IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-548

No. COA20-635

Filed 5 October 2021

New Hanover County, Nos. 19CRS050630-050632

STATE OF NORTH CAROLINA

v.

ROGER ARTHUR, JR.

Appeal by Defendant from judgments entered 31 October 2019 by Judge Joshua W. Willey, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 8 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for the State-Appellee.

Anne Bleyman for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals from judgments entered upon guilty verdicts of various drug-related crimes and his plea of guilty to attaining habitual felon status. Defendant argues that the trial court erred by permitting a lay witness to give opinion testimony identifying a substance as marijuana, and his sentence as a habitual felon constitutes cruel and unusual punishment. We discern no error.

I. Background

¶ 2 On 22 April 2019, Defendant was indicted for possession with intent to manufacture, sell, and deliver heroin; possession of heroin; possession of heroin on the premises of a local confinement facility; possession of marijuana; possession of marijuana on the premises of a local confinement facility; two counts of possession of drug paraphernalia; and attaining habitual felon status. All but the charge of attaining habitual felon status were tried before a jury on 29 and 30 October 2019.

¶ 3 The evidence at trial tended to show the following: Defendant was arrested and booked into the New Hanover County Detention Facility on 21 January 2019. The next day, Deputy Heavin Mason was working as a detention officer and smelled marijuana in the cell where Defendant and another inmate were housed. Mason checked the nearby cells and confirmed that the odor was coming from Defendant's cell. Officers removed Defendant and his cellmate from the cell, conducted a pat-down search of each, and then searched the cell.

¶ 4 After the officers did not find any narcotics in the cell, they conducted a "visual body inspection" on both Defendant and his cellmate. A visual body inspection begins with a pat-down while the inmate is dressed. Then, the officer directs the inmate to remove one article of clothing at a time, searches the article of clothing, and moves to the next article. Once the inmate is undressed, the officer searches the inmate's mouth, behind the ears, in any long hair, and behind the inmate's scrotum. Finally,

the officer directs the inmate to squat and cough "to make sure that no contraband is being smuggled into the facility" via the inmate's anal cavity.

¶ 5 Mason testified that when he instructed Defendant to squat and cough, Defendant only partially performed the maneuver. After Mason again instructed Defendant to squat and cough, Defendant complied, and Mason "saw a clear plastic bag, material, sticking out of . . . his rectum." Mason instructed Defendant to perform the maneuver again, but Defendant refused. Mason informed a superior, Corporal James Biondo, who attempted to perform another visual body inspection on Defendant in the intake area of the jail. According to the officers, Defendant only partially performed the squat and cough maneuver and became "belligerent and argumentative." The officers restrained Defendant and took him to the hospital.

¶ 6 Deputy Wes Baxley of the New Hanover County Sheriff's Office vice and narcotics unit came to the hospital. After Baxley obtained a search warrant to search Defendant's rectal cavity, Defendant spoke to a nurse and agreed to remove the items hidden in his rectal cavity. Baxley testified that Defendant first reached behind himself and "produced a small amount of marijuana." Baxley "still could hear crinkling of plastic on or about [Defendant's] person" and asked Defendant what else was hidden. Baxley testified that Defendant then reached behind himself and produced "a small amount of heroin in a plastic bag." This second bag contained 30 smaller individual baggies bundled together with rubber bands. Once an x-ray

revealed no further hidden items, Defendant was transported back to the detention center.

¶ 7 Lyndsay Cone, a forensic scientist in the State Crime Lab's drug chemistry section, testified at trial as "an expert in the field of forensic chemistry analyzing substances for the purposes of determining whether they contain controlled substances." Cone analyzed the substance found in one of the 30 small bags within the second bag, but did not analyze the substance which Baxley identified as marijuana.

¶ 8 The State dismissed the possession of heroin charge during the charge conference. The jury found Defendant guilty of the remaining drug charges. Defendant thereafter pled guilty to attaining habitual felon status. The trial court consolidated the convictions into two judgments and sentenced Defendant as a habitual felon to two consecutive terms of 67 to 93 months in prison. Defendant gave oral notice of appeal in open court.

II. Discussion

A. Lay Opinion Testimony

¶ 9 Defendant argues that the trial court erred by permitting Baxley to give lay opinion testimony identifying the substance in the first bag produced by Defendant as marijuana. Defendant contends that Baxley's testimony was inadmissible because "[a] law enforcement officer may not express a lay opinion as to the visual

identification of the chemical composition of a purported controlled substance."

¶ 10 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 specific grounds were not apparent from the context" and must "obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1). Defendant did not object to any of the instances in which Baxley identified the substance as marijuana. However, because Defendant "specifically and distinctly" contends that the trial court's admission of Baxley's testimony amounted to plain error, we will review this issue for plain error. N.C. R. App. P. 10(a)(4).

¶ 11 "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.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

¶ 12 A lay witness' "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2019). This Court has

consistently held that "a police officer experienced in the identification of marijuana may testify to his visual identification of evidence as marijuana[.]" *State v. Garnett*, 209 N.C. App. 537, 546, 706 S.E.2d 280, 286 (2011) (citation omitted); *see also State v. Johnson*, 225 N.C. App. 440, 455, 737 S.E.2d 442, 451 (2013) ("It is well established that officers with proper training and experience may opine that a substance is marijuana."); *State v. Mitchell*, 224 N.C. App. 171, 179, 735 S.E.2d 438, 444 (2012) (noting that "marijuana is distinguishable from other controlled substances that require more technical analyses for positive identification" and "the State is not required to submit marijuana for chemical analysis"); *State v. Cox*, 222 N.C. App. 192, 198, 731 S.E.2d 438, 443 (2012) ("[T]he trial court did not err by allowing the two officers to identify the green vegetable matter as marijuana based on their observation, training, and experience."), *rev'd on other grounds*, 367 N.C. 147, 749 S.E.2d 271 (2013); *State v. Jones*, 216 N.C. App. 519, 526, 718 S.E.2d 415, 421 (2011) ("[O]ur case law provides that an officer may testify that the contraband seized was marijuana based on visual inspection alone.").

¶ 13 Defendant contends that these cases are at odds with *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009) (per curiam), and *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010), in which our Supreme Court held that certain lay and expert opinion testimony was inadmissible to identify certain substances as controlled substances. As the State argues, however, the Supreme

Court's decisions in *Llamas-Hernandez* and *Ward* do not control the issue here—the admissibility of Baxley's opinion testimony identifying a substance as marijuana. Instead, we are bound by the multiple cases since *Ward* in which this Court has permitted officers to give lay opinion testimony identifying marijuana based upon their training and experience. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

¶ 14 At trial, Baxley testified that the first bag produced by Defendant contained marijuana. Baxley testified that he identified the substance "from what it looks like [and] what it smelled like"; he had been "exposed [] to what marijuana smelled like and looked like" during training; and he had "done numerous cases involving marijuana, small to large quantities," in his time with the vice and narcotics unit. Baxley permissibly offered an opinion identifying the substance as marijuana based on his training and experience. *See Johnson*, 225 N.C. App. at 455, 737 S.E.2d at 451. The trial court did not err, let alone commit plain error, by admitting his testimony.

B. Sentencing as a Habitual Felon

¶ 15 Defendant next argues that being sentenced as a habitual felon violated his right to be free of cruel and unusual punishment under the state and federal

constitutions. Defendant acknowledges "that this Court has previously upheld the statutory scheme against an identical challenge and raises this issue in [his] brief to urge the Court to re-examine its prior holdings and so as not to be considered to have abandoned these claims under N.C. R. App. P. 28(b)(6)."

¶ 16 Defendant is correct that our appellate courts have upheld sentences under the habitual felon laws against similar constitutional challenges. *See State v. Todd*, 313 N.C. 110, 118-19, 326 S.E.2d 249, 253-54 (1985) (habitual felon laws are constitutional); *State v. Blackwell*, 228 N.C. App. 439, 449, 747 S.E.2d 137, 144-45 (2013) (holding that a sentence of 107 to 138 months' imprisonment for drug offenses did not violate the prohibition against cruel and unusual punishment); *State v. Lackey*, 204 N.C. App. 153, 159, 693 S.E.2d 218, 222 (2010) (holding that a sentence "of 84 to 110 months in prison for possession of [0.1 grams of] cocaine, as an habitual felon, did not offend the proscription against cruel and unusual punishment . . . ."); *State v. Hall*, 174 N.C. App. 353, 355-56, 620 S.E.2d 723, 725 (2005) (holding that sentencing defendant convicted of obtaining property by false pretenses to 121 to 155 months in prison did not amount to cruel and unusual punishment); *State v. Clifton*, 158 N.C. App. 88, 96, 580 S.E.2d 40, 46 (2003) (holding that sentencing a defendant convicted of a Class H felony as a Class C felon to two prison terms of a minimum of 168 months and a maximum of 211 months did not amount to cruel and unusual punishment). This Court is bound by those prior decisions and cannot overrule itself.

In re Civil Penalty, 324 N.C. at 384, 379 S.E.2d at 37. Therefore, we must overrule Defendant's argument and hold that Defendant's sentence did not violate Defendant's right to be free of cruel and unusual punishment.

III. Conclusion

¶ 17 The trial court did not err in admitting Baxley's opinion testimony, based on his training and experience, that one of the substances in Defendant's possession was marijuana. Defendant's sentence did not violate the prohibition against cruel and unusual punishment in the state and federal constitutions. We discern no error.

NO ERROR.

Judges ARROWOOD and JACKSON concur.

Report per Rule 30(e).