IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-620

Filed: 4 February 2020

Lincoln County, No. 18 CRS 780

STATE OF NORTH CAROLINA

v.

IRA VERNARD WILSON, Defendant.

Appeal by defendant from judgment entered 1 January 2019 by Judge Carla Archie in Lincoln County Superior Court. Heard in the Court of Appeals 5 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Katherine M. McCraw, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

YOUNG, Judge.

Where the trial court combined two offenses for a single jury instruction, but the instruction properly outlined the elements of both offenses, defendant cannot show that the trial court committed plain error in its instruction. We therefore find no plain error.

I. Factual and Procedural Background

On 26 April 2018, Lincoln County Sheriff's Deputy Lonnie Leonard (Deputy Leonard) was involved in an undercover narcotics investigation. He had prior contact with Ira Vernard Wilson (defendant), from whom he was to purchase cocaine. Deputy Leonard met defendant on Highway 321, where defendant's vehicle had broken down, and defendant got into Deputy Leonard's car. Deputy Leonard inquired whether defendant had "the dope[,]" and defendant produced a bag of white powder. Deputy Leonard then paid defendant for the bag. A North Carolina State Crime Lab forensic scientist examined the bag of powder and determined it contained roughly 31.61 grams, plus or minus .02 grams, of cocaine.

On 6 August 2018, the Lincoln County Grand Jury returned indictments charging defendant with one count each of trafficking in 28 grams or more but less than 200 grams of cocaine by possession, by transport, by sale, and by delivery.

The matter proceeded to trial. At the jury charge conference, the trial court stated its intention to instruct the jury on "drug trafficking by sale or delivery[,]" consolidating two of the charges for instruction. Defendant did not object or offer alternative instructions. The trial court instructed the jury accordingly.

The jury returned verdicts finding defendant guilty of all four counts. The trial court consolidated the charges of trafficking by transport and possession in one judgment, and the charges of trafficking by sale and delivery in another. The trial

court sentenced defendant to two consecutive sentences each of a minimum of 35 and a maximum of 51 months in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. 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).

"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).

III. Jury Instructions

In his sole argument on appeal, defendant contends that the trial court committed plain error in failing to instruct the jury on the charge of trafficking by delivery. We disagree.

In its jury instructions, the trial court specifically outlined what the jury would need to determine to convict defendant of the crimes of trafficking in cocaine by possession and trafficking in cocaine by transportation. However, the trial court consolidated its jury instructions on the charges of trafficking by sale and by delivery, as follows:

> The defendant has also been charged with trafficking in cocaine, which is the unlawful sale or delivery of 28 grams or more but less than 200 grams of cocaine. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that the defendant knowingly sold or delivered cocaine to Deputy Lonnie Leonard.
>
> And second, that the amount of cocaine which the defendant sold or delivered was 28 grams or more but less than 200 grams.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant -- the defendant knowingly sold or delivered cocaine to Detective or Deputy Lonnie Leonard and that the amount which he sold or delivered was 28 grams or more but less than 200 grams, it would be your duty to return a verdict of guilty.
>
> If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Defendant contends that it was error for the trial court to consolidate these instructions in this manner. Because defendant failed to object to this instruction, we review it for plain error.

"Sale, manufacture, delivery, transportation, and possession of 28 grams or more of cocaine as defined under N.C.G.S. § 90-95(h)(3) are separate trafficking offenses for which a defendant may be separately convicted and punished." *State v. Garcia*, 111 N.C. App. 636, 641, 433 S.E.2d 187, 190 (1993). As defendant was charged with one count each of trafficking by sale and trafficking by delivery, it is clear that the jury should properly have been instructed on two offenses, rather than two alternate theories of one offense. This is defendant's contention – that by combining the instructions into "trafficking by sale or delivery," the trial court dismissed one of the charges, and treated the other as a single charge with two alternate theories under which the jury could find defendant guilty.

However, "[i]nstructions to the jury must be read in their entirety and taken in context." *State v. Crummy*, 107 N.C. App. 305, 329, 420 S.E.2d 448, 462 (1992). We generally will not permit a single *lapsis linguae* in jury instructions to rise to the level of reversible error. *Id.* The question is whether, taken in context, the jury may have been misled by the instruction, as defendant contends.

In examining the circumstances to determine whether ambiguity exists, "the evidence and the charge are reasonably considered in connection with the verdict

returned[]" to establish the manifest intent of the jury. *State v. Hampton*, 294 N.C. 242, 248, 239 S.E.2d 835, 840 (1978). In the instant case, the verdict sheets revealed eight possibilities – guilty or not guilty, for each of the four separate charges. The jury clearly had no issue understanding that defendant was charged with four separate offenses, and finding defendant guilty of each in turn. As such, we are hard-pressed to hold that, absent the alleged error in the jury instructions, the jury "probably would have reached a different result."

Moreover, it is worth noting that the trial court used the appropriate Pattern Jury Instruction. North Carolina Criminal Pattern Jury Instruction 260.23 governs trafficking by sale, as well as trafficking by delivery, with the only distinction between the charges being the choice of which word – sale or delivery. N.C.P.I.-Crim 260.23. The trial court in the instant case, rather than repeat the identical instruction save for the substitution of one word, merely offered one instruction, and said "sale or delivery" instead of one or the other. While we acknowledge that it would have been the better practice to give these instructions separately, and strongly encourage the courts of this State to do so whenever possible, we understand the trial court's desire for some degree of economy. As such, we decline to hold that this simple substitution, otherwise comporting with the Pattern Jury Instructions, constituted "error so fundamental that it denied the defendant a fair trial and quite probably

tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

Defendant contends that, where the trial court fails to instruct the jury on a charged offense, the conviction for that offense must be vacated. This is true. However, in the instant case, the trial court – in an attempt at judicial economy – did indeed instruct the jury on two offenses, not one. That it did so in a single, combined instruction was hardly fundamental error. We therefore hold that the trial court did not commit plain error in instructing the jury on the charges of trafficking by sale and trafficking by delivery in a single, combined instruction.

NO PLAIN ERROR.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).