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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-571

Filed: 21 February 2017

New Hanover County, No. 13 CRS 056047

STATE OF NORTH CAROLINA

v.

JOHN SCOTT HUDSON, Defendant.

Appeal by defendant from judgment entered 11 December 2015 by Judge John E. Nobles Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 30 November 2016.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip K. Woods, for the State.

Anne Bleyman for defendant-appellant.

ELMORE, Judge.

On 11 December 2015, John Scott Hudson (defendant) was convicted of trafficking heroin by possession and possession with intent to manufacture, sell, or deliver heroin (PWIMSD). Defendant appeals, arguing that the trial court erred in failing to exercise the necessary discretion in response to the jury's request for further instruction, and that he was denied his right to a unanimous jury verdict. Upon

review, we conclude that defendant failed to preserve his first argument for appellate review and otherwise received a trial free from error.

I. Background

On 9 September 2013, defendant was indicted for (1) trafficking by possession of more than twenty-eight grams of heroin; (2) conspiracy to traffic heroin by possession; (3) and PWIMSD. The case came to trial during the 7 December 2015 Criminal Session of the New Hanover County Superior Court, the Honorable John E. Nobles Jr. presiding.

At the close of the evidence, the trial court instructed the jury on the offenses charged in the indictments and the additional offense of possession of heroin. The jury submitted a note to the court during deliberations requesting a copy of the instructions. The court informed the attorneys outside of the jury's presence: "I'm not going to send back my instructions. I never do." The court then instructed the bailiff, without objection, to relay the court's decision to the jury.

After three more hours of deliberation, the jury submitted another note to the court: "May we have the Judge's order on trafficking by possession of more than 28 grams of heroin?" The court brought the jury back into the courtroom and, without objection, re-charged them on trafficking. The jury resumed deliberations without any further requests.

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The jury returned verdicts finding defendant guilty of trafficking heroin by possession, PWISMD, possession of heroin, and not guilty of conspiracy to traffic heroin. The court explained that it would arrest judgment on the conviction for simple possession “as that’s a lesser-included part of the possession with intent to manufacture, sell and deliver.” Upon defendant’s motion, the court polled the jury by asking the foreman and each juror:

Your [jury or foreman] has returned your verdict and you find the defendant, [] John Scott Hudson, guilty of trafficking by possession of more than 28 grams of heroin, and you have found the defendant guilty of possession of heroin with intent to manufacture, sell and deliver. Is this now your verdict?

Each juror answered in the affirmative and “still agree[d] and assent[ed] thereto.”

The court subsequently denied defendant’s motion for judgment notwithstanding the verdict. Defendant gave notice of appeal in open court.

II. Discussion

Defendant first argues that the trial court erred in failing to provide the jury with a written copy of the instructions during deliberations, and placing undue prominence on the trafficking charge by singling it out for re-instruction.

Despite his failure to raise a timely objection at trial, defendant contends that this issue is preserved for appellate review by operation of law. He attempts to analogize this case to those in which our appellate courts have reviewed unpreserved

errors—specifically, where “a trial court violates [a] statutory mandate by denying the jury’s request to review the transcript upon the ground that the trial court has no power to grant the motion in its discretion.” *State v. Starr*, 365 N.C. 314, 317, 718 S.E.2d 362, 365 (2011) (citations omitted) (internal quotation marks omitted). In this case, however, there is no indication that the trial court “refuse[d] to exercise its discretion in the erroneous belief that it has no discretion as to the question presented.” *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999) (citations omitted) (internal quotation marks omitted). And because defendant has not “specifically and distinctly contended” that the action amounts to plain error, *see* N.C. R. App. P. 10(a)(1), (4) (2016), he has waived the right to appellate review.

Assuming *arguendo* that the issue is preserved, we disagree with defendant’s argument. N.C. Gen. Stat. § 15A-1234 provides in pertinent part:

(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.

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N.C. Gen. Stat. § 15A-1234(a), (b) (2015). Absent an error in its charge to the jury, “the trial court is not required to repeat instructions which have been previously given.” *State v. Moore*, 339 N.C. 456, 464, 451 S.E.2d 232, 236 (1994) (citing *State v. Hockett*, 309 N.C. 794, 800, 309 S.E.2d 249, 252 (1983)). “[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). The decision “to give additional instructions rests within the sound discretion of the trial court and will not be overturned absent abuse of that discretion.” *State v. Bartlett*, 153 N.C. App. 680, 685, 571 S.E.2d 28, 31 (2002) (citation omitted). A failure to exercise discretion, however, “constitutes reversible error.” *Id.* (citing *State v. Thompkins*, 83 N.C. App. 42, 45–46, 348 S.E.2d 605, 607 (1986)).

The record reveals that the trial court properly acted within its discretion in denying the jury’s request for additional instruction. The court, having already charged the jury at the close of the evidence, was not required to repeat its instructions during deliberation. It declined to send back its charge sheet to the jury before adding, “I never do.” We do not take this expression to mean that the trial

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court was flying on auto-pilot, as defendant suggests, but that the court found no reason in this case to deviate from its normal practice.

The court's subsequent decision to repeat the trafficking instruction, moreover, did not place undue prominence on that offense. The jury had specifically requested additional instruction on the trafficking charge alone. The circumstances indicate that the court accommodated the second request due to the jury's persistence and not because it considered that instruction more important than the others. The jury made no further requests thereafter, presumably because the court's initial instructions on the other offenses were adequate.

Defendant also argues that he was denied his right to a unanimous jury verdict because the trial court accepted the jury's "imperfect or insensible verdict of guilty to [PWISMD]." Because the verdict for simple possession was complete and responsive, defendant contends, the trial court impermissibly rejected that verdict and erroneously concluded that the jury intended to convict defendant for "the greater offense" of PWISMD. Defendant also asserts that the manner in which the court polled the jury was not sufficient to "eliminate[] any ambiguity or uncertainty." We disagree.

"No person shall be convicted of any crime but by the unanimous verdict of a jury in open court" N.C. Const. art. I, § 24; *see also* N.C. Gen. Stat. § 15A-1201(a) (2015) ("In all criminal cases the defendant has the right to be tried by a jury of 12

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whose verdict must be unanimous.”). “A verdict is deemed sufficient if it ‘can be properly understood by reference to the indictment, evidence and jury instructions.’” *State v. Scanlon*, 176 N.C. App. 410, 422, 626 S.E.2d 770, 779 (2006) (quoting *State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986), *aff’d per curiam*, 319 N.C. 392–93, 354 S.E.2d 238–39 (1987)). Because defendant claims that the alleged error “violates the right to a unanimous jury verdict under Article 1, Section 24, it is preserved for appeal without any action by counsel.” *State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009); *see also State v. Ramseur*, 338 N.C. 502, 505–07, 450 S.E.2d 467, 470 (1994).

We agree that the guilty verdict for possession was complete and responsive—as was the guilty verdict for PWISMD. The PWISMD verdict conforms to both the charge in the indictment and the jury instructions, and defendant does not argue that it was unsupported by the evidence at trial. Contrary to defendant’s suggestion, moreover, the court did not “change” the jury’s verdict to convict defendant of PWISMD. The court arrested judgment on simple possession upon its conclusion that it was “a lesser-included part of the possession with intent to manufacture, sell and deliver.” Finally, there was nothing improper about the manner in which the trial court polled the jury. The jury had found defendant not guilty of conspiracy, and after arresting judgment on simple possession, the court asked each juror individually if it was his or her verdict that defendant was guilty of trafficking by possession and

PWISMD. *See* N.C. Gen. Stat. § 15A-1238 (2015) (“The poll may be conducted by the judge or by the clerk by asking each juror individually whether the verdict announced is his verdict.”); *see also Ramseur*, 338 N.C. at 505–07, 450 S.E.2d at 470. Each juror responded affirmatively and assented to the verdict.

III. Conclusion

Defendant failed to preserve his first argument for appellate review through a timely objection at trial. Assuming that the issue is preserved, however, the trial court did not abuse its discretion in denying the jury’s request for further instruction. In addition, the court’s decision to arrest judgment on possession of heroin, and the manner in which it polled the jury, did not deprive defendant of his right to a unanimous jury verdict.

DISMISSED IN PART; NO ERROR IN PART.

Chief Judge McGEE and Judge DIETZ concur.

Report per Rule 30(e).