IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-128

Filed: 1 October 2019

Mecklenburg County, No. 16CRS203354

STATE OF NORTH CAROLINA

v.

PATRICIA CAMILLO PALACIOS, Defendant.

Appeal by Defendant from judgment entered 9 March 2018 by Judge Jesse B. Caldwell in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Richard H. Bradford, for the State.

J. Clark Fischer for the Defendant.

BROOK, Judge.

Patricia Camillo Palacios ("Defendant") appeals from a judgment entered upon jury verdicts finding her guilty of trafficking in heroin by possession, trafficking in heroin by transportation, and conspiracy to traffic in heroin by possession. We hold that Defendant has failed to show prejudicial error.

I. Background

On 27 January 2016 law enforcement received a tip from a confidential informant that there would be a delivery of 52 grams of heroin to the parking lot of Home Depot at 9501 Albemarle Road in Charlotte, North Carolina. The confidential informant described the individual who would be making the delivery as a Hispanic female with short brown hair driving a white Toyota RAV4. Officers observed a Toyota RAV4 being driven by Defendant enter the parking lot. Defendant went inside Home Depot after parking her car.

As she was walking back to her car, Defendant was approached by law enforcement. She was instructed to stop and asked if she was carrying any weapons, whereupon she spontaneously stated to officers, "I'm just here making a delivery for a friend." Officers conducted a search of Defendant and found two phones, one smart phone and one Kyocera flip phone.

Officers thereafter conducted a search of Defendant's vehicle, in which they found Defendant's checkbook, a vehicle registration in Defendant's name, some mail to Defendant, and a package containing a substance wrapped in black electrical tape that was later determined to be 52.28 grams of black tar heroin.

Defendant was quickly taken away to a nearby church parking lot to avoid alerting other individuals potentially involved in the delivery to the presence of law enforcement. At the church parking lot, one of the two phones found on Defendant's person – the Kyocera flip phone – began to ring. Defendant answered the phone at

the request of law enforcement. The caller told Defendant to meet her at Defendant's apartment to collect the money that was supposed to have changed hands when the heroin was delivered.

Defendant went with law enforcement to her apartment where officers conducted a search and apprehended the individual they believed to be the caller, who was waiting outside in a black Mercedes. The suspected caller was searched and officers found two phones on her person, one smart phone and one Kyocera flip phone identical to the Kyocera flip phone found on Defendant. The suspected caller was also in possession of a little less than $9,000 in cash. Searches of the phones confirmed that the Kyocera flip phone found on the suspected caller was the phone that had called the Kyocera flip phone found in Defendant's possession while she was with the officers in the church parking lot.

Defendant thereafter traveled with officers to a mobile home in Stanfield, North Carolina to which she had a key. She turned over the key to officers and gave them her verbal consent to search the mobile home. Inside the mobile home law enforcement recovered two digital scales, packaging material, and approximately 515 grams of a substance that was determined to be black tar heroin.

On 1 February 2016 Defendant was indicted for charges of conspiring to traffic in excess of 28 grams of heroin by possession, trafficking in excess of 28 grams of heroin by possession, and trafficking in excess of 28 grams of heroin by

transportation. The matter came on for trial before the Honorable Jesse B. Caldwell, III, on 26 February 2018 in Mecklenburg County Superior Court. After several days of pre-trial motions and jury selection, Judge Caldwell presided over a five-day trial.

On 9 March 2018, the jury returned verdicts of guilty on all three charges. However, during sentencing the trial court found that Defendant had rendered substantial assistance "in the identification, arrest, or conviction of an accomplice, co-conspirator, [or] principal." The court therefore sentenced Defendant to 76 to 104 months in prison for all three charges. Defendant entered notice of appeal in open court.

II. Analysis

Defendant makes two arguments on appeal, which we address in turn.

A. Verdict Forms

Defendant first argues that the trial court violated her rights guaranteed by the Sixth Amendment to the United States Constitution by imposing a sentence greater than the minimum sentence for trafficking in heroin where the verdict forms did not specify the quantity of heroin in which she trafficked. Specifically, Defendant contends that sentencing her for the Class C felony of trafficking in excess of 28 grams of heroin and conspiring to do the same constituted plain error in violation of the Sixth Amendment because the verdict forms did not specify the quantity of heroin. According to Defendant, "sentencing [her] as a Class C drug trafficker constituted

plain error under *Apprendi v. New Jersey* when the underlying verdicts did not specify any drug quantity." We disagree.[1]

Defendant did not raise this issue before the trial court. Generally speaking, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. Rule 10(b)(1). Relatedly, "[u]npreserved error . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). Moreover, "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Rawlings*, 236 N.C. App. 437, 443, 762 S.E.2d 909, 914 (2014) (internal marks and citation omitted).

[1] We note at the outset that this argument is based on a false premise. As noted previously, the trial court sentenced Defendant to 76 to 104 months in prison. This sentence falls within the punishment range for the Class E felony of trafficking between 14 and 28 grams of heroin, not the Class C felony of trafficking in excess of 28 grams of heroin, of which the jury found Defendant guilty. *Compare* N.C. Gen. Stat. § 90-95(4)(c) (2017) ("Any person who . . . transports[] or possesses . . . heroin . . . shall be guilty of a felony . . . known as 'trafficking in . . . heroin' and if the quantity . . . [i]s 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 282 months") *with id.* § 90-95(4)(b) (where the quantity "[i]s 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 120 months"). It is therefore not true, as Defendant claims in her brief, that the trial court sentenced Defendant as a Class C drug trafficker. The trial court departed from the minimum, required sentence of 225 months in prison under N.C. Gen. Stat. § 90-95(4)(c) because of Defendant's substantial assistance to the State – and in spite of the State's opposition to a finding of substantial assistance.

However, this Court has held that "[a]n error at sentencing is not considered an error at trial for the purpose of Rule 10(b)(1) because this rule is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal." *State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005) (internal marks and citation omitted). In particular, alleged Sixth Amendment violations under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000), and its progeny have been held to be subject to harmless error review. *State v. Watts*, 185 N.C. App. 539, 540, 648 S.E.2d 862, 864 (2007). Under this standard, "[a] violation of the defendant's rights under the Constitution . . . is [presumed] prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." *State v. Hammonds*, 370 N.C. 158, 167, 804 S.E.2d 438, 444 (2017) (citation omitted).

Apprendi and its progeny set out the rule that the Sixth Amendment right to jury trial includes a requirement that punishment only be imposed upon proof beyond a reasonable doubt of "any fact that increases the penalty for a crime," other than the fact of a prior conviction. *Watts*, 185 N.C. App. at 540, 648 S.E.2d at 864 (internal marks and citation omitted). Defendant's argument based on this line of cases is that the absence of a quantity term on the verdict forms prevented the trial court from imposing a sentence greater than the lowest level drug trafficking sentence under N.C. Gen. Stat. § 90-95(4)(a) because the verdict forms do not reflect that the jury

found Defendant guilty of trafficking any specific amount of heroin, much less that the amount was in excess of 28 grams – this fact qualifying as a fact that increases the penalty for the crime under *Apprendi* and its progeny. Defendant thus re-casts alleged, unpreserved instructional error subject to plain error review as constitutional error subject to harmless error review under *Apprendi*.

Although not in the context of an alleged violation of a defendant's Sixth Amendment rights, we have previously rejected a very similar argument. *See State v. Butler*, 147 N.C. App. 1, 9, 556 S.E.2d 304, 309-10 (2001), *aff'd*, 356 N.C. 141, 567 S.E.2d 137 (2002). In *Butler*, we held that "[t]he absence of the specific amount of [a controlled substance] listed on the verdict sheets was not error, much less plain error," in a drug trafficking case where the identity and quantity of the controlled substance was essentially undisputed. *Id.* at 9, 556 S.E.2d 310. While not explicitly articulated in *Butler*, the reason this result was required was that "[a] jury is presumed to follow the court's instructions." *Nunn v. Allen*, 154 N.C. App. 523, 541, 574 S.E.2d 35, 46 (2002) (citation omitted). As an appellate court, we cannot assume anything other than that a properly instructed jury follows its instructions, absent some error actually appearing on the record. *See Ridley v. Wendel*, ___ N.C. App. ___, ___, 795 S.E.2d 807, 813-14 (2016) ("[W]e must [] presume that the jury based its verdict on the[] [jury's] instructions.") (citation omitted).

In *Butler*, the defendant stipulated that the controlled substance recovered by law enforcement was cocaine in an amount in excess of 28 grams. 147 N.C. App. at 9, 556 S.E.2d at 310. The defendant disputed however whether he *knowingly* trafficked the cocaine. *Id.* We reasoned that "the jury's return of guilty verdicts on [trafficking] charges establishe[d] that the jury determined beyond a reasonable doubt that [the] defendant possessed and transported 28 grams or more but less than 200 grams of cocaine," after being instructed by the trial court "that in order to find [the] defendant guilty of both charges they must find that he knowingly possessed and transported the cocaine, and that the amount of the cocaine was 83.1 grams." *Id.* We therefore held that "[t]he absence of the specific amount of cocaine listed on the verdict sheets was not error, much less plain error." *Id.*

Despite Defendant's articulation of the present argument as a constitutional challenge under the Sixth Amendment, with respect to this issue, this case is indistinguishable from *Butler*. The trial court instructed the jury in this case as follows:

> Members of the jury, the defendant has been charged with trafficking in heroin, which is the unlawful transportation of 28 grams or more of heroin, and that the defendant knew what she transported was heroin.
>
> Now, for you to find the defendant guilty of this offense the state must prove two things beyond a reasonable doubt: First, the state must prove beyond a reasonable doubt that the defendant knowingly transported heroin from one place to another and that the

defendant knew that what she transported was heroin. The state must prove that beyond a reasonable doubt. The second thing of the two things the state must prove beyond a reasonable doubt for you to convict the defendant on this charge is that the amount of heroin which the defendant transported was 28 grams or more.

Therefore, members of the jury, to sort of summarize or wrap it up, I charge that if you should find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant knowingly transported heroin from one place to another, and that the defendant knew that what she transported was heroin, and that the amount which the defendant transported was 28 grams or more, 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 as to one [or] both these things, it would be your duty to return a verdict of not guilty.

. . .

Members of the jury, in this case . . . [t]he defendant has been charged with trafficking in heroin, which is the unlawful possession of 28 grams or more of heroin, and that the defendant knew that what the defendant possessed was heroin.

Now, members of the jury, for you to find this defendant guilty of this offense the state must prove two things beyond a reasonable doubt. First, the state must prove beyond a reasonable doubt that the defendant knowingly possessed heroin. Members of the jury, a person possesses a controlled substance if the person is aware of its presence and has, either by oneself or together with others, both the power and the intent to control the disposition or use of that substance.

Members of the jury, possession of heroin may be either actual or it may be constructive. A person has actual possession of heroin if the person has it on his or her

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. Now, that's actual possession.

What is constructive possession? A person has constructive possession of heroin if the person does not have it on his or her person but is aware of its presence and has, either alone or together with others, both the power and the intent to control its disposition or use.

A person's awareness of the presence of heroin 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. Again, we've talked about circumstantial evidence.

Members of the jury, if you find beyond a reasonable doubt that heroin was found in close physical proximity to the defendant, that would be a circumstance from which, together with other circumstances, you may infer that the defendant was aware of the presence of heroin and had the power and the intent to control its disposition or use. However, the defendant's physical proximity or closeness, if any, to the heroin does not by itself permit an inference that the defendant was aware of its presence or had the power or intent to control its disposition or use. Such an inference may be drawn only from this and other circumstances which you find from the evidence beyond a reasonable doubt.

Now, members of the jury, if you find beyond a reasonable doubt that heroin was found in a vehicle and that the defendant exercised control over that vehicle, whether or not the defendant owned the vehicle or not, this would be a circumstance from which you may infer that the defendant was aware of the presence of the heroin and had the power and the intent to control its disposition or use.

And, again, as I said previously, in this first element

the state . . . must prove beyond a reasonable doubt that the defendant knew that what she possessed was heroin.

Now, the second of the two elements that the state must prove beyond a reasonable doubt for you to convict the defendant of trafficking in heroin by possession is this: is that the amount of heroin which the defendant possessed was 28 grams or not.

So to sort of summarize and wrap this up, I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant knowingly possessed heroin, members of the jury, and that the defendant knew that what she possessed was heroin, and that the amount which the defendant possessed was 28 grams or more, 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 as to one or both of these things, it would be your duty to return a verdict of not guilty.

. . .

Members of the jury, the defendant has been charged with feloniously conspiring to commit trafficking in heroin by possession. For you to find the defendant guilty of this offense the state must prove three things beyond a reasonable doubt: First, that the defendant and Beatriz Avila entered into an agreement. That's the first thing the state must prove beyond a reasonable doubt. Second, that the agreement was to commit trafficking in heroin by possession.

Now, members of the jury, you will recall the two elements of trafficking in heroin by possession. First, the state would have to prove beyond a reasonable doubt that the defendant knowingly possessed heroin and that the defendant knew that the defendant possessed – that what the defendant possessed was heroin; and, secondly, members of the jury, the state would have to prove beyond a reasonable doubt that the amount of heroin which the

> defendant possessed was 28 grams or more. . . .
>
> Here's the third element: That the defendant and Beatriz Avila intended that the agreement be carried out at the time it was made; that they intended that the agreement be carried out at the time it was made.
>
> So to sort of summarize and wrap that up. Members of the jury, . . . if you should find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant agreed with Beatriz Avila to commit the crime of trafficking in heroin by possession and that the defendant and Beatriz Avila intended at that time that the agreement was made that it would be carried out, then it would be your duty to return a verdict of guilty of this charge. However, if you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphasis added.) The verdict forms reflect that the jury found Defendant guilty of all three charges. The trial court's polling of the jury confirmed both that jury found Defendant guilty of these charges and that the jury's verdicts were unanimous.

We hold that the trial court did not err in imposing a sentence greater than the minimum sentence for trafficking in heroin and conspiring to do the same where the verdict forms did not specify the quantity of heroin. As in *Butler*, Defendant did not dispute whether the substance recovered from her vehicle was heroin, nor did she dispute whether the amount exceeded 28 grams. *See* 147 N.C. App. at 9, 556 S.E.2d at 310. Defendant's trial counsel elected not to cross-examine the State's expert in forensic chemistry, who testified that the substance contained heroin and that it weighed 52.28 grams. Instead, the defense theory at trial was that Defendant did

not knowingly traffic in heroin or conspire to do the same. Taking the stand in her own defense, Defendant testified that she had never seen heroin before; that she did not know the package in her vehicle contained heroin; and that she did not know the trailer to which she possessed the key contained heroin. However, as in *Butler*, the jury returning guilty verdicts after being properly instructed by the trial court established that the jury determined beyond a reasonable doubt that Defendant possessed and transported 28 grams or more of heroin and conspired to traffic in heroin by possessing the same. *See id.* As the jury was properly instructed, we must assume that it followed its instructions.[2] *See Ridley*, ___ N.C. App. at ___, 795 S.E.2d at 813-14. Accordingly, we overrule this argument.

B. Confidential Informant's Tip

Defendant next argues that the trial court erred in overruling her objection to the admission of a confidential informant's tip that someone matching her description would deliver 52 grams of heroin to the Home Depot parking lot. Specifically, Defendant contends that allowing Special Agent Billings to testify that Defendant matched the physical description provided by the confidential informant and that the confidential informant's tip was that 52 grams of heroin would be delivered to the

[2] Defendant argues in the alternative that the verdicts were fatally ambiguous because the verdict forms did not specify the quantity of heroin. The verdicts in this case were not ambiguous: there are three separate verdict forms, one for each of the three charges; and none of the three verdict forms states different modes of liability for a single charge in the disjunctive. *See generally State v. McLamb*, 313 N.C. 572, 577-78, 330 S.E.2d 476, 479-80 (1985) (explaining that disjunctively stated modes of liability within one charge results in fatal ambiguity in verdicts).

Home Depot parking lot constituted prejudicial error because it was hearsay evidence offered for the truth of the matter asserted. We disagree.

Rule 801 of the North Carolina Rules of Evidence defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C–1, Rule 801(c) (2017). However, "[o]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (citation omitted). "Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *Id.*

When Special Agent Billings was asked why he approached Defendant in the Home Depot parking lot, the out-of-court description provided by the confidential informant to which Special Agent Billings testified was being offered for the non-hearsay purpose of explaining why Defendant, and not some other person in the Home Depot parking lot that day, was approached by Special Agent Billings and other members of law enforcement. Specifically, Special Agent Billings testified as follows:

> [PROSECUTOR:] At any point in time did you see someone in the Home Depot parking lot matching that description?
>
> [SPECIAL AGENT BILLINGS:] We did.
>
> [PROSECUTOR:] How is it that they matched that description?

[SPECIAL AGENT BILLINGS:] The description provided –

[DEFENSE COUNSEL:] Objection.

THE COURT: What was provided?

[SPECIAL AGENT BILLINGS:] I believe he said the description provided, and that was as far as it goes.

THE COURT: Overruled.

[SPECIAL AGENT BILLINGS:] The description provided was that of a Hispanic female with short brown hair driving a Toyota, a white Toyota RAV4 that was going to be in the parking lot.

. . .

[PROSECUTOR:] And after you got the description, did you see someone fitting that description leave the Home Depot?

[SPECIAL AGENT BILLINGS:] I did.

[PROSECUTOR:] What did you see them do as they left the Home Depot?

[SPECIAL AGENT BILLINGS:] I saw a Hispanic female with the short brown hair as described walking towards the RAV4 – come out of the Home Depot and walk directly towards a Toyota RAV4.

[PROSECUTOR:] Did that person get all the way to the Toyota RAV4?

[SPECIAL AGENT BILLINGS:] They got to the RAV4, but they did not get into the RAV4.

> . . .
>
> [PROSECUTOR:] What stopped her from getting into the RAV4?
>
> [SPECIAL AGENT BILLINGS:] She was approached by members of our team prior to her gaining access to the vehicle.
>
> [PROSECUTOR:] Were you one of the individuals that approached?
>
> [SPECIAL AGENT BILLINGS:] I was.

We hold that it was not error for the trial court to allow Special Agent Billings to testify that Defendant matched the physical description provided by the confidential informant because that testimony was being offered for the non-hearsay purpose of explaining why law enforcement approached Defendant, and not some other person in the Home Depot parking lot that day.

"Prejudicial error is defined as a question of whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Dewalt*, 209 N.C. App. 187, 190, 703 S.E.2d 872, 874 (2011) (internal marks and citation omitted).

Assuming, *arguendo*, that the testimony of Special Agent Billings regarding the tip by the confidential informant that 52 grams of heroin would be delivered to the Home Depot parking lot was offered for the truth of the matter asserted, *i.e.*, that

the substance recovered from Defendant's vehicle was heroin weighing 52 grams, we hold that any error in allowing this testimony was not prejudicial to Defendant. Specifically, Special Agent Billings testified on redirect examination as follows:

> [PROSECUTOR:] . . . That day in the Home Depot did the confidential source say how much heroin would be delivered?
>
> [SPECIAL AGENT BILLINGS:] Yes.
>
> [PROSECUTOR:] Do you know that or should I ask Officer Bridges?
>
> [SPECIAL AGENT BILLINGS:] No, I know it was – what was told to – or what the confidential source relayed to us as a whole. He said it was going to be 52 grams.
>
> [DEFENSE COUNSEL:] Objection, Judge Caldwell. Hearsay.
>
> THE COURT: Overruled.
>
> [SPECIAL AGENT BILLINGS:] On that particular day the confidential –
>
> THE COURT: Excuse me, I'm sorry. I didn't hear it, but I'm going to overrule the objection. Go ahead.
>
> [PROSECUTOR:] . . . So on that day how much was to be delivered at Home Depot?
>
> [SPECIAL AGENT BILLINGS:] On that day it was going to be 52 grams was going to be delivered.
>
> [PROSECUTOR:] And how much showed up that day?
>
> [SPECIAL AGENT BILLINGS:] Fifty-two grams.

> [PROSECUTOR:] And there was a physical description given by the confidential source?
>
> [SPECIAL AGENT BILLINGS:] Yes.
>
> [PROSECUTOR:] Of the runner?
>
> [SPECIAL AGENT BILLINGS:] Of the runner, yes.
>
> [PROSECUTOR:] And what was that description again?
>
> [SPECIAL AGENT BILLINGS:] Hispanic female driving a white Toyota RAV4 with short brown hair.
>
> [PROSECUTOR:] Did the defendant show up matching everything from that description?
>
> [SPECIAL AGENT BILLINGS:] Yes.

Assuming without deciding that this testimony was offered to establish the truth of the matter asserted, we hold that it was not prejudicial error to allow the introduction of this testimony.

We hold that the introduction of this testimony did not constitute prejudicial error because we do not believe its introduction created "a question of whether there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached[.]" *Dewalt*, 209 N.C. App. at 190, 703 S.E.2d at 874. The State's expert in forensic chemistry testified that the substance was heroin and that it weighed 52.28 grams. As noted previously, Defendant's trial counsel chose not to attempt to impeach this testimony on cross-examination, leaving the State's evidence of the identity and quantity of the controlled substance

essentially undisputed. Accordingly, even assuming Special Agent Billings's testimony on this point was offered for the truth of the matter asserted, there is no reasonable probability that it changed the jury's verdicts.

III. Conclusion

We hold that Defendant has failed to show prejudicial error.

NO PREJUDICIAL ERROR.

Judges INMAN and HAMPSON concur.

Report per Rule 30(e).