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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-446

No. COA20-601

Filed 17 August 2021

New Hanover County, Nos. 17 CRS 52659, 3405

STATE OF NORTH CAROLINA

v.

OTHELLO YORK AKA ABU MUHAMAD

Appeal by defendant from judgment entered 8 January 2020 by Judge John E. Nobles Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Ronald D. Williams, II, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant.

DIETZ, Judge.

¶ 1 Defendant Othello York appeals a criminal judgment on multiple drug charges. York challenges various portions of a detective's testimony at trial, arguing that his counsel was ineffective for failing to object, move to strike, or request a mistrial, and that the trial court committed plain error by admitting the challenged testimony.

¶ 2 As explained below, York's ineffective assistance claim is not suited for review

on direct appeal and we therefore dismiss it without prejudice. We reject York's plain error argument because York cannot show that, but for the challenged testimony, the jury probably would have reached a different verdict.

Facts and Procedural History

¶ 3 On 31 March 2017, Sarah Paffenroth went to a magistrate in Wilmington and claimed that Defendant Othello York assaulted her and stole her cell phone. The magistrate signed a warrant for York's arrest.

¶ 4 Law enforcement officers then located York and arrested him. During a search incident to the arrest, officers found a purple bag in York's pocket that had several smaller containers of illegal drugs. In total, the officers seized two bags of marijuana weighing 1.46 grams, 38 bindles of heroin, and 45 baggies of cocaine weighing 9.6 grams.

¶ 5 Due to the quantity of drugs found on York, the arresting officers contacted Detective Lawson, a narcotics investigator with the Wilmington Police Department, who was on call at the time of the arrest. Lawson arrived at the police department to view the drugs seized from York. Detective Lawson then obtained a search warrant for York's residence. When officers searched York's residence, they found no additional drugs but found sifters, grinders, and a package of plastic baggies. One of the grinders was filled with a brown-tinted substance, but the contents of the grinder were not sent for testing. The officers executed the search warrant a few hours after

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York's arrest and, when they arrived, the window in the door was smashed, indicating that someone may have broken into the home before the officers arrived.

¶ 6 The State charged York with possession with intent to sell or deliver heroin, possession with intent to sell or deliver cocaine, possession of drug paraphernalia, and attaining habitual felon status. The drug charges were based on the items found inside the purple bag officers recovered from York's pocket during his arrest.

¶ 7 In April 2017, Detective Lawson followed Paffenroth after she attended York's first court appearance. He later stopped her and found a large quantity of drugs in her car. Paffenroth admitted to breaking into York's home after his arrest and claimed the drugs in her possession came from York's home.

¶ 8 At trial, Detective Lawson testified that he was "immediately familiar" with York because he had previously conducted investigations at York's residence. Lawson explained that he had conducted two separate "trash pulls" there several weeks before York's arrest, after receiving an anonymous tip that York was involved with the sale of illegal drugs. He also testified that he had investigated York's "past criminal activities." Detective Lawson described the items found during the trash pulls, including plastic bags consistent with those used to package narcotics, cardboard boxes consistent with packaging for glassine bindles used to sell heroin, empty pill bottles, a glass pipe, and a hotel key.

¶ 9 During cross-examination by York's trial counsel, Detective Lawson also

testified that Paffenroth told him she broke into York's home after his arrest and took drugs belonging to York.

¶ 10 On 8 January 2020, a jury convicted York of possession with intent to sell or deliver heroin, possession with intent to sell or deliver cocaine, and possession of drug paraphernalia. York then pleaded guilty to attaining habitual felon status. The trial court consolidated the charges for judgment and sentenced York to 73 to 100 months in prison. York appealed.

Analysis

I. Ineffective assistance of counsel claim

¶ 11 York first argues that he received ineffective assistance of counsel because his trial attorney failed to object, move to strike, or request a mistrial when Detective Lawson gave inadmissible and prejudicial testimony. York focuses on Detective Lawson's testimony concerning York's past criminal activities, the anonymous tip that York was dealing drugs, the items found in trash pulls at York's home, and Paffenroth's statements about taking drugs from York's home.

¶ 12 "To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations omitted).

¶ 13 This Court will address an ineffective assistance of counsel claim on direct appeal only "when the cold record reveals that no further investigation is required." *State v. Thompson*, 359 N.C. 77, 122–23, 605 S.E.2d 850, 881 (2004). When the claim raises "potential questions of trial strategy and counsel's impressions, an evidentiary hearing available through a motion for appropriate relief is the procedure to conclusively determine these issues." *State v. Stroud*, 147 N.C. App. 549, 556, 557 S.E.2d 544, 548 (2001). Thus, when there are factual questions about why trial counsel failed to object or move to strike, we dismiss the ineffective assistance claim "without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *Thompson*, 359 N.C. at 122–23, 604 S.E.2d at 881.

¶ 14 York argues that trial counsel's actions in this case could not have been part of a trial strategy because "no competent trial attorney would've allowed the State to introduce the following evidence without either a timely objection, motion to strike, or a motion for a mistrial." We are not persuaded that we can make that determination as a matter of law. For example, part of trial counsel's strategy may have been to suggest that others, not York, were responsible for the drug activity at

his home, and the challenged testimony may have been part of that strategy. In short, this is simply not a case where we can assess the ineffective assistance claim on a cold record on direct appeal. We therefore dismiss York’s ineffective assistance of counsel claim without prejudice.

II. Evidentiary challenges to Detective Lawson’s testimony

¶ 15 York next argues that, in addition to counsel’s alleged ineffective assistance, the trial court committed plain error by admitting the testimony described above. We reject this argument.

¶ 16 “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “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.” *Id.* In other words, the defendant must show that, “absent the error, the jury probably would have returned a different verdict.” *Id.* at 519, 723 S.E.2d at 335.

¶ 17 York has not satisfied this plain error standard. Even setting aside the challenged testimony, there was substantial evidence of the charged drug offenses. Law enforcement seized a large quantity of drugs from York when they arrested him, including 38 bindles of heroin and 45 baggies of cocaine. In York’s home, officers found grinders, and the State presented evidence that these grinders often are used to cut

and mix illegal drugs. Finally, there was evidence that someone broke into York's home before the officers arrived, and the jury reasonably could infer that other incriminating evidence may have been removed during this break-in.

¶ 18 York repeatedly asserts that, despite this evidence, the challenged testimony “probably impacted the jury’s verdicts.” But York never explains how or why. In light of the large quantity of drugs seized from York and the other incriminating evidence presented by the State, York simply has not shown that “absent the error, the jury probably would have returned a different verdict.” *Id.* at 519, 723 S.E.2d at 335. Accordingly, we find no plain error in the trial court’s judgments.

Conclusion

¶ 19 We dismiss York’s claim of ineffective assistance of counsel without prejudice and find no plain error in the trial court’s judgment.

DISMISSED IN PART; NO PLAIN ERROR IN PART.

Judges MURPHY and CARPENTER concur.

Report per Rule 30(e).