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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-475

No. COA20-583

Filed 7 September 2021

Lincoln County, No. 18CRS051953-54, 18CRS051959

STATE OF NORTH CAROLINA

v.

TAMMY JO HERNANDEZ, Defendant.

Appeal by Defendant from judgment entered 22 January 2020 by Judge Todd Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 11 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.

Drew Nelson for the Defendant.

JACKSON, Judge.

¶ 1

Tammy Jo Hernandez (“Defendant”) argues that the trial court erred by failing to instruct the jury on possession of methamphetamine, the lesser-included offense of trafficking in methamphetamine. Defendant also contends that the judgment contains a clerical error. The State concedes the clerical error on appeal. We agree that the judgment contains a clerical error but find no plain error in the trial court’s

jury instructions. Thus, we remand the case for the limited purpose of correcting the clerical error.

I. Facts and Procedural Background

¶ 2 On 9 June 2017, Deputy Wayne Hollar of the Lincoln County Sheriff's Office ("Deputy Hollar") noticed a red Pontiac Sunbird traveling at a very low rate of speed and occasionally traveling over the fog line. The vehicle was owned by Defendant but being operated by Randy McDonald ("Mr. McDonald"). Deputy Hollar, believing the occupants may be experiencing some form of either a medical issue or impairment, initiated a traffic stop to investigate.

¶ 3 After pulling the vehicle over, Deputy Hollar approached the passenger side where Defendant was sitting and noticed her reaching down toward the floorboard. Defendant was asked to exit the vehicle and consented to a search of her person. Deputy Hollar proceeded to pat Defendant down to determine if she had any weapons and found a glass pipe in Defendant's pocket. The pipe had burn marks and appeared to contain a "crystal-like substance." Subsequently, Defendant was placed under arrest. After being advised of her *Miranda* rights, Defendant agreed to answer some of Deputy Hollar's questions. When asked if there was anything else illegal on her person or in the vehicle, Defendant informed Deputy Hollar that there was a black tin can that contained methamphetamine in the vehicle. Defendant also indicated that she had additional pipes in her bra. Deputy Hollar then removed Mr. McDonald

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from the vehicle and found a small clear baggie with a crystal-like substance on his person.

¶ 4 After searching Mr. McDonald and Defendant, Deputy Hollar performed a search of the vehicle. During the search, he located the black tin can described by Defendant which contained a bag of what Deputy Hollar believed to be methamphetamine. Deputy Hollar also discovered several other items containing the same crystal-like substance amongst Defendant's belongings in the trunk of the vehicle. Deputy Hollar also found a hard case in the back of the driver's seat that contained two large bags of methamphetamine. Digital scales, baggies, and five cell phones were also found in the vehicle.

¶ 5 After seizing the items found in the vehicle, Deputy Hollar placed them in evidence bags and took them to the sheriff's office where they were later processed. Deputy Hollar also submitted five bags—each containing what he described as a “crystal-like substance”—to the state crime lab for testing. The five bags were identified as items 001, 002, 011 and 012 on the property sheet, with the two bags discovered in the hard case behind the driver's seat being included under a single item number (item 001). Deputy Hollar attributed three of the items (001, 011, and 012) to Defendant. One bag from item 001 and item 011 tested positive for methamphetamine and weighed approximately 64.42 grams and 0.27 grams, respectively. A chemical analysis was not performed on item 012 or the second bag

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in item 001.

¶ 6 On 9 July 2018, Defendant was indicted for trafficking in methamphetamine by possession, trafficking in methamphetamine by transport, and felony maintaining a vehicle for keeping and selling a controlled substance. The case came on for trial on 21 January 2020 before the Honorable W. Todd Pomeroy in Lincoln County Superior Court.

¶ 7 During the trial, Deputy Hollar testified that, based on his training and experience, the items seized from the car indicate selling and delivery of narcotics. He also testified that while speaking with Defendant about the items found in the car, she indicated that she and Mr. McDonald had picked up the narcotics in Gaffney, South Carolina, and were delivering them to an unknown address in Newton, North Carolina.

¶ 8 Following testimony from Deputy Hollar and the forensic scientist at the state crime lab, Defendant testified in her own defense. Defendant testified that she had allowed Mr. McDonald to use her car over the three days leading up to her arrest in exchange for money to pay her car insurance, and she had only been in the car with Mr. McDonald on the date of the arrest because he had agreed to take her to the hospital. Defendant also admitted to owning the methamphetamine in the tin can but testified that she was not aware of any other controlled substances in the vehicle,

although she acknowledged that Mr. McDonald might be in possession of a controlled substance.

¶ 9 At the conclusion of the trial, the jury was instructed on actual and constructive possession, trafficking in methamphetamine by transportation, trafficking in methamphetamine by possession, and intentionally maintaining a vehicle which was used for the unlawful keeping or selling of a controlled substance. In addition to these instructions, the trial court also instructed the jury on the misdemeanor version of maintaining a vehicle for the unlawful keeping or selling of a controlled substance, which requires that the defendant “knowingly” maintained the vehicle. The jury asked the trial court to clarify the difference between the two versions of this crime before ultimately finding Defendant guilty of the lesser, misdemeanor version. Defendant was also found guilty of trafficking in methamphetamine by possession and trafficking in methamphetamine by transport.

¶ 10 At the conclusion of the trial, the trial court asked Defendant’s counsel if Defendant would like to give oral notice of appeal. Defendant’s counsel indicated that he would like additional time to discuss the issue of appeal with Defendant. Subsequently, the trial court ordered that Defendant be held in the local jail for 24 hours so that she could discuss appealing the judgment with her trial counsel.

II. Analysis

A. Petition for Writ of Certiorari

¶ 11 Defendant filed a Petition for Writ of Certiorari on 12 December 2020 seeking review of the trial court’s judgment. Pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure, notice of appeal in criminal cases may be taken by “(1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]” N.C. R. App. P. 4(a).

¶ 12 Here, the transcripts of the trial do not reflect notice of appeal being given in open court following the trial and the record does not indicate that written notice of appeal was given. Thus, Defendant requests that we issue a writ of certiorari to review the case. Because the Court cannot hear Defendant’s direct appeal for failure to comply with Rule 4 of the North Carolina Rules of Appellate Procedure, we exercise our broad discretion, pursuant to N.C. Gen. Stat. § 7A-32(c), and hereby allow Defendant’s petition for a writ of certiorari.

B. Jury Instruction

¶ 13 Defendant argues that the trial court committed plain error when it did not instruct the jury on the lesser-included offense of trafficking in methamphetamine. Specifically, Defendant argues that she was entitled to a possession of methamphetamine instruction because she admitted to possession of a smaller amount of methamphetamine, which was less than 28 grams needed for the trafficking charge, while denying knowledge of the other methamphetamine found in

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the car. We disagree.

¶ 14 According to our Supreme Court, a “[d]efendant is ‘entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.’” *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)). However, “a lesser offense should not be submitted to the jury if the evidence is sufficient to support a finding of all the elements of the greater offense, and there is no evidence to support a finding of the lesser offense.” *State v. Nelson*, 341 N.C. 695, 697, 462 S.E.2d 225, 226 (1995) (internal marks and citations omitted). Furthermore, the “[m]ere possibility of the jury’s piecemeal acceptance of the State’s evidence will not support the submission of a lesser included offense. Thus, mere denial of the charges by the defendant does not require submission of a lesser included offense.” *State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988) (citations omitted).

¶ 15 Section 90-95(h)(3b) of the North Carolina General Statutes provides that “[a]ny person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or any mixture containing such substance shall be guilty of a felony which felony shall be known as ‘trafficking in methamphetamine.’” N.C. Gen. Stat. § 90-95(h)(3b) (2019). Thus, the State was required to prove that Defendant (1) knowingly possessed methamphetamine and (2) the amount was 28

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grams or more. *See State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (explaining that one of the essential elements of felonious possession of any controlled substance is knowledge). Here, Defendant disputes the second element, arguing that there was evidence that she possessed less than 28 grams of methamphetamine.

¶ 16 During the trial, Deputy Hollar and Defendant both testified that Defendant had informed Deputy Hollar that she owned a black tin can which contained methamphetamine. The tin can was in the trunk of the vehicle and contained what Deputy Hollar believed to be methamphetamine. The contents of the tin can, however, were never tested.

¶ 17 This case is remarkably similar to *State v. Siler*, 310 N.C. 731, 314 S.E.2d 547 (1984). In *Siler*, the defendant denied knowing about over 300 grams of cocaine found in the trunk of a car in which he had been a passenger but admitted that he had knowledge of a smaller amount of cocaine found in a separate bag inside the car. *Id.* at 733, 314 S.E.2d at 549. The smaller bag inside the car was not tested. *Id.* Our Supreme Court held that from this evidence, the jury could have determined that the defendant possessed an amount of cocaine less than the amount required for conviction of trafficking in cocaine by possession, and therefore the defendant was entitled to an instruction on the lesser-included offense. *Id.* at 733-34, 314 S.E.2d at 549.

¶ 18 Here, Defendant, like the defendant in *Siler*, admitted that she had knowledge

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of a smaller amount of methamphetamine found in a separate container in the vehicle. The contents of the can, however, were not tested. Thus, there was no analysis done to verify the weight of the contents in the tin can and the jury could have found Defendant to be in possession of less than 28 grams. These facts, taken together, amount to contradictory evidence as to the second element of the offense. Thus, we hold that the trial court erred in failing to instruct the jury on the lesser-included offense.

¶ 19 Here, however, Defendant did not request that the trial court instruct the jury on the lesser-included offense. When a defendant fails to request an instruction, the trial judge must give the instruction if there is sufficient evidence to support it. *State v. Lowe*, 150 N.C. App. 682, 686, 564 S.E.2d 313, 316 (2002) (explaining that the trial court should give the instruction “even in the absence of a request by the defendant, where sufficient evidence of the lesser offense is presented at trial”). If the defendant fails to request the instruction and the trial judge fails to give the instruction, we review the issue solely for plain error. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

¶ 20 “Under the plain error rule, [a] 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). To that end, “[a] reversal for plain error is only appropriate in the most exceptional

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cases.” *State v. Raines*, 362 N.C. 1, 16, 653 S.E.2d 126, 136 (2007) (internal marks and citation omitted).

¶ 21 Defendant contends that there is a reasonable possibility that the jury would have selected the lesser-included offense if properly instructed, because the verdict on the third charge—maintaining a vehicle for selling a controlled substance—signifies that the jury was willing to select the lesser version of an offense. More importantly, it demonstrates that Defendant knowingly rather than intentionally maintained a vehicle for selling a controlled substance. Defendant’s argument, however, is unavailing.

¶ 22 Here, in finding Defendant guilty of trafficking, the jury had to have determined that Defendant had possession of the methamphetamine. Because the methamphetamine was not found on Defendant’s person, the jury must have determined that Defendant had constructive possession of the methamphetamine. As the judge explained, “[a] person has constructive possession of methamphetamine if the person does not have it on the 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.” (Emphasis added.)

¶ 23 In finding Defendant guilty of the misdemeanor offense in the third charge, the jury again recognized that Defendant knew or was aware that there was a high probability that Mr. McDonald was using her car to transport methamphetamine.

Simply because Defendant was not aware of the quantity does not negate the fact that she constructively possessed more than 28 grams of methamphetamine.

¶ 24 Additionally, Deputy Hollar testified that Defendant informed him that she had traveled with Mr. McDonald to pick up methamphetamine and they were to deliver it to an unknown address. These statements were also included in the police report. Defendant contends that she only made these statements to Deputy Hollar because Mr. McDonald instructed her to do so. Defendant further testified that she was only in the car with Mr. McDonald because of a condition that required medical attention. However, Defendant's testimony also revealed that she had been in the car with Mr. McDonald for over 12 hours without visiting a hospital. Defendant, when questioned by Deputy Hollar, also acknowledged it was likely that Mr. McDonald had drugs in the car.

¶ 25 Given these circumstances, we find that even if the jury was properly instructed, it cannot be said that the jury probably would have reached a different result. Thus, we find no plain error in the trial court's jury instructions.

C. Clerical Error

¶ 26 Next, Defendant argues that the judgment contains a clerical error. Specifically, the judgment indicates that Defendant was found guilty of possession of drug paraphernalia when she was actually found guilty of misdemeanor maintaining a vehicle/dwelling for controlled substance. The State concedes this error on appeal.

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¶ 27 Clerical error has been defined as “[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.” *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting Black’s Law Dictionary 563 (7th ed. 1999)). While our courts have not formally adopted this definition, “the concept of ‘judicial reasoning or determination’ as a component of a judicial action has been implicitly recognized in numerous appellate decisions.” *Id.* For example,

[i]n reviewing criminal convictions, our courts have found harmless clerical errors to include the inadvertent checking of a box finding an aggravating factor on a judgment form; reference in a bill of particulars to a wrong charge when the indictment indicated the proper charge; submission to the jury of a range of drug trafficking amounts differing from the range indicated in the indictment; judgment mistakenly stating that prison term was imposed pursuant to plea agreement; *judgment erroneously stating conviction of wrong crime*[.]

Id. at 202, 535 S.E.2d at 878-79 (citations omitted) (emphasis added).

¶ 28 When a clerical error is discovered on appeal, the appropriate remedy is 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, 696-97 (2008) (internal marks and citations omitted).

¶ 29 Here, the judgment indicates that Defendant was found guilty of: (1) trafficking in methamphetamine by possession; (2) trafficking in methamphetamine

by transport; and (3) possession of drug paraphernalia. The transcript of the trial and verdict sheets reveal that Defendant was in fact convicted of the first two offenses listed in the judgment, but the third offense—possession of drug paraphernalia—is not listed. Instead, Defendant was convicted of misdemeanor maintaining a vehicle/dwelling for controlled substance. Thus, the third offense listed on the judgment should have been misdemeanor maintaining a vehicle/dwelling for controlled substance instead of possession of drug paraphernalia.

¶ 30 As such, the trial court committed clerical error when writing the offenses on the judgment. Accordingly, we remand for the limited purpose of correcting the clerical error found on the judgment.

III. Conclusion

¶ 31 For the reasons stated above, we hold that the trial court did not commit plain error by not instructing the jury on the lesser-included offense of trafficking in methamphetamine, as it was probable the jury would have still found Defendant guilty of the trafficking offenses even if the instruction were given. The judgment, however, does contain a clerical error. Thus, we remand the matter to the trial court for correction of this clerical error.

NO PLAIN ERROR; REMANDED TO CORRECT CLERICAL ERROR.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).