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IN THE COURT OF APPEALS OF NORTH CAROLINA

2023-NCCOA-13

No. COA22-379

Filed 17 January 2023

Cabarrus County, No. 21 CRS 52152

STATE OF NORTH CAROLINA

v.

DOMINIQUE VONTARIO ANDERSON

Appeal by defendant from judgment entered 12 November 2021 by Judge Kevin M. Bridges in Cabarrus County Superior Court. Heard in the Court of Appeals 19 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Tin Fulton Walker & Owen, PLLC, by Noell P. Tin, for defendant-appellant.

ZACHARY, Judge.

¶ 1

Defendant Dominique Vontario Anderson appeals from the judgment entered upon a jury's verdict finding him guilty of trafficking in fentanyl by possession of 28 grams or more. After careful review, we conclude that Defendant has failed to show error entitling Defendant to a new trial.

I. Background

¶ 2 On 8 June 2021, Concord Police Detective Angel Gonzalez was conducting a surveillance operation on a housing development on Harold Goodman Circle based on information that Defendant was selling drugs at and behind the apartments there. In the nearby woods, Detective Gonzalez was wearing camouflage clothing and watching the apartment complex with binoculars.

¶ 3 Detective Gonzalez saw Defendant exit the back door of 354 Harold Goodman Circle, walk past several trash cans (including the trash can associated with unit 354), and approach the trash can behind 348 Harold Goodman Circle. Defendant retrieved a white grocery bag from the trash can and walked back into unit 354, then returned to the same trash can “about 20 minutes later” with a yellow box and a brown paper bag, both of which appeared to be from fast-food restaurants. He “placed those items in the trash can, closed the trash can, looked around, stuck his hand back in the trash can,” and pulled out what appeared to Detective Gonzalez to be a white object about the size of a golf ball. Defendant put the white object in his pocket and returned to unit 354.

¶ 4 As Detective Gonzalez continued to watch, Defendant returned to the same trash can a few minutes later, retrieved the yellow box, placed the white object in it, and left the box in the trash can. Throughout this activity, Detective Gonzalez observed that Defendant was acting in a suspicious, anxious manner: walking slowly,

“looking around constantly” toward parked cars and through corridors between the apartment buildings, and holding the items he carried “close to his body, . . . tight to his chest and his belly area[.]”

¶ 5 Aware that Defendant had been banned from all City of Concord Housing Department properties, including the apartments being surveilled, Detective Gonzalez called for uniformed officers to arrest Defendant for trespassing. Once Defendant had been taken into custody, Detective Gonzalez removed his camouflage suit and contacted the resident of unit 348, who consented to a search of that unit’s trash can. Inside the trash can, Detective Gonzalez found the yellow box and brown bag. The brown bag had trash in it, but the yellow box contained a white t-shirt. Detective Gonzalez discovered “a pack of drugs [and] a set of digital scales” wrapped within the shirt.

¶ 6 Detective Gonzalez determined that the suspected drugs weighed approximately 120 grams. The retrieved pack was sent to the North Carolina State Crime Laboratory, which tested a portion of the substance and found that 37.64 grams contained fentanyl. The forensic scientist at the Crime Laboratory later testified that she did not test all of the substance because “28 grams is the threshold amount” for fentanyl. *See* N.C. Gen. Stat. § 90-95(h)(4)(c) (2021) (classifying trafficking in “28 grams or more” of an opiate as a Class C felony).

¶ 7 On 12 July 2021, a Cabarrus County grand jury returned a true bill of

indictment charging Defendant with trafficking in opium or heroin, possession with intent to sell or deliver cocaine, first-degree trespassing, and possession of up to one-half ounce of marijuana. On 23 August 2021, a Cabarrus County grand jury returned a superseding indictment charging Defendant with the same offenses, but amending the trafficking charge to specifically allege that Defendant possessed 28 grams or more of fentanyl. Before trial, the State voluntarily dismissed the charges of possession with intent to sell or deliver cocaine and possession of up to one-half ounce of marijuana.

¶ 8

On 28 September 2021, Defendant filed various motions, including motions for the trial court to order the State to produce impeachment material and the prior statements of the State’s witnesses, as well as a motion to suppress evidence, allegedly obtained through warrantless searches in violation of his federal and state constitutional rights. On 8 November 2021, the matter came on for jury trial in Cabarrus County Superior Court. After a pre-trial suppression hearing, the trial court denied Defendant’s motion to suppress. Concerning Defendant’s motion for the production of impeachment material and witness statements, the State reaffirmed that “Defendant and [d]efense counsel ha[ve] all statements and reports and everything that the State has in possession.” Accordingly, the trial court granted Defendant’s motion to produce.

¶ 9

At trial, Detective Gonzalez was the State’s principal witness. On cross-

examination, defense counsel attempted to impeach Detective Gonzalez’s credibility as a witness by referencing Detective Gonzalez’s alleged prior violations of Concord Police Department policies. The State objected to the line of questioning and the trial court excused the jury.

¶ 10 Defense counsel explained that she had obtained public records showing that Detective Gonzalez had been suspended four times, and indicated that the defense “would be completely satisfied if [the trial court] conducted an *in camera* review” of his personnel record. (Italics added). After considering the arguments of counsel, the trial court ordered, *inter alia*, that the State obtain and provide Detective Gonzalez’s personnel file for the court’s *in camera* review.

¶ 11 Upon completion of its *in camera* review, the trial court “conclude[d] that the file does not contain any exculpatory evidence . . . which would be materially favorable” to Defendant and “decline[d] to find any discovery violations” by the State. More specifically, the court determined that “the suspensions that [d]efense counsel uncovered in her search of public records are not relevant in this case” and disallowed further questioning with regard to the suspensions. The trial court then directed the State to instruct Detective Gonzalez’s commanding officer to approach the bench, whereupon the court returned the confidential personnel file to the commanding officer. At this point, the trial court asked the prosecutor and defense counsel if either had anything further to discuss on the matter, to which each replied: “No, Your

Honor.” The jury returned and Defendant’s cross-examination of Detective Gonzalez resumed.

¶ 12 At the close of the State’s evidence, Defendant moved to dismiss all charges. After hearing arguments of counsel, the trial court granted Defendant’s motion to dismiss the trespassing charge but denied Defendant’s motion as to the trafficking charge. Defendant chose not to present any evidence and renewed his motion to dismiss the trafficking charge, which the trial court denied.

¶ 13 After deliberating, the jury returned its verdict finding Defendant guilty of the trafficking charge. On 12 November 2021, the trial court entered judgment upon the jury’s verdict, sentencing Defendant to a term of 225 to 282 months in the custody of the North Carolina Division of Adult Correction, and ordering that a \$500,000 fine and costs be entered as a civil judgment. Defendant gave his notice of appeal in open court.

II. Discussion

¶ 14 On appeal, Defendant first challenges the trial court’s admission of certain portions of Detective Gonzalez’s testimony, notwithstanding Defendant’s failure to object to this evidence at trial. Specifically, Defendant argues that the trial court committed plain error by allowing Detective Gonzalez’s testimony regarding (1) the circumstances that precipitated law enforcement’s surveillance of Defendant and the Harold Goodman Circle apartments, and (2) Defendant’s exercise of his right against

self-incrimination, in declining to interview with law enforcement officers following his arrest. Defendant further argues that the trial court violated his constitutional right to due process by failing to seal and preserve Detective Gonzalez’s personnel records in the court file for appellate review. Lastly, Defendant argues that the trial court erred by denying his motion to dismiss the trafficking charge for insufficient evidence that he possessed the fentanyl in question.

A. Plain Error Arguments

¶ 15 We first address Defendant’s plain error arguments. “In criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.” N.C.R. App. P. 10(a)(4). Defendant acknowledges that he did not preserve for appellate review either his Rule 403 or post-arrest silence arguments, and he therefore “specifically and distinctly contend[s]” that the trial court’s admission of this evidence amounted to plain error. *Id.*

¶ 16 “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “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.” *Id.* (citation and internal

quotation marks omitted).

1. Rule 403

¶ 17 Defendant argues that the trial court plainly erred by admitting “Detective Gonzalez’s testimony that he received information that [Defendant] was selling drugs at the Harold Goodman Circle apartments” because “its probative value was substantially outweighed by the danger of unfair prejudice.” See N.C. Gen. Stat. § 8C-1, Rule 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

¶ 18 However, “[w]hether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion.” *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995). “The North Carolina Supreme Court has specifically refused to apply the plain error standard of review ‘to issues which fall within the realm of the trial court’s discretion.’” *State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) (quoting *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000)). We therefore decline to review this issue for plain error. See, e.g., *State v. Washington*, 277 N.C. App. 576, 2021-NCCOA-219, ¶ 22.

2. Post-Arrest Silence

¶ 19 Defendant also alleges that “[t]he trial court committed plain error in allowing Detective Gonzalez to testify that [Defendant] declined to interview with him after his arrest.”

a. Preservation

¶ 20 As an initial matter, the State argues that Defendant waived this issue by failing to raise it before the trial court. *See, e.g., State v. Roache*, 358 N.C. 243, 288, 595 S.E.2d 381, 411 (2004) (“[I]nasmuch as [the] defendant made no objection based on violation of his federal or state constitutional rights before the trial court, any assignment of error premised on a constitutional violation is not properly before this Court for review.”). However, Defendant “specifically and distinctly contend[s]” that the trial court plainly erred in admitting this testimony, and seeks plain error review. N.C.R. App. P. 10(a)(4). Our Supreme Court “has held that plain error analysis applies only to jury instructions and evidentiary matters.” *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Because the admission of Detective Gonzalez’s testimony is an evidentiary matter, we review for plain error.

¶ 21 Moreover, “our Supreme Court’s decision in *State v. Moore* governs where a defendant asserts that the trial court committed plain error in admitting testimony in violation of his constitutional right not to incriminate himself.” *State v. Malone-Bullock*, 278 N.C. App. 736, 2021-NCCOA-406, ¶ 30 (citation omitted), *disc. review*

denied, 379 N.C. 682, 865 S.E.2d 863 (2021). In *State v. Moore*, our Supreme Court reviewed for plain error “the admission as substantive evidence of [a law enforcement officer]’s testimony referring to [the] defendant’s post-*Miranda* exercise of his constitutional right to remain silent[.]” 366 N.C. 100, 104, 726 S.E.2d 168, 172 (2012). Thus, “the issue of whether the trial court committed plain error by admitting testimony regarding Defendant’s post-arrest silence is properly before us.” *Malone-Bullock*, ¶ 31.

b. Analysis

¶ 22 During Detective Gonzalez’s testimony on direct examination as part of the State’s case-in-chief, the following exchange occurred:

Q. Did you attempt to interview the Defendant at the Concord Police Department?

A. I did, yes.

Q. Why did you want to interview the Defendant?

A. I always interview defendants, and in particular in drug or gun cases or cases of that nature, I always attempt to get a statement and interview defendants. My job is to identify where drugs are coming from and stop the flow of illegal drugs in our communities to reduce crime and disorder, stop the crime that these drugs perpetuate into our neighborhoods.

I always try to talk to defendants in drug cases to find out where they’re getting their drugs from, who they are selling the drugs to and what part they play in the drug trade. That’s always my goal.

. . . .

Q. All right, thank you. Detective Gonzalez, did the Defendant agree to speak with you at the Concord Police Department?

A. No, he did not.

¶ 23 Defendant contends that allowing this testimony violated his “federal and state constitutional rights, as it resulted in [Defendant]’s exercise of his right to remain silent being used against him to infer guilt.” Presuming the admission of this testimony was error, it did not rise to the level of plain error.

¶ 24 “A criminal defendant’s right to remain silent is guaranteed under the Fifth Amendment to the United States Constitution and is made applicable to the states by the Fourteenth Amendment.” *Moore*, 366 N.C. at 104, 726 S.E.2d at 172. Our Supreme Court has “consistently held that the State may not introduce evidence that a defendant exercised his Fifth Amendment right to remain silent.” *Id.* (citation omitted). “A defendant’s post-arrest, post-*Miranda* warnings silence . . . may not be used for any purpose.” *State v. Richardson*, 226 N.C. App. 292, 299–300, 741 S.E.2d 434, 440 (2013) (citation omitted).¹ “The rationale underlying this rule is that the

¹ Unlike “[a] defendant’s post-arrest, post-*Miranda* warnings silence[,]” which “may not be used for any purpose[,]” this Court has repeatedly “explained that a defendant’s pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant’s prior silence is inconsistent with his present statements at trial.” *Richardson*, 226 N.C. App. at 299–300, 741 S.E.2d at 440 (citation omitted). Defendant has not established

value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.” *Moore*, 366 N.C. at 104, 726 S.E.2d at 172 (citation and internal quotation marks omitted).

¶ 25 “Except in certain limited circumstances, any comment upon the exercise of the right to remain silent, nothing else appearing, is impermissible.” *Id.* at 105, 726 S.E.2d at 172 (citation and internal quotation marks omitted). In the present case, Detective Gonzalez testified that Defendant did not agree to speak with him after he was arrested. “This testimony referred to [D]efendant’s exercise of his right to silence, and its admission by the trial judge was error.” *Id.*

¶ 26 “Having determined that admission of the evidence was error, we turn to [D]efendant’s next argument that he is entitled to a new trial on account of the erroneously admitted testimony.” *Id.* at 105, 726 S.E.2d at 173. “Whether [D]efendant is entitled to a new trial is to be determined by application of our plain error rule.” *Id.* at 106, 726 S.E.2d at 173. This Court has since recognized that *Moore* applied four factors, “none of which should be deemed determinative” when considering whether evidence concerning a defendant’s post-arrest silence rises to the level of plain error. *Richardson*, 226 N.C. App. at 302, 741 S.E.2d at 441–42. These four factors are:

whether the post-arrest silence at issue in this case occurred before or after Defendant received his *Miranda* warnings. As we conclude that Defendant has not shown plain error in either set of circumstances, for the purposes of our analysis, we assume, *arguendo*, that the silence at issue was post-arrest, post-*Miranda*.

(1) whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; (2) whether the record contained substantial evidence of the defendant's guilt; (3) whether the defendant's credibility was successfully attacked in other ways in addition to the impermissible comment upon his or her decision to exercise his or her constitutional right to remain silent; and (4) the extent to which the prosecutor emphasized or capitalized on the improper testimony by, for example, engaging in extensive cross-examination concerning the defendant's post-arrest silence or attacking the defendant's credibility in closing argument based on his decision to refrain from making a statement to investigating officers.

Id. at 302, 741 S.E.2d at 442.

¶ 27 Applying these factors to the case at hand, Defendant correctly observes that the prosecutor here directly elicited the improper testimony, and that the third factor “cannot be weighed in the State’s favor” because he “did not testify at trial and his credibility was not at issue.” And although Defendant acknowledges that, “[w]ith regard to the fourth factor, the prosecutor’s questioning about [Defendant]’s post-arrest silence was not especially extensive,” he nevertheless contends that “it was a direct elicitation and emphasized during direct examination.” However, “after examination of the entire record,” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334, we conclude that the testimony at issue in this case belongs to that category of “relatively benign” improprieties that our Supreme Court has determined do not amount to plain error, *see State v. Alexander*, 337 N.C. 182, 196, 446 S.E.2d 83, 91 (1994) (concluding that no prejudicial error existed where the defendant “did not object to the line of

questioning at issue, the comments were relatively benign, and a review of the record indicates that the prosecutor made no attempt to emphasize the fact that [the] defendants did not speak with them after having been arrested”).

¶ 28 For example, as in *Moore*, the prosecutor here made no mention of Defendant’s post-arrest silence in his closing argument. 366 N.C. at 107, 726 S.E.2d at 173–74. By contrast, the violation in *Richardson* was far more severe and pervasive throughout the State’s case:

The prosecutor’s cross-examination of [the d]efendant impermissibly focused almost exclusively on [the d]efendant’s failure, unlike other witnesses, to make a statement to investigating officers. Similarly, the comments made by the prosecutor during his concluding argument to the jury clearly constituted an impermissible comment upon [the d]efendant’s decision to exercise his constitutional right to remain silent after being placed under arrest. In fact, the prosecutor’s challenge to [the d]efendant’s credibility was limited to questions and comments concerning his failure, unlike the other witnesses, to “tell his side of the story” during the investigative process. Thus, the challenged questions and comments at issue here, unlike those before the Supreme Court in *Moore*, were not indirect or incidental.

226 N.C. App. at 308–09, 741 S.E.2d at 445.

¶ 29 *Richardson* provides an instructive example of a case in which the improper invocation of a defendant’s post-arrest silence reached the level of plain error. But this case bears far more resemblance to *Moore* and *Alexander* than to *Richardson*. We therefore conclude that, “given the brief, passing nature of the evidence in the context

of the entire trial, the evidence is not likely to have tilted the scales in the jury's determination of [D]efendant's guilt or innocence." *Moore*, 366 N.C. at 107, 726 S.E.2d at 174 (citation and internal quotation marks omitted). Defendant cannot show that the error in this case rose to the level of plain error, and this argument is overruled.

B. Detective Gonzalez's Personnel File

¶ 30 Defendant next argues that the trial court erred by failing "to seal Detective Gonzalez's personnel file and place it in the record after conducting its *in camera* review[.]" thus denying Defendant appellate review on this issue. Defendant relies upon *State v. Hardy*, in which our Supreme Court set forth the proper procedure to be followed by the trial court with respect to "an *in camera* inspection when a specific request is made at trial for disclosure of evidence in the State's possession that is obviously relevant, competent and not privileged." 293 N.C. 105, 127–28, 235 S.E.2d 828, 842 (1977). In such cases, our Supreme Court recognized that "[a]s an additional measure, if the judge, after the *in camera* examination, rules against the defendant on his motion, the judge should order the sealed statement placed in the record for appellate review." *Id.* at 128, 235 S.E.2d at 842 (italics added).

¶ 31 In this case, the trial court did not order that Detective Gonzalez's confidential personnel file be sealed and it is not included in the record on appeal before us. Defendant contends that this failure to order the file sealed violated his federal and state constitutional rights to due process under *Hardy* because it "deprived [him] of

the opportunity to have this Court review the file and determine whether the trial court's ruling as to [Defendant]'s right to review the personnel file was proper or erroneous."

¶ 32 The State argues that Defendant waived appellate review of this issue by failing to object at trial when the trial court returned the confidential personnel file to Detective Gonzalez's commanding officer. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id.*

¶ 33 After the trial court conducted its *in camera* review of Detective Gonzalez's confidential personnel file and "conclude[d] that the file does not contain any exculpatory evidence . . . which would be materially favorable to the Defendant[.]" Defendant did not move that the trial court order the file sealed and placed in the record for appellate review. Neither did Defendant object when the trial court directed the prosecutor to summon Detective Gonzalez's commanding officer for the return of the file, when the trial court returned the file to the commanding officer, nor when the trial court asked counsel if there would be anything further on the matter.

¶ 34 “We decline to consider this [issue] because [D]efendant failed to preserve this question for appellate review.” *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). Our appellate courts “will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal.” *Id.*; *see also* N.C.R. App. P. 10(a)(1).

C. Motion to Dismiss

¶ 35 Lastly, Defendant argues that the trial court erred by denying his motion to dismiss the trafficking charge. Defendant alleges that the State “presented insufficient evidence that he possessed the fentanyl because there was not substantial evidence establishing both [his] power and intent to control its disposition or use.” We disagree.

1. Standard of Review

¶ 36 “The denial of a motion to dismiss for insufficient evidence is a question of law,” of which this Court conducts de novo review. *State v. Nunez*, 204 N.C. App. 164, 166, 693 S.E.2d 223, 225 (2010) (citation omitted). “The question upon review 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 [the] defendant’s being the perpetrator of such offense. If so, the motion is properly denied.” *Id.* (citation and internal quotation marks omitted). “In considering the motion, the trial court must view the evidence in the light most favorable to the State and give the State every reasonable inference.” *Id.* at 167, 693 S.E.2d at 225.

2. Analysis

¶ 37 Fentanyl is an “opiate” within the meaning of N.C. Gen. Stat. § 90-95(h)(4). *State v. Garrett*, 277 N.C. App. 493, 2021-NCCOA-214, ¶ 16, *disc. review denied*, 378 N.C. 365, 860 S.E.2d 916 (2021). Pursuant to § 90-95(h)(4), the crime of trafficking in an opiate, such as fentanyl, “has two elements: (1) knowing possession (either actual or constructive) of (2) a specified amount” of the controlled substance. *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987); *see also* N.C. Gen. Stat. § 90-95(h)(4). An individual “has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use.” *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972).

¶ 38 Defendant argues that the State presented insufficient evidence that he “had both the power and intent to control the disposition or use of the” fentanyl in this case, and that the State’s evidence “was sufficient only to raise a suspicion or conjecture as to” his possession of fentanyl. *See State v. Bettis*, 206 N.C. App. 721, 729, 698 S.E.2d 507, 512 (“Evidence is not substantial if it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, and the motion to dismiss should be allowed even though the suspicion so aroused by the evidence is strong.” (citation omitted)), *disc. review denied*, 364 N.C. 619, 705 S.E.2d 371 (2010).

¶ 39 However, Detective Gonzalez’s testimony provides sufficient circumstantial

evidence of Defendant’s possession of fentanyl to put the trafficking charge before the jury. *See State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433–34 (1988). Detective Gonzalez testified that he saw Defendant walk past several trash cans to approach the trash can behind 348 Harold Goodman Circle, retrieve a white grocery bag from the trash can, and then return to the same trash can “about 20 minutes later” with the yellow box and brown bag. Defendant “placed those items in the trash can, closed the trash can, looked around, stuck his hand back in the trash can,” and pulled out a white object about the size of a golf ball. Defendant pocketed the white object, then returned to the trash can “a few minutes later,” retrieved the yellow box, placed the white object in the box, and left the box in the trash can. Throughout all of this activity, Detective Gonzalez observed Defendant walking slowly, “looking around constantly” toward parked cars and through corridors between buildings, and holding the items he carried “close to his body, . . . tight to his chest and his belly area[.]”

¶ 40 Defendant contends that this “evidence established nothing more than [him] handling the fentanyl for inspection purposes”—in other words, an incomplete transaction, with no showing of sufficient power and intent to control the disposition or use of the opioid to constitute possession. *See State v. Wheeler*, 138 N.C. App. 163, 165, 530 S.E.2d 311, 312–13 (2000) (concluding that there was insufficient evidence of possession where the defendant and another “handled the cocaine for the sole purpose of inspecting it and after inspection they made a determination not to

purchase the cocaine”); *see also, e.g., State v. Nowell*, 144 N.C. App. 636, 645–46, 550 S.E.2d 807, 813–14 (2001) (concluding that evidence that the defendant placed money on the kitchen counter where approximately fifty pounds of marijuana was present and stated that he “was going to smoke [some of the marijuana]” was insufficient to show power and intent to control the marijuana (alteration in original)), *aff’d per curiam*, 355 N.C. 273, 559 S.E.2d 787 (2002).

¶ 41 Defendant’s sufficiency-of-the-evidence argument relies on gaps in the State’s evidence, from which he draws inferences in his favor. For example, Defendant posits that “the fact that [he] was next seen in the driver’s seat of a running car—indicating that he was about to leave the apartment complex—while the fentanyl was left in the trashcan, strongly suggests that he was abandoning the fentanyl[.]” However, on a motion to dismiss, the State is entitled to every reasonable inference, not the defendant. *See Nunez*, 204 N.C. App. at 167, 693 S.E.2d at 225. Further, “[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *Stone*, 323 N.C. at 452, 373 S.E.2d at 433.

¶ 42 When considering a defendant’s motion to dismiss, the trial court “is concerned only with the sufficiency of the evidence to carry the case to the jury; it is not concerned with the weight of the evidence.” *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983). “Contradictions and discrepancies in the evidence are strictly

for the jury to decide.” *Id.* Defendant’s inferential arguments regarding the State’s evidence were more properly for the jury to resolve, *id.*, which it did in this case by returning a guilty verdict. Defendant’s argument is overruled.

III. Conclusion

¶ 43 For the foregoing reasons, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges TYSON and HAMPSON concur.

Report per Rule 30(e).