NO. COA10-430

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

STATE OF NORTH CAROLINA

v. Edgecombe County
No. 07 CRS 51971

DESHAUN QUANTRELL MURPHY

Appeal by defendant from judgment entered 3 March 2009 by Judge William C. Griffin, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 11 October 2010.

Roy Cooper, Attorney General, by Susannah P. Holloway, Assistant Attorney General, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant-appellant.

MARTIN, Chief Judge.

On 20 May 2007 Officer Ricky Dozier of the Tarboro Police Department observed a vehicle with the front seat passenger not wearing a seat belt. Officer Dozier turned on his blue lights in order to pull over the vehicle. The vehicle continued to travel approximately another 300 yards during which time Officer Dozier observed the passenger "moving around inside the vehicle" "as if he was placing something down beneath him or underneath him or down beside him." After pulling over and approaching the car, Officer Dozier noticed an odor of marijuana. When he asked defendant, who was the passenger, to step out of the vehicle, he saw a plastic bag

with a small amount of marijuana fall between defendant's door and seat. Officer Dozier placed defendant in his patrol vehicle before returning to speak with the driver and owner of the vehicle, Timothy Vines. At that time, Officer Dozier noticed another plastic bag containing a large rock of crack cocaine between the center console and defendant's seat.

Officer Dozier placed Timothy Vines into custody in his patrol car and then searched the vehicle, finding nine additional bags of powder cocaine stuffed down in defendant's seat. Neither Timothy Vines nor defendant admitted that the cocaine belonged to them.

Defendant was charged with failing to wear his seatbelt as a passenger in a motor vehicle, possession with intent to sell or deliver cocaine, possession of cocaine, possession of one half ounce or less of marijuana, and possession of drug paraphernalia.

On 3 March 2009, outside the presence of the jury, defendant was asked if he had spoken with his attorney. He responded, "I don't think I've talked to him like I want to" and that he "didn't know [he] was going here for a plea today." When he was asked "do you want a jury trial?," defendant responded, "[y]eah." The following discussion then took place:

> The Court: Well, I got a jury outside, waiting out there in the hall to try this case. Do you want to do that?
>
> Mr. Murphy: Yeah.
>
> The Court: You do.
>
> Mr. Murphy: Yes, but I need to talk to [my attorney].
>
> The Court: Why?

Mr. Murphy: Is there a plea --

The Court: You want to plead guilty. Is that what you want to do?

Mr. Murphy: Sir.

The Court: Do you want to plead guilty?

Mr. Simmons [defendant's attorney]: To paraphernalia --

The Court: To some of the charges, not all of them. Some of --

Mr. Murphy: Yeah, not all of them, but --

The Court: Well, I think that your lawyer I think Mr. Simmons and the state agree upon some of the charges but not all of them. Is that what you want to do?

Mr. Simmons: Judge, what we're talking about doing is pleading guilty to some of them and then having a trial on the other ones.

The Court: Well, we're not going to do that.

Mr. Simmons: Okay.

The Court: We're going to have a trial. We're going to trial [sic] all of them. So the court will have a free hand based on the evidence at the end of this to do whatever the court thinks is appropriate.

Mr. Simmons: Judge, I think he's entitled to plead guilty to certain charges.

The Court: I can reject them.

Mr. Simmons: Sir.

The Court: I can reject them.

Mr. Simmons: Okay.

The Court: You're not going to dismiss any of them.

The State: No, sir.

The Court: Well, why don't we just try all of them then.

Mr. Simmons: Because he says he's guilty of some of them.

The Court: Well, he can take the stand and admit them.

Mr. Simmons: Sir.

The Court: He can take the stand and admit--

Mr. Simmons: Well, he may choose --

The Court: I misunderstood you folks. I thought he wanted to plead guilty as part of a plea arrangement.

Mr. Simmons: No sir, I apologize. He says he's guilty of some of the charges, but not the other ones.

The Court: I just as soon try and do all of them. [sic]

Mr. Simmons: Well, Judge, may I -- I'd like to be able to tell the jury that he admits to some part of them.

The Court: Do you want him to do that? Do you want him to tell the jury you're guilty of some of them?

Mr. Murphy: I mean, the seat belt- I'm guilty of the seat belt.

The Court: Seat belt. We're not even trying no seat belt. This is a murder court. We're not fooling with no seat belt. I can tell you that right now. A seat belt is not a crime to start with. It's an infraction and has no business up here.
Bring the jury -- let's quit fooling around and try the case. Then the court can do what it wants to when we get through. I'll give him some stakes to play for, Mr. Simmons. He wants to play games. I can play them. Fetch the jury.

The jury returned and the trial commenced with the judge briefly instructing the jury that "Mr. Murphy is here because he's been accused of possession with intent to sell and deliver cocaine, possession of cocaine, possession of marijuana, [and] possession of drug paraphernalia. He denies the charges. He says he's not guilty."

At trial, Officer Dozier testified as to the circumstances of the stop. The SBI laboratory report was admitted into evidence pursuant to a stipulation that the results of the SBI examination were both true and accurate. The report stated that "the white powder was cocaine hydrochloride weighing 5.9 grams and that the tan solid was cocaine base weighing 2.0 grams." Officer Dozier also testified over objection that "[u]sually, . . . crack rocks [in an] individual bag like this is [sic] used mainly for individual use. But when you locate them [in] separate bags at least three or more it's usually for sale, in my opinion. It's not for their personal use."

Officer Dozier was then asked, without objection, if he knew what happened with Timothy Vines' case. He answered, "[f]rom what I was told, that he was going to take a plea to possession of marijuana to testify against Mr. Murphy." Later it was disclosed that Timothy Vines was killed in a car accident prior to trial. Officer Dozier also testified that $282 was seized from defendant in denominations of twenties, fives, and ones.

The defendant presented no evidence. The trial court granted the defendant's motion to dismiss the charge of

possession of drug paraphernalia. The jury found defendant guilty of possession of less than half an ounce of marijuana and guilty of possession with intent to sell or distribute cocaine. The lesser included simple possession of cocaine charge was dismissed. The State also dismissed the seatbelt violation.

At sentencing, defendant's attorney informed the trial judge that while defendant had "a few things" on his record, he only had one prior felony, he had moved back in with his mother, and had a "big family support system." He informed the trial judge that defendant had never been on probation before and asked that it be considered. Defendant made a statement to the court, denying his culpability and explaining that he "guess[ed he] was riding with the wrong person at the wrong time."

The trial judge noted that defendant had a prior conviction level of III and then stated that he "noticed that [defendant had] been convicted of resisting arrest more than one time[.]" The trial judge also clarified that the defendant's convictions were for a class H felony and a class III misdemeanor. The trial court sentenced defendant to a minimum of ten and maximum of twelve months in the custody of the North Carolina Department of Correction for the possession with intent to sell or deliver cocaine felony conviction and twenty days for the misdemeanor marijuana conviction. The two sentences were ordered to be served consecutively.

Defendant appeals, raising five issues: that the trial court (I) erred in rejecting a guilty plea by the defendant, (II) erred by allowing Officer Dozier to testify as to whether the amount of cocaine found with defendant was for sale or personal use, (III) plainly erred by allowing Officer Dozier to testify as to how Timothy Vines planned to handle his charges, (IV) plainly erred by instructing the jury on the law of acting in concert, and (V) punished defendant for trying his case. We find no prejudicial error in his trial or sentence.

I.

Defendant argues that he "tried to plead guilty to the offense of possession of drug paraphernalia," was not permitted to by the trial court, and therefore is entitled to a new trial. It is unclear whether that was in fact defendant's intent. In fact, defendant stated he "didn't know [he] was going here for a plea today." When asked whether he wanted his attorney to "tell [the] jury [he was] guilty of some of [his charges,]" his attorney mentioned the paraphernalia charge but defendant asserted only that he was "guilty of the seat belt." However, even assuming that defendant did in fact attempt to plead guilty to the paraphernalia charge and not only the seat belt charge, defendant's argument fails.

Defendant argues that by not accepting his plea, the trial court violated his constitutional and statutory rights so that he had "to decide whether to exercise his right to remain silent . . . or take the stand to admit those offenses for which he was

guilty, but unnecessarily expose himself to cross-examination . . . ." Defendant's contentions that this rises to the level of a constitutional violation are without merit. *See McGautha v. California*, 402 U.S. 183, 213, 28 L. Ed. 2d 711, 730 (1971) ("It does no violence to the privilege [against compelled self-incrimination] that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case."), *overruled on other grounds sub nom. Crampton v. Ohio*, 408 U.S. 941, 33 L. Ed. 2d 765 (1972).

North Carolina does however have a statute which addresses the acceptance of pleas:

> If the parties have entered a plea arrangement relating to the disposition of charges in which the prosecutor has not agreed to make any recommendations concerning sentence, . . . [t]he judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea.

N.C. Gen. Stat. § 15A-1023(c) (2009). However, in light of the circumstances of this case, it is not clear whether there was a plea arrangement between defendant and the State at the time of trial so that N.C. G.S. § 15A-1023(c) applies. Putting aside the parties' arguments on that point, and assuming *arguendo* that the statute does apply, we conclude that any statutory error was harmless. N.C.G.S. § 15A-1443(a) outlines the rule for when a statutory error is prejudicial:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the

> error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

Here, both the seatbelt and paraphernalia charges were dismissed so defendant could not have been prejudiced.

II.

Defendant next argues that the trial court erred when it permitted the testimony by Officer Dozier that "when you locate them separate bags at least three or more it's usually for sale, in my opinion. It's not for their personal use." Defendant contends this testimony was inadmissible lay opinion testimony. We disagree.

When reviewing a trial court's admission of opinion testimony by a lay witness, this Court reviews for abuse of discretion. *State v. Buie*, 194 N.C. App. 725, 730, 671 S.E.2d 351, 354 (citing *State v. Llamas-Hernandez*, __ N.C. App. __, __, 659 S.E.2d 79, 81 (2008)), *review denied and dismissed*, 363 N.C. 375, 679 S.E.2d 135 (2009). "[O]pinion testimony from a lay witness is permitted when it is 'rationally based on the perception of the witness' and is helpful to the jury. As long as the lay witness has a basis of personal knowledge for his opinion, the evidence is admissible." *State v. Hargrave*, __ N.C. App. __, __, 680 S.E.2d 254, 258 (2009) (citing *State v. Bunch*, 104 N.C. App. 106, 110, 408 S.E.2d 191, 194 (1991)).

Defendant argues that Officer Dozier did not have the requisite experience or knowledge to form his opinion as he had not received any specialized training in cocaine. We disagree. Officer Dozier had been a police officer for eight years and had been involved in approximately 125 to 130 drug transactions or arrests. As such, there was no abuse of discretion in permitting Officer Dozier to testify that the amount and packaging of the cocaine seized is "not for . . . personal use." *See also id.* (holding that an officer can testify as to whether substances appear to be packaged for sale or personal use).

III.

Defendant next argues that Officer Dozier's testimony regarding defendant's deceased co-defendant Timothy Vines' intentions as to how to deal with his criminal case was inadmissible hearsay. We agree that the statement was hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c). Defendant however failed to object at trial to this hearsay testimony. "Where, as here, a criminal defendant fails to object to the admission of certain evidence, the plain error analysis . . . is the applicable standard of review." *State v. Ridgeway*, 137 N.C. App. 144, 147, 526 S.E.2d 682, 685 (2000). Defendant does not meet his burden to demonstrate plain error.

"Under the plain error standard of review, defendant has the burden of showing: '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of

a fair trial.'" *State v. Wilson*, __ N.C. App. __ , __, 691 S.E.2d 734, 738 (2010) (quoting *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135, *cert. denied*, 543 U.S. 1023, 160 L. Ed. 2d 500 (2004)). "The plain error rule applies only in truly exceptional cases." *Id.* (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

Defendant contends this is "such an exceptional case" and that, but for this error, there was a "substantial likelihood" the jury would have acquitted him. In his reply brief, defendant expands upon this assertion by stating, without citing any authority, "[w]here unreliable hearsay testimony is offered to rebut a defendant's defense to the charges against him, it must be considered plain error." He concludes that there is a "reasonable likelihood" that the jury would have ruled differently on one or more of the charges against him without this evidence.

First, we note that simply asserting that there was a "substantial" or "reasonable" likelihood that a jury would have ruled differently falls below defendant's required burden to show "a different result *probably* would have been reached but for the error." *Wilson*, __ N.C. App. at __, 691 S.E.2d at 738 (emphasis added). The jury was presented other evidence which belies defendant's assertion that there was even a "substantial" or "reasonable" likelihood that the jury would have ruled differently. Officer Dozier testified that once he had activated his blue lights, the vehicle proceeded on another approximately

300 yards and during this time, the defendant "was doing a lot of movement as if he was placing something down beneath him or underneath him or down beside him." When Officer Dozier opened defendant's door, a plastic bag containing marijuana fell from between the door and the defendant's seat. Officer Dozier also found a bag containing cocaine between the defendant's seat and the center console and nine separately-packaged bags of powder cocaine stuffed further down in the defendant's seat. Additionally, defendant was found with large amounts of cash in small denominations.

In light of this ample additional evidence supporting the jury's verdict, we hold that defendant has not met his burden to show that Officer Dozier's hearsay statement was plain error. *See id.* ("[T]he appellate court must determine that the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant.") (quoting *Walker*, 316 N.C. at 39, 340 S.E.2d at 83).

IV.

Defendant next challenges the trial court's jury instruction on the law of acting in concert. Defendant argues that this amounted to plain error because the jury could have convicted defendant believing that Timothy Vines alone possessed the marijuana or cocaine. We disagree.

"Before the court can instruct the jury on the doctrine of acting in concert, the State must present evidence tending to show two factors: (1) that defendant was present at the scene of

the crime, and (2) that he acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Robinson*, 83 N.C. App. 146, 148, 349 S.E.2d 317, 319 (1986) (citing *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979)). We agree with defendant that there was no evidence presented to support this second factor and that therefore the instruction was given in error.

Defendant however failed to object to the jury instructions at trial; therefore, his argument will be reviewed for plain error only. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). The trial court's decision to give the instruction will only be overturned under plain error review when "the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Id.* When reviewing the jury instruction for plain error the instruction must be reviewed as a whole, in its entirety. *Id.*

Turning then to the entire relevant portion of the jury instruction, the trial court instructed the jury:

> for a person to be guilty of a crime it is not necessary that he personally do all the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit the possessing cocaine and intending to sell or deliver the cocaine each of them if actually or constructively present are guilty of that crime if the other person commits the crime. . . . And, thus, if you find from the evidence and beyond a reasonable doubt that on the occasion alleged, the defendant acted either by himself or together with Timothy Vines knowingly possessed cocaine and intended to

> sell and deliver it, it would be your duty to return a verdict of guilty of possessing cocaine with intent to sell and deliver it.
>
> . . ..
>
> Defendant is also accused of possessing marijuana. In order for you to find the defendant guilty of possession of marijuana, the state must prove beyond a reasonable doubt that he knowingly possessed marijuana. Marijuana is a controlled substance. That a person possesses marijuana when he is aware of its presence and has either by himself or together with others both the power and intent to control the disposition or use of that substance.
>
> . . ..
>
> Also, applying here is the doctrine that if a person–for a person to be guilty of a crime it is not necessary that he personally do all the acts necessary to constitute the crime. If two or more person [sic] join in a common purpose to possess marijuana, each of them if actually or constructively present is guilty of possessing marijuana if the other person commits the crime. And, thus, if you find from the evidence and beyond a reasonable doubt that on the occasion alleged, the defendant either by himself or together with Timothy Vines possessed marijuana, it you would be your duty to return a verdict of guilty.

The trial court, by instructing the jury that defendant could be found guilty if he "either by himself or together with Timothy Vines" committed a crime, did not allow for the possibility suggested by defendant: that the jury thought that Timothy Vines alone possessed the drugs and that defendant was therefore guilty because he was present. Rather, when viewed in their entirety, the trial court's instructions to the jury were clear that defendant could be convicted if he either possessed

the cocaine and marijuana alone or with Timothy Vines. This does not rise to the level of plain error.

V.

Finally, defendant challenges his sentence, arguing that the trial court violated his constitutional rights by punishing him for trying his case. While acknowledging that "[a] sentence within statutory limits is 'presumed to be regular,'" *State v. Peterson*, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002) (quoting *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977)), defendant argues that this is such a case where the trial court considered an improper matter in determining the severity of the sentence and therefore the presumption of regularity should be overcome. *See id.* We disagree.

The extent to which a trial court imposed a sentence based upon an improper consideration is a question of law subject to *de novo* review. *State v. Pinkerton*, __ N.C. App. __, __, 697 S.E.2d 1, 7 (citing *State v. Swinney*, 271 N.C. 130, 133, 155 S.E.2d 545, 548 (1967)), *writ allowed by*, __ N.C. __, __ S.E.2d __ (No. 321A10) (Aug 18, 2010). As a general proposition, however, there must be an "'express indication of improper motivation.'" *State v. Gantt*, 161 N.C. App. 265, 272, 588 S.E.2d 893, 898 (2003) (quoting *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987)), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004).

Defendant bases his argument on the statements the trial judge made prior to the trial starting, notably: "Bring the jury – let's quit fooling around and try the case. Then the court can

do what it wants to when we get through. I'll give him some stakes to play for, Mr. Simmons. He wants to play games. I can play them. Fetch the jury."

The statements made in this case do not rise to the level of the statements our courts have held to be improper considerations of a defendant's exercise of his right to a jury trial. *Cf. State v. Cannon*, 326 N.C. 37, 38, 387 S.E.2d 450, 451 (1990) (holding judge's statement "that if defendants were convicted he would give them the maximum sentence" was improper); *Boone*, 293 N.C. at 712, 239 S.E.2d at 465 (holding improper judge's statement that he would be compelled to give the defendant an active sentence due to the fact that the defendant had pled not guilty and the jury had returned a verdict of guilty as charged); *State v. Haymond*, __ N.C. App. __, __, 691 S.E.2d 108, 124 (2010) (holding that judge's statement that "I'm just telling you up front that the offer the State made is probably the best thing" and, after the jury returned a guilty verdict, judge's reminder to defendant "I told you that the best offer you're gonna get was that ten-year thing, you know" were improper considerations of defendant's right to a jury trial); *State v. Hueto*, 195 N.C. App. 67, 77-78, 671 S.E.2d 62, 69 (2009) (holding improper judge's statement that if the defendant proceeded with a jury trial then he would "not be able to give [the defendant] the help that [he could] probably give [the defendant] at this point" and made the inaccurate statement that "if [the jury finds] you guilty of the charges . . . it will compel me to give you more than a single

B-1 sentence, and . . . to give you at least two . . . and maybe more"); *Peterson*, 154 N.C. App. at 516-17, 571 S.E.2d at 884 (holding improper judge's statement that the defendant tried to be a "con artist" with the jury, "rolled the dice in a high stakes game with the jury, and it's very apparent that [he] lost that gamble," and the evidence of guilt was "such that any rational person would never have rolled the dice and asked for a jury trial"); *State v. Pavone*, 104 N.C. App. 442, 446, 410 S.E.2d 1, 3 (1991) (holding improper judge's statement during sentencing noting the prior chance to enter into a plea agreement and told the defendant "that having moved through the jury process and having been convicted, it is a matter in which [he was] in a different posture").

While the trial judge's pre-trial statements may have been improvident, the record does not reflect any improper motivation. Rather, the judge noted defendant's prior conviction level of III and that defendant had been convicted of resisting arrest more than one time. He asked if this time the "[s]ame kind of stuff [was] going on?" He also clarified that defendant's convictions were for a class H felony and a class III misdemeanor. The judge never mentioned the pre-trial discussion surrounding the possibility of pleading guilty on some charges. He never mentioned the fact that defendant had gone to trial at all.

We cannot, under the facts of this case, say that defendant was prejudiced or more severely punished because he exercised his constitutional right to trial by jury. In our opinion, the

evidence in the case in combination with the defendant's prior record level and the fact that he had previous convictions for resisting arrest justified the sentence imposed. As such, this Court finds that defendant's final argument is without merit. *See Johnson*, 320 N.C. at 753, 360 S.E.2d at 681; *State v. Bright*, 301 N.C. 243, 262, 271 S.E.2d 368, 380 (1980); *State v. Tice*, 191 N.C. App. 506, 511-16, 664 S.E.2d 368, 372-75 (2008).

No prejudicial error.

Judges STEPHENS and STROUD concur.

Report per Rule 30(e).