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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-118

No. COA20-352

Filed 6 April 2021

Cabarrus County, No. 19 CRS 51752

STATE OF NORTH CAROLINA

v.

ANGEL NARVAEZ CRUZ

Appeal by defendant from judgments entered 12 December 2019 by Judge Anna M. Wagoner in Cabarrus County Superior Court. Heard in the Court of Appeals 10 February 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Stacey A. Phipps, for the State.

Dunn, Pittman, Skinner & Cushman, PLLC, by Rudolph A. Ashton, III, for defendant.

DIETZ, Judge.

¶ 1 Defendant Angel Cruz appeals his convictions on multiple charges concerning the possession and sale of cocaine. On appeal, he argues that the trial court committed structural error by failing to properly instruct the jury on the reasonable doubt standard and committed plain error by failing to properly instruct the jury on the option to return a not guilty verdict.

¶ 2

We reject these arguments. The trial court provided the constitutionally required instruction on the presumption of innocence and repeatedly instructed on the State's burden to prove each element of the charged offenses beyond a reasonable doubt. Likewise, although the instructions on two of the six counts omitted portions of the standard not-guilty instruction, when viewed in context the jury understood that it had the option to return a not guilty verdict on any of the six counts. We thus find no plain error in the trial court's judgments but remand solely for the correction of minor clerical errors in those judgments.

Facts and Procedural History

¶ 3

Defendant Angel Cruz sold cocaine to a confidential informant on three separate occasions in 2019. The Concord Police Department provided the informant with money for each sale, which the informant exchanged with Cruz for a plastic bag containing a white, powdery substance later identified as cocaine.

¶ 4

The State charged Cruz with three counts of selling cocaine and three counts of possession with intent to sell or deliver cocaine. The jury found Cruz guilty of all charges. The court found that a mitigated sentence was justified, consolidated the sale charges—counts one, three, and five—and consolidated the possession with intent to sell or deliver charges—counts two, four, and six—for judgment. Cruz appealed.

Analysis

I. Challenge to jury instructions

¶ 5

Cruz first argues that the trial court erred when instructing the jury on counts two and four “by omitting required language regarding proof beyond a reasonable doubt of all elements and failing to offer a proper verdict of not guilty.” Cruz acknowledges that he did not object to the instructions but asserts that the alleged errors are either structural or plain error. We reject this argument and find no plain error in the instructions.

¶ 6

We first address Cruz’s argument that the instructions unconstitutionally heightened the standard for reasonable doubt. In a criminal trial, the court must instruct the jury that the State bears the burden of proving all the elements of the charged offense beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 277–78 (1993). A deficient jury instruction on reasonable doubt is constitutionally defective and is a structural error, meaning one that compels reversal without the need to show prejudice. *State v. Polke*, 361 N.C. 65, 73, 638 S.E.2d 189, 194 (2006).

¶ 7

Here, the trial court correctly instructed the jury on the State’s burden to prove all elements of the charged offenses beyond a reasonable doubt. First, before charging the jury on each individual count, the trial court explained that Cruz is presumed innocent and that the State has the burden to prove guilt beyond a reasonable doubt:

The Defendant has entered a plea of not guilty. Under our system of justice a defendant who pleads not guilty is not required to prove his or her innocence but is presumed to be innocent. The State must prove to you that the Defendant is guilty beyond a reasonable doubt. A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack or insufficiency of the evidence as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the Defendant's guilt.

¶ 8 Then, when discussing the elements of each individual criminal count, the trial court again emphasized that, “[f]or you to find the Defendant guilty of this offense, the State must prove two things beyond a reasonable doubt” before describing the elements of the offense. Finally, after listing those elements, the trial court again in each count explained that, “[i]f you find from evidence beyond a reasonable doubt that” the State proved the elements of the offense, “it would be your duty to return a verdict of guilty.”

¶ 9 Thus, the trial court's instructions satisfied the constitutional requirement to instruct the jury that Cruz is presumed innocent and that the State bears the burden of proof beyond a reasonable doubt. We therefore reject Cruz's argument that the instructions were constitutionally deficient under *Sullivan* and amounted to structural error.

¶ 10 We next turn to Cruz's argument that the instructions failed “to offer the jury the option of not guilty” with respect to two of the six counts. Cruz acknowledges that

he did not object to the jury charge and we therefore review this issue for plain error.

State v. Calderon, 242 N.C. App. 125, 128, 774 S.E.2d 398, 402 (2015).

¶ 11 “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “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.” *Id.* In other words, the defendant must show that “absent the error, the jury probably would have returned a different verdict.” *Id.* at 519, 723 S.E.2d at 335. Our Supreme Court has emphasized that we should invoke the plain error doctrine “cautiously and only in the exceptional case” where the consequences of the error seriously affect “the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 518, 723 S.E.2d at 334.

¶ 12 “Every criminal jury must be instructed as to its right to return, and the conditions upon which it should render, a verdict of not guilty.” *Calderon*, 242 N.C. App. at 129, 774 S.E.2d at 403. Ordinarily, this instruction is given with each count, accompanying the instruction concerning the State’s burden to prove guilt beyond a reasonable doubt. *Id.* “Our Supreme Court has held that the failure of the trial court to provide the option of acquittal or not guilty in its charge to the jury can constitute reversible error.” *Id.* “Nonetheless, it has long been recognized that the trial court’s charge to the jury must be construed contextually and isolated portions of it will not

be held prejudicial error when the charge as a whole is correct.” *Id.*

¶ 13 Here, in four of the six counts, the trial court properly instructed the jury that, if the State proved each element of the offense beyond a reasonable doubt, “it would be your duty to return a verdict of guilty” and also that, “[i]f you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.” But in count two, the trial court omitted the portion stating that, “[i]f you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.” Similarly, in count four, the trial court omitted the phrase “or have a reasonable doubt as to one or more of these things,” stating only “[i]f you do not so find, you would return a verdict of not guilty.”

¶ 14 These two omissions in the trial court’s instructions do not rise to the level of plain error. The trial court repeatedly emphasized that Cruz is presumed innocent and that the State bears the burden to prove every element beyond a reasonable doubt. The court also expressly included the alternative choice to find Cruz not guilty in four of the six counts. In the two challenged counts, the trial court used conditional phrasing when explaining the State’s burden of proof: “*If* you find from evidence beyond a reasonable doubt” that the State proved all the elements of the offense, “it would be your duty to return a verdict of guilty.” (Emphasis added). Finally, on the verdict sheet, all six counts included the same options to return a verdict of either

guilty or not guilty.

¶ 15 Viewed in context, Cruz has not met his burden to show that the alleged error had a probable impact on the jury's verdict. Likewise, Cruz has not shown that the alleged error was so fundamental that it seriously affected "the fairness, integrity or public reputation of judicial proceedings." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, we find no plain error in the trial court's instructions.

II. Clerical errors in the judgments

¶ 16 Cruz next argues that the trial court made clerical errors because the judgments reflect inaccurate offense dates. On the first page of each judgment, the offense dates are all listed as 9 January 2019 when they should reflect the separate offense dates of 9 January 2019, 12 March 2019, and 30 April 2019. "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008). "This Court has held that an error on a judgment form which does not affect the sentence imposed is a clerical error, warranting remand for correction but not requiring resentencing." *State v. Gillespie*, 240 N.C. App. 238, 245, 771 S.E.2d 785, 790 (2015). We affirm the trial court's judgments but remand for the limited purpose of correcting the clerical errors in the offense dates.

Conclusion

¶ 17 We find no plain error in the trial court's judgments but remand for the limited purpose of correcting the clerical errors described in this opinion.

NO PLAIN ERROR; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).