NO. COA14-318

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Catawba County
Nos. 11 CRS 054162, 12 CRS 004054

KARSTEN EUGENE TURNER,
Defendant.

Appeal by defendant from judgment entered 21 August 2013 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 26 August 2013.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth A. Fisher, for the State.

M. Alexander Charns for defendant-appellant.

BRYANT, Judge.

Where defendant's indictment and judgment were for the same offense and a deviation in the trial court's jury instruction as to that offense was not significant, defendant cannot show plain error. The trial court did not err in describing a reasonable doubt as a "fair doubt" in its preliminary jury instruction where the entirety of the trial court's jury charge correctly stated the definition of reasonable doubt to the jury. Where

defendant cannot show that his attorney's failure to object to a jury instruction would have resulted in a different outcome at trial, defendant's ineffective assistance of counsel claim will be denied.

On 23 April 2012, defendant Karsten Eugene Turner was indicted on one count each of possession with intent to sell or deliver cocaine and resisting a public officer. On the same date, defendant was separately indicted for being an habitual felon. The charges came on for trial during the 19 August 2013 session of Catawba County Superior Court, the Honorable Nathaniel J. Poovey, Judge presiding. The State's evidence presented during the trial tended to show the following.

On 11 July 2011, Investigator Wes Gardin of the Hickory Police Department conducted surveillance at 442 10th Avenue Drive in Hickory. The surveillance was set-up based on information that a gold-colored Honda Accord would arrive that day at that location for a drug transaction. Shortly after beginning his surveillance, Investigator Gardin saw a gold-colored Honda Accord arrive and park at 420 10th Avenue; Investigator Gardin recognized the driver of the car as defendant.

Investigator Gardin directed a marked unit, operated by Officer Killian and Sergeant Kerley, to pull in behind the Honda and activate its lights to conduct a narcotics investigation. Upon the marked unit activating its lights, defendant exited the car, leaving the driver's side door open, and took off running. Investigator Gardin and Officer Killian engaged in a foot pursuit of defendant; despite ordering defendant to halt, the chase did not end until defendant tripped and fell. As a passenger was observed in defendant's Honda, Sergeant Kerley remained with the car during the pursuit of defendant.

After capturing defendant, the officers returned to the Honda and saw through the open driver's side door a baggie of crack cocaine in the driver's seat. Upon searching the Honda, the officers found a marijuana joint in the center console and a second baggie of crack cocaine in the glove box. Investigator Gardin testified that the baggie found on the driver's seat contained about 5—6 rocks of cocaine, while the baggie found in the glove box contained over 200 rocks of cocaine. The officer also found about $80.00 cash in the driver's seat of the Honda.

The passenger in the Honda was identified as Victor Wilfong. Defendant and Wilfong were arrested and transported to the Hickory Police Department for processing.

While being held at the Hickory Police Department, defendant voluntarily made a statement to Investigator Gardin that "it's all mine." Investigator Gardin testified that he took defendant's statement "to mean that all the controlled substances found in that vehicle belonged to [defendant]."

On 21 August 2013, a jury convicted defendant of possession with intent to sell or deliver cocaine and resisting a public officer. The trial court found defendant had a prior record level of II, and defendant stipulated to being an habitual felon. After finding that defendant had shown three mitigating factors, the trial court sentenced defendant to 50 to 69 months imprisonment. Defendant appeals.

On appeal, defendant argues that the trial court erred (I) in holding that it had jurisdiction to enter judgment against defendant for a charge not alleged in the indictment, and (II) by instructing the jury that a reasonable doubt was a "fair doubt." Defendant further argues (III) that he received ineffective assistance of counsel.

I.

Defendant argues that the trial court erred in holding that it had jurisdiction to enter judgment against him for a charge

not alleged in the indictment. Specifically, defendant contends the trial court committed a jurisdictional error because it instructed the jury on the offense of possession of cocaine with intent to manufacture, sell, or deliver, rather than the offense for which defendant was indicted, possession of cocaine with intent to sell or deliver, and that as a result, "[t]he State's indictment was fatally defective here as to manufacturing."

However, defendant failed to object to the indictment and failed to object to the jury instruction until after the jury returned its verdict. Pursuant to North Carolina Rules of Appellate Procedure, Rule 10, "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict . . . ." N.C. R. App. P. 10(a)(2) (2013). As such, this Court reviews unpreserved instructional and evidentiary issues for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted).

> [T]he plain error rule . . . is always to be applied cautiously and 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 instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

Id. at 516—17, 723 S.E.2d at 333 (citations and quotations omitted).

Defendant was indicted for one count of possession of cocaine with intent to sell or deliver. In its jury instructions, the trial court instructed the jury on the offense of possession of cocaine with intent to manufacture, sell, or deliver:

> The defendant has been charged with possessing cocaine with the intent to manufacture, sell or deliver it. For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant knowingly possessed cocaine. Cocaine is a controlled substance. A person possesses cocaine 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.
>
> And, second, that the defendant intended to manufacture, sell or deliver the cocaine. Intent is seldom, if ever, provable by direct evidence. It must ordinarily be

> proved by circumstances from which it may be inferred.

Defendant did not object to this instruction during either the jury charge conference or when the trial court gave its instructions to the jury. In fact, the discrepancy between the indictment and the jury instructions were discovered only after the jury returned its verdict finding defendant guilty of possession of cocaine with intent to manufacture, sell, or deliver. After considering the arguments of counsel, the trial court held that the use of the word "manufacture" in the jury instructions was harmless error, noting that the charge required the jury to find only two elements, possession and intent, and that "[t]here wasn't any particular evidence also regarding what constitutes manufacture, what constitutes a sale or what constitutes delivery[]" to affect the jury's finding as to the element of intent. The trial court then sentenced defendant in the mitigated range for the offense for which defendant was indicted: possession of cocaine with intent to sell or deliver.

We agree with the trial court that the use of the word "manufacture" in its jury instructions was harmless error. "[A]n indictment is insufficient to support a conviction if it does not conform to material elements in the jury charge required to support the conviction." *State v. Bollinger*, 192

N.C. App. 241, 245, 665 S.E.2d 136, 139 (2008) (citation omitted). Likewise, "an indictment is sufficient if it charges the substance of the offense, puts the defendant on notice of the crime, and alleges all essential elements of the crime." *Id.* at 246, 665 S.E.2d at 139 (citation omitted). North Carolina General Statutes, section 90-95(a)(1), holds that "it is unlawful for any person . . . [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance[.]" N.C. Gen. Stat. § 90-95(a)(1) (2013). It is well-established that there are two essential elements of this charge: possession and intent. *See State v. Hyatt*, 98 N.C. App. 214, 216, 390 S.E.2d 355, 357 (1990) (citation and quotation omitted).

Defendant was charged with possession of cocaine with intent to sell or deliver. N.C.G.S. § 90-95(a)(1) only requires the jury to find one element of intent: an intent to sell, deliver *or* manufacture. N.C.G.S. § 90-95(a)(1) (emphasis added). The gravamen of the offense of possession with intent to sell or deliver is possession and intent. As long as defendant possessed the cocaine with intent — whether to sell, deliver, or manufacture — he has committed the statutory offense of possession of cocaine with intent to sell or deliver. *See*

State v. Moore, 327 N.C. 378, 383, 395 S.E.2d 124, 127 (1990) (citations omitted). Therefore, even assuming *arguendo* the trial court erred in instructing the jury as to possession of cocaine with intent to manufacture, as well as sell or deliver, this error did not rise to the level of plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 ("For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." (citations and quotation omitted)). The record shows that the charge of possession with intent to sell or deliver was supported by the evidence, as two baggies of crack cocaine rocks and cash were found in defendant's car, with the cash and smaller baggie of crack cocaine being found in the driver's seat where defendant had been sitting. As such, defendant cannot show plain error where he received a mitigated sentence for the proper, indicted charge of possession of cocaine with intent to sell or deliver. Accordingly, defendant's first argument is overruled.

II.

Defendant next argues that the trial court erred by instructing the jury that a reasonable doubt was a "fair doubt." We disagree.

As defendant failed to object to the trial court's jury instruction that a reasonable doubt was a "fair doubt," we review defendant's second issue on appeal for plain error. *See Lawrence,* 365 N.C. at 516, 723 S.E.2d at 333.

Defendant contends the trial court erred in instructing the jury that a reasonable doubt was a "fair doubt."

"[A]s a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." *State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (citation and quotation omitted).

> The charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the jury to have considered it[]. . . . It will be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct. If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal.

Id. at 634, 548 S.E.2d at 505 (citations and quotations omitted). "If, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled

or misinformed, any exception to it will not be sustained even though the instruction could have been more aptly worded." *State v. Maniego*, 163 N.C. App. 676, 685, 594 S.E.2d 242, 248 (2004) (citation omitted).

The jury instruction of which defendant complains was a preliminary instruction given by the trial court to prospective jurors prior to the commencement of jury selection, as opposed to final instructions given after the close of evidence at trial. The trial court, in its preliminary instruction, stated the following:

> A reasonable doubt is not a vain nor fanciful doubt. For most things that relate to human affairs are open to some possible or imaginary doubt. A reasonable doubt is a fair doubt based upon reason or common sense arising out of some or all the evidence that has been presented or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

Thereafter, a petit jury was selected to hear the evidence in the case. After all the evidence was presented, the trial court instructed the jury as to the definition of reasonable doubt:

> A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that

> fully satisfies or entirely convinces you of the defendant's guilt.

Defendant's argument that the trial court erred in its jury instruction on reasonable doubt by describing it as a "fair doubt" lacks merit. It is clear from a review of the trial court's two statements of the reasonable doubt instruction that although the trial court did deviate from the pattern instruction by using the term "fair doubt" in its preliminary jury instruction to prospective jurors, the charge as a whole was correct. *See State v. James*, 342 N.C. 589, 597—98, 466 S.E.2d 710, 715—16 (1996) (the defendant was not prejudiced where the trial court gave an appropriate jury instruction at the close of evidence despite giving an allegedly erroneous preliminary instruction); *State v. Hunt*, 339 N.C. 622, 643—44, 457 S.E.2d 276, 288—89 (1994) (holding that the trial court's jury instruction, which defined a reasonable doubt as "a fair doubt," was not "constitutionally deficient" and did not impermissibly alter the context of the jury instruction); *see also State v. Flowers*,[1] No. COA01-1024, 2002 N.C. App. LEXIS 2208, at *4—6 (July 16, 2002) (the trial court did not commit plain error where it gave an erroneous preliminary jury

[1] We note that although *Flowers* and *McElvine* are unpublished opinions of this Court, both cases are on point with the instant case.

instruction to prospective jurors but gave the proper jury instruction at the close of evidence at trial); *State v. McElvine*, No. COA01-677, 2002 N.C. App. LEXIS 2124, at *12 (May 21, 2002) (finding the defendant could not show plain error where, "[w]hen taking the entire instruction as a whole and in context, the trial court properly instructed the prospective jurors on the presumption of innocence and the burden of proof on the State. Thus, we find the trial court did not err in its preliminary instructions to the jury."). Defendant's argument is, therefore, overruled.

III.

Defendant also argues that he received ineffective assistance of counsel. We disagree.

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citations omitted).

> It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct

> appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant[s] to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122—23, 604 S.E.2d 850, 881 (2004) (citations and quotation omitted).

> Criminal defendants are entitled to the effective assistance of counsel. When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. In order to meet this burden [the] defendant must satisfy a two part test.
>
> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.
>
> In considering [ineffective assistance of counsel] claims, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

State v. Boozer, 210 N.C. App. 371, 382—83, 707 S.E.2d 756, 765 (2011) (citations and quotation omitted), *disc. review denied*, 365 N.C. 543, 720 S.E.2d 667 (2012).

Defendant contends he received ineffective assistance of counsel because his attorney failed to object to the trial court's jury instruction on possession of cocaine with intent to manufacture, sell, or deliver. Because the record reveals no further investigation is required, we review defendant's ineffective assistance of counsel claim.

Defendant argues that he received ineffective assistance of counsel because, by not objecting to the trial court's jury instruction on possession of cocaine with intent to manufacture, sell, or deliver, defendant's attorney caused defendant to be convicted of an offense for which defendant was not indicted. We disagree for, as discussed in *Issue I*, the trial court's error did not amount to plain error. Further, defendant did not challenge his indictment (for possession of cocaine with intent to sell or deliver), and the trial court sentenced defendant in the mitigating range for the indicted offense. As such, defendant's ineffective assistance of counsel claim lacks merit.

Moreover, assuming *arguendo* that defendant's attorney was deficient in failing to object to the trial court's jury

instructions, defendant has failed to show how his attorney's actions amounted to prejudicial error. "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) (citation omitted). Here, where defendant's car was stopped by officers acting on a tip and, in addition to a bag with 5—6 rocks of crack cocaine and cash found on the driver's seat and defendant's voluntary admission that "it's all mine," over 200 rocks of crack cocaine were found in a baggie in defendant's glove box, there was no reasonable probability that a different result would have been reached by the jury. "After examining the record we conclude that there is no reasonable probability that any of the alleged errors of defendant's counsel affected the outcome of the trial." *Id.* at 563, 324 S.E.2d at 249. Accordingly, defendant's argument is overruled, and his claim of ineffective assistance of counsel denied.

No error.

Chief Judge McGEE and Judge STROUD concur.