IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-920

Filed: 17 July 2018

Mecklenburg County, No. 15 CRS 234786

STATE OF NORTH CAROLINA

v.

DUANE AUSTIN, JR.

Appeal by defendant from judgment entered 3 February 2017 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Richard H. Bradford and Special Deputy Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

CALABRIA, Judge.

Duane Austin, Jr. ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of felonious possession of marijuana pursuant to N.C. Gen. Stat. § 90-95(d)(4) (2017). After careful review, we conclude that the trial court's failure to instruct the jury on the amount of marijuana possessed, an essential

element of felonious possession, rendered the jury's verdict a guilty verdict on misdemeanor simple possession. Accordingly, we vacate the judgment and remand to the trial court for resentencing on the lesser-included offense.

I. Factual and Procedural Background

On 27 September 2015, Charlotte-Mecklenburg Police Department officers served defendant with an outstanding arrest warrant in an unrelated case. When the officers arrived at his residence, they detected a very strong odor of unburned marijuana emanating from the partially open garage door. Defendant and another individual exited the house to speak with the officers. After verifying defendant's identity, Officer Matthew Cottingham placed him under arrest for the outstanding warrant. When Officer Cottingham requested permission to search the residence, defendant responded that he could not consent because it was his girlfriend's house. Officers obtained and executed a search warrant for the residence approximately two hours later. In one of the bedrooms, officers discovered defendant's driver's license and Visa card; an ashtray containing cigar innards and a small amount of burnt marijuana; and a clear plastic bag of a plant substance appearing to be marijuana. Officers also found a black scale in the living room.

On 13 June 2016, defendant was indicted for possession of more than one and one-half ounces of marijuana, misdemeanor possession of stolen goods, and

misdemeanor possession of marijuana drug paraphernalia. The State subsequently dismissed the possession of stolen goods charge due to insufficient evidence.

Defendant's trial commenced in Mecklenburg County Superior Court on 31 January 2017. At trial, the State's forensic analyst testified that the plastic bag discovered in the bedroom contained 47.91 grams of marijuana, plus or minus 0.03 grams. According to the analyst, one and one half ounces weighs "a little bit more than 42 grams[.]" Defendant did not present evidence but moved to dismiss all charges at the close of the State's evidence and at the close of all the evidence. The trial court denied defendant's motions to dismiss.

At the charge conference, defendant requested a jury instruction on the lesser-included offense of misdemeanor simple possession, based upon the "marijuana roach in an ashtray" in the bedroom and testimony that defendant "reek[ed] of burnt marijuana." However, the trial court denied defendant's requested instruction, concluding that the amount of marijuana was not in controversy. Defendant did not object when the trial court delivered the following jury instruction on felonious possession of marijuana:

> Members of the jury, the defendant has been charged with possessing marijuana, a controlled substance. Members of the jury, a person possesses a controlled substance such as marijuana when the person is aware of its presence and has, either by himself or together with others, both the power and intent to control the disposition or use of that substance.

> Now, members of the jury, a person has actual possession of a substance if the person has it on his person, is aware of its presence, and either alone or together with others has both the power and the intent to control its disposition or use.
>
> But as to constructive possession, a person has constructive possession of a substance if the person does not have it on his person but is aware of its presence and, either alone or together with others, has both the power and the intent to control its disposition or use. A person's awareness of the presence of the substance and the person's power and intent to control its disposition or use may be shown by direct evidence or may be inferred by circumstances, or from the circumstances.
>
> Now, members of the jury, if you find beyond a reasonable doubt that a substance such as marijuana was found in certain premises and that the defendant exercised control over those premises, whether or not the defendant owned those premises, this would be a circumstance from which you may infer that the defendant was aware of the presence of the substance and had the power and the intent to control its disposition or use.
>
> So, members of the jury, I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant knowingly possessed marijuana, being a controlled substance, then it would be your duty to return a verdict of guilty. However, if you do not so find or if you have a reasonable doubt, then it would be your duty to return a verdict of not guilty.

On 3 February 2017, the jury returned verdicts finding defendant guilty of possession of marijuana, but not guilty of possession of marijuana drug paraphernalia. The trial court sentenced defendant to 6 to 17 months in the custody

of the North Carolina Division of Adult Correction, but suspended the active sentence and placed him on supervised probation for 30 months.

Defendant appeals.

II. Jury Instructions

On appeal, defendant argues that the trial court's failure to instruct the jury on the amount of marijuana possessed, an essential element of felonious possession, entitles him to resentencing on the lesser-included offense of misdemeanor simple possession. Defendant concedes, however, that he failed to object when the court instructed the jury at trial. Therefore, he requests plain error review of this issue.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4). The plain error standard of review applies "to unpreserved instructional or evidentiary error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). To prevail under plain error review, the "defendant must show that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict." *Id.*

In North Carolina, it is unlawful for any person to possess marijuana. N.C. Gen. Stat. § 90-95(d)(4). A person who possesses any amount of marijuana is guilty of simple possession, a Class 3 misdemeanor. *Id.* However, if the amount possessed

exceeds one and one-half ounces, the violation is punishable as a Class I felony. *Id.* Accordingly, the sole distinction between felonious possession of marijuana and simple possession of marijuana "is the element of amount. . . . Otherwise, the elements of the two offenses are the same." *State v. Gooch*, 307 N.C. 253, 257, 297 S.E.2d 599, 602 (1982). "[T]he amount possessed is an essential element for jury determination." *Id.* at 256, 297 S.E.2d at 601. "The trial court must give proper instructions with respect to each of these elements." *Id.*

In *Gooch*, our Supreme Court held that the trial court's failure to instruct the jury on the amount of marijuana possessed entitled the defendant to resentencing on the lesser-included offense of simple possession. *Id.* at 257-58, 297 S.E.2d at 602 ("Because the trial court failed to give proper instructions to the jury on the amount of contraband possessed, . . . it follows that the verdict the jury returned must be considered a verdict of guilty of simple possession of marijuana[.]"). Our Court subsequently held, pursuant to *Gooch*, that the trial court committed plain error by failing to instruct the jury on the element of amount of contraband possessed. *State v. Valladares*, 165 N.C. App. 598, 609, 599 S.E.2d 79, 87 (vacating the judgment entered upon the charge of trafficking in cocaine by possession and remanding to the trial court for resentencing "as upon a verdict of guilty of simple possession of cocaine"), *appeal dismissed and disc. review denied*, 359 N.C. 196, 608 S.E.2d 66 (2004).

On appeal, the State acknowledges that the trial court erred under *Gooch* by failing to instruct the jury that the amount of marijuana possessed is an essential element of felonious possession. However, because "there is no contrary evidence or controversy regarding the weight" of marijuana possessed by defendant, the State asserts that we should conduct harmless error review pursuant to *State v. Bunch*, 363 N.C. 841, 689 S.E.2d 866 (2010). We disagree.

The *Bunch* defendant argued on appeal "that the trial court's failure to properly instruct the jury on felony murder violated his right to a trial by jury under Article I, Section 24 of the North Carolina Constitution." *Bunch*, 363 N.C. at 843, 689 S.E.2d at 868. In rejecting this argument, our Supreme Court adopted the harmless error analysis established in *Neder v. United States*, 527 U.S. 1, 144 L. Ed. 2d 35 (1999). *Bunch*, 363 N.C. at 845, 689 S.E.2d at 869. The *Neder* analysis "is twofold: (1) if the element is uncontested and supported by overwhelming evidence, then the error is harmless, but (2) if the element is contested and the party seeking retrial has raised sufficient evidence to support a contrary finding, the error is not harmless." *Id.* Applying this analysis to the circumstances in *Bunch*, the Supreme Court concluded that "any potential error was harmless beyond a reasonable doubt," due to the overwhelming evidence of the defendant's guilt. *Id.* at 849, 689 S.E.2d at 871-72. "Therefore, even if the jurors had received the complete pattern instruction for felony

murder, there is no reasonable probability that [the] outcome would have been different." *Id.* at 849, 689 S.E.2d at 871.

Unlike in *Bunch*, here, defendant does not raise a constitutional challenge to the jury instructions, nor does he argue that the trial court's error entitles him to a new trial. Rather, defendant asserts that, pursuant to *Gooch*, we should "leave the verdict undisturbed but recognize it as a verdict of guilty of the lesser included offense of simple possession" and remand to the trial court for resentencing. *Gooch*, 307 N.C. at 258, 297 S.E.2d at 602. Defendant's argument is supported by the Supreme Court's favorable discussion of *Gooch* in its post-*Bunch* decision in *State v. Stokes*, 367 N.C. 474, 756 S.E.2d 32 (2014). *See Stokes*, 367 N.C. at 479, 756 S.E.2d at 36 ("When the actual instructions given are sufficient to sustain a conviction on a lesser included offense, we consider the conviction a verdict on the lesser charge and then remand for appropriate sentencing. For instance, in *State v. Gooch* . . . .").

Since the trial court failed to instruct the jury on the amount of marijuana possessed, an essential element of felonious possession, "the verdict the jury returned must be considered a verdict of guilty of simple possession of marijuana[.]" *Gooch*, 307 N.C. at 258, 297 S.E.2d at 602. Therefore, we vacate the judgment entered on the charge of felonious possession of marijuana and remand to the trial court for resentencing on the lesser-included offense of simple possession of marijuana.

VACATED AND REMANDED.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).