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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-875

Filed: 7 May 2019

Johnston County, Nos. 17 CRS 2089, 53724

STATE OF NORTH CAROLINA

v.

ERIC MICHAEL JORDAN

Appeal by Defendant from Judgment entered 22 February 2018 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 14 February 2019.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Kacy L. Hunt, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Eric Michael Jordan appeals from a Judgment adjudicating him guilty of Possession of Controlled Substance on the Premises of a Penal Institution in violation of N.C. Gen. Stat. § 90-95(e)(9) and sentencing him as a Habitual Felon. The Record before us tends to show the following relevant facts:

On 12 June 2017, Defendant was incarcerated at Johnston Correctional Institution (JCI). On this particular day, Sergeant Michael Richie, a correctional sergeant at JCI employed by the Department of Adult Correction, observed several inmates standing in the yard with their shirts untucked. JCI rules require inmates to have their shirts tucked inside their pants or shorts. Sergeant Richie noticed Defendant in particular because as Sergeant Richie approached the group, the others immediately began to tuck in their shirts. Defendant, on the other hand, was digging into his waistband, but did not tuck in his shirt. Sergeant Richie asked Defendant what was tucked inside Defendant's waistband and, eventually, Defendant produced a bag of pills from his shorts. A subsequent search of Defendant revealed a concealed pocket sewn into the inside of Defendant's shorts. These pills were submitted into evidence without objection. Agent Courtney Dupper, a forensic scientist at the North Carolina State Crime Lab, testified she performed testing on one of the pills. The testing revealed the pill contained buprenorphine, which Agent Dupper testified was a Schedule III opium derivative.

On 5 September 2017, the Grand Jury indicted Defendant for Possession of a Controlled Substance at a Penal Institution, specifically buprenorphine, a Schedule III controlled substance. The indictment, however, erroneously alleged possession occurred at the Johnston County Jail and not JCI. Defendant was also indicted for having attained Habitual Felon status.

The matter was first called for trial on 22 January 2018. During pre-trial motions, Defendant expressed his desire for "state-appointed counsel to take leave[.]" The trial court confirmed with Defendant he wanted court-appointed counsel to be relieved, and Defendant wished to represent himself in the proceedings. The trial court then engaged Defendant in an extended colloquy, explaining to Defendant the charges against him, the range of sentences for those charges, and, while advising Defendant against representing himself, the fact Defendant had a constitutional right to defend himself if he so chose. Again, the trial court indicated it would not force Defendant to accept assistance of counsel, and asked if Defendant wished to waive that right. Defendant repeatedly asserted he did. The trial court inquired into Defendant's age, educational background, and mental status, and ensured Defendant understood he had a right to counsel, and, if that right was waived, Defendant would be required to follow the rules of evidence and procedure. Defendant, under oath, signed a written waiver of counsel.

The trial court relieved defense counsel of representation, but requested he remain as standby counsel. In explaining the role of standby counsel to Defendant, the trial court explained:

> If at any time during the trial you change your mind and decide you want him to step into the case and represent you, let me know that and I'll let him come back into the case and represent you.

The trial court proceeded to hear pre-trial motions. The State moved to amend the Bill of Indictment charging Possession of a Controlled Substance at the Johnston County Jail to correct the location to JCI. The trial court denied the State's Motion to Amend, and, after Defendant declined to consent to be tried on a Bill of Information, the trial was continued to permit the State to seek a superseding indictment. Subsequently, on 5 February 2018, the Grand Jury issued a superseding indictment for Possession of a Controlled Substance at a Penal Institution identifying JCI as the location.

The case came back on for trial on the superseding indictment on 22 February 2018. Prior to trial, the trial court asked Defendant if he still wished to represent himself and Defendant responded he did. The trial court again placed Defendant under oath and repeated the entire colloquy with Defendant. The trial court, once more, asked Defendant if he still desired to waive his right to counsel and Defendant again confirmed he did. The trial court emphasized: "please make sure that you understand totally, sir, that from this point on, you've waived counsel." Finally, the trial court asked Defendant: "Do you understand that you've reached the point of no return in terms of your waiving your right to a lawyer?" Defendant responded: "I understand."

Trial began with Defendant representing himself, including cross-examining the State's witnesses and moving to dismiss at the close of the State's evidence. Prior

to putting on his own evidence, Defendant requested his standby counsel represent him going forward. The trial court denied the request finding Defendant made "a free, knowing, and voluntary waiver of counsel." The trial court further explained standby counsel would remain and be available to Defendant for consultation.

Following trial, the jury returned a verdict finding Defendant guilty of Possession of a Controlled Substance at a Penal Institution. After the jury returned its verdict, Defendant pleaded guilty to attaining Habitual Felon status.

The trial court found Defendant had a prior felony record level of IV. The trial court entered written findings, finding no aggravating factors, but finding as a mitigating factor Defendant pleaded guilty to his actions at an administrative hearing before the North Carolina Department of Public Safety/ Department of Adult Correction. The trial court sentenced Defendant, as a Habitual Felon, to a minimum of 60 and a maximum of 84 months in the custody of the North Carolina Department of Adult Correction. Defendant gave oral notice of appeal in open court.

Issues

Defendant raises the following issues on appeal: (I) whether the trial court denied Defendant due process by failing to allow Defendant to withdraw his waiver of the right to counsel; and (II) whether the trial court committed plain error in allowing testimony: (A) Defendant had been disciplined by JCI for his possession of the buprenorphine; and (B) based on his prior convictions, Defendant knew what a

Schedule III controlled substance looked like, when at the time of the offense, buprenorphine was still a Schedule IV controlled substance.

Analysis

I. Denial of Defendant's Request to Withdraw his Waiver of Counsel

A. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied,* 363 N.C. 857, 694 S.E.2d 766 (2010). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"The trial court's denial of a motion to withdraw a waiver of the right to counsel is reviewed for abuse of discretion." *State v. Rogers*, 194 N.C. App. 131, 139, 669 S.E.2d 77, 83 (2008). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

B. Defendant's Waiver of Counsel

At the initial 22 January 2018 trial date, Defendant expressed his desire to represent himself and for his court-appointed counsel to be relieved from representation. Following its extensive colloquy with Defendant and after receiving Defendant's oral and written waivers of counsel, the trial court relieved defense counsel of representation, but requested he remain as standby counsel. In explaining the role of standby counsel, the trial court told Defendant:

> If at any time during the trial you change your mind and decide you want him to step into the case and represent you, let me know that and I'll let him come back into the case and represent you.

The trial was ultimately continued until 22 February 2018.

At the 22 February 2018 trial, after the State rested its case and prior to presenting his own testimony, Defendant moved to have standby counsel represent him. The trial court denied this motion, explaining:

> You waived counsel and the Court does find that it was a free, knowing, and voluntary waiver of counsel. He will remain here. He will be available for you to confer with. But I'm going to decline to allow him to initiate representation of you at this time.

Defendant first contends the trial court violated Defendant's constitutional right to counsel by denying Defendant's request to reinstate his counsel in the middle of trial after stating: "If at any time during the trial you change your mind and decide you want him to step into the case and represent you, let me know that and I'll let him come back into the case and represent you." Specifically, Defendant contends this

statement constituted a promise, upon which Defendant detrimentally relied, standby counsel could resume representation at any time.

Our Supreme Court addressed a similar situation in *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994), *overruled on other grounds*, *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997). In *Blankenship*, the defendant sought to represent himself. The trial court allowed the request, and informed the defendant, "When you tell me you want [trial counsel] for your lawyer, I will reinstate him as your lawyer." *Id*. at 552, 447 S.E.2d at 733. Subsequently, after the State rested and during the defendant's case-in-chief, the defendant asked for his lawyer to be reinstated. The trial court denied the defendant's motion. On appeal, the defendant contended the trial court's promise prejudiced him, and he was therefore denied his constitutional right to counsel.

Our Supreme Court rejected the defendant's argument on several points. Most relevant of which, the Court noted:

> there is no showing in the record or transcript that defendant relied on anything the trial court said in choosing to represent himself. Indeed, the transcript demonstrates that defendant deliberately disregarded the trial court's advice with regard to his self-representation decision. He made this decision, the transcript reveals, not because of, but in spite of, [the trial court]'s advice. We are convinced both his initial decision to proceed *pro se* and his continuing in this mode would have occurred even if [the trial court]'s statements concerning future availability of counsel had not been made.

Id. at 552, 447 S.E.2d at 732-33. Here, as in *Blankenship*, there is no showing Defendant relied on anything the trial court said in choosing to represent himself. To the contrary, Defendant repeatedly affirmed his desire to proceed *pro se* even in light of the trial court's colloquy and advisement not to proceed *pro se*. Indeed, the trial court's statement regarding standby counsel occurred only after the extensive colloquy in which Defendant confirmed his understanding of the charges, possible sentence, his right to a lawyer or to proceed *pro se*, after the trial court advised against self-representation, and after Defendant signed a written waiver of counsel under oath.

As in *Blankenship*, "the transcript demonstrates that [D]efendant deliberately disregarded the trial court's advice with regard to his self-representation decision." Defendant's repeated assertion of his right to represent himself was not incentivized by the trial court's promise. Rather, Defendant repeatedly asserted his desire to waive counsel "not because of, but in spite of," the trial court's advice.

Defendant nonetheless attempts to distinguish the instant case from *Blankenship*. He notes the trial court's statements in *Blankenship* did not constitute a guarantee counsel would be reinstated at "any time during trial[.]" Even so, Defendant fails to distinguish the instant case from *Blankenship* on the key point cited above – Defendant was not incentivized to waive counsel by the trial court's statement, but rather did so despite the repeated warnings of the trial court.

Furthermore, Defendant overlooks the pre-trial proceedings a month later on 22 February 2018. Prior to the 22 February 2018 trial, the trial court revisited Defendant's waiver of counsel, including repeating the colloquy with Defendant and confirming Defendant understood his right to counsel and desired to waive that right. The trial court further emphasized: "please make sure that you understand totally, sir, that from this point on, you've waived counsel." Finally, the trial court asked Defendant: "Do you understand that you've reached the point of no return in terms of your waiving your right to a lawyer?" Defendant responded: "I understand."

At no time did Defendant indicate any reliance on the trial court's statement regarding standby counsel made at the January hearing. To the contrary, Defendant unequivocally stated his understanding he was waiving his right to a lawyer and was at "the point of no return" in that decision. Furthermore, when requesting to withdraw his waiver, Defendant made no mention of the trial court's earlier statement at the January hearing. In light of the absence of any showing in the Record Defendant detrimentally relied on the trial court's statement, we conclude Defendant's constitutional rights were not violated by the trial court's denial of his request to withdraw his waiver of counsel.

C. Abuse of Discretion

Defendant alternatively contends, even if the denial of his request did not rise to the level of a constitutional violation, the trial court nevertheless abused its

discretion in denying his request to withdraw his waiver of counsel. Defendant contends the trial court gave no explanation for its denial of Defendant's request and, thus, the denial was arbitrary. However, the trial court did provide an explanation for its decision, finding Defendant's waiver was "a free, knowing, and voluntary waiver of counsel." This finding is supported by the Record which shows the trial court's repeated efforts to ensure Defendant was making a free, knowing and voluntary waiver of counsel, making Defendant aware of the consequences of that decision and the seriousness of the charges against him, advising Defendant against such a decision, and warning Defendant prior to trial he was at the point of no return in making that decision.

Moreover, a defendant seeking to withdraw waiver of counsel bears the "burden of showing sufficient facts entitling him to a withdrawal of the waiver of right to counsel[.]" *State v. Atkinson*, 51 N.C. App. 683, 686, 277 S.E.2d 464, 466 (1981). Where a defendant delays his withdrawal of waiver until trial, he further bears the burden "to show good cause for the delay." *State v. Smith*, 27 N.C. App. 379, 381, 219 S.E.2d 277, 279 (1975). Defendant's motion before the trial court, after the close of the State's evidence and prior to Defendant's presentation, offered no explanation or argument showing good cause for his delay or facts entitling him to withdraw his waiver of counsel. Consequently, we conclude the trial court did not abuse its discretion in denying Defendant's request.

II. Plain Error

In his second and third arguments, Defendant contends the trial court committed plain error in admitting several pieces of testimony. We disagree.

A. Standard of Review

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Prior Disciplinary Proceeding

At trial, Lieutenant Donald Morrison, a correctional officer at JCI, testified as to the underlying events. Lieutenant Morrison was a contraband control officer at the time of the offense. He was contacted by Sergeant Richie regarding Defendant's alleged possession of buprenorphine, a controlled substance, on prison grounds. Lieutenant Morrison also oversaw JCI's own disciplinary proceeding against Defendant resulting from this incident. The State questioned Lieutenant Morrison, without objection, about the disciplinary proceedings that resulted, and Lieutenant Morrison explained the procedures involved.

On appeal, Defendant contends this was prejudicial error because the sole effect of this evidence "was to unfairly prejudice Mr. Jordan in the eyes of the jury by stating that the government had already found him 'guilty' of the very crime the jury was charged with deciding." Because Defendant failed to object to this testimony at trial, we review it for plain error.

First, we note Defendant himself testified as to the disciplinary proceedings against him, in greater detail than Lieutenant Morrison. Lieutenant Morrison's testimony was limited to a discussion of general procedure. Defendant, however, testified specifically as to the proceeding against him, who was present and what happened, thus, waiving any potential objection to Lieutenant Morrison's prior testimony. *See State v. Van Landingham*, 283 N.C. 589, 603, 197 S.E.2d 539, 548 (1973) (error was cured when testimony of like import was admitted thereafter without objection).

Moreover, on plain error review, Defendant bears the burden of showing this Court "not only that there was error, but that absent the error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

Here, in addition to Lieutenant Morrison's testimony, the State presented Sergeant Richie's testimony. Sergeant Richie gave a first-hand account of the incident describing how Defendant turned over the contraband pills to him. The pills themselves were admitted into evidence, and Agent Dupper testified her testing

revealed the pills contained a controlled substance. Thus, even had Lieutenant Morrison not been permitted to mention the disciplinary proceedings against Defendant, there was ample evidence of Defendant's conduct for a jury to find Defendant guilty. As such, we hold Defendant has failed to demonstrate "absent the error, the jury probably would have reached a different verdict."

C. Buprenorphine as a Scheduled III Controlled Substance

After the State rested its case, Defendant chose to testify in his own defense. Defendant testified on direct examination he "had no idea" the pills he possessed were a controlled substance. On cross-examination, the State questioned Defendant about his prior offenses, noting he had previously been convicted of possession of a Schedule III controlled substance. After asking Defendant about his criminal record, the following exchange occurred:

> Q. So you know exactly what a Schedule III controlled substance looks like, don't you, Mr. Jordan?
>
> A. Yes.
>
> Q. Because you've been convicted of it yourself in the past?
>
> A. Yes.

On appeal, Defendant contends the admission of this testimony was error.

Defendant specifically argues, at the time of the incident, buprenorphine was a Schedule IV substance, and only after his arrest was it declared a Schedule III

substance. Moreover, he contends it was only considered a Schedule III substance "for offenses occurring on or after 1 December 2017." *See* N.C. Gen. Stat. § 90-91(d)(9) (2017); 2017 N.C. Sess. Law 115 § 5. Defendant's argument alleges, in essence, it was improper to suggest he was in possession of a Schedule III substance when, in fact, the substance he possessed was, at the time of the offense, a Schedule IV substance. Thus, Defendant claims, the State's cross-examination on whether Defendant knew what a Schedule III substance looked like based upon his prior conviction was irrelevant and improper character evidence suggesting his culpability for the current offense.

The discrepancy in the classification of buprenorphine or references to Schedule III controlled substances was, however, never raised before the trial court, and Defendant did not object to the challenged testimony. As Defendant failed to object at trial, we again review only for plain error. Even assuming, without deciding, there was error, the overwhelming evidence of Record demonstrates Defendant, in fact, possessed buprenorphine, which is a controlled substance, on the premises of JCI, a penal institution. Defendant makes no argument the remaining evidence does not support his conviction for Possession of a Controlled Substance on the Premises of a Penal Institution. As such, we conclude Defendant has failed to demonstrate "absent the error, the jury probably would have reached a different verdict." Consequently, we conclude there was no plain error.

Conclusion

Accordingly, we conclude the trial court did not err in denying Defendant's request to withdraw his waiver of counsel. Furthermore, we conclude there was no plain error in the admission of the testimony of Lieutenant Morrison or in the cross-examination of Defendant.

NO ERROR IN PART, NO PLAIN ERROR IN PART.

Judges ZACHARY and BERGER concur.

Report per Rule 30(e).