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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-357

Filed: 6 November 2018

Forsyth County, No. 13 CRS 060689

STATE OF NORTH CAROLINA

v.

RUDOLPH COLES, JR.

Appeal by defendant from judgment entered 26 April 2017 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

CALABRIA, Judge.

Rudolph Coles, Jr. ("defendant") appeals from a judgment following a jury trial in which the jury found defendant guilty of trafficking heroin by transportation. Defendant argues that the trial court erred by (1) denying his motion to dismiss for insufficient evidence, (2) failing to properly instruct the jury as to the knowing

element of trafficking by transportation, and (3) failing to intervene *ex mero motu* during the prosecutor's closing argument.

After careful review, we hold that the trial court erred in its instructions to the jury and remand for a new trial. Because we are remanding for a new trial on the basis of erroneous jury instructions, we need not address defendant's remaining arguments on appeal.

I. Facts & Procedural History

On 28 October 2013, defendant was arrested, along with Terrance Poindexter, during a traffic stop that was the culmination of an extensive drug investigation into an organization known as the "Detroit Boys." Defendant was indicted on 16 February 2015 for conspiracy to traffic heroin, trafficking heroin by possession, and trafficking heroin by transportation.

One of the primary defenses presented at trial was that defendant was unaware of the drug operation, and was merely a relative of the others implicated with the "Detroit Boys" and was driving to and from Detroit to see his wife. Following the evidence, the parties agreed to the pattern jury instructions for all three charges. The trial court then provided the following instructions to the jury:

> Members of the jury, all the evidence has been presented. It is now your duty to decide from this evidence what the facts are. And you must then apply the law which I am about to give you to those facts.
>
> . . .

[T]he defendant has been indicted for three offenses: And condition conspiracy to traffic in heroin, by transportation or possession, guilty of trafficking of heroin by possession and guilty of trafficking, and heroin by transportation. And I will tell you what the law is generally, and then I will give it to you more specifically.

A conspiracy is when—when two or more persons join in an agreement to commit a particular crime; and that they also agree that this crime be carried out. There are three elements for the conspiracy. The fact that they join in an agreement, that the agreement is to participate in some type of criminal enterprise, what the crime is. And then third, that they want the agreement to be carried out. And those are the three elements of conspiracy.

But also I will have to give you the elements of those particular crimes. And it is two crimes in this case: Trafficking and heroin by possession, and trafficking in heroin by transportation.

. . .

And now the two elements for trafficking in heroin by possession: First, that you possessed that control substance. And in this case it is alleged to be heroin. And then the amount of that substance which was 28 or more grams.

For trafficking in heroin by transportation there are two elements. And that you moved heroin from one location to another; and the amount of that heroin that you moved from one location to another was 28 or more grams of that particular substance.

Now there is going to be one other concept that you are going to add in this case, and that is the difference between actual and constructive possession. And I will do a little bit more detail. I will not read those two elements over and

over and over, and I will not read them to you three times. And I will just read them to you one time. And when I give you this instruction on conspiracy, and the same elements for trafficking and possession, that I read this apply to for conspiracy to traffic and possession apply to the actual offense of trafficking and possession. And it is just that there is no conspiracy or agreement. And the same thing for trafficking by transportation.

. . .

Possession of a substance may be either actual or constructive. A person has actual possession of a substance if the person has it on their person, and is aware of its presence in either alone or together with others, has both the power and intent to control its disposition or use.

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 has either alone or together with others, both the power and 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 from the circumstances.

. . .

The defendant is also been charged with trafficking in heroin by transportation. For you to find the defendant guilty of this offense, the State must also prove two things beyond a reasonable doubt. First, that the defendant knowingly transported the heroin from one place to another; and second that the amount of the heroin which the defendant transported was 28 or more grams.

Now those are the two elements for trafficking in heroin by possession, and the two elements for trafficking in heroin by transportation. And I have defined the elements of those

> two offenses, which is the second element of conspiracy to traffic in heroin by possession or transportation. And that third element of the conspiracy to traffic in heroin by possession or transportation is that the defendant and Terrance Coles and Terrance Poindexter intended that the agreement be carried out at the time it was made.
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> . . .

Following the jury charge, the jury requested the definition of possession and the trial court reinstructed them. The jury returned a verdict finding defendant not guilty of the conspiracy to traffic heroin charge and the trafficking by possession charge, and guilty of the trafficking by transportation charge.

The trial court sentenced defendant to 225 months to 282 months in the custody of the North Carolina Department of Adult Corrections. Defendant gave notice of appeal in open court.

II. Jury Instruction

Defendant argues the trial court erred in its jury instructions by failing to properly instruct on the knowledge element of the trafficking by transportation charge. We agree.

A. Standard of Review

When reviewing challenges to jury instructions,

> this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden

> of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must demonstrate that such error was likely, in light of the entire charge, to mislead the jury.

Bass v. Johnson, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (internal quotation marks, alterations, and citations omitted).

B. Discussion

As an initial matter, the State contends that defendant failed to preserve his challenge to the jury instructions because defendant did not object to the instructions at trial. We disagree.

The North Carolina Supreme Court has held that "[t]he State's request, approved by the defendant and agreed to by the trial court, satisfie[s] the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and preserve[s] [the] question for review on appeal[,]" when the trial court deviate[s] from the agreed upon pattern instructions and the defendant fails to object at trial. *State v. Keel*, 333 N.C. 52, 56-57, 423 S.E.2d 458, 461 (1992). The Court similarly explained in *State v. Ross*, that "a request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions." 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) (citation omitted). Accordingly,

defendant's challenge to the jury instructions in the instant case is properly preserved.

For the State to succeed in convicting a defendant for trafficking a controlled substance by transportation, the State must prove "the defendant (1) knowingly (2) transported a given controlled substance, and that (3) the amount transported was greater than the statutory threshold amount." *State v. Zamora-Ramos*, 190 N.C. App. 420, 425, 660 S.E.2d 151, 155 (2008) (citation omitted). "It is the duty of the trial judge without any special requests to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence." *Millis Const. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 509, 358 S.E.2d 566, 568 (1987) (citation omitted). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citations omitted). Moreover, where the trial court provides conflicting instructions and does not offer the proper instruction as a correction to the former error, "[w]e may not assume that the jury wholly disregarded the [incorrect] charge . . . ." *Templeton v. Kelley*, 217 N.C. 164, 166-67, 7 S.E.2d 380, 382 (1940).

Among those material features in the present case was defendant's knowledge of the heroin in the rental car. It is apparent that the trial court's initial instruction regarding the trafficking by transportation charge—"[f]or trafficking in heroin by transportation there are two elements. And *that you moved heroin from one location*

to another; and that *the amount of that heroin that you moved from one location to another was 28 or more grams* of that particular substance"—that the instruction lacked the requisite knowledge element required and accounted for in the pattern jury instruction. While the trial court later provided the proper instruction—*i.e.* "the State must also prove two things beyond a reasonable doubt. First, that *the defendant knowingly transported the heroin from one place to another*; and second that the amount of the heroin which the defendant transported was 28 or more grams"—the trial court failed to give this as a correction to the original error. Examining the jury instructions as a whole, the trial court did not properly correct the issue created from its divergence from the pattern jury instruction and nor is it apparent from the record that the jury could not have been misled. *See State v. Wells*, 290 N.C. 485, 498, 226 S.E.2d 325, 334 (1976), *superseded in part on other grounds by statute*, N.C. Gen. Stat. § 15A-924(a)(5) (2003) (explaining that where "the inadvertence complained of occurs early in the charge but is not called to the attention of the court at the time, and is later corrected, the occurrence will not be held for prejudicial error when it is apparent from the record that the jury could not have been misled"). We therefore hold the trial court committed prejudicial error by failing to properly charge the jury on every element of the trafficking by transportation offense. *See State v. Maske*, 358 N.C. 40, 54, 591 S.E.2d 521, 530 (2004) ("We have held that error arises where a court's oral instructions are correct at one point and incorrect at another. Because

we cannot tell which version of the instructions guided the jury, we must assume that it was influenced by any portions of either instruction that were erroneous." (internal citations omitted)).

III. Conclusion

For the foregoing reasons, we vacate defendant's conviction and remand for a new trial.

NEW TRIAL.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).