IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-131

Filed: 20 December 2016

Beaufort County, No. 13 CRS 50055

STATE OF NORTH CAROLINA

v.

CEDRIC LAMAR SMALLWOOD

Appeal by defendant from judgments entered 17 September 2015 by Judge W. Douglas Parsons in Beaufort County Superior Court. Heard in the Court of Appeals 24 August 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General June S. Ferrell, for the State.

Dylan J.C. Buffum, for defendant-appellant.

CALABRIA, Judge.

Where testimony was not hearsay, the trial court did not err in admitting it, and defendant's Confrontation Clause rights were not implicated. Where an officer offered testimony from his personal experience concerning the illegal drug trade, and this testimony was helpful to the jury in determining a fact at issue, the trial court did not err in overruling defendant's objection. Where defendant could not show prejudice, the trial court did not commit plain error in its jury instruction on

constructive possession. Because the State presented evidence of the essential elements of the offenses charged, the trial court did not err in denying defendant's motions to dismiss. Where there was no error to accumulate to defendant's prejudice, defendant is not entitled to a reversal based upon cumulative error. We find no error.

I. Factual and Procedural Background

On 9 January 2013, Officer William Bradbury ("Officer Bradbury"), a patrol officer with the Washington Police Department ("WPD") in Beaufort County, NC, was patrolling Van Norden Street and West Martin Luther King Street. While in the area, Officer Bradbury witnessed a man, later identified as Carl Moore ("Moore"), walking back and forth in front of a barbershop. Officer Bradbury also saw a man, later identified as Cedric Lamar Smallwood ("defendant") sitting on the barbershop's porch. Finding the behavior strange, Officer Bradbury observed them for a few minutes in his car and called Officer Andrew Dawley ("Officer Dawley"), a narcotics officer with the WPD.

As Officer Bradbury observed Moore, he saw Moore go to the curb and "either hand or take something from [defendant]." After the exchange, Moore walked south on Van Norden in the direction of Officer Bradbury's parked patrol car. When Moore reached the intersection of Van Norden Street and Martin Luther King, Officer Bradbury approached Moore in his car and motioned for him to stop. When he got out of his car, Officer Bradbury spoke with Moore. Officer Bradbury searched Moore,

but he did not find any drugs or drug paraphernalia on Moore. During the search, Officer Dawley arrived. Officers Dawley and Bradbury spoke and searched the area.

Officer Bradbury found two bags containing an off-white, rock-like substance lying on the ground at the Van Norden and Martin Luther King intersection. While observing Moore, Officer Bradbury had not seen Moore drop or try to dispose of anything. Officer Bradbury testified that when he found the plastic bags on the ground, they did not appear to be dirty or wet. Neither bag looked like it had "been there long." Officer Bradbury handed the bags to Officer Dawley who, at trial, corroborated Officer Bradbury's testimony. Based on his experience as a narcotics officer, Officer Dawley testified that he believed the bags to be crack cocaine, and the substance was sealed, secured and submitted for analysis. He also testified as to the street value of crack cocaine, the substance found in the baggies.

After collecting the bagged substance, Officer Bradbury and Officer Dawley continued with the investigation. During this time, Moore revealed defendant's identity to the officers. While officers were investigating him, defendant approached Officer Dawley, claiming that he had not been involved in a drug sale, but asserting instead that "Mr. Moore owed him $30 and he was getting the $30 Mr. Moore owed him."

Defendant was indicted for possession with intent to sell or deliver cocaine, sale or delivery of cocaine, and possession of drug paraphernalia.

At trial, relying on his experience with arranging crack cocaine deals through confidential informants, Officer Dawley testified that he had arranged numerous such purchases, including crack cocaine and specifically "purchases of two crack rocks[.]" When asked to estimate the purchase price of two crack rocks, Officer Dawley testified that, "[f]or the size--and weight of what we located, I would say approximately $30." On cross-examination, when questioned as to what he meant by "approximately," Officer Dawley responded, "It depends on who's selling it and who's buying it." Since the rocks of crack had been crushed during the analysis process by the State Bureau of Investigation ("SBI"), Officer Dawley was unable to testify as to the size of the crack rocks in this case.

An agent with the SBI also testified that a chemical analysis showed that the substance in the baggies was a Schedule II controlled substance commonly referred to as crack cocaine. Combined, it weighed approximately 0.29 grams. The agent estimated that individually the rocks weighed 0.14 and 0.15 grams.

At the close of the State's evidence, and without presenting any of his own evidence, defendant moved for dismissal of all charges on the grounds that Officer Dawley should not have been allowed to offer lay opinions. Defendant also argued that the charges should be dismissed because Officer Dawley had not been offered as an expert witness. The trial court denied defendant's motions.

The jury returned verdicts finding defendant guilty of all charges. The trial court sentenced defendant to a minimum of 12 and a maximum of 24 months for sale and/or delivery of cocaine, and a minimum of 6 and a maximum of 17 months for possession with intent to distribute cocaine and possession of drug paraphernalia, to run consecutively, in the North Carolina Department of Adult Correction. The trial court then suspended these sentences, placing defendant on 36 months of supervised probation.

Defendant appeals.

II. Hearsay Testimony

In his first argument, defendant contends that the trial court erred in permitting Officer Dawley to offer hearsay testimony. We disagree.

A. Standard of Review

"When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011).

B. Analysis

At trial, Moore did not testify. Instead, during Officer Dawley's testimony, the following colloquy occurred:

> Q. Did you speak with Carl Moore?
>
> A. Yes, sir.

> Q. And after speaking with Carl Moore, what did you do?
>
> A. I determined who he had just met with and attempted to locate the other individual involved.
>
> Q. Did--did you--who were you looking for?
>
> A. The defendant--
>
> MR. GRAY: Objection, Your Honor. Hearsay.
>
> THE COURT: Overruled.

Defendant contends that this testimony constituted inadmissible hearsay, as it alerted the jury to the fact that Moore had told Officer Dawley about defendant.

Hearsay is "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). Hearsay evidence is not generally admissible unless made so by a rule or statutory exception. N.C. R. Evid. 802. However, "statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (citing *State v. Coffey,* 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990)); *see also State v. Rollins*, 226 N.C. App. 129, 140, 738 S.E.2d 440, 448-49 (2013) (holding that testimony regarding an officer's conversation with a suspect was admitted for the proper purpose of explaining the officer's decision to conduct a subsequent search); *State v. Alexander*, 177 N.C. App. 281, 284, 628 S.E.2d 434, 436 (2006) (holding that

testimony was admissible to explain how an officer received information leading him to form a reasonable suspicion of defendant's involvement in a crime).

In the instant case, we hold that the statements by Officer Dawley were not hearsay. The colloquy above reveals that Officer Dawley spoke with Moore, that Officer Dawley determined that Moore had just met with defendant, and that Officer Dawley then sought out defendant. No statement by Moore was admitted into evidence. When Officer Dawley was asked who he was looking for, he did not speak of what Moore told him, but rather testified as to his own actions subsequent to speaking with Moore. As such, the testimony was not hearsay, and the trial court did not err in overruling defendant's objection.

C. Constitutional Error

Defendant further contends that the introduction of this testimony violated his right to confront the witnesses against him. He concedes that this alleged constitutional error was not preserved by objection. Constitutional errors not raised at trial cannot be raised for the first time on appeal. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001). Instead, such error must be reviewed for plain error. *See State v. Lemons*, 352 N.C. 87, 92, 530 S.E.2d 542, 545 (2000) (holding that "because there was no issue of constitutional error preserved at trial, we review this question using a plain error analysis").

Defendant specifically contends that this constituted plain error. However, " 'admission of nonhearsay raises no Confrontation Clause concerns.' " *Gainey*, 355 N.C. at 87, 558 S.E.2d at 473 (quoting *United States v. Inadi,* 475 U.S. 387, 398 n. 11, 89 L.Ed.2d 390, 400 n. 11 (1986)) (internal quotations omitted). Because we have held that this testimony did not constitute hearsay, defendant's right to confront the witnesses against him has not been implicated, and no Confrontation Clause argument may stand. We hold, therefore, that the trial court did not commit plain error in overruling defendant's objection.

III. Lay Opinion Testimony

In his second argument, defendant contends that the trial court erred in permitting Officer Dawley to offer lay opinion testimony regarding the price of crack cocaine. We disagree.

A. Standard of Review

"[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Analysis

Officer Dawley testified, over objection, that the street value for the crack cocaine in this case was approximately $30. Defendant contends, however, that this was not rationally based on Officer Dawley's perception or helpful to the jury in determining a fact at issue, and that he was offering an improper lay opinion.

We have previously held that an officer's testimony that is "relevant, based on personal knowledge, and non-prejudicial," is properly admitted. *State v. Bunch*, 104 N.C. App. 106, 110, 408 S.E.2d 191, 194 (1991) (holding that the trial court did not err in admitting an officer's testimony concerning the practices of drug dealers). Officer Dawley, speaking from his experience as a narcotics officer, testified to the value of the cocaine based upon his personal knowledge. Officer Dawley testified that, based on his five years of experience, a rock of crack cocaine of the size found would have been worth roughly $30, the amount defendant admitted to receiving from Moore. This testimony was based on his personal knowledge, relevant, and helpful to the jury in determining a fact at issue. Therefore, the trial court did not err in overruling defendant's objection to this testimony.

IV. Jury Instruction

In his third argument, defendant contends that the trial court committed plain error in its instruction to the jury on constructive possession. We disagree.

A. Standard of Review

"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." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom,* 307 N.C. at 660, 300 S.E.2d at 378. 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." *See id.* (citations and quotation marks omitted); *see also Walker,* 316 N.C. at 39, 340 S.E.2d at 83 (stating "that absent the error the jury probably would have reached a different verdict" and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error).

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

B. Analysis

The trial court instructed the jury on constructive possession. Since defendant did not object to this instruction at trial, we review it for plain error.

Defendant contends that this instruction constituted plain error because the State's theory of the case involved a hand-to-hand exchange of money for cocaine. Defendant contends therefore that actual possession, rather than constructive possession, was an appropriate instruction for the jury.

Even assuming *arguendo* that there was insufficient evidence of constructive possession, however, there was evidence of actual possession presented at trial. Specifically, there was evidence presented that Moore met with defendant, that Moore engaged in some kind of hand-to-hand exchange with defendant, that subsequently $30 worth of crack cocaine was found at the site of the exchange, and that defendant admitted to receiving $30 from Moore. This evidence, taken together, could allow a jury to conclude that Moore purchased the cocaine from defendant, which would require a jury to find that defendant actually possessed the cocaine prior to the exchange. Thus, even assuming that the trial court had not instructed the jury on constructive possession, and had instead only instructed the jury on actual possession, defendant has not shown that this would have had a probable impact on the outcome of the case. Therefore, the trial court did not commit plain error in giving an instruction on constructive possession.

V. Motions to Dismiss

In his fourth argument, defendant contends that the trial court erred in denying his motions to dismiss the charges against him. We disagree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis

Defendant contends that the State failed to produce substantial evidence of each element of the offenses charged. Specifically, as he did above, defendant challenges the element of possession.

As held above, the evidence that Moore engaged in some kind of hand-to-hand trade with defendant, resulting in the discovery of $30 worth of cocaine and defendant receiving $30 from Moore, supported a determination by the jury that Moore received the cocaine from defendant, and that defendant actually possessed the cocaine prior to that time. We hold this evidence, taken in the light most favorable to the State, was sufficient to support the element of possession. The trial court did not err in denying defendant's motion to dismiss.

VI. Cumulative Error

In his fifth argument, defendant contends that the cumulative prejudice from the trial court's errors deprived him of his right to a fair trial. We disagree.

Defendant notes that cumulative errors require reversal when, taken as a whole, they deprive a defendant of his right to a fair trial free from prejudicial error. *State v. Wilkerson*, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009), *cert. denied*, 559 U.S. 1074, 176 L. Ed. 2d 734 (2010). In the instant case, however, we have not found error where defendant has alleged it. As such, we hold that there were no errors to accumulate to defendant's prejudice.

VII. Conclusion

The trial court did not err in admitting Officer Dawley's testimony, as it was not hearsay. For the same reason, defendant's Confrontation Clause rights were not violated. Since Officer Dawley offered testimony from his personal experience which

was helpful to the jury, the trial court did not err in overruling defendant's objection. In addition, since defendant cannot show prejudice, the trial court did not commit plain error in its jury instruction on constructive possession. Finally, since the State presented evidence of possession, the trial court did not err in denying defendant's motions to dismiss. Where there was no error to accumulate to defendant's prejudice, defendant is not entitled to a reversal based upon cumulative error. We find no error in the jury verdict or the trial court's judgment.

NO ERROR IN PART, NO PLAIN ERROR IN PART.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).