IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1220

Filed: 18 August 2020

Forsyth County, No. 15 CRS 61754

STATE OF NORTH CAROLINA

v.

TONYA RENEE WHITAKER

Appeal by defendant from order entered 28 April 2017 and judgments dated 26 April 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 21 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General William A. Smith, for the State.

Joseph P. Lattimore for defendant-appellant.

ZACHARY, Judge.

Defendant Tonya Renee Whitaker appeals from an order denying her motions to suppress and from judgments entered upon a jury's verdicts finding her guilty of trafficking in methamphetamine and possession of drug paraphernalia. After careful review, we affirm the trial court's denial of Defendant's motions to suppress, and we conclude that Defendant received a fair trial, free from prejudicial error.

Background

In November 2015, Detective Patrick McKaughan of the Winston-Salem Police Department's Special Investigation Division received an anonymous tip via the Crimestoppers website about suspected methamphetamine trafficking. The tip identified an address for the suspected offense, and alleged:

> Joel Dennis and [Defendant] received methamphetamine from Oregon through the mail via Fed Ex. Joel sells it to people he meets in local bars and invites them to their house. I know this because I have overheard Joel and [Defendant] talking about it at the bar. I report it out you have [sic] concern for my friends that they are now involved with them and concerned for the neighborhood.

The tipster provided the phone numbers of customers who called to make purchases, and also stated that (1) drug sales occur at all times of the day, (2) "I'm told [Dennis] uses digital scales" to measure the drugs, and (3) "I believe [Dennis] sells [the drugs] out of plastic containers."

Detective McKaughan's principal duty assignment was parcel interdiction, and he primarily monitored the FedEx hub. After receiving the anonymous tip, Detective McKaughan identified the FedEx driver who delivered to the specified address and asked the driver to contact him if the driver received a box intended for that address. The driver agreed.

On 18 December 2015, the driver notified Detective McKaughan that he had received a package addressed to Defendant at the specified address, and offered to

meet along his delivery route. Detective McKaughan agreed, and proceeded to the driver's location.

The driver was holding the package when Detective McKaughan arrived. Detective McKaughan asked the driver to get four other parcels of similar shape and size from his truck to use as controls for a canine sniff. The driver handed Detective McKaughan four similar packages. Detective McKaughan placed the target package with the other four in a line along the side of the road and conducted a canine sniff of the five packages with his trained narcotics detector dog, Sassy. Sassy only alerted to the presence of drugs upon reaching the target package addressed to Defendant.

After the canine sniff, Detective McKaughan inspected the package addressed to Defendant more closely. He cross-referenced the information contained in the package's return address against a law enforcement database, but found no match for the name, the Oregon address, or the phone number listed for the sender. Detective McKaughan also searched a FedEx database and determined that the package had been shipped from a pack-and-ship store, and that the sender had paid in cash for the delivery. From his training and experience with parcel interdiction, Detective McKaughan knew each of these facts "to be consistent with a narcotics-laden package."

Detective McKaughan seized the package and returned to his office, where he drafted a search warrant application for the package. Later that day, a magistrate

issued a search warrant for the FedEx package addressed to Defendant, and Detective McKaughan executed it. Inside the package, he found an off-white, hazy substance, which a chemical field test identified as methamphetamine.

Detective McKaughan then organized a controlled delivery operation, to be carried out three days later, in which law enforcement officers would pose as FedEx employees delivering the package to Defendant. In addition, Detective McKaughan obtained an anticipatory search warrant for Defendant's residence, which would be triggered by the package's successful delivery and being taken within the threshold of the residence.

On 21 December 2015, undercover law enforcement officers successfully delivered the package to Defendant at the residence. Defendant and Dennis were then detained and read their *Miranda* rights, and the law enforcement officers executed the anticipatory search warrant. Inside the residence, law enforcement officers located and seized the package, as well as marijuana, "various marijuana bongs, methamphetamine pipes, razor blades and digital scales."

On 5 July 2016, Defendant was indicted on charges of trafficking in methamphetamine and possession of drug paraphernalia, specifically pipes, razor blades, and push rods. On 13 July 2016, the State filed and served notice of its intent to use (1) evidence of statements made by Defendant, (2) evidence obtained by a search without a search warrant, (3) evidence obtained by a search pursuant to a

search warrant executed when Defendant was not present, and (4) expert testimony. On 13 January 2017, Defendant filed separate motions to suppress evidence obtained or derived (1) from the "illegal stop" of the FedEx truck, (2) from the "illegal K-9 'sniff' " of the FedEx package, and (3) pursuant to a search warrant for the package, which Detective McKaughan obtained and executed following the canine sniff, while Defendant was not present.

On 24 April 2017, Defendant's case came on for trial before the Honorable Susan E. Bray in Forsyth County Superior Court. Before trial began, the trial court heard arguments on Defendant's motions to suppress. The State moved the trial court to dismiss all three motions as untimely under N.C. Gen. Stat. §§ 15A-975 and 15A-976 (2019). After reviewing the record and considering arguments of counsel, the trial court summarily denied as untimely Defendant's motion to suppress evidence obtained or derived from the search warrant for the FedEx package.

The trial court agreed to hear Defendant's motions to suppress evidence obtained (1) from the alleged "stop" of the FedEx truck, and (2) from the canine sniff of the package. After hearing testimony and arguments of counsel, the trial court denied both of Defendant's remaining motions to suppress, and commenced trial.

On 26 April 2017, a jury found Defendant guilty of both charges. Defendant filed her written notice of appeal on 27 April 2017. The trial court memorialized its findings of fact, conclusions of law and ruling on Defendant's motions to suppress in

two written orders, one for the summarily denied motion and one for the remaining two motions, filed on 28 April 2017.

Discussion

On appeal, Defendant argues that (1) the trial court committed plain error in denying her motions to suppress, (2) the trial court committed reversible error by allowing Detective McKaughan to testify regarding her invocation of her right to counsel, and (3) the trial court committed plain error in delivering to the jury a trafficking instruction that did not conform to the weight of the methamphetamine alleged in the indictment. We address each issue in turn.

I. Motions to Suppress

Defendant first argues that the trial court committed plain error "by concluding that the removal of the Fed Ex package from the delivery truck, in order to conduct a canine sniff one month after the receipt of an uncorroborated anonymous tip, was lawful." We disagree.

A. Standard of Review

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (citing N.C.R. App. P. 10(a)(1)). Defendant concedes that her counsel did not object at trial either during

Detective McKaughan's testimony that he observed methamphetamine in the package after the canine sniff, or when the methamphetamine was admitted into evidence as an exhibit. However, Defendant specifically and distinctly contends on appeal that the trial court committed plain error by failing to correctly apply the reasonable suspicion standard to Detective McKaughan's removing the package from the FedEx truck for investigation. *See* N.C.R. App. P. 10(a)(4).

An unpreserved evidentiary issue may be reviewed for plain error on appeal, where "a defendant has moved to suppress and both sides have fully litigated the suppression issue at the trial court stage." *State v. Miller*, 371 N.C. 266, 272, 814 S.E.2d 81, 85 (2018). The plain error rule "is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something 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) (citation and internal quotation marks omitted). "Under the plain error rule, [a] 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).

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) (citations omitted). "However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). "Conclusions of law are reviewed de novo[.]" *Id.* (citations omitted).

B. Motions to Suppress

The Fourth Amendment to the United States Constitution and Article I, § 20 of the North Carolina Constitution protect individuals against unreasonable searches and seizures. *State v. Cabbagestalk*, __ N.C. App. __, __, 830 S.E.2d 5, 9 (2019). A warrantless search of a sealed package is "presumptively unreasonable." *United States v. Jacobsen*, 466 U.S. 109, 114, 80 L. Ed. 2d 85, 94 (1984) (citations omitted). However, a package may be briefly detained, without a warrant, for inspection upon a reasonable suspicion that the package may be "part of an illicit project." *United States v. Van Leeuwen*, 397 U.S. 249, 252, 25 L. Ed. 2d 282, 285 (1970). "A court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory [detention] exists." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981)).

In the instant case, Defendant filed three pretrial motions to suppress, challenging the alleged stop of the FedEx truck, the canine sniff of the package, and the execution of the search warrant for the package. The trial court summarily denied as untimely Defendant's motion to suppress the evidence obtained as a result of the search warrant, which was executed when Defendant was not present.[1] The trial court agreed to hear the other two motions to suppress, but denied them following arguments of counsel.

Defendant raises no challenge to the trial court's written order summarily denying as untimely her motion to suppress evidence obtained pursuant to execution of the search warrant. Thus, her appeal appears to be limited to the trial court's written order denying her motions to suppress evidence obtained as a result of the alleged stop of the truck and the canine sniff of the package. As such, our review is "strictly limited" to evaluating the findings of fact and conclusions of law in the trial court's order from which Defendant appeals. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619; N.C.R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs.").

1. Findings of Fact

In the written order denying Defendant's remaining motions to suppress, the trial court made 21 findings of fact, none of which Defendant challenges on appeal.

[1] Neither Defendant nor the State acknowledge this motion or its summary denial, although both the motion and the trial court's written order are included in the record on appeal.

Indeed, she acknowledges the trial court's 21 findings of fact "were consistent with the . . . evidence from the hearing." Accordingly, these unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal. *See Biber*, 365 N.C. at 168, 712 S.E.2d at 878.

The trial court found as fact, *inter alia*:

> 8. The [Winston-Salem Police Department] received a Crimestoppers' tip in November 2015 that [Defendant] and Joel Dennis were having methamphetamine from Oregon shipped via Fed Ex to their residence . . . . The tipster said he/she heard [Defendant] and Dennis talking about it at an area bar. The tipster said Dennis used digital scales and kept meth in little plastic containers, and that he and [Defendant] invited people from the bar to their residence to smoke meth. Tipster indicated he/she was concerned for [Defendant] and Dennis and also worried about drug activity in the neighborhood.
>
> 9. Detective McKaughan followed up on the tip and asked the Fed Ex driver who delivered in the Hawthorne Road area to be on the lookout for a package from Oregon being sent to that address. He gave the driver his card with his cell phone number and asked the driver to contact him if he had any deliveries for that address.
>
> 10. From his training and experience, Detective McKaughan has identified several indicators of parcels containing controlled substances: these include source locations such as Oregon, California and Mexico; handwritten labels; misspelled names; heavy taping; use of pack and post type vendors; person to person parcels; priority or overnight boxes; payment in cash.
>
> 11. On December 18, 2015, the Fed Ex driver called Detective McKaughan and told him he [had] a box going to [Defendant's address].

12. Detective McKaughan met the driver at a parking lot near West Academy Street and Hawthorne Road.

13. Detective McKaughan took the parcel addressed to [Defendant] and four other parcels from the Fed Ex van that were similar in size. He set all five parcels on the ground, approximately 5-6 feet apart and had his K9 Sassy perform a free air sniff of the parcels.

14. The target package was the 4th in line.

15. Sassy sniffed the first three, and then at the fourth, she gave a positive alert (heavy breathing, excited physical demeanor, wagging tail and then rapid sit).

16. The target parcel had a handwritten label, return address of Jennifer Jamison on Southeast Hairston Street in Portland, OR.

17. Detective McKaughan ran a check through [h]is TLO app (data base that cross references law enforcement records, credit and employment records, court records, tax and real property records) and found no match to the name Jennifer Jamison, the address or the phone number. They appeared to be fake. This is common with drug parcels.

18. The target package was from a pack and ship center, was paid in cash.

19. From the totality of the circumstances involved with the packing and shipping of the parcel, the positive K9 sniff, Detective McKaughan developed his suspicion that criminal activity was afoot.

20. Detective McKaughan obtained a search warrant for the package, opened it and determined the plastic bag with a white rock powder substance located inside a box within the box contained approximately 40 grams of methamphetamine (positive field test).

The trial court then synthesized the pertinent findings of fact:

> Although Defendant filed a Motion to Suppress Illegal Stop, this case involves no stop. The Fed Ex driver voluntarily contacted Detective McKaughan. There was no "stop" of the Fed Ex truck.
>
> Detective McKaughan examined the package, noted the handwritten label to the person and address mentioned in the Crimestoppers tip and then had his K9 perform a sniff of the package in a lineup of sorts with 4 other similar parcels from the Fed Ex driver's truck.
>
> Detective McKaughan, based on the totality of the circumstances from the tip, the Fed Ex driver, the markings on the package, the fake address, the cash payment, the pack and post, etc. gave him reasonable, articulable suspicion that the package might contain drugs.

The trial court then concluded, which Defendant now challenges on appeal, "that the interdiction of the Fed Ex package was legal, [and] that the k9 sniff of the package was legal and supported by reasonable and articulable suspicion from the totality of the circumstances." The trial court's unchallenged findings of fact, deemed to be supported by competent evidence and by which we are bound on appeal, amply support that challenged conclusions of law.

2. Conclusions of Law

Defendant argues that the trial court's "legal analysis was erroneous [in its written order] because it failed to acknowledge the seizure occasioned by the detective's taking possession of the package from the FedEx driver for the purpose of

conducting an investigation." However, Defendant is not challenging any of the conclusions of law the trial court actually made in its written order. Rather, Defendant is arguing against a conclusion that the trial court did not make. In conducting our "strictly limited" review of the trial court's order, we analyze only the conclusions of law the trial court did make. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

At the outset, we agree with the trial court's conclusion that "this case involves no stop." A "stop" or "seizure" occurs

> only when, by means of physical force or a show of authority, . . . freedom of movement is restrained. . . . A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

State v. Farmer, 333 N.C. 172, 187, 424 S.E.2d 120, 129 (1993) (citation omitted). As stated in the trial court's unchallenged finding of fact #11, the "driver called Detective McKaughan and told him he [had] a box going to" Defendant's address. In finding of fact #12, the trial court stated that "Detective McKaughan met the driver at a parking lot near West Academy Street and Hawthorne Road." The driver voluntarily contacted Detective McKaughan and offered to meet him along his route. The trial court's unchallenged findings of fact demonstrate that the FedEx driver neither had his freedom of movement restrained nor believed he was not free to leave, and support the conclusion that "this case involves no stop." "If there is no detention—no seizure

within the meaning of the Fourth Amendment—then no constitutional rights have been infringed." *Florida v. Royer*, 460 U.S. 491, 498, 75 L. Ed. 2d 229, 236 (1983).

Further, whether considering the canine sniff or even assuming, *arguendo*, that there was a stop, Defendant has not shown that the trial court committed plain error in concluding that Detective McKaughan had the requisite reasonable suspicion to conduct his investigation in this case. Defendant argues that the purported stop and the canine sniff were unsupported by reasonable suspicion "based solely on the single, unreliable anonymous tip received one month before the seizure." We disagree. In a case such as this, the tip should be viewed as but one of the circumstances leading to the ultimate conclusion, which is exactly how the trial court viewed the tip: "Detective McKaughan, *based on the totality of the circumstances from the tip, the Fed Ex driver, the markings on the package, the fake address, the cash payment, the pack and post, etc.* gave him reasonable, articulable suspicion that the package might contain drugs." (Emphasis added).

Considering the totality of the circumstances, the trial court did not commit plain error by concluding, as a matter of law, that Detective McKaughan developed "reasonable, articulable suspicion that the package might contain drugs." Defendant has not shown that the trial court committed "a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done" by the denial of her motions to suppress. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378

(citation and internal quotation marks omitted). Defendant's arguments are without merit.

II. Invocation of the Right to Counsel

Defendant next argues that the trial court erred by allowing Detective McKaughan to testify that, after he informed Defendant of her constitutional right to counsel, she said, "I've been through this before. I want a lawyer." We disagree.

A. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*. Once error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citations omitted), *disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

B. Preservation for Appellate Review

As a threshold matter, the State argues that Defendant has not preserved this issue for appellate review, in that Defendant's trial counsel failed to state the specific grounds for her objection. "In order 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*." N.C.R. App. P. 10(a)(1) (emphasis added).

In this case, Defendant's counsel objected just before Detective McKaughan testified to Defendant's statement during his direct examination:

> [THE STATE]. At that point after you read her the search warrant, did you advise [Defendant] of her Miranda rights?
>
> [DETECTIVE McKAUGHAN]. I did.
>
> Q. And what was her response, if any?
>
> [DEFENDANT'S COUNSEL]: Objection to what she may have said, Your Honor?
>
> THE COURT: Overruled.
>
> THE WITNESS: Her response was, "I've been through this before. I want a lawyer."

The State argues that Defendant did not specify—and it is therefore unclear—whether she objected on the basis of hearsay, relevance, or an alleged violation of her constitutional right to counsel. We disagree. Viewed in context, Defendant's counsel plainly was objecting "to what [Defendant] may have said" in response to being informed of her *Miranda* rights. This objection, although imprecise, implicates both the right to counsel about to be invoked, as well as any out-of-court statement Defendant may have made. The State's argument is unpersuasive. This issue is preserved.

C. Right to Counsel

"[T]he right to counsel under the [F]ifth [A]mendment is afforded a defendant 'to assure that the individual's right to choose between silence and speech remains

unfettered throughout the interrogation process.' " *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 172 (1983) (quoting *Miranda v. Arizona*, 384 U.S. 436, 469, 16 L. Ed. 2d 694, 721 (1966)). "Therefore, a defendant *must* be permitted to invoke this right with the assurance that [she] will not later suffer adverse consequences for having done so." *Id.* at 283-84, 302 S.E.2d at 172.

Although we are unmoved by the State's argument, Defendant's position is similarly unpersuasive. Indeed, our careful review of Defendant's argument on appeal suggests that it is not the admission of her invocation of counsel about which she truly complains, but rather the first sentence of her response, as recounted by Detective McKaughan: "I've been through this before." In arguing that the admission of this testimony was prejudicial, Defendant asserts that "the evidence that [she] wanted to speak with a lawyer - *coupled with the further prejudicial information that she had been involved in criminal activity prior to this incident* - influenced the jury's decision to convict." (Emphasis added).

Further supporting our inference as to which of these two statements truly concerns her, Defendant's counsel only cross-examined Detective McKaughan about the first of Defendant's two statements—"I've been through this before"—by asking him: "You have absolutely no idea what she meant by that statement, do you?" Detective McKaughan replied that he did not. The cross-examination did not address the second of Defendant's sentences, in which she invoked her right to counsel. As

the first sentence neither invokes nor implicates Defendant's right to counsel, its admission was not constitutional error.

To the extent the admission of Detective McKaughan's testimony regarding the second sentence of her response—"I want a lawyer"—did implicate Defendant's invocation of her right to counsel, his testimony regarding his conduct thereafter does not support Defendant's assertion that the State's "questions and Detective McKaughan's response *punished* [her] for invoking her right to counsel." (Emphasis added). Even assuming, *arguendo*, that the admission of Detective McKaughan's testimony concerning Defendant's invocation of her right to counsel was error, any such error was harmless beyond a reasonable doubt. *See State v. Christian*, 180 N.C. App. 621, 624, 638 S.E.2d 470, 472 (2006) (explaining that when analyzing this issue for harmless error, our courts consider, *inter alia*: "whether the State presented other overwhelming evidence of guilt of the defendant; . . . whether the State emphasized the defendant's invocation of rights; and . . . whether the State attempted to capitalize on the defendant's invocation of rights through reference in its closing statement or during cross-examination"), *cert. denied*, 362 N.C. 178, 658 S.E.2d 658 (2008).

Our careful review of the record shows the State did present other overwhelming evidence of Defendant's guilt. Detective McKaughan testified that he did not attempt to conduct an interview of Defendant after she invoked her right to counsel. Defendant does not allege that the State ever referred to her invocation of

the right to counsel at any other point during the trial, and our review of the record does not reveal any other such references. "Accordingly, [D]efendant is not entitled to a new trial on this basis." *Id.* at 625, 638 S.E.2d at 473.

III. Jury Instructions

Lastly, Defendant argues that the trial court committed plain error by delivering a jury instruction on trafficking by possession that did not conform to the precise weight of methamphetamine that Defendant purportedly possessed, as alleged in the indictment, and consequently, there exists a fatal variance between the jury instruction and the indictment. We disagree.

A. Standard of Review

Because Defendant did not object to the trial court's instructions to the jury on the weight element of the trafficking charge, the challenged instructions are reviewable only for plain error. *See State v. Charles*, 194 N.C. App. 500, 504-05, 669 S.E.2d 859, 862 (2008) (citations omitted), *cert. denied*, 363 N.C. 658, 685 S.E.2d 511 (2009). Defendant specifically and distinctly contends on appeal that the trial court committed plain error in its instructions to the jury. *See* N.C.R. App. P. 10(a)(4).

> [T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error[s]. For [an] error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because

> plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

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

B. Jury Instructions

In the case at bar, the indictment alleged that Defendant violated N.C. Gen. Stat. § 90-95(h)(3b) by possessing 41 grams of methamphetamine. At trial, Detective McKaughan testified that he weighed the substance "in its original plastic packaging, which yielded a weight of 40.87 grams," whereas the forensic chemist, Lori Knops, testified that the substance weighed 37.51 grams when she conducted her chemical analysis after removing it from its packaging. The trial court instructed the jury that, in order to find Defendant guilty of trafficking, the State had to prove that she possessed "more than 28 grams but less than 199 grams"[2] of methamphetamine.

It is clear that the State's evidence supported a jury instruction on trafficking, and that the indictment and the delivered instruction track the statutory language. However, Defendant maintains that, with regard to the element of quantity, there was a variance between the indictment and the trial court's instructions to the jury,

[2] This instruction actually varies slightly from N.C. Gen. Stat. § 90-95(h)(3b)(a), which sets the upper limit of the range as "less than 200 grams," rather than "less that 199 grams," as the trial court instructed the jury. However, this variance is neither implicated by nor material to the outcome of this case.

and that this variance between the allegations and the proof was material and fatal. Defendant is incorrect.

> It is well established that a defendant must be convicted, if at all, of the particular offense charged in the indictment and that the State's proof must conform to the specific allegations contained therein. . . . The rationale for this rule is to insure that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident. However, not every variance is fatal, because in order for a variance to warrant reversal, the variance must be material.

State v. Henry, 237 N.C. App. 311, 322, 765 S.E.2d 94, 102 (2014) (citations and internal quotation marks omitted), *disc. review denied*, 368 N.C. 277, 775 S.E.2d 852 (2015).

"Not every variance between the indictment and the proof is a material variance." *State v. Furr*, 292 N.C. 711, 721, 235 S.E.2d 193, 200, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977). While it is "essential to the validity of the indictment that it advise the defendant of the nature and cause of the accusation sufficiently to allow him to meet it [and] to prepare for trial . . . it is not necessary to allege with technical precision the nature" of the charged offense. *Id.* at 722, 235 S.E.2d at 200. A variance becomes material if it "fundamentally alter[s] the nature of the offense charged[.]" *Henry*, 237 N.C. App. at 324, 765 S.E.2d at 103. "[T]he fatal variance rule was not intended as a get-out-of-jail-free card for setting aside convictions based on hyper-technical arguments[.]" *Id.* at 323, 765 S.E.2d at 103 (citation omitted).

In the instant case, the variance between the weight element as charged in the indictment, as shown in evidence at trial, and as instructed to the jury was not material. Defendant was convicted under N.C. Gen. Stat. § 90-95(h)(3b)(a), which makes possession of "28 grams or more, but less than 200 grams" of methamphetamine a Class F felony. N.C. Gen. Stat. § 90-95(h)(3b)(a). The trial court's instruction to the jury conformed with the statute. Each of the three amounts in question—41 grams in the indictment, 40.87 grams in Detective McKaughan's testimony, or 37.51 grams in Knops's testimony—is within the statutory range.

Any variance between the amount as alleged in the indictment and the amount as presented in evidence at trial or as instructed to the jury was immaterial and could not have been prejudicial, as it could not have affected the jury's verdict with regard to Defendant's trafficking charge. Thus, Defendant has failed to carry her burden of establishing that any alleged error in the trial court's jury instructions rose to the level of plain error. *See Henry*, 237 N.C. App. at 324, 765 S.E.2d at 103-04.

Conclusion

In sum, we conclude that the trial court's denial of Defendant's motions to suppress was not plain error. As Defendant does not challenge the order summarily denying one of her motions to suppress, we affirm the order denying Defendant's two remaining motions to suppress.

Assuming, *arguendo*, that the admission of Detective McKaughan's testimony that Defendant invoked her right to counsel was error, any error was harmless. Moreover, the trial court did not err, much less commit plain error, in its jury instructions on the charge of trafficking in methamphetamine by possession. We therefore conclude that Defendant received a fair trial, free from prejudicial error.

AFFIRMED IN PART; NO ERROR IN PART.

Judges DILLON and YOUNG concur.

Report per Rule 30(e).