NO. COA11-416
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Cleveland County
No. 10 CRS 51332

JAMES KELVIN McGILL

Appeal by defendant from judgment entered 16 November 2010 by Judge F. Lane Williamson in Cleveland County Superior Court. Heard in the Court of Appeals 12 October 2011.

*Attorney General Roy Cooper, by Assistant Attorney General James M. Stanley, Jr., for the State*.

*Bryan Gates, for defendant-appellant*.

ERVIN, Judge.

Defendant James Kelvin McGill appeals from a judgment sentencing him to 96 to 125 months imprisonment based upon his convictions for robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. On appeal, Defendant contends that the trial court erred by allowing the State to cross-examine him about and introduce rebuttal evidence concerning his arrest for an unrelated offense and by refusing to allow his trial counsel to discuss in his final argument to the jury the possible maximum sentence to which he would be

exposed if convicted as charged. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant is not entitled to any relief from the trial court's judgment.

## I. Factual Background

### A. Substantive Facts

#### 1. State's Evidence

On 8 March 2010, William Barnett, who was 52 years old and received a monthly disability check, was visiting in Michelle Schenck's home. Mr. Barnett knew Defendant because he had been friends with Defendant's father. Defendant arrived at Ms. Schenck's residence between 10:00 p.m. and midnight. At that time, Mr. Barnett was in a bathroom that opened off a back bedroom, while Ms. Schenck was in the living room with friends. According to Ms. Schenck, Defendant entered her house, went down the hall toward the back bedroom, and knocked on the bathroom door. After Mr. Barnett opened the bathroom door, Defendant asked him for money. Thinking that Defendant was joking, Mr. Barnett denied having any money and started to walk away.

At that point, Defendant shoved Mr. Barnett back into the bathroom, where he fell onto the toilet. After Defendant hit Mr. Barnett with a pistol, "everything went black." The blow broke Mr. Barnett's glasses and left his eyes swollen shut.

Following the infliction of this blow from the handgun, Mr. Barnett handed Defendant approximately $181 for fear that Defendant would hit him again.

After Defendant left the house, Mr. Barnett went to the hospital, where he received treatment for his injuries, including stitches. Corporal K.L. Putnam of the Kings Mountain Police Department observed blood in the toilet in the rear bathroom of Ms. Schenck's house and saw blood spots leading from the bathroom to the front door. According to Officer Tim Adams of the Kings Mountain Police Department, who saw Mr. Barnett at the hospital, Mr. Barnett had "a severe laceration to the left side of his eye." At the time of trial, Mr. Barnett had a scar at the location where he claimed that Defendant had hit him with the gun.

On cross-examination, Defendant asked Mr. Barnett numerous questions concerning his history of drug use and the extent to which drug use occurred at Ms. Schenck's residence. Among other things, Mr. Barnett admitted that he had been convicted for possessing drug paraphernalia in 2007. However, despite conceding that he had smoked crack cocaine on previous occasions, Mr. Barnett denied having consumed alcohol or crack cocaine on the night of 8 March 2010 or that smoking crack cocaine caused him to become violent or affected his memory. In

addition, Mr. Barnett denied having stolen or bought anything from Defendant or being indebted to Defendant. Although Mr. Barnett testified that he had seen people smoke crack cocaine at Ms. Schenck's house, Ms. Schenck claimed that neither she nor her guests were using cocaine on the night in question. Finally, Mr. Barnett testified that Defendant's father had called him to apologize for Defendant's conduct and had explained that Defendant was high on crack cocaine at the time of the assault.

2. Defendant's Evidence

Defendant had known Mr. Barnett since he was young because of Mr. Barnett's friendship with Defendant's father. Defendant sold drugs. Since Defendant did not have a driver's license, he had previously employed Mr. Barnett to drive him. According to Defendant, Mr. Barnett was a drug user. Mr. Barnett was indebted to Defendant because, after Defendant gave Mr. Barnett money for use at the store, Mr. Barnett failed to pay him back.

On 8 March 2010, Defendant went to Ms. Schenck's house, which he knew to be a place where people smoked crack cocaine, to sell drugs. Defendant did not own a gun and was not carrying one that evening. Defendant denied having taken drugs or being intoxicated on 8 March 2010. Upon his arrival at Ms. Schenck's house, Defendant went to the back bathroom and asked Mr. Barnett

for his money. After Mr. Barnett denied having any money, Defendant said, "you're in here smoking crack, give me my money." When Mr. Barnett tried to push past Defendant, Defendant "punched him in his eye and . . . in his mouth and [] left." Defendant did not take any money from Mr. Barnett on that occasion.

On cross-examination, Defendant conceded that the debt that Mr. Barnett owed him had been incurred months prior to 8 March 2010. Defendant had not been angry at Mr. Barnett about this debt until, on the night of 8 March 2010, he overheard Mr. Barnett cursing and saying unfavorable things about him over the telephone. At that point, Defendant decided to go to Ms. Schenck's house, collect the money that Mr. Barnett owed him, "and sell crack, what I normally do every night." Although Defendant estimated that he had crack cocaine worth several thousand dollars in his possession on 8 March 2010, he still demanded repayment of the relatively small debt that Mr. Barnett owed him because of "the principle of the matter." Defendant reiterated on several occasions that, while he sold drugs, he did not use them.

Out of the presence of the jury, the prosecutor requested that he be allowed to impeach Defendant's testimony to the effect that he did not use drugs by questioning him about

certain events that occurred at the time of Defendant's arrest for an unrelated offense approximately ten days after the alleged robbery of and assault upon Mr. Barnett. At that time, Defendant had a white powdery substance about his nose and mouth and was in possession of a baggie containing white powder. Although the trial court allowed the prosecutor to question Defendant about the arrest, it informed the prosecutor that he would be bound by Defendant's answers and could not introduce extrinsic evidence concerning the circumstances surrounding that subsequent arrest.

After the jury returned, the prosecutor cross-examined Defendant about his later arrest. At that time, Defendant admitted that there was white powder around his nose and mouth at the time he was taken into custody and that the substance around his mouth and in the baggie was crack cocaine. Defendant claimed that he had been trying to swallow the contents of the baggie because he "didn't want to get caught with it." After the crack cocaine made his mouth numb, Defendant spit the wet baggie out. Defendant lodged no objection to this line of cross-examination.

3. State's Rebuttal Evidence

After Defendant rested, the State requested authorization to offer rebuttal testimony from the officer who had made the

subsequent arrest of Defendant. According to the prosecutor, this rebuttal testimony was intended to impeach Defendant's cross-examination testimony to the effect that he had been trying to swallow the bag of crack cocaine. In order to achieve that end, the State wanted to present the arresting officer's testimony that he never saw a baggie in Defendant's mouth and had found powder in the patrol vehicle in which Defendant had been placed following his arrest. Although the trial court allowed the prosecutor to question the officer about the bag of powder, it instructed him to refrain from eliciting testimony concerning the identity of the substance in the baggie.

On rebuttal, Corporal Putnam testified that, when he arrested Defendant a week or so after the incident involving Mr. Barnett, Defendant was "irate" and cursed at him. At that time, Corporal Putnam noticed that Defendant had "a white powdery substance around his mouth and down his shirt." Upon removing Defendant from his patrol vehicle, Corporal Putnam saw "a white powdery substance on [the] seat and [the] floorboard where . . . [Defendant] had attempted to spit something out the back window because it was on my door panel." Defendant did not object to these questions or pose any additional questions to Corporal Putnam.

4. Closing Arguments to the Jury

At the conclusion of all the evidence, the prosecutor asked the trial court to instruct Defendant's trial counsel to refrain from informing the jury during the course of his closing argument of the maximum possible sentence that Defendant could receive if he were convicted as charged. Although the trial court granted the State's request, it did allow Defendant's trial counsel to inform the jury that the possible penalty for robbery with a dangerous weapon was four times longer than the permissible sentence for common law robbery, a lesser included offense that was also submitted for the jury's consideration. Defendant did not interpose any objection to the trial court's ruling.

B. Procedural History

A warrant for arrest charging Defendant with robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury was issued on 8 March 2010. On 12 April 2010, the Cleveland County grand jury returned a bill of indictment charging Defendant with robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. The charges against Defendant came on for trial before the trial court and a jury at the 15 November 2010 criminal session of the Cleveland County Superior Court. At the conclusion of the

trial, the jury returned verdicts convicting Defendant of the charged offenses. Based upon the jury's verdicts, the trial court consolidated Defendant's convictions for judgment and sentenced Defendant to a minimum term of 96 months and a maximum term of 125 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

## II. Legal Analysis

### A. Evidence Concerning Defendant's Arrest for an Unrelated Offense

In his first challenge to the trial court's judgment, Defendant argues that the State should not have been permitted to either cross-examine him about or offer rebuttal evidence concerning his arrest for an unrelated offense approximately ten days after 8 March 2010. Defendant's argument relates to (1) evidence admitted on both cross-examination and in rebuttal to the effect that Defendant had white powder on his face and possessed a baggie containing white powder at the time of his subsequent arrest and (2) evidence admitted on rebuttal tending to show that Defendant was belligerent at the time of this subsequent arrest. In his brief, Defendant contends that (1) evidence that he concealed crack cocaine in his mouth at the time of his arrest was inadmissible because it "did not contradict his denial of drug use" and that (2) "testimony about the presence of drugs, curses and threats at arrest [constituted

inadmissible] extrinsic evidence [concerning] a collateral matter." We do not find Defendant's arguments persuasive.

1. Standard of Review

As an initial proposition, we must address the extent, if any, to which Defendant's challenge to the trial court's rulings has been properly preserved for appellate review. Although Defendant argues that, with respect to "the matter of allegations about concealment of cocaine, defense counsel noted an objection on the ground that the facts alleged did not show drug use," Defendant has not cited any portion of the record as support for this assertion. As we read the transcript, Defendant noted that the arrest was a "separate case" and argued that, in accordance with the Supreme Court's decision in *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010),[1] the State should not be allowed to elicit testimony concerning the results of a field test performed on the material contained in the baggie. In other words, Defendant has not advanced the same argument before this Court that he presented in the trial court. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (stating that

[1]Although the trial court precluded the State from introducing evidence concerning the identity of the white powder observed on Defendant's face and in the plastic bag found in the patrol car, Defendant admitted that this substance was crack cocaine and that he had attempted to swallow the substance to avoid prosecution. As a result, Defendant, rather than the State, identified the substance in question as crack cocaine.

"the law does not permit parties to swap horses between courts in order to get a better mount" on appeal). In addition, Defendant never objected to the questions that the prosecutor posed to him on cross-examination or to any aspect of Corporal Putnam's rebuttal testimony. As a result, we conclude that Defendant failed to properly preserve his challenge to any of the evidence in question and that we are only entitled to review the trial court's rulings using a plain error standard of review. *See, e.g., State v. Forte*, 360 N.C. 427, 441, 629 S.E.2d 137, 147, *cert. denied*, 549 U.S. 1021, 127 S.Ct. 557, 166 L.Ed.2d 413 (2006) (stating that "defendant did not object at trial to the cross-examination in question . . . [so] we review the pertinent portion of the cross-examination only for plain error") (citations omitted).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," . . . or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings[.]"

*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.), *cert. denied*, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d 513 (1982)). In cases subject to plain error review, a defendant must satisfy "a higher standard [before obtaining relief on appeal], *i.e.*, that a different result 'probably would have been reached but for the error.'" *State v. Williams*, 201 N.C. App. 161, 176, 689 S.E.2d 412, 420 (2009) (quoting *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000) (internal quotation marks omitted), *cert. denied*, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001)). Assuming that the trial court did, in fact, err by allowing the admission of the challenged evidence, we do not believe that any such error rose to the level of plain error.

2. Plain Error Analysis

Corporal Putnam's direct testimony concerning Defendant's demeanor at the time of his subsequent arrest was that:

> Q. And did you have any conversation with [Defendant] when you arrested him and placed him in your vehicle?
>
> A. Just some threats being made, cursing to me.
>
> Q. But did he talk to you?
>
> A. Yes, sir.
>
> A. Did you have any trouble understanding him?
>
> A. No, sir. He was a little irate.

Corporal Putnam did not specify the exact nature of the threats and curses that Defendant made at the time that he was taken into custody or provide any indication that Defendant raised his voice or made threatening gestures at that time. In light of the fact that Defendant had already admitted that he was a drug dealer and that he had assaulted Mr. Barnett, we are unable to conclude that the admission of this cursory evidence concerning threats and profanity probably led to Defendant's conviction.

The admission of evidence on cross-examination and rebuttal to the effect that Defendant had white powder on his face and possessed a baggie containing such a substance at the time of the subsequent arrest did not constitute plain error either. In view of Defendant's testimony on direct examination that he sold crack cocaine and had come to Ms. Schenck's residence, at least in part, for the purpose of selling crack cocaine, the other evidence in the record clearly permitted the jury to draw unfavorable inferences about Defendant's character. We are simply not persuaded that a jury would take a less favorable view of a drug dealer who made personal use of the product that he sold than it would take towards one who simply facilitated the use of that product by others without using that substance himself. Moreover, Defendant admitted that he assaulted Mr. Barnett in Ms. Schenck's house after demanding money from him.

Finally, the undisputed evidence concerning the condition of the bathroom in which Defendant assaulted Mr. Barnett and the severity of Mr. Barnett's injuries provided significant corroboration of Mr. Barnett's claim that Defendant struck him with a handgun rather than a fist. For all of these reasons, we believe that the incremental adverse impact of the trial court's decision to admit the challenged testimony would have been relatively limited given the other evidence in the record.[2]

As a result, we conclude that the admission of the challenged testimony probably did not result in Defendant's conviction. For that reason, we hold that the error, if any, inherent in the trial court's decision to admit evidence concerning the presence of white powder on Defendant's face and in a baggie at the time he was arrested for an unrelated offense and Defendant's conduct at the time of that arrest did not rise to the level of plain error. Thus, Defendant is not entitled to relief from his convictions based on the admission of the challenged evidence.

B. Closing Argument

Secondly, Defendant argues that the trial court erred by precluding him from informing the jury in his closing argument

[2]Given our determination that the admission of this evidence did not rise to the level of plain error, we need not determine whether the State is correct in arguing that Defendant opened the door to the admission of this evidence.

of the maximum possible term of imprisonment to which he would be exposed in the event that he was convicted as charged. In his brief, Defendant contends that, given the provisions of N.C. Gen. Stat. § 7A-97 and various decisions construing that statutory provision, he should have been allowed to deliver the argument in question. We are unable, given the record before us, to conclude that any error that the trial court might have committed in making this decision prejudiced Defendant.

According to N.C. Gen. Stat. § 7A-97, "[i]n jury trials the whole case as well of law as of fact may be argued to the jury." In construing N.C. Gen. Stat. § 84-14, the predecessor to N.C. Gen. Stat. § 7A-97, the Supreme Court held that "[t]his statute secures to counsel the right to inform the jury of the punishment prescribed for the offense for which defendant is being tried." *State v. Walters*, 294 N.C. 311, 313, 240 S.E.2d 628, 630 (1978) (citing *State v. McMorris*, 290 N.C. 286, 288, 225 S.E. 2d 553, 555 (1976), and *State v. Britt*, 285 N.C. 256, 273, 204 S.E. 2d 817, 829 (1974)).

As the State notes, the Supreme Court revisited the extent to which a criminal defendant was entitled to argue the issue of maximum punishment in *State v. Lopez*, 363 N.C. 535, 681 S.E.2d 271 (2009), holding that the trial court erred by allowing the State to discuss the sentence that might be imposed upon

Defendant in the event of a guilty verdict under structured sentencing and to explain the doctrine of merger of offenses. According to the Supreme Court, "[t]he State's discussion of the application of the sentencing grids was inaccurate . . . [and] misleading because it indicated potential specific sentencing ranges for defendant when defendant's sentencing range had not been, and in this case could not be, determined at the time the argument was made." *Lopez*, 363 N.C. at 538, 681 S.E.2d at 273. Although the Supreme Court acknowledged that, "[i]n interpreting [N.C. Gen. Stat. § 7A-97], we have held that the penalty prescribed for a criminal offense is part of the law of the case" and that "'[i]t is, consequently, permissible for a criminal defendant in argument to inform the jury of the statutory punishment provided for the crime for which he is being tried,'" *Lopez* at 539, 681 S.E.2d at 274 (quoting *McMorris*, 290 N.C. at 287-88, 225 S.E.2d at 554, and *Britt*, 285 N.C. at 273, 204 S.E.2d at 829), it noted that "sentencing procedure has changed significantly since this Court decided" *Britt* and *McMorris* and explained that "a criminal sentence under Structured Sentencing is determined through numerous interlocking decisions and findings made by the trial court after the jury has completed its work." *Lopez*, 363 N.C. at 539, 540, 681 S.E.2d at 274. As a result, the status of the legal

principle upon which Defendant relies is, in the aftermath of *Lopez*, something less than crystal clear.

Assuming, for purposes of discussion, that Defendant should have been permitted to inform the jury of the maximum sentence associated with the crimes with which he had been charged, Defendant must also establish that he was prejudiced by the trial court's error in order to obtain relief on appeal. *See, e.g., State v. Belfield*, 144 N.C. App. 320, 328, 548 S.E.2d 549, 553 (2001) (stating that, since "the trial court erroneously denied defendant the right to read to the jury the punishment prescribed under the Structured Sentencing Act for the charged offenses," "we must now decide whether the error was prejudicial to defendant"). An error not involving a constitutional violation is prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a). Thus, unless Defendant can persuade us that, absent the trial court's ruling, there is a "reasonable possibility" that the outcome at trial would have been different, Defendant will have failed to make the necessary showing of prejudice.

The record before us in this case does not include a transcript of the closing arguments of counsel or any attempt at

reconstructing them. As a result, we are unable to assess the impact that an argument concerning the length of the sentences that might have been imposed on Defendant would have had on the strength of Defendant's closing argument to the jury. In other words, we have no way to evaluate the validity of Defendant's contention that the trial court's ruling "drained [his] argument of all punch and context" given the record that we have before us. In analyzing a somewhat similar factual situation, we stated that:

> [T]he transcript of counsels' arguments to the jury . . . is not included in the record before this Court. However, the record does reflect Ms. Williams' testimony . . . that defendant had instructed and encouraged her to hit the victim over the head and take his money . . . [and] threatened her with bodily harm[.] . . . [W]hen defendant was arrested on a completely unrelated charge, defendant . . . [said] that he went to the victim's house with Ms. Williams[.] . . . This evidence was substantial in . . . placing defendant at the scene of the crime . . . [and] corroborating Ms. Williams' testimony that defendant was aware of and involved in the crime. We, therefore, hold that this "evidence of [defendant's] guilt was overwhelming and the error complained of" . . . could not have contributed to defendant's conviction.

*Belfield*, 144 N.C. App at 328, 548 S.E.2d at 553 (quoting *Walters*, 294 N.C. at 315, 240 S.E.2d at 631). Similarly, in *State v. Peoples*, 141 N.C. App 115, 539 S.E.2d 25 (2000), we concluded that:

> In the instant case, the jury was provided two different versions of the events. Eley's version was fully corroborated . . . [and] Deputy Michael Stephenson, who arrived at the scene shortly after the shooting, testified that Eley stated that he had been shot by defendant. Defendant's version, that he simply was not there, was also presented to the jury[.] . . . Although defense counsel should have been allowed to advise the jury of the possible sentences, we fail to see how such error had any impact on the jury's determination.

*Peoples,* 141 N.C. App at 121, 539 S.E.2d at 30. As in *Belfield* and *Peoples*, we have reviewed the evidence and conclude that, given the substantial evidence against Defendant and the absence of any indication of the impact that the argument in question would have had upon the strength of Defendant's presentation to the jury, we cannot conclude that the denial of Defendant's right to inform the jury of the sentences he faced, if error, prejudiced Defendant. As a result, Defendant is not entitled to relief based upon the trial court's refusal to allow the argument in question.

## III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant had a fair trial that was free from prejudicial error. As a result, the trial court's judgment entered should remain undisturbed.

NO ERROR.

Judges STEELMAN and McCULLOUGH concur.

Report per Rule 30(e).