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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1091

Filed: 6 October 2020

Catawba County, Nos. 18 CRS 50390, 50540

STATE OF NORTH CAROLINA

v.

CHAD LEE SMITH

Appeal by Defendant from judgments entered 31 July 2019 by Judge Jesse B. Caldwell, III, in Catawba County Superior Court. Heard in the Court of Appeals 26 August 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State-Appellee.*

*Sharon L. Smith for Defendant-Appellant.*

COLLINS, Judge.

**I. Procedural History**

Defendant Chad Lee Smith was initially arrested on 18 January 2018. On 4 September 2018, Defendant was indicted on two counts of possession with intent to manufacture, sell, or deliver cocaine; one count of maintaining a dwelling for controlled substances; and one count of possession with intent to manufacture, sell,

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or deliver marijuana. Before trial, the State gave notice of intent to introduce evidence of prior acts under N.C. Gen. Stat. § 8C-1, Rule 404(b), statements by Defendant, evidence obtained from a residence as a result of a search warrant, evidence obtained as a result of a warrantless search of a vehicle, and State Bureau of Investigation lab reports. Defense counsel did not move to suppress any evidence before trial.

Defendant was tried at the 29 July 2019 Criminal Session of the Catawba County Superior Court. At trial, the State's case in chief consisted of testimony from five members of the Hickory Police Department. Defendant did not present any evidence. At the close of the State's evidence, Defendant moved to dismiss the charges for insufficient evidence, or in the alternative, to reduce them to lesser-included offenses. The trial court denied the motions.

The jury found Defendant guilty of all but one of the charges of possession with intent to manufacture, sell, or deliver cocaine, where the jury found Defendant guilty of the lesser charge of possession of cocaine. The trial court sentenced Defendant to consecutive prison terms of 9 to 20 months, 15 to 27 months, and 9 to 20 months. The trial court also sentenced Defendant to a term of 9 to 20 months to be served concurrently with his last sentence. Following sentencing, Defendant gave notice of appeal in open court.

## **II. Factual Background**

The State's evidence at trial tended to show the following: At approximately 8 p.m. on 18 January 2018, four officers of the Hickory Police Department began surveilling the residence at 202 11th Avenue Northwest in Hickory, where they believed Defendant lived. One of the officers, Sergeant Daniel Orders, testified on voir dire that the surveillance followed tips he had received from a confidential informant that Defendant was selling narcotics. At approximately 8:45 p.m., officers saw Defendant exit the residence alongside Brittany Setzer. Setzer got into the driver's seat of a Lexus that was parked in the driveway, while Defendant got in the passenger's seat. When Setzer began to drive away, three of the officers began to follow in an unmarked car. Meanwhile, one officer remained to continue surveillance of the residence.

That night, Officer Bryson Grier with the Hickory Police Department was on patrol. Orders called Grier and told him the Lexus' location, that a man would be in the vehicle with either drugs on his person or in the vehicle, and that the woman driving did not have a driver's license. When Grier saw the Lexus, he determined that it was following too closely for the wintry road conditions and that it had an illegal license plate cover. At that point, Grier initiated a traffic stop. The other officers had kept the Lexus under surveillance from the time it left the house until

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the time Grier stopped it. In that span, the car had made no stops and did not meet anyone else.

When Grier approached the vehicle, he saw Setzer in the driver's seat and Defendant in the passenger's seat. During the stop, Grier determined that both Setzer and Defendant had suspended driver's licenses. Grier ran the license plate number of the Lexus and determined that it was registered to a Mark Brandon Long. According to Grier, Setzer indicated that the car was not hers; Defendant indicated that the car belonged to his sister. Grier asked Setzer to step out of the car. Once she was out of the car, Grier issued her a warning citation for following too closely and a citation for driving with a revoked license.

After issuing the citations, Grier explained that they were not in custody and were free to leave, but could not drive the Lexus because of their suspended licenses. According to Grier, before Setzer and Defendant left, he asked Setzer if she would answer a few questions and she agreed. Grier asked if she had any illegal substances on her; she replied that she did not. Grier testified that Setzer then consented to a search of her purse and her person.

Grier found a pill in Setzer's purse and used an internet resource to identify it as Carisoprodol, a Schedule IV controlled substance. Setzer admitted that she received the pill from a friend and did not have a prescription. Grier issued another citation for possession of a controlled substance. After issuing the citation, Grier

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asked if there was anything illegal in the car; Setzer said that the car was not hers. He then searched the car, asserting that he had both probable cause and Setzer's consent.

During the search of the car, Grier asked Defendant to step out from the passenger side seat. In the glove compartment, Grier found a small silver container with multiple pills and two small bags containing a total of 1.4 grams of cocaine inside. Officers at the scene then detained Setzer and Defendant; neither admitted to owning the drugs. At that time, Grier arrested Defendant and searched his person. Defendant had \$902 in cash.

Following the stop, one of the officers, Investigator Josh Hight, sought and obtained a warrant to search the residence at 202 11th Avenue Northwest. The warrant was based on the tips from the confidential informant and the discovery of the controlled substances in the Lexus. One officer remained to surveil the residence until the warrant could be executed.

When officers executed the warrant at 12:05 a.m. on 19 January 2018, no one was at the residence. Upon entering, they noted an odor of marijuana and saw vacuum seal bags, small baggies, and a straw with powder residue on a piece of furniture. In the living room, officers found a digital scale concealed behind the baseboard and a plate with white powder residue and a straw. In the kitchen, they found a vacuum sealer and a supplement commonly used to mix with cocaine.

Officers located another digital scale in the closet. There was also a safe containing a vacuum sealed bag of marijuana weighing 6.8 ounces, a bag of cocaine weighing 5.4 grams, pill bottles, and a ledger. In the bedroom, officers found documents bearing Defendant's name, including a contract, receipts, mail addressed to him, a business card, and a ledger book containing names and dollar amounts. On the nightstand, officers found a Bible bearing the name "Smith." On 25 January 2018, officers arrested Defendant at the same residence.

### **III. Discussion**

#### ***A. Ineffective Assistance of Counsel***

Defendant first argues that he received ineffective assistance of counsel because his trial counsel did not file a motion to suppress challenging the legality of the 18 January 2018 stop and search. We dismiss this claim without prejudice to Defendant's right to raise it in a motion for appropriate relief ("MAR").

"A defendant challenging his conviction on the basis of ineffective assistance of counsel must establish that his counsel's conduct 'fell below an objective standard of reasonableness.'" *State v. McNeill*, 371 N.C. 198, 218, 813 S.E.2d 797, 812 (2018) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). To establish that counsel's performance was objectively unreasonable, the defendant must make two showings. *Id.*

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made

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errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Id.* (quoting *Strickland*, 466 U.S. at 687).

This Court will decide a claim for ineffective assistance of counsel on direct review only where “the cold record reveals that no further investigation is required.” *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). Direct review of an ineffective assistance of counsel claim is not appropriate where the record shows that “evidentiary issues may need to be developed before defendant will be in position to adequately raise” the claim. *State v. Long*, 354 N.C. 534, 540, 557 S.E.2d 89, 93 (2001). If the reviewing court determines that ineffective assistance of counsel claims have “been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant’s right to reassert them during a subsequent MAR proceeding.” *Fair*, 354 N.C. at 167, 557 S.E.2d at 525.

Defendant argues that counsel’s failure to file a motion to suppress was deficient because, absent a motion to suppress, the prosecution was not required to provide any evidence of reasonable suspicion to extend the traffic stop beyond the issuance of the traffic citations. He further contends that the only basis for reasonable suspicion to extend the stop was the information received from the

confidential informant, and a motion to suppress was the appropriate avenue to challenge the informant's reliability.

The State responds that counsel's performance was not deficient because the entire stop and search of the Lexus was lawful. Specifically, the State argues that Grier had probable cause to effect the stop and that there is "no evidence of record" that any officer impeded Setzer and Defendant from leaving the scene on foot once Grier issued the citations. The State further argues that Grier merely engaged Setzer in lawful, non-coercive conversation, that Setzer freely consented to the search of her purse, and that "[n]othing of record suggests that Setzer was under any duress or coercion . . . ." The automobile search was lawful, the State asserts, both because Setzer consented to the search and because Grier had probable cause upon finding the pill in Setzer's purse. The State claims that Grier therefore had no need to rely on the informant to establish probable cause, though doing so would have been permissible.

We cannot resolve these issues on the record before us. We therefore dismiss the ineffective assistance of counsel claim without prejudice so that Defendant may pursue it in an MAR. *Id.*

***B. Sufficiency of the Evidence***

Defendant next argues that the trial court erred by denying his motion to dismiss the charge of possession with the intent to manufacture, sell, or deliver



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cocaine stemming from the cocaine found in the glove box. Defendant specifically argues that the State failed to meet its burden of proving he constructively possessed the cocaine. We disagree.

We review the trial court's denial of a motion to dismiss for insufficient evidence de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.

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. The trial court is concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight, and the test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or 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. 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 satisfy the jury beyond a reasonable doubt that the defendant is actually guilty. But if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.

*State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549-50 (2018) (citations, internal quotation marks, and ellipses omitted).

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“Possession of a controlled substance may be either actual or constructive.” *State v. Hamilton*, 145 N.C. App. 152, 155, 549 S.E.2d 233, 235 (2001). “A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use.” *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002). “Constructive possession exists when a person, while not having actual possession, has the intent and capability to maintain control and dominion over a controlled substance.” *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983).

“When contraband is ‘found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.’” *Chekanow*, 370 N.C. at 493, 809 S.E.2d at 550. If the defendant does not have “exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred.” *Id.* (citation omitted). “Whether incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry.” *Id.* at 496, 809 S.E.2d at 552. Relevant considerations include:

- (1) the defendant’s ownership and occupation of the property . . . ;
- (2) the defendant’s proximity to the contraband;
- (3) indicia of the defendant’s control over the place where the contraband is found;
- (4) the defendant’s suspicious behavior at or near the time of the contraband’s discovery;

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and (5) other evidence found in the defendant's possession that links the defendant to the contraband.

*Id.* No single consideration is controlling, and a finding of constructive possession depends on the totality of circumstances in each case. *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986).

In this case, Defendant did not have exclusive possession of the car in which the pills were found. The State was therefore required to provide evidence of other incriminating circumstances. *See Chekanow*, 370 N.C. at 493, 809 S.E.2d at 550.

The State has done so. Defendant was seen leaving his residence and getting into the front passenger seat of the Lexus. Law enforcement officers maintained continual surveillance of the Lexus until Grier pulled it over. During that time, the Lexus made no stops and no one got in or out of the car. Two baggies of cocaine, containing a total of 1.4 grams, were found in the glove compartment located directly in front of the front passenger seat. *See State v. Matias*, 354 N.C. 549, 551, 556 S.E.2d 269, 270 (2001) (finding constructive possession where cocaine and marijuana were found "in the back right seat where defendant had been sitting"); *State v. Carr*, 122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996) (finding constructive possession where cocaine was on the floor of the front passenger seat and defendant was the only person to exit the passenger side of the vehicle). Defendant told the officer that it was his sister's car, suggesting that he had greater awareness of and control over the car than a mere passenger. A search of Defendant revealed \$902 in cash on his person. *See*

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*State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984) (over \$1,700 in cash in defendant's pocket considered incriminating); *State v. Martinez*, 150 N.C. App. 364, 371, 562 S.E.2d 914, 918 (2002) (\$1,780 in cash on the person of defendant considered incriminating). A search of Defendant's house four hours later revealed, inter alia, small baggies and a bag of cocaine weighing 5.4 grams. Viewed in the light most favorable to the State, this evidence was sufficient evidence from which a jury could conclude that Defendant possessed the cocaine found in the glove compartment. See, e.g., *State v. Nettles*, 170 N.C. App. 100, 104, 612 S.E.2d 172, 175 (2005) (finding constructive possession where defendant had \$411 in cash on his person, owned the car containing the drugs, and was present in the home containing drug paraphernalia).

Defendant relies on *State v. Weems*, 31 N.C. App. 569, 230 S.E.2d 193 (1976), in urging that his proximity to the cocaine alone is not enough to demonstrate constructive possession. This Court has recognized that "mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession." *Id.* at 571, 230 S.E.2d at 194 (internal quotation marks and citation omitted). In *Weems*, the defendant "was in close proximity to the heroin hidden in the front seat area" of the car, but

[t]here was no evidence he had been in the car at any time other than during the short period which elapsed between the time the officers saw the three men get in the car and the time they stopped and searched it. There was no

evidence of any circumstances indicating that defendant knew of the presence of the drugs hidden in the car.

*Id.* at 571, 230 S.E.2d at 194-95.

Here, as explained above, the State has presented other incriminating circumstances. *Weems* is thus distinguishable, and Defendant's reliance is misplaced.

Because the State made a sufficient showing of constructive possession, the trial court did not err by denying Defendant's motion to dismiss the possession with the intent to manufacture, sell, or deliver charge related to the cocaine found in the 18 January 2018 automobile search.

***C. Admission of Testimony***

Finally, we address Defendant's argument that the trial court erroneously admitted certain testimony from Grier. Defendant specifically argues that Grier's testimony that he was told to watch for a Lexus, that Defendant was in the Lexus, and that there would be illegal substances either in the car or on Defendant's person was based on statements made by a confidential informant who did not testify.

At trial, Defendant objected to the challenged testimony based only on the ground that it was 404(b) evidence without "sufficient evidence of its reliability," and did not raise hearsay or Confrontation Clause grounds. However, as Defendant has specifically and distinctly contended on appeal that the admission of the challenged testimony amounts to plain error, we will review for plain error. N.C. R. App. P.

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10(a)(4) (allowing for plain error review in criminal cases “when the judicial action questioned is specifically and distinctly contended to amount to plain error”).

“For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “To show that an error was fundamental, a defendant must establish prejudice . . . .” *Id.* (citation omitted). To establish prejudice stemming from an alleged evidentiary error, “the defendant has the burden to show 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. Moore*, 366 N.C. 100, 106, 726 S.E.2d 168, 173 (2012) (internal quotation marks and citations omitted).

At trial, the prosecution asked Grier what he knew prior to coming into contact with Defendant. Grier responded that he “had received information from Officer Hight and Sergeant Orders at that point in time.” Defendant objected on grounds that the question would elicit testimony covered by N.C. Gen. Stat. § 8C-1, Rule 404(b), and that there needed to be “sufficient evidence of its accuracy.” The trial court held a conference with counsel outside the presence of the jury, during which the State explained that it expected Grier would not “go into explicit detail” about the informant’s tip and that Grier would testify that he had an independent basis for the stop.

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The trial court ultimately overruled Defendant's objection, stating that Grier's testimony was hearsay but would be admitted to corroborate the testimony of a later-testifying witness. The trial court instructed the jury to consider Grier's testimony for the "sole purpose" of corroboration.

After the court instructed the jury, the prosecution asked Grier why he came into contact with Defendant the night of 18 January. The following dialogue took place:

[Grier:] I was offered information by . . . Orders that a VIC [sic] would be traveling south near the 800 block of Highway 127, that basically a male party would be in the vehicle, would have illegal substances on him or in the vehicle. I was also told that there would be a female driving the vehicle, that she did not have a valid driver's license.

[State:] And you said that they told you to look for a vehicle driving southbound near the 800 block of 127.

[Grier:] Yes.

[State:] Did they give you a description of the vehicle?

[Grier:] They did.

[State:] What was that?

[Grier:] A silver Lexus.

After Grier testified, Hight was called to the stand. Hight testified that he observed Defendant on 18 January "at 202 11th Avenue, Northwest walking out and getting into a Lexus that was parked in the driveway." Hight further testified without objection:

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When we established surveillance, Investigator Jenkins also observed a BMW parked in the driveway there. He ran that tag which came back to a female subject, Brittany Setzer, who had a suspended license, as well as the Lexus that they later got into. At approximately 8:45 they walked out of the residence and Ms. Setzer got into the driver's seat of the Lexus and Mr. Smith got into the passenger seat of the Lexus and they went to back out of the driveway and leave.

....

Once we observed them enter that vehicle, like I said, me and the other investigators other than Investigator Williams continued to follow the vehicle and until—at the direction of Sergeant Orders, Officer Grier was able to stop it based off of us knowing that Ms. Setzer had a revoked license as well as the other infractions that Officer Grier observed.

After Hight testified, Orders was called to the stand. Orders testified that he was part of the surveillance team that established surveillance at 202 11th Avenue Northwest at approximately 8 o'clock on the evening of 18 January. When he arrived, “[t]here was a Lexus IS 250 sitting in the driveway, as well as a BMW SUV that was registered to Brittany Setzer.” When they ran the tag on that vehicle, it “showed that her license had been suspended.” They were aware from an earlier investigation that Defendant’s license had also been suspended. He did not observe them leave the residence, but one of his investigators radioed that both subjects had exited the residence.

Orders further testified that at that point, they conducted mobile surveillance on Setzer and Defendant to allow Grier to get behind the vehicle and stop them as



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“Setzer [was] driving that vehicle illegally because her license was suspended.”

Orders acknowledged that he had a conversation with Grier prior to the stop.

Grier’s testimony that he was told to watch for a Lexus and that Defendant was in the Lexus corroborated Hight and Order’s later testimony. Accordingly, the trial court did not err, much less plainly err, in admitting this challenged portion of Grier’s testimony. *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011) (“Statements properly offered to corroborate former statements of a witness are not offered for their substantive truth and consequently [are] not hearsay.” (internal quotation marks and citation omitted)).

Even assuming arguendo that the final portion of Grier’s testimony that he was informed that Defendant “would have illegal substances on him or in the vehicle” was erroneously admitted, upon review of the whole record, we cannot conclude that admission of the testimony “had a probable impact on the jury’s finding that the defendant was guilty.” *Moore*, 366 N.C. at 106, 726 S.E.2d at 173 (internal quotation marks and citations omitted). First, the trial court instructed the jury that the testimony was being admitted for the “sole purpose” of corroboration and that it was “not to be received for any other purpose than that.” Although this portion of Grier’s testimony did not ultimately corroborate future testimony, the trial court’s instruction prohibited the jury from considering the challenged testimony for its

truth. Additionally, there was ample evidence beyond Grier's statement, as explained above, that Defendant possessed the cocaine in the glove compartment.

Defendant argues that "the jury had some doubt about the evidence" because "[t]he jury rejected the original charge that [Defendant] was in possession of the cocaine with intent to manufacture, sell, or [deliver]," and instead convicted him solely of possession of cocaine. We disagree. The fact that the jury found Defendant guilty of the lesser offense of possession of cocaine indicates that the jury did not find beyond a reasonable doubt that Defendant had the intent to manufacture, sell, or deliver the cocaine, and does not indicate that the jury had some doubt about the evidence of his possession of the cocaine.

Under the facts of this case, we cannot say that the jury would have reached a different result absent Grier's challenged testimony. Accordingly, the admission of the challenged testimony was not plain error.

#### **IV. Conclusion**

Because we cannot decide the matter on the cold record, we dismiss Defendant's ineffective assistance of counsel claim without prejudice so that he may pursue it in a motion for appropriate relief. The trial court did not err by denying Defendant's motion to dismiss the charge of possession with the intent to manufacture, sell, or deliver cocaine. The trial court did not err in part and did not plainly err in part by admitting certain challenged testimony.

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DISMISSED IN PART; NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges INMAN and BERGER concur.

Report per Rule 30(e).