An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-361

Filed: 15 December 2020

Forsyth County, Nos. 17CRS50492; 50494-96

STATE OF NORTH CAROLINA

v.

BRANDEE LAMONT THOMAS

Appeal by defendant from judgments entered on or about 15 August 2018 by Judge Michael D. Duncan in Superior Court, Forsyth County. Heard in the Court of Appeals 13 May 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Lynne Weaver, for the State.

Winifred H. Dillon for defendant-appellant.

STROUD, Judge.

Defendant appeals judgments convicting him of multiple drug-related offenses. Defendant argues the trial court plainly erred by its failure to instruct the jury with North Carolina Pattern Jury Instruction 104.21, "Testimony of Witness with Immunity or Quasi-Immunity." The witness at issue testified he was granted

immunity in a federal court for a different crime, though tangentially related, but was still subject to prosecution by the State of North Carolina. Because the evidence does not support the pattern jury instruction as requested by defendant, we conclude there was no error.

I. Background

The State's evidence showed that in 2017, police sent Mr. Jones[1] to conduct a controlled buy[2] from defendant. Defendant sold Mr. Jones heroin, and thereafter the police obtained a search warrant for defendant's home where they found over 60 grams of heroin, over $20,000 in cash, and drug paraphernalia. Defendant was tried by a jury and found guilty of multiple drug offenses. The trial court entered judgments, and defendant appeals.

II. Jury Instructions

During Mr. Jones's testimony before the jury he stated that he had been granted immunity in *federal* court regarding an individual who had died from a heroin overdose.[3] Defendant's only argument on appeal is "that the trial court

[1] A pseudonym is used to protect the identify of an individual who acted as an informant to the police.

[2] "A controlled buy is a method whereby the police use a confidential informant to purchase drugs from a targeted individual." *State v. Collins*, 216 N.C. App. 249, 249–50, 716 S.E.2d 255, 256 (2011). We need not address the specifics of the buy in this case, as the only issue on appeal is the jury instructions.

[3] Mr. Jones testified that he sold heroin to an individual who gave it to someone else who ultimately died from a heroin overdose.

committed reversible and plain error in failing to instruct the jury on the testimony of a witness with immunity or quasi-immunity as requested by the defendant." (Original in all caps.) Defendant notes that he requested the jury instruction at issue on appeal but failed to object to the instructions as given, and thus requests plain error review.

> 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. Cameron, 223 N.C. App. 72, 75, 732 S.E.2d 386, 388–89 (2012) (citation omitted).

Here, it is undisputed that Mr. Jones was not granted any immunity from prosecution by the State of North Carolina. Mr. Jones testified he received "a federal immunity letter" regarding his immunity from federal prosecution for the death of the individual from a heroin overdose.[4] Mr. Jones also testified he was aware he "could still be charged in state court[.]" In *this* jurisdiction, at the time Mr. Jones

[4] There was no evidence of where the person who overdosed on heroin died or in which jurisdiction, either state or federal, the death occurred. Mr. Jones acknowledged he "could still be charged in state court" although the record does not reveal the prosecutorial district where this could happen.

testified he did not have any type of immunity, and the State would be able to prosecute him for any applicable crime.

Defendant requested pattern jury instruction, 104.21 regarding "Testimony of Witness with Immunity or Quasi-Immunity." Defendant did not cite any case or statute which may support his argument for an instruction based upon immunity granted by another jurisdiction and that instruction is not supported by the evidence.[5] Defendant's requested pattern jury instruction, "North Carolina Pattern Jury Instruction 104.21, Testimony of Witness with Immunity or Quasi-Immunity[,]" is based upon several statutes in Article 61 of Chapter 15A – North Carolina General Statute §§ 15A-1052(c), -1054, and -1055 – addressing immunity from prosecution and "[c]harge reductions or sentence concessions" in North Carolina. N.C. Gen. Stat. §15A-1054 (2017); *see* N.C.P.I. – Crim. 104.21; *see also* N.C. Gen. Stat. §15A-1052(c), -1055 (2017). All of these statutes, North Carolina General Statutes §§ 15A-1052(c), -1054, and -1055, address the requirements for formal grants of immunity and

[5] North Carolina Pattern Jury Instruction 104.21 provides, "There is evidence which tends to show that a witness testified [under a grant of immunity] [under an agreement with the prosecutor for a charge reduction in exchange for the testimony] [under an agreement with the prosecutor for a recommendation for sentence concession in exchange for the testimony]. If you find that the witness testified for this reason, in whole or in part, you should examine this testimony with great care and caution. If, after doing so, you believe the testimony, in whole or in part, you should treat what you believe the same as any other believable evidence." N.C.P.I. – Crim. 104.21 (footnote omitted). The footnote to 104.21 provides, "Prior to the witness's testimony under a grant of immunity and an order to testify, the judge must inform the jury. N.C. Gen. Stat. § 15A-1052(c)."

discretionary charge reductions by a North Carolina district attorney.[6] Article 61 of Chapter 15A does not specifically address grants of immunity in a federal court arising from a separate prosecution or potential charges of another crime in *federal* courts. *See generally* N.C. Gen. Stat. Art. 61 (2017). Further, the Criminal Code Commission Commentary to North Carolina General Statute § 15A-1052 noted the need for immunity from prosecution to be addressed by the particular jurisdiction:

> The Commission determined that there was also a need for central clearance in North Carolina to guard against a solicitor's unwittingly granting immunity to a key figure under investigation elsewhere in the State or in the United States. The Commission decided, though, that it would be sufficient for the district solicitor to inform the Attorney General of North Carolina, or a Deputy or Assistant Attorney General designated by him, of the proposed application for an immunity order. The person in the Department of Justice receiving the information should then be able to tell the district solicitor whether our Department of Justice knows of any reason why the particular individual should not be given immunity. A telephone call should be sufficient to satisfy the terms of the statute. Note that only the elected district solicitor may apply for the immunity order from the judge.
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> One interesting point might be noted. Even though the North Carolina statute grants full transactional immunity,

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[6] North Carolina General Statute § 15A-1052 addresses a "[g]rant of immunity in court proceedings" when the district attorney determines a witness "is likely to asset his privilege against self-incrimination and his testimony or other information is or will be necessary to the public interest." N.C. Gen. Stat. § 15A-1052. The district attorney must inform the Attorney General of the intent to request immunity and must obtain an order from the trial court. *See id.* North Carolina General Statute § 15A-1054 allows the prosecutor in his discretion to elect "not to try any suspect for offenses believed to have been committed within the prosecutorial district . . ., to agree to charge reductions, or to agree to recommend sentence concessions" based upon the suspect's truthful testimony in a criminal proceeding. N.C. Gen. § 15A-1054. North Carolina General Statute § 15A-1055 addresses evidence regarding a grant of immunity or testimonial arrangement. *See* N.C. Gen. Stat. § 15A-1055.

> this grant would be effective only with respect to prosecutions under the laws of North Carolina.

N.C. Gen. Stat. § 15A-1052 (Criminal Code Commission Commentary).

The evidence here shows Mr. Jones was not "testifying under a grant of immunity or pursuant to an arrangement under G.S. 15A-1054 with respect to that grant of immunity or arrangement." N.C. Gen. Stat. § 15A-1055. The pattern jury instructions requested by defendant address testimony "under a grant of immunity[,]" "under an agreement with the prosecutor for a charge reduction in exchange for the testimony[,]" or "under an agreement with the prosecutor for a recommendation for sentence concession in exchange for the testimony." N.C.P.I. – Crim. 104.21. None of the circumstances noted in pattern jury instruction 104.21 were present in this case. *See generally id.*

In addition, even if there were error in failure to give an instruction regarding the immunity, defendant has failed to show any prejudice. Mr. Jones testified regarding his immunity from federal prosecution and defendant cross-examined him on this issue. The trial court also gave the jury one of the instructions noted in North Carolina General Statute § 15A-1052(c): "During the charge to the jury, the judge must instruct the jury as in the case of interested witnesses." N.C. Gen. Stat. § 15A-1052(c). Here, the trial court gave the jury instructions in accord with North Carolina Pattern Jury Instruction 104.20, "Testimony of Interested Witness[,]" in full. (Original in all caps.)

Upon review of Mr. Jones's testimony regarding his federal immunity and the jury instructions in their entirety, we cannot find the trial court erred by its failure to give North Carolina Pattern Jury Instruction 104.21. In addition, defendant has not demonstrated any prejudice from failure to give this instruction, considering the other evidence and instructions to the jury regarding Mr. Jones's testimony as an interested witness. Defendant has failed to demonstrate any error, much less plain error.

III. Conclusion

We conclude there was no error.

NO ERROR.

Judges DILLON and YOUNG concur.

Report per Rule 30(e).