IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1248

Filed: 1 August 2017

Johnston County, No. 15 CRS 54467, 15 CRS 55398

STATE OF NORTH CAROLINA

v.

JOHN ANDREW MADDUX, Defendant.

Appeal by Defendant from Judgment entered 25 April 2016 by Judge Charles W. Gilchrist in Johnston County Superior Court. Heard in the Court of Appeals 7 June 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip K. Woods, for the State.

Anne Bleyman, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

John Andrew Maddux ("Defendant") appeals a jury verdict convicting him of manufacturing methamphetamine, trafficking in methamphetamine by manufacture, and trafficking in methamphetamine by possession. On appeal, Defendant asserts the court committed plain error by instructing the jury on an

aiding and abetting theory. For the following reasons, we grant Defendant a new trial.

I. Factual and Procedural Background

On 5 October 2015, a Johnston County Grand Jury indicted Defendant for manufacturing methamphetamine, possession of a methamphetamine precursor, and conspiracy to manufacture methamphetamine. On 2 November 2015, another Johnston County Grand Jury indicted Defendant for two counts of trafficking in methamphetamine by manufacture and one count of conspiracy to traffic in methamphetamine. On 7 March 2016, a third Johnston County Grand Jury issued a superseding indictment, charging Defendant with trafficking in methamphetamine by manufacture, trafficking in methamphetamine by possession, and conspiracy to traffic in methamphetamine.

On 18 April 2016, the Johnston County Criminal Superior Court called Defendant's case for trial. The State voluntarily dismissed the two conspiracy charges. The State's evidence tended to show the following.

The State first called Detective Jordan Haddock of the Johnston County Sheriff's Office Narcotics Division ("JCSOND"). On 19 August 2015, Detective Haddock and another member of the narcotics unit, Detective Adam Dunn, responded to a "generic drug complaint" regarding Defendant's home.[1] Detectives Haddock and

[1] The record does not disclose the identity of the tipster. Detectives referred to the complaint as a "generic drug complaint" reporting "drug activity at [Defendant's] house and that's it . . . ."

Dunn knocked on the door. Defendant answered the door and identified himself as the homeowner. Detective Haddock informed Defendant of the drug complaint. Detective Haddock asked if the detectives could search Defendant's home, and Defendant replied "yeah, go ahead."

Defendant walked detectives through his home. One of Defendant's sons, Andrew, and a friend watched television in the living room. Defendant first led Detectives to his bedroom and adjoining bathroom.[2] Detectives "did not see any items" in Defendant's bedroom at this time.

Next, Detectives entered Andrew's bedroom. They saw a clear "baggie" containing four white pills and a "homemade like bong" on the floor of Andrew's room.[3] Detective Haddock asked Defendant if there were "any methamphetamine manufacturing or paraphernalia" in his home, which Defendant denied. However, Defendant informed Detectives of his stepson, Lyn Sawyer, who "occasionally" spent the night on Defendant's living room couch. According to Defendant, Sawyer was on probation for a South Carolina conviction for manufacturing methamphetamine. Detectives came across a "burn barrel"[4] approximately thirty yards behind

[2] Defendant shares the room with his wife, but she left four months prior to the search to care for her sister, who suffers from a medical condition.

[3] Defendant was not charged for any of the items found in his son's room.

[4] A burn barrel, typically a 55-gallon drum, is a device used to burn trash, often in the backyard. A burn barrel is a common method of solid waste disposal in some rural areas.

Defendant's house, with what appeared to be a "one-pot meth lab" inside. Detective Haddock turned the investigation over to another JCSOND Detective, Jay Creech.

The State next called Detective Creech. On 19 August 2015, Detective Creech arrived at Defendant's home. Detective Creech first searched Defendant's bedroom. Under the bed, he discovered an empty package of lithium batteries, a metal strainer, a glass measuring cup, the top portion of a plastic bottle containing white residue, and a Walgreens's receipt for medication containing pseudoephedrine.[5] **[**Inside a plastic tote beside the bed, Detective Creech found a clear plastic tube.[6]

Detective Creech also discovered a trash bag containing "a lot of balled up aluminum foil strips" with burn marks on the inside of them. These strips, he explained, are commonly referred to as "meth boats" and are used as a means to smoke and inhale methamphetamine.

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[5] Pseudoephedrine is statutorily labeled as an immediate precursor chemical to the manufacture of methamphetamine. N.C. Gen. Stat. § 90-95(d2)(37) (2016). As such, pharmacies are required to record and log purchases of medication containing pseudoephedrine. N.C. Gen. Stat. § 90-113.52A (2016). Detective Creech determined Defendant purchased the pseudoephedrine based on the date, time, and location on the receipt and cross matching with the pharmacy's purchase records. Purchase records also show this is Defendant's first pseudoephedrine purchase since 2011. The medication was purchased 12 days prior to this search. Neither the pseudoephedrine products or packaging were found in Defendant's home.

[6] Detective Creech explained his familiarity with these items in the production of methamphetamine. Pseudoephedrine is the key ingredient to manufacture methamphetamine. Measuring cups are used to measure the chemicals that are mixed together. Strainers are utilized to separate the methamphetamine oil in the cooking process. The tops of plastic bottles are cut off and used as a makeshift funnel. Plastic tubing is essential in manufacturing methamphetamine as one of the processes. However, the measuring cup, strainer, plastic tubing, or cutoff bottle top with white residue were not sent off for drug analysis or fingerprint testing.

In Defendant's bathroom, Detective Creech found, among other things, an open box of cold packs[7] and a "clear plastic baggie" containing "a white powdered substance . . . resembl[ing] methamphetamine."[8] Detective Creech found a can of acetone[9] beside some tools in Defendant's kitchen. On the kitchen table, he discovered an empty "water bladder" from a cold pack, indicating the ammonium nitrate was removed. Inside of a diaper box, Detective Creech found more "meth boats," along with a piece of mail addressed to Sawyer at Defendant's address.

Detective Creech turned his attention to the burn barrel located approximately thirty yards behind Defendant's residence. Based on his experience, it is a common practice for methamphetamine manufacturers to have burn barrels such as these to burn the evidence and components of the methamphetamine lab. Detective Creech found a two-liter bottle with characteristics of a one-pot methamphetamine manufacturing method inside the barrel. Along with the bottle, Detective Creech found coffee filters, a latex glove, a trash bag, paper towels, and a battery casing

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[7] An instant cold pack, or cold pack for short, is a device that consists of two bags. One bag contains a chemical, such as ammonium nitrate, and is placed inside of the other bag containing water, also referred to as the "water bladder." Specific brands of cold packs contain ammonium nitrate. Ammonium nitrate is an essential element to manufacture methamphetamine. The brand of cold packs found in Defendant's home contained ammonium nitrate.

[8] The white substance found in the bathroom was not submitted for chemical analysis.

[9] The record reveals contradictory testimony concerning whether the can of acetone was completely empty or only nearly empty. Acetone is listed as an immediate precursor chemical in North Carolina and can be used to manufacture methamphetamine as a solvent. N.C. Gen. Stat. § 90-95(d2)(2). The State originally indicted Defendant for unlawful possession of the acetone with intent to manufacture methamphetamine. However, the court dismissed the precursor charges at the close of all evidence.

appearing to have been pried open. The battery casing was too rusted to identify the manufacturer, but Detective Creech said it had similar characteristics to a AA battery. According to Detective Creech, a pried open battery is a common sign of a meth lab because the lithium strips inside the battery are removed in order to extract the lithium, a key ingredient in the manufacture of methamphetamine.

As Detective Creech walked across the property to look for other evidence, Defendant's neighbor, Annie Satalango, approached him. Satalango's residence is roughly forty to fifty yards from Defendant's. Satalango shares the house with her daughter, Alex Tucker, and Sawyer.[10] Detectives spoke with Satalango and Tucker. Detective Creech explained to Satalango they were looking for "meth making materials." Satalango expressed concerns about her daughter, because Tucker was using methamphetamine and "possibly cooking meth in [Tucker's] bedroom." Tucker gave Detective Creech permission to search her room. During the search of Tucker's bedroom, he found a pink bag containing "methamphetamine components."[11] Detective Creech did not find any other items linked to methamphetamine in the Satalango home.

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[10] Sawyer and Tucker dated at the time of the search.

[11] Items found in Tucker's bag included, among other things, cigarettes, syringes, a plastic container containing salt, an AA lithium battery casing, a plastic soda bottle with the top portion removed, an empty aluminum foil box, portions of a cut-up drinking straw, a hot plate burner, and a glass measuring cup.

The State initially named Tucker as Defendant's co-conspirator in the indictment on the conspiracy charges. Detective Creech described the items discovered in her room as "consistent" with the items found in Defendant's home and the burn barrel. However, the State voluntarily dismissed all conspiracy charges against Defendant, and did not proffer Tucker as a co-conspirator at trial.

An unidentified child at Tucker's home informed Detective Creech he/she saw Sawyer run out of the back door when detectives began approaching Tucker's house. Sawyer did not return to the scene, but Detective Creech spoke to him on the phone. Sawyer knew what detectives found during the search, and "was scared to come home" because "he was on probation for manufacturing meth" and assumed Detective Creech "would lock him up for manufacturing meth." Tucker took full responsibility for the items found in her room. Detective Creech believed Tucker was attempting to protect Sawyer from getting in trouble. The State did not charge Sawyer with any crimes relating to items found in either home.

Detective Creech then spoke with Defendant.[12] Defendant called Sawyer "a liar" and said Sawyer was on probation for manufacturing methamphetamine in South Carolina. Defendant also alleged Sawyer "possibly" cooked methamphetamine next door with Tucker and "talks about cooking meth all the time." Defendant admitted to trying "meth a long time ago but didn't like it."

Defendant explained the presence of some of the items in his home. The acetone found in the kitchen "ha[d] been there forever," and he does not buy or use lithium batteries.[13] Defendant stated he uses the plastic tubing to make homemade

[12] Defendant was not in custody at the time of his conversation with Detective Creech.

[13] The record is inconsistent on Defendant's statement about the batteries, but appears to be a typo or Detective Creech misspoke.

wine, and he does not use the cold packs "unless it's an emergency." Detective Creech transported Defendant to the Johnston County Detention Center.[14]

The State called Special Agent Adam Turner of the North Carolina State Bureau of Investigation. The State tendered him as an expert witness in the field of site safety and processing clandestine laboratories, as well as an expert in manufacturing methamphetamine. Agent Turner's duties include processing methamphetamine laboratories, taking samples of materials to be sent off for testing, and neutralizing and transporting dangerous materials associated with clandestine methamphetamine laboratories. Agent Turner arrived at Defendant's house around 2:45 pm and examined the items discovered earlier.[15] Agent Turner collected a sample of the white substance with red specks from the bottle found inside the burn barrel and then packaged the remaining substance and bottle for testing. Based on Agent Tanner's training and experience and examination of the scene and items found, he concluded someone used a one-pot method to manufacture methamphetamine.

[14] The record does not disclose whether Detective Creech placed Defendant under arrest at this time.

[15] Agent Turner explained how these items contribute to the manufacturing of methamphetamine, specifically using the one-pot method. The one-pot method involves a two-part process. The first part involves placing the necessary ingredients into a single container, usually a 20-ounce plastic bottle. The five key ingredients are: (1) sodium hydroxide, obtained through crystal drain cleaners; (2) ammonium nitrate, obtained from instant cold packs; (3) pseudoephedrine, a common ingredient in some cold medications; (4) some form of solvent, such as lighter fluids or acetone; and (5) lithium metal, usually obtained through lithium batteries.

The State next called Lana Martin, a drug chemist at the North Carolina State Crime Laboratory. The State tendered Martin as an expert witness in the field of chemical analysis. Martin received the sample taken from the bottle found in the burn pile for analysis. After weighing and analyzing the substance found in the bottle, Martin determined it to be 31.05 grams of material containing methamphetamine, a Schedule II controlled substance, and pseudoephedrine, an immediate precursor. The white substance in the bottle found in the burn barrel located between Defendant's and Tucker's homes is the only evidence chemically analyzed and determined to be methamphetamine.

The State rested. Defendant moved to dismiss the charges. Specifically, Defendant argued the manufacturing methamphetamine charge should be dismissed because the State presented no evidence directly linking him to the manufacturing process or the chemicals used. Defendant further argued the State presented insufficient evidence to show aiding and abetting because they failed to show who the actual principal was, or Defendant somehow actively encouraged or communicated an intent to assist them in the crime. With regard to the precursor charge, Defendant argued he legally purchased the pseudoephedrine medication. He further asserted only an empty package, not any lithium batteries, were found in his possession. Next, Defendant contended the trafficking by possession charge should be dismissed because the State did not present any evidence showing actual possession. Moreover,

he contended under the constructive possession theory, he did not have exclusive dominion and control over the burn barrel and at least two to three other people living in his home and next door had access to the barrel and could have placed the bottle containing methamphetamine inside at any time. Under the totality of the circumstances, he argued, his cooperation with the police in allowing the police to search and assisting them in their search weighs against finding constructive possession. Lastly, Defendant argued the trafficking in methamphetamine by manufacture charge should be dismissed because the State failed to present any evidence indicating "he mixed, combined, promulgated anything to make methamphetamine" in his home.

The court granted Defendant's motion to dismiss the charge of possession of an immediate precursor, but denied the motion to all other charges. Defendant did not present any evidence. Defendant renewed his motion to dismiss, and the court denied the motion.[16]

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[16] The record is ambiguous on whether Defendant renewed his motion to dismiss after resting his case. The court and Defendant had the following exchange after the jury reentered the courtroom:

> THE COURT: . . . [D]o you wish to offer an open and closing?
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> [DEFENSE COUNSEL]: No, Your Honor. I would just at the close of all evidence.
>
> THE COURT: That's denied.
>
> [DEFENSE COUNSEL]: Thank you. Just for the record.
>
> THE COURT: You just wanted to offer –

The court conducted the charge conference. Defendant did not object to the proposed jury instructions. During the jury charge, the court instructed the jury on the elements of manufacturing methamphetamine and trafficking methamphetamine by manufacture by chemical synthesis, and aiding and abetting. The court also instructed the jury on the elements of trafficking methamphetamine by possession (actual or constructive possession) and aiding and abetting.

The jury returned a general verdict sheet finding Defendant guilty of: (1) manufacturing methamphetamine; (2) trafficking in methamphetamine by manufacture; and (3) trafficking in methamphetamine by possession. The court sentenced Defendant to a term of 70 to 93 months of imprisonment for each trafficking conviction and 58 to 82 months of imprisonment for the manufacturing conviction, to run concurrently. Defendant gave timely written notice of appeal.

II. Standard of Review

Because Defendant did not object to the jury instructions at trial, we review jury instructions for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d

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> [DEFENSE COUNSEL]: Last argument.
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> THE COURT: One argument?
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> [DEFENSE COUNSEL]: One argument.
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> THE COURT: The jury's with you, [State prosecutor].

However, this Court will assume, without deciding, this exchange satisfies Defendant's required renewal of his motion to dismiss at the close of all evidence.

326, 334 (2012). Plain error occurs when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

III. Analysis

Defendant argues the court committed plain error by instructing the jury on the aiding and abetting theory.[17] We agree.

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citation omitted). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* at 171, 200 S.E.2d at 191. "The trial court's jury instructions on possible theories of conviction must be

[17] Defendant also argues the court in denying his motion to dismiss the charges on the theory of aiding and abetting. However, because the State's case did not succeed or fail on the aiding and abetting theory alone, we address only Defendant's assignment of error regarding jury instructions. *See State v. Smith*, 65 N.C. App. 770, 772, 310 S.E.2d 115, 117 (1984); *State v. Madry*, 140 N.C. App. 600, 602, 537 S.E.2d 827, 829 (2000) (citation omitted) ("aiding and abetting is not a substantive offense but just a theory of criminal liability").

supported by the evidence." *State v. Osborne*, 149 N.C. App. 235, 238, 562 S.E.2d 528, 531 (2002) (citing *State v. Carter*, 122 N.C. App. 332, 339, 470 S.E.2d 74, 79 (1996)).[18]

In order to impose criminal liability on the theory of aiding and abetting, the State must show: "(1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person." *State v. Francis*, 341 N.C. 156, 161, 459 S.E.2d 269, 272 (1995) (citation omitted).

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[18] We note the North Carolina Supreme Court recently identified two lines of cases regarding disjunctive jury instructions in the context of the right to a unanimous jury verdict:

> *State v. Diaz* [317 N.C. 545, 346 S.E.2d 488 (1986), and its progeny] stand[ ] for the proposition that "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." In such cases, the focus is on the conduct of the defendant.
>
> In contrast, this Court has recognized a second line of cases [stemming from *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990),] standing for the proposition that "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct.

State v. Walters, 368 N.C. 749, 753, 782 S.E.2d 505, 507-08 (2016) (citation omitted) (alterations in original).

In the case *sub judice*, the court's jury instructions fall within the *Hartness* line of cases. *See State v. Surrett*, 217 N.C. App. 89, 95, 719 S.E.2d 120, 124 (2011) (concluding jury instructions on theories of acting in concert, aiding and abetting, and accessory before the fact fell within the *Hartness* line of cases). Therefore, Defendant's right of unanimity would not be *per se* violated by the disjunctive jury instructions at issue. Nevertheless, "where the trial court instructs disjunctively in this manner, there must be evidence to support all of the alternative acts that will satisfy the element." *State v. Johnson*, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007).

> In ruling on a motion to dismiss in the context of aiding and abetting, the court may also (1) infer a defendant's communication of his intent to aid from his actions and from his relationship to the actual perpetrators; (2) consider his motives to assist in the crime; and (3) consider the defendant's conduct before and after the crime.

State v. Walker, 167 N.C. App. 110, 132, 605 S.E.2d 647, 662 (2004) (citation omitted), *vacated in part on other grounds,* 361 N.C. 160, 695 S.E.2d 750 (2006).

"Our courts have consistently held that the mere presence of a defendant at the scene of the crime is not enough to establish the defendant's culpability. The defendant's intent to aid the perpetrator in the commission of the crime must also be shown." *State v. Bowman*, 188 N.C. App. 635, 647, 656 S.E.2d 638, 648 (2008) (internal citations omitted). "The communication or intent to aid does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators." *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 722 (2001), *overruled on other grounds*, 359 N.C. 425, 615 S.E.2d 256 (2005) (internal quotation marks and citations omitted). Further, "when the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement." *Lucas*, 353 N.C. at 581, 548 S.E.2d at 722.

The evidence does not reveal Defendant expressly communicated his intent to aid or encourage either Tucker or Sawyer. Further, there is no evidence to warrant the inference of aid from the relationship or friendship they shared. Defendant is

Sawyer's stepfather. However, Sawyer did not live with Defendant. The only evidence linking Sawyer to Defendant's home is Defendant's admission he allowed Sawyer to "occasionally crash[ ] on his couch in the living room . . . every once in a while," and one piece of mail addressed to Sawyer at Defendant's address. The evidence does not disclose a friendship or close relationship between the men. On the contrary, the evidence tends to show a contentious relationship. Defendant told Detectives Sawyer "was a liar and that you cannot trust anything that he said." Furthermore, the only evidence linking Defendant to Tucker is their mutual connection to Sawyer, living next door to one another, and Tucker's statement to Detective Creech about the bag found in her room.[19]

This evidence is not enough to show Defendant aided and abetted another. *Compare State v. Young*, 196 N.C. App. 691, 695-97, 675 S.E.2d 704, 707-08 (2009) (holding the State's evidence supported a jury instruction on aiding and abetting when defendant drove another to the crime scene, acted as the getaway driver, discarded evidence of the crime, supplied a gun used in the commission of the crime, and was a "tight" friend of the perpetrator), *with State v. Hargett*, 255 N.C. 412, 415-16, 121 S.E.2d 589, 592 (1961) (holding the trial court erred by instructing the jury on aiding and abetting when the evidence showed defendant was either "guilty as the

[19] Detective Creech testified Tucker told him she retrieved the bag from Defendant, but Tucker took responsibility for everything found in the bag. The bag's contents included multiple prescription bottles in Tucker's name.

perpetrator or not guilty at all", even though defendant was a friend of a perpetrator and did not intervene in criminal activity, but there was no evidence of aiding and abetting). Accordingly, we hold the court erred by instructing the jury on the State's theory of aiding and abetting.

Because we conclude the court erred in instructing the jury on this theory, we must next consider whether this error constitutes plain error. Defendant must demonstrate that "absent the error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

We note the jury completed a general verdict form, which does not show upon which theory the jury convicted Defendant. The record before us shows that absent the erroneous jury instruction, the jury probably would have reached a different result. The evidence linking Defendant to the offenses is entirely circumstantial. There is no direct evidence linking Defendant to the manufacturing evidence found in the house. The items found in his home, such as the cold packs and pseudoephedrine medication, are common household products. Detectives found the actual manufacturing device and only evidence chemically analyzed and determined to be methamphetamine in the back yard, between Defendant and Tucker's homes.

The evidence shows Defendant's defense theory revolved around presenting the jury with someone other than Defendant, such as Sawyer or Tucker, as the actual perpetrator. We cannot conclude the jury would have convicted Defendant beyond a

reasonable doubt had the jury been instructed only on the State's theory identifying Defendant as the sole perpetrator. Without the erroneous instruction on aiding and abetting, it is probable the jury would have returned with a different result.

Here, unlike in *Lawrence*, the evidence is not "overwhelming and uncontroverted" showing Defendant's guilt. *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335. *Compare State v. Jefferies*, ___ N.C. App. ___, ___, 776 S.E.2d 872, 880 (2015) (holding the trial court plainly erred in instructing the jury on a theory of guilt not included in the indictment), *with State v. Boyd*, 222 N.C. App. 160, 730 S.E.2d 193 (2012), *rev'd per curiam per the dissent*, 366 N.C. 548, 742 S.E.2d 798 (2013) (finding no plain error where jury was presented with a theory of guilt not supported by the evidence).

We conclude the court committed plain error by instructing the jury on a theory of guilt not supported by the evidence, and, therefore, grant Defendant a new trial.

IV. Conclusion

For the reasons stated above, we hold the court committed plain error by instructing the jury on a theory unsupported by the evidence and, accordingly, grant Defendant a new trial.

NEW TRIAL.

Judges DAVIS and MURPHY concur.

Report per Rule 30(e).