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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-859

Filed: 7 March 2017

Union County, No. 13 CRS 52896, 13 CRS 52897

STATE OF NORTH CAROLINA

v.

KEITH PAUL OXNER

Appeal by defendant from judgment entered 1 April 2016 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Joseph P. Lattimore for defendant-appellant.

TYSON, Judge.

Keith Paul Oxner (“Defendant”) appeals from his misdemeanor convictions of illegally selling alcoholic beverages, gambling, and simple possession of marijuana.

We find no plain error.

I. Background

A. Voir Dire Testimony and Ruling

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Defendant filed a motion to suppress evidence from a search warrant prior to trial. The trial court denied the motion for Defendant's failure to attach the required accompanying affidavit. *See* N.C. Gen. Stat. § 15A-977(a) (2015) ("The motion [to suppress evidence in superior court] must be accompanied by an affidavit containing facts supporting the motion.")

After the trial court denied his motion to suppress, and before the jury was impaneled, Defendant made an oral motion to suppress the evidence on the grounds the State had failed to comply with its statutory obligation to provide notice of its intent to rely on the evidence at trial pursuant to N.C. Gen. Stat. § 15A-975(b). The statute provides: "[a] motion to suppress may be made for the first time during trial when the State has failed to notify the defendant's counsel . . . sooner than 20 working days before trial, of its intention to use the evidence," and the evidence at issue falls into one of three listed categories. Those categories include evidence obtained by warrantless search, and "[e]vidence obtained as a result of search with a search warrant when the defendant was not present at the time of the execution of the search warrant." N.C. Gen. Stat. § 15A-975(b)(2)-(3) (2015). The trial court conducted a *voir dire* hearing on Defendant's motion.

State Patrol Trooper Robert Hall testified he responded to a call regarding injury to real property at 105 Jones Street in Monroe, North Carolina on 30 June 2013. It appeared someone had driven a vehicle into the side of the residence. A

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muddy footprint was visible on the side door. When he arrived at the residence, Trooper Hall spoke with Defendant's brother, Phillip Oxner. Defendant was not present at the time.

Phillip Oxner told Trooper Hall he was unsure whether anything had been stolen from the residence and gave consent for officers to go inside "to look." With that consent, Trooper Hall entered and conducted a safety sweep to ensure no one else was present inside the residence.

Once inside, Trooper Hall and accompanying officers noticed standing water on the kitchen floor. The officers investigated to determine whether the standing water resulted from removed and stolen copper pipes. While in the kitchen, the officers observed "large amounts of alcohol bottles, [S]olo cups," and "a piece of paper with names and dollar amounts located on the back side[] of the bar in plain view."

The officers contacted Monroe Alcoholic Beverage Control ("ABC") Officer David McCallister and informed him of the items located in the bar area. Officer McCallister arrived at the residence, entered without a warrant, and observed the items in the kitchen. Officer McCallister left the residence, obtained a search warrant from the magistrate, and returned to the residence to execute the warrant. Officer McCallister seized very small amounts of cocaine and marijuana, multiple spirituous liquor and malt beverage containers, and "ledgers that would tend to

show gambling [and] alcoholic beverage sales,” pursuant to execution of the warrant.

After arguments of counsel, the trial court made oral findings of fact consistent with the testimonies of Trooper Hall and Officer McCallister. The court determined the consent given by Phillip Oxner to permit Trooper Hall and accompanying officers to enter the residence to determine whether items had been stolen did not extend to Officer McCallister’s initial warrantless entry. The court redacted paragraph three of Officer McCallister’s search warrant application, which pertains to his initial entry of the residence and the items he observed at that time. Based upon the remaining allegations asserted in the search warrant application, the court determined the issuance of the search warrant was supported by probable cause.

B. Evidence at Trial

Trooper Hall’s trial testimony mirrored his earlier *voir dire* testimony regarding his arrival at the residence, the footprint on the door, Phillip Oxner’s consent for him to enter the residence, and his observation of water on the floor. Trooper Hall testified twelve to fifteen bottles of liquor, Solo cups, and “a piece of paper with different patriots [sic] name and dollar amounts on it” were located behind the freestanding bar in the kitchen.

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ABC Officer McCallister testified he entered the residence pursuant to a search warrant he had obtained based upon Trooper Hall's plain view observation of the items in the kitchen. He testified he observed a box of "empty or unsealed spirituous liquor containers" behind the bar and alcoholic beverages in a portable electric cooler. He also found additional beer in a refrigerator, a mason jar containing a small amount of "non-tax paid liquor" and numerous empty malt beverage containers in a garbage can.

Officer McCallister found multiple copies of papers stating "Birthday club \$200," and listing names and dates of birth in the kitchen bar area. He also found a notebook containing written names, numbers, and the letters "PD." Officer McCallister found nothing to show prices of the drinks, and did not find any sale proceeds in the kitchen.

Officer McCallister also seized papers with a schedule of NFL football games and the writing "money to be turned in by Wednesday no exceptions, \$13." He also discovered sheets of paper with NBA and NFL games, blocks for the entry of names, and dollar amounts showing payouts for individual quarters and the end of the games.

The residence contained three bedrooms. Officer McCallister discovered a small amount of marijuana from an ashtray on top of a dresser in one of the bedrooms. That bedroom also contained mail addressed to Sammy A. Cunningham,

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the owner of the house. An additional amount of marijuana was discovered inside another bedroom. That bedroom contained mail in the name of Phillip Oxner. Inside the bathroom, Officer McCallister discovered a small baggy, which contained a white powdery substance. Multiple large trash bags containing empty beer cans were located outside of the house.

Defendant was not present while the officers searched 105 Jones Street. Officer McCallister testified he knew that Defendant lived there. Officer McCallister further testified he had previously executed search warrants at 105 Jones Street in 2003 and 2007, and discovered evidence of illegal alcohol sales and gambling.

Officer McCallister served an arrest warrant upon Defendant at the Jones Street residence on 3 July 2013. As Officer McCallister explained the warrants to him, Defendant stated, “[I]t’s just a birthday club, you didn’t get the birthday list off the wall.” He further stated family and friends pay five dollars to be in the club and drink beverages. Defendant also stated he had lived at the residence for ten years, and that Sammy Cunningham did not live there.

Defendant was indicted for the charges of felonious possession of cocaine, gambling pursuant to N.C. Gen. Stat. § 14-292, selling alcoholic beverages without an ABC permit pursuant to N.C. Gen. Stat. § 18B-304, and simple possession of

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marijuana. The jury acquitted Defendant of the felonious possession of cocaine charge, but convicted him of the remaining three misdemeanor charges.

II. Jurisdiction

Defendant appeals as of right from the superior court's final judgment entered upon his misdemeanor jury convictions pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2015).

III. Issues

Defendant argues: (1) the trial court committed plain error by denying his motion to suppress evidence seized pursuant to the search warrant; (2) the trial court committed plain error by allowing several opinions of Defendant's guilt and hearsay testimony into evidence; and, (3) the evidence presented was insufficient to convict him of simple possession of marijuana.

IV. Motion to Suppress Evidence Obtained by the Search Warrant

Defendant argues the trial court committed plain error by denying his motion to suppress the evidence recovered from 105 Jones Street pursuant to the search warrant obtained by Officer McCallister, where the un-redacted portions of the search warrant application fail to show probable cause. We disagree.

A. Standard of Review

A pretrial motion to suppress evidence is insufficient to preserve for appeal the question of the admissibility of the challenged evidence, if Defendant fails to

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object to the admission of that evidence at the time it is offered at trial. *State v. Grooms*, 353 N.C. 50, 65-66, 540 S.E.2d 713, 723 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). Although trial counsel moved to suppress the evidence obtained through the execution of the search warrant, counsel failed to object at trial when the prosecutor introduced the challenged evidence. Defendant concedes this issue was not preserved for appellate review, and argues the denial of his motion to suppress constituted plain error. N.C. R. App. P. 10(a)(4).

Under a plain error standard of review, “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). “Thus, . . . the defendant must first demonstrate that the trial court committed error, and next that absent the error, the jury probably would have reached a different result.” *State v. Larkin*, 237 N.C. App. 335, 339, 764 S.E.2d 681, 685 (2014) (citation and internal quotation marks omitted). In reviewing the trial court’s ruling on a motion to suppress for error,

[i]t is well established that. . . the trial court’s findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court’s findings of fact are supported by the evidence,

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then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Campbell, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008) (citations, quotation marks, and brackets omitted).

B. Probable Cause Analysis

Re-dacted paragraph three of the search warrant application pertains to the items Officer McCallister observed during his warrantless initial entry into the residence. The trial court determined probable cause existed for the issuance of the search warrant, without the information contained in paragraph three, and denied Defendant's motion to suppress.

The Constitution of the United States and the North Carolina Constitution prohibit unreasonable searches and seizures. *See* U.S. Const. amends. IV and XIV; N.C. Const. art. I, § 20. A law enforcement officer's application for a search warrant must demonstrate through statements and supporting facts probable cause exists that items subject to seizure may be found in the described place. N.C. Gen. Stat. § 15A-244 (2015).

"Probable cause for a search is present where facts are stated which establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender." *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997) (citation omitted). Courts

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view the “totality of the circumstances” to determine whether the officer’s application contains sufficient information to support the magistrate’s determination that probable cause exists to issue the search warrant. *See State v. Sinapi*, 359 N.C. 394, 397-98, 610 S.E.2d 362, 365 (2005).

The magistrate must “make a practical, common sense determination whether, under all the circumstances, there is a fair probability that contraband or evidence will be found in the place to be searched.” *State v. Riggs*, 328 N.C. 213, 220, 400 S.E.2d 429, 434 (1991) (citing *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983)). Defendant argues the magistrate lacked probable cause to issue the search warrant upon these allegations, because the officers’ observations “must be taken as equally indicative of lawful . . . conduct as of contraband or unlawful conduct.” *State v. Beaver*, 37 N.C. App. 513, 519, 246 S.E.2d 535, 540 (1978).

It is unlawful “for any person to sell any alcoholic beverage, or possess any alcoholic beverage for sale, without first obtaining the applicable permit and revenue licenses.” N.C. Gen. Stat. § 18B-304 (2015). Aside from the information contained in paragraph three, Officer McCallister’s search warrant application sets forth information, which establishes a fair probability that evidence of illegal alcohol sales would be found inside the Jones Street residence. *Riggs*, 328 N.C. at 221, 400 S.E.2d at 434.

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The search warrant application describes Officer McCallister's fourteen-year career as a law enforcement officer, his experience and expertise, and that he currently serves as the Monroe ABC Officer. It specifically states Officer McCallister's duties include inspecting all ABC permitted establishments and investigating illegal alcohol sales within the City of Monroe. *See id.* at 221, 400 S.E.2d at 434 ("Reasonable inferences from the available observations, particularly when coupled with common or specialized experience, long have been approved in establishing probable cause." (citation omitted)).

The application describes information, provided to him by other law officers, who had entered the residence with Phillip Oxner's consent. *See State v. Horner*, 310 N.C. 274, 280, 311 S.E.2d 281, 286 (1984) ("The officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties.") The application states that on 30 June 2013, another officer called to inform him officers had responded to 105 Jones Street, entered the residence with consent, and observed "multiple alcoholic beverage containers, drinking cups and paperwork/ledgers containing names and entries of money. These items were located in and around a small bar within the kitchen."

The search warrant application further states Officer McCallister determined no permit had been issued to 105 Jones Street for the sale of alcoholic beverages. "Based on [his] training and experience investigating illegal alcoholic

beverage establishments and items observed within the kitchen area of 105 Jones Street,” Officer McCallister asserted probable cause existed to issue the search warrant.

“[C]ourts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.” *Riggs*, 328 N.C. at 221, 400 S.E.2d at 434 (quoting *Gates*, 462 U.S. at 236, 76 L. Ed. 2d at 547). “[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” *Id.* at 222, 400 S.E.2d at 435 (quoting *Gates* at 237 n.10, 76 L. Ed. 2d at 547 n.10). Here, in addition to observing multiple empty and unopened alcoholic beverage containers, the officers observed paperwork or ledgers containing entries of names and sums of money located within a bar area in the kitchen. Aside from the redacted paragraph three, Officer McCallister’s search warrant application was sufficient for the magistrate to determine whether probable cause existed for the issuance of the search warrant. Defendant’s argument is overruled.

V. Evidentiary Issues

Defendant argues the trial court also committed plain error in allowing officers’ opinions on Defendant’s guilt, and admitting hearsay evidence to establish Defendant did not have a permit to sell alcoholic beverages. We disagree.

A. Standard of Review

Defendant acknowledges trial counsel did not object at trial to the admission of the testimony he challenges on appeal. We review unpreserved evidentiary issues for plain error under the standard stated *supra*. *State v. Turner*, 237 N.C. App. 388, 390-91, 765 S.E.2d 77, 81 (2014).

B. Lay Opinion Testimony on Defendant's Guilt

Rule 701 of the Rules of Evidence provides:

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2015).

Defendant challenges Trooper Hall's conclusory testimony on cross-examination that he "saw evidence of illegal gambling, alcohol sales" in the residence under Rule 701. Defendant also challenges Officer McCallister's testimony that, based upon his training and experience, the birthday club "looks like membership for an illegal alcohol establishment."

Officer McCallister further testified "[t]here was a notebook with – as I mentioned before, a notebook with names and numbers tending to show dollar amounts that would reveal the sale of alcoholic beverages." Defendant argues the testimonies of Trooper Hall and Officer McCallister were improper and constituted inadmissible opinion evidence upon Defendant's guilt.

“[Our courts have] long held that a witness may state the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of facts.”

State v. McVay, 174 N.C. App. 335, 339, 620 S.E.2d 883, 886 (2005) (quoting *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975), sentence vacated on other grounds, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976)) (internal quotation marks omitted).

Here, the statements of Trooper Hall and Officer McCallister “explain their perceptions and the impact of those perceptions on their actions.” The trial court did not commit plain error by failing to strike these statements *ex mero motu*. *Id.* Further, Defendant has not met his plain error burden to show, absent this testimony, “the jury probably would have reached a different result.” *Larkin*, 237 N.C. App. at 339, 764 S.E.2d at 685 (citation and quotation marks omitted). Defendant’s argument is overruled.

C. Hearsay Testimony

Defendant argues the trial court committed plain error by allowing Officer McCallister to testify the ABC Commission is “the sole governing body that would issue ABC permits” and that Defendant did not have a permit to sell alcoholic beverages when he checked “through the North Carolina ABC Commission.”

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Defendant argues this testimony was hearsay and not admissible under the exception to the hearsay rule set forth in Rule 803(6):

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal under Rule 902 of the Rules of Evidence made by the custodian or witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2015).

The testimony of Officer McCallister, an experienced ABC law enforcement officer assigned to investigate violations of alcoholic beverage laws in Monroe, who asserted he searched the database of the “sole governing body that would issue ABC permits,” was sufficient to create an inference that such records are kept in the regular course of business. *See State v. Sneed*, 210 N.C. App. 622, 628 709 S.E.2d 455, 460 (2011) (holding no plain error under Rule 803(6) in the trial court’s admission of the officer’s testimony that he checked the NCIC database and learned the handgun recovered from the defendant’s person was listed as having been stolen). Defendant has failed to show plain error in the admission of evidence. His arguments are overruled.

VI. Sufficiency of the Evidence to Support Defendant's Marijuana Conviction

Defendant argues the evidence was insufficient to convict him of simple possession of marijuana, because other people kept their items inside the residence and the contraband was found in two rooms to which Defendant had no connection.

At the close of the State's evidence, defense counsel stated to the court: "motion to dismiss at the close of the State's evidence, would like to be heard on a couple of matters, your Honor." Defense counsel then specifically argued the State had not presented sufficient evidence to convict Defendant of illegally selling alcoholic beverages, and specifically stated he did not wish to be heard on the other three charges. At the close of the evidence, Defense counsel renewed the motion to dismiss, and did not further wish to be heard.

"In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial." N.C. R. App. P. 10(a)(3). "[I]n order to preserve a question 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). Defendant concedes he is procedurally barred from attacking the sufficiency of the evidence to support his conviction on that charge, because the motion to dismiss did not address

the marijuana charge. Defendant requests this Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure to determine whether the State presented sufficient evidence to support this conviction.

Rule 2 provides this Court may “suspend or vary the requirements or provisions” of the Rules of Appellate Procedure “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.” N.C. R. App. P. 2. Our Supreme Court has instructed Rule 2 is an “extraordinary step,” and must be invoked “cautiously” and in “exceptional circumstances.” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citation omitted). Defendant has failed to show it is appropriate to exercise our discretion to invoke Rule 2 and suspend the requirements of the Appellate Rules to review Defendant’s sufficiency of the evidence argument. *Id.*

VII. Conclusion

Officer McCallister’s search warrant affidavit, even with the information in paragraph three redacted, contained sufficient statements and supporting facts to show probable cause existed that evidence of illegal alcohol sales may be found within Defendant’s residence. N.C. Gen. Stat. § 15A-244. The trial court did not err by denying Defendant’s motion to suppress the evidence obtained pursuant to the warrant under plain error review.

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Defendant has failed to show the trial court's unchallenged admission of the testimonies of Officer McCallister and Trooper Hall constituted plain error under Rule 703. Defendant has also failed to show plain error in the unchallenged admission of Officer McCallister's hearsay testimony that he determined from the ABC Commission's database that Defendant did not possess an ABC permit.

We decline to invoke our discretion under Rule 2 to suspend the Appellate Rules to review Defendant's insufficiency of the evidence argument for simple possession of marijuana. Defendant received a fair trial, free from prejudicial errors he preserved and plain errors he argued. *It is so ordered.*

NO ERROR.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).