NO. COA07-1254

NORTH CAROLINA COURT OF APPEALS

Filed: 1 July 2008

STATE OF NORTH CAROLINA

v. Madison County
Nos. 06 CRS 50397-98

DARRELL CHARLES CHANDLER

Appeal by defendant from judgments entered 2 May 2007 by Judge J. Marlene Hyatt in Madison County Superior Court. Heard in the Court of Appeals 23 June 2008.

Attorney General Roy Cooper, by Assistant Attorney General Richard G. Sewelby, for the State.

David G. Belser, for defendant-appellant.

CALABRIA, Judge.

Darrell Charles Chandler ("defendant") appeals his judgment entered upon jury verdicts for manufacturing marijuana, trafficking marijuana, and possession of a firearm by a felon. Defendant argues the trial court erred by (1) allowing the State to present evidence of his prior conviction for manufacturing marijuana to prove an element of possession of a firearm by a felon, where defendant offered to stipulate to the fact of the conviction, and (2) instructing the jury that if it found defendant grew marijuana, that would constitute manufacturing marijuana. We find no error.

The State introduced evidence that on or about 1 August 2006 State Bureau of Investigation ("SBI") aerial surveillance discovered marijuana plants growing in Haywood County near Metcalf Creek Loop. Special Agent Chuck Vines ("Agent Vines") and Deputy Sheriff Lamar Worley ("Detective Worley" collectively "the officers") went to the area to place surveillance cameras. After installing the cameras, they saw a man walking in the area carrying a sprayer and a jug. Agent Vines described the man as dressed in a light colored jumpsuit and a two-tone ball cap that was tan with a rust colored bill. The man had a beard and shoulder length hair. He did not see the two officers at that time. Approximately two weeks later, the officers returned to the same field and discovered that the batteries in the cameras had run out of power. No pictures were recorded.

On or about 20 September 2006, another SBI aerial surveillance flight discovered more marijuana plants. The next day Agent Vines and other law enforcement officers returned to the area and cut down over one hundred marijuana plants. A chemist at the SBI laboratory examined the plants and determined that 91.5 pounds of marijuana plants had been seized. The plants were discovered between seventy-five and four hundred yards from defendant's residence. Several footpaths were cut through the high grass and brush to connect the various patches of marijuana plants. The footpaths led back to defendant's residence.

Within a day or two of seizing the plants, law enforcement returned to defendant's residence to execute a search warrant.

Upon seeing defendant that day, both Agent Vines and Detective Worley realized defendant was the same man they had seen walking through the fields at the beginning of August. Defendant wore the same ball cap and still had a beard. Agent Vines asked defendant several times if the marijuana was his, and then asked if defendant knew whether the officers had collected all of the marijuana. Defendant's response indicated that the officers had gotten all of it. Lieutenant H.C. Aldridge, Jr. was also at defendant's residence and questioned him about the plants and asked if there were any plants the officers did not know about. Defendant responded, "No, you got them all." When asked how many plants he was growing, he stated, "You guys do a pretty good job. I'm sure you got them all." Items collected from the house included less than half an ounce of marijuana, four rifles, and a shotgun. Law enforcement discovered baling twine, fertilizers, and black plastic buckets in the area surrounding the house.

At trial, defendant stated his intent to stipulate to the fact of a prior conviction for purposes of the possession of a firearm by a felon charge. He argued that N.C. Gen. Stat. § 8C-1, Rule 403 allows the trial to accept the stipulation in order to avoid the risk of prejudice outweighing the probative value of the nature of the conviction, which was a conviction for manufacturing marijuana. The State countered that it had given defendant a copy of his criminal record, defendant was on notice that the State would have to prove the prior conviction, and the offer to stipulate was not made in writing. The trial court allowed the State to present

evidence of defendant's prior conviction for manufacturing marijuana, and gave a limiting instruction to the jury that the conviction was only to be used to prove the prior conviction for purposes of the charge of possession of a firearm by a felon.

During defendant's case-in-chief, defendant's girlfriend Kathleen Sharpe testified that the marijuana found in the home was hers and the multiple guns found belonged to her daughter, Holly Thompson ("Thompson"). Thompson's testimony confirmed that she purchased four of the five guns from defendant. She purchased the fifth gun, an SKS rifle, from the sheriff's office after it had been seized from defendant.

The jury returned guilty verdicts for all three charges. The trial court determined defendant was a level III offender based on five prior record points, and sentenced defendant to a consolidated term of thirty-five to forty-two months for the two drug offenses, and to a term of thirteen to sixteen months for possession of a firearm by a felon. The trial court ordered the sentences to run consecutively and to be served in the North Carolina Department of Correction. Defendant appeals.

I. Evidence of a Prior Conviction

Defendant first argues the trial court erred by allowing the State to introduce evidence of his prior conviction for manufacturing marijuana. For support, he cites to *Old Chief v. United States*, 519 U.S. 172, 136 L. Ed. 2d 574 (1997), which states that when the only purpose of introducing the fact of a prior conviction is to prove an element of the offense of possession of

a firearm by a felon, the district court abused its discretion in denying defendant's offer to stipulate to the conviction. This is so because the name and nature of the prior conviction raises the risk of unfair prejudice outweighing the probative value of the record of conviction. *Old Chief*, 519 U.S. at 191, 136 L. Ed. 2d at 594-95. Here, defendant argues that he should have been allowed to stipulate to the fact of his prior conviction to avoid the risk of undue prejudice from the name and nature of his conviction, because the prior conviction was for manufacturing marijuana, the same offense he was charged with in this case. He contends the trial court has the discretion to exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, rule 403 (2007). We disagree.

The North Carolina General Statutes prohibit possession of a firearm by a convicted felon pursuant to N.C. Gen. Stat. § 14-415.1. Under that section, "record of prior convictions of any offense, . . . shall be admissible in evidence for the purpose of proving a violation of this section." N.C. Gen. Stat. § 14-415.1(b)(3) (2007). No such provision may be found in the federal statute at issue in *Old Chief*. *See* 18 U.S.C. § 922(g)(1) (2008). Moreover, non-constitutional decisions of the U.S. Supreme Court are not binding on our appellate courts in determining how to interpret State rules of evidence. *State v. Faison*, 128 N.C. App. 745, 747, 497 S.E.2d 111, 112 (1998). Since section 14-415.1 expressly allows the State to present evidence of prior convictions

to prove that element for the offense of possession of a firearm by a felon, the nature of such evidence cannot be so prejudicial that a trial court would be required to exclude it under Rule of Evidence 403. Therefore, we hold that the trial court did not err in denying defendant's offer to stipulate to the fact of his prior conviction. This assignment of error is overruled.

II. Jury Instruction

Defendant also challenges the trial court's jury instruction on the charge of manufacturing marijuana. The trial judge instructed the jury that to find defendant guilty of manufacturing marijuana, it would have to find that the State proved beyond a reasonable doubt that defendant manufactured marijuana. The instruction continued:

> Manufacturing a controlled substance includes producing, preparing, propagating, compounding, converting or processing a controlled substance. Growing of marijuana would be manufacture of a controlled substance.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant was growing marijuana, it would be your duty to return a verdict of guilty of manufacturing marijuana.

Defendant contends these instructions removed from the jury the duty of finding an essential element of the offense, that defendant manufactured marijuana. We disagree.

We first note that although defendant argues the trial court committed reversible error, defendant did not object to the instruction when given and therefore the standard of review on appeal is whether the instruction constitutes plain error. *State*

v. Wiley, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Plain error is an error so fundamental and so prejudicial that justice cannot have been done. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Our statutes prohibit the manufacture of controlled substances, including marijuana. N.C. Gen. Stat. §§ 90-95(a)(1), 90-94 (2007). "Manufacture" means "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly." N.C. Gen. Stat. § 90-87(15)(2007). "Production" includes the "manufacture, planting, cultivation, growing, or harvesting of a controlled substance." N.C. Gen. Stat. § 90-87(24). Therefore, the act of growing comes within the purview of the offense of manufacturing marijuana. Since the trial court instructed the jury within the parameters of the statutory definitions, no error can be shown in the instructions as given, much less plain error. The jury still retained the duty of finding beyond a reasonable doubt that defendant was the person who cultivated and grew the marijuana plants. This assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).