IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-733

Filed: 2 July 2019

Gaston County, Nos. 16 CRS 64486-87

STATE OF NORTH CAROLINA

v.

JUAN CARLOS AGUILAR GUTIERREZ

Appeal by defendant from judgments entered 10 January 2018 by Judge Forrest D. Bridges in Gaston County Superior Court. Heard in the Court of Appeals 10 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind Dongre, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

ZACHARY, Judge.

Defendant Juan Carlos Aguilar Gutierrez appeals from judgments entered upon jury verdicts finding him guilty of trafficking in cocaine by possession and trafficking in cocaine by transportation. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

Background

The evidence presented at trial showed that on 12 December 2016, Officer Matthew Harris of the Gaston County Police Department was assisting with a narcotics investigation when he observed a silver Honda Civic following too closely and failing to signal while changing lanes. Officer Harris activated his blue lights and siren and initiated a traffic stop. He approached the vehicle on the passenger side and spoke to the driver. Defendant, who was sitting in the passenger seat, was staring straight ahead and had his feet tucked beneath his seat. Officer Harris could see Defendant's heartbeat pulsing through the artery in his neck.

While Officer Harris was conducting the traffic stop, Officers Anderson Holder and Robbie Waldrop arrived at the scene. Officer Harris asked Officer Holder to use his K-9 partner to conduct a free air sniff for narcotics along the perimeter of the Civic. The driver and Defendant exited the vehicle while the sniff was conducted. The K-9 officer alerted outside of the passenger door, and then entered the vehicle and alerted on the passenger seat. Officer Holder searched under the seat and discovered a wrapped package containing approximately one kilogram of powdered cocaine.

Defendant was arrested and subsequently indicted for trafficking in cocaine by possession, trafficking in cocaine by transportation, and trafficking in cocaine by manufacturing. Prior to trial, Defendant moved to suppress "any and all evidence"

obtained as a result of the traffic stop, arguing that the stop was pretextual, and that the K-9 sniff exceeded the scope of the stop.

The case was called for trial on 8 January 2018. The trial court conducted a suppression hearing immediately prior to the trial. At the hearing, Detective Joe Burch testified that he had contacted Officer Harris and advised him "to find his own reasonable suspicion of probable cause to stop the [Civic]." Detective Burch informed Officer Harris that he had just witnessed a confidential informant signal that there was a controlled substance in the Civic.

The trial court denied Defendant's motion to suppress, concluding that the information Officer Harris received from his fellow officers about the presence of cocaine in the Civic provided reasonable suspicion for the stop. The court also concluded that the traffic violations observed by Officer Harris justified the stop. The court noted, however, that Officer Harris had already decided to stop the vehicle before he observed the violations.

At the close of all of the evidence, the trial court dismissed the charge of trafficking in cocaine by manufacturing. The court then instructed the jury on the applicable law. The reasonable doubt portion of the jury charge included a statement from the trial court that "there is no predetermined formula as to the amount of evidence or the specific type of evidence that is necessary for proof beyond a

reasonable doubt." During deliberations, the jury asked to hear the definition for reasonable doubt, and the trial court substantially repeated its prior charge.

On 10 January 2018, the jury returned verdicts finding Defendant guilty of both remaining charges. The trial court sentenced Defendant to two concurrent sentences of 175 to 222 months in the custody of the North Carolina Division of Adult Correction. Defendant gave oral notice of appeal.

Discussion

Defendant first argues that the trial court twice delivered an erroneous jury instruction regarding reasonable doubt. We disagree.

Initially, we note that Defendant did not object to the court's instructions at trial. Nonetheless, he argues the trial court's instruction constituted structural error, which is reversible *per se*. Should we determine that the trial court's instruction did not constitute structural error, Defendant requests that the instructions be reviewed for plain error.

Our Supreme Court has held that "[s]tructural error, no less than other constitutional error, should be preserved at trial." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). Thus, Defendant's failure to preserve this issue below limits our review of his argument to plain error. *See State v. Gaines*, 345 N.C. 647, 678, 483 S.E.2d 396, 415, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997).

> 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.

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

The trial court's instructions to the jury should "be construed contextually, and isolated portions will not be held prejudicial when the charge as [a] whole is correct." *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970). As for instructions regarding reasonable doubt, our Supreme Court has explained that

> so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, taken as a whole, the instructions must correctly convey the concept of reasonable doubt to the jury.
>
> Upon appeal the proper inquiry is not whether the instruction could have been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it.

State v. Hooks, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (quotation marks, citations, and original alterations omitted), *cert. denied*, 534 U.S. 1155, 151 L. Ed. 2d 1018 (2002).

In the instant case, the trial court delivered the following instruction on reasonable doubt:

> It is up to the State to prove guilt beyond a reasonable doubt. Now, a reasonable doubt means a doubt based upon 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 maybe [sic]. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt. Members of the jury, there is no predetermined formula as to the amount of evidence or the specific type of evidence that is necessary for proof beyond a reasonable doubt. It is up to you and you alone to decide whether or not the State has proven guilt beyond a reasonable doubt.

Later, when the jury asked for the definition of reasonable doubt, the trial court delivered a substantially similar instruction.

Defendant argues on appeal that the trial court's instruction that "there is no predetermined formula as to the amount of evidence . . . that is necessary for proof beyond a reasonable doubt" improperly lowered the State's burden of proof. We fail to see how this is so. As Defendant concedes, the court provided the jury with the definition of proof beyond a reasonable doubt found in the North Carolina Pattern Jury Instructions: "proof that fully satisfies or entirely convinces you of the defendant's guilt." N.C.P.I.-- Crim. 101.10; *see also State v. Solomon*, 117 N.C. App. 701, 706, 453 S.E.2d 201, 205, *disc. review denied*, 340 N.C. 117, 456 S.E.2d 325 (1995) ("The preferred method of instructing the jury is the use of the approved guidelines of the North Carolina Pattern Jury Instructions."). The trial court's additional language in no way lessened the State's burden of proof. It is clear from context that the court was simply informing the jurors that no specific amount of evidence was

required in order for them to determine Defendant's guilt. This proposition is well established and unremarkable. *See State v. Knox*, 61 N.C. 312, 313 (1867) ("What amount of evidence in any particular case will remove reasonable doubt is a question solely for the jury . . . ."). Thus, we conclude that the trial court's instructions correctly conveyed the concept of reasonable doubt to the jury. This argument is overruled.

Defendant also argues that the trial court erred by denying his motion to suppress the evidence obtained as a result of Officer Harris's traffic stop. However, Defendant makes this argument only for preservation purposes. He concedes that, under *Whren v. United States*, 517 U.S. 806, 135 L. Ed. 2d 89 (1996), and *State v. McClendon*, 350 N.C. 630, 517 S.E.2d 128 (1999), the traffic violations witnessed by Officer Harris provided reasonable and articulable suspicion to justify the stop, regardless of the officer's subjective intentions. We agree with Defendant that, based on *Whren* and *McClendon*, the trial court properly denied his motion to suppress.[1]

We conclude that Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges STROUD and BERGER concur.

Report per Rule 30(e).

[1] Defendant also argues that the trial court erred by concluding that Officer Harris had reasonable suspicion for the traffic stop absent the pretextual traffic violations. However, because we have concluded that the trial court's denial of the motion to suppress was supported by binding precedent, we need not address this argument.