IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1260

Filed: 18 August 2015

Craven County, Nos. 12 CRS 508-09, 50304, 50323, 13 CRS 1244-45

STATE OF NORTH CAROLINA

v.

AVERY ORLANDO GRAHAM

Appeal by defendant from judgment entered 13 March 2014 by Judge W. Allen Cobb, Jr., in Craven County Superior Court. Heard in the Court of Appeals 5 March 2015.

Roy Cooper, Attorney General, by Steven Armstrong, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by David W. Andrews, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

Avery Orlando Graham ("Defendant") appeals from his convictions for three counts of possession with intent to sell and deliver marijuana, two counts of possession of drug paraphernalia, one count of sale of marijuana, and attaining the status of an habitual felon. On appeal, he contends that the trial court committed plain error by admitting testimony concerning (1) the identity of the person who

purchased marijuana from him; and (2) that individual's guilty plea. After careful review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: In September 2011, the New Bern Police Department ("NBPD") Street Crimes Unit, in conjunction with the NBPD Narcotics Unit, began conducting a surveillance operation in the vicinity of the Craven Terrace Housing Authority Projects on Roundtree Street in New Bern, North Carolina. The operation was focused on the area surrounding Roundtree Street because the NBPD believed the area to be an "open air drug market" — meaning that it was an area where individuals could purchase controlled substances from drug dealers out in the open on streets or sidewalks.

The surveillance operation was supervised by Sergeant David Daniels ("Sergeant Daniels") of the NBPD. Sergeant Daniels described the operational plan for the surveillance of Roundtree Street as follows:

> The objective was for [law enforcement officers] not to make arrests immediately, because it's possible if we made an immediate arrest it would disclose our operation and the activity would not have continued.
>
> So the objective was to observe the activity, make notes, record what we could, and then at a later date make multiple arrests at one time so that we wouldn't cause a problem with the operation.

On 5 November 2011, as part of the ongoing surveillance operation, Detective Barry Bryant ("Detective Bryant") and Corporal Sean Joll ("Corporal Joll") of the NBPD observed Defendant engaging in "hand-to-hand transactions" with various individuals. Corporal Joll explained that "[h]and-to-hand transactions are simply I walk up. I give you an item, you give me an item right back. It's an exchange for something." Detective Bryant saw one such individual — a man identified at trial as Joshue Balcazar ("Balcazar") — hand Defendant cash in exchange for "four items" and then begin walking away from Roundtree Street in the direction of Broad Street. Detective Bryant, upon witnessing this exchange, radioed Detective David Welch ("Detective Welch") and ordered him to stop Balcazar once he had left the area. Corporal Joll videotaped this transaction.[1]

Detective Welch stopped Balcazar and, upon searching his person, discovered four baggies containing a substance later identified as marijuana. Balcazar was arrested for possession of a controlled substance. Defendant was not arrested at that time.

On 28 January 2012, the last day of the surveillance operation, Sergeant Daniels' team executed a series of arrests on persons they had been observing for the previous five months. One of the individuals arrested was Defendant based on the officers' suspicion that he was in possession of, and selling, marijuana. At the time

[1] The recording was inadvertently erased prior to Defendant's trial.

of his arrest, law enforcement officers did not discover any controlled substances or cash on Defendant's person.

On 21 May 2012, Defendant was indicted on charges of (1) two counts of possession with intent to sell and deliver marijuana; (2) sale of marijuana; (3) possession of drug paraphernalia; and (4) attaining the status of an habitual felon. On 14 October 2013, Defendant was indicted by a separate grand jury on additional charges of possession with intent to sell and deliver marijuana, possession of drug paraphernalia, and attaining the status of an habitual felon. A jury trial was held before the Honorable W. Allen Cobb, Jr. in Craven County Superior Court on 10 March 2014.

At trial, Detective Welch testified as follows regarding the circumstances surrounding his arrest of Balcazar:

> Q. Okay. Do you recall encountering an individual by the name of Josue[2] Balcazar?
>
> A. Yes, ma'am.
>
> Q. Okay. Tell us about that.
>
> A. I was a couple blocks away from the area being observed by other officers, and I got a call that a male subject had just left the area after a hand-to-hand transaction, which is consistent with sale of illegal narcotics, and I was asked to stop that individual and check him.
>
> Q. And did you stop that individual and check him?

[2] Balcazar's first name is spelled "Joshue" in the indictment. However, it is spelled "Josue" throughout the trial transcript. Both spellings refer to the same individual.

A. Yes, ma'am.

Q. Were you given a description of that individual?

A. Yes, ma'am.

Q. Okay. And so you stopped that individual, you recall about where it was in the vicinity of Roundtree Street that you stopped that individual?

A. At the was [sic] end of the Roundtree where it hits Broad Street on the other side of [sic] barber shop to be out of view from where he came from.

Q. Why did you want to be out of view from where he came from?

A. We didn't want the people that were doing the sales [sic] see us so they wouldn't know we were watching them.

Q. Okay. So you came in contact with this individual, was he walking?

A. Yes, ma'am.

Q. Okay. And tell us -- don't tell us anything he said to you, but tell us about your encounter with him.

A. He stopped as soon as we pulled my vehicle in front of him. I got out of the vehicle, identified myself as a police officer. I asked him where he was coming from if he had anything on him. He put his hands up in the air.

Q. Okay. And at some point did you get consent to search his person, or did he turn anything over to you? What?

A. He turned around hands above his head and I searched him and recovered four, I believe it was four small bags of marijuana out of his pocket.

> Q. Okay. And based on that did you or any other officer end up charging Mister -- did you determine who he was?
>
> A. Yes, ma'am.
>
> Q. Okay. Was that the Josue Balcazar, or Josue Balcazar?
>
> A. Yes, ma'am.
>
> Q. And did you, or any other officer arrest Mr. Balcazar for the possession?
>
> A. Yes, ma'am.

Balcazar could not be located prior to Defendant's trial and, therefore, did not testify. During his testimony, Detective Bryant stated that Balcazar had pled guilty to the offense of possession of a controlled substance, a charge stemming from the same series of events out of which Defendant's charges arose.

Defendant was convicted by the jury of all charges. He subsequently pled guilty to attaining the status of an habitual felon. The trial court consolidated Defendant's convictions and sentenced him to 146-185 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

Initially, we note that neither of the two issues that Defendant raises on appeal was properly preserved at trial for appellate review due to defense counsel's failure to object to the admission of the testimony at issue. Consequently, we review Defendant's arguments only for plain error. *See* N.C.R. App. P. 10(a)(4) ("In criminal

cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

I. Identification of Balcazar

Defendant's first argument on appeal is that Detective Welch's testimony that Joshue Balcazar was the name of the person who had purchased marijuana from Defendant constituted inadmissible hearsay. Specifically, Defendant contends that (1) the only way Detective Welch could have learned Balcazar's identity was through out-of-court statements that Balcazar made to Detective Welch during his arrest; and (2) Detective Welch's testimony as to Balcazar's name was, therefore, based on hearsay.

Defendant correctly recognizes that the State was required to establish Balcazar's identity at trial in connection with the charge of sale of marijuana because Balcazar was identified in the indictment for that charge as the man to whom Defendant allegedly sold the drugs.

> The law is settled in this state that an indictment for the sale and/or delivery of a controlled substance must accurately name the person to whom the defendant allegedly sold or delivered, if that person is known. A defendant must be convicted, if at all, of the particular offense charged in the indictment. The State's proof must conform to the specific allegations contained in the indictment. If the evidence fails to do so, it is insufficient to convict the defendant of the crime as charged.

State v. Wall, 96 N.C. App. 45, 49, 384 S.E.2d 581, 583 (1989) (internal citations omitted). Therefore, by naming Balcazar in the indictment, the State was required to offer evidence at trial that Balcazar was, in fact, the buyer of the marijuana sold by Defendant.

Under the North Carolina Rules of Evidence, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c); *State v. Carroll*, 356 N.C. 526, 542, 573 S.E.2d 899, 910 (2002), *cert. denied*, 539 U.S. 949, 156 L.Ed.2d 640 (2003). "Hearsay is not admissible except as provided by statute or by these rules." N.C.R. Evid. 802.

The flaw in Defendant's argument is that no evidence was introduced at trial of an actual out-of-court statement that resulted in Detective Welch's ability to identify Balcazar at trial. Therefore, the hearsay rule was not implicated. In identifying Joshue Balcazar as the person to whom Defendant sold the marijuana, Detective Welch did not testify as to any specific statement that was made by Balcazar (or anyone else) during these events. Instead, he simply testified as follows:

> Q. Okay. And based on that did you or any other officer end up charging Mister -- did you determine who he was?
>
> A. Yes, ma'am.
>
> Q. Okay. Was that the Josue Balcazar, or Josue Balcazar?
>
> A. Yes, ma'am.

In light of his inability to show an actual hearsay statement that was offered at trial, Defendant cannot prevail on his argument that the admission of Detective Welch's testimony identifying Balcazar violated the hearsay rule. The record does not disclose how Detective Welch learned Balcazar's identity. Defendant has failed to cite any cases in which North Carolina courts have found a violation of the hearsay rule based on the mere *assumption* that a hearsay statement was made (although not contained in the record). Based on defense counsel's failure to obtain additional testimony from Detective Welch on cross-examination exploring the basis for his identification of Balcazar, we cannot accept Defendant's invitation to assume —

without confirmation in the record — that his testimony was actually based on inadmissible hearsay.

While Defendant attempts to rely on our holding in *Jones v. Allred*, 64 N.C. App. 462, 307 S.E.2d 578 (1983), that case actually demonstrates the invalidity of his argument on this issue. In *Jones*, the plaintiff brought a wrongful death action against three defendants. *Id.* at 463, 307 S.E.2d at 579. The plaintiff alleged that the decedent, who — along with two of the defendants — had been in a car that was driven into a river, was killed as a result of the negligent operation of the vehicle. *Id.* at 464, 307 S.E.2d at 579. The principal issue in the case concerned the identity of the driver at the time of the accident. *Id.* at 463, 307 S.E.2d at 579.

The officer who investigated the accident testified at trial that the defendants had told him that the decedent had been driving the car at the time of the accident, and the plaintiff objected to this testimony on hearsay grounds. *Id.* at 469, 307 S.E.2d at 582. On appeal, we held as follows:

> After telling the jury six different times that [the decedent] was the driver, [the officer] stated, "when I say I made a determination of the driver it is strictly [from] information that I received from the defendants and the defendants only." His testimony, therefore, was hearsay: an out-of-court statement offered for the purpose of proving the truth of the matter asserted therein which probative force depends upon the competency and credibility of some other person not on the witness stand. These statements are inadmissible because they are hearsay and fit within no recognized exception to the hearsay rule, and their admission constitutes reversible error.

Id. (internal citations omitted).

Thus, in *Jones*, the officer, by his own admission, testified at trial as to information he received from out-of-court statements. Here, conversely, Detective Bryant did not testify that he learned Balcazar's name based on an analogous out-of-court statement.

Thus, Defendant has failed to show error at all much less plain error. *See State v. Torain*, 316 N.C. 111, 123, 340 S.E.2d 465, 472 ("Because we hold that there was no error . . . there can be no 'plain error' as contended by the defendant."), *cert. denied*, 479 U.S. 836, 93 L.Ed.2d 77 (1986). Accordingly, this argument is overruled.

II. Testimony Concerning Balcazar's Guilty Plea

Defendant next argues that the trial court plainly erred in allowing Detective Bryant's testimony regarding Balcazar's guilty plea to the possession of a controlled substance charge. We disagree.

It is well established that

> evidence of convictions, guilty pleas, and pleas of nolo contendere of non-testifying co-defendants is inadmissible unless introduced for a legitimate purpose, i.e., used for a purpose other than evidence of the guilt of the defendant on trial. This Court has previously determined that this rule applies equally to evidence that co-defendants were charged and tried.

State v. Batchelor, 157 N.C. App. 421, 430, 579 S.E.2d 422, 429 (internal citations omitted), *disc. review denied*, 357 N.C. 462, 586 S.E.2d 101, 101-02 (2003). The

rationale behind the prohibition of such evidence is "(1) that an individual defendant's guilt must be determined solely on the basis of the evidence presented *against that defendant* and (2) that the introduction of evidence of charges against co-defendants deprives a defendant of the right to cross examination and confrontation[.]" *State v. Gary*, 78 N.C. App. 29, 37, 337 S.E.2d 70, 76 (1985), *disc. review denied*, 316 N.C. 197, 341 S.E.2d 586 (1986).

In the present case, the State elicited the following testimony from Detective Bryant:

> Q. This Balcazar individual, was he arrested?
>
> A. He was arrested.
>
> Q. And since that date his cases have been handled?
>
> A. I believe, I believe he pled guilty to the misdemeanor possession of marijuana.

From this testimony, the jury was allowed to hear that Balcazar (1) was charged with possession of marijuana; and (2) pled guilty to that charge.

While not formally conceding that the introduction of this testimony constituted error, the State in its brief neither attempts to offer any reasons why the above-referenced rule does not apply in this case nor suggests any "legitimate purpose" served by the introduction of this testimony regarding Balcazar's guilty

plea. Instead, the State simply argues that any error resulting from the admission of this testimony would not constitute plain error.

In *Batchelor*, the defendant was charged with, among other offenses, trafficking in cocaine. *Batchelor*, 157 N.C. App. at 423, 579 S.E.2d at 424. On appeal, the defendant argued that the trial court had committed plain error by allowing a detective to testify that his co-defendant had also been charged with trafficking in cocaine, along with several other offenses, and that the charges against the co-defendant were still pending. *Id.* at 430-31, 579 S.E.2d at 429. This Court held that "there was no testimony that [the co-defendant] had been found guilty, pleaded guilty, or pleaded nolo contendere to the charges. It is unlikely that the jury inferred defendant's guilt from the evidence that his co-defendant had been charged with similar offenses. Therefore, defendant is not entitled to a new trial based on this error." *Id.* at 431, 579 S.E.2d at 429.

Similarly, in *State v. Lyles*, 172 N.C. App. 323, 615 S.E.2d 890, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 625 (2005), the defendant was charged with trafficking in cocaine. *Id.* at 324, 615 S.E.2d at 892. Evidence was admitted that his co-defendant had also been charged with that offense. However, there was no evidence offered as to how that charge had been resolved. *Id.* at 329-30, 615 S.E.2d at 895. Relying on *Batchelor*, we held that

> we can find no testimony in the record before us suggesting the co-defendant had been found guilty, pleaded guilty, or

> pleaded nolo contendere. There is nothing to indicate that a jury would have reached a different result had it not been for the admission of the testimony. As a result, the admission of testimony involving the co-defendant, while error, does not rise to the level of plain error.

Id. at 330, 615 S.E.2d at 895.

Implicit in *Batchelor* and *Lyles* is the notion that plain error *could* exist where the jury hears evidence not only that a co-defendant was charged with a similar offense but also that the co-defendant was *convicted* of the offense (by means of a guilty plea or otherwise). Here, the error was more serious than in *Batchelor* or *Lyles* given that instead of merely mentioning that Balcazar had been charged with possession of marijuana, Detective Bryant testified that Balcazar had actually pled guilty to that offense. Nevertheless, we do not believe that Defendant has demonstrated that this error rose to the level of plain error.

We find instructive our Supreme Court's decision in *State v. Moore*, 366 N.C. 100, 726 S.E.2d 168 (2012). In *Moore*, the defendant argued that the admission of testimony by a police officer that the defendant had refused to give a statement to law enforcement officers after invoking his right to remain silent constituted plain error. *Id.* at 109, 726 S.E.2d at 175. This testimony was contained within the following exchange between the prosecutor and the officer:

> Q. And did you arrest [defendant] thereafter?
>
> A. Yes. I went to [defendant's] residence . . . and I took him into custody. Once he was in custody, I read him his

> Miranda Rights, but he refused to talk about the case at that time.
>
> Q. Have you ever spoken to the defendant or any of the other parties in this case since that time?
>
> A. No, I have not.

Id. at 102, 726 S.E.2d at 171.

The Supreme Court found that the admission of this testimony constituted error. *Id.* at 104, 726 S.E.2d at 172. However, the Court determined that because "the prosecutor did not emphasize, capitalize on, or directly elicit [the officer's] prohibited responses . . . the brief, passing nature of the evidence in the context of the entire trial . . . [did] not likely . . . tilt[ ] the scales . . . in the jury's determination of defendant's guilt or innocence" so as to establish plain error. *Id.* at 107, 726 S.E.2d at 174. Noting that "[s]ubstantial evidence of a defendant's guilt is a factor to be considered in determining whether the error was a fundamental error rising to plain error[,]" *id.* at 108, 726 S.E.2d at 174, the Supreme Court concluded as follows:

> In sum, the erroneous admission of [the officer's] testimony was not plain error. The prosecutor did not emphasize, capitalize on, or directly elicit [the officer's] prohibited responses; the prosecutor did not cross-examine defendant about his silence; the jury heard the testimony of all witnesses, including defendant; and the evidence against defendant was substantial and corroborated by the witnesses. For the above reasons, we hold that defendant has not carried his burden, and the admission of [the officer's] testimony referring to defendant's post-*Miranda* exercise of his right to remain silent, although error, was not plain error. Thus, defendant is not entitled to a new

trial on this basis.

Id. at 109, 726 S.E.2d at 175.

While *Moore* involved a different category of improperly admitted officer testimony, we believe its analysis is useful here. In the present case, the prosecutor admittedly elicited the improper testimony when he asked Detective Bryant whether Balcazar's case had been "handled." Notably, however, the record does not suggest that the State sought to further emphasize or capitalize upon the fact that Balcazar had pled guilty to possession of marijuana at any point during the remainder of Defendant's trial. Indeed, nowhere else in the trial transcript is there any additional reference to Balcazar's guilty plea.[3]

Furthermore, our Supreme Court has emphasized that in order for plain error to exist, "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." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation and quotation marks omitted). We cannot agree with Defendant that he has met his burden on this issue.

The evidence against Defendant was overwhelming. Detective Bryant and Corporal Joll witnessed Defendant drop four items into Balcazar's hand and then saw

[3] We observe that the closing arguments were not recorded and, therefore, are not contained in the record on appeal. For this reason, we have no way of knowing whether the State mentioned Balcazar's guilty plea in its closing argument. We do note, however, both that Defendant makes no such contention in his brief and that "[i]t is appellant's duty to ensure that the record is complete." *Morley v. Redden,* 194 N.C. App. 806, 810, 670 S.E.2d 586, 589, *disc. review denied,* 363 N.C. 373, 678 S.E.2d 238 (2009).

Balcazar hand him cash in return. Balcazar was then under constant surveillance until he was stopped shortly thereafter by Detective Welch. Upon searching Balcazar, Detective Welch discovered four baggies containing marijuana. Thus, it cannot reasonably be argued that the jury "probably would have returned a different verdict," *see id.* at 507, 723 S.E.2d at 327, but for the admission of this testimony. *See State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) ("The overwhelming evidence against defendant leads us to conclude that the error committed did not cause the jury to reach a different verdict than it otherwise would have reached. Accordingly, although the trial court's admission of the challenged portion of [the witness's] testimony was error, it did not rise to the level of plain error." (internal citation omitted)); *see also State v. Rothwell*, 308 N.C. 782, 787-88, 303 S.E.2d 798, 801-02 (1983) (holding that defendant failed to show prejudicial error resulting from testimony by two co-defendants that they pled guilty to charges arising out of same events for which defendant was being tried).

We wish to emphasize that our holding is limited to the specific facts of the present case. As noted above, the admission of evidence of a co-defendant's guilty plea could — under some circumstances — rise to the level of plain error, and we caution prosecutors not to elicit such testimony. However, based on the present facts, Defendant has failed to meet his burden of establishing plain error.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges STROUD and DILLON concur.

Report per Rule 30(e).