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NO. COA05-983

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

STATE OF NORTH CAROLINA

v.

JAIME ALEJANDRO LOPEZ,  
Defendant.

Gaston County  
Nos. 04 CRS 51868  
04 CRS 51875-78  
04 CRS 51880

Appeal by defendant from judgments entered 17 March 2005 by Judge David S. Cayer in Gaston County Superior Court. Heard in the Court of Appeals 22 May 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Lars F. Nance, for the State.*

*Leslie C. Rawls for defendant-appellant.*

GEER, Judge.

Defendant Jaime Alejandro Lopez appeals from his convictions of trafficking by sale, possession, transportation, and delivery, possession of cocaine with intent to sell and deliver, and carrying a concealed weapon. Defendant argues on appeal that the trial court committed plain error by allowing testimony referencing defendant's invocation of his right to remain silent and to have an attorney. We hold that, even assuming *arguendo* that the testimony was inadmissible, defendant has failed to demonstrate plain error.

#### Facts

The State's evidence tended to show the following facts. On

4 February 2004, Paul Solas, a confidential informant, contacted Detective Barry Crisp of the City of Gastonia Police Department regarding a potential drug deal. That afternoon, Detective Crisp and Officer Scott Barnes went to Solas' house. At the request of Detective Crisp, Solas called a Hispanic man named "Adrian" and arranged for a \$100,000.00 purchase of five kilograms of cocaine. Adrian (who was subsequently determined to be Adrian Guevara) was expected to drive up from Atlanta, Georgia, followed in another car driven by a Hispanic male, and arrive in Gastonia around 5:00 p.m. on 5 February 2004. The police planned for the transaction to take place at the Fairfield Inn on Remount Road and set up surveillance at the Inn.

On the afternoon of 5 February 2004, the police escorted Solas to a hotel room at the Inn. The arrest and surveillance teams were in an adjoining room. After Solas and Guevara spoke on the phone at around 4:20 p.m., two Hispanic males, Guevara and defendant, arrived at the Fairfield Inn in a white Pontiac with Georgia plates. Guevara exited the car and proceeded to Solas' room, while defendant remained in the Pontiac with the engine running. Guevara entered Solas' room, spoke with Solas, and made a call on his cell phone. Defendant then exited the Pontiac, put an item under his leather jacket and also went to Solas' room.

Upon entering Solas' room, defendant pulled out a package and threw it on the bed next to Guevara. Solas asked defendant about the quality of the cocaine, and defendant responded that it was good quality; it had not been "stomped on." Guevara took the

package from defendant and began to open it on the bed. Solas gave the "go" signal, and the arrest team entered Solas' room.

As Officer Barnes attempted to restrain defendant, defendant reached for his right front pants pocket. Officer Barnes grabbed defendant's hand and discovered that defendant was grasping a loaded .38 caliber revolver. The officers recovered one kilogram of cocaine on the bed and another kilogram of cocaine in the Pontiac.

Defendant was charged with trafficking by sale, trafficking by possession, trafficking by transporting, trafficking by delivery, possession with intent to sell and deliver cocaine, and carrying a concealed weapon. A jury found defendant guilty of all the charges. The trial court sentenced defendant to two consecutive terms of 175 to 219 months imprisonment. Defendant timely appealed.

#### Discussion

Defendant contends the trial court committed plain error when it allowed the State to elicit testimony from Officer Barnes and Detective Crisp regarding defendant's invocation of his *Miranda* rights. When the prosecutor asked Officer Barnes what happened after defendant was transported to the police station, Officer Barnes answered:

A. Before they were transported from the room, Detective Holloway began to try to speak to them, advised them of their rights; and Mr. Lopez and Mr. Guevara at that time advised that they did not want to speak to law enforcement, they wanted to speak to their attorney[s].

Q. And Detective Holloway is someone who's fluent in Spanish, is he not?

A. Right.

Q. And you were present when Mr. Lopez was read his Miranda rights.

A. Yes, sir.

The following exchange occurred during the prosecutor's questioning of Detective Crisp regarding the events that took place at the police station:

Q. Did you have any dealings at all with either Mr. Lopez or Mr. Guevara on that day?

A. At the police department, Mr. Lopez, I did.

Q. And tell us about what, if any, dealings you had with Mr. Lopez at that time.

A. He was in an interview room at the police department. Detective Holloway had already told they weren't involved [sic], that he did not want to speak other than he wanted to talk to his attorney. And at that point I went in for basic questions on the arrest sheet, name, date of birth, stuff like that. He was communicating back to me in English.

Q: Now, the person that you're identifying, referring to as Mr. Lopez, do you know what his full name is?

A: I just know it by Jaime Lopez.

[Detective then identified the defendant in court.]

Q. . . . So Detective Crisp, once you arrived back there at the police station, Mr. Lopez did not give you any information through any interpreter regarding the transaction, is that correct?

A. Regarding the transaction, no.

Q. But he was provided that opportunity,

was he not?

A. Basically, when Detective Holloway advised us that he's invoked his Miranda rights, we [were] not going to go and ask any questions about what had took [sic] place.

Thus, during their testimony, both officers specifically referenced defendant's invocation of his right to remain silent and to have an attorney.

Defendant correctly asserts that the exercise of his constitutionally protected rights to remain silent and to request counsel during interrogation may not be introduced as evidence against him at trial. *State v. Elmore*, 337 N.C. 789, 792, 448 S.E.2d 501, 502 (1994). A violation of a defendant's rights under the Constitution of the United States is prejudicial unless the State shows the error to be harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2005).

As defendant concedes, however, he did not object to the officers' testimony at trial. This Court will not ordinarily consider a constitutional argument raised for the first time on appeal. *State v. Allen*, \_\_ N.C. \_\_, \_\_, 626 S.E.2d 271, 284 (2006). Nevertheless, in *State v. Alexander*, 337 N.C. 182, 196, 446 S.E.2d 83, 91 (1994), our Supreme Court applied plain error analysis to an identical constitutional argument. We may reverse for plain error:

"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 'where [the error] is grave error which amounts to a denial of a fundamental

right of the accused,' 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' or where it can be fairly said '[the error] mistake had a probable impact on the jury's finding that the defendant was guilty.'

*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, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)).

In this case, the evidence against defendant was substantial. Defendant's guilt was supported by a surveillance tape and the testimony of Solas and co-defendant Guevara. As noted, it was undisputed that defendant exited the Pontiac, placed a package containing one kilogram of cocaine under his jacket, went to Solas' room, and put the package on the bed. Further, Solas testified that when asked, defendant told him that the cocaine was good quality. Then, as the arresting team arrived at Solas' room, defendant reached for a loaded revolver. Although defendant argues that the only evidence of his knowledge that the package contained cocaine came from his co-defendant, both Solas' testimony and defendant's drawing a revolver in response to the arrival of the police strongly corroborate that testimony. Given this evidence, we cannot conclude that the jury would probably have reached a different result absent the officers' testimony. Accordingly, defendant has failed to present grounds sufficient to overturn his convictions.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).