An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA18-85

Filed: 7 August 2018

Ashe County, No. 17-CRS-050022

STATE OF NORTH CAROLINA

v.

ELIJAH HAYWOOD, Defendant.

Appeal by defendant from judgment entered 26 September 2017 by Judge Susan E. Bray in Ashe County Superior Court. Heard in the Court of Appeals 6 August 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Shawn Maier, for the State.

Allegra Collins Law, by Allegra Collins, for defendant-appellant.

BERGER, Judge.

An Ashe County jury convicted Elijah Haywood ("Defendant") of possession of a controlled substance on the premises of a local confinement facility, and Defendant subsequently pleaded guilty to having attained habitual felon status. Defendant appeals the trial court's rulings on Defendant's motion to dismiss and jury instructions.

On April 24, 2017, Defendant was indicted for possession of a controlled substance on the premises of a local confinement facility in violation of N.C. Gen. Stat. § 90-95(e)(9) (2017) and for having attained habitual felon status. A superseding indictment for the habitual felon charge was issued on July 3, 2017.

At trial, the State's evidence tended to show that on January 12, 2017, Defendant was arrested for an outstanding warrant during a traffic stop. Sergeant Will Hicks ("Sergeant Hicks") of the Ashe County Sheriff's Department arrived on the scene to transport Defendant to the Ashe County jail. On the way to the jail, Sergeant Hicks noticed a strong odor of marijuana emanating from Defendant. When asked if he had any marijuana on him, Defendant replied, "No, I do not."

Upon arriving at the Ashe County jail, Sergeant Hicks pulled into the garage and explained to Defendant that "if he had any illegal substances on his person, he needed to either give it to me or tell me about it prior to entering the jail." Sergeant Hicks further informed him that if anything that "is found on him inside the jail[,] he will be charged with contraband." Defendant was escorted into the jail and was patted down several times. Nothing was found on Defendant during these pat downs, but Sergeant Hicks testified that he noticed a strong odor of marijuana coming from Defendant's waistline. When asked about the odor, Defendant stated that he had smoked marijuana earlier and that the smell remained on his clothes.

Sergeant Hicks brought Defendant to the booking area of the jail to process his

paperwork. Defendant asked to use the bathroom, and Sergeant Hicks escorted Defendant to the bathroom. Sergeant Hicks inspected the inside of the bathroom prior to letting Defendant enter. Defendant entered the bathroom, and Sergeant Hicks shut the door. Thirty seconds later, Sergeant Hicks opened the bathroom door and observed Defendant on the toilet, in a seated position. Defendant's pants were down and there was a "green leafy substance" scattered around Defendant's feet on the floor and in his underwear. Sergeant Hicks testified that he determined the green substance to be marijuana. Sergeant Hicks collected the marijuana that was located in Defendant's underwear and on the floor, which amounted to less than half an ounce. Sergeant Hicks observed an equal amount in the toilet but did not collect it.

On September 25, 2017, a jury convicted Defendant of possession of a controlled substance on the premises of a local confinement facility. Defendant then pleaded guilty to having attained habitual felon status and was sentenced to fifty-eight to eighty-two months in prison.

Defendant appeals, arguing that the trial court erred by (1) denying his request for a special jury instruction; (2) denying his motion to dismiss the charge of possession of a controlled substance on the premises of a confinement facility; and (3) denying his request for a jury instruction on the lesser-included offense of possession of marijuana. We address each argument in turn.

First, Defendant contends that the trial court erred by denying his request for

a special jury instruction that he must "knowingly" be on the premises of a confinement facility in order to be found guilty of possession of a controlled substance on the premises of a confinement facility in violation of Section 90-95(e)(9). We disagree.

"[T]he trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "This Court has previously held that the trial court is not required to give the exact instructions requested by a defendant. Instead, requested instructions need only be given in substance if correct in law and supported by the evidence." *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004) (internal citations omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005).

Here, Defendant was charged with violating Section 90-95(e)(9), which provides that "[a]ny person who [possesses a controlled substance] on the premises of a penal institution or local confinement facility shall be guilty of a Class H felony." N.C. Gen. Stat. § 90-95(e)(9). At trial, Defendant requested a special jury instruction, asking that the word "knowingly" be added to the pattern jury instruction such that the jury must find that Defendant was *knowingly* on the premises of a local confinement facility. The trial court denied Defendant's request and, using N.C. Pattern Jury Instruction 260.12, charged the jury as follows:

> The Defendant Elijah Haywood has been charged with possessing marijuana, a controlled substance, on the

> premises of a local confinement facility.
>
> For you to find the Defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:
>
> First, that the Defendant knowingly possessed marijuana. Marijuana is a controlled substance. A person possesses marijuana when a person is aware of its presence, and has (either by himself or together with others) both the power and intent to control the disposition or use of that substance.
>
> And Second, that the Defendant was on the premises of a local confinement facility at the time of the Defendant's possession of marijuana.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date of January 12, 2017, the defendant Elijah Haywood knowingly possessed marijuana and that he was on the premises of the local confinement facility at the time, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty.

Defendant does not provide any direct authority, nor are we aware of such authority, to support his contention that a defendant must *knowingly* be on the premises of a local confinement facility to be in violation of Section 90-95(e)(9). Rather, relying on *State v. Dent*, 174 N.C. App. 459, 621 S.E.2d 274 (2005), Defendant asserts that such construction is in accord with the legislative intent to deter drug possession at local confinement facilities. However, Defendant's reliance on *Dent* is misplaced as it does not address whether a defendant must knowingly be on the premises of a local confinement facility for the conduct to be proscribed by Section 90-95(e)(9).

One of the issues in *Dent* was whether the defendant was on the premises of a local confinement facility when he was found in possession of marijuana in violation of Section 90-95(e)(9). *Dent,* 174 N.C. App. at 460, 621 S.E.2d at 276. There, the defendant was found to have marijuana on his person in the search room of the magistrate's office, which was a separate area from where inmates were housed. *Id.* at 465, 621 S.E.2d at 279. That defendant argued that the reference in Section 90-95(e)(9) to "the premises of a penal institution or local confinement facility" does not include the search room of the magistrate's office. *Id.* The *Dent* Court noted that the legislative intent of Section 90-95(e)(9) was clear: "to deter and prevent drug possession among those individuals present at local confinement facilities." *Id.* at 467, 621 S.E.2d at 280. Rejecting the defendant's argument, the *Dent* Court further explained that

> [b]y including the term "on the premises of" in its description of the restricted area, the legislature plainly intended that N.C. Gen. Stat. § 90-95(e)(9) should extend beyond the bounds of the "lockup" area of a local confinement facility, including to those secured areas in which arrestees are temporarily detained for search, booking, and other purposes.

Id. at 467-68, 621 S.E.2d at 280.

However, this Court did not address the issue of whether a defendant must *knowingly* be on the premises of a local confinement facility in *Dent*. Therefore, neither Defendant, nor any other case we could find, supports the contention that a

defendant must knowingly be on the premises of a local confinement facility to violate Section 90-95(e)(9). Accordingly, the trial court properly denied Defendant's request for a special jury instruction incorporating this additional mental state requirement.

In his second and third arguments on appeal, Defendant challenges the trial court's denials of his motion to dismiss the charge of possession of a controlled substance on the premises of a confinement facility and request for a jury instruction on the lesser-included offense of possession of marijuana. Defendant argues that the trial court erred because presence at a local confinement facility must be voluntary, and his presence at the Ashe County jail was not voluntary. We disagree.

"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 (citation and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). In addition, "[a]n 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) (citation omitted).

Defendant's precise argument has been resolved by this Court in *State v. Barnes*, 229 N.C. App. 556, 747 S.E.2d 912 (2013), *aff'd per curiam*, 367 N.C. 453, 756

S.E.2d 38 (2014). In *Barnes*, the defendant was arrested and taken to the Wayne County jail. *Id.* at 558, 747 S.E.2d at 915. After the defendant was seated in a chair at the jail, a bag containing marijuana fell from his pant leg. *Id.* On appeal, that defendant argued that the trial court should have granted his motion to dismiss the charge of possession of a controlled substance in a local confinement facility because he did not voluntarily enter the jail. *Id.* at 562-63, 747 S.E.2d at 918. This Court held that "a defendant may be found guilty of possession of a controlled substance in a local confinement facility even though he was not voluntarily present in the facility in question." *Id.* at 563, 747 S.E.2d at 918. "[T]he voluntary act necessary for guilt of the offense made punishable by N.C. Gen. Stat. § 90-95(e)(9) occurs when the defendant knowingly possesses a controlled substance . . . ." *Id.* at 566, 747 S.E.2d at 920.

This Court is bound by the our prior decision on this issue in *Barnes*. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.") Thus, we reject Defendant's argument that he must have been voluntarily present at the confinement facility to be found in violation of Section 90-95(e)(9).

Based on the foregoing, we hold that the trial court did not err in denying

Defendant's request for a special instruction, motion to dismiss, and request for a jury instruction on a lesser-included offense. Defendant received a fair trial, free from error.

NO ERROR.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).