IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1297

Filed: 6 August 2019

Craven County, Nos. 15CRS054178-79, 16CRS000270

STATE OF NORTH CAROLINA

v.

MICHAEL EUGENE BRADLEY, Defendant.

Appeal by defendant from judgments entered 10 January 2018 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 8 May 2019.

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

Yoder Law PLLC, by Jason C. Yoder, for defendant-appellant.

BERGER, Judge.

On May 8, 2019, a Craven County jury convicted Michael Eugene Bradley ("Defendant") of possession of a firearm by a felon, trafficking heroin by manufacture, trafficking heroin by possession, maintaining a dwelling for controlled substances, possession of drug paraphernalia, possession of marijuana paraphernalia, and possession of marijuana. Defendant was sentenced as an habitual felon to

consecutive active terms of imprisonment of 225 to 282 months, 252 to 282 months, and 146 to 188 months. Defendant was also ordered to pay $1,000,000.00 in fines.

Defendant appeals, arguing that the trial court (1) plainly erred when it denied Defendant's motion to suppress because an affidavit used to obtain a search warrant failed to establish probable cause; (2) erred when it denied Defendant's motion to dismiss the charge of trafficking in heroin by manufacture because there was a fatal variance between the indictment and proof at trial, and that there was insufficient evidence that Defendant manufactured a mixture containing heroin; (3) plainly erred when it failed to instruct the jury on the lesser included offenses of manufacturing and attempted manufacturing; and (4) erred when it instructed the jury on both actual and constructive possession because there was no evidence that Defendant did in fact possess the contraband. We find no error in part, and no prejudicial error in part.

Factual and Procedural Background

From September 1, 2015 through December 15, 2015, officers with the Havelock Police Department conducted three controlled purchases of heroin from Defendant's residence. On December 16, Detective James A. Henderson ("Detective Henderson") applied for a search warrant to search Defendant's residence, vehicle, and outbuildings.

The application for a search warrant contained an affidavit which set forth Detective Henderson's training and experience, a statement of facts for probable cause, and a description of the items to be seized and places to be searched. The statement of facts for probable cause included the following:

> On Tuesday December 15, 2015 a controlled purchase was conducted by Carteret County Sheriff's Office Narcotics Investigators, and Havelock Police Department Investigators. The controlled purchase was for heroin, made from the residence located at 209 Trader St. Havelock NC 28532. A MICHAEL EUGENE BRADLEY (AKA "Flex") lives at this residence.
>
> On Tuesday 12-15-2015 Investigators met with a Confidential Informant (CI) to conduct the controlled purchase of heroin. The CI was searched and provided with a sum of money from the Carteret County Sheriff's narcotics funds, the serial numbers had been recorded, to purchase a quantity of heroin. The CI met with a female in the Newport area, to whom they provided the narcotics funds to for her to purchase the quantity of heroin. The female was then followed by Investigators from the Newport area to BRADLEY's residence. Investigators maintained constant visual surveillance of BRADLEY's residence, the female, as well as the CI. The female was observed entering and exiting BRADLEY's residence. The female was then followed by Investigators back to the Newport area. The CI obtained the quantity of heroin from the female. The CI then met with Investigators and turned the quantity of heroin over, and was again searched.
>
> Two (2) other controlled purchases were made from BRADLEY's residence located at 209 Trader St. Havelock NC on September 01, 2015 and December 01, 2015. In both controlled purchases heroin was purchased and Investigators maintained surveillance. During the controlled purchase on December 01, 2015 other vehicles

> were observed coming to BRADLEY's residence staying for a short time and then leaving, which is actions typically carried out by people involved in the illegal sale and delivery of illegal narcotics.
>
> Based on the facts that a total of three (3) controlled purchases have been conducted from BRADLEY's residence, traffic coming and going during one of the controlled purchase[s], information provided by C[IS], locating a quantity of marijuana, heroin, handguns, large sum of cash, and items related to the illegal sell and delivery of illegal narcotics, BRADLEY's criminal history of numerous charges of narcotics violations and weapons violations Affiant believes a search of BRADLEY's storage unit located at 180 Greenfield Heights Blvd. Unit 24 Havelock NC, will result in the recovery of heroin, illegal narcotics, and items related to the illegal sell and delivery of illegal narcotics.

A search warrant was issued, and upon searching Defendant's residence, law enforcement seized a loaded Ruger .380 pistol, a Jennings .22 pistol, $9,000.00 in cash, a bag containing 55.77 grams of heroin, and an assortment of drug paraphernalia. Defendant was indicted for multiple offenses, including trafficking in heroin by manufacture of 28 grams or more, trafficking in heroin by possession of 28 grams or more, maintaining a dwelling, possession of a firearm by a felon, and having attained habitual felon status.

Prior to trial, Defendant filed a motion to suppress. The trial court denied Defendant's motion in an order filed January 10, 2018. Defendant was found guilty on the charges referenced herein, and then admitted to having attained habitual felon status. Defendant appeals.

Analysis

I. Motion to Suppress

Although Defendant filed a motion to suppress the evidence obtained through the search warrant, Defendant concedes that he failed to object at trial when the State introduced the evidence at issue. However, on appeal Defendant contends that the trial court plainly erred in denying his motion to suppress because the affidavit in support of the search warrant failed to establish probable cause to search Defendant's residence. Specifically, Defendant argues that Detective Henderson's affidavit failed to include information that the confidential informant or a middleman used to purchase heroin from his residence was reliable. However, because the affidavit included observations by law enforcement officers which were corroborated, we find no error.

"[I]n cases where a defendant fails to preserve for appellate review an issue relating to the suppression of evidence we conduct plain error review if the defendant specifically and clearly makes a plain error argument on appeal." *State v. Lenoir*, ___ N.C. App. ___, ___, 816 S.E.2d 880, 883 (2018).

> For error to constitute plain error, 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." Moreover, because plain error is to be "applied cautiously and only in the exceptional case," the error will often be one that "seriously

> affect[s] the fairness, integrity or public reputation of judicial proceedings."

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378-79 (1983) (citations omitted)).

When reviewing an affidavit for a search warrant, a reviewing court should accord "great deference" to a magistrate's determination of probable cause and "after-the-fact scrutiny should not take the form of a *de novo* review." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 258 (1984) (citing *Illinois v. Gates*, 462 U.S. 213 (1983)). The role of this Court "is simply to ensure that the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed." *Id.* Reviewing "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense manner." *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 434-35 (1991) (quoting *Gates*, 462 U.S. at 236).

> An affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. The applicable test is
>
> > whether, given all the circumstances set forth in the affidavit before [the magistrate], including "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is

> simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed.

Id. at 218, 400 S.E.2d at 432 (*purgandum*).

Probable cause does not require absolute certainty. *State v. Campbell*, 282 N.C. 125, 129, 191 S.E.2d 752, 755 (1972). "[W]hether probable cause has been established is a 'common sense, practical question' based on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Riggs,* 328 N.C. at 219, 400 S.E.2d at 433 (citation omitted). "Probable cause requires only *a probability or substantial chance* of criminal activity, not an actual showing of such activity." *Id.* (citations, quotation marks, and brackets omitted). The allegations made in the affidavit need only be sufficient to allow the magistrate to determine that "there is a 'fair probability' that contraband will be found in the place to be searched." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015). Probable cause is a flexible standard that is based upon the totality of the circumstances. *Id.*

Here, a common sense review of the facts provided in the affidavit, and the reasonable inferences that could be drawn therefrom, demonstrates that the magistrate had a substantial basis for finding probable cause.

Detective Henderson applied for the search warrant the day after a controlled purchase of heroin was conducted at Defendant's residence by investigators with the

Carteret County Sheriff's Office and the Havelock Police Department. Investigators met with their CI, who was searched and then provided money to purchase heroin. The CI met a female who was given money to purchase heroin. Investigators followed the female to Defendant's residence, and maintained constant surveillance on the CI, the female, and Defendant's home. Investigators observed the female enter and exit Defendant's residence. She was again followed by investigators, and the CI received heroin from the female. The CI turned over heroin to investigators.

In two other controlled purchases from Defendant's residence, one two weeks prior and the other three months prior, heroin was obtained while investigators maintained surveillance. On December 1, 2015, investigators also observed other vehicles arrive at Defendant's residence, stay for a short time, and then leave. Detective Henderson stated that this action was consistent with activity surrounding the sale and purchase of illegal drugs.

Contrary to Defendant's assertions, this case does not concern the reliability of a CI or a middleman. Rather, this case rests on the observations of law enforcement officers and the reasonable inferences that could be made by the magistrate from the facts set forth in the affidavit. The facts in the affidavit here are similar to the affidavits in *State v. Riggs*, 328 N.C. 213, 400 S.E.2d 429 (1991) and *State v. Frederick*, ___ N.C. App. ___, 814 S.E.2d 855, *aff'd*, ___ N.C. ___, 819 S.E.2d 346 (2018).

In *Riggs*, our Supreme Court stated that

> two different individuals had been able to secure drugs by sending an observed third party on the defendants' premises and that one of the transactions had occurred within the previous 48 hours. Therefore, it was reasonable for the magistrate to conclude that there was a fair probability or substantial chance that contraband was present in the defendants' residence.

Riggs, 328 N.C. at 221, 400 S.E.2d at 434.

Similarly, in *Frederick*, this Court noted that

> On two occasions, Detective Ladd personally observed his confidential source meet the middleman and travel to Defendant's residence, where the middleman entered and exited shortly thereafter. The confidential source, who had been searched and supplied with money to purchase controlled substances, provided Detective Ladd with MDMA and heroin after his interaction with the middleman. Detective Ladd also observed other traffic in and out of Defendant's residence. Detective Ladd's experience and personal observations set forth in the affidavit were sufficient to establish probable cause to believe that controlled substances would probably be found in Defendant's residence.
>
> Based on Detective Ladd's training and experience, the conduct of the middleman, and Detective Ladd's personal observations, the magistrate here could reasonably infer that the middleman obtained MDMA and heroin from Defendant's residence. Further, the magistrate could reasonably infer that there would probably be additional controlled substances at that location. Moreover, the magistrate could reasonably infer that the middleman did not have the MDMA or heroin in his possession when he met the confidential source, and his purpose in traveling to Defendant's residence was to obtain the controlled substance the confidential source supplied to Detective Ladd. Based on the totality of the circumstances,

> the magistrate had a substantial basis for concluding probable cause existed to believe controlled substances were located on the premises of 3988 Neeley Street in Raleigh.

State v. Frederick, ___ N.C. App. ___, ___, 814 S.E.2d 855, 860 (2018).

While *Riggs* and *Frederick* also had reliable confidential sources, that fact alone is not dispositive when reviewing the totality of the circumstances. In the present case, the affidavit begins by setting forth the credentials of the affiant, Detective Henderson, a narcotics investigator for the Havelock Police Department. Detective Henderson had "assisted the Narcotics Investigators with numerous investigations into the illegal sale and delivery of illegal narcotics, pill diversion and illegal shot houses." He further stated that he had "received numerous hours of training in all aspects of Law Enforcement including that of the sale and deliver[y] of illegal narcotics."

In addition, the affidavit specifically alleges that three controlled purchases occurred at Defendant's residence; each transaction involved the purchase of heroin; officers either "maintained constant visual surveillance of [Defendant's] residence, the female, as well as the CI," or that surveillance was "maintained" for each purchase; and officers personally observed evidence of illegal drug sales at Defendant's residence.

Although a middleman was used to conduct the third controlled purchase, the investigators maintained constant visual surveillance of the female before and after

she entered and exited Defendant's residence. Moreover, investigators searched the CI before he met the female middleman and after the middleman provided the CI with the purchased heroin. In both *Riggs* and *Frederick*, searching the informant before and after the informant met the middleman, and maintaining surveillance of the middleman before, during, and after the purchase of the controlled substance in the defendant's residence, was considered sufficient conduct in establishing probable cause. *Riggs*, 328 N.C. at 214-15, 400 S.E.2d at 430; *Frederick*, ___ N.C. App. at ____, 814 S.E.2d at 859-60.

Thus, the personal observations of the officers provided sufficient evidence to establish probable cause. "Observations of fellow officers engaged in the same investigation are plainly a reliable basis for a warrant applied for by one of their number." *State v. Rayfield*, 231 N.C. App. 632, 643, 752 S.E.2d 745, 754 (2014) (citations, quotation marks, and brackets omitted). Detective Henderson's affidavit properly relied on the observations of investigators to support a probable cause determination, and not any statement from the CI or the female. It was the observations of investigators that provided the facts to establish probable cause.

Given that the affidavit mentioned three controlled purchases had taken place at Defendant's residence, provided a detailed explanation of the third controlled purchase, which was conducted the day before the arrest warrant was requested, and indicated that Defendant had a prior criminal history of involvement with narcotics

and weapons violations, the magistrate had a substantial basis for making "a practical, common sense determination" that there was "a fair probability that contraband or evidence" would be located in Defendant's residence. *Riggs*, 328 N.C. at 220, 400 S.E.2d at 434.

> A grudging or negative attitude by reviewing courts toward warrants," is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." "[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

Riggs, 328 N.C. at 222, 400 S.E.2d at 434-35 (citations omitted).

Defendant also contends that the affidavit's bare allegation of his criminal history could not be used to support a finding of probable cause.

> "When evidence of previous criminal activity is advanced to support a finding of probable cause, a further examination must be made to determine if the evidence of the prior activity is stale." *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 358 (1990).
>
> . . . The *test for "staleness" of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued*. Common sense must be used in determining the degree of evaporation of probable cause. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar[,] but of variables that do not punch a clock. *State v. Lindsey*, 58 N.C. App. 564, 565-66, 293 S.E.2d 833, 834 (1982) (citations and internal quotation marks omitted; emphasis added).

Rayfield, 231 N.C. App. at 640, 752 S.E.2d at 752-53.

Here, Detective Henderson applied for a search warrant the day after the third controlled purchase had taken place and about two weeks after the second controlled purchase had taken place. The fact that the affidavit made mention of a controlled purchase that took place about three months earlier is not determinative. An illegal drug transaction was observed by investigators at Defendant's residence the day before the search warrant was issued. Thus, on December 16, 2015, there was a fair probability that evidence of a crime or illegal contraband would be located in Defendant's residence. Because the information contained in the search warrant was not stale, and the "facts indicate that probable cause exist[ed] at the time the warrant [wa]s issued[,]" *Id.*, the magistrate had sufficient evidence to support a determination based on probable cause.

Under the totality of the circumstances, the magistrate in the present case had ample basis upon which to find probable cause to authorize a search of Defendant's residence. Thus, the trial court did not err when it denied Defendant's motion to suppress. Because there was no error, Defendant cannot establish plain error.

II. Motion to Dismiss

Defendant also contends that the trial court erred in failing to dismiss the charge of trafficking in heroin by manufacture because of a fatal variance between the indictment and the evidence presented at trial. While "[t]he issue of variance between the indictment and proof is properly raised by a motion to dismiss[,]" a

defendant "waive[s] his right to raise this issue by failing to raise the issue at trial." *State v. Baldwin*, 117 N.C. App. 713, 717, 453 S.E.2d 193, 195 (1995) (citing N.C.R. App. P. 10(b)(1)). Here, Defendant moved to dismiss the charges based upon insufficient evidence, but not based upon a variance between the indictment and proof. Therefore, Defendant has waived appellate review of this issue.

Defendant also asserts that there was insufficient evidence of manufacturing presented at trial, and the trial court erred in not granting his motion to dismiss. Specifically, Defendant argues that the State failed to present any evidence that Defendant manufactured "a mixture containing heroin." We disagree.

"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). "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).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "When ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State,

drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009).

Pursuant to Section 90-95 of the North Carolina General Statutes,

> (4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:
>
> > c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 282 months in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

N.C. Gen. Stat. § 90-95(h)(4)(c) (2017). "Manufacture" is defined as

> the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and "manufacture" further includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use . . . .

N.C. Gen. Stat. § 90-87(15) (2017).

> An indictment is only required to allege the essential elements of the crime sought to be charged. *Billinger*, 213

> N.C. App. at 255, 714 S.E.2d at 206. " 'Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage.' " *State v. White*, 202 N.C. App. 524, 529, 689 S.E.2d 595, 598 (2010) (quoting *State v. Bollinger*, 192 N.C. App. 241, 246, 665 S.E.2d 136, 139 (2008), *aff'd per curiam*, 363 N.C. 251, 675 S.E.2d 333 (2009)). Consequently, "[t]he use of superfluous words should be disregarded." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972).

State v. Oxendine, 246 N.C. App. 502, 507-08, 783 S.E.2d 286, 291 (2016).

Here, the indictment alleged that Defendant engaged in trafficking "by manufacture of 28 grams or more of a mixture containing heroin." Including the language "of a mixture" was surplusage and should be disregarded because the indictment alleged the essential elements of *manufacturing 28 grams or more of heroin*. In support of this charge, at trial the State introduced evidence that 55.77 grams of heroin were found in Defendant's bedroom. Moreover, the trial court instructed the jury in trafficking in heroin by unlawful manufacturing of 28 or more grams of heroin, not a mixture of heroin.

Although "the language 'or any mixture containing such substance' [in N.C. Gen. Stat. § 90-95(h)] presents a catch-all provision for any variation in form, weight, or quantity of the controlled substance," *State v. McCracken*, 157 N.C. App. 524, 528, 579 S.E.2d 492, 495 (2003), it was superfluous here. Even if, assuming *arguendo*, use of the phrase "of a mixture" in Defendant's indictment was not surplusage, the State presented substantial evidence that the total weight of Defendant's heroin exceeded 28 grams. When determining whether a defendant has engaged in manufacturing a

controlled substance, "the legislature's use of the word 'mixture' establishes that the total weight of the dosage units ... is sufficient basis to charge a suspect with trafficking." *Id.* at 527, 579 S.E.2d at 494 (quoting *State v. Jones*, 85 N.C. App. 56, 68, 354 S.E.2d 251, 258 (1987)).

In addition, this Court

> has held that there was sufficient evidence of manufacturing where the instruments of manufacture are found together with [the controlled substance] which was apparently manufactured. As a result, in the event that investigating officers find [the controlled substance] or a [controlled substance]-related mixture and an array of items used to package and distribute that substance, the evidence suffices to support a manufacturing conviction.

State v. Miranda, 235 N.C. App. 601, 611-12, 762 S.E.2d 349, 356-57 (2014) (citations and quotation marks omitted).

Here, a sealed bag containing 55.77 grams of heroin was found in Defendant's bedroom. MiraLax, a plastic bag of sweetener, sheets of aluminum foil, a jar of rice, a vacuum sealer, and plastic sandwich baggies were all found in Defendant's residence. Detective Henderson testified that MiraLax and sweetener are often used in heroin and cocaine to "cut" the narcotic, which allows the controlled substance to increase in weight. He further testified that aluminum foil can be used to package heroin. He also stated that rice may be utilized to dry contraband. A dryer sheet box was also discovered in Defendant's bedroom, which contained a scale and spoon.

Detective Henderson testified that sandwich baggies are used in narcotics for packaging.

Thus, there was substantial evidence that Defendant engaged in trafficking heroin by manufacture, and the trial court did not err when it denied Defendant's motion to dismiss. Accordingly, we find no error.

III. Jury Instructions

Defendant next contends that the trial court plainly erred when it (1) failed to instruct on the lesser-included offenses of manufacturing pursuant to N.C. Gen. Stat. § 90-95(a)(1) and attempted manufacturing, and (2) instructed the jury on both actual and constructive possession. We disagree.

If an instructional error is not preserved below, it nevertheless may be reviewed for plain error "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4). As stated above,

> For error to constitute plain error, 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (citations and quotation marks omitted).

A. Instructing on lesser-included offenses

Defendant first argues that the trial court plainly erred in failing to instruct the jury on the lesser-included Class G felony of manufacturing a controlled substance under Section 90-95(a)(1) and attempted manufacturing. We find no error.

> A trial court must instruct the jury concerning the issue of the defendant's guilt of a lesser included offense in the event that "(1) the evidence is equivocal on an element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the lesser included offense would be justified." *State v. White*, 142 N.C. App. 201, 205, 542 S.E.2d 265, 268 (2001) (citations omitted). As a result, a trial court should instruct the jury concerning the issue of a defendant's guilt of a lesser included offense where "the evidence 'would permit a jury rationally to find [the] [defendant] guilty of the lesser offense and acquit him of the greater,' " *State v. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (quoting *State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983), *overruled in part on other grounds in State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986)), with "[t]he determinative factor [being] what the State's evidence tends to prove." *Strickland*, 307 N.C. at 293, 298 S.E.2d at 658.

Miranda, 235 N.C. App. at 608, 762 S.E.2d at 354.

"[I]t is unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" N.C. Gen. Stat. § 90-95(a)(1) (2017). Moreover, "[a] defendant may be convicted of the crime charged in the bill of indictment, or, *inter alia*, of an attempt to commit it." *State v. Gray*, 58 N.C. App. 102, 106, 293 S.E.2d 274, 277 (1982) (citation omitted). "The two elements

of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, *but falling short of the completed offense*." *Id.* (citation and quotation marks omitted).

Defendant cites to *State v. Quick*, an unpublished opinion, in which this Court vacated the defendant's conviction of trafficking by manufacture because the trial court erred when it failed to instruct on the lesser included offense of manufacturing a controlled substance after determining that the evidence only showed that the defendant manufactured less than the statutorily required amount for trafficking by manufacture. *State v. Quick*, 149 N.C. App. 669, 562 S.E.2d 607, 2002 WL 485371, *4 (2002) (unpublished).

Here, however, sufficient evidence tended to establish that Defendant manufactured 55.77 grams of heroin which was found in his bedroom, along with various items used to weigh and package heroin, which were found throughout his residence. As a result, the evidence supports that Defendant manufactured over 28 grams of heroin. Because the evidence would not permit a jury rationally to find Defendant guilty of the Class G felony of manufacturing a controlled substance and acquit him of manufacturing over 28 grams of heroin, the trial court did nor err in not instructing on the lesser included offense of manufacture. Accordingly, we cannot find plain error.

Further, Defendant argues that the heroin seized at his residence was "not mixed or manufactured." However, as stated above, the language in the indictment was surplusage. Again, even if *arguendo* that the catch all phrase "of a mixture" was not surplusage, the total weight of the controlled substance was sufficient to support Defendant's conviction for trafficking, and the controlled substance was found with manufacturing instruments. Thus, the evidence supports a manufacturing conviction. Therefore, the trial court did not err when it did not instruct on the lesser included offense of attempted manufacturing, and we find no plain error.

B. Instructing on possession

Defendant also argues that the trial court plainly erred when it instructed the jury that it could find Defendant guilty of actual or constructive possession of heroin because there was no evidence that Defendant actually possessed any contraband or the contents of the safe. We find no plain error.

"According to well-established North Carolina law, it is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence." *State v. Malachi*, ___ N.C. ___, ___, 821 S.E.2d 407, 416 (2018) (citations and quotation marks omitted). However, "a reviewing court conducting a plain error analysis . . . is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the

jury relied on the inappropriate theory." *State v. Booker*, ___ N.C. App. ___, ___, 821 S.E.2d 877, 884 (2018) (citation and quotation marks omitted).

> The "knowing possession" element of the offense of trafficking by possession may be established by a showing that (1) the defendant had actual possession, (2) the defendant had constructive possession, or (3) the defendant acted in concert with another to commit the crime. *State v. Garcia*, 111 N.C. App. 636, 639-40, 433 S.E.2d 187, 189 (1993). A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use. *State v. Crawford*, 104 N.C. App. 591, 600, 410 S.E.2d 499, 504 (1991). " 'Under the theory of constructive possession, a person may be charged with possession of ... narcotics when he has both the power and intent to control its disposition or use even though he does not have actual possession.' " *Garcia*, 111 N.C. App. at 640, 433 S.E.2d at 189 (citation omitted).

State v. Reid, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002).

"Proof of constructive possession is sufficient and that possession need not always be exclusive." *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). In *State v. Allen*, the defendant was found to be in constructive possession when, even though the defendant was absent from the apartment at the time of a search, heroin was found in the bedroom and kitchen; the defendant's identification and other personal papers were in the bedroom; public utilities for the apartment were listed in the defendant's name; and a witness testified that the defendant had provided heroin to him for resale. *State v. Allen*, 279 N.C. 406, 408, 412, 183 S.E.2d 680, 682 (1971). Similarly, in *State v. Baxter*, the defendant was found to be in constructive possession

of the contraband and packaging materials found in his apartment, even though both the defendant and his wife lived in the apartment and the defendant was not in the apartment when the police conducted the search of the apartment. *State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 697-98 (1974). Thus, where contraband is "found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *Perry*, 316 N.C. at 97, 340 S.E.2d at 457 (citation and quotation marks omitted).

In the present case, it was error for the trial court to instruct on actual possession because there was no evidence to support this theory. However, the instruction on actual possession was not prejudicial because the error did not have "a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C at 518, 723 S.E.2d at 334 (citation and quotation marks omitted). Defendant's driver license listed his residence as the address where the contraband was found. Public utilities for the residence were listed in Defendant's name. Personal correspondence addressed to Defendant were found inside his residence. Although Halee Woodyard, Defendant's girlfriend at the time, testified that she kept a couple pairs of shoes and a jacket in Defendant's master bedroom closet, which contained the safe, Ms. Woodyard further testified that she did not own the safe found in

Defendant's bedroom, did not know the combination to the safe, and that the safe was usually closed.

Because possession need not always be exclusive, the State presented sufficient evidence for the jury to determine that Defendant had constructive possession through his capability and intent to control the contraband and paraphernalia found in his bedroom and residence. Therefore, the trial court's inclusion of actual possession in its jury instruction did not prejudice Defendant as required under plain error review.

Conclusion

The trial court did not err when it (1) denied Defendant's motion to suppress because the search warrant did establish probable cause to search Defendant's residence; (2) denied Defendant's motion to dismiss the charge of trafficking in heroin by manufacture because there was sufficient evidence that Defendant had manufactured over 28 grams of heroin; and (3) did not instruct the jury on the lesser included offenses of manufacturing a controlled substance and attempted manufacturing because there was sufficient evidence of trafficking in heroin by manufacture. Although the trial court did err when it instructed the jury on actual possession, it was not so prejudicial as required to establish plain error.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).