IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-329

Filed: 17 December 2019

Forsyth County, Nos. 17CRS058561-62, 17CRS004536

STATE OF NORTH CAROLINA

v.

DEAGLO CORTEZ MCMOORE, Defendant.

Appeal by defendant from judgment entered 17 August 2018 by Judge Julia Lynn Gullett in Forsyth County Superior Court. Heard in the Court of Appeals 12 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany K. Brown, for the State.

Forrest Firm, P.C., by Patrick S. Lineberry, for defendant-appellant.

BERGER, Judge.

Deaglo Cortez McMoore ("Defendant") was found guilty of possession of cocaine and possession of drug paraphernalia. On appeal, Defendant contends the trial court committed plain error when it admitted the expert opinion of a forensic chemist and the lab reports generated by the forensic chemist because her testimony failed to demonstrate that the methods she used were reliable under Rule 702(a) of North Carolina's Rules of Evidence. Defendant also contends the trial court erred in

denying his motion to dismiss the possession of drug paraphernalia charge because there was insufficient evidence that he possessed and used or intended to use the drug paraphernalia seized. We find no error in part and remand in part.

Factual and Procedural Background

On September 13, 2017, Officers J.G. Wells ("Officer Wells") and Dalton McGuire ("Officer McGuire") of the Winston-Salem Police Department were dispatched to investigate a complaint of loud music coming from a parked vehicle in a residential neighborhood in Winston-Salem. Officer Wells determined the source of the sound was coming from a blue Chevrolet SUV. Officer Wells then approached the vehicle and observed that it was unoccupied, it was playing loud music, and it smelled of burnt marijuana. Officer Wells knocked on a nearby apartment door to locate the owner of the vehicle. While Officer Wells was waiting for a response, Officer McGuire observed Defendant leaning inside the driver's side of the Chevrolet SUV. As he approached Defendant, Officer McGuire witnessed Defendant put something in his mouth. He also witnessed Defendant throw some items out of the SUV. Officer McGuire requested Defendant to stop chewing and to spit out the substance. Defendant refused, and Officers McGuire and Wells unsuccessfully attempted to manipulate Defendant's hypoglossal to prevent Defendant from swallowing the substance.

Once Defendant was detained, Officer Wells conducted a search of the SUV after he observed a digital scale in plain view on the driver's side floorboard and continued to smell a strong marijuana odor emanating from the vehicle. Based on his search, Officer Wells discovered a white rock substance; a small bag with a light brown substance; a digital scale; and flavored cigars, which he believed contained a controlled substance. Although the Chevrolet SUV was a rental, Officer Wells testified that Defendant said he had been driving the SUV.

At trial, Defendant did not object to the admission of the evidence recovered from Officer Wells' search of the vehicle. The State called Alexis Harrington ("Ms. Harrington") to identify the evidence seized from Officer Wells' search. Ms. Harrington is a forensic chemist with the NMS Labs in Winston-Salem ("WIN Lab"). Defendant did not object to Ms. Harrington serving as an expert witness in the field of forensic chemistry specializing in chemical analysis of controlled substances. Ms. Harrington testified that she had conducted a gas chromatography mass spectrometry ("GCMS") analysis of the substances discovered from Officer Wells' search. Based on the results of the analyses, she opined the white substance recovered was cocaine and the brown substance recovered was heroin.

At the close of the State's evidence, Defendant moved to dismiss each charge on the grounds of insufficient evidence. The trial court denied Defendant's motion. Defendant did not present evidence.

Defendant was indicted for felony possession of heroin, felony possession of cocaine, possession of drug paraphernalia, and having attained habitual felon status. The jury found Defendant not guilty of possession of heroin but did find Defendant guilty of possession of cocaine and guilty of possession of drug paraphernalia. Defendant then pleaded guilty to attaining habitual felon status. He was sentenced to 30 to 48 months imprisonment.

On appeal, Defendant argues the trial court committed plain error when it admitted Ms. Harrington's expert opinion and the lab reports she generated because her testimony failed to demonstrate that the methods she used in identifying the controlled substances as cocaine and heroin were reliable under Rule 702(a). He also contends the trial court erred in denying his motion to dismiss the possession of drug paraphernalia charge because there was insufficient evidence that he possessed and used or intended to use the digital scale or cigars seized from the vehicle. We address each argument in turn.

Analysis

I. Expert Witness Testimony

Defendant acknowledges he failed to object to the admission of Ms. Harrington's expert opinion testimony or the lab reports at trial. However, "an unpreserved challenge to the performance of a trial court's gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review in

North Carolina state courts." *State v. Hunt*, ___ N.C. App. ___, ___, 792 S.E.2d 552, 559 (2016). "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.' " *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations omitted). On appeal, Defendant specifically and distinctly contends the GCMS method utilized by Ms. Harrington in identifying the substances seized from the SUV was unreliable and renders her expert testimony and the lab results unreliable under Rule 702(a). Therefore, our review is limited to plain error.

"Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a)." *State v. McGrady*, 368 N.C. 880, 892, 787 S.E.2d 1, 10 (2016) (citation omitted). If a trial court concludes the proffered expert testimony meets Rule 702(a)'s requirements of qualification, relevance, and reliability, the "ruling will not be reversed on appeal absent a showing of abuse of discretion." *Id.* at 893, 787 S.E.2d at 11 (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* at 893, 787 S.E.2d at 11 (*purgandum*).

Rule 702(a) provides in pertinent part:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> > (1) The testimony is based upon sufficient facts or data.
> > (2) The testimony is the product of reliable principles and methods.
> > (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017).

In 2011, the General Assembly amended Rule 702 and "incorporated the standard announced in *Daubert*." *McGrady*, 368 N.C. at 888, 787 S.E.2d at 8. When a trial court considers whether testimony based on "technical or other specialized knowledge" is reliable, the following five factors articulated in *Daubert may* have a bearing on reliability:

> (1) whether a theory or technique ... can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the theory or technique's known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or technique has achieved general acceptance in its field.

Id. at 890-91, 787 S.E.2d at 9 (citations and quotation marks omitted).

The trial court should only consider the factors articulated in *Daubert* when "they are reasonable measures of the reliability of expert testimony." *Id.* at 891, 787 S.E.2d at 9 (citation and quotation marks omitted). "Those factors are part of a

'flexible' inquiry, so they do not form 'a definitive checklist or test.' " *Id.* at 891, 787 S.E.2d at 9-10 (citations omitted). Thus, "the trial court is free to consider other factors that may help assess reliability." *Id.* at 891, 787 S.E.2d at 10 (citations omitted). For instance, the trial court has "discretion to consider any of the particular factors articulated in previous cases, or other factors it may identify, that are reasonable measures of whether the expert's testimony is based on sufficient facts or data, whether the testimony is the product of reliable principles and methods, and whether the expert has reliably applied those principles and methods in that case." *Id.* at 892, 787 S.E.2d at 10.

In *State v. Abrams*, this Court concluded the trial court did not abuse its discretion in admitting expert testimony by the analyst who conducted a microscopic and chemical analysis on the controlled substance seized from the defendant. *State v. Abrams*, ___ N.C. App. ___, ___, 789 S.E.2d 863, 867 (2016). This Court reasoned the analyst's "detailed explanation of the systematic procedure she employed to identify the substance recovered from defendant's home, a procedure adopted by the NC Lab specifically to analyze and identify marijuana . . . was clearly the 'product of reliable principles and methods' sufficient to satisfy the second prong of Rule 702(a)." *Id.* at ____, 789 S.E.2d at 867.

Similarly, in *State v. Gray*, this Court held "a proper Rule 702(a) foundation was established at the time [the analyst] provided her opinion because her testimony

demonstrated that she was a qualified expert and that her opinion was the product of reliable principles and methods which she reliably applied to the facts of the case." *State v. Gray*, ___ N.C. App. ___, ___, 815 S.E.2d 736, 740 (2018). This Court reasoned, the expert analyst's testimony described the procedures her crime lab used to identify controlled substances, explained the preliminary test and GCMS method utilized by the lab, and showed the results from the GCMS method provided the basis for her opinion. *Id.* at ____, 815 S.E.2d at 741. This Court also emphasized, "because a proper Rule 702(a) foundation was established," any challenges to the GCMS testing process, "had they been raised during trial, would go to the weight of [the expert's] opinion, not its admissibility." *Id.* at ____, 815 S.E.2d at 740-41.

Here, Ms. Harrington was accepted by the court, without objection, as an expert in the field of forensic chemistry specializing in chemical analysis of controlled substances. Ms. Harrington testified that she had been working with drug samples for about two years and she had worked on about 700 to 800 drug cases. Ms. Harrington then explained the procedures and methods she employed in identifying the substances recovered as heroin and cocaine:

> Q. Who did you receive State's Exhibit Number 3 from?
> A. This exhibit was received from M. Fuentes of the Winston-Salem Police Department.
> Q. And does it appear in substantially the same condition as when you received it?
> A. Yes, it does.
> Q. Did you examine State's Exhibit 3 that was submitted to you by WSPD?

A. Yes, I did.
Q. And can you please briefly describe the purpose of your examination?
A. The purpose of my connection was to obtain weight of the substance and determine whether there was controlled substance within the evidence.
Q. And what type of chemical analysis did you conduct?
A. I performed a series of color tests which is considered a preliminary test. It gives me an idea of what the substance might be and how to proceed with testing.

From there, I determine that -- determine my next test should be a gas chromatograms or gas chromatography mas[s] spectrometry also known as a GCMS. This gives us definitive confirmation what the substance can be?
Q. Can you explain what the GCMS is[.]
A. Yes. A GCMS is a two-part instrument test. The GCMS separates out components of a mixture, the mas[s] spec or the MS. It then gives us a picture of what each different component of the mixture is.
Q. And as a result of your analysis, were you able to form an opinion about what the substance you examined was?
A. Yes, I was.
Q. And what is your opinion?
A. In my opinion, this substance was found to be Heroin.
Q. How much did it weigh?
A. It weighed 1.18 grams plus or minus 0.01 grams
Q. What does that plus or minus mean, 0.01 grams?
A. The plus 0.01 grams is the range of uncertainty. It means that the true weight will fall between the range of plus or minus 0.01 grams of 1.18 grams.
. . . .

Q. Ms. Harrington, I'm now showing you what's been marked as State's Exhibit 2. Do you recognize that item?
A. Yes, I do.
Q. How do you recognize that item?
A. I recognize it by my green evidence tape and my initials, and the date of analysis across the seal.
Q. When did you receive that item?
A. This item was received on December 19th, 2017.

> Q. Who did you receive that from?
> A. It was received from D. Lewis of the Winston-Salem Police Department.
> Q. Does it appear in the same or substantially the same condition as when you received it?
> A. Yes, it does.
> Q. Did you examine State's Exhibit Number 2?
> A. I did.
> Q. Can you explain that process.
> A. The same process was used to examine this exhibit. The series of color tests was performed, and then the GCMS was used.
> Q. And as a result of your analysis, were you able to form an opinion about what the substance you examined was?
> A. Yes, I was.
> Q. What is your opinion?
> A. This exhibit was Cocaine.
> Q. How much did it weigh?
> A. 0.06 grams plus or minus 0.01 grams.
> Q. And can you explain that plus or minor, 0.01 grams.
> A. It is the ranges in which the true weight of the exhibit will lie.

Ms. Harrington's testimony provides an explanation of the systematic procedures employed by the WIN Lab in identifying controlled substances. Her testimony demonstrates she complied with the WIN Lab's procedures. She first weighed the substances and conducted a preliminary test. She described the preliminary test as a series of color tests that provides "an idea of what the substance might be and how to proceed with testing." She then testified a GCMS analysis was conducted on both substances. She explained, "[a] GCMS is a two-part instrument test. The GCMS separates out components of a mixture, the mas[s] spec or the MS. It then gives us a picture of what each different component of the mixture is." Based

on these systematic procedures and methods, she identified the controlled substances found in the vehicle Defendant had been driving as heroin and cocaine and materialized these results in two separate lab reports.

Despite this foundation, Defendant contends that the State was required to further demonstrate the reliability of the GCMS testing process utilized. "However, because a proper Rule 702(a) foundation was established, any procedural shortcomings of the [WIN lab], had they been raised during trial, would go to the weight of [the expert's] opinion, not its admissibility." *Gray*, ___ N.C. App. at ____, 815 S.E.2d at 741.

It was in the trial court's discretion to use the factors it believed would best help it determine whether Ms. Harrington's expert testimony was reliable. *McGrady*, 368 N.C. at 891, 787 S.E.2d at 9-10 (citations omitted). Ms. Harrington's expert testimony explained the procedures and methods she employed, as proscribed by the WIN lab, in identifying the cocaine and heroin found in the vehicle Defendant had been driving. Because her testimony shows that her opinion was the product of reliable principles and methods and that she reliably applied the principles and methods to the facts of this case, the trial court did not abuse its discretion, much less plainly err, in admitting Ms. Harrington's expert opinion testimony and lab reports.

II. Motion to Dismiss

Defendant also contends the trial court erred in denying his motion to dismiss the possession of drug paraphernalia charge at the close of the State's evidence. Defendant specifically contends there was insufficient evidence Defendant constructively possessed the scale or flavored cigars, which may have contained a controlled substance, found in the Chevrolet SUV or that Defendant used or intended to use the scale or cigars in connection with a controlled substance. We disagree.

"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). "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) (citation and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994). "The defendant's evidence, unless favorable to the State, is not to be taken into

consideration." *State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) (citation and quotation marks omitted).

Section 90-113.22 of North Carolina's General Statutes makes it

> unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, or conceal a controlled substance other than marijuana which it would be unlawful to possess, or to inject, ingest, inhale, or otherwise introduce into the body a controlled substance other than marijuana which it would be unlawful to possess.

N.C. Gen. Stat. § 90-113.22(a) (2017). "Drug paraphernalia" means "all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act[.]" N.C. Gen. Stat. § 90-113.21(a) (2017). "Drug paraphernalia" includes, but is not limited to, "[s]cales and balances for weighing or measuring controlled substances," and "[o]bjects for ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the body." N.C. Gen. Stat. § 90-113.21(a)(5), (12) (2017). Furthermore, "[t]he proximity of the object to a controlled substance" or "other drug paraphernalia" may be considered in determining whether an object is drug paraphernalia. N.C. Gen. Stat. § 90-113.21(b)(4), (6) (2017).

"Possession may be actual or constructive." *State v. Sawyers*, ___ N.C. App. ___, ___, 808 S.E.2d 148, 153 (2017) (citations omitted). "Actual possession requires that a party have physical or personal custody of the item. A person has constructive

possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition." *State v. Wirt*, ___ N.C. App. ___, ___, 822 S.E.2d 668, 671 (2018) (citation and quotation marks omitted).

Here, Defendant did not have actual possession of the digital scale or flavored cigars. The digital scale was found on the driver's floorboard in the Chevrolet SUV. The flavored cigars were found in the front passenger compartment of the SUV. Thus, the State was required to establish Defendant had constructive possession of the scale, the flavored cigars, or both.

Generally, if the defendant did not have exclusive control of the premises where the contraband is found, "the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *State v. Garrett*, 246 N.C. App. 651, 655, 783 S.E.2d 780, 784 (2016) (citation and quotation marks omitted). "Whether sufficient incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry dependent upon the totality of the circumstances in each case." *Id.* at 655, 783 S.E.2d at 784. Our Courts have considered the following four non-dispositive factors: "the defendant's (1) proximity to the contraband, though mere presence is not enough, (2) ownership or control of the place where the contraband was found, (3) opportunity to dispose of the contraband in the place it was found, and (4) suspicious or unusual behavior." *Id.* at 655, 783 S.E.2d at 784 (citations omitted).

However,

> [A]n inference of constructive possession can ... arise from evidence which tends to show that a defendant was the custodian of the vehicle where the [contraband] was found. In fact, the courts in this State have held consistently that the driver of a borrowed car, like the owner of the car, has the power to control the contents of the car. Moreover, power to control the automobile where [contraband] was found *is sufficient, in and of itself*, to give rise to the inference of knowledge and possession sufficient to go to the jury.

Wirt, ___ N.C. App. at ___, 822 S.E.2d at 671 (quoting *State v. Mitchell*, 224 N.C. App. 171, 177, 735 S.E.2d 438, 443 (2012)).

Because it is undisputed Defendant was the driver of the Chevrolet SUV in which the drug paraphernalia was found, Defendant's dominion and control over the Chevrolet SUV is sufficient to give rise to an inference of possession of its contents. *Wirt*, ___ N.C. App. at ___, 822 S.E.2d at 671 ("As Defendant was undisputedly the driver of the truck in which the methamphetamine was found at the time the officers stopped the truck, Defendant's dominion and control over the truck is sufficient to give rise to an inference of possession.").

Even though Defendant's status as the driver was sufficient to support an inference of possession, assuming *arguendo* it was not sufficient, the State presented additional incriminating evidence to support an inference of constructive possession. Again, the State was only required to show Defendant had constructive possession of either the scale or cigars, but not both.

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (citations and quotation marks omitted).

The State showed Defendant's proximity to the vehicle and its contents, including the scale. Even after four people dispersed from the Chevrolet SUV when law enforcement arrived, law enforcement saw Defendant "leaning into the driver's side of the vehicle." Prior to detaining Defendant, Officer McGuire witnessed Defendant remove a few items from the passenger seat, including the lid to the digital scale found on the driver's floorboard. Based on these facts, a reasonable inference that Defendant possessed the digital scale could be drawn. Thus, the trial court did not err in denying Defendant's motion to dismiss because there was sufficient evidence he constructively possessed the digital scale.

Furthermore, there was sufficient evidence Defendant used or intended to use the scale with the cocaine recovered from the SUV. As aforementioned, the "small white rock substance" recovered from the driver's side floorboard in the Chevrolet SUV was confirmed to be cocaine by Ms. Harrington's expert testimony. Officer Wells

testified he saw white residue on the scale found on the driver's floorboard and the white residue on the scale appeared to match the white rock substance. Based on these circumstances, a reasonable inference that Defendant used or intended to use the digital scale with the cocaine found in Chevrolet SUV could be drawn. Once the trial court decides there is sufficient evidence to get the case to the jury, "it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

Accordingly, the trial court did not err in denying Defendant's motion to dismiss the possession of drug paraphernalia charge because there was sufficient evidence Defendant possessed the scale and used or intended to use the digital scale in connection with the cocaine found in the SUV.

Furthermore, we note there is a clerical error in the AOC judgment form. "It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth, ... to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record." *State v. Dixon*, 139 N.C. App. 332, 337, 533 S.E.2d 297, 302 (2000) (*purgandum*). "When a court amends its records to accurately reflect the proceedings, the amended record 'stands as if it had never been defective, or as if the entry had been made at the proper time.' " *Id.* at 338, 533 S.E.2d at 302 (citations omitted).

In a criminal case, "[j]udgment is entered when sentence is pronounced." N.C. Gen. Stat. § 15A-101(4a) (2017). When the written judgment does not reflect what the trial court pronounced in open court during sentencing, the case will be remanded to the trial court to correct the clerical error in the judgment so that it conforms to the sentence actually pronounced in open court. *State v. Lawing*, 12 N.C. App. 21, 23, 182 S.E.2d 10, 11 (1971).

Here, the record reflects the jury found Defendant "guilty of possession [of] drug paraphernalia." During sentencing, the trial court first ordered that the verdict of the jury be recorded. The trial court then consolidated "the possession of drug paraphernalia charge with the possession of cocaine conviction." However, the judgment form erroneously reflects he was convicted of Class 3 misdemeanor "possession mari[juana] paraphernalia." Therefore, the written judgment does not reflect the sentence actually pronounced by the trial court in open court. Accordingly, on remand, the offense description and class on the judgment form should be corrected to reflect Defendant was convicted of Class 1 misdemeanor possession of drug paraphernalia. *See* N.C. Gen. Stat. § 90-113.22(b) (2017). Because the clerical error did not adversely impact sentencing, the remainder of the judgment shall remain intact.

Conclusion

The trial court did not err in admitting Ms. Harrington's expert testimony and the lab reports identifying the controlled substances found in the SUV as cocaine and heroin. The trial court did not err in denying Defendant's motion to dismiss the possession of drug paraphernalia charge at the close of the State's evidence. However, we remand to the trial court for the sole purpose of correcting the clerical error on the judgment form in accordance with this opinion.

NO ERROR IN PART; REMANDED IN PART.

Chief Judge McGEE and Judge BRYANT concur.

Report per Rule 30(e).