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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-307

Filed: 15 December 2015

Mecklenburg County, Nos. 14 CRS 18649, 200593, 207764

STATE OF NORTH CAROLINA

v.

KWMAINE DELEON RAINEY

Appeal by Defendant from judgment entered 6 February 2015 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 5 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General J. Aldean Webster III, for the State.

Charlotte Gail Blake for Defendant.

McGEE, Chief Judge.

Kwmaine Deleon Rainey (“Defendant”) was indicted on 31 March 2014 for one count of assault by strangulation, alleged to have occurred on 4 January 2014, and was also indicted on 12 May 2014 for one count of possession of a firearm by a felon and one count of discharging a firearm into an occupied vehicle in operation, both offenses alleged to have occurred on 26 February 2014. Defendant was tried and found guilty of possession of a firearm by a felon and discharging a firearm into an

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occupied vehicle on 2 October 2014. Defendant pled guilty to assault by strangulation on 3 October 2014 and was sentenced to a consolidated active sentence of 80 to 108 months.

Prior to trial, Defendant moved to exclude certain evidence, including evidence of prior criminal convictions. Further, Defendant stipulated to having been convicted of a felony prior to 26 February 2014, thereby admitting to that element of the charge of possession of a firearm by a felon. Defendant's purpose in stipulating to this element of possession of a firearm by a felon was to exclude evidence of the specific nature and date of the prior felony.

During its charge to the jury, the trial court instructed regarding possession of a firearm by a felon as follows:

[D]efendant has also been charged with the possession of a firearm after having been convicted of a felony. For you to find [D]efendant guilty of this offense, the State must prove two things to you beyond a reasonable doubt. First, that on July 19, 2010, in the Mecklenburg County Superior Court, [D]efendant was convicted of the felony of possession of cocaine that was committed on December 4, 2007 in violation of the laws of the State of North Carolina; and second, that thereafter, [D]efendant possessed a firearm. If you find from the evidence beyond a reasonable doubt that [D]efendant was convicted of a felony in the Mecklenburg County Superior Court and that [D]efendant, thereafter, possessed a firearm, it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty.

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The State first brought to the trial court's attention that Defendant had stipulated to having been convicted of a felony before 26 February 2014. The trial court noted that it had not been asked to give "stipulation instructions." The trial court asked Defendant's attorney if the jury should be called back to instruct it to "ignore the fact that I told you he's guilty of a felony[.]" Defendant's counsel responded: "Yes, sir, and also exclude the mentioning of the date of the cocaine conviction[.]" The trial court recalled the jury, and instructed them as follows:

THE COURT: You are back before I thought you would be back. It is nothing you have done. It's what I have done. You will recall that when I instructed you as to the possession of a firearm by a felon charge, I told you there were two elements that the State had to prove beyond a reasonable doubt. One, that [D]efendant had been convicted of a felony, and I gave you a particular felony, possession of cocaine; and the second element was that he had to be in possession of a firearm after that conviction. It was brought to my attention that both sides had stipulated to the existence of a conviction for a felony by [D]efendant. You may recall that at some point during the State's presentation the District Attorney got up and read that stipulation to you of the fact that [D]efendant had been convicted of a felony.

For the purposes of this trial, you can assume that that stipulation is true and that that fact is, in fact, proven beyond a reasonable doubt. You are not to consider anything else I said with respect to matters including the particular time of the felony, anything with regard to that felony. What it really boils down to is with respect to that charge, the State would have to prove to you, given the stipulation, that [D]efendant was, in fact, in possession of a firearm after that conviction.

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Will each of you be able to follow that instruction as I have just given it to you? If you would, raise your right hand.

Let the record reflect that all twelve members of the jury ha[ve] raised their right hands, and thank you.

Defendant moved for a mistrial, arguing the jury would consider his prior felony conviction against him in its deliberations. The trial court denied Defendant's motion, and Defendant was convicted as stated above. Defendant appeals.

In Defendant's sole argument on appeal, he contends the trial court erred in denying his motion for a mistrial. We disagree.

In light of the agreement made for Defendant to stipulate to felony status for the purposes of the charge of possession of a firearm by a felon, we agree that it was error for the trial court to have informed the jury of the date and nature of that felony conviction. We note that Defendant was apparently at least partially responsible because he failed to request a stipulation instruction.

We hold that Defendant cannot show prejudice sufficient to render the trial court's denial of his motion for a mistrial an abuse of discretion. We find our Supreme Court's opinion in *State v. Black* on point:

The defendant next contends the trial court erred in failing to declare a mistrial when a detective read from a recorded statement of Gail Isom, part of which indicated that the defendant had been involved with drugs in the past. Whether a motion for mistrial should be granted is a matter which rests within the sound discretion of the trial court, and a mistrial is appropriate only when there are such serious improprieties as would make it impossible to

achieve a fair and impartial verdict under the law.

In the case *sub judice*, before Isom's statement was read, the trial court had granted the defendant's motion *in limine* and forbidden any evidence concerning the defendant's prior drug dealings. Even so, Isom's statement as read by the detective included the remark that, "I knew that he [the defendant] had, you know, drug involvement in the past." The defendant objected and his objection was sustained. The trial court then instructed the jury to disregard the statement. When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. The trial court did not abuse its discretion by denying the defendant's motion for a mistrial. There is no merit to this assignment of error.

State v. Black, 328 N.C. 191, 199-200, 400 S.E.2d 398, 403-04 (1991) (citations omitted). We find the prejudice of erroneously acknowledging that the felony underlying the charge of possession of a firearm by a felon – possession of cocaine – to have been slight. The stipulation acknowledged that Defendant was a convicted felon. Possession of an illegal narcotic is not likely to influence a jury in the same manner as a conviction for a violent crime, or even a property crime. Further, possession of cocaine does not involve use of a firearm. In other words, because the prior possession conviction was unrelated to the type of charges for which Defendant was on trial, its prejudicial impact is lessened. Furthermore, we presume the jury followed the trial court's instruction. *State v. Talbot*, __ N.C. App. __, __, 758 S.E.2d 441, 443, *review denied*, 367 N.C. 790, 766 S.E.2d 648 (2014) ("Jurors are presumed

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to follow jury instructions and curative instructions[.]”). We find no abuse of discretion in the trial court’s denial of Defendant’s motion for a mistrial.

NO ERROR.

Judges ELMORE and INMAN concur.

Report per Rule 30(e).