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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 17-496

Filed: 2 January 2018

Johnston County, No. 13 CRS 50932-33

STATE OF NORTH CAROLINA,

v.

ANTHONY PAUL SMITH, Defendant.

Appeal by defendant from judgment entered 15 May 2014 by Judge Richard T. Brown in Johnston County Superior Court. Heard in the Court of Appeals 2 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Martin T. McCracken, for the State.

Narron, O'Hale and Whittington, P.A., by John P. O'Hale and Frank B. O'Hale, for defendant-appellant.

ZACHARY, Judge.

Where defendant filed a pre-trial motion to suppress evidence but did not object to the introduction of the evidence at trial, the issue was not preserved for appellate review. Where there was substantial evidence of each element of the offense charged, the trial court did not err in denying defendant's motion to dismiss. Where

the evidence supported both of the alternative acts that could establish an element of the offense, the trial court did not err in instructing the jury in the disjunctive as to the alternative acts.

Background

On 28 February 2013, Johnston County Sheriff's Deputy Brian Clifton began surveillance on the home of defendant Anthony Smith. Deputy Clifton observed an individual drive up, park, and then enter defendant's home. After several minutes, the individual exited and drove away. Deputy Clifton followed him until the individual "drove left of center," at which point Deputy Clifton pulled him over. The driver, Aubrey Ellis, consented to a search of the vehicle and admitted to having marijuana in the car. Ellis gave seven grams of marijuana to Deputy Clifton, and told Deputy Clifton that he had just purchased the marijuana from defendant.

Based on this information, Deputy Clifton and another officer, Detective Meredeth Langston, returned to defendant's home in order to conduct a "knock-and-talk" investigation. When defendant did not immediately answer the door, Detective Langston left to apply for a search warrant. After several minutes, defendant came outside and shut the door behind him. Deputy Clifton asked defendant for his consent to search the home, and defendant refused. Deputy Clifton then handcuffed defendant and entered the home. At least six additional officers arrived at the scene and remained in defendant's home, with defendant handcuffed, for the next two-and-

a-half hours while they waited for the warrant to issue. The officers did not conduct a thorough search while they were waiting for the warrant, although they did walk through the home in order to ensure that the area was secure.

Detective Langston eventually returned with a warrant, at which time the officers began a complete search of the home. Officers found digital scales, a bag in the kitchen containing 4.88 grams of marijuana, and two kitchen bowls containing marijuana residue. Deputy Clifton searched the bathroom and noticed marijuana residue on the toilet seat. The officers dug up the septic tank and discovered another bag containing 22 grams of marijuana. Defendant was arrested and indicted for possession with intent to sell or deliver marijuana, maintaining a dwelling for the keeping or selling of controlled substances, and possession of drug paraphernalia.

Defendant filed a motion to suppress the evidence obtained from the 28 February 2013 search, which was heard on 12 May 2014 before the Honorable Richard T. Brown. Judge Brown denied defendant's motion to suppress. The case came on for trial the same day. At the close of the State's evidence, and again at the close of all evidence, defendant moved to dismiss the charge of maintaining a dwelling for the keeping or selling of controlled substances, which Judge Brown denied.

On 15 May 2014, the jury found defendant not guilty of possession with the intent to sell or deliver marijuana, but guilty of possession of marijuana, knowingly and intentionally maintaining a dwelling for the purpose of keeping or selling a

controlled substance, and possession of drug paraphernalia. However, the judgment that was entered mistakenly recited defendant's conviction of the offense of possession with intent to sell or deliver marijuana instead of the offense of maintaining a dwelling for the keeping or selling of marijuana.

Defendant timely filed a Notice of Appeal, but the appeal was never perfected. Apparently, defendant discovered the mistake in the judgment while settling the record. The record contains no further information as to what happened following that discovery, other than that the State filed a Motion to Correct Clerical Error on 28 November 2016. The State also filed a Motion to Dismiss Defendant's Appeal on 8 December 2016. The State's motions were heard before the Honorable Thomas H. Lock. Judge Lock orally granted the State's motions on 8 December 2016. The trial court's Order Correcting Clerical Error and Order Dismissing Defendant's Appeal were entered on 29 March 2017. Defendant gave timely notice of appeal.

On appeal, defendant argues that Judge Brown erred in (1) denying his motion to suppress, (2) denying his motion to dismiss, and (3) instructing the jury in the disjunctive on the charge of maintaining a dwelling for the keeping or selling of controlled substances. The State argues, however, that the original appeal in which defendant could have raised these issues was dismissed for defendant's failure to timely perfect the appeal. The State contends that defendant is limited to appealing from Judge Lock's orders dismissing the original appeal and correcting the clerical

error. On 11 September 2017, defendant filed a Petition for Writ of Certiorari requesting that this Court address the merits of the three issues listed above, which was granted on 1 November 2017.

Discussion

We turn now to the propriety of the trial court's (1) denial of defendant's motion to suppress, (2) denial of defendant's motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling controlled substances, and (3) jury instructions on the charge of maintaining a dwelling for the purpose of keeping or selling controlled substances.

I. Motion to Suppress

Defendant first argues that the trial court erred by denying his motion to suppress the evidence obtained from the 28 February 2013 search of his home. However, defendant failed to preserve this issue for review.

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." N.C. R. App. P. 10(a)(1) (2014). A pre-trial filing of a motion to suppress is not "timely" for purposes of Rule 10(a)(1). *See State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010). It is well settled that "a trial court's evidentiary ruling on a pretrial motion to suppress is not sufficient to preserve the issue of admissibility for appeal unless a defendant renews

the objection during trial." *State v. Gullette*, ___ N.C. App. ___, ___, 796 S.E.2d 396, 399 (2017) (citation and quotation marks omitted) (emphasis omitted); *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007). However, Rule 10 further provides that "a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law . . . nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contented to amount to plain error." N.C. R. App. P. 10(c)(4) (2016).

While defendant objected to the introduction of the evidence obtained from the 28 February 2013 search in his motion to suppress, he did not timely object to the introduction of that evidence at trial. Because he failed to object to the evidence at the time it was introduced to the jury, defendant failed to preserve the issue for review. Nor has defendant "specifically and distinctly" alleged plain error on appeal. Therefore, he has also waived the right to have the denial of his motion to suppress reviewed for plain error. *See State v. Lawrence*, 365 N.C. 506, 516-18, 723 S.E.2d 326, 333-34 (2012).

II. Motion to Dismiss

Next, defendant argues that the trial court erred in denying his motion to dismiss the charge of maintaining a dwelling for the keeping or selling of controlled substances. We find no error.

A. Standard of Review

The trial court's denial of a defendant's motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). A motion to dismiss is properly denied where 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." *State v. Estes*, 186 N.C. App. 364, 369, 651 S.E.2d 598, 601-02 (2007) (internal quotations omitted). "The evidence is to be considered in the light most favorable to the State[.]" *Id.* at 369, 651 S.E.2d at 602. "[C]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion." *Id.* (internal quotations omitted).

B. Analysis

N.C. Gen. Stat. § 90-108(a)(7) provides that it shall be unlawful for any person

> [t]o knowingly keep or maintain any . . . dwelling house . . . which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article[.]

The statute thus provides two alternative theories for prosecution. Under the first alternative, "the State must prove that the defendant did (1) knowingly (2) keep or maintain (3) a [dwelling house] (4) which is resorted to (5) by persons unlawfully using controlled substances (6) for the purpose of using controlled substances." *State*

v. Mitchell, 336 N.C. 22, 31, 442 S.E.2d 24, 29 (1994). Under the second theory, "the State must prove that the defendant did (1) knowingly (2) keep or maintain (3) a [dwelling house] (4) which is used for the keeping or selling (5) of controlled substances." *Id.*

At the close of the State's evidence, the trial court dismissed the first statutory theory alleging that defendant did knowingly keep or maintain a dwelling house which is resorted to by persons unlawfully using controlled substances. However, the trial court denied defendant's motion to dismiss under the second statutory theory, that defendant did knowingly keep or maintain a dwelling which is used for the keeping or selling of controlled substances.

Defendant argues that the trial court erred when it denied his motion to dismiss because the State failed to present substantial evidence establishing the fourth element of the offense—that the dwelling was used for the keeping or selling of controlled substances. We disagree.

To establish that a dwelling is used for the keeping of controlled substances under N.C. Gen. Stat. § 90-108(a)(7), the evidence must show "not just possession, but possession that occurs over a duration of time." *Mitchell*, 336 N.C. at 32, 442 S.E.2d at 30. Likewise, "the fact that a defendant was in his [dwelling] on one occasion when he sold a controlled substance does not by itself demonstrate the [dwelling] was kept or maintained to sell a controlled substance." *State v. Dickerson*, 152 N.C. App.

714, 716, 568 S.E.2d 281, 282 (2002). Rather, courts must consider the totality of the circumstances in determining whether a defendant knowingly kept or maintained a dwelling house for the purpose of keeping or selling controlled substances. *State v. Thompson*, 188 N.C. App. 102, 105, 654 S.E.2d 814, 817 (2008). Direct evidence of a separate instance of keeping or selling controlled substances in the dwelling is not required. Courts may consider several other factors, "including the amount of drugs present, any paraphernalia (including . . . scales[] and containers for distribution) found in the dwelling, the amount of money found in the dwelling," *Thompson*, 188 N.C. App. at 106, 654 S.E.2d at 817, as well as a defendant's admission "to selling controlled substances[.]" *State v. Frazier*, 142 N.C. App. 361, 366, 542 S.E.2d 682, 686 (2001).

> For example, in *State v. Rosario*, 93 N.C. App. 627, 379 S.E.2d 434, *cert. denied*, 325 N.C. 275, 384 S.E.2d 527 (1989), the defendant was properly convicted on maintaining a dwelling with the intent to use it to sell drugs where the State showed delivery of a package of cocaine, discovery of additional cocaine, a cocaine grinder, and scales. *Rosario*, 93 N.C. App. at 638, 379 S.E.2d at 440. In *State v. McDougald*, 18 N.C. App. 407, 197 S.E.2d 11, *cert. denied*, 283 N.C. 756, 198 S.E.2d 726 (1973), the defendant's possession of 276 grams of marijuana, concealment of the marijuana, and the marijuana's being separated into twenty smaller containers, indicating that it was being broken up for ready distribution, was held properly to support a jury finding that the defendant intended to sell the marijuana.

State v. Battle, 167 N.C. App. 730, 734, 606 S.E.2d 418, 421 (2005).

In the present case, the State presented evidence that the officers found a digital scale hidden in defendant's bathroom vent. Two mixing bowls containing marijuana residue were also found, along with rolling papers that are commonly used for marijuana. A book was recovered from defendant's kitchen entitled "Marijuana New School Indoor Cultivation. A Reference Manual with Step by Step Instruction." The book purported to "help you save a fortune and guide you towards the hairiest, stinkiest buds known to man." Marijuana residue was found on defendant's toilet seat. Suspecting that defendant had flushed marijuana down the toilet, the officers excavated the septic tank and recovered 22 grams of marijuana. Officers also found an additional 4.88 grams of marijuana in the kitchen. At trial, Ellis testified that he had just purchased a quarter-ounce of marijuana from defendant when Deputy Clifton pulled him over. Viewed in the light most favorable to the State, we find this to be substantial evidence of defendant having maintained a dwelling house for the selling of marijuana, a controlled substance. We thus conclude that the trial court did not err when it denied defendant's motion to dismiss that charge.

III. Jury Instructions

Lastly, defendant argues that the trial court improperly instructed the jury in the disjunctive as to the crime of maintaining a dwelling for the keeping or selling of controlled substances, and that the instruction was fatally flawed because it allowed the jury to convict him without a unanimous verdict. We disagree.

"Both the North Carolina Constitution and the North Carolina General Statutes protect the right of the accused to be convicted only by a unanimous jury[.]" *State v. Walters*, 368 N.C. 749, 752, 782 S.E.2d 505, 507 (2016).

> *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), and its progeny stand for the proposition that "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." In such cases, the focus is on the conduct of the defendant.

Id. at 753, 782 S.E.2d at 507 (quoting *State v. Bell*, 359 N.C. 1, 29, 603 S.E.2d 93, 112-13 (2004)) (alterations omitted).

Defendant argues that the jury instruction violated the principles of *Diaz* because it charged him with two separate offenses—keeping and selling. However, *Diaz* is inapplicable. Defendant was not charged under N.C. Gen. Stat. § 90-108(a)(7) for either "keeping controlled substances" *or* "selling controlled substances." Rather, defendant was charged with *maintaining a dwelling* for either of those two purposes. The act that N.C. Gen. Stat. § 90-108(a)(7) proscribes is the maintenance of a dwelling for an unlawful purpose. "Keeping" or "selling" simply constitute alternative unlawful purposes. The trial court's instruction is thus more properly analyzed pursuant to the line of cases in which the jury is instructed that a

number of alternative purposes may satisfy an element of the overall offense charged. *See State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990).

Where "the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied. In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct." *Walters*, 368 N.C. at 753, 782 S.E.2d at 507-08 (citation and quotation marks omitted). However, "there must be evidence to support all of the alternative acts that will satisfy the element." *State v. Johnson*, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007).

Defendant cites *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990), for the proposition that

> [w]here the trial court erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence and . . . it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles [the] defendant to a new trial.

327 N.C. at 219, 393 S.E.2d at 816 (citing *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319 326 (1987)). Defendant contends that, here, maintaining a dwelling for the alternative purpose of *selling* controlled substances was not supported by the evidence. Defendant argues that, pursuant to N.C. Gen. Stat. § 90-108(a)(7), the State must present evidence of more than one instance of defendant selling a controlled substance from the dwelling in order for him to be convicted pursuant to that theory.

Because the evidence only established that defendant sold marijuana on 28 February 2013, defendant maintains that he is entitled to a new trial as a matter of law.

Again, defendant misconstrues the case law when he asserts that a second instance of selling a controlled substance is required to justify a conviction under N.C. Gen. Stat. § 90-108(a)(7). As explained in Section II *supra*, whether a defendant may be convicted of maintaining a dwelling for the keeping or selling of controlled substances will depend on the totality of the circumstances. There was sufficient evidence, based on the totality of the circumstances, for defendant to be found guilty of maintaining a dwelling for the purposes of both keeping and selling controlled substances. Accordingly, the principle cited from *Lynch* is inapplicable, and the trial court did not improperly charge the jury in the disjunctive.

Conclusion

For the reasons expressed herein, we find no error.

AFFIRMED.

Judges DAVIS and BERGER concur.

Report per Rule 30(e).