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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-292

Filed 17 December 2024

McDowell County, Nos. 22CRS50092, 22CRS50094-95

STATE OF NORTH CAROLINA

v.

JOHN ALLEN MERRELL, JR., Defendant.

Appeal by defendant from judgments entered 19 January 2023 by Judge J. Thomas Davis in Superior Court, McDowell County. Heard in the Court of Appeals 22 October 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.

Jackie Willingham for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments convicting him of two counts of trafficking opium or heroin, possession with intent to sell or deliver a schedule II narcotic, maintaining a vehicle or dwelling for controlled substance, felony breaking and entering, and larceny after breaking and entering. Defendant contends the trial court erred in instructing the jury as to whether Defendant knowingly possessed fentanyl

as he thought the substance was heroin. Defendant further argues his right to a unanimous jury verdict was violated when the trial court instructed the jury that trafficking heroin and trafficking fentanyl are the same and that there was insufficient evidence to support the charge of maintaining a dwelling or vehicle for controlled substance. We conclude there was no error.

I. Background

The State's evidence tended to show that on 31 January 2022 at about 2:00 a.m., Deputy Baliles with the McDowell County Sheriff's Office was dispatched to a possible breaking and entering in progress. Deputy Baliles was the first to arrive; the address was a trailer in a mobile home park. Upon his arrival, Deputy Baliles observed a "red Ford truck parked in the driveway." Deputy Baliles ran the tags on the truck which came back as being registered to Defendant. Deputy Baliles waited for backup to arrive and the other responding deputies contacted the owners of the trailer, who were both incarcerated, and one of the owners gave deputies consent to enter the trailer. Upon entering the trailer, Deputy Baliles encountered two people, Defendant and Cynthia Nichols. Deputies secured the scene and detained Defendant and Ms. Nichols.

Detective Jones interviewed Ms. Nichols who stated Defendant "had drugs in the . . . red Ford truck in the driveway in a case under the steering wheel, a black zipper case that she observed him place there." Deputies then searched the truck and found a small zipper case in the area Ms. Nichols indicated. Deputies located

“two scales, a glass smoking bowl, and . . . three small baggies with a white powder substance in it, as well as a cut straw in that small black zipper case.” One of the bags contained 7.2 grams of fentanyl and a precursor to manufacturing fentanyl. As the other two bags did not weigh enough to reach a new charging threshold, the lab did not test them per its policy.

Defendant was indicted on 29 August 2022 for breaking and/or entering, larceny after breaking and/or entering, possession with intent to sell and deliver schedule II controlled substance (“PWISD”), maintaining a vehicle/dwelling/place for controlled substance, and two counts of trafficking opium or heroin. Trial began on 17 January 2023.

During deliberations, the trial court received a note from the jury which read, “[i]s 7.2 grams of heroin enough to warrant a trafficking charge?” The court noted that the note “doesn’t say fentanyl. It says heroin.” In a discussion with the State and Defendant’s attorney, the trial court stated, “I don’t mind telling them that the law in regard to fentanyl is the same as the law in regard to heroin.” The trial court ultimately answered the jury’s question as follows:

I’m not going to speculate on why you’re asking that question, but the law in regard to trafficking in heroin and the law in regard to trafficking in fentanyl is the same but for the substance. I’ll also instruct you that this defendant has not been charged with possession of heroin or trafficking in heroin. He has been charged with regard to fentanyl.

The jury found Defendant guilty on all counts. The trial court entered

judgments on each count. Defendant entered oral notice of appeal.

II. Jury Instructions regarding “Knowingly Possess”

Defendant first contends “[t]he trial court plainly erred when it failed to instruct the jury that for [Defendant] to knowingly possess fentanyl, the State had to prove that [Defendant] knew that the white powder contained fentanyl.” Defendant concedes that he did not ask for this instruction to the trial court, and thus we review this issue for plain error. *See State v. Banks*, 191 N.C. App. 743, 748-49, 664 S.E.2d 355, 359 (2008) (“If a defendant assigns error to [jury] instructions, but failed to object at trial, the alleged error is subject to review for plain error only.” (citation and quotation marks omitted)). “Plain error with respect to jury instructions requires the error be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected.” *Id.* at 749, 664 S.E.2d at 359 (citation and quotation marks omitted).

Defendant essentially contends there was evidence that Defendant believed the substance he possessed was heroin, not fentanyl, and the jury would have reached a different verdict as to the trafficking by transportation charge if they were given the instruction. Defendant argues the trial court should have instructed the jury as follows:

For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt:

First, that [Defendant] knowingly possessed a mixture containing fentanyl, which is an opiate or opioid, *and*

[Defendant] knew that what he possessed was fentanyl.

And second, that the amount of the possessed mixture containing fentanyl weighed more than 4 grams, but less than 14 grams.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date [Defendant] knowingly possessed a mixture containing fentanyl, knew the mixture contained fentanyl, and the amount of the mixture which [Defendant] possessed was more than 4 grams, but less than 14 grams, it would be your duty to return a verdict of guilty.

(Emphasis added.) The trial court did not include the part of the instruction which states “and [Defendant] knew that what he possessed was fentanyl.”

Defendant primarily relies on two cases in this argument, *State v. Lopez*, 176 N.C. App. 538, 626 S.E.2d 736 (2006), and *State v. Coleman*, 227 N.C. App. 354, 742 S.E.2d 346 (2013). In *Lopez*, this Court discussed the amended pattern jury instructions, which included an instruction that “the defendant knew that what he possessed was [the illegal drug]” in cases “when a defendant contests lack of knowledge as to the true identity of what he possessed[.]” 176 N.C. App. at 545, 626 S.E.2d at 741. The defendant Lopez “properly requested that the trial court instruct the jury with the amended instruction, as he contended in his testimony that he was unaware that heroin was in the refrigerator that he had been paid to receive for a third party.” *Id.* at 545-46, 626 S.E.2d at 742. This Court concluded Lopez was entitled to a new trial as he “presented evidence that he lacked knowledge of the true contents of the package.” *Id.* at 546, 626 S.E.2d at 742. However, the second

defendant, Sanchez, “presented no evidence that he was unaware of the contents of the package and did not raise the issue of his knowledge . . . to the trial court” and thus this Court found no error as to Sanchez. *Id.*

In *Coleman*, the State argued the defendant was not entitled to the instruction since he “did not testify nor did he present any evidence to raise the issue of knowledge as a disputed fact.” 227 N.C. App. at 359, 742 S.E.2d at 349. However, this Court noted

during the State’s case-in-chief, a detective in the Vice Narcotics Unit of the Charlotte Police Department testified that he interviewed [the] defendant the day he was arrested. The detective gave the following summary of [the] defendant’s statements during the interview: [The d]efendant said he had been asked to hold a box until later in the week, at which time he would be contacted about where to deliver the box. [The d]efendant stated he was expecting to be paid \$200.00 for holding the box. “He said he thought the box contained marijuana and cocaine and he took some marijuana out of it and put it under the seat of his car.” The interview had been audio recorded. The recording was admitted into evidence and played for the jury. Multiple times during the interview, [the] defendant stated that when he was in possession of the box, he believed that it contained only marijuana and cocaine.

Id. This Court concluded that the defendant’s statements “in his interview with, and recounted in subsequent trial testimony by, law enforcement officers amount[ed] to a contention that [the] defendant did not know the true identity of what he possessed[.]”

Id. at 359, 742 S.E.2d at 350 (emphasis omitted). This Court determined the lack of a jury instruction amounted to plain error and granted the defendant a new trial. *Id.*

at 363, 742 S.E.2d at 352.

Here, Defendant relies only on testimony from Ms. Nichols to argue the “evidence showed that whether [Defendant] knew the powder was fentanyl was in dispute.” During her testimony, Ms. Nichols said she believed the drugs to be heroin:

Q. Okay. Are you familiar with a black pouch that was in that car?

A. Yes.

Q. And what did that pouch contain?

A. I don’t know.

Q. Who did that pouch belong to?

A. John.

Q. Okay. Where was the pouch?

A. In the car.

Q. Where in the car?

A. Under the steering wheel.

Q. Okay. Are you sure you don’t know what was in that bag?

A. No, I don’t.

Q. I want to remind you you’re under oath, Cynthia.

A. I know.

Q. And you don’t know what was in that bag?

A. I mean, it was drugs.

Q. Okay. What kind of drugs was it?

A. Heroin.

Then, on cross-examination by Defendant's attorney, Ms. Nichols was asked "[a]nd just to be clear, you said that was *what you thought was heroin*?" to which Ms. Nichols responded "[y]es." (Emphasis added.) Detective Jones testified about his initial conversations with Ms. Nichols at the trailer, stating "based off her knowledge of [Defendant], [she] believed [the drugs] to be heroin."

This testimony from Ms. Nichols is not sufficient to require the trial court instruct that Defendant "knew what he possessed was fentanyl." While Defendant carried no burden of production as to the elements of the charges, at no point did Defendant himself indicate any belief that the drugs were heroin and not fentanyl. Ms. Nichols merely speculates that *she* believed the drugs to be heroin. This evidence contrasts with *Lopez*, where Lopez "contended in his testimony that he was unaware that heroin was in the refrigerator that he had been paid to receive for a third party." *Lopez*, 176 N.C. App. at 545-46, 626 S.E.2d at 742. This is also in contrast to *Coleman*, where the defendant unequivocally stated in his interview with law enforcement he believed the drugs to be marijuana and cocaine, not heroin. *Coleman*, 227 N.C. App. at 359, 742 S.E.2d at 349. Thus, as there was no evidence that Defendant believed the drugs to be heroin instead of fentanyl, the trial court did not commit error, much less plain error, in not giving an instruction that Defendant "knew what he possessed was fentanyl." This argument is without merit.

III. Jury Instructions regarding Trafficking Heroin and Fentanyl

Defendant next argues “[t]he trial court violated [Defendant’s] right to a unanimous verdict under the North Carolina Constitution by instructing the jury that the law in regard to trafficking heroin and the law in regard to trafficking fentanyl are the same.” Defendant specifically contends “[t]he jury’s verdict of guilty is fatally defective because there is no way for the court to determine whether the jurors unanimously found that [Defendant] knowingly possessed/transported fentanyl or whether some jurors found that [Defendant] believed he possessed/transported heroin[.]”

[T]he proper standard of review for an alleged error that violates a defendant’s right to a unanimous jury verdict under Article I, Section 24, is harmless error, under which the State bears the burden of showing that the error was harmless beyond a reasonable doubt. An error is harmless beyond a reasonable doubt if it did not contribute to the defendant’s conviction.

State v. Gillikin, 217 N.C. App. 256, 261, 719 S.E.2d 164, 168 (2011) (citations, quotation marks, and brackets omitted). Article I, Section 24 of the North Carolina Constitution states “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]” N.C. Const., art. I, § 24.

Defendant here, again, relies on the claim that the evidence presented showed Defendant thought he had heroin, not fentanyl; however, the evidence shows Ms. Nichols thought the substance was heroin but does not at all indicate Defendant thought the substance was heroin. The trial court’s initial instruction stated, in part, “[t]he defendant has been charged with trafficking by possession of fentanyl, which

is the unlawful possession of four grams or more but less than fourteen grams of fentanyl” and

[i]f you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant knowingly possessed fentanyl and that the amount which the defendant possessed was four grams or more but less than fourteen grams, it would be your duty to return a verdict of guilty of trafficking by possession of fentanyl.

The trial court’s instruction as to trafficking by transportation also clearly identified the substance at issue as fentanyl. Thus, the trial court did not initially instruct the jury as to trafficking in heroin. It is possible the jury’s note to the judge asked about heroin because Ms. Nichols had mentioned heroin in her testimony, but the trial court clarified that Defendant was charged only with offenses related to fentanyl.

In response to the jury’s question, the trial court answered:

I’m not going to speculate on why you’re asking that question, but the law in regard to trafficking in heroin and the law in regard to trafficking in fentanyl is the same but for the substance. I’ll also instruct you that this defendant has not been charged with possession of heroin or trafficking in heroin. He has been charged with regard to fentanyl.

The trial court’s answer (1) clarified, again, Defendant was charged with trafficking in fentanyl, not heroin, and (2) gave a correct statement of the law regarding trafficking. *See* N.C. Gen. Stat. § 90-95(h)(4) (2023). In fact, Defendant does not contend the trial court gave an incorrect statement of law. We also note the verdict sheet the jury filled out clearly states the charge was trafficking fentanyl, not heroin.

As there was substantial evidence that the drug in question was fentanyl and the testimony does not show *Defendant* thought it was heroin, the trial court correctly instructed the jury on trafficking fentanyl and then correctly answered the jury's question while reaffirming the charges were for trafficking fentanyl, and the jury filled out a verdict sheet identifying the charge as trafficking fentanyl, we conclude there was no error.

IV. Sufficiency of the Evidence

Finally, Defendant contends "[t]he trial court erred in denying the motion to dismiss maintaining a dwelling or vehicle for controlled substances where the evidence was insufficient to establish that charge."

We review the trial court's denial of a motion to dismiss *de novo*. In doing so, we must determine 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.

State v. Summey, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013) (citations and quotation marks omitted).

Under North Carolina General Statute Section 90-108(a)(7),

(a) It shall be unlawful for any person:

....

(7) To knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such

substances, or which is used for the keeping or selling of the same in violation of this Article.

N.C. Gen. Stat. § 90-108(a)(7) (2023).

As to the “keep or maintain” part of the statute, “keep” “refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use” and “maintain” “means to bear the expense of; carry on hold or keep in an existing state or condition.” *State v. Weldy*, 271 N.C. App. 788, 790-91, 844 S.E.2d 357, 361 (2020) (citations, quotation marks, and ellipses omitted). “Whether a vehicle is ‘kept or maintained’ for the keeping or selling of controlled substances depends on the totality of the circumstances.” *Id.* at 791, 844 S.E.2d at 361 (citation omitted).

Circumstances courts have considered in determining whether a defendant “kept or maintained” a vehicle within the meaning of N.C. Gen. Stat. § 90-108(a)(7) include [the] defendant’s use of the vehicle, title to or ownership of the vehicle, property interest in the vehicle, payment toward the purchase of the vehicle, and payment for repairs to or maintenance of the vehicle.

Id. Deputy Baliles testified that the truck where the drugs were found was registered to Defendant and Defendant does not contend otherwise. Further, Ms. Nichols testified the truck belonged to Defendant. Thus, there was substantial evidence presented that Defendant “kept or maintained” the truck. *See id.*

Defendant mostly argues there was insufficient evidence as to the keeping of drugs, stating “[e]vidence of controlled substances temporarily in the truck on one

occasion is insufficient to support a conviction for maintaining a vehicle.” “Keeping” of drugs “means ‘the storing of drugs.’” *Id.* at 794, 844 S.E.2d at 363. “However, subsection 90-108(a)(7) does not require that a car be used to store drugs for a certain minimum period of time—or that evidence of drugs must be found in the vehicle, building, or other place on more than one occasion—for a defendant to have violated subsection 90-108(a)(7).” *Id.*

In other words, merely possessing or transporting drugs inside a car—because, for instance, they are in an occupant’s pocket or they are being taken from one place to another—is not enough to justify a conviction under the keeping element of subsection 90-108(a)(7). Rather, courts must determine whether the defendant was using a car for the *keeping* of drugs—which, again, means the *storing* of drugs—and courts must focus their inquiry on the *use*, not the contents, of the vehicle. The meaning of a vehicle which is used for selling controlled substances is self-evident. The determination of whether a vehicle is used for keeping or selling controlled substances will depend on the totality of the circumstances. As restated in *Rogers*, in addition to evidence of controlled substances found, the State must produce other incriminating evidence of the totality of the circumstances and more than just evidence of a single sale of illegal drugs or merely having drugs in a car (or other place) to support a conviction under this charge.

Circumstances our courts have considered relevant to this determination include: the presence of controlled substances in the car; the packaging of the controlled substances; the amount of controlled substances found in the car; the presence of drug paraphernalia in the car; the presence of large amounts of cash in the car; and whether the controlled substances were hidden in the car.

Id. at 794-95, 844 S.E.2d at 363 (emphasis in original) (citations and quotation marks

omitted).

Here, the State presented sufficient evidence that Defendant was storing the drugs in his vehicle. First, not only was the fentanyl in the car when it was found, it was hidden inside the steering column. *See State v. Rogers*, 371 N.C. 397, 403, 817 S.E.2d 150, 155 (2018) (“When someone ‘keeps’ an object in his car, that word does not refer to possessing something for a designated use; it refers to *storing* that object in his car. That is the ‘common and ordinary meaning’ of the word ‘keeping’ in this context. There is no reason to interpret the use of the word ‘keeping’ in subsection 90-108(a)(7) differently, and, in fact, no other interpretation would make sense. So when subsection 90-108(a)(7) speaks of ‘the keeping of’ drugs, it is referring to the storing of drugs. In this case, the State presented substantial evidence that [the] defendant was using the Cadillac to store crack cocaine. Officers found the cocaine hidden in, of all places, the gas-cap compartment.” (emphasis in original) (citations, brackets, and ellipses omitted)). Here, there were 3 separate bags of fentanyl, with one of the bags weighing 7.2 grams, a trafficking amount. *See* N.C. Gen. Stat. § 90-95(h)(4). There was drug paraphernalia in the car, including scales and smoking devices. Each of the factors discussed by this Court in *Weldy*, other than the presence of large amounts of cash, show “keeping” drugs under the statute. *See Weldy*, 271 N.C. App. at 794-95, 844 S.E.2d at 363. Therefore, the trial court did not err in denying Defendant’s motion to dismiss.

V. Conclusion

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Opinion of the Court

We conclude the trial court committed no error in not including the instruction stating Defendant “knew what he possessed was fentanyl.” We further conclude Defendant received a unanimous jury verdict and the trial court did not err in denying his motion to dismiss based on sufficiency of the evidence.

NO ERROR.

Judges MURPHY and FLOOD concur.

Report per Rule 30(e).