IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-902

Filed: 21 July 2020

Iredell County, No. 13 CRS 55419

STATE OF NORTH CAROLINA

v.

SHYHEIM FITZHUGH MILLSAPS

Appeal by defendant from judgment entered 21 December 2018 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 31 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara S. Zmuda, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

BRYANT, Judge.

Where the evidence at trial supported the amount of heroin found in defendant's vehicle was more than 14 grams, the trial court did not err by failing to deliver jury instructions on a lesser-included offense to trafficking in heroin by transportation. We decline defendant's request to invoke Rule 2 on the unpreserved

issue regarding his judgment and conviction on possession of heroin and trafficking in heroin by transportation.

On 17 February 2014, defendant Shyheim Fitzhugh Millsaps was indicted for trafficking in heroin by possession and trafficking in heroin by transportation. The matter was tried during the 18 December 2018 session of Superior Court in Iredell County before the Honorable Julia Lynn Gullett, Judge presiding.

The State's evidence at trial tended to show that on 23 September 2013, a Sergeant with the Statesville Police Department received information from a confidential informant that a person driving a white Honda Accord was in possession of narcotics. The Sergeant contacted two narcotics investigators, who were on-duty at the time. The officers located the white Honda Accord, which was driven by defendant, and conducted a traffic stop for window tint violation. While one investigator was writing a warning citation for the window tint violation, the other investigator called a K9 to sniff the vehicle. After the K9 alerted, the officers searched the interior and trunk of the vehicle.

In the trunk, the officers found a bag containing bindle paper, a red ink pad, a stamp that said "pride," rubber gloves, small plastic bags, and a filter mask. The officers also discovered bindles containing heroin and marked with "pride" in red ink. The heroin in the bindles weighed approximately 0.14 grams. Also in the trunk was a Pringles can with a false bottom, which contained heroin in a Ziploc bag. The heroin

in the Pringles can weighed approximately 14.19 grams. Defendant was arrested and taken into custody.

Defendant chose not to testify or present any evidence. The trial court instructed the jury on the following charges: trafficking in heroin by possession, trafficking in heroin by transportation, and possession of heroin as a lesser-included offense of trafficking by possession.

On 21 December 2018, defendant was found guilty of possession of heroin and trafficking in heroin by transportation. The trial court consolidated the convictions and sentenced defendant as a Class E felon to an active term of 90 to 120 months imprisonment. Defendant appeals.[1]

On appeal, defendant argues the trial court erred by I) failing to instruct the jury on possession of heroin as a lesser-included offense of trafficking in heroin by transportation, and II) entering judgment on verdicts of possession of heroin and trafficking in heroin by transportation based on the same heroin.

I

[1] During sentencing, and prior to the judgment being entered, defendant gave oral notice of appeal. After the entry of judgment, the trial court noted the appeal, and appointed appellate counsel. Defendant, acknowledging his notice of appeal was prematurely asserted, filed a petition for writ of certiorari asking this Court to review his proposed issues on appeal. *See* N.C.R. App. P. 4. In our discretion, we allow defendant's petition and review the merits of his appeal. *See* N.C.R. App. P. 21(a)(1).

First, defendant argues the trial court erred by not instructing the jury on possession of heroin as a lesser-included offense of trafficking in heroin by transportation. Specifically, defendant argues the trial court should have submitted possession of heroin as a lesser-included offense because the jury could have found that defendant did not transport more than 14 grams of heroin—the statutory amount necessary to convict a Class E felon for trafficking in heroin by transportation. We disagree.

We review this issue of jury instructions for plain error, having found in the record that defendant did not properly preserve this issue for appellate review. *See* N.C.R. App. P. 10(a)(2). Rule 10 of the North Carolina Rules of Appellate Procedure allows plain error review in criminal cases where the issue is not preserved at trial. *See id.* 10(a)(4). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* (citation and quotation marks omitted).

When the trial court is instructing the jury on a lesser-included offense, the instruction "must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v.*

Millsaps, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). The trial court, making the decision to give instructions on lesser-included offenses, "must focus on the sufficiency of the evidence, not the credibility of the evidence[,]" and must consider the evidence in the light most favorable to the defendant. *State v. Reynolds*, 160 N.C. App. 579, 581, 586 S.E.2d 798, 800 (2003). "When the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element, submission of a lesser[-]included offense is not required." *State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988). "Mere possibility of the jury's piecemeal acceptance of the State's evidence will not support the submission of a lesser[-]included offense." *Id.*

To sustain a conviction under N.C. Gen. Stat. § 90-95(h)(4) (2019), a defendant must knowingly transport or possess heroin, or any mixture containing heroin, greater than the statutory threshold amount to be guilty of trafficking in heroin. By statute, a defendant can be convicted as a Class E felon if the quantity involved is 14 grams or more, but less than 28 grams. *Id.* § 90-95(h)(4)(b). In contrast, "[f]elonious possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be knowingly possessed." *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (citation omitted). If the substance is a Schedule I controlled substance, such as heroin, a defendant is punished as a Class I felon. *See* N.C.G.S. §§ 90-89(2)j. and 90-95(d)(1).

In the instant case, defendant was tried for trafficking at least 14 grams of heroin by transportation. In his brief submitted to this Court, we note defendant does not rebut the contention that he knowingly transported heroin in violation of N.C.G.S § 90-95(h)(4). Rather, defendant argues the weight of the heroin was close enough to the statutory threshold to warrant instruction on possession of heroin as a lesser-included offense.

At trial, law enforcement officers, who conducted a traffic stop of defendant's vehicle, testified that they searched the vehicle and found heroin in the trunk—specifically, three individually wrapped bindles of heroin, and a Pringles can which contained a larger amount of heroin. The State called Elizabeth Regan, a forensic scientist who examined the heroin, to testify. According to Regan's testimony, the three bindles of heroin weighed "0.14 grams, plus or minus 0.05 grams [of marginal error,]" and the heroin found in the Pringles can "weighed 14.19, plus or minus 0.03 grams [of marginal error.]" Based on the record, a total of 14.33 grams of heroin, plus or minus 0.08 grams, was recovered from defendant's vehicle. Even if the marginal error was applied and the total weight reduced by 0.08 grams, the weight of the heroin—14.25 grams in total—would still be 0.25 grams above the statutory threshold. In fact, defendant conceded during the charge conference that the heroin was 14 grams—stating, "[t]he evidence was it was 14."

Defendant asserts that a reasonable juror may not have found the State presented 14 grams or more of heroin because the trial court did not instruct the jury to add the weight of the bindles and the Pringles can together. However, we disagree. Considering the evidence in a light most favorable to defendant, had the jury only considered the weight of the heroin in the Pringles can, the statutory threshold would have still been met. The State sufficiently established that the heroin weighed more than 14 grams. Thus, the trial court was not required to give instructions of lesser-included offenses for heroin less than the statutory threshold as the evidence did not warrant it. *See Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771 ("An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater."). Therefore, we hold the trial court did not err, much less commit plain error, by not instructing the jury on the lesser-included offense of possession.[2]

II

Defendant next argues the trial court erred by accepting and entering judgment on the verdicts of possession of heroin and trafficking in heroin by transportation based on the same heroin. The State argues, and defendant concedes,

[2] While defendant argues he was entitled to receive jury instructions on felony possession as a lesser-included offense to trafficking by transportation, we note that he received the benefit of having the lesser-included offense presented to the jury for the trafficking by possession charge as, based on the evidence, the only amount of heroin in question was a trafficking amount—more than 14 grams but less than 28 grams.

that he did not object to the trial court's acceptance and entry of judgment on the verdict. Thus, defendant did not preserve his argument on appeal. Nevertheless, defendant asks this Court to invoke our authority under Rule 2 of the Rules of Appellate Procedure to waive the preservation requirements of Rule 10 of the Rules of Appellate Procedure.

"Appellate Rule 2 specifically gives 'either court of the appellate division' the discretion to 'suspend or vary the requirements or provisions of any of [the] rules' in order '[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.' " *State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 204–05 (2007) (quoting N.C.R. App. P. 2). Despite our discretionary authority to invoke Rule 2, our Supreme Court has directed we do so "cautiously." *Id.* at 315, 644 S.E.2d at 205.

Here, given that defendant was indicted for trafficking in heroin by possession and trafficking in heroin by transportation, and the State presented evidence that defendant possessed and transported heroin above the statutory threshold which led to his conviction, we hold that this case does not involve exceptional circumstances to suspend the rules.[3] Defendant has not demonstrated a "manifest injustice" or any

[3] Although *dicta*, had we reviewed defendant's argument as to his verdicts on possession of heroin and trafficking in heroin by transportation based on the same heroin, we would have found no error in the judgment. Our case law supports that a defendant may be punished and convicted for separate offenses even when the conviction stems from the same contraband material. *See State v. Perry*, 316 N.C. 87, 103–04, 340 S.E.2d 450, 461 (1986) ("[The North Carolina Supreme Court held] that possessing, manufacturing, and transporting heroin are separate and distinct offenses. . . . Therefore, [a] defendant may be convicted and punished separately for trafficking in heroin by possessing 28 grams or more of heroin, trafficking in heroin by manufacturing 28 grams or more of

factor that implicates the "public interest." *Id*. Accordingly, we decline to exercise our discretion to invoke Rule 2.

NO ERROR.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).

heroin, and trafficking in heroin by transporting 28 grams or more of heroin even when the contraband material in each separate offense is the same heroin."). As such, defendant's verdict was correctly entered.