NO. COA09-1550

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

STATE OF NORTH CAROLINA

v. Lenoir County
No. 08 CRS 51637

LATRELL DEMORE WOOTEN

Appeal by defendant from judgment entered 3 June 2009 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 13 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Bradley Dawson, for the State.

Lucas & Ellis, P.L.L.C., by Anna S. Lucas, for defendant.

BRYANT, Judge.

Following a trial in the Lenoir County Superior Court on 28 May and 2-3 June 2009, a jury convicted defendant Latrell Demore Wooten of one count each of trafficking in cocaine by possession and trafficking in cocaine by transportation. The trial court sentenced defendant to an active term of 35 to 42 months and fined him $50,000.00. Defendant appeals. We remand for a new trial.

Facts

On 2 May 2008, defendant was arrested as a result of an undercover narcotics operation conducted by the Lenoir County Sheriff's department ("the Department"). Defendant told a

confidential informant that he wanted to purchase four and one-half ounces of cocaine for $3,200.00. The department arranged for the informant and Detective Jovani Villagra to meet defendant at a Bojangle's restaurant in Little Baltimore. Detective Villagra obtained cocaine for the operation from the Department's safe; the "powdered cocaine in the rock solid form" had been seized in 2000 during another drug sting. Defendant withdrew $3,200.00 from his wife's bank account. At the restaurant, defendant got into Detective Villagra's vehicle and gave him the money. Defendant then placed the packaged cocaine in his pants pocket. As defendant got out of the car, uniformed officers arrested him.

Defendant makes two arguments in his brief to this Court: (I) the trial court committed plain error in admitting the results of a NarTest drug analyzer and opinion testimony of a detective based thereon where no evidence about the reliability of the test was presented; and (II) defendant received ineffective of assistance of counsel based on the lack of objection to admission of the NarTest results and related testimony at trial.

I

Defendant first argues the trial court committed plain error in admitting the results of a NarTest drug analyzer and opinion testimony from Detective Christopher Dale Cahoon based thereon where no evidence about the reliability of the test was presented. We agree.

The identity of the controlled substance allegedly possessed is an essential element of the offense of possession of a controlled substance. *State v. Ledwell*, 171 N.C. App. 328, 331, 614 S.E.2d 412, 414, *disc. review denied*, 360 N.C. 73, 622 S.E.2d 624 (2005). The State bears the burden of proof on identity of the alleged controlled substance, as on any other element. *Id.* Here, to prove the identity of the substance defendant bought, the State introduced NarTest results purportedly showing the substance was cocaine. Defendant did not object to the admission of the NarTest results or related testimony by Detective Cahoon. Normally, failure to object to alleged errors at trial waives the right to raise them on appeal. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986); N.C. Gen. Stat. § 15A-1443 (2009). Thus, defendant is limited to contending plain error. It is well-established that

> [t]he plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. In other words, the appellate court must determine that the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant. Therefore, the test for "plain error" places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon defendants who have preserved their rights by timely objection.

Id. (internal citations omitted).

Here, defendant argues the trial court's admission of results from and testimony based on the NarTest rises to the level of plain error. He notes that, in an opinion filed after his trial concluded, this Court awarded a new trial after finding an abuse of

discretion where the trial court admitted NarTest results and related testimony over the defendant's objection because the State failed to present sufficient evidence of its reliability under *Howerton v. Arai Helmet, Ltd.*, 358 N.C., 597 S.E.2d 674 (2004). *State v. Meadows*, __ N.C. App. __, __, 687 S.E.2d 305, 309 (2010). As in *Meadows*, the State here failed to offer any evidence about reliability of the NarTest and the trial court erred in admitting the testimony.

However, under plain error review, we must consider whether this error was so exceptional that it "'tilted the scales' and caused the jury to reach its [guilty] verdict." *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. The State asserts that, because other witnesses testified that the substance defendant purchased was cocaine, the jury would have convicted defendant even without admission of the NarTest evidence. Detectives Shawn Howard, Edward Eubanks, Jr., and Villagra each gave lay opinion testimony that the substance used in the operation was cocaine based on their visual identifications.

However, the North Carolina Supreme Court has recently held that, "[u]nless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, *some form of scientifically valid chemical analysis is required.*" *State v. Ward*, __ N.C. __, __, __ S.E.2d __, __ (2010) (emphasis added). While not specifically barring *all* visual identifications of controlled substances, the Court held that such identifications

are not admissible where "the State has not carried its burden of demonstrating the sufficient reliability of [the witness'] visual inspection methodology." *Id.* at __, __ S.E.2d at __; *see* N.C. Gen. Stat. § 8C-1, Rule 702(a) (2009). Here, the State presented no evidence about the reliability of the detectives' visual inspection methodology and, thus, the trial court erred in admitting this testimony as well. As in *Meadows*, because "the NarTest machine results and [the detective's] visual identification were the only evidence that defendant possessed cocaine *and* as both were admitted erroneously, defendant was prejudiced." __ N.C. App. at __, 687 S.E.2d at 309.

We conclude that, absent the erroneously admitted NarTest evidence, the State failed to carry its burden of proving an essential element of the charges facing defendant. *Ledwell*, 171 N.C. App. at 331, 614 S.E.2d at 414. The jury could not have convicted defendant but for the error and, thus, defendant has established plain error and is entitled to a new trial.

II

Defendant also argues that he received ineffective assistance of counsel. Our resolution of issue I renders this argument moot.

New trial.

Judges ELMORE and ERVIN concur.

Report per Rule 30(e).