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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-464

Filed: 4 December 2018

Catawba County, No. 16 CRS 1220-22; 17 CRS 103

STATE OF NORTH CAROLINA

v.

MARIJO RUDISILL

Appeal by defendant from judgments entered 28 November 2017 by Judge Andrew Taube Heath in Catawba County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas W. Yates, for the State.

Richard Croutharmel for defendant-appellant.

ZACHARY, Judge.

Where the trial court improperly instructed the jury on an alternative theory of guilt not charged in the bill of indictment, but Defendant did not object to the instruction at trial and the record does not otherwise reveal that the error had a probable impact on the jury's finding that Defendant was guilty, Defendant cannot

establish plain error. Where the trial court acted within its discretion in imposing consecutive sentences, we affirm the judgments and find no error.

Background

On 18 September 2015, Sergeant Dennis Smith of the Catawba County Sheriff's Office conducted an undercover purchase of a "small amount" of methamphetamine from Defendant Marijo Rudisill. Officer Smith used a hidden video camera to record the undercover transaction.

On 7 March 2016, the Catawba County Grand Jury indicted Defendant for one count of "possession of controlled substance with intent to sell or deliver" and one count of "sale or delivery of a controlled substance," stemming from the 18 September 2015 undercover operation (16 CRS 1221). Defendant was also indicted for an additional count each of the same charges, with an offense date of 28 September 2015 (16 CRS 1222). Defendant was further indicted for two counts of attaining the status of an habitual felon for the 18 September and 28 September offenses (16 CRS 1220 and 17 CRS 103).

Defendant proceeded to trial on the two counts listed in 16 CRS 1221. At trial, the jury was shown the video footage of the 18 September 2015 transaction between Defendant and Officer Smith. Officer Smith also testified in detail about the undercover transaction. Defendant testified and admitted that she was guilty of the charges. However, subsequent to the 18 September 2015 transaction, Defendant

assisted Officer Smith as an informant in several controlled purchases, which Defendant believed "was supposed to resolve all this," meaning that Officer Smith would "put in a good word . . . to the DA" in exchange for her assistance.

The jury found Defendant guilty in 16 CRS 1221 on Count I of "possession of controlled substance with intent to sell/deliver" and Count II of "sell/deliver sch II controlled substance." Defendant thereafter pleaded guilty to attaining habitual felon status in 16 CRS 1220, the remaining two counts in 16 CRS 1222, and the additional habitual felon status in 17 CRS 103.

The Honorable Andrew Heath sentenced Defendant in 16 CRS 1221 in the mitigated range at Class D, Level VI to 77-105 months' imprisonment for Count I of possession with intent to sell or deliver, and in the mitigated range at Class C, Level VI to 87-107 months' imprisonment for Count II of sale or delivery, with those two sentences to run concurrently. Judge Heath imposed the identical concurrent sentences for both counts in 16 CRS 1222. Defendant was already serving an 8.5-year habitual felon sentence at the time of her sentencing in the instant case, requiring her sentences in 16 CRS 1221 and 1222 to run consecutive with and at the expiration of that 8.5-year sentence.

Defendant objected to the possibility of the trial court likewise running her two sentences in 16 CRS 1221 and 1222 consecutively under the proportionality principle, noting that "[t]hat would be an active sentence of fifteen years for the [sale] of, I think

it was eleven hundredths of a gram of methamphetamine." The trial court denied Defendant's objection and ordered Defendant's sentence in 16 CRS 1222 to run consecutively with and at the expiration of her sentence in 16 CRS 1221, noting her "almost uninterrupted history of committing both misdemeanor and felony crimes." Defendant gave oral notice of appeal in open court.

Discussion

Defendant first argues that the trial court committed plain error when it instructed the jury on an uncharged theory of guilt for possession of a controlled substance with intent to sell or deliver. Defendant also argues that the trial court abused its discretion when it imposed consecutive sentences in 16 CRS 1221 and 16 CRS 1222 based in part on some of the same past conduct that was used to enhance her sentence under the habitual felon statute.

I. Jury Instructions

Defendant's indictment in Count I of 16 CRS 1221 for "possession of controlled substance with intent to sell or deliver" pursuant to N.C. Gen. Stat. § 90-95(a)(1) alleged only that Defendant "did possess with intent to sell or deliver a controlled substance, namely methamphetamine." However, the conduct proscribed under N.C. Gen. Stat. § 90-95(a)(1) is broader than that alleged in Defendant's indictment, in that the statute provides that it shall be unlawful to "possess with intent to *manufacture*, sell or deliver, a controlled substance." N.C. Gen. Stat. § 90-95(a)(1)

(2017) (emphasis added). Although the "manufacture" of a controlled substance was not charged in Defendant's indictment, the trial court nevertheless instructed the jury on Count I pursuant to the pattern jury instruction for N.C. Gen. Stat. § 90-95(a)(1), that: "to find the defendant guilty of this offense the state must prove . . . beyond a reasonable doubt . . . that the defendant intended to *manufacture*, sell, or deliver the methamphetamine." (Emphasis added). Defendant argues that it was error for the trial court to do so because it "created a fatal variance by instructing the jury on a theory of guilt not charged in the bill of indictment."

"[A] defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). "It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420 (1986). Accordingly, Defendant is correct that it was error for the trial court to instruct the jury that it should convict Defendant on her charge of "possession of controlled substance with intent to sell or deliver" upon finding that she either "intended to *manufacture*, sell, or deliver the methamphetamine." *See, e.g.*, *State v. Dominie*, 134 N.C. App. 445, 448, 518 S.E.2d 32, 34 (1999) (concluding that the trial court erred where, "even though the indictment charged the defendant with kidnapping for 'removing' the victims, the trial court informed the jury that the

defendant committed kidnapping if he 'confined, restrained, or removed' the victims"). However, Defendant did not preserve the trial court's instructional error by objecting at trial, and therefore our review is limited to one for plain error. *See State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012); N.C.R. App. P. 10(a)(4).

In order for a defendant to establish that she is entitled to a new trial under the plain error standard of review, she must show

> that a fundamental error occurred at trial. 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (citations, quotation marks, and brackets omitted).

"Plain error review in the context of improper disjunctive jury instructions will in large part turn on an analysis of the probability that the jury relied upon the improper instruction as opposed to the proper instruction." *State v. Collington*, ___ N.C. App. ___, ___, 814 S.E.2d 874, 882 (2018).

> In certain circumstances, it may be clear that the jury did not rely upon the improper instruction. For instance, if there was ample evidence presented at trial to support the proper alternative theory of conviction, and the State presented no evidence at trial that would have supported

> the improper alternative theory, then the reviewing court may find it probable that the jury relied upon the proper instruction rather than the improper instruction that was wholly unsupported by the evidence at trial.

Id. at ___, 814 S.E.2d at 882 (citations omitted).

In the instant case, although it was error for the trial court to instruct the jury in the alternative as to "manufacture" where the "manufacture" of a controlled substance was not charged in Defendant's indictment, in the absence of an objection, Defendant is unable to establish that the instruction amounted to plain error, thereby entitling her to a new trial.

The evidence presented against Defendant on Count I of possession of a controlled substance with intent to sell or deliver was overwhelming. In addition to the testimony of Officer Smith and the video footage of the transaction, Defendant testified, "I mean, I'm guilty." This significantly weakens Defendant's argument that the instructional error was so prejudicial as to amount to plain error—that is, that the jury probably would not have found Defendant guilty had the word "manufacture" been excluded from the instruction. *Compare Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335 ("In light of the overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict."), *with Tucker*, 317 N.C. at 540, 346 S.E.2d at 422 ("In light of the highly conflicting evidence in the instant kidnapping case on the unlawful removal and

restraint issues, we think the instructional error might have . . . 'tilted the scales' and caused the jury to reach its verdict convicting the defendant.").

Additionally, as Defendant notes, the evidence at trial wholly "failed to support a theory of guilt based on intent to manufacture a controlled substance." The absence of evidence that would have supported the conviction of Defendant upon the improper alternative "manufacture" instruction further indicates that its inclusion did not have a probable impact on the jury's verdict. *See Collington*, ___ N.C. App. at ___, 814 S.E.2d at 881-82 ("If it is apparent from the record that the jury did not convict the defendant based upon the improper instruction, it would contravene the purpose of the plain error rule for the reviewing court to nevertheless assume that the jury relied upon the improper instruction and mandate a new trial." (citations omitted)). Finally, the verdict sheet indicates that the jury unanimously found Defendant guilty only of "possession of controlled substance with intent to sell/deliver," thus indicating that its guilty verdict was not dependent upon the manufacturing instruction. *Contra State v. Sergakis*, 223 N.C. App. 510, 515, 735 S.E.2d 224, 228 (2012), *disc. review denied*, 366 N.C. 438, 736 S.E.2d 487 (2013).

Accordingly, we conclude that Defendant has failed to establish that the trial court's improper inclusion of the alternative manufacturing instruction amounted to plain error, and therefore affirm Defendant's conviction on Count I of 16 CRS 1221 for possession of a controlled substance with intent to sell or deliver.

II. Consecutive Sentences

We next address Defendant's argument pertaining to her consecutive sentences. As Defendant notes, through the trial court's imposition of consecutive sentences in 16 CRS 1221 and 1222, she was "given a 14.5-year prison sentence for possessing and selling merely 0.2 grams of methamphetamine." In justifying its sentencing decision, the trial court stressed Defendant's extensive criminal history, noting that it included, among many others, "crimes involving . . . drug offenses, . . . uttering forged instruments, . . . [and] possessing a firearm by a felon." However, Defendant points out that her habitual felon indictments also "included convictions for a drug offense, uttering a forged instrument, and possession of a firearm by a felon." Thus, Defendant argues that the trial court erred because it imposed the consecutive sentences "based on the same prior convictions it used to enhance [her] current convictions under the habitual felon statute." Defendant contends that "[t]his was a fundamentally unfair and impermissible form of doubly punishing [her] based on the same prior convictions in violation of *Gentry* and similar cases." We find no error.

When sentencing a defendant, "the trial court must determine the prior record level, if any, of [the] defendant pursuant to N.C. Gen. Stat. § 15A-1340.14." *State v. Gentry*, 135 N.C. App. 107, 108, 519 S.E.2d 68, 69 (1999). "Points" are assigned for each prior conviction that a defendant may have pursuant to N.C. Gen. Stat. § 15A-

1340.14(b). "Once the total number of points is calculated pursuant to G.S. 15A-1340.14(b), the prior record level is determined by comparing the point total calculated to the range of point totals corresponding to each prior record level as listed in G.S. 15A-1340.14(c)." *State v. Bethea*, 122 N.C. App. 623, 626, 471 S.E.2d 430, 432 (1996). In addition to her prior record level, a defendant's sentence may be further enhanced if she is convicted of having attained the status of an habitual felon. *See* N.C. Gen. Stat. § 14-7.1, -7.6 (2017). "Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977).

N.C. Gen. Stat. § 14-7.6 explicitly provides that "[i]n determining the prior record level [of a defendant], convictions used to establish [her] status as an habitual felon shall not be used." N.C. Gen. Stat. § 14-7.6 (2017). "Obviously, our legislature recognized the basic unfairness and constitutional restrictions on using the same convictions both to elevate a defendant's sentencing status to that of an habitual felon, and then to increase [her] sentencing level." *Gentry*, 135 N.C. App. at 111, 519 S.E.2d at 70. Thus,

> [a] defendant's prior convictions will either serve to establish a defendant's status as an habitual felon pursuant to G.S. 14-7.1 or to increase a defendant's prior record level pursuant to G.S. 15A-1340.14(b)[.] G.S. 14-7.6 establishes clearly, however, that the existence of prior convictions may not be used to increase a defendant's

> sentence pursuant to both provisions at the same time.

Bethea, 122 N.C. App. at 626, 471 S.E.2d at 432.

Nonetheless, separate and apart from enhancing a defendant's sentence based on her prior record level or habitual felon status, "[i]t is undisputed that the trial court has express authority under N.C.G.S. § 15A-1354(a) to impose consecutive sentences." *State v. LaPlanche*, 349 N.C. 279, 284, 507 S.E.2d 34, 37 (1998). Pursuant to N.C. Gen. Stat. § 15A-1354,

> [w]hen multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court.

N.C. Gen. Stat. § 15A-1354(a) (2017). Thus, "G.S. 15A-1354(a) gives the sentencing court discretion to run multiple sentences either concurrently or consecutively." *State v. Benfield*, 76 N.C. App. 453, 458, 333 S.E.2d 753, 757 (1985). Review of a trial court's decision to impose a consecutive sentence is limited to determining only whether the trial court committed an abuse of that discretion. *State v. Thompson*, 139 N.C. App. 299, 310, 533 S.E.2d 834, 842 (2000).

> A trial court abuses its discretion if its determination is "manifestly unsupported by reason" and is "so arbitrary that it could not have been the result of a reasoned decision." In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record.

State v. Lasiter, 361 N.C. 299, 301-02, 643 S.E.2d 909, 911 (2007) (citation omitted).

In the instant case, Defendant cites no authority in support of her contention that the trial court "erred as a matter of law" by factoring into its decision as to whether to impose a consecutive sentence those prior convictions that were also used to establish Defendant's status as an habitual felon. Unlike a defendant's prior record level or habitual felon status, whether to impose a concurrent or consecutive sentence is left to the discretion of the sentencing judge. *State v. Ysaguire*, 309 N.C. 780, 785, 309 S.E.2d 436, 440 (1983). We do not find that the trial court's imposition of consecutive sentences in this case was so arbitrary that it could not have been the result of a reasoned decision.

In response to Defendant's objection to the imposition of consecutive sentences, Judge Heath reasoned:

> Just for the record, in sentencing this defendant the court will reviewed [sic] the prior convictions of this defendant, which date back many years into the 1980s, which shows almost uninterrupted history of committing both misdemeanor and felony crimes involving trespasses, fraudulent checks, driving while impaired, hit-and-run with failing to stop after property damage, drug offenses, stealing, uttering forged instruments, stolen motor vehicle, crimes of violence including assault, stealing a firearm, possessing a firearm by a felon.
>
> The Court is satisfied that this individual is a danger to society, and the sentences are within the sentencing grids. And in fact, are at the bottom presumptive range. And although it is argued that it is a

> small amount of methamphetamine, methamphetamine has been proven time and again to ruin the lives of North Carolina citizens. And taking all that into account, the Court has sentenced the defendant appropriately. And for that reason, the motion reconsidered is denied.

In fact, beyond the three prior convictions that were used to establish Defendant's status as an habitual felon, the prior record worksheet reveals that Defendant possessed more than *eighty additional prior convictions* by the time she was sentenced in the instant case. "[G]uided by the axiom that ordinarily on sentencing decisions appellate courts do not substitute their judgment for that of the trial court[,]" we therefore conclude that the trial court's imposition of consecutive sentences was well supported by reason and thus did not constitute an abuse of discretion. *Id.* at 786, 309 S.E.2d at 440.

Conclusion

For the reasoning contained herein, Defendant received a fair trial, free of plain error. The trial court's decision to run Defendant's sentences consecutively did not constitute an abuse of discretion. The judgments entered upon the jury's verdicts are affirmed.

NO ERROR IN PART, AFFIRMED IN PART.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).