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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-684-2

Filed: 6 November 2018

Wayne County, Nos. 14 CRS 055045, 15 CRS 000551

STATE OF NORTH CAROLINA

v.

DARYL WILLIAMS

On certiorari review of judgment entered 12 August 2015 by Judge Paul L. Jones in Wayne County Superior Court. Originally heard in the Court of Appeals 25 January 2017. By opinion issued 16 May 2017, a divided panel of this Court, ___ N.C. App. ___, 801 S.E.2d 169 (2017), ordered that defendant receive a new trial based upon one of two issues raised on appeal. By opinion issued 2 March 2018, our Supreme Court, 370 N.C. 526, 809 S.E.2d 581 (2018), reversed in part and remanded the case to this Court to address the second issue.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.

Gilda C. Rodriguez for defendant.

ELMORE, Judge.

Previously, a divided panel of this Court, *State v. Williams*, ___ N.C. App. ___, 801 S.E.2d 169 (2017) ("*Williams I*"), having deemed preserved for appellate review defendant's first issue concerning the propriety of admitting Rule 404(b) evidence, *id.* at ___, 801 S.E.2d at 173–74, held the trial court's erroneous admission of that evidence constituted reversible error under N.C. Gen. Stat. § 15A-1443's prejudice standard, *id.* at ___, 801 S.E.2d at 177–78. The majority panel thus determined it was unnecessary to address defendant's second issue concerning the propriety of jury instructions limiting that evidence. *Id.* at ___, 801 S.E.2d at 177. The dissenting judge reasoned that because defendant failed to preserve his first issue, even had the evidence been erroneously admitted, any resulting error did not rise to the level of plain error and thus did not warrant a new trial. *Id.* at ___, 801 S.E.2d at 178–79 (Dillon, J., dissenting). On 2 March 2018, our Supreme Court "reversed in part" the majority's decision in *Williams I* "for the reasons stated in the dissenting opinion" and remanded the case "to address defendant's remaining argument on appeal." *State v. Williams*, 370 N.C. 526, 809 S.E.2d 581 (2018) (per curiam). Defendant's remaining argument was that "the trial court erred each time it instructed the jury on the limited purpose for which [it] could consider the Rule 404(b) evidence."

I. Background

The facts and trial procedure of this case are more fully discussed in our prior opinion. The challenged Rule 404(b) evidence concerned a prior incident in which

Goldsboro Police Department Officers while investigating a suspected drug transaction encountered defendant, searched his vehicle, and found a Glock 22 pistol underneath the driver's seat. Following a *voir dire* hearing, the trial court ruled that it would admit the evidence for limited purposes under Rule 404(b). Soon after this evidence was introduced at trial without objection, defense counsel requested under Rule 105 that the trial court give an instruction limiting the evidence to the Rule 404(b) purpose(s) for which it was admitted. *See* N.C. Gen. Stat. § 8C-1, Rule 105 (2017). The trial court gave the following midtrial limiting instruction:

> Ladies and Gentlemen, the Court is going to give you a limited instruction regarding prior testimony in this case. Evidence of other crimes is inadmissible if it's only referenced to show the character of the accused.
>
> There are two exceptions, one where a specific mental attitude, state, is an essential element of the crime charged. Evidence may be offered of certain action, declaration of the accused as it tends to establish the requisite mental intent or state even though the evidence disclosed the commission of another offense by the accused. And two, where a guilt knowledge is an essential element of the crime charged. Evidence to be offered of such action and declaration of an accused tend[s] to establish the requisite guilt knowledge even though the evidence reveals commission of another offense by the accused.
>
> Ladies and Gentlemen, the defendant cannot be convicted in this trial for something he has done in the past unless it is an essential element of the charge here.

Defendant did not object after the trial court gave this instruction.

Later, during the charge conference, defendant objected to the trial court's proposed final instruction limiting the evidence to the Rule 404(b) purposes of knowledge and opportunity in accordance with the pattern jury instructions. *See* N.C.P.I.—Crim. 104.15. During its final charge, the trial court instructed:

> Evidence that has been received tend[s] to show that that previous encounter, defendant and Officer Prevost, were involved in an incident which involved a firearm, which was detailed as a Glock pistol. *This evidence was received solely for showing defendant had knowledge, which is a necessary element of the crime charged in the case, and that defendant had opportunity to commit the crime.*
>
> *If you believe this evidence, you may consider it, which you will consider it only for the limited purpose which it was received. You may not consider it for any other purpose. Evidence of other crimes is inadmissible if its only relevance is to show the character of the accused.* There are exceptions to the rule. They are when specific mental attitude or state is a sentencing element of the crime charged.
>
> Evidence may be offered of such action [ ]or declaration of the accused as they tend to establish mental state even though the evidence discloses the commission of another offense by the accused or where guilt knowledge is an essential element of the crime charged.
>
> Evidence may be offered of such action or declarations of the accused that tends to establish required guilt knowledge; that even though the evidence reveals a commissioned offense by the accused, defendant cannot be convicted in this trial for something he has done in the past, unless it is an element of the charges here.

(Emphasis added.) Defendant did not object following this instruction.

II. Analysis

Defendant asserts the trial court reversibly erred when instructing the jury on the limited Rule 404(b) purposes it could consider the challenged evidence because the instructions failed to "specify the purpose(s) it was allowing the evidence" and certain isolated statements were erroneous, confusing, and misleading. We disagree.

Defendant failed to object after the trial court gave its midtrial and final limiting instructions and thus contends that, if we deem this issue unpreserved, the limiting instructions constituted plain error. Because defendant only objected to the trial court limiting the evidence at the charge conference to the Rule 404(b) purposes of knowledge and opportunity, N.C. R. App. P. 10(a)(2), and does not challenge the propriety of those purposes in this argument before us on remand, our review of the challenged limiting instruction language is for plain error, N.C. R. App. P. 10(a)(4).

"To constitute plain error, an error in the trial court's instruction must be 'so fundamental as to amount to a miscarriage of justice or . . . probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Chandler*, 342 N.C. 742, 751, 467 S.E.2d 636, 641 (1996) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)). "[E]ven when the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.' " *State v.*

Morgan, 315 N.C. 626, 645, 340 S.E.2d 84, 96 (1986) (quoting *State v. Odom*, 307 N.C. 655, 660–61, 300 S.E.2d 375, 378 (1983)).

> A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal.

Chandler, 342 N.C. at 751–52, 467 S.E.2d at 641 (quoting *State v. McWilliams*, 277 N.C. 680, 684–85, 178 S.E.2d 476, 479 (1971)).

Defendant argues the limiting instructions were erroneous because they (1) did not specify the "other crimes" on the grounds that the incident described two potential crimes—the suspected drug transaction and the gun possession; (2) did not specify the purpose(s) for which the evidence could be considered on the grounds that the discussion of "requisite mental state" and "guilt knowledge" was confusing; (3) contained a misstatement of law since "mental state" and "guilt knowledge" are not elements of firearm possession by a felon; (4) the language "for something he has done in the past" suggested the evidence was not something the jury was permitted to determine its believability; and (5) the concluding statement "the defendant cannot be convicted in this trial for something he has done in the past, unless it is an element of the charges here" was misleading and inappropriate. After reviewing the entire instructions, we conclude any alleged limiting instruction error fails to rise to the level of plain error.

In its final limiting instruction, the trial court clarified the relevant incident concerned the discovery of the pistol and that the purposes of admitting the evidence were proof of knowledge and opportunity. Even if the limiting instructions could be construed to have suggested that "mental state" and "guilt knowledge" were elements of firearm possession by a felon, or the language about "something [defendant] has done in the past" was unnecessary because defendant stipulated to the first element of firearm possession by a felon, the trial court properly instructed the jury on the elements of that offense, and a defendant is not prejudiced by instructions adding elements to an offense that increases the State's burden of proving guilt. *See, e.g.*, *State v. Farrar*, 361 N.C. 675, 679, 651 S.E.2d 865, 867 (2007) ("[T]he trial court's charge to the jury in this case benefited defendant, because the instructions required the State to prove more elements than those alleged in the indictment. Therefore, there was no prejudicial error in the instructions."). Further, although defendant did not request the precise limiting language used by the trial court, the transcript reveals he requested the judge provide limiting instructions on the evidence. *See* N.C. Gen. Stat. § 15A-1443(c) (2003) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."); *see also State v. Duke*, 360 N.C. 110, 124, 623 S.E.2d 11, 21 (2005) ("[A] criminal defendant will not be heard to complain of a jury instruction given in response to his own request." (quoting *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991))).

Moreover, our analysis of the prejudicial impact of any error arising from defendant's second argument must be viewed on remand through the lens that the challenged propensity evidence, the admission of which the law-of-the-case doctrine establishes did not rise to the level of plain error, is before the jury without limitation. Instructions limiting Rule 404(b) evidence provide additional protection against undue prejudice arising from admitting propensity evidence. Because the trial court here twice instructed the jury it could not consider the challenged evidence for propensity purposes, even if the purposes were erroneous or the limiting instruction confusing, those instructions could have only mitigated any potential prejudice of admitting the challenged evidence. Accordingly, for the same reasons our dissenting colleague previously concluded the admission of the challenged evidence did not constitute plain error, we conclude that omitting these instructions limiting that evidence would not rise to the level of plain error.

III. Conclusion

When viewing the charge as a whole, even if the limiting instructions contained isolated errors or may be construed to have created some jury confusion, under the facts of this case, we hold that any error did not rise to the level of plain error. Accordingly, we hold defendant received a fair trial, free of plain error.

NO PLAIN ERROR.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).