

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA13-145  
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

STATE OF NORTH CAROLINA

v. Cleveland County  
Nos. 10 CRS 2476-78  
10 CRS 51931-33

SHERMAN LAMONT ADDISON,  
Defendant.

Appeal by defendant from judgment entered 15 August 2012 by Judge Robert T. Sumner in Cleveland County Superior Court. Heard in the Court of Appeals 29 October 2013.

*Attorney General Roy Cooper, by Assistant Attorney General Kenneth A. Sack, for the State.*

*Brock, Payne & Meece, P.A., by C. Scott Holmes, for defendant-appellant.*

GEER, Judge.

Defendant appeals from a judgment entered upon his convictions of three counts of possession with intent to sell cocaine, three counts of sale of cocaine, and attaining habitual felon status. Defendant argues on appeal that the trial court plainly erred in failing to repeat its instructions regarding the elements of each offense for each identical count. We hold

that the trial court's instructions were sufficient, and no plain error occurred.

#### Facts

The State's evidence tended to show that in 2010, a confidential informant advised the Cleveland County Sheriff's Office that he could purchase crack cocaine from defendant. Based on this information, the Sheriff's Office set up three separate controlled buys from defendant on 15 February 2010, 23 February 2010, and 16 April 2010. As a result, defendant was charged with six offenses: three counts of possession with intent to manufacture, sell, and deliver cocaine and three counts of sale and delivery of cocaine. Defendant was also indicted for being a habitual felon.

During the trial, the State introduced video recordings of the 15 February 2010 and 23 February 2010 buys, as well as an audio recording of the 16 April 2010 buy. The informant gave detailed testimony regarding each transaction. In the trial court's charge to the jury, the court gave only one instruction on possession with intent to sell cocaine and only one instruction on sale of cocaine, despite defendant's having been charged with three counts of each offense. The jury was then provided with six verdict sheets, one for each of the six charged offenses. The jury found defendant guilty of each of

the six offenses. Thereafter, defendant entered a plea of guilty to being a habitual felon. The trial court sentenced defendant to a consolidated term of 110 to 141 months imprisonment.

#### Discussion

On appeal, defendant argues that the trial court erred by failing to instruct the jury on each offense separately. Defendant did not object at trial, but contends that the trial court's failure to "fully and independently set forth the instructions for each of the separate counts of possession with intent to sell and deliver, and selling cocaine," as well as its failure to take certain "steps to cure the error," constituted plain error.

In order to establish plain error, 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). An error is fundamental if, after a review of the record as a whole, the error "'had a probable impact on the jury's finding that the defendant was guilty.'" *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). However, "plain error review should be used sparingly, only in exceptional circumstances . . . [and] 'does not mean that every failure to give a proper instruction mandates reversal regardless of the

defendant's failure to object at trial.'" *Id.* at 517, 723 S.E.2d at 333 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). We conclude that defendant has not met his burden of proving that there was a fundamental error at trial.

This Court has previously declined to find plain error under facts similar to those in this case. In *State v. Barr*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 721 S.E.2d 395, 399 (2012), the defendant was charged with three counts of unlawfully accessing a government computer for a fraudulent purpose and two counts of aiding and abetting the unlawful access of a government computer. On appeal, the defendant argued that she was entitled to a new trial because it was plain error for the trial court to give a "'generic instruction to the jury'" and not instruct the jury on each element of each charge. *Id.* at \_\_\_, 721 S.E.2d at 405, 406.

In holding that the trial court had not committed plain error, this Court noted that the trial court provided the jury with a copy of the instructions and with separate verdict sheets "clearly identifying the separate charges." *Id.* at \_\_\_, 721 S.E.2d at 406. This Court explained that

the dispositive point on this issue is that Defendant has failed to explain in her brief how any alleged error by the trial court in categorizing the jury instructions prejudiced her trial. Because Defendant bears the burden of showing that an error

arose to the level of plain error, and because Defendant failed to meet this burden, we conclude the trial court did not commit plain error in its jury instructions on the elements of the offenses in this case.

*Id.* at \_\_\_\_, 721 S.E.2d at 406 (internal citation omitted). The Court also noted that "this Court has held that similar jury instructions, categorizing multiple identical charges in one instruction, did not constitute plain error." *Id.* at \_\_\_\_, 721 S.E.2d at 406 (citing *State v. Evans*, 162 N.C. App. 540, 544, 591 S.E.2d 564, 566 (2004)).

Here, as in *Barr*, the trial court provided the jury with separate verdict sheets "clearly identifying the separate charges." See *id.* at \_\_\_\_, 721 S.E.2d at 406. It is not apparent from the record in this case whether the trial court provided the jury with a copy of the instructions. However, the court instructed the jury that "a unanimous verdict as to each charge . . . should [be] indicate[d] on the verdict form" and provided the jury with a separate verdict sheet for each of the six charged offenses. Like *Barr*, the dispositive issue here is that defendant has failed to explain how the trial court's instructions prejudiced his trial. See *id.* at \_\_\_\_, 721 S.E.2d at 406. After reviewing the record, we cannot see how the trial court's failure to repeat the instructions three times for the exact same offense "'had a probable impact on the jury's finding

that the defendant was guilty.'" *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). The State produced overwhelming evidence of defendant's guilt, including detailed testimony from the informant regarding each of the three controlled buy operations and accompanying video and/or audio recordings that were made during each transaction. Accordingly, defendant has failed to meet his burden of demonstrating plain error.

No error.

Judges ERVIN and DILLON concur.

Report per Rule 30(e).