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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-226

Filed: 3 November 2020

Scotland County, No. 16 CRS 051589

STATE OF NORTH CAROLINA

v.

CLARENCE EUGENE SMITH

Appeal by defendant from judgment entered 14 June 2019 by Judge Tanya T. Wallace in Scotland County Superior Court. Heard in the Court of Appeals 6 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Martin T. McCracken, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for defendant-appellant.

TYSON, Judge.

Clarence Eugene Smith (“Defendant”) appeals from a judgment entered upon a jury’s verdict finding him guilty of trafficking oxycodone by possession and for obtaining a controlled substance by fraud. We find no plain error.

I. Background

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Defendant's wife of thirty-four years, Linda Smith, died in a hospice facility on Friday, 24 June 2016. Defendant testified in the days before his wife's death, Medical Village Pharmacy called him in reference to his "wife's prescription" and told him to "pick it up on Monday." Prior to her death, Mrs. Smith was taking approximately fifteen medications per day. Defendant was sixty-two years old at the time, had lost toes on both feet, and suffers from permanent nerve damage in his right eye. He receives dialysis treatment three times per week and is prescribed approximately thirty medications per day. Defendant and his wife were both prescribed oxycodone to be taken three times per day.

Defendant spent Friday night at his brother's house ("John Smith") so they could drive together to Charlotte to arrange Mrs. Smith's funeral. John Smith testified Defendant was not in his normal state of mind that following morning as they began the trip to Charlotte.

Defendant testified that he received a phone call that morning from a young woman from Medical Village Pharmacy, who told him "your prescription is ready to be picked up." Defendant testified that he presumed the prescription was for his wife because of the phone call he received three days prior, when the pharmacy called in reference to the prescription.

The State's evidence showed on Monday, an unidentified male called the Medical Village Pharmacy, asking to fill his wife's prescription for pain medication.

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The caller provided the name “Linda Smith” and stated he would be picking up the prescription. Other employees at the pharmacy were surprised that someone had called to fill Mrs. Smith’s prescription as they had previously discovered on Facebook social media postings that she was deceased on 24 June 2016.

After confirming Defendant’s wife was deceased, the owner of the pharmacy, Ed Herring, contacted Scotland County Sheriff’s Lieutenant Dave Salzlein (“Lieutenant Salzlein”) around 11:50 a.m. Herring informed Lieutenant Salzlein that Defendant was on his way to pick up a prescription for his recently deceased wife. Lieutenant Salzlein and another officer, Lieutenant Earl Haywood, agreed to set up a controlled delivery. Lieutenant Salzlein was present at the pharmacy to observe the transaction while Lieutenant Haywood waited outside in his patrol vehicle.

The State’s evidence tended to show when Defendant arrived at the drive-thru window, he stated he had come to pick up Linda Smith’s prescription and confirmed her date of birth. Defendant signed for the medication on an iPad. The pharmacy employee printed the receipt, attached it to the bag, and handed the prescription to Defendant himself.

Defendant’s evidence showed John Smith drove into the drive-thru at the pharmacy, greeted the employee, and pointed to Defendant in the backseat. John Smith’s son, Defendant’s nephew, was seated in the front passenger seat. Defendant testified that the employee addressed Defendant by name and asked him if he was

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“getting his medication.” Defendant replied, “yes.” Another employee came to the window with a bag already folded and stapled. John Smith passed the bag to Defendant and drove away.

After the vehicle left the drive-thru, Lieutenant Haywood performed a traffic stop on the vehicle. Lieutenant Haywood went to the back-passenger side of the vehicle where Defendant was seated and knocked on the window. Lieutenant Haywood observed a Medical Village Pharmacy bag sitting to Defendant’s left side and asked Defendant if he had just picked up a prescription. Defendant replied in the affirmative. Lieutenant Haywood asked to see the bag and told Defendant not to open it. He then asked Defendant, “is this your dead wife’s medicine, Linda? Is she dead?” Defendant dropped his head and did not respond to Lieutenant Haywood.

Inside the bag was a Medical Village Pharmacy pill bottle, labelled as oxycodone prescribed for Linda Smith. Attached to the bag was the receipt for the prescription, also from Medical Village Pharmacy. Defendant testified that he did not know what prescription he was picking up and that he never opened nor looked inside the bag. Defendant also testified that when he picked up the prescription he was confused because he had just lost his wife of thirty-four years.

Lieutenant Haywood requested Defendant to step out of the car and placed him under arrest. Testing of the contents of the pill bottle later confirmed oxycodone.

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Defendant was indicted for trafficking in oxycodone and for obtaining a controlled substance by fraud.

During the charge conference, the trial court stated it would instruct on trafficking a controlled substance using North Carolina Pattern Jury Instruction, Criminal 260.17 -- Drug Trafficking by Possession. As to the “knowingly possess” element, the trial court instructed that the State must prove beyond a reasonable doubt that “the defendant knowingly possessed oxycodone, an opiate derivative.”

The jury convicted Defendant of trafficking oxycodone and obtaining a controlled substance by fraud. The trial court consolidated the convictions for judgment and sentenced Defendant to an active sentence of 70 to 93 months and imposed a \$50,000 fine. Defendant gave oral notice of appeal.

II. Jurisdiction

An appeal of right lies with this Court from a final judgment of the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2019).

III. Issues

Defendant argues the trial court erred by not instructing the jury on guilty knowledge for the trafficking offense and by failing to exercise discretion in response to his motion to arrest judgment on his conviction for trafficking oxycodone.

IV. Jury Instruction

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Defendant argues the trial court erred by not instructing on North Carolina Pattern Jury Instruction, Criminal 260.17 -- Drug Trafficking by Possession or the additional language contained in footnote 6. Defendant did not request this instruction and acknowledges our review of this issue is limited to plain error.

A. 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).

This Court’s review under plain error is to be “applied cautiously and only in the exceptional case” where the error “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings” to overcome dismissal for a defendant’s failure to preserve. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). To constitute plain error, Defendant carries and maintains the burden to show “not only that there was error, but that absent the error, the jury probably would have reached a different result” to demonstrate prejudice to reverse the judgment. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

“The jury charge is one of the most critical parts of a criminal trial. It is the

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duty of the trial court to instruct on all substantial features of a case raised by the evidence.” *State v. Coley*, 375 N.C. 156, 159, 846 S.E.2d 455, 457 (2020) (citations omitted).

Our Supreme Court also stated, “all substantive and material features of the crime with which a defendant is charged must be addressed in the trial court’s instructions to the jury.” *State v. Bogle*, 324 N.C. 190, 196, 376 S.E.2d 745, 748 (1989). “[W]hen instructions, viewed in their entirety, present the law fairly and accurately to the jury, the instructions will be upheld.” *State v. Roache*, 358 N.C. 243, 304, 595 S.E.2d 381, 420 (2004) (citation omitted).

This Court stated, “[i]n order for a new trial to be granted, the burden is on the defendant to not only show error but to also show that the error was so prejudicial that without the error it is likely that a different result would have been reached.” *State v. Owen*, 133 N.C. App. 543, 549, 516 S.E.2d 159, 164 (1999) (citation omitted). “[I]t is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.” *State v. Cornell*, 222 N.C. App. 184, 191, 729 S.E.2d 703, 708 (2012) (citations omitted).

Defendant asserts the trial court was under a duty to instruct the jury that it had to find Defendant had specific intent and “knowingly possessed [oxycodone] and [he] knew that he possessed [oxycodone].” Our Supreme Court has held: “When the

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defendant denies having knowledge of the controlled substance that he has been charged with possessing or transporting, the existence of the requisite guilty knowledge becomes a ‘determinative issue of fact’ about which the trial court must instruct the jury.” *State v. Galaviz-Torres*, 368 N.C. 44, 48-49, 772 S.E.2d 434, 437 (2015) (citation omitted).

North Carolina Pattern Jury Instruction, Criminal 260.17 -- Drug Trafficking by Possession, in pertinent part, reads as follows: “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 possessed [opiate]. ... and Second, that the amount of [opiate] which the defendant possessed was [state amount].” N.C.P.I. -- Crim. 260.17 (2016) (alteration in original).

Footnote 6 directs the trial judge to further instruct the jury: “If the defendant contends that the defendant did not know the true identity of what the defendant possessed, add this language to the first sentence: ‘and the defendant knew that what the defendant possessed was [opiate].’” N.C.P.I. -- Crim. 260.17 n. 6.

Defendant cites *State v. Coleman*, 227 N.C. App. 354, 361, 742 S.E.2d 346, 350-51 (2013), wherein this Court held plain error existed when there was contested knowledge of possession. *Coleman* is inapposite to the case before us because Defendant did not contest knowledge of the contents of the prescription, only the person to whom the medicine was prescribed. Defendant provided no testimony

tending to show he did not know the prescription he picked up was oxycodone. Defendant gave conflicting testimony of whether he thought the prescription was for himself or his deceased wife. Nowhere in Defendant's trial testimony does he argue he did not know the prescription was not oxycodone or was something else. Defendant's counsel also failed to request an instruction on the ultimate user exemption. N.C. Gen. Stat. §§ 90-87(27); 90-101(c) (2019).

We find no error, and certainly no plain error in this record, when the trial court did not further instruct the jury on Defendant's guilty knowledge under footnote 6. Defendant's argument is overruled.

V. Defendant's Purported Motion to Arrest Judgment

Defendant argues the trial court declined to arrest judgment on his trafficking conviction, based on the trial court's belief it could not exercise discretion in the matter. Defendant asserts the trial court's error was prejudicial because if judgment was arrested on the trafficking conviction, he would be eligible for a probationary sentence on the remaining conviction instead of serving an active sentence.

Defendant's counsel made no motion to arrest judgment after trial. Defendant's counsel moved the court to enter a judgment notwithstanding the verdict. Our appellate rules provide:

In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the

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specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). A party's failure to preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal. *Dogwood Dev. and Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195, 657 S.E.2d 361, 364 (2008). Defendant failed to raise this issue before the trial court. His argument is dismissed.

VI. Conclusion

Defendant did not present evidence at trial to request or require the trial court to give the requested jury instruction. Defendant did not make the required motion before the trial court to preserve appellate review of the trial court's discretion to arrest judgment on the trafficking conviction.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. Under plain error review, we find no reversible errors to warrant a new trial or re-sentencing. *It is so ordered.*

NO PLAIN ERROR.

Judges BRYANT and COLLINS concur.

Report per Rule 30(e).