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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-451

Filed: 19 December 2017

Alleghany County, Nos. 14 CRS 50314-15

STATE OF NORTH CAROLINA

v.

EDWARD BICKERTON LANE, JR.

Appeal by defendant from judgment entered 19 December 2016 by Judge Michael D. Duncan in Alleghany County Superior Court. Heard in the Court of Appeals 4 October 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Whitney Hendrix Belich, for the State.*

*Dylan J.C. Buffum for defendant.*

DIETZ, Judge.

Defendant Edward Lane, Jr. appeals his conviction for trafficking in opium. During a traffic stop, law enforcement found a large number of hydrocodone pills in Lane's car. The pills were inside a pill bottle labeled for an antibiotic prescription. Several months before the traffic stop, Lane received a prescription for hydrocodone with enough pills to last one or two weeks. Lane argues that, because he once had a

prescription for hydrocodone, the trial court committed plain error by failing to instruct the jury on the defense of lawful possession by a valid prescription.

As explained below, Lane cannot satisfy the prejudice prong of plain error review. The State presented evidence that Lane concealed the hydrocodone pills in a pill bottle for a different prescription, that he attempted to dispose of the hydrocodone pills while law enforcement was searching his car, and that officers found drug paraphernalia in Lane's car commonly used to consume crushed opioid pills. In light of this evidence, Lane cannot show that, but for the alleged error, the jury probably would have reached a different result.

### **Facts and Procedural History**

On 18 September 2014, a law enforcement officer stopped Defendant Edward Lane, Jr. after Lane committed several traffic violations, including speeding, crossing the center line multiple times, and swerving into the officer's own lane of travel.

As the officer approached Lane's car, he smelled marijuana in the vehicle and asked Lane to step out. The officer then conducted a search of the car and discovered a smoking pipe that had burnt marijuana residue, a small bag containing a green leafy substance that the officer identified as marijuana, five plastic fast food straws that had been cut into three- to four-inch lengths, and an orange prescription bottle with Lane's name on it.

The prescription pill bottle with Lane's name on it prescribed doxycycline, an antibiotic, and included a description of the doxycycline pills that were supposed to be inside the bottle. But when the officer opened the bottle, he noticed that the pills did not match the description on the label. The officer put the lid back on the pill bottle, placed the bottle on top of Lane's car, and continued searching the car's interior. The officer then found a loose pill identical to the ones in the pill bottle. The officer examined that pill and, using a drug identification application on his mobile phone, identified the pill as hydrocodone, an opioid.

While the officer searched Lane's car, Lane took the pill bottle the officer placed on the car's roof, emptied the contents into a nearby grassy area, and put the empty pill bottle back on the car's roof. Lane later admitted to law enforcement that he had done so. The officer eventually recovered nineteen of the discarded pills from the grassy area surrounding the car and, as with the loose pill, identified those pills as hydrocodone.

Three months before his arrest, Lane received a prescription for hydrocodone after he broke his hand at work. Lane's prescription was for 20 hydrocodone pills, and he was given a prescription for another 45 pills a few days later while he was having a cast put on his arm. At trial, a pharmacy technician from Walgreens testified that if Lane was taking the second prescription as directed, the pills would have lasted

him only seven days. The month before his arrest, Lane received a prescription for doxycycline, the antibiotic whose pill bottle the officer found in Lane's car.

The State charged Lane with numerous offenses, including trafficking in opium. Lane moved to dismiss the trafficking charge based on his possession of a legal prescription for the hydrocodone. The trial court denied the motion. During the jury charge, the trial court did not instruct the jury that possession of a valid prescription is a defense to criminal charges that rely on the defendant's illegal possession of the drug for which the defendant has a prescription. The jury convicted Lane of trafficking in opium, resisting an officer, simple possession of marijuana, and possession of drug paraphernalia. The trial court sentenced Lane to 70 to 93 months in prison. Lane timely appealed.

### **Analysis**

Lane argues that the trial court erred when it failed to instruct the jury on the defense of possession pursuant to a valid prescription. Lane concedes that he did not preserve this alleged error in the trial court and, therefore, this Court reviews the issue for plain error. "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.

Lane cannot satisfy this prejudice requirement. The jury heard evidence that Lane’s prescription for hydrocodone was filled months before law enforcement stopped him, and that the pills provided by that prescription should have lasted only one week or so. Moreover, law enforcement found the pills concealed in a bottle for an antibiotic prescription. The jury heard evidence that Lane tried to dispose of the hydrocodone pills by throwing them into the nearby woods and grass while the officer was distracted. Finally, the officer found several cut-up straws in Lane’s car, which are commonly used to inhale crushed pills.

In light of this evidence, Lane cannot satisfy the prejudice prong of plain error review. To do so, Lane must show that “absent the error, the jury *probably* would have returned a different verdict.” *Id.* (emphasis added). Although a jury *might* have concluded that Lane possessed the hydrocodone pills under a valid prescription, it is far more likely that the jury would have concluded that Lane illegally possessed the pills, put them in a different pill bottle to hide that fact, and tried to dispose of them in an unsuccessful effort to conceal his crime. Thus, Lane has failed to show that the alleged error in this case amounts to plain error.

### **Conclusion**

We find no plain error in the trial court’s judgment.

STATE V. LANE

*Opinion of the Court*

NO PLAIN ERROR.

Judges ELMORE and INMAN concur.

Report per Rule 30(e).