IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-578

No. COA20-716

Filed 19 October 2021

Mecklenburg County, Nos. 17CRS214592, 17CRS214595

STATE OF NORTH CAROLINA

v.

RICARDO VERNAR HALE, Defendant.

Appeal by Defendant from judgments entered on 23 January 2020 by Judge Casey M. Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael E. Bulleri, for the State.

Office of the Public Defender, by Assistant Public Defender Julie Ramseur Lewis, for the Defendant.

JACKSON, Judge.

¶ 1 Ricardo Vernar Hale ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of trafficking in cocaine by possession and trafficking in cocaine by transportation. We hold that Defendant has failed to demonstrate any prejudicial error occurred during his trial.

I. Background

¶ 2 On 18 April 2017, Detective K. Odell of the Charlotte Mecklenburg Police Department was sitting in an unmarked pickup truck in the parking lot of a Jack-in-the-Box in a "very high drug area" of Charlotte, North Carolina. Defendant pulled into the parking spot next to Detective Odell in a white Oldsmobile. The vehicles were oriented so that Detective Odell was looking down from the driver's window of the truck into the driver's window of the Oldsmobile.

¶ 3 A second vehicle pulled into the parking lot and a man got out of it, walked over to the Oldsmobile, and got into the passenger seat. Detective Odell observed Defendant's wallet open on his lap with a large amount of cash in it. Then he observed Defendant hand a plastic baggie corner to the man. This aroused Detective Odell's suspicion that a drug deal had just occurred, and he notified officers in a marked police vehicle nearby.

¶ 4 Seconds later, Officers M. Richter and W. Buie responded, parking behind the Oldsmobile. Officer Richter approached the driver's side door while Officer Buie approached the passenger side. Officer Richter saw a bag of marijuana on the passenger's lap, and a $20 bill in Defendant's hand. Officer Buie detected the odor of marijuana as he approached the Oldsmobile. After Officer Richter opened the driver's side door, he too detected the odor of marijuana. Officer Richter searched Defendant, finding two cellphones and a wallet containing $1,133 in cash. Officer Buie handcuffed the passenger and then began searching the Oldsmobile.

¶ 5 Inside, Officer Buie found four plastic baggies in the center console that appeared to contain approximately 54 grams of crack cocaine. He also found two digital scales. Officer A. Jean-Paul assisted Officer Buie's search of the Oldsmobile, and recovered a grocery bag containing 262 grams of marijuana on the floor of the driver's side of the vehicle, a five gram bag of marijuana under the driver's seat, and two more baggies of what appeared to be crack cocaine.

¶ 6 On 24 April 2017, Defendant was indicted for trafficking in cocaine by possession and trafficking in cocaine by transportation in Mecklenburg County Superior Court. Defendant pleaded not guilty and the case came on for trial on 29 July 2019 before the Honorable Louis A. Trosch. Judge Trosch declared a mistrial on 1 August 2019.

¶ 7 The case came on for trial a second time on 13 January 2020 before the Honorable Casey M. Viser. Judge Viser presided over a seven-day trial. The jury's deliberations went into an eighth day. The jury found Defendant guilty of both trafficking in cocaine by possession and trafficking in cocaine by transportation. The trial court sentenced him to two consecutive terms of 35 to 51 months in prison.

¶ 8 Defendant entered notice of appeal in open court.

II. Analysis

¶ 9 Defendant makes three arguments on appeal, which we address in turn.

A. Improper Comment on Defendant's Decision Not to Testify

¶ 10 Defendant first argues that the trial court erred by failing to give a curative instruction after the prosecutor referred to his decision not to testify during closing arguments. Specifically, Defendant contends that a new trial is required because the trial court did not promptly give the jury a curative instruction after sustaining his counsel's objection to the prosecutor's remark. We hold that the trial court's failure to give the curative instruction was error, but that this error was not prejudicial.

¶ 11 "A criminal defendant cannot be compelled to testify, and any reference by the State regarding his failure to do so violates an accused's constitutional right to remain silent." *State v. Randolph*, 312 N.C. 198, 205-06, 321 S.E.2d 864, 869 (1984) (citation omitted). Thus, while "[t]he prosecution may comment on a defendant's failure to produce witnesses or exculpatory evidence[,]" *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993) (citation omitted), references to a defendant's decision not to testify in a prosecutor's closing argument are error, *State v. McCall*, 286 N.C. 472, 486, 212 S.E.2d 132, 141 (1975). This error can "be cured by withdrawal of the remark or by an immediate statement from the court that it was improper, followed by a jury instruction to disregard it." *State v. Barfield*, 127 N.C. App. 399, 402, 489 S.E.2d 905, 908 (1997). However, it "is not cured by later instruction in the court's jury charge." *Id.* (citation omitted).

¶ 12 Nevertheless, "comment on an accused's failure to testify does not call for an automatic reversal." *Id.* at 403, 489 S.E.2d at 908 (citation omitted). "Instead, the

comment requires the court to determine if the error is harmless beyond a reasonable doubt." *Id.* Under this standard, the error "is presumed to be prejudicial, and the burden is [] on the State to show that it was harmless beyond a reasonable doubt." *State v. Lyles*, 94 N.C. App. 240, 248, 380 S.E.2d 390, 395 (1989). An error is harmless beyond a reasonable doubt only if "the court can declare a belief that there is no reasonable possibility that the [error] might have contributed to the conviction." *Id.* at 249, 380 S.E.2d at 396.

¶ 13 The prosecutor made the following comment during closing arguments:

> Now, I presented to you information that helps you make a choice in this case, information that makes it easier for you to make a decision. *It's true that you are not allowed to hold against the defendant his decision not to testify*. You cannot do that, but you do get to ask the question, why didn't [Defendant's counsel] show me something that –

(Emphasis added.) Defendant's counsel objected, and the trial court sustained the objection. However, the court did not give a curative instruction. Accordingly, we hold that the failure to give a curative instruction was error.

¶ 14 This error is presumed prejudicial, and the issue then becomes whether it was harmless beyond a reasonable doubt—that is, has the State shown that there is no reasonable possibility that the error contributed to Defendant's convictions? Based on the evidence of record, we conclude that it has. Detective Odell observed Defendant pull into a parking spot and as Defendant sat with his wallet open in his

lap with a large amount of cash, he handed a plastic baggie corner to a man who had gotten into the car with Defendant. Officers seized the men and searched the vehicle, whereupon they found four plastic baggies containing what appeared to be approximately 54 grams of crack cocaine as well as two digital scales, a grocery bag containing 262 grams of marijuana, a bag containing five grams of marijuana, and two more baggies containing what appeared to be crack cocaine. cellphones were recovered from Defendant's person, and Officer Buie testified that these cellphones continued ringing "the entire time" he interviewed Defendant after his arrest. The forensic chemist testifying on behalf of the State confirmed that the suspected cocaine was, in fact, cocaine, and had net weights of 44.14 grams and 2.98 grams. Defendant was also carrying over $1,000 in cash, and data recovered from his cellphones included "selfie"-type photographs of Defendant with the car, as well as notes showing numerical amounts associated with names and terms like "hard" and "soft"—slang terms for crack and powder cocaine. We hold that the trial court's failure to give a prompt curative instruction after sustaining the objection to the prosecutor's improper remark about Defendant's decision not to testify was harmless beyond a reasonable doubt because there is no reasonable possibility the jury's verdicts would have differed if the instruction had been given, based on the record evidence of Defendant's guilt.

B. Jury Instructions

¶ 15 Defendant next argues that the trial court erred by not providing additional instructions to the jury that directly answered a question that arose during the jury's deliberations. During the second day of deliberations, the jury submitted a note to the court that asked, among other things, "If the defendant is guilty of trafficking in cocaine by transportation, does it mean the defendant is automatically guilty of trafficking in cocaine by possession?" The State requested that the substantive instructions on trafficking in cocaine by possession and transportation be reread to the jury, whereas Defendant's counsel asked that the court instruct the jury "that it is not automatic[,]" i.e., that the charges should be considered separately. The court then reread its substantive instructions to the jury.

¶ 16 Defendant contends that the trial court's decision to reread its instructions rather than answer the jury's question directly constituted prejudicial error, and that our review of this issue should be de novo. We disagree, and hold (1) that we review this decision for an abuse of discretion, and (2) that the trial court did not abuse its discretion by rereading the instructions rather than answering the question directly.

¶ 17 "After the jury retires for deliberation, the judge may give appropriate additional instructions to respond to an inquiry of the jury[.]" *State v. Guarascio*, 205 N.C. App. 548, 563, 696 S.E.2d 704, 715 (2010) (internal quotation marks and citation omitted). "[T]he trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further

instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions." *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986). For this reason, "whether to give additional instructions to the jury is within the trial court's discretion[.]" *State v. Hazel*, 243 N.C. App. 741, 744, 779 S.E.2d 171, 173 (2015). Accordingly, "a trial court's decision to grant or deny the jury's request for additional instruction is reviewed by this Court only for an abuse of discretion." *Guarascio*, 205 N.C. App. at 563, 696 S.E.2d at 715. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation omitted).

¶ 18 We are bound by our prior holdings that the trial court's decision to give additional instructions—unlike a trial court's evaluation of the sufficiency of the evidence to support an instruction—is reviewed for an abuse of discretion. *See, e.g.*, *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."). By contrast, whether the evidence presented at trial is sufficient to support a jury instruction on a defense or a lesser-included offense is a question of law we review de novo. *See State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54, *aff'd*, 364 N.C. 417, 700 S.E.2d 222 (2010) (de novo review applicable to whether

evidence was sufficient to support a self-defense instruction); *State v. Edwards*, 239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) (de novo review applicable to whether evidence was sufficient to support instructions on duress or necessity); *State v. Matsoake*, 243 N.C. App. 651, 657, 777 S.E.2d 810, 814 (2015) ("A trial court's decision not to give a requested lesser-included offense instruction is reviewed *de novo* on appeal.").

¶ 19 North Carolina General Statute § 15A-1234 provides:

> (a) After the jury retires for deliberation, the judge may give appropriate additional instructions to:
>
> > (1) Respond to an inquiry of the jury made in open court; or
> >
> > (2) Correct or withdraw an erroneous instruction; or
> >
> > (3) Clarify an ambiguous instruction; or
> >
> > (4) Instruct the jury on a point of law which should have been covered in the original instructions.
>
> (b) At any time the judge gives additional instructions, he may also give or repeat other instructions to avoid giving undue prominence to the additional instructions.
>
> (c) Before the judge gives additional instructions, he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard. The parties upon request must be permitted additional argument to the jury if the additional instructions change, by restriction or enlargement, the permissible verdicts of the jury. Otherwise, the allowance of additional argument is within the discretion of the judge.

> (d) All additional instructions must be given in open court and must be made a part of the record.

N.C. Gen. Stat. § 15A-1234 (2019). As noted above, the trial court chose to respond to the jury's question by rereading the portion of its charge containing the substantive instructions on trafficking in cocaine by possession and transportation. This is an option contemplated by subdivision (1) of subsection (a) of § 15A-1234, and the trial court complied with the statute.

¶ 20 In *Hazel*, we rejected a remarkably similar argument to the one Defendant now makes. *See* 243 N.C. App. at 745-46, 779 S.E.2d at 174. There, the jury was instructed on charges of first-degree murder by reason of the felony murder rule and robbery with a dangerous weapon, and after deliberating for some time, the jury sent the court a note with the following question: "[C]an this defendant be found guilty of the robbery charge and then found not guilty of the murder charge?" *Id.* at 743, 779 S.E.2d at 173. The prosecutor argued that the answer to the question was no and defense counsel argued that the answer was yes. *Id.* After the jury returned to the courtroom, rather than give a yes-or-no answer, the court provided the jury with a written copy of its instructions. *Id.* The jury then returned verdicts of guilty on both charges. *Id.* at 744, 779 S.E.2d at 173.

¶ 21 On appeal, the defendant argued that the trial court committed prejudicial error by failing either (1) to provide a yes-or-no answer to the jury's question or (2) to

"instruct[] the jury to consider each charge against [the] defendant separately." *Id.* at 745, 779 S.E.2d at 174. Either response "would have properly conveyed to the jury that its finding on the robbery charge did not automatically dictate the verdict on the murder charge[,]" the defendant contended. *Id.* We rejected the argument, holding that it was not an abuse of discretion for the trial court to provide the jury with a written copy of its instructions instead of "telling the jury to 'treat each count separately[.]'" *Id.*

¶ 22 In this case, as in *Hazel*, the trial court declined to answer the jury's question about whether Defendant would be "*automatically* guilty of trafficking in cocaine by possession" if the jury convicted him of trafficking in cocaine by transportation by giving the instruction requested by his counsel—i.e., "that it is *not* automatic." (Emphasis added.) N.C. Gen. Stat. § 15A-1234(a)(1) authorized the court to respond to the question by rereading its substantive instructions rather than answering the question directly. Here, as in *Hazel*, the trial court did not abuse its discretion by rereading its substantive instructions on trafficking in cocaine by possession and transportation rather than instructing the jury that a finding of guilt on one charge would not require a finding of guilt on the other.

C. Consecutive Sentences

¶ 23 Defendant also argues that the trial court erred by sentencing him to consecutive rather than concurrent terms for his convictions. Specifically, Defendant

contends that the court improperly considered and relied on pending charges for offenses allegedly committed by Defendant while on pretrial release when it sentenced him to consecutive terms. We disagree.

¶ 24 "It is well established that a trial judge may not consider, when imposing a sentence, other charges pending against a defendant for which he has not been convicted." *State v. Westall*, 116 N.C. App. 534, 550, 449 S.E.2d 24, 34 (1994). "[A] pending charge raises no inference of [the] defendant's guilt of the crime charged," *State v. Mack*, 87 N.C. App. 24, 30, 359 S.E.2d 485, 489 (1987), and "[c]harges pending against a defendant are purely hearsay and not admissible as evidence[,]" *State v. McLean*, 83 N.C. App. 397, 402, 350 S.E.2d 171, 175 (1986), except in certain "narrow instances . . . to prove a sentencing factor," *Mack*, 87 N.C. App. at 31, 359 S.E.2d at 490. *See also* N.C. Gen. Stat. § 15A-1334(b) (2019) ("Formal rules of evidence do not apply at the [sentencing] hearing.").

¶ 25 It is likewise "well established that the decision to impose consecutive or concurrent sentences is within the discretion of the trial judge and will not be overturned absent a showing of abuse of discretion." *State v. Espinoza-Valenzuela*, 203 N.C. App. 485, 497, 692 S.E.2d 145, 154 (2010) (citation omitted). Unless the record "affirmatively disclose[s] that the trial court enhanced [the] defendant's sentence due to [] pending cases[,]" we are unable to conclude on appeal that a trial court's mere awareness of charges pending against a defendant entails or implies that

the court considered or relied upon a pending charge when imposing a sentence. *Westall*, 116 N.C. App. at 550, 449 S.E.2d at 34. Moreover, it is not our role "to substitute [our] judgment for that of the sentencing judge[.]" *Id.* at 551, 449 S.E.2d at 34 (citation omitted).

¶ 26 Nothing in the record affirmatively discloses that the trial court relied on Defendant's pending charge when sentencing Defendant. The following colloquy transpired just before the trial court sentenced Defendant:

> [PROSECUTOR]: Your Honor, the State is respectfully requesting consecutive sentences in this case. The basis for that is that I do believe that the evidence does show that the defendant was not only in possession of that cocaine, but it supports the fact the defendant was actually selling and dealing in that cocaine. Additionally, although the State did not proceed on the charges of marijuana, I do believe the evidence shows the defendant was dealing in multiple types of controlled substances, both marijuana and cocaine.
>
> THE COURT: Well, I'm not going to consider the marijuana. You dismissed that.
>
> [PROSECUTOR]: Yes, Your Honor. Additionally, we do feel that, at the sentencing stage, it's important for Your Honor to know that while the defendant was on pretrial release, he did pick up a subsequent possession of cocaine charge.
>
> [DEFENSE COUNSEL]: Well objection, Your Honor.
>
> [PROSECUTOR]: It's the sentencing stage. I do think you can hear that.
>
> THE COURT: Do you wish to be heard on your objection?

> What's your objection, [Defense Counsel]?
>
> [DEFENSE COUNSEL]: Well Your Honor, whatever he has now is not relevant at the sentencing. He still has the presumption of innocence.
>
> THE COURT: Sure. I appreciate that. Go ahead, Ms. [Prosecutor.]
>
> [PROSECUTOR]: At any rate, December of 2017, while on pretrial release on these charges, he was stopped and found and charged with possession of cocaine for three different baggies of cocaine that was [sic] in the vehicle with him. That was – the largest baggie weighed nine grams. The other two baggies were two grams and one gram apiece.
>
> THE COURT: Are they still pending?
>
> [PROSECUTOR]: They are still pending. . . .
>
> THE COURT: All right, thank you.

As the foregoing colloquy shows, the State referenced a pending charge Defendant picked up while on pretrial release, and the court affirmed that it understood that Defendant was presumed innocent of the charge. Nothing in the colloquy above or anywhere else in the record affirmatively discloses that the trial court sentenced Defendant to consecutive rather than concurrent terms because of the pending charge. As in *Mack*, "the trial court's statements merely indicate it was aware of [D]efendant's pending charge[], not that it found or even considered [it] a factor aggravating defendant's sentence." 87 N.C. App. at 31, 359 S.E.2d at 490. Accordingly, we hold that the trial court did not abuse its discretion by sentencing

Defendant to consecutive sentences.

III. Conclusion

¶ 27 For the reasons stated above, we hold that Defendant has failed to demonstrate any prejudicial error occurred during his trial.

NO PREJUDICIAL ERROR.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).