IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-60

Filed: 15 October 2019

New Hanover County, No. 14 CRS 53128 29

STATE OF NORTH CAROLINA

v.

GEOFFREY ANTOINE BELL, Defendant.

Appeal by defendant from judgment entered 19 April 2017 by Judge Imelda J. Pate in New Hanover County Superior Court. Heard in the Court of Appeals 17 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Charles Whitehead, for the State.

Leslie C. Rawls, by Leslie C. Rawls, for defendant-appellant.

YOUNG, Judge.

This case arises from a judgment finding defendant guilty of possession with intent to distribute heroin. Defendant waived his right to appeal on the issue of expert testimony when he elicited that testimony on cross-examination. Therefore, we dismiss that argument. Furthermore, the trial court did not commit plain error

by declining to instruct the jury on a lesser-included offense. As a result, we find no plain error in part and dismiss in part.

I. Factual and Procedural History

On 1 May 2014, the Wilmington North Carolina Police Department executed a search warrant at 442 Moseley Street, Unit B, home of defendant, Geoffrey Antoine Bell ("Bell"). No one responded to the knock and announce and forced entry followed. Detective Alan Lawson ("Detective Lawson") saw Bell moving through the house, and specifically observed Bell exiting a bathroom. Bell complied with the orders and was detained. Detective Robert Simpson ("Detective Simpson") found a plastic grocery bag in the toilet of the bathroom Bell exited. Detective Simpson recognized what he believed to be "bindles" of heroin in the grocery bag. Detective Simpson searched the bedroom finding approximately four hundred dollars cash and other bindles similar to those found in the toilet. While detained, Bell offered that "everything in the house was his."

Wilmington Police Department Crime Lab employee William Peltzer ("Peltzer") testified as an expert witness in forensic chemistry for the testing of controlled substances. After cross-examination, defendant had "no objection" to Peltzer's qualifications as an expert forensic chemist. Peltzer was responsible for the same prep and sample weighing of the substance. His data was analyzed and interpreted by his supervisor. The crime lab received 335 bindles of heroin. Peltzer

selected 281 random samples and weighed them each separately, recording the individual weights for each bindle. Since this was a suspected trafficking matter he individually weighed enough bindles, here 281, to reach the threshold weight of four grams. Peltzer then took an average weight of 335 bindles for a total weight of 4.995 grams. He then processed 27 samples to determine the presence of a controlled substance by performing a color test as well as "gas chromatology" and "mas spec". The Crime Lab director, Bethany Pridgen ("Pridgen") testified, without objection, that she had no issues with Peltzer's "prep work or his weight analysis." The sampling process allowed an assumption with 95% confidence that 90% of the bags would contain the same substance.

A jury convicted Bell of possession of heroin with intent to manufacture, sell, and deliver; maintaining a dwelling house for purpose of keeping and selling heroin; and trafficking heroin. Bell was sentenced 70-93 months on the heroin trafficking conviction and a consecutive 8-19 months for maintaining a dwelling and possession with intent to sell and deliver convictions. On 18 April 2018, this Court issued a writ of certiorari to review the judgments.

II. Standard of Review

Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "Under the plain error rule, defendant must convince this

Court not only that there was error, but that absent the error, the jury probably would have reached a different result. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

When a defendant fails to object to the State's evidence and then elicits the same evidence on cross-examination, he waives his right to appellate review of any error resulting from the admission of the evidence, even for plain error. *State v. Steen*, 226 N.C. App. 568, 576, 739 S.E.2d 869, 876 (2013); *State v. Cook*, 218 N.C. App. 245, 250, 721 S.E.2d 917 (2012). *See also State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007), *aff'd per curiam*, 362 N.C. 342, 661 S.E.2d 732 (2008).

According to the North Carolina Supreme Court,

> [a] trial court must submit to the jury a lesser included offense when and only when there is evidence from which the jury could find that the defendant committed the lesser included offense. When the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element, submission of a lesser included offense is not required. Mere possibility of the jury's piecemeal acceptance of the State's evidence will not support the submission of a lesser included offense. Thus, mere denial of the charges by the defendant does not require submission of a lesser included offense.

State v. Maness, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988) (citations omitted).

III. Expert Testimony

Bell contends that the trial court committed plain error in allowing expert testimony regarding the assumed weight of unweighted heroin packets, because the testimony failed to satisfy the requirements for expert testimony. We disagree.

Bell did not object to forensic analyst Peltzer's testimony to the methodology and applicability of the weight of the heroin. In fact, Bell elicited the same evidence on cross-examination. Defense counsel asked, "You said after you weighed the 281 grams [sic] measured in 4.1 grams, the measure of uncertainty of .403, so just under half a gram?" Peltzer answered, "That's correct." And, "[s]o in this case when you say 4.19, plus or minus .4, it's estimated that would be somewhere between 3.7 and 4.5 grams roughly?" Peltzer responded, "Roughly, yes." Bell did not object to the admission of any testimony from the State's experts, and after cross-examination of Peltzer, Bell stated he had "no objection" to his qualifications as an expert in forensic chemistry. Any alleged error in the admission of this testimony was invited and Bell waived his right to appellate review. *Steen*, 226 N.C. App. at 576, 739 S.E.2d at 876 . *See also State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) ("[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review"). Since Bell waived his right to appellate review, we dismiss this argument as moot.

IV. Jury Instructions

Bell contends that the trial court committed plain error by not instructing the jury on the lesser-included possession of heroin when the evidence and law supported the instruction. We disagree.

Bell argues that he was entitled to a lesser-included offense instruction to the jury for possession of heroin because there was conflicting evidence as to the weight of the heroin in Bell's possession. Specifically, the "expert's unfounded extrapolation" established the heroin weight above four grams. There was no conflicting evidence as to the total weight of the heroin in Bell's possession.

N.C. Gen. Stat. § 90-95(h)(4) provides, a charge in trafficking opium requires two essential elements be met: "(1) knowing possession (either actual or constructive) of (2) a specified amount of heroin." *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987). The specified amount of heroin is four grams or more. N.C. Gen. Stat. § 90-95(h)(4)(a)-(c).

Peltzer testified extensively as to the procedures he performed and his analysis for this case. He randomly selected and analyzed 27 of the 335 bindles and determined they contained heroin; Bell does not challenge that he knowingly possessed heroin.

Peltzer testified that the difference in weight between each of the bags was so small that, just based on holding the bags, he would not be able to tell any difference in weight. Peltzer testified that the weight of the 281 bindles, which included the 27

bindles specifically analyzed and determined to contain heroin, was 4.19 grams with a plus/minus calibration of .403. Peltzer then calculated an average weight of the 281 bindles and applied that average to the entire population of 335 bindles. This calculation yielded a total weight of 4.995 grams. Accordingly, the sole evidence of the total weight of the 335 bindles was 4.995 grams, above the four-gram threshold for a trafficking conviction.

This Court held in *State v. Lewis* that "upon establishing the chemical composition of a sufficient sample, and visually confirming that the remaining pills were similar, the State's analyst satisfied the evidentiary burden upon the State to determine the quantity of opium derivative in the pills." *State v. Lewis*, 243 N.C. App. 757, 760, 779 S.E.2d 147, 149 (2015). Like in *Lewis*, Bell is not challenging the fact that he possessed heroin, but rather the expert's methodology and analysis used to determine how much heroin was present. This Court has determined that "extrapolation [is] reliable." *State v. Catoe*, 78 N.C. App. 167, 169, 336 S.E.2d 691, 693 (1985).

Furthermore, in *State v. Massenburg*, this Court held that the lower court is not required to submit lesser degrees of the offense to the jury when the State's evidence is positive to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime. *State v.*

Massenburg, 66 N.C. App. 127, 131, 310 S.E.2d 619, 622 (1984). Like in *Massenburg*, there is no conflicting evidence as to the weight of the heroin in Bell's possession.

Even if it were erroneous for the trial court to not instruct the jury on the lesser-included offense, Bell has not shown that this omission prejudiced him. Since there was no conflicting evidence, and the established weight of the heroin was over four grams, it is probable that the jury would have reached the same result. Therefore, the trial court did not commit plain error by declining to instruct the jury on the lesser-included offense.

NO PLAIN ERROR IN PART, DISMISSED IN PART.

Judges BRYANT and COLLINS concur.

Report, per Rule 30(e).