IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-28

Filed: 17 September 2019

Iredell County, Nos. 16CRS54786, 16CRS54787, 17CRS2321, 17CRS53128

STATE OF NORTH CAROLINA

v.

MICHAEL DAVIS PHELPS, Defendant.

Appeal by Defendant from judgments entered 20 July 2018 by Judge Martin B. McGee in Iredell County Superior Court. Heard in the Court of Appeals 21 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Carolyn McLain, for the State.

Law Office of J. Clark Fischer, by J. Clark Fischer, and Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant.

INMAN, Judge.

Defendant Michael Davis Phelps ("Defendant") was found guilty by a jury for felony keeping or maintaining a dwelling for the keeping or selling of a controlled substance and conspiracy to sell marijuana. Following the verdicts, Defendant pled guilty to possession with intent to sell or deliver marijuana and attaining habitual

felon status. Defendant argues that the trial court erred in denying his motion to dismiss the maintaining a dwelling charge and the conspiracy charge for insufficient evidence. Defendant further argues the trial court plainly erred in giving the jury a fatally ambiguous disjunctive jury instruction on the maintaining a dwelling charge. After thorough review of the record and applicable law, we conclude Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence introduced at trial tended to show the following:

In March of 2016, narcotics investigator Detective Donald Murray ("Detective Murray") of the Statesville Police Department in Iredell County began investigating a residence at 103 Buena Vista Drive for possible drug involvement. Detective Murray employed an informant, Kevin Alexander ("Alexander"), to conduct multiple controlled purchases at the residence. Prior to each purchase, Alexander was searched to ensure he was not in possession of any drugs, given marked bills to conduct the transactions, and was fitted with an audio-visual body camera to capture his interactions with the suspects. After each purchase, Alexander immediately returned to Detective Murray and gave him the camera, any remaining money, and the drugs obtained. All the videos for each transaction were played for the jury and admitted into evidence.

On 31 March 2016, Alexander visited the residence and Isaac Bines ("Bines") answered the front door. Alexander attempted to have a conversation with Bines on the porch, asking if he "used to get high with [him]." Bines expressed no interest in Alexander, but as they were talking, Defendant arrived at the residence in his truck. Alexander quickly struck up a conversation with Defendant. Alexander told Defendant that he "smelled the White Grape"[1] and inquired if he could purchase any marijuana. Defendant asked Alexander "what you looking for," and told Alexander that Bines sold quarter ounces of marijuana for $50 each. Defendant then invited Alexander into the residence where he bought $50 worth of marijuana from Bines, with Defendant making change for Alexander, handing him $10. The transaction occurred beside the kitchen table, where there were also scales, baggies, and a cup of marijuana in plain view.

Alexander proceeded to purchase marijuana from Defendant and Bines seven more times at the residence. On 8 April 2016, Alexander bought marijuana from Bines. Before the transaction, Defendant told Alexander that he had some higher quality marijuana to sell him as well. Alexander could not purchase the additional marijuana at the time because the money provided by Detective Murray was less than the total for both purchases. Defendant then gave Alexander his phone number.

[1] Alexander testified that "White Grape" is a flavor of cigarette that is used to hold marijuana inside.

On 12 April 2016, Alexander called Defendant to arrange another marijuana transaction. Defendant instructed Alexander to go to the residence, where Alexander purchased marijuana from Bines without Defendant in attendance.

On 26 April, at Detective Murray's direction, Alexander made a fourth controlled purchase of marijuana from Bines at the residence. Defendant was not present.

The next day, 27 April 2016, Detective Murray and several officers arrived at the residence and executed a search warrant obtained based on evidence of the controlled purchases. Defendant was home alone at that time. The search revealed a cell phone, a box of clear plastic bags on the kitchen table, a digital scale with marijuana fragments, and other various drug paraphernalia, including a small marijuana plant outside near the front door. Officers also searched Defendant and found in his pants pocket two $20 marked bills from the 26 April transaction between Alexander and Bines.[2]

On 6 May 2016, less than two weeks after the search, Alexander returned to the residence to make another controlled purchase. When he arrived, Alexander saw

[2] Defendant acknowledged during his testimony that officers entered and searched the residence and found the specified items, including the marked bills in his pocket. Bines also testified that he was not present for the 27 April search. Despite finding evidence of drug paraphernalia and the fact that Defendant possessed marked money Alexander used to purchase marijuana on 26 April, the record does not indicate that Defendant was arrested or charged that day. Defendant and Bines were apparently undeterred by the search, because Alexander made controlled purchases from Bines at the residence on four later dates in 2016.

Defendant sitting in his truck, holding a large quantity of marijuana in his hands, accompanied by an unknown person. Defendant remained in the truck while Alexander purchased marijuana from Bines.

On 23 May 2016, Alexander made another controlled purchase at the residence. Defendant and Bines were both present. Bines, while looking for a plastic bag to package marijuana for sale to Alexander, told Defendant "we need more bags, brother." Bines eventually found a plastic bag, weighed the agreed-upon amount of marijuana, and sold it to Alexander.

Alexander made two more controlled purchases at the residence in July 2016. On 6 July, Defendant answered the door and led Alexander into the residence. Defendant notified Bines that Alexander was there to purchase more marijuana. Alexander purchased marijuana from Bines while Defendant was in another room. On 12 July, Alexander conducted his last controlled purchase of marijuana at the residence. He purchased marijuana from Bines, with Defendant "standing there and then walking around." Alexander also asked Defendant if he could also purchase a pound of marijuana, but no transaction occurred.

Defendant was arrested on 26 August 2016 on charges stemming from the 31 March and 26 April transactions.

On 7 November 2016, Defendant was indicted on two counts of conspiracy to sell marijuana[3] and one count of felony keeping or maintaining a dwelling to keep or sell marijuana.[4]

Defendant's case proceeded to trial on 16 July 2018. Before presenting evidence, the prosecutor informed defense counsel that the State intended to prove Defendant's residency by showing that he is on the North Carolina Sex Offender Registry. Defense counsel filed a motion in limine arguing, pursuant to North Carolina Rule of Evidence 403, that the jury knowing Defendant was a registered sex offender would be unduly prejudicial. The trial court denied the motion. As a result, Defendant chose to stipulate that he was a resident at 103 Buena Vista Drive at the time of the alleged transactions, in lieu of the State introducing his sex offender registration.

At the close of the State's evidence, Defendant moved to dismiss all the charges for insufficient evidence, which the trial court denied. Defendant's evidence consisted of his testimony and Bines' testimony. At the close of all the evidence, defense counsel renewed his general motion to dismiss, and the trial court summarily denied the motion.

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[3] Defendant was apparently charged with four additional conspiracy counts that do not appear in the record other than in the trial transcript. The jury acquitted Defendant of these charges.

[4] On 11 September 2017, Defendant was indicted on felony drug charges alleging offenses independent of those at issue in this appeal. These charges stemmed from offenses alleged to have occurred on 31 May 2017. Following guilty verdicts on the 2016 drug offenses, Defendant entered into a plea agreement with the State on these additional charges.

On 20 July 2018, the jury found Defendant guilty of maintaining a dwelling to keep or sell a controlled substance and conspiracy to sell marijuana on 31 March 2016. Defendant was acquitted of the second conspiracy charge.

Following his guilty verdicts, Defendant entered into a plea arrangement with the State on the charges alleged in the 11 September 2017 indictment, which were independent of the controlled marijuana purchases. Defendant pled guilty to felony possession with intent to sell or deliver marijuana and attaining habitual felon status, and the State dismissed the charges of felony possession of marijuana and the other charge of keeping or maintaining a dwelling to keep or sell marijuana. The trial court acknowledged that Defendant's possession plea was "contingent on [his] appeal" from his maintaining a dwelling and conspiracy convictions.

The trial court then consolidated Defendant's conspiracy, maintaining a dwelling, and habitual felon convictions into one judgment and sentenced him in the presumptive range of 120 to 156 months' imprisonment, with six days credit for time spent in confinement prior to trial. The trial court also entered a civil judgment against Defendant for court costs and attorney's fees but stayed its execution pending this appeal.

Defendant gave valid oral notice of appeal.

II. ANALYSIS

A. Motions to Dismiss

1. Maintaining a Dwelling

Defendant first argues that the trial court erred in denying his counsel's motion to dismiss because there was insufficient evidence that he kept or maintained the residence at 103 Buena Vista Drive. We disagree.

We review a trial court's denial of a motion to dismiss *de novo*. *State v. Rouse*, 198 N.C. App. 378, 381, 679 S.E.2d 520, 523 (2009). When employing *de novo* review, we consider the matter anew and can freely substitute our conclusions for that of the trial court below. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

In ruling on a decision to grant or deny a motion to dismiss for insufficient evidence, this Court's standard of review is well-known:

> [T]he 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.

State v. McClaude, 237 N.C. App. 350, 352-53, 765 S.E.2d 104, 107 (2014) (citations and quotation marks omitted). "[S]o long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence." *State*

v. Bradshaw, 366 N.C. 90, 92-93, 728 S.E.2d 345, 347 (2012) (citation and quotation marks omitted).

To convict a defendant pursuant to N.C. Gen. Stat. § 90-108(a)(7) for keeping or maintaining a dwelling to keep or sell a controlled substance, the State must prove that the defendant " '(1) knowingly or intentionally kept or maintained; (2) a building or other place; (3) being used for the keeping or selling of a controlled substance.' " *State v. Alston*, __ N.C. App. __, __, 802 S.E.2d 753, 756 (2017) (quoting *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001)). Defendant only disputes whether the State produced sufficient evidence that he kept or maintained the residence.

Determining whether someone kept or maintained a dwelling with respect to Section 90-108(a)(7) generally requires an inquiry into several factors in their totality, none of which is dispositive. *State v. Fuller*, 196 N.C. App. 412, 424, 674 S.E.2d 824, 832 (2009) (citations omitted). "Those factors include: ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses; payment of repair expenses; and payment of rent." *State v. Bowens*, 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000) (quotation marks and citation omitted). Proof of occupancy, in and of itself, cannot establish the keeping or maintaining element. *State v. Kraus*, 147 N.C. App. 766, 768-69, 557 S.E.2d 144, 147 (2001).

We need not perform this analysis, however, because, as we held in *State v. Spencer*, notwithstanding the aforementioned multi-factor analysis, "evidence of residency, standing alone, is sufficient to support the element of maintaining."[5] 192 N.C. App. 143, 148, 664 S.E.2d 601, 605 (2008); *see also id.* (holding that the defendant's confession to police that he resided at the dwelling "was substantial evidence that defendant maintained the dwelling"). Defendant stipulated that he was a resident of 103 Buena Vista Drive for the purposes of establishing the maintaining element, which the trial court informed the jury of in its instructions.[6] Defendant testified to this stipulation at trial and admitted that he and Bines sold marijuana from the residence. Bines also testified that he and Defendant resided at 103 Buena Vista Drive.

We therefore hold that the trial court did not err in denying Defendant's motion to dismiss the charge of keeping or maintaining a dwelling to keep or sell a controlled substance.

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[5] Defendant concedes *Spencer*'s authority in his brief. Although Defendant urges us to reconsider the logic underpinning the dichotomy between "occupancy" and "residency," we must adhere to precedent. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

[6] Defendant argues that the trial court erred by essentially forcing him into a "Hobson's Choice" between stipulating to the maintaining element or letting proof of his sex offender status be introduced to the jury. But Defendant's argument concerns no error that this Court can review. Defendant and his counsel made the strategic decision to stipulate to his residency rather than requiring the State to prove that fact and then objecting to evidence of his sex offender status at trial. Defense counsel failed to object regarding the stipulation or the trial court's Rule 403 decision, nor does Defendant allege plain error in his brief. *See, e.g.*, *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012).

2. Conspiracy

Defendant also argues that the trial court erred in denying his motion to dismiss the charge of conspiracy to sell marijuana on 31 March 2016 because the State failed to show that he and Bines agreed to sell marijuana. We disagree.

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). A conspiratorial agreement can be proven expressly or by implication through direct or circumstantial proof that tends to show a mutual implied understanding. *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984); *State v. Howell*, 169 N.C. App. 741, 748, 611 S.E.2d 200, 205 (2005). "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals." *State v. Glisson*, __ N.C. App. __, __, 796 S.E.2d 124, 128 (2017) (quoting *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985)).

Here, viewing the evidence in the light most favorable to the State, it is sufficient to allow a reasonable juror to infer an agreement existed between Defendant and Bines to sell marijuana on 31 March 2016. Alexander testified that on 31 March 2016, Bines was initially reluctant to sell marijuana to him. It was not until Defendant arrived at the residence and conversed with Alexander that Bines

and Alexander entered into the drug transaction. Defendant "brought [Alexander] into the house for [him] to buy marijuana from [] Bines." Defendant also told Alexander that Bines only sold a certain amount of marijuana for a fixed price. And during the transaction, Defendant participated in the exchange, making change for Alexander.

Defendant argues that he cannot be guilty of a crime for merely being present during the 31 March 2016 transaction between Bines and Alexander, citing our Supreme Court's opinion in *State v. Malloy,* 309 N.C. 176, 179, 305 S.E.2d 718, 720-21 (1983). *Malloy*, however, is inapposite. In that case, the defendant was working under the hood of a vehicle parked more than two car lengths in front of another vehicle that was holding stolen firearms. *Id.* at 179, 305 S.E.2d at 720. No evidence tended to show that "the defendant ever mentioned the firearms, saw them or knew of their presence." *Id.* Our Supreme Court held that the defendant's mere proximity to the stolen firearms, among other things, did not establish that he possessed them. *Id.* at 179-80, 305 S.E.2d at 720-21.

Here, Defendant was not only in physical proximity to the transaction, but communicated with Alexander about Bines' preferences of sale and actively participated in the transaction between Bines and Alexander. Accordingly, we conclude the trial court did not err in denying the motion to dismiss.

B. Jury Instruction

Defendant finally argues that the trial court's instruction on the maintaining a dwelling charge was fatally ambiguous and constituted plain error. Throughout its instruction, the trial court instructed that the State had to prove that Defendant intentionally or knowingly "kept *and/or* maintained a dwelling which was used for the purpose of unlawfully keeping and/or selling marijuana." (emphasis added). Defendant contends that the phrase "and/or" makes the jury's verdict fatally ambiguous as to whether it unanimously found him guilty of "keeping" a drug dwelling or "maintaining" a drug dwelling.[7] Because there is no risk of error, we are unpersuaded by Defendant's argument.

At the charge conference, both parties agreed to include "and/or" in the maintaining a dwelling instruction. Also, after the trial court instructed the jury, defense counsel did not object to that instruction when given the opportunity. Because defense counsel failed to object, he did not preserve this issue for appellate review. N.C. R. App. P. 10(a)(2) (2019). As a result, we can only review this issue for plain error, which Defendant distinctly argues in his brief. *See State v. Sergakis*, 223 N.C. App. 510, 512-13, 735 S.E.2d 224, 227 (2012) (reviewing an unpreserved challenge to jury instructions for plain error); N.C. R. App. P. 10(a)(4).

[7] Although Defendant quotes the entire instruction and highlights multiple instances where the trial court used "and/or," he does not proffer any substantive argument for the "keeping and/or selling" context of the instruction.

To show plain error, the defendant must first demonstrate error and second must show that absent that error the jury would have probably reached a different result. *State v. Carpenter*, 155 N.C. App. 35, 44, 573 S.E.2d 668, 674 (2002). The error "must be so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him. . . . [I]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection had been made." *State v. Lucas*, 353 N.C. 568, 584, 548 S.E.2d 712, 723-24 (2001) (quotation marks and citations omitted).

A trial court's disjunctive jury instruction is fatally ambiguous when it "allows the jury to find a defendant guilty of either of two underlying acts each of which is in itself a separate offense, . . . because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." *State v. Ingram*, 160 N.C. App. 224, 229, 585 S.E.2d 253, 257 (2003) (citing *State v. Lyons*, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991)); *see also State v. Anderson*, 76 N.C. App. 434, 436, 333 S.E.2d 762, 764 (1985) ("Two offenses cannot, in the absence of statutory permission, be alleged alternatively in the same count."). However, "if 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." *Lyons*, 330 N.C. at 303, 412 S.E.2d at 312 (emphasis in original).

Here, Defendant asserts that in the "keep or maintain" context, the words "keep" and "maintain" are "separate means by which a defendant may violate" Section 90-108(a)(7). Defendant contends that because the trial court instructed jurors in the disjunctive that they could find Defendant guilty if he "kept and/or maintained" a dwelling, the instruction resulted in an ambiguous verdict.[8] Defendant misconstrues our Supreme Court's opinion in *Lyons* and decisions following it.

A plain reading of the statute reveals that the terms "keep" and "maintain" do not describe separate offenses, but simply provide similar terms used interchangeably to establish a singular element. The General Assembly enacted Section 90-108(a)(7) to prevent the knowing *continued possession* of one's dwelling as a means of keeping or selling controlled substances. *See State v. Rogers*, __ N.C. __, __, 817 S.E.2d 150, 154 (2018) (defining "keep" in the "keep or maintain" context to be "possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use"); *State v. Moore*, 188 N.C. App. 416, 423, 656 S.E.2d 287, 292 (2008) (defining "maintain" as to "bear the expense

[8] Defendant also makes a one-sentence argument that, because the indictment says "keep and maintain" and the instruction used the phrase "and/or," "this inconsistency alone furnishes grounds to set aside" his maintaining a dwelling conviction. We interpret this to be an argument that the trial court's instruction impermissibly varied from the language of the indictment. Defendant's passing assertion has no merit. *See State v. Birdsong*, 325 N.C. 418, 422, 384 S.E.2d 5, 7 (1989) ("The use of the conjunctive form [in an indictment] to express alternative theories of conviction is proper."); *State v. Garnett*, 209 N.C. App. 537, 547-49, 706 S.E.2d 280, 286-87 (2011) (holding that the conjunctive of maintaining a dwelling "for keeping *and* selling a controlled substance" did not disallow the trial court from instructing in the disjunctive of "keeping *or* selling" (emphasis added)), *disc. review denied in part and remanded in part*, 352 N.C. 680, 545 S.E.2d 723 (2000).

of; carry on . . . hold or keep in an existing state or condition" (quotation marks and citations omitted)).

Whether one or more of the jurors found that the dwelling was "kept" and not "maintained" is irrelevant. The jury need only find that the defendant (1) knowingly "kept or maintained" the dwelling (2) for the purposes of keeping or selling controlled substances. *Cf. State v. Hartness*, 326 N.C. 561, 566-67, 391 S.E.2d 177, 180 (1990) (holding that N.C. Gen. Stat. § 14-202.1 "involves a situation in which a single wrong is established by a finding of various alternative elements" because it "may be proved by evidence of the commission of any one of a number of acts"); *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985) ("[T]he possession of narcotics with the intent to 'sell or deliver' is one offense. . . . As long as the jury finds that the possession was with the intent to 'sell or deliver,' the crime is proved."); *Jones v. All Am. Life Ins. Co.*, 312 N.C. 725, 738, 325 S.E.2d 237, 244 (1985) (instructing in the disjunctive was proper because the killing of someone and "procuring the killing" of someone are "alternative means by which" a jury could unanimously agree that participation in the killing occurred). The language in Section 90-108(a)(7) does not lend to an interpretation that someone can be convicted separately for both "*keeping* a dwelling to keep or sell controlled substances" and "*maintaining* a dwelling to keep or sell controlled substances."

In addition, Defendant stipulated to his residency at 103 Buena Vista Drive and acknowledged he was admitting an element of the crime. The trial court informed the jury of this stipulation and instructed: "It is hereby agreed and stipulated upon by and between the State and the defendant herein, that for the *purpose of the charge of maintaining a dwelling* to keep/sell controlled substances, the defendant resided at 103 Buena Vista Drive. . . . [Y]ou are to take these facts as true." (emphasis added).

Because there is no possibility, let alone probability, that less than all of the jurors found that Defendant "kept or maintained" the residence for the purposes of Section 90-108(a)(7), we hold that the trial court's instruction was free from error.

III. CONCLUSION

For the foregoing reasons, we hold that Defendant has failed to demonstrate error.

NO ERROR.

Judges HAMPSON and BROOK concur.

Report per Rule 30(e).