than the amount typically purchased for personal use. *Cf. State v. Baldwin*, 161 N.C. App.

382, 392, 588 S.E.2d 497, 505 (2003) (holding that 414.5 grams of marijuana seized was "more than a normal amount for individual use").

Other factors used to determine a defendant's intention are the presence of cash or drug paraphernalia on the defendant's person. *Wilkins*, 208 N.C. App. at 731, 703 S.E.2d at 810 (citation omitted); *see generally State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996) (holding that there was sufficient evidence of the defendant's intent to sell and deliver cocaine after officers observed the defendant having discussions through a car window with known drug users, the defendant attempted to hide his identity when questioned by the police, and a large rock of cocaine and eight smaller rocks were found in the defendant's possession). In this case, Respondent did not possess drug paraphernalia, weapons, or cash. Indeed, there was no evidence presented to suggest that his actions were consistent with those of a drug dealer.

In *Wilkins*, this Court held that the defendant's possession of less than half an ounce of marijuana, packaged into three smaller bags, did not raise an inference that he intended to sell or deliver the substance, even when the defendant was carrying more than $1,200 in cash on his person. *Wilkins*, 208

N.C. App. at 732, 703 S.E.2d at 810. In the present case, there are fewer factors to support an intention to sell or deliver marijuana. Respondent only possessed 10.98 grams of marijuana, which had been separated into smaller packages. Further, unlike *Wilkins*, Respondent was carrying no cash. Therefore, given the quantity of marijuana found, the packaging, and the absence of cash, weapons, or drug paraphernalia on Respondent's person, we hold that the evidence presented was insufficient to support an inference of intent to sell or deliver marijuana. Accordingly, we vacate Respondent's delinquent adjudication and "remand for entry of a judgment as upon a verdict of guilty of simple possession of marijuana." *Id.* at 733, 703 S.E.2d at 811 (citation and quotation marks omitted).

IV. Respondent's Remaining Arguments

Each of Respondent's remaining arguments concerns the juvenile court's actions with regard to its adjudication that Respondent committed the delinquent act of possession with intent to sell or deliver marijuana. Because we have held the State failed to present a sufficient factual basis to support that adjudication, there is no need to address the remaining issues raised on appeal.

AFFIRMED in part; VACATED and REMANDED in part.

Judge DILLON concurs.

Judge BRYANT concurs in the result only.

Report per Rule 30(e).