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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-64

Filed: 20 March 2018

New Hanover County, No. 13CRS056528

STATE OF NORTH CAROLINA

v.

ANTONIO MONTEZ FOSTER, Defendant.

Appeal by defendant from judgment entered 31 August 2016 by Judge W. Douglas Parsons in Superior Court, New Hanover County. Heard in the Court of Appeals 6 June 2017.

Attorney General Josh Stein, by Special Deputy Attorney General Kimberly A. D'Arruda, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

STROUD, Judge.

Defendant appeals his convictions for drug-related offenses and attaining the status of habitual felon. We determine there was no error.

I. Background

In the early morning hours of 2 August 2013, officers saw a silver Nissan 350z that they had seen defendant driving several times. Three men were standing near the car. When officers approached the parked car, the three men ran. The officers noticed the area around the car smelled like marijuana. Inside the car, officers found "a lot" of bagged marijuana, 97 bags in total; the officers also found a work order form for repair to the car, a letter from an attorney, and a perfect attendance award for completion of "some drug program" – all had defendant's name on them.

The following month, officers were actively looking for defendant because there was a warrant out for his arrest. Officers saw a black Nissan 350z in the same parking lot where the silver Nissan 350z had been when the marijuana was seized. Officers approached the car and defendant ran away, but the officers caught him and noticed that he smelled of marijuana. In defendant's hands, they found a car key which unlocked the black Nissan, and the area around the car smelled of marijuana. The license plate of the silver Nissan was also in the car, and the officers discovered the car was the same Nissan 350z, painted black.

Defendant was indicted for possession with intent to sell or deliver marijuana ("PWISD"), maintaining a vehicle for the keeping and selling of a controlled substance, possession of drug paraphernalia ("possession of paraphernalia"), and attaining the status of habitual felon. A jury found defendant guilty of the three drug-

related charges, and defendant pled guilty to the charge of attaining the status of a habitual felon. The trial court entered judgment. Defendant appeals.

II. Failure to Preserve Arguments

Defendant first contends there was insufficient evidence to support his convictions for PWISD and possession of paraphernalia. Defendant admits in his brief he failed to make the arguments to the trial court he now makes on appeal and requests this Court to review this issue under Rule 2 of the Appellate Rules; alternatively, defendant argues that his counsel was ineffective for failing to preserve the issue before the trial court. Because these issues were not preserved before the trial court and the record is not sufficient to allow us to review the issue of ineffective assistance of counsel, we choose not to review them at this time. We dismiss this argument regarding the sufficiency of the evidence for PWISD and possession of paraphernalia, without prejudice, so defendant may pursue ineffective assistance of counsel in a Motion for Appropriate Relief before the trial court if he so chooses.

III. Maintaining a Vehicle for Keeping or Selling Marijuana

Defendant makes two separate arguments related to his conviction for maintaining a vehicle for keeping or selling marijuana.

A. Insufficient Evidence

Defendant first argues there was insufficient evidence to support his conviction for maintaining a vehicle so the trial court erred in denying his motion to dismiss on this basis.

> In ruling on a motion to dismiss based on insufficiency of evidence, the trial court must determine whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When reviewing the evidence, the trial court must consider even incompetent evidence in the light most favorable to the prosecution, granting the State the benefit of every reasonable inference. Any contradictions or discrepancies in the evidence should be resolved by the jury. The standard of review of a trial court's denial of a motion to set aside a verdict for lack of substantial evidence is the same as reviewing its denial of a motion to dismiss.

State v. Stafford, 166 N.C. App. 118, 123-24, 601 S.E.2d 219, 223 (2004) (citations and quotation marks omitted).

> N.C. Gen. Stat. § 90–108(a)(7) (2015) makes it unlawful to knowingly keep or maintain any vehicle which is used for the keeping or selling of controlled substances. This statute prohibits the maintaining of a vehicle only when it is used for keeping or selling controlled substances.

State v. Rogers, ___ N.C. App. ___, ___ 796 S.E.2d 91, 94, *writ of supersedeas allowed*, 369 N.C. 526, 797 S.E.2d 2 (2017) (citations, quotation marks, ellipses, and brackets omitted). Defendant argues evidence "[t]hat a vehicle was used on one occasion for possession of marijuana does not establish that the vehicle was used for keeping

marijuana[.]" "[T]here was no evidence that the marijuana was continuously in the Nissan over any period of time." In *Rogers*, this Court continued:

> The focus of the inquiry is on the use, not the contents, of the vehicle.
>
> > Thus, the fact that an individual within a vehicle possesses marijuana on one occasion cannot establish the vehicle is used for keeping marijuana; nor can one marijuana cigarette found within the car establish that element. Likewise, the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance.
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> N.C. Gen. Stat. § 90–108(a)(7) does not require the State to demonstrate a defendant's ownership of a vehicle, or that a sale was actually transacted from the vehicle. The totality of the circumstances controls, and whether there is sufficient evidence of the keeping or maintaining element depends on several factors, none of which is dispositive. In *Mitchell*, in interpreting N.C. Gen. Stat. § 90–108(a)(7), our Supreme Court observed that
>
> > the word keep is variously defined as follows: to have or retain in one's power or possession; not to lose or part with; to preserve or retain. To maintain continuously and methodically. To maintain continuously and without stoppage or variation; to take care of and to preserve.
>
> Thus, keep denotes not just possession, but possession that occurs over a duration of time.

___ N.C. App. at ___, 796 S.E.2d at 94-95 (citations, quotation marks, ellipses, and brackets omitted).

Defendant relies on *State v. Mitchell*, where our Supreme Court reversed the defendant's conviction because

> [a]t most, the State has shown that on 6 September 1989 defendant possessed marijuana while in his car and that on the following day his car contained a marijuana cigarette. The State also presented evidence of the presence of drugs and drug paraphernalia at defendant's home. This evidence raises at most only a suspicion that defendant's car was used for either keeping or selling marijuana.

336 N.C. 22, 33, 442 S.E.2d 24, 30 (1994); *see also State v. Dickerson*, 152 N.C. App. 714, 716–17, 568 S.E.2d 281, 282 (2002) ("[T]he fact that an individual within a vehicle possesses marijuana on one occasion cannot establish the vehicle is used for keeping marijuana; nor can one marijuana cigarette found within the car establish that element. Likewise, the fact that a defendant was in his vehicle on one occasion when he sold a controlled substance does not by itself demonstrate the vehicle was kept or maintained to sell a controlled substance. In this case, the State presented no evidence in addition to Defendant having been seated in a vehicle when the cocaine purchase occurred. As such, the trial court erred by failing to dismiss the charge of keeping and/or maintaining a motor vehicle for the sale and/or delivery of cocaine." (citation, quotation marks, and brackets omitted)).

The State, relying on *State v. Hudson*, 206 N.C. App. 482, 488, 696 S.E.2d 577, 582 (2010), contends that it need not demonstrate defendant had marijuana on more than one occasion but merely that defendant had possession of the vehicle which

contained a controlled substance over a duration of time; in other words, the State claims it need not show defendant kept or sold marijuana more than once, but instead that defendant had maintained and kept a vehicle over a duration of time with marijuana in it during that period of time, even if only once, for the purposes of keeping and selling that marijuana. In *Hudson*, this Court found no error in the defendant's conviction where the defendant was the driver of a transfer truck carrying cars; one vehicle the truck was carrying had marijuana in it; and the evidence indicated that defendant had the vehicle with the marijuana in it for two days. *See Hudson*, 206 N.C. App. 482, 696 S.E.2d 577 (2010). Thus, in *Hudson*, though marijuana was only found once, the defendant had possession of the vehicle and marijuana over a duration of time. *See id.*

As noted by *Rogers*, "[t]he focus of the inquiry is on the use[.]" ___ N.C. App. at ___, 796 S.E.2d at 94. In addition, "[t]he totality of the circumstances controls" and no one factor is dispositive. *Id.* at ___, 796 S.E.2d at 94. *Mitchell* and *Dickerson* may be distinguished from this case because here defendant's car contained *97 individual packages of marijuana.* In *Mitchell* the defendant had two bags of marijuana and a marijuana cigarette, 336 N.C. at 26, 442 S.E.2d at 26, and in *Dickerson* the defendant sold one bag of cocaine. 152 N.C. App. at 715, 568 S.E.2d at 281. Looking at this "evidence in the light most favorable to the prosecution, granting the State the benefit of every reasonable inference[,]" *Stafford*, 166 N.C. App. at 123,

601 S.E.2d at 223, the quantity and packaging of the marijuana would tend to show that defendant was using the vehicle to transport and sell individual packages of marijuana over some period of time. Officers had observed defendant driving the vehicle prior to the confiscation of the 97 bags of marijuana and when defendant was caught running from the vehicle in September he smelled of marijuana. In addition, the jury could also infer that defendant had gone to the trouble to have the car painted and got a new license plate so law enforcement would not recognize it as the same Nissan 350z from which they had seized the marijuana the prior month, so that he could continue using the vehicle for illegal purposes. Therefore, we conclude that the trial court did not err in denying defendant's motion to dismiss the charge of maintaining a vehicle for keeping or selling marijuana. This argument is overruled.

B. Jury Instructions

Defendant argues that the trial court erred in denying his request for a jury instruction on misdemeanor maintaining a vehicle. Defendant contends that "knowingly" maintaining a vehicle is a misdemeanor while "intending" to maintain the vehicle is a felony with the misdemeanor as the lesser-included offense of the felony. "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

Defendant cites to unpublished cases and *State v. Locklear*, 84 N.C. App. 637, 353 S.E.2d 666 (1987), contending that the trial court erred in failing to instruct on the misdemeanor offense because some evidence at trial pointed to the lesser *mens rea* of "knowing" on the part of defendant. In *Locklear*, the defendant argued the trial court failed to present proof "that the trailer, which was the building or dwelling referred to by the charge, was owned by or in any way connected to" him. 84 N.C. App. 637, 643, 353 S.E.2d 666, 670. But in *Locklear*, this Court pointed out that "[t]he evidence defendant relies on in his brief goes to the issue of defendant's guilt or innocence; this evidence does not, however, tend to show commission of the arguably lesser-included offenses." *Id.* In other words, if there was no connection between defendant and the trailer, then defendant was innocent – defendant's argument pointed to a lack of evidence, not a different intent regarding the evidence as defendant argues here. We find this case distinguishable from *Locklear* because here defendant does not direct us to evidence regarding his guilt or innocence but is contending there was a lack of evidence of intentional *mens rea*. *See id.*

Our Court has clarified that for North Carolina General Statute § 90-108, "[a] person knows of an activity if he is aware of a high probability of its existence. A person acts intentionally if he desires to cause the consequences of his act or that he believes the consequences are substantially certain to result." *State v. Bright*, 78 N.C. App. 239, 242-43, 337 S.E.2d 87, 89 (1985) (citation omitted). Considering all the

evidence as noted above, and in particular the evidence of 97 individually packaged bags of marijuana in the vehicle and that defendant had painted his vehicle after the marijuana was confiscated, the State's evidence demonstrated defendant's intentional *mens rea* to maintain a vehicle for keeping or selling marijuana. Therefore, this argument is overruled.

IV. Flight Instruction

Defendant next makes several arguments on why the trial court erred in instructing the jury on flight.

> The question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*. The standard of review set forth by this Court for reviewing jury instructions is as follows:
>
> > This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. *Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.*

State v. McGee, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014) (emphasis added) (citation, quotation marks, ellipses, and brackets omitted). Even if the trial court wrongfully instructed the jury on flight, defendant has failed to demonstrate prejudice. As to prejudice, defendant argues

> the unsupported flight instruction invited the jury to speculate (1) that . . . [he] was one of the people who ran from the Nissan on August 2, 2013, which was not supported by the evidence; and/or (2) that . . . [his] flight from the Nissan on September 19, 2013 was substantive evidence of . . . [his] guilt, which it was not.

Despite defendant's contentions, we do not view this as a *close* case where an instruction on flight tipped the scales for the jury to find defendant guilty of any of the charges against him. Ninety-seven baggies of marijuana were found in a vehicle that also contained a certificate and a bill for repair in defendant's name; the instruction on flight did not mislead the jury on these charges. This argument is overruled.

V. Letter from Attorney

Defendant next contends it was plain error for the trial court to allow the letter from his attorney to him into evidence or in the alternative, by not giving a limiting instruction regarding the letter. Defendant contends because the letter was regarding a pending criminal charge it led to the jury to believe he was guilty of the charges before it.

> [I]n conducting plain error review, our appellate courts have considered whether the error was prejudicial and whether it resulted in a miscarriage of justice. In determining whether an error was prejudicial, our courts have examined the entire record to determine if the error had a probable impact on the jury's finding of guilt. Courts have also noted that plain error may exist when the error is so fundamental as to amount to a miscarriage of justice[.]

State v. Lawrence, 365 N.C. 506, 517–18, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, ellipses, and brackets omitted).

We cannot say that defendant's attorney's letter "had a probable impact on the jury's finding of guilt[;]" *id.*, particularly given the fact that defendant's certificate for perfect attendance for attending a drug class was also introduced into evidence without objection. The certificate regarding the drug class could lead to substantially the same inferences as the letter. This argument is overruled.

VI. Clerical Error

Last, defendant contends the trial court committed a clerical error in failing to note his habitual felon file number on his judgment; the judgment included only the file number for the underlying crimes. The State argues there was no error, clerical or otherwise. Defendant has raised no substantive argument regarding the underlying crimes, and our concern for clerical errors is simply that the court records "speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted). But the court records of defendant's convictions do "speak the truth." *Id.*

The Rules of Recordkeeping for the Clerks of Superior Court explain:

> When a defendant is charged as a habitual felon under G.S. 14-7.1 or a violent habitual felon under G.S. 14-7.7, a case file should be established for the habitual offense separate and apart from the underlying charges. If the defendant is found not guilty of the underlying felony charges or the charges are dismissed, the habitual felon charge should be

> disposed of in the same manner. *If the defendant is convicted of the underlying offenses and also found to be a habitual felon or violent habitual felon, no sentence should be entered in the habitual felon file, instead enter "Judgment entered and defendant sentenced in case number xxCRSxxxx" into the ACIS system.* This section does not apply to habitual DWI charges.

State of North Carolina Records of the Clerks of Superior Court, Rules of Recordkeeping, IX. Criminal District and Criminal Superior Rule 9.1 Comments D. (7 Dec. 2017) (emphasis added). We see no error here as the trial court entered judgment and sentenced defendant based upon his underlying substantive case file, and the judgment would be indexed in accordance with the Rules of Recordkeeping. This argument is overruled.

VII. Conclusion

We conclude there was no error.

NO ERROR.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).