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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-257

Filed 3 December 2024

Catawba County, No. 22 CRS 003414-15

STATE OF NORTH CAROLINA

v.

DERRICK SHAY BISHOP, Defendant.

Appeal by Defendant from judgment entered 9 August 2023 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 24 September 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General BreAnna VanHook, for the State.

Stanley F. Hammer for Defendant.

GRIFFIN, Judge.

Defendant Derrick Shay Bishop appeals from the trial court's judgment entered upon a jury's verdict finding him guilty of possession with intent to manufacture, sell, or deliver methamphetamine. Defendant contends the trial court erred by denying his motion to dismiss and by permitting a witness to testify about Defendant's probation history. We hold the trial court did not err.

I. Factual and Procedural Background

On 11 September 2021, a passerby walking through a convenience store parking lot noticed Defendant sitting unconscious behind the wheel of his truck. The passerby attempted to wake Defendant by pounding on the truck's window and front hood. When he finally awoke, Defendant was fidgety, incoherent, and his speech was slurred. The passerby determined it was unsafe to leave Defendant in his truck and convinced him to exit the vehicle and wait for help to arrive.

When an officer arrived on scene, he approached both men and asked Defendant if he was intoxicated, which Defendant denied. Upon taking Defendant's information, the officer discovered Defendant's license was suspended and he was currently on probation. The officer looked inside the truck and noticed sitting in plain view a set of scales coated in white powdery residue that he suspected was methamphetamine residue. The officer handcuffed Defendant and conducted a more thorough search of the vehicle, during which he located several plastic baggies. The officer then searched Defendant and found a prescription pill bottle labeled with his information which contained 49.5 units of Suboxone, 5 units of Alprazolam, and a folded napkin containing an unknown, crystal substance. Testing revealed the substance was 4.86 grams of methamphetamine.

Defendant was taken into custody and charged with possession of methamphetamine, possession of a Schedule IV controlled substance, and possession of drug paraphernalia. A Catawba County grand jury indicted Defendant for

possession with intent to sell or deliver methamphetamine (“PWISD”), maintaining a vehicle for the purpose of selling a controlled substance, possession of drug paraphernalia, and attaining habitual felon status. On 7 August 2023, Defendant was tried in Catawba County Superior Court. The jury found Defendant guilty of PWISD and possession of drug paraphernalia; Defendant pled guilty to attaining habitual felon status, and the trial court dismissed the charge of maintaining a vehicle for the purpose of selling a controlled substance. Defendant gave an oral notice of appeal.

II. Analysis

Defendant argues the trial court erred by denying his motion to dismiss the PWISD charges and by allowing the officer to mention Defendant’s probation history while testifying. We address each argument.

A. Motion to Dismiss

Defendant argues the evidence produced by the State failed to sufficiently demonstrate he intended to sell or deliver a controlled substance and, consequently, the motion to dismiss was improperly denied. Specifically, he contends the amount of methamphetamine found on his person was too little to demonstrate his intent to sell or distribute,¹ the officer did not think to collect the baggies because he did not

¹ Defendant further contends that the amount of methamphetamine in his possession was indicative of a “binge and crash” pattern of drug use and moves that this Court take judicial notice of a report from the National Institute on Drug Abuse detailing this pattern of methamphetamine

believe Defendant was selling drugs, and no other paraphernalia or large amounts of cash were found in Defendant's possession. Nonetheless, we hold the State's evidence was sufficient to submit the charge of possession with intent to sell or distribute to the jury.

We review the denial of a motion to dismiss *de novo*, *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016), to determine, as a question of law, "whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Once the court has determined the existence of substantial evidence of the defendant's guilt at the trial level, the case is given to the jury to determine whether the defendant's guilt is proven beyond a reasonable doubt. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 434 (1956). However, if the evidence supports only "suspicion or conjecture" the defendant committed the offense, the motion to dismiss should be granted. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). We have previously held that any case supported by more than "a scintilla of competent evidence" should be submitted to the jury. *State v. Horner*, 248 N.C. 342, 344–45, 103 S.E.2d 694, 696 (1958). If a case is close, the

misuse. *See* N.C. R. Evid. 201 (2023). This evidence was not presented to the trial court and therefore not a factor in the jury deliberations. Though this Court may take judicial notice of evidence for the first time on appeal, *see State v. Cannon*, 254 N.C. App. 794, 797, 804 S.E.2d 199, 202 (2017) (taking judicial notice of well-established facts during appeal), the presence of this evidence in support of Defendant's case would have no effect on our analysis here. The issue on appeal from the denial of a motion to dismiss is the sufficiency of the State's evidence, in the light most favorable to the State and notwithstanding contradictory evidence. We deny Defendant's motion.

preference is to submit the case to the jury for determination. *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985).

We assess the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). If the record contains substantial evidence to support each essential element of the crime, the motion to dismiss should be denied. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). Substantial evidence is evidence that a reasonable mind would deem adequate to support a given conclusion. *Smith*, 300 N.C. at 78, 265 S.E.2d at 169. The evidence presented can be circumstantial, direct, or a combination of the two. *Stephens*, 244 N.C. at 383, 93 S.E.2d at 433.

North Carolina prohibits the possession of a controlled substance with the intent to manufacture, sell, or deliver that substance. N.C. Gen. Stat. § 90-95(a)(1) (2023). To support a conviction for PWISD, the defendant must have (1) possessed (2) a controlled substance (3) with the intent to manufacture, sell, or deliver the substance. *State v. Casey*, 59 N.C. App. 99, 116, 296 S.E.2d 473, 483–84 (1982). Intent is the “gravamen” of the offense. *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985). Intent may be proven using direct or circumstantial evidence. *State v. Blagg*, 377 N.C. 482, 490, 858 S.E.2d 268, 274 (2021). Pertinent circumstantial evidence includes: “(1) the packaging, labeling, and storage of the controlled substance; (2) the defendant’s activities; (3) the quantity of controlled

substance located; and (4) the presence of cash or drug paraphernalia.” *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005).

This Court has previously determined the presence of drugs, in addition to scales and plastic bags, is sufficient to allow the case to go to the jury. *See State v. Coley*, 257 N.C. App. 780, 780–81, 810 S.E.2d 359, 360 (2018) (holding that the presence of marijuana, a digital scale, and plastic baggies was sufficient for a reasonable juror to infer intent to sell or deliver marijuana); *Blagg*, 377 N.C. at 483, 858 S.E.2d at 270 (holding the presence of multiple baggies containing a total of eight grams of methamphetamine, a bag of marijuana, cotton balls, syringes, rolling paper, and a safe containing plastic baggies was sufficient to survive the defendant’s motion to dismiss, despite absence of cash, scales, or business ledgers).

Here, the State presented evidence tending to show Defendant’s intent to sell or distribute: a set of scales covered in a powder, clear plastic baggies, and an amount of methamphetamine that was greater than a typical personal use amount. The presence of scales covered in white powder, plastic baggies, and a prescription bottle containing a large amount of methamphetamine and other controlled substances was sufficient to support the conclusion Defendant intended to sell or deliver methamphetamine and thus sufficient to submit the charge to the jury. Based on the evidence present in Defendant’s truck, the officer testified that he did not initially believe Defendant was actively selling, manufacturing, or delivering the methamphetamine found in the truck; however, as the investigation progressed, he

began to believe that Defendant did intend to do so. Additionally, the State must only prove the defendant's intent to sell or deliver, not that a defendant was presently selling or delivering at the time of his arrest. Viewing the evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference, we hold the evidence produced at trial was sufficient to submit the charge of PWISD to the jury. Therefore, the trial court appropriately denied the motion to dismiss.

B. Officer Testimony

Defendant argues the trial court erred in two ways regarding testimony given by the officer during trial. First, the trial court erred in overruling Defendant's objection during direct examination when the officer mentioned Defendant was a probationer at the time of his arrest. Second, Defendant argues the trial court should have intervened *ex mero motu* during cross-examination when the officer stated Defendant could not be a confidential informant based on his probation history.

We defer to trial courts' evidentiary rulings, particularly when those rulings are matters of discretion. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619–20 (1982). To preserve an issue for appeal, the challenging party must have made a timely request, objection, or motion to the court, stated the specific grounds upon which the objection is based, and obtained a ruling from the court on the request, objection, or motion. N.C. R. App. P. 10(a)(1). Any properly preserved issue may form the basis of an appeal. N.C. R. App. P. 10(b).

1. Defendant's objection to the officer's testimony

Defendant argues the trial court improperly allowed the officer to testify that he had learned Defendant was on probation at the time of his arrest when he contacted dispatch. At trial, Defendant objected to the officer's testimony but failed to state the grounds upon which the objection was made. The court overruled the objection using reasoning based on the rules of hearsay. Defendant argues the officer's knowledge Defendant was a probationer at the time of his arrest was unfairly prejudicial character evidence under Rules 404(b) and 403 of the North Carolina Rules of Evidence because it could cause the jury to believe the State's argument, even if it was—as Defendant suggests—supported by insufficient evidence.

Rule 404(b) challenges are reviewed on appeal using two different standards of review. First, we review de novo whether the trial court erred in deciding whether Rule 404(b) applies to the evidence presented. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158–59 (2012). Next, we consider whether the trial court's decision regarding the evidence's relevance and prejudicial effect under Rule 403 was an abuse of discretion. *Id.*

Rule 404(b) prohibits using evidence of “other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith.” N.C. R. Evid. 404(b). We address challenges under this rule de novo. *Beckelheimer*, 366 N.C. at 355, 893 S.E.2d at 198. Rule 404(b) is a rule of inclusion; covered evidence may be admitted, “subject to but one exception requiring its exclusion if [the evidence's] only probative value is to show that the defendant has

the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990).

Such evidence is, however, admissible for other purposes. *State v. Pickens*, 385 N.C. 351, 356, 893 S.E.2d 194, 198 (2023). Permissible uses of character evidence include establishing a “chain of circumstances” or providing context for the crime at issue. *State v. Agee*, 326 N.C. 542, 547–48, 391 S.E.2d 171, 174 (1990). It may also be admitted to “enhance the natural development of the facts or . . . to complete the story of the charged crime for the jury. *Id.* (citations omitted).

Evidence admissible under Rule 404(b) is also subject to assessment under Rule 403. *State v. Thaggard*, 168 N.C. App. 263, 269, 608 S.E.2d 774, 779 (2005). Under Rule 403, relevant evidence is admissible unless its “probative value is substantially outweighed by the danger of unfair prejudice[.]” N.C. R. Evid. 403. Relevant evidence “ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. R. Evid. 401. The danger of unfair prejudice outweighs probative value if the evidence admitted in error caused a reasonable possibility that, but for the error, the jury would have reached a different result. *State v. Pabon*, 380 N.C. 241, 260, 867 S.E.2d 632, 645 (2022) (citations omitted). The defendant shoulders the burden of proving admitted evidence was unfairly prejudicial. *Id.* (quoting N.C. Gen. Stat. § 15A-1443(a)).

Assuming, without deciding, the issue was properly preserved for appeal, we hold the trial court properly allowed the officer's testimony at trial. Rule 404(b)'s list of permitted uses of evidence of prior wrongs or criminal acts is not exhaustive; trial courts should prohibit use of such evidence at trial only if it is admitted for the purpose of demonstrating a defendant's propensity for criminal behavior. *State v. Church*, 99 N.C. 647, 653, 394 S.E.2d 468, 472 (1990).

Here, the officer's statements were offered to explain the steps taken during his investigation, and thus to provide context for his investigation and the crime charged, not to suggest Defendant's propensity for criminal behavior. The officer did not mention—and the State did not ask—why Defendant was on probation, and there was no indication the probation was related to a previous drug-related conviction. Rather, the testimony explained why the officer searched Defendant's truck and provided context to the jury. Consequently, Rule 404(b) permitted its inclusion at trial.

Even if we were to hold the statements were not admissible under Rule 404(b), their admission was harmless because Defendant cannot show that they caused unfair prejudice. *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001). Under Rule 403, relevant evidence should be excluded if its prejudicial impact *substantially outweighs* its probative value. N.C. R. Evid. 403 (emphasis added). The evidence offered by the officer was relevant to the case at hand because it contextualized the investigation for the jury—a proper purpose that has been

previously accepted by this Court. *See Agee*, 326 N.C. at 547–48, 391 S.E.2d at 174. Thus, the remaining question is whether the prejudicial impact of the officer's statements outweighed their probative value.

Defendant fails to demonstrate he was unfairly prejudiced. The officer revealed Defendant was a probationer in response to a question regarding the steps he took during his investigation. He neither said what crime Defendant previously committed nor revealed any specific details regarding his probation. For the foregoing reasons, Defendant was not unfairly prejudiced, and the trial court did not abuse its discretion in allowing the testimony to be admitted.

2. The officer's testimony on cross examination

Defendant's challenge pertains to the following testimony made by the officer on cross examination:

Officer: For felony possession, more often than not, I would let the people go in an attempt to give them the option to work as a confidential informant to help themselves out later on.

Defendant's Counsel: Okay. That makes sense.

Officer: However, in this case that would not have been possible based on his probation status.

Defendant's Counsel: Understood. Basically, if somebody is on probation, they cannot be a confidential informant, generally, correct?

Defendant argues the trial court should have intervened when, during cross examination, the officer testified Defendant was ineligible to act as a confidential

informant because he was a probationer. Defendant argues the court's failure to intervene *ex mero motu* constitutes plain error, but it was not invited error because the officer opined further than was invited or warranted by the question asked. We disagree.

The plain error doctrine is appropriate in only the most extreme cases where, after reviewing the whole record, the court deems the error committed to be "something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). A new trial is only warranted if the jury "*probably* would have returned a different verdict had the error not occurred." *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012) (emphasis added).

Plain errors are not always reviewable on appeal. Under the doctrine of invited error, a defendant "is not prejudiced by . . . error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2021). Thus, a defendant waives his right to appellate review for any error he invites by his own conduct. *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001). To constitute invited error, the defendant's "affirmative actions [must have] directly precipitate[d] [the] error." *State v. Miller*, 289 N.C. App. 429, 433, 889 S.E.2d 231, 234 (2023).

"Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State*

v. Gopal, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007). *See State v. Crane*, 269 N.C. App. 341, 837 S.E.2d 607 (2020) (holding that an officer’s testimony was invited error because the defendant elicited the testimony on cross-examination). A defendant is not entitled to a new trial based on evidence elicited during cross examination which he could have “excluded if the same evidence had been offered by the State[.]” *State v. Rivers*, 324 N.C. 573, 576, 380 S.E.2d 359, 360 (1989) (citations omitted).

We hold that any error in admitting the officer’s testimony was invited error because Defendant’s counsel elicited the testimony on cross examination. Thus, the statements are not prejudicial as a matter of law, and Defendant cannot challenge their admission on appeal. *See Gopal*, 186 N.C. App. at 319–20, 651 S.E.2d at 287 (holding the defendant’s assignment of error was “without merit” because it involved testimony made by a witness during cross examination). Accordingly, Defendant’s contention is without merit.

III. Conclusion

For the foregoing reasons, we hold the trial court did not err.

NO ERROR.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).