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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-14

Filed 19 November 2024

Haywood County, No. 22 CRS 51640

STATE OF NORTH CAROLINA

v.

CHRISTINA NATASHA HUTSLAR, Defendant.

Appeal by Defendant from judgment entered 5 May 2023 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 25 September 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth G. Arnette, for the State.

Daniel M. Blau for defendant-appellant.

MURPHY, Judge.

Plain error and abuse of discretion are high hurdles on appeal, not cleared by a criminal defendant except in the most exceptional cases. Here, Defendant has argued reversible error on four bases on appeal, three of which are subject to our review for either plain error or abuse of discretion. Defendant has not cleared these hurdles; and her final argument, despite being subject to de novo review, is

unmeritorious. We therefore hold that Defendant received a trial free from error in all respects identified.

BACKGROUND

This appeal arises from Defendant's convictions for two counts of trafficking in 400 grams or more of methamphetamine, one by possession and one by transportation. The transaction giving rise to the convictions, according to the State's evidence at trial, was a traffic stop initiated on 17 July 2022 in which Sergeant Deweese of the Haywood County Sheriff's Office pulled over a stolen vehicle driven by Defendant and occupied in the passenger seat by Defendant's romantic partner, Allen White. Defendant and White both appeared wary and attempted to distance themselves from Sergeant Deweese before the stop was initiated; and, once stopped, after a brief exchange to obtain the vehicle's keys, Sergeant Deweese opened the passenger door where White was seated, and an AR-15 fell out of the vehicle. White remarked that he was going to jail for the rest of his life as Sergeant Deweese searched the vehicle, where he found three "large gallon sandwich bags with a white crystal substance that [he] knew to be methamphetamine inside[.]" After he was handcuffed, White also stated that everything in the vehicle, including the drugs, weapon, and paraphernalia, were his. As a result, Defendant's theory of the case has consistently been that White was solely responsible for the drugs and that she was not personally involved in the trafficking.

Defendant was indicted for two counts of trafficking in 400 grams or more of

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methamphetamine, one by possession and one by transportation, as well as two corresponding counts of conspiracy to commit the same, on 26 September 2022, and she was tried starting on 1 May 2023. At trial, the jury heard testimony from Sergeant Deweese, who testified on a number of occasions as to the bases for his suspecting Defendant's involvement in trafficking the drugs. On direct examination, Sergeant Deweese testified as to Defendant's behavior during the stop and noted that he frequently saw suspects attempt to take sole responsibility for offenses in which their romantic partners were involved:

[THE STATE:] And when you first performed the traffic stop and walked up to the vehicle, when you were asking for the keys, did Ms. Hutslar have an option to either give you the keys or not give you the keys?

[SERGEANT DEWEESE:] Yes, she did.

[THE STATE:] Was there anything preventing her from handing you the keys?

[SERGEANT DEWEESE:] No.

[THE STATE:] Did Ms. Hutslar appear to be afraid of Mr. White at the traffic stop?

[SERGEANT DEWEESE:] No, not that I saw.

[THE STATE:] When you asked for Ms. Hutslar's driver's license, did she hand it over immediately?

[SERGEANT DEWEESE:] No, she didn't.

[THE STATE:] Do you know why not?

[SERGEANT DEWEESE:] She seemed to stall as if she

either didn't want to hand me those over or acted like she didn't have them.

[THE STATE:] When you asked her to get out of the vehicle, did she get out willingly?

[SERGEANT DEWEESE:] Not willingly, no. I had to ask several times and then pretty much grab ahold of her hand to pull her out of the car.

[THE STATE:] We heard Mr. White on the video claim all of the drugs, the stolen car, the gun, everything. Is that -- in your training and experience in the criminal suppression unit, is that a common thing that you see happen with male and female codefendants?

[SERGEANT DEWEESE:] Yeah, it happens quite often, to be frank. There's always a lot of times where, especially if they're husband and wife or girlfriend and boyfriend, usually the male or one party usually seems to claim the stuff or the drugs or contraband over one of the other just to try to keep the other one from getting in trouble.

He also reiterated this opinion on cross-examination, explaining his belief that the quantity of drugs and circumstances surrounding the offense informed his belief that both White and Defendant were involved:

[DEFENDANT'S TRIAL COUNSEL:] Sergeant Deweese, as a result of this traffic stop and the evidence collected, who did you charge and with what?

[SERGEANT DEWEESE:] I charged them both with possession of a stolen motor vehicle. I also charged them with trafficking in methamphetamine, possession with intent to manufacture, sell, and deliver methamphetamine, and maintaining a vehicle or dwelling place with a controlled substance.

[DEFENDANT'S TRIAL COUNSEL:] Why did you charge

both with all of those same charges?

[SERGEANT DEWEESE:] Because I highly believe they are both involved. When you're dealing with this much narcotics in the vehicle, the fact they're in a stolen motor vehicle, and the fact that five pounds of methamphetamine is not something that one individual can conceal and not have any other idea that both people in the vehicle know what's in the vehicle, especially when Ms. Hutslar is driving the vehicle.

Finally, Sergeant Deweese testified on redirect as to his belief that a gun case found in the back seat of the vehicle Defendant was driving appeared to have belonged to a woman:

[THE STATE:] Where was the gun case located in relation to the silver briefcase that we saw yesterday?

[SERGEANT DEWEESE:] They were pretty much hand-in-hand, right there together.

[THE STATE:] Together? Like, on top of each other --

[SERGEANT DEWEESE:] Yes.

[THE STATE:]-- or side-by-side?

[SERGEANT DEWEESE:] On top of each other, laying in the back seat.

[THE STATE:] We saw the gun case yesterday. It looked pink or purple-colored, had a design on it. Was there anything about that gun case that drew your attention?

[SERGEANT DEWEESE:] The fact that it being bright colors, to me, seemed like that was a female's gun case. I mean, not to say that the male couldn't pick out that type of color of a gun case, but usually you don't see most men pick out a pinkish-purple gun case.

Defendant did not object to this testimony.

Later in the trial, a juror indicated to the trial court that he recently learned of a relative's death from an overdose. However, the trial court determined that the juror was still qualified to serve:

THE COURT: Good morning. I understand during our break you did communicate with our bailiff, and I understand, sadly, there may have been a family member that was exposed to some drugs and possibly overdosed. Can you tell us a little bit about what has gone on?

JUROR NO. 8: Yes, sir. My cousin Nathan—it's probably not related to this case because he lives in Florida.

THE COURT: Florida.

JUROR NO. 8: He just passed away of an overdose of—I think it's heroin—what's the generic thing called? But he's been fighting that, but that was over ten years ago.

THE COURT: Oh, so it wasn't last night. So about ten years ago?

JUROR NO. 8: No, no, no. He's been clean for over ten years, and I got a text message just now that he had passed away.

THE COURT: Oh, so he has been battling the addiction issue for a number of years?

JUROR NO. 8: Well, he had been, but his father told me last year he had been clean over ten years, and I just got a text message that he has passed away.

THE COURT: Oh, okay. Do you know if it was related to substances, or do you even know what the reason is?

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JUROR NO. 8: It was related to an overdose.

THE COURT: You think that was in the last day or two?

JUROR NO. 8: Am I allowed to use my phone?

THE COURT: Of course.

JUROR NO. 8: Thursday.

THE COURT: A week ago today?

JUROR NO. 8: Yes.

THE COURT: Obviously, for all of us, we extend to you and your family our deepest condolences. We're sorry for the loss of your family member. Let me just talk to you a little bit more in detail. Obviously, that occurred in Florida, not here. Obviously, you're talking about heroin, opium, that type of thing, and that's not the subject of this case. But we do realize—and apparently even though this happened a week ago, you just found about it yesterday.

JUROR NO. 8: No, just now.

THE COURT: Okay. So I certainly think that you're more than able to serve. You're more than capable to serve, but I just want to kind of hear from you, do you feel like receiving that information today is going to be a concern for you, or would it impact your ability to serve? Just tell me kind of how you're feeling about that.

JUROR NO. 8: No, sir.

THE COURT: "No, sir," in the sense of?

JUROR NO. 8: It's not going to impact my ability.

THE COURT: Okay. Do you feel like you can be fair? I'd like to ask a question, if you will permit me, let me just ask a quick question to you: Do you feel like you can put aside

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any prior knowledge and impression—just set aside—and I realize there is a shock about the loss in your family—but set that aside for the purposes of this trial, consider the evidence presented with an open mind, follow the law as I give it to you and render a fair and impartial verdict—a fair verdict to the State, but also a fair verdict to Ms. Hutslar; can you do that?

JUROR NO. 8: Yes, sir.

THE COURT: Well, I appreciate you sharing that with us, and we again extend to you our condolences. And if something else should develop, you just let me know, okay?

JUROR NO. 8: Yes, sir.

THE COURT: Okay. Thank you. You can step back out.

Immediately after this exchange, Defendant moved to reopen voir dire, and the trial court denied the motion.

Later still, the trial court admitted, over Defendant's Rule 403 objection, portions of two letters written by Defendant to White from jail. The contents of the letters were read aloud at trial:

How else can I convince you that I'm yours? You don't have to remind me what you're giving up for me. Praying that I'm—I guess—can find a way out so that I can fight for you. It's not over until it's over. And if you couldn't tell by me threatening to take on the Cartel twice, once over Auntie and once over them threatening us like a joke, I do not back down easy. Death before dishonor. They will not take you from me. You hear me? Now stop suggesting that shit, or I'll get locked back or charged busting into A pod to beat your fuckin' ass. You know not to test my gangster, laugh out loud. I'm the type of girl you got to hold on an AR—hold an AR-15 to just to make me listen. LMAO.

. . . .

I'll keep that fire lit if you never doubt my ability to. I'm going to walk down the aisle to you one day. I still smile thinking about when I was so fired up and going off before we got arrested, and you were just calming—or smiling at me and I said what, laugh out loud. And you said, nothing, Babe, I've got you no matter what. But you were taking me seriously and loving that I wasn't being pushed around, laugh out loud. I think of you and your beautiful smile anytime I feel low, and I talk about you to everyone. I'm just waiting for the day that you are able to put a ring on my finger yourself and love on my body the way you love on my heart and soul. I miss you and I love you irrevocably. You're mine—you're my person.

. . . .

I told him I couldn't say you forced me either. You know I'll make sure you're taken care of.

. . . .

As much as I want out of here, I'm just following your lead. I'm solid no matter what. I know you said do what I need to do to get out, but I need to stick by you and remain loyal and solid. I'm going to back up whatever you say. I know you have my best interest in mind and at heart. If you and Newman can't find a way to get me out, I'm content, but I won't say or do anything without you directing me.

[Please just don't let me down. I'm trusting you with my life. If you can get Troy or a trustee to sweep a note up under the door, our trustee Allie is out cleaning upstairs from 10:00 to 11:00 p.m., and she will get it to me. I miss you so badly and I need to hear from you more often. I need your voice. I sleep with your letters. I keep them on my person. My little Carly told me last night that she could tell that you really love me. I told her that I just trust you with my [life.]

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. . . .

I miss you holding me. Hope I get something from you tomorrow. Faith over fear. You move, I move. You're my person. You go, I follow.

. . . .

I know all you're doing for me and I've told you, you truly showed me my worth and saved my life when you didn't think twice about taking all the charges.

. . . .

I told my cellie that I knew you were the one for me because I'm . . . [l]ow key obsessed with you, laugh out loud. But I'm . . . very smart. I was captain of the chess team at Tennessee High. I know how to manipulate a room. I know how to pick my battles. I know how to puppet master any situation to get my desired result. I've been diagnosed with a God complex and narcissistic[] But I test extremely high and know how to present myself so others don't know my intelligence. But I'm all the same addicted to it and you. I can't wait until I'm out of here and can set visits. I'll get a new dress for our first, one just for you.

I know you're used to people leaving and hurting you, but you remember in booking, I was willing to take it all. You told me that you were hit anyway because of all the parole violations and the gun, but was I not ready to do the same for you? That hasn't changed. If anything, my love and dedication for you is stronger now than it was. It's been almost seven weeks. Friday makes 50 days since I felt your touch or your kiss. No matter where they send you, I'll come to see you. I am yours, you hear me. No one sets my soul on fire like you. I fucking love you.

. . . .

I love you so much. I'm still a little gangster and that won't change. Don't pull my G card.

....

You are my man, period. God, you, and my dad. The queen is the most powerful.

....

But they call me Mrs. White and the Great White. I don't need you to worry about me going anywhere. You are all I need.

....

My sweet future hubby.

....

I'm ready to be out making our future come together. I love you.

....

My husband.

....

My love, but I'm trying to be super careful for both our sakes. I miss you so much, my love. I love you with every piece of me.

....

God first, then you, my dad, and our adopted kids. You are my future.

....

And you better explain why the queen is the most powerful piece on the board. That fuck boy may be over there cutting up with you, but I know your loyalty always lies with me

regardless of the time or space, and you trust my word.

....

I'm used to being the smartest in the room, your wife to be.

Defendant moved to dismiss each of the charges at the close of the State's evidence and at the close of all evidence, both of which the trial court denied.

Defendant was found guilty with respect to both counts of trafficking and not guilty with respect to both counts of conspiracy. She now appeals.

ANALYSIS

On appeal, Defendant argues (A) the trial court committed plain error in allowing an officer to opine that Defendant was involved with the drugs; (B) that the trial court abused its discretion in disallowing Defendant to reopen voir dire or substitute an alternate juror when the above-referenced juror's family member died of a drug overdose; (C) that the trial court abused its discretion in admitting the letters written by Defendant from jail; and (D) that the trial court erred in denying Defendant's motion to dismiss all charges.¹

¹ Defendant also argues that the trial court erroneously permitted her to be convicted by a non-unanimous jury verdict. The entirety of the factual basis for this argument, as presented in Defendant's principal brief, is as follows:

In this case, the jury initially returned verdicts finding [Defendant] guilty of trafficking in methamphetamine by possession and by transportation. The jury also found her not guilty of conspiracy to traffic[] in methamphetamine by possession and by transportation.

A. Plain Error

First, Defendant contends the trial court committed plain error when it allowed Sergeant Deweese to testify as to his assessment of Defendant's involvement with the drugs, especially in the form of sex-based assessments of behavioral norms. To demonstrate plain error, a defendant must make three showings:

First, the defendant must show that a fundamental error occurred at trial.

Second, the defendant must show that the error had a

Defense counsel then requested a jury poll. The clerk first asked the foreperson: "you have returned a verdict of not guilty to trafficking in methamphetamine by possession and transportation. Was this your verdict?" The foreperson said yes. The clerk then asked: "you have returned verdicts of guilty to trafficking in methamphetamine by possessing 400 grams or more and trafficking in methamphetamine by transporting 400 grams or more. Was this your verdict?" The foreperson again said yes. The clerk never asked the foreperson about his verdict on the conspiracy counts. The clerk then polled the other eleven jurors. In each of those polls, the clerk specifically referenced the conspiracy counts and the substantive counts. Each of the eleven jurors indicated that they had found [Defendant] not guilty of the conspiracy counts and guilty of the substantive trafficking counts.

The Trial Court should not have accepted the verdicts because the foreperson's vote on the substantive counts was inconsistent. Based on the poll, the foreperson found Christina not guilty of "trafficking in methamphetamine by possession and transportation," but also found her guilty of "trafficking in methamphetamine by possessing 400 grams or more and trafficking in methamphetamine by transporting 400 grams or more." Those were the same offenses; thus, the foreperson announced that he had found Christina both guilty and not guilty of those offenses.

Defendant omits mention entirely that both questions in the poll were preceded by file numbers specifying the charge, and the count to which the foreperson responded "not guilty" was the *conspiracy* charge. The foreperson, who the transcript reflects responded "not guilty" during the poll, personally signed both the verdict sheet for the trafficking charges and the verdict sheet for the conspiracy charges and would have been familiar with both the file numbers and the charges at issue. This was demonstrably an instance of either misspeaking or mistranscription; therefore, the argument is without merit.

probable impact on the outcome, meaning that[,] absent the error, the jury probably would have returned a different verdict.

Finally, the defendant must show that the error is an exceptional case that warrants plain error review, typically by showing that the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Reber, 386 N.C. 153, 158 (2024) (marks and citations omitted) (line breaks added).

Here, we need not extend our analysis beyond the first step, as Defendant has not shown error. Defendant challenges the statements made by Sergeant Deweese, reproduced in the background above, primarily on the basis that they violate Rule 701 of our Rules of Evidence and relied improperly on sex-based stereotypes. Rule 701 provides, in relevant part, that, “[i]f [a] witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on [his] perception . . . and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C.G.S. § 8C-1, Rule 701 (2023). However, in *State v. Elkins*, we clarified that this rule does not preclude lay opinion as to “ultimate issues” unless they either are “assertions which amount to little more than choosing up sides” or incorporate legal terms of art:

Rule 701 provides the following: “If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.”

However, [N.C.G.S.] § 8C-1, Rule 704 (2009), provides that “[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”

Rule 704 “does allow admission of lay opinion evidence on ultimate issues, but to qualify for admission the opinion must be helpful to the jury.” *Mobley v. Hill*, 80 N.C. App. 79, 86[] . . . (1986) (citing [N.C.G.S.] § 8C-1, Rule 701). “[M]eaningless assertions which amount to little more than choosing up sides’ are properly excludable as lacking helpfulness under the Rules.” *Hill*, 80 N.C. App. at 86[] . . . Furthermore, “while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness.” *State v. Najewicz*, 112 N.C. App. 280, 293[] . . . (1993), *disc. review denied*, 335 N.C. 563[] . . . (1994) (citing *State v. Rose*, 327 N.C. 599, 602-04[] . . . (1990)).

State v. Elkins, 210 N.C. App. 110, 124 (2011).

While Defendant maintains that Sergeant Deweese’s testimony in this case constituted the sort of “choosing up sides” that *Elkins* holds should be excluded as unhelpful, we disagree. Sergeant Deweese’s testimony was not a bare assertion of his support for the State’s position, but was instead a combination of his perception of Defendant, *see* N.C.G.S. § 8C-1, Rule 701(a) (2023), and his thoughts and interpretation of that perception to contextualize the alleged link between Defendant and the drugs. *See* N.C.G.S. § 8C-1, Rule 701(b) (2023).

As a subcomponent of this argument, Defendant cites *State v. McNeil* for the proposition that officer testimony based on “gender stereotypes” is inappropriate. However, while we do not, and could not, *see In re Appeal from Civil Penalty*, 324 N.C.

373, 384 (1989), contest the precedential value of *McNeil* as a whole, the portion of *McNeil* Defendant cites is quintessential dicta. The portion of *McNeil* discussing gender stereotypes is a brief aside within a discussion of an allegedly unlawful traffic stop that resulted in a holding made squarely on the unrelated basis that an officer is permitted to make routine inquiries during a stop:

In the instant case, Defendant argues that “[w]hile the officers might have had reasonable suspicion when they stopped the vehicle [D]efendant was driving, the traffic stop became unlawful when it was verified that the male owner was not driving the vehicle.” We disagree.

We first note that Defendant’s argument is based upon a basic erroneous assumption: that a police officer can discern the gender of a driver from a distance based simply upon outward appearance. Not all men wear stereotypical “male” hairstyles nor do they all wear “male” clothing. The driver’s license includes a physical description of the driver, including “sex.” Until Officer Henry had seen Defendant’s driver’s license, he had not confirmed that the person driving the car was female and not its owner. While he was waiting for her to find her license, he noticed her difficulty with her wallet, the odor of alcohol, and her slurred speech.

In any event, the time needed to complete an officer’s mission will always include time for the ordinary inquiries incident to the traffic stop. Such ordinary inquiries include checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance. Regardless of an officer’s precise *reason* for initially stopping a vehicle, database searches of driver’s licenses, warrants, vehicle registrations, and proof of insurance all fall within the mission of a traffic stop.

State v. McNeil, 262 N.C. App. 497, 502-03 (2018) (citations omitted), *writ denied*,

review denied sub nom. State v. Myers-McNeil, 372 N.C. 718 (2019); *see also Berens v. Berens*, 284 N.C. App. 595, 601 (2022) (“The mandate itself is limited to holdings made by this Court in response to issues presented on appeal; any other discussions made within the opinion is *obiter dicta*.”). *McNeil*’s analysis concerning gender stereotypes is an aside, not an alternative holding, and therefore carries no binding effect. *McKinney v. Goins*, 290 N.C. App. 403, 425 (2023) (“[D]icta is itself without legal effect.”), *appeal dismissed, disc. rev. denied*, 385 N.C. 886 (2024); *but see M.E. v. T.J.*, 275 N.C. App. 528, 542 (2020) (“An alternative holding is not dicta but instead is binding precedent.”), *aff’d as modified*, 380 N.C. 539 (2022).

As a result, the trial court did not err, much less plainly err, in admitting Sergeant Deweese’s testimony.

B. Voir Dire

Defendant next argues the trial court abused its discretion in failing to reopen voir dire or substitute an alternate juror when, during trial, a juror found out that his family member had died of an overdose. *See State v. Harris*, 290 N.C. 681, 688 (1976) (rulings concerning voir dire are reviewed only for abuse of discretion). However, as demonstrated in the colloquy with the trial court reproduced in the background above, the overdose affecting the juror in question occurred in a different state and with a different drug, and the juror testified unequivocally that the overdose would not impact his ability to serve impartially as a juror. Denying Defendant’s motion was well within the trial court’s discretion.

C. Defendant's Letters

Defendant also argues the trial court erred in admitting during trial a series of letters written by Defendant to White from jail. She specifically challenges the admission of these letters under Rule 403, contending the contents of the letters were substantially more prejudicial than probative. *See* N.C.G.S. § 8C-1, Rule 403 (2023) (“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.”). “We [] review the trial court’s Rule 403 determination for abuse of discretion.” *State v. Beckelheimer*, 366 N.C. 127, 130 (2012).

Although the letters are reproduced more fully in the background of this opinion, Defendant primarily takes issue with the sections of the letters where Defendant referred to herself as a “gangster,” a “puppet master,” or a “queen” on a chess board or alluded to her and White’s past involvement with “the Cartel.” These references, she contends, were substantially more prejudicial than probative in that they improperly invited the jury to convict her for having unflattering character traits rather than for committing the crime.² Her argument is especially emphatic with

² We note that, despite this conceptual allusion to Rule 404(a) of our Rules of Evidence, Defendant never objected to the admission of the evidence under Rule 404(a) at trial, nor does she actually purport to challenge the admission of the letters under this rule on appeal. *See* N.C.G.S. § 8C-1, Rule 404(a) (2023) (“Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except [] [as otherwise provided.]”)

respect to the admission of the letter describing herself as a “gangster,” which she contends violates our established caselaw.

We disagree. First, whatever prejudicial impact the letters may have had with respect to unflattering assessments made of Defendant by the jury, Defendant’s own characterization of her role in the transportation of the drugs and relationship to White is undeniably material because her principal argument throughout the proceedings against her has been that White was solely responsible for the drugs. Her own statements to White inconsistent with the notion that she was uninvolved are probative; and, assuming, *arguendo*, they had the prejudicial effect Defendant attributes to them, that prejudicial effect does not significantly outweigh the probative value.

Second, Defendant’s subjective assessment of herself as a “gangster,” especially in this context, is not comparable to the cases Defendant cites for the argument that the admission of such testimony is improper. In *State v. Gayton*, we held that testimony by a detective was irrelevant to a trafficking offense when the testimony dealt exclusively with norms and expectations of gangs in the area. *State v. Gayton*, 185 N.C. App. 122, 124-25 (2007). Similarly, in *State v. Hinton*, we held irrelevant “the State’s proffered evidence that defendant was a self-admitted gang member” because it “was neither relevant to the alleged criminal act nor to the aggravating factor of which the State had given notice of its intent to show.” *State v. Hinton*, 226 N.C. App. 108, 114 (2013). In other words, “the gang-related testimony

was never connected to the crime charged and was thus irrelevant and inadmissible.” *Id.* (marks omitted). Critically, then, both of these cases concerned testimony that the defendants were actually involved in gangs, and the testimony admitted to prove that the defendants were involved in gangs did not prove facts material to the offenses.

Here, the letter in which Defendant referred to herself as a “gangster” read as follows:

How else can I convince you that I’m yours? You don’t have to remind me what you’re giving up for me. Praying that I’m—I guess—can find a way out so that I can fight for you. It’s not over until it’s over. And if you couldn’t tell by me threatening to take on the Cartel twice, once over Auntie and once over them threatening us like a joke, I do not back down easy. Death before dishonor. They will not take you from me. You hear me? Now stop suggesting that shit, or I’ll get locked back or charged busting into A pod to beat your fuckin’ ass. You know not to test my gangster, laugh out loud. I’m the type of girl you got to hold on an AR—hold an AR-15 to just to make me listen. LMAO.

This evidence differs from the evidence in *Gayton* and *Hinton*, most significantly, in that it was not challenged on the basis of relevance, but on the basis that it was substantially more prejudicial than probative.³ Moreover, the evidence differs from

³ To the extent Defendant attempts to argue she preserved a general relevance objection to the letters during pretrial motions, the record contains no such objection. As noted in the previous footnote, while Defendant has generally framed her argument in terms of unfair prejudice, she occasionally alludes to unpreserved allegations of error. However, as Defendant did not preserve an argument based on relevance, our remaining discussion of this issue concerns the import of *Gayton* and *Hinton* as it pertains to her unfair prejudice argument.

that in *Gayton* and *Hinton* in both the nature of the gang reference and in the function of the evidence. As to the nature, Defendant's reference to herself as a "gangster" was a matter of characterization, not a matter of affiliation; the letter did not concern any particular gang, and the term appears to have been used by Defendant primarily to describe her behaviors and attitudes. Furthermore, as to function, this letter was admitted—consistent with its tone and content—to demonstrate Defendant's intentions and mental state, not to prove her participation in a gang or other criminal organization. *Gayton* and *Hinton* are therefore distinguishable from this case.

As a result, we hold the trial court did not abuse its discretion in admitting the letters over Defendant's Rule 403 objection.

D. Motion to Dismiss

Finally, Defendant contends that the trial court erred in denying her motion to dismiss both charges because the evidence did not demonstrate that the drugs were in her possession at any point. For this contention, she primarily relies on *State v. Ferguson* to argue that the State's evidence amounted to "mere proximity" to the drugs and therefore could not prove she either possessed or transported them. 204 N.C. App. 451, 459-60 (2010). Reviewing the trial court's ruling under the de novo standard and taking the evidence in the light most favorable to the State, *State v. Cole*, 199 N.C. App. 151, 156, *disc. rev. denied*, 363 N.C. 658 (2009), we disagree.

"Possession of a controlled substance may be actual or constructive. '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. Steele*, 201 N.C. App. 690, 692 (2010) (quoting *State v. Reid*, 151 N.C. App. 420, 428-29 (2002)). Meanwhile, “[a] person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing.” *State v. Beaver*, 317 N.C. 643, 648 (1986).

It is true that, “[a]s a general rule, mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession”; therefore, “the mere presence of the defendant in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs.” *Ferguson*, 204 N.C. App. at 459-60 (marks omitted) (citing *State v. Weems*, 31 N.C. App. 569, 570-71 (1976)). However, Defendant’s reliance on *Ferguson* as a comparison to her own case is misplaced. In *Ferguson*, the defendant was one of several passengers in a vehicle containing drugs, not the driver. *Id.* at 453. This difference, standing alone, is sufficient to draw a distinction between “mere proximity” and constructive possession, as it evidences an essential feature of constructive possession: “the intent and capability to maintain control and dominion” over the item or items in question. *Beaver*, 317 N.C. at 648.

Indeed, we have observed that evidence of a defendant’s being the driver of a vehicle, even if the vehicle is borrowed, is sufficient to carry a case to a jury unless a

defendant has presented evidence rebutting the notion that the defendant controlled the drugs:

An inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the controlled substance was found.” *State v. Dow*, 70 N.C. App. 82, 85[] . . . (1984). In fact, this Court has consistently held that “[t]he driver of a borrowed car, like the owner of the car, has the power to control the contents of the car.” *State v. Glaze*, 24 N.C. App. 60, 64[] . . . (1974); *see also Dow*, 70 N.C. App. at 85[] . . . ; *State v. Wolfe*, 26 N.C. App. 464, 467[] . . . (1975). Thus, where contraband material is found in a vehicle under the control of an accused, even though the accused is the borrower of the vehicle, “this fact is sufficient to give rise to an inference of knowledge and possession which *may* be sufficient to carry the case to the jury.” *Glaze*, 24 N.C. App. at 64[] . . . (emphasis added). This inference is rebuttable and if the accused offers evidence rebutting the inference, the State must show other incriminating circumstances before constructive possession may be inferred. *See [State v.] Matias*, 354 N.C. [549,] 552 [(2001).]

State v. Tisdale, 153 N.C. App. 294, 297-98 (2002). Here, although Defendant argues that her limited history with the vehicle and White’s purported admission to stealing the car and possessing the drugs rebutted the inference that she constructively possessed the drugs, the State’s evidence also showed other incriminating circumstances sufficient to carry the case to the jury under *Tisdale*. The State’s evidence showed, at a minimum, that Defendant, as the driver of the vehicle, was attempting to avoid Sergeant Dewese prior to the stop and that Defendant, by her communications with White from jail, indicated a personal involvement in trafficking the drugs and a collaborative relationship with White with respect to that offense.

This constitutes sufficient evidence, together with her driving the vehicle, to survive a motion to dismiss.

CONCLUSION

The trial court neither plainly erred nor abused its discretion when admitting evidence or considering Defendant's motion to reopen *voir dire*, and it correctly denied Defendant's motion to dismiss the charges.

NO ERROR.

Chief Judge DILLON and Judge THOMPSON concur.

Report per Rule 30(e).