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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1185

Filed: 18 June 2019

Clay County, No. 15 CRS 61

STATE OF NORTH CAROLINA

v.

JASON PAUL WARE

Appeal by defendant from judgment entered on or about 22 February 2017 by Judge William Coward in Superior Court, Clay County. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Ebony J. Pittman, for the State.

James R. Parrish for defendant-appellant.

STROUD, Judge.

Defendant appeals judgments convicting him of drug-related charges. Since defendant made only a general objection to admission of the video of the drug sale and did not timely argue any defect in the foundation for the evidence before the trial court and has not argued plain error on appeal, he has waived review of this issue. Because there was substantial evidence showing that he maintained a dwelling for

keeping and selling methamphetamine, the trial court did not err by denying his motion to dismiss. We therefore conclude there was no error in defendant's trial.

I. Background

The State's evidence tended to show that Mr. Brandon Coker, formerly of the Clay County Sheriff's Office, had Ms. Smith[1] set up a drug buy between herself and defendant. Ms. Smith had previously been to defendant's residence several times to purchase drugs. On 17 May 2013, Ms. Smith went into defendant's trailer and purchased methamphetamine from him. The officers equipped her with a video device and she videotaped the transaction. Defendant was indicted for selling and delivering methamphetamine and maintaining a dwelling for keeping and selling methamphetamine. Defendant was tried by a jury and found guilty of both charges. The trial court entered judgments, and defendant appeals.

II. Admission of Video Evidence

Defendant first contends that the trial court erred in allowing the video tape of the drug transaction into evidence without proper authentication The video was introduced during testimony by Ms. Smith. Ms. Smith first described the transaction from beginning to end and testified that she had videotaped the transaction. Ms. Smith further testified that she had just viewed the video before the trial and it accurately depicted the events she had just described. The State moved to admit the

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[1] A pseudonym will be used.

video tape as evidence; defendant's counsel said, "Objection[,]" with no basis for the objection or argument. The trial court denied the objection and the video was shown to the jury. Defendant did not request to be heard further and did not move to strike the video.

> At the outset, we reiterate that failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice. Accordingly, the Rules of Appellate Procedure are mandatory and not directory. Our appellate rules state that to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. Furthermore, the objecting party must obtain from the trial court a ruling upon the party's request, objection, or motion.
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> The specificity requirement in Rule 10(a)(1) prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required. Moreover, a specific objection discourages gamesmanship, and prevents parties from allowing evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assigning error to them if the strategy does not work. Practically speaking, Rule 10(a)(1) contextualizes the objection for review on appeal, thereby enabling the appellate court to identify and thoroughly consider the specific legal question raised by the objecting party.
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> It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal. As a result, even constitutional challenges are subject to the same strictures of Rule 10(a)(1).

State v. Bursell, ___ N.C. ___, ___, ___ S.E.2d ___, ___, slip op. at *4-5 (May 10, 2019) (No. 12A18) (citations, quotation marks, and brackets omitted).

During defendant's motion to dismiss at the close of the State's evidence he argued that "how the -- the picture went from a little hand camera to a DVD, if there had been any kind of altering, cleaning up, anything[,]" was "never addressed" and "[t]here was no evidence whatsoever submitted for that[.]" But the foundation for the videotape was "never addressed" because defendant stated no basis for the objection and made no argument regarding the foundation. The comment in the argument for dismissal is not a timely objection in compliance with our rules. *See id.*; *State v. Brent*, 367 N.C. 73, 76, 743 S.E.2d 152, 154 (2013).

> Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. *To be timely, the objection must be contemporaneous with the time such testimony is offered into evidence.* Moreover, a defendant loses his remaining opportunity for appellate review when he fails to argue in the Court of Appeals that the trial court's admission of the evidence amounted to plain error.

Brent, 367 N.C. at 76, 743 S.E.2d at 154 (emphasis added) (citation, quotation marks, and brackets omitted). Defendant also failed to argue plain error. This argument is dismissed. *See id.*

III. Motion to Dismiss

Defendant also contends that the trial court erred in denying his motion to dismiss due to insufficient evidence of his conviction for keeping and maintaining a dwelling house for a controlled substance.

> A motion to dismiss must be denied if there is substantial evidence (1) of each essential element of the offense charged and (2) that the defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence.
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> To obtain a conviction for knowingly and intentionally maintaining a place used for keeping and/or selling controlled substances under N.C. Gen. Stat. § 90–108(a)(7), the State has the burden of proving the defendant: (1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance.

State v. Frazier, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001) (citations, quotation marks, and brackets omitted).

> Whether a person keeps or maintains a place, within the meaning of N.C. Gen. Stat. § 90–108(a)(7), requires consideration of several factors, none of which are dispositive. Those factors include: occupancy of the property; payment of rent; possession over a duration of time; possession of a key used to enter or exit the property; and payment of utility or repair expenses.
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> The determination of whether a building or other place is used for keeping or selling a controlled substance will depend on the totality of the circumstances. Factors to be considered in determining whether a particular place is

> used to keep or sell controlled substances include: a large amount of cash being found in the place; a defendant admitting to selling controlled substances; and the place containing numerous amounts of drug paraphernalia.

Id. at 365-66, 542 S.E.2d at 686 (citations, quotation marks, and brackets omitted).

Mr. Coker testified that he had been investigating defendant's home because of the many people going in and out, and staying for only a short time: "It's indicative of a person going there for two minutes, walking in the house, walking back out to get in their vehicle. That is indicative of a drug deal, by my training and my knowledge, for the [sale] of controlled substances." Mr. Coker further testified that they attempted to set up a later drug buy in June of 2013 at the trailer but defendant cancelled because his family was there. Further, Ms. Smith testified that she had been to defendant's trailer several times before to buy methamphetamine from defendant. We conclude there was substantial evidence of the elements of keeping and maintaining a dwelling for the purpose of selling a controlled substance.

IV. Conclusion

We conclude there was no error.

NO ERROR.

Judges BRYANT and COLLINS concur.

Report per Rule 30(e).