An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-126

Filed 20 February 2024

Johnston County, No. 21CRS52611

STATE OF NORTH CAROLINA

v.

DERRICK RASHEEN CALDWELL

Appeal by Defendant from Judgment entered 28 July 2022 by Judge G. Bryan Collins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 4 October 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General Christopher J. Stipes, for the State.*

*Jackie Willingham for Defendant-Appellant.*

HAMPSON, Judge.

## Factual and Procedural Background

Derrick Rasheen Caldwell (Defendant) appeals from Judgment entered 28 July 2022 upon jury verdicts finding Defendant guilty of Possession with Intent to Sell or Deliver Methamphetamine and Possession of Drug Paraphernalia. The Record before us—including evidence presented at trial—tends to reflect the following:

On 26 June 2021, Sergeant Joey Allen Wheeler (Sergeant Wheeler) of the Smithfield Police Department observed a vehicle traveling below the posted speed limit, slowing further as Sergeant Wheeler followed the vehicle. Sergeant Wheeler ran the vehicle's registration, which indicated the vehicle's owner's driver's license was suspended. Sergeant Wheeler activated his blue lights and siren to initiate a traffic stop. The vehicle slowly continued to a nearby parking lot and eventually stopped in a parking space. Sergeant Wheeler approached the vehicle and asked the driver if he was the registered owner of the vehicle, Derrick Caldwell. The driver responded that he was Derrick Caldwell's brother. Sergeant Wheeler requested his driver's license and registration, observing the driver was extremely nervous. The driver then admitted he was, in fact, Derrick Caldwell—Defendant in this case.

Because Defendant initially claimed not to be Derrick Caldwell, Sergeant Wheeler called K-9 Officer James Brian Sittig (Officer Sittig) to the scene. Officer Sittig asked Defendant to step out of his vehicle, and Defendant complied. Defendant denied consent to search his vehicle but consented to a search of his person. Officer Sittig found cash, totaling $201, in Defendant's front pocket. Officer Sittig informed Defendant of his intent to deploy his K-9 around Defendant's vehicle, and he asked Defendant if the K-9 would alert to anything in his vehicle. Defendant stated the K-9 might alert to marijuana. Officer Sittig deployed his K-9, and the K-9 alerted to the passenger side of Defendant's vehicle. Based on this positive alert, Officer Sittig conducted a search of Defendant's vehicle. During the search, Officer Sittig

discovered 11.73 grams of crystal methamphetamine, a digital scale, and a magazine to an AR-15.

On 20 September 2021, Defendant was indicted for Possession with Intent to Sell or Deliver a Schedule II Controlled Substance, Maintaining a Vehicle for the Purpose of Keeping or Selling a Controlled Substance, and Possession of Drug Paraphernalia. This matter came on for trial on 25 July 2022. At the close of the State's evidence, Defendant moved to dismiss all charges. The trial court dismissed the charge of Maintaining a Vehicle for the Purpose of Keeping or Selling a Schedule II Controlled Substance. At the close of all the evidence, Defendant renewed his Motion to Dismiss the remaining charges. The trial court denied Defendant's Motion to Dismiss.

On 27 July 2022, the jury returned verdicts finding Defendant guilty of Possession with Intent to Sell or Deliver Methamphetamine and Possession of Drug Paraphernalia. On 21 July 2022, the trial court entered Judgment sentencing Defendant to 12 to 24 months of imprisonment. Defendant gave oral Notice of Appeal in open court.

## Issue

The sole issue on appeal is whether the trial court erred in denying Defendant's Motions to Dismiss the charge of Possession with Intent to Sell or Deliver Methamphetamine.

## Analysis

"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) (citation omitted). "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); *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (citation omitted)). "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 of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (alteration in original) (citation and quotation marks omitted). "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) (citation omitted).

Defendant contends the trial court erred in denying his Motions to Dismiss the charge of Possession with Intent to Sell or Deliver Methamphetamine. N.C. Gen. Stat § 90-95(a)(1) makes it unlawful to "possess with intent to manufacture, sell or

deliver, a controlled substance." N.C. Gen. Stat. § 90-95(a)(1) (2021). The offense of possession with intent to manufacture, sell, or deliver has three elements: (1) possession; (2) of a controlled substance; (3) with intent to manufacture, sell, or deliver the controlled substance. *See id.* Specifically, Defendant argues the State failed to demonstrate the third element—intent. Because Defendant does not challenge the remaining elements of this offense, we limit our analysis to whether the State presented sufficient evidence of intent.

"While intent may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred." *State v. Nettles*, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175-76 (2005) (citation omitted). Our Supreme Court has recognized the intent to sell or deliver may be inferred from " '(1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity [of the controlled substance] found, and (4) the presence of cash or drug paraphernalia.' " *State v. Blagg*, 377 N.C. 482, 490, 858 S.E.2d 268, 274 (2021) (alteration in original) (citing *State v. Coley*, 257 N.C. App. 780, 788-89, 810 S.E.2d 359, 363 (2018) (quoting *Nettles*, 170 N.C. App. at 106, 612 S.E.2d at 176)). "Moreover, our case law demonstrates that this is a fact-specific inquiry in which the totality of the circumstances in each case must be considered unless the quantity of drugs found is so substantial that this factor—by itself—supports an inference of possession with intent to sell or deliver." *Coley*, 257 N.C. App. at 788-89, 810 S.E.2d at 365. "In 'borderline' or close cases, our courts have consistently expressed a

preference for submitting issues to the jury[.]" *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (citations omitted); *see also State v. Everhardt*, 96 N.C. App. 1, 11, 384 S.E.2d 562, 568 (1989) ("If there is more than a scintilla of competent evidence to support allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." (citation and quotation marks omitted)), *aff'd*, 326 N.C. 777, 392 S.E.2d 391 (1990).

"Although 'quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver,' it must be a substantial amount." *Nettles*, 170 N.C. App. at 105, 612 S.E.2d at 176 (quoting *State v. Morgan*, 329 N.C. 654, 659-60, 406 S.E.2d 833, 835-36 (1991)). This Court has previously held "a controlled substance's substantial amount may be determined by comparing the amount to the amount necessary to constitute a trafficking offense." *Id.* at 106, 612 S.E.2d at 176.

Here, Defendant was in possession of 11.73 grams of methamphetamine, more than a third of the amount required for a trafficking offense. *See* N.C. Gen. Stat. § 90-95(h)(3b) (2021) (establishes the minimum quantity of methamphetamine for trafficking in the controlled substance is 28 grams). However, we need not reach the issue of whether the amount of methamphetamine found in Defendant's possession constitutes a "substantial amount" sufficient, standing alone, to support the denial of Defendant's Motions to Dismiss. This is so because in addition to the amount of methamphetamine, the State presented evidence Defendant was in possession of a

digital scale, $201 in cash, and a magazine to an AR-15. These are additional circumstances which may be considered when ascertaining Defendant's intent. *See Blagg*, 377 N.C. at 490, 858 S.E.2d at 274. Thus, this evidence, taken in the light most favorable to the State, could support an inference of Defendant's intent to sell or deliver methamphetamine. *See id*. Therefore, there was "more than a scintilla of competent evidence to support [the] allegations in the . . . indictment". *Everhardt*, 96 N.C. App. at 11, 384 S.E.2d at 568 (citation and quotation marks omitted). Consequently, the trial court did not err in denying the Motions to Dismiss.

## **Conclusion**

Accordingly, for the foregoing reasons, we conclude there was no error at Defendant's trial, and we affirm the trial court's Judgment.

NO ERROR.

Judges TYSON and CARPENTER concur.

Report per Rule 30(e).