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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-462

Filed: 7 November 2017

Lincoln County, No. 15 CRS 53507

STATE OF NORTH CAROLINA

v.

BOBBY RAY MARTIN

Appeal by defendant from judgment entered 28 July 2016 by Judge W. Todd Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 4 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

TYSON, Judge.

Bobby Ray Martin (“Defendant”) appeals from a judgment entered after a jury convicted him of manufacturing methamphetamine. We find no error. We dismiss Defendant’s ineffective assistance of counsel (“IAC”) claim without prejudice.

I. Background

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On 6 September 2015, C.T., age 15, resided on Crouse Road with her grandparents; her mother, Tammy Hewlett; her 2-year-old brother, A.T.; her mother's boyfriend; and her uncle, Defendant. On that day, C.T. was babysitting her brother and took him outside into the backyard of the residence. While outside, C.T.'s brother found hypodermic needles in a burnpit in the backyard. C.T. also found a spoon and a black container under a seat in the backyard. C.T. observed that one of the needles in the container had a black stain and contained a clear substance. C.T. took the needle containing the clear substance to her grandmother, Tina Martin, who called 911.

After the police arrived, C.T. gave a statement to Officer Houser. C.T. told Officer Houser that she had previously seen Defendant make methamphetamine on at least 20 occasions. She stated Defendant sometimes made methamphetamine in the house, his truck, or in the backyard. C.T. stated Defendant would crush cold pills; open a cold pack and drain the contents; then, mix drain clog remover, the cold pills, and the contents of the cold pack into a plastic bag. She stated he would pour the contents of the plastic bag into a bowl, then put salt and lithium into a 2-liter bottle. He would cut a hole in the top of the bottle and then would condense the smoke that came out of the bottle into a bowl. She also observed Defendant put a coffee filter into a cup, then pour the contents of the bowl into the cup. Defendant would then put a white powdery substance from the coffee filter into a plastic baggie.

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When asked again what items Defendant used to make methamphetamine, C.T. testified Defendant would use: cold packs, salt, a 2-liter bottle, lithium batteries, and “sinus stuff.” Deputy Houser performed a field test on the liquid inside the syringe, which tested positive for methamphetamine.

C.T. told law enforcement officers that Defendant was at the residence of Lindsey Neal, a house located on Oakdale Lane, and that he was driving a green, two-door truck with a bed in the back.

When the law enforcement officers arrived at Lindsey Neal’s house, they observed a green Chevrolet S-10 pickup truck parked in the driveway. Deputy Houser found Defendant sitting in the driver’s seat of the green truck. Defendant was the only person in or near the truck. When questioned, Defendant denied using or making methamphetamine.

Defendant consented to a pat down and a search of his truck. The law enforcement officers found a “one-pot meth lab” in the passenger seat of the truck, next to the center console. The one-pot meth lab was a modified 2-liter soda bottle containing a white granular substance with black flakes. Based upon his training, Deputy Houser identified the modified soda bottle as a device used to manufacture methamphetamine. The officers impounded Defendant’s truck.

On 9 September 2015, the truck was processed by investigators who recovered a 2-liter bottle, two glass vials, a plastic tube, and a metal bowl.

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On 9 November 2015, a grand jury returned an indictment against Defendant on a single count of manufacturing methamphetamine.

The jury found Defendant guilty of manufacturing methamphetamine. On 28 July 2016, Defendant was sentenced to an active term of imprisonment of eighty-eight to one hundred eighteen months. After failing to give notice of appeal, Defendant petitioned this Court for a writ of certiorari, which was allowed by an order dated 7 December 2016.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Issues

Defendant contends (1) the trial court erred when it responded to a note submitted by the jury asking for “[p]hotos and evidence” without first returning the jury to the courtroom in accordance with N.C. Gen. Stat. § 15A-1233(a); (ii) his defense counsel provided ineffective assistance of counsel by failing to object to the trial court’s failure to follow § 15A-1233(a); and (iii) the trial court committed plain error by misreading a portion of the jury instructions. We address each issue in turn.

IV. Section 15A-1233(a)

Defendant argues that the trial court committed error and violated N.C. Gen. Stat. § 15A-1233(a) by failing to conduct the jurors back into the courtroom after the

jurors submitted a note requesting “[p]hotos and evidence.” Presuming, *arguendo*, the trial court violated § 15A-1233(a) by not returning the jurors back into the courtroom, we hold Defendant failed to show any prejudice resulted from the violation.

A. Standard of Review

N.C. Gen. Stat. § 15A-1233(a) provides:

If the jury after retiring for deliberation requests a review of certain testimony or other evidence, *the jurors must be conducted to the courtroom*. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat § 15A-1233 (2015) (emphasis supplied).

Defendant concedes his defense counsel failed to object to the trial court’s responding to the jury’s request to review evidence without first conducting the jurors back to the courtroom. Even though defense counsel failed to object to this error at trial, this issue is nevertheless preserved for this Court’s review. *State v. Nobles*, 350 N.C. 483, 506, 515 S.E.2d 885, 899 (1999) (“Although he did not object to the failure of the trial court to conduct the jury to the courtroom, defendant is not precluded from raising this issue on appeal.” (citation omitted)). Our Supreme Court has held that this question is preserved, notwithstanding defendant’s failure to object at trial, when

the record shows “a defendant is prejudiced thereby[.]” *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (emphasis added).

“In order to be entitled to a new trial, defendant must demonstrate that there is a reasonable possibility that a different result would have been reached had the trial court’s error not occurred.” *Nobles*, 350 N.C. at 506, 515 S.E.2d at 899 (citing *State v. McLaughlin*, 320 N.C. 564, 570, 359 S.E.2d 768, 772 (1987)).

B. Analysis

During deliberations, the jury submitted a note to the judge. The note only stated: “Photos and evidence.” The relevant portion of the transcript showing the trial court’s response to the jury’s note is as follows:

THE COURT: So I’m going to assume they want the photos and evidence, based on my deductive reasoning. Is there any objection to the photos going back to the jurors?

MS. KILLIAN [the prosecutor]: Objection.

THE COURT: Anything?

MR. SMITH [for Defendant]: No objection.

THE COURT: All right. Let’s have you and Mr. Smith go and collect the photos only. Then let’s make notations of what numbers are being sent back for the record. All right. So --

MR. SMITH [for Defendant]: It’s State’s Exhibits Nos. 1 through 8 and 11.

THE COURT: All right. So the photographs that will be going back are State’s Exhibit 1, 2, 3, 4, 5, 6, 7, 8, and

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State's Exhibit 11. Is that right?

MS. KILLIAN [the prosecutor]: That is correct.

THE COURT: Now, have you all reviewed those?

MS. KILLIAN [the prosecutor]: I did.

THE COURT: And there's no objection to those photographs going back?

THE COURT: All right. If you'll pass those to the sheriff, please. Mr. Sheriff, if you will deliver those back.

MR. SMITH [for Defendant]: I thought there was one more with the bottle. It's number 7. I thought we were missing one.

THE COURT: All right. Let the record reflect that we have passed the photos back as requested.

Before sending the photographic evidence to the jury, the trial court offered the prosecutor and defense counsel two opportunities to object to the court's response to the jury's request by sending photographs to the jury room. Notwithstanding the opportunity expressly offered by the court, Defendant failed to object, and affirmatively stated "[n]o objection." When the information was sent to the jury, the record shows the trial court, the prosecutor, and Defendant were in agreement with this resolution. Similarly, Defendant also did not object to the trial court's interpretation of the note as only requesting photos and not other additional evidence.

Defendant argues he was prejudiced by the trial court's failure to conduct the jury back into the courtroom, because the trial court failed to clarify what the jury

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meant by the request for “Photos and evidence.” In his brief, Defendant relies upon *State v. Helms*, 93 N.C. App. 394, 400, 378 S.E.2d 237, 240 (1989), for support. *Helms* involved a trial judge’s failure to exercise judicial discretion to determine whether a jury could review evidence during deliberations. *Helms*, 93 N.C. App. at 399, 378 S.E.2d at 240.

Defendant cites *dicta* from this Court’s opinion in *Helms*, in which the Court stated that despite its holding the defendant waived appellate review of the trial court’s failure to conduct the jury to the courtroom, “the discrepancy between the note and the judge’s later restatement of its contents arguably suggests [the trial court] misinterpreted the jury’s request. Had defendant not waived his right to bring forward this issue on appeal, we would award a new trial on the basis of this error.” *Id.* at 402, 378 S.E.2d at 242.

Helms is distinguishable from the case at bar. In *Helms*, the trial judge restated, in his own words, the jury’s request to review a witness’s testimony. *Id.* at 397-98, 378 S.E.2d at 239. The trial judge summarized the jury’s request as one to hear *new* testimony. *Id.* The trial judge violated section 15A-1233(a) by failing to exercise discretion and denied the jury’s request on the basis that it was “not possible” to grant the request. *Id.* at 400, 378 S.E.2d at 241.

Presuming, *arguendo*, the trial judge misinterpreted the jury’s note requesting “Photos and evidence” and only sent the specified photographs to the jury and did not

send any other evidence the jury may have wanted to review, Defendant has not shown how he was prejudiced by this presumed misinterpretation. Defense counsel assisted in collecting the photographic evidence the trial court submitted to the jury. After the trial court submitted the photographic evidence, nothing prevented the jury from making further requests for evidence, if the photographs failed to fulfill its request.

Defendant has also failed to show a reasonable possibility that a different result would have been reached had the trial court's failure to conduct the jury back to the court room not occurred, or had the trial court sent the jury any additional evidence. *Nobles*, 350 N.C. 483, 506, 515 S.E.2d 885, 899; *see State v. Harrison*, 218 N.C. App. 546, 553-54, 721 S.E.2d 371, 377 (2012) (holding failure to return jury to courtroom was error, but not prejudicial error because there was no reasonable possibility that the jury would have reached a different result).

Defendant failed to meet his burden of proof by not demonstrating prejudice as a result of the trial court's neglecting to follow section 15A-1233 of the North Carolina General Statutes. This argument is overruled.

V. Ineffective Assistance of Counsel

Defendant argues that if his trial counsel's failure to object to the trial court not following section 15A-1233(a) is construed as consenting to the trial court's

handling of the jury's question, his trial counsel provided IAC. We decline to address Defendant's IAC claim because it was not raised in a motion for appropriate relief.

In general, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, an ineffective assistance of counsel claim brought on direct review "will be decided on the merits when the cold record reveals that no further investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001).

In *State v. Todd*, our Supreme Court recently dismissed an appeal in which a defendant claimed his counsel was ineffective for failing to make a meritorious motion to dismiss for insufficiency of the evidence. *State v. Todd*, ___ N.C. ___, ___, 799 S.E.2d 834, 838 (2017). While it is difficult to imagine any conceivable strategic reason for declining to assert a meritorious, dispositive motion to dismiss, nonetheless, our Supreme Court held that whether defense counsel "made a particular strategic decision remains a question of fact, and is not something which can be hypothesized" by an appellate court on direct appeal. *Id.*

The record before us does not indicate whether defense counsel declined to object to the trial court's failure to conduct the jury back into the courtroom or assisted the trial court in choosing the photographs that were delivered to the jury room for any strategic reasons. Based upon *Todd* and the insufficiency of the cold

record before us, we dismiss Defendant's ineffective assistance of counsel claim, without prejudice to pursue it through a motion for appropriate relief in the trial court.

VI. Jury Instructions

Defendant argues the trial court committed error in instructing the jury when it left out a word from the standard jury instructions. We disagree.

The contested portion of the jury instructions reads as follows:

The law requires the presiding judge to be impartial. You *should infer* from anything I've done or said that the evidence is to be believed or disbelieved, that a fact has been proven or not proven, or what your findings ought to be. It is your duty to decide the facts and to render a verdict reflecting the truth. (Emphasis supplied.)

The standard jury instruction states:

The law requires the presiding judge to be impartial. You *should not infer* from anything I've done or said that the evidence is to be believed or disbelieved, that a fact has been proved or what your findings ought to be. It is your duty to decide the facts and to render a verdict reflecting the truth.

N.C.P.I. – Criminal 101.35 (emphasis supplied). After the trial court finished instructing the jury, it asked “are there any additions, subtractions, special requests that were not said or any corrections to the instructions read to the jury?” To which Defendant's counsel replied: “[n]ot from the Defendant.”

The record does not show whether the trial court's omission of the word "not" in the instruction was either a slip of the tongue, a *lapsus linguae*, or whether there was a mistake or omission in the transcript. *State v. Sanderson*, 346 N.C. 669, 684-85, 488 S.E.2d 133, 141 (1997). However, prior to determining whether this error misled the jury, we note that Defendant's trial counsel did not object to the jury instructions, even when he was given an affirmative opportunity to do so. Accordingly, this Court's review of this assignment of error is limited to plain error. N.C. R. App. P. 10(c)(4).

A. Standard of Review

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

Plain error exists when the trial court has committed a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done" or "which amounts to a denial of a fundamental right of the accused," or has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial[.]"

State v. Odom, 307 N.C. 655, 660 300 S.E.2d 375, 378 (1983) (citation and emphasis omitted).

The law controlling our review of jury instructions is well settled:

An instruction to a jury will not be viewed in isolation, but rather must be considered in the context of the entire charge. *State v. Holden*, 346 N.C. 404, 438-39, 488 S.E.2d 514, 533 (1997), *cert. denied*, 522 U.S. 1126, 140 L.Ed.2d 132 (1998). Instructions that as a whole present the law fairly and accurately to the jury will be upheld. *State v. Rich*, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970)).

State v. Roache, 358 N.C. 243, 303, 595 S.E.2d 381, 419 (2004).

B. Analysis

Looking at the trial court's instructions in its entirety, we conclude that the error was not prejudicial. The transcript clearly shows the trial court was following the pattern jury instructions when giving the above quoted instruction, and the omission of the word "not" was either a mere slip of the tongue, *lapsus linguae*, or a transcription error.

If the omission of "not" from the jury instruction was a transcription error, then the trial court correctly stated the law, and there would be no legal error. If the omission of "not" was a *lapsus linguae* by the trial court, Defendant has not shown prejudice by the omission.

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After reviewing the record “contextually and in its entirety,” it is clear any *lapsus linguae* is not plain error, because it did not have a “probable impact on the jury’s finding that the [D]efendant was guilty.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks and citation omitted).

The sentences before and after the sentence with the omission of “not” in the transcript both correctly state the law. The sentence preceding the sentence in question states “[t]he law requires the presiding judge to be impartial.” The sentence subsequent to the sentence in question states “[i]t is your duty to decide the facts and to render a verdict reflecting the truth.”

To the extent the sentence in question misstates the law by the omission of “not,” the preceding and subsequent sentences, as well as the remainder of the charge to the jury, clearly shows the jury was instructed to find facts independently of the trial judge’s alleged influence. The trial court also instructed the members of the jury that they were “the sole judges of the believability of the witnesses[,]” and “the sole judges of the weight to be given any evidence.”

Presuming, *arguendo*, the jury was misled by the omission of “not” from the sentence in question, Defendant also does not point to any action or comment by the trial court from which the jury could have inferred that any piece of evidence should have been believed or disbelieved.

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In light of the “context of the entire charge[,]” it is clear the jury instructions, “as a whole,” presented the law as to the trial judge’s impartiality “fairly and accurately.” *See Roache*, 358 N.C. at 303, 595 S.E.2d at 419 (citations omitted). Defendant’s assignment of plain error is overruled.

VII. Conclusion

For the foregoing reasons, we find no prejudicial error in the trial court’s failure to follow section 15A-1223(a) of the North Carolina General Statutes and conduct the jury back into the courtroom upon their request for review of evidence. We find no plain error in the purported omission of the word “not” from the trial court’s instructions to the jury.

We dismiss Defendant’s claim for ineffective assistance of counsel without prejudice to his right to assert it in a motion for appropriate relief to the trial court.

It is so ordered.

NO PREJUDICIAL ERROR IN PART; DISMISSED IN PART.

Judges STROUD and HUNTER concur.

Report per Rule 30(e).