IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-326

No. COA21-73

Filed 3 May 2022

Lincoln County, Nos. 14CRS53438-39, 14CRS53442

STATE OF NORTH CAROLINA

v.

ROBERT EUGENE DAVIS, Defendant.

Appeal by defendant from judgment entered 27 August 2019 by Judge Forrest D. Bridges in Lincoln County Superior Court. Heard in the Court of Appeals 2 November 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General G. Mark Teague, for the State-appellee.

Sean P. Vitrano for defendant-appellant.

GORE, Judge.

¶ 1 Defendant Robert Eugene Davis was convicted of trafficking in opium or heroin, manufacturing marijuana, felony possession of marijuana, maintaining a dwelling, and possession of a firearm by a felon. On appeal, defendant argues the trial court committed plain error by: (1) admitting unauthenticated records purporting to establish his prior felony conviction; and (2) omitting the essential

element of weight from its jury charge on felonious possession of marijuana. We discern no plain error.

I. Factual and Procedural Background

¶ 2 On 15 October 2015, officers with the Lincoln County Sheriff's Office Narcotics Division went to a residence located at 1041 Camp Creek Road in Iron Station, Lincoln County, in response to complaints of drug activity. Investigator Billy Burgin attempted to conduct a knock-and-talk, but nobody answered the door. As officers were preparing to leave, defendant arrived in his vehicle. The officers introduced themselves and explained why they were there. After a brief conversation, defendant admitted he had marijuana in the house and consented to a search of the residence.

¶ 3 Defendant escorted the officers to the kitchen, where they found a small quantity of marijuana on a plate. Defendant said it was for personal use. Inside the kitchen cabinets, officers recovered several pill bottles containing 11.3 grams of hydrocodone and 66 dosage units of Xanax with various imprints. Chemical analysis by the North Carolina State Crime Lab confirmed the contents of the pill bottles contained hydrocodone, a Schedule III preparation of an opium derivative. Defendant did not provide investigators with any medical documentation or the name of any prescribing physician pertaining to the pills found in his kitchen. He told investigators he bought the pills from other people because he had medical issues and lacked medical insurance.

¶ 4 Defendant then consented to the search of a closed bedroom in the house. Inside the bedroom, officers found an unspecified number of gallon storage bags containing marijuana. Other officers located and seized a few marijuana plants approximately 20 yards from the house, which had already been harvested. Officers seized an "antique-ish" triple beam balance scale, which Burgin testified could be used for weighing drugs for packaging and sale, a silver marijuana grinder, and an open box of Fine Gum cigarette wrappers. Officers also found a bag of clear capsules, some containing a leafy green material suspected to be marijuana. Burgin testified the capsules are commonly used to ingest narcotics.

¶ 5 In defendant's bedroom, officers located six firearms, and seized boxes of 12-gauge shotgun slugs and .22 caliber ammunition. At trial, defendant claimed two of the firearms were used to protect his chickens from predators, one of the rifles belonged to his son, and the remaining firearms were broken and inherited from his father.

¶ 6 Defendant was arrested. During transportation to the magistrate's office, Burgin reported that defendant stated, "he [had] gotten away with this for 20-plus years, and it was bound that he would get caught at some point."

¶ 7 At trial, defendant testified on his own behalf. He told the jury he was 63 years old, had sustained various injuries in his lifetime, and needed Valium and hydrocodone to keep himself functional. When he could no longer obtain drugs

through his doctor or stress clinics outside of North Carolina, he started purchasing Valium and various pills from individuals on the street. The pills in his cabinet "just accumulated over years and years and years." Defendant stated that he never sold marijuana, and that the marijuana found drying in his home was his year's supply and strictly for personal use. On cross-examination, defendant confirmed he had approximately 5 pounds of marijuana in his home.

¶ 8 At the beginning of the second day of trial, the State moved into admission docket entries, an indictment, a plea transcript, judgments entered in the Lincoln County Superior Court on 9 October 1975, and an order terminating probation dated 5 December 1978 as evidence of defendant's prior felony conviction for the offense of selling and delivering LSD. On direct examination, defendant testified about the circumstances surrounding his arrest for selling LSD and admitted he was convicted of the felony charge in 1975.

¶ 9 On 27 August 2019, defendant was convicted of trafficking in opium or heroin, manufacturing marijuana, felony possession of marijuana, maintaining a dwelling, and possession of a firearm by a felon. The trial court imposed two judgments: 70-93 months' imprisonment for the trafficking charge, and 14-26 months for all remaining charges, to run concurrently.

¶ 10 Defendant did not file timely notice of appeal. However, on 24 August 2020, this Court granted a petition for writ of certiorari and directed the superior court to

determine whether defendant was entitled to appointment of counsel.

II. Proof of Prior Felony Conviction

¶ 11 Defendant argues the trial court plainly erred by admitting an unauthenticated copy of a 1975 judgment for selling or delivering LSD as proof of his prior conviction. In defendant's estimation, this error had a probable impact on the jury's verdict and fundamentally affected the fairness and integrity of the proceedings. Specifically, he contends that had the trial court properly refused to admit the judgments, the jury could not have convicted him of possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. We disagree.

A. Standard of Review

¶ 12 Defendant did not object to the introduction of his prior felony conviction record at trial. However, defendant asserts plain error on appeal. In criminal cases, this Court applies a plain error standard of review to unpreserved instructional or evidentiary errors "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4). "Under plain error review, defendant has the burden of convincing this Court: (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. McNeil*, 165 N.C. App. 777, 784, 600 S.E.2d 31, 36 (2004) (quotation marks and citation omitted); *see State v. Lawrence,* 365 N.C. 506, 516-18, 723 S.E.2d 326, 333-34

(2012).

B. Discussion

¶ 13 Under § 14-415.1(a), "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm . . . ." § 14-415.1(a). "Thus, the State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Best*, 214 N.C. App. 39, 45, 713 S.E.2d 556, 561 (2011) (quotation marks and citation omitted), *disc. rev. denied*, 365 N.C. 361, 718 S.E.2d 397 (2011). To satisfy the first element, a defendant's prior felony conviction can be established through "records of prior convictions of any offense, . . . [which] shall be admissible in evidence for the purpose of proving a violation of this section." § 14-415.1(b).

¶ 14 As judgments of conviction are public records, N.C.R. Evid. 901 requires "authentication or identification as a condition precedent to admissibility [a]s satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." § 8C-1, Rule 901(a). This can be accomplished pursuant to Rule 907(a)(7), which provides that the authentication requirement can be satisfied by "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are

kept." § 8C-1, Rule 901(a)(7). Alternatively, N.C.R. Evid. 902(4) permits the State to establish a prior conviction without extrinsic evidence:

> (4) Certified Copies of Public Records. -- A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

§ 8C-1, Rule 902(4).

¶ 15 Here, the trial court erred by admitting several documents, unauthenticated in the manner prescribed by Rules 901 or 902, as evidence of defendant's prior felony conviction.

¶ 16 However, defendant has not met his burden of establishing prejudice in this case. Defendant offers no argument contesting the authenticity of the erroneously admitted records. This Court has previously held that the admission of unauthenticated evidence did not amount to plain error where the defendant failed to demonstrate the State could not otherwise authenticate the evidence at issue. *See State v. Jones*, 176 N.C. App. 678, 684, 627 S.E.2d 265, 269 (2006) (concluding that the admission of an unauthenticated videotape did not amount to plain error "[s]ince [the] defendant has made no showing that the foundational prerequisites, upon objection, could not have been supplied and has pointed to nothing suggesting that

the videotape in this case is inaccurate or otherwise flawed . . . ."). When testifying on his own behalf, defendant acknowledged the legitimacy of his 1975 felony conviction for selling or delivering LSD. Thus, we discern no plain error.

III. Jury Instruction on Felonious Possession of Marijuana

¶ 17 Defendant argues the trial court's failure to instruct the jury on the amount of marijuana possessed, an essential element of felonious possession, amounted to plain error. Further, defendant contends he is entitled to resentencing on the lesser-included offense of misdemeanor simple possession. We disagree.

A. Standard of Review

¶ 18 As a preliminary matter, the State maintains the appropriate standard of review for this issue is harmless error. The State cites *State v. Lawrence* for the proposition that harmless error review applies when "the error relates to a right not arising under the United States Constitution, [and] . . . requires the defendant to bear the burden of showing prejudice." 365 N.C. at 513, 723 S.E.2d at 331 (citing § 15A-1443(a)). However, the State's rationale in arguing a divergence from a plain error standard of review is unclear. In *Lawrence*, our Supreme Court also observed:

> we treat preserved and unpreserved error differently. Preserved legal error is reviewed under the harmless error standard of review. Unpreserved error in criminal cases, on the other hand, is reviewed only for plain error. Because the plain error standard of review imposes a heavier burden on the defendant than the harmless error standard, it is to the defendant's advantage to object at trial and

> thereby preserve the error for harmless error review.

Id. at 512, 723 S.E.2d at 330 (citations omitted). Defendant failed to object and has not preserved this issue for appellate review. Accordingly, our review is limited to plain error. *See* N.C.R. App. P. 10(a)(4).

B. Discussion

¶ 19 Defendant was charged with PWIMSD marijuana. At the charge conference, the trial court stated:

> THE COURT: I've been thinking about the charge of [PWIMSD]. I believe that the jury from this evidence could find him guilty of possession—felonious possession of marijuana without the intent. As [defense counsel] pointed out, each one of them is a Class I felony, but I still think that from this evidence they could find the lesser-included offense, so I think I'm going [to] give that as a possible verdict in that case.
>
> [THE STATE]: Okay.
>
> THE COURT: Let the verdicts be: Guilty of possession with intent, guilty of possession—felonious possession of marijuana, or not guilty. Okay? And with that change I think we're ready to go.

¶ 20 While the trial court elected to instruct the jury on the "lesser-included offense" of felony possession of marijuana, felonious possession is not a lesser-included offense of PWIMSD because it requires an additional element, proof of the quantity defendant possessed. *See* § 90-95(a)(1) & (d)(4); *see also State v. McGill*, 296 N.C. 564, 568, 251 S.E.2d 616, 619 (1979) (observing that when "two crimes each contain one

element that is not necessary for proof of the other crime[,] [o]ne is not a lesser included offense of the other."). "To prove the offense of felonious possession of marijuana under § 90-95(d)(4), the State must prove two elements: (1) possession by defendant, and (2) that the amount possessed was greater than one and one-half ounces." *State v. Gooch*, 307 N.C. 253, 256, 297 S.E.2d 599, 601 (1982) (*purgandum*). Regardless, the trial court's instruction on felonious possession as "a possible verdict" was permissible in this case. *See State v. Perry*, 84 N.C. App. 309, 311, 352 S.E.2d 259, 260 (1987) (holding that the trial court did not err by instructing the jury on the alternative verdict of felonious possession of marijuana where the indictment sufficiently alleged both elements of possession and quantity possessed). Here, the indictment sufficiently stated, in pertinent part, "[PWIMSD] a controlled substance, namely approximately five pounds of marijuana," which is an amount exceeding the "one and one-half ounces (avoirdupois) of marijuana . . ." necessary for the State to obtain a conviction for felony possession of marijuana. § 90-95(d)(4).

¶ 21 The trial court's instruction to the jury reads, in pertinent part:

> [N]ext consider whether or not the defendant is guilty of felonious possession of marijuana.
>
> Now, that offense would differ from the possession of—possession with intent to sell or deliver marijuana only in the sense that it does not include the element of intent to manufacture, sell, or deliver it.
>
> So then, if you find that on or about the alleged date the

> defendant possessed marijuana, that is, on or about [15 October 2014], if you find that beyond a reasonable doubt, then it would be your duty to return a verdict finding the defendant guilty of the lesser charge of felony possession of marijuana. On the other hand, if you fail to so find or if you have a reasonable doubt, it would be your duty to return the verdict finding the defendant not guilty.

¶ 22 "A trial court must instruct jurors on every element of the charged offense." *State v. Snyder*, 343 N.C. 61, 68, 468 S.E.2d 221, 225 (1996). Thus, defendant's contention is correct. The trial court erred by omitting the essential element of quantity from its charge on felonious possession of marijuana.

¶ 23 However, defendant fails to establish prejudice. Defendant relies primarily on *State v. Gooch*, 307 N.C. 253, 297 S.E.2d 599 (1982) and *State v. Valladares,* 165 N.C. App. 598, 599 S.E.2d 79 (2004) to support his contention that the trial court's omission of an essential element from its jury charge is inherently prejudicial, and that he is entitled to resentencing on a verdict of simple possession. His reliance on these cases is misplaced.

¶ 24 In *State* v. *Valladares*, the defendant "was arrested and charged with conspiracy to traffic in cocaine and trafficking in cocaine by possession." 165 N.C. App. at 599, 599 S.E.2d at 82. At the time of his arrest, Wake County ABC agents "Knuckles and Nipper recalled seeing a clear plastic bag containing a white, rocky substance in the backseat of [co-defendant] Gerrehgy's car. The bag was located near [the] defendant's leg. Later, it was taken into evidence and determined to be cocaine."

Id. at 601, 599 S.E.2d at 83. On appeal, the defendant argued, *inter alia*, that "the trial court erred by . . . failing to instruct the jury as to each element of the offense of trafficking in cocaine by possession." *Id.* at 603, 599 S.E.2d at 84. This Court applied a plain error analysis and held that the trial court erred by omitting the essential element of amount from its instruction to the jury. *Id.* at 607, 599 S.E.2d at 86. This Court reasoned "[a]s the Supreme Court did in *Gooch*," that defendant was not entitled to a new trial. *Id.* at 608, 599 S.E.2d at 87; *see Gooch*, 307 N.C. at 257, 297 S.E.2d at 602. Instead, "we remand[ed] this portion of the case . . . for resentencing as upon a verdict of guilty of simple possession of cocaine." *Valladares*, 165 N.C. App. at 608, 599 S.E.2d at 87.

¶ 25 The case at bar is distinguishable. In *Valladares*, the "defendant testified that he never used cocaine and never saw Gerrehgy use cocaine. Additionally, his defense was that he was not involved in buying or selling cocaine and that he accompanied Gerrehgy without knowledge that Gerrehgy was making a drug deal." *Id.* at 604, 599 S.E.2d at 84. Thus, the amount of cocaine the defendant possessed was a disputed material fact not submitted for the jury's consideration. Here, defendant also testified on his own behalf, and he admitted on cross-examination that he had 5 pounds of marijuana in his home:

> [THE STATE]: Okay. You're not denying that you had 5 pounds of marijuana laying around your house.

[DEFENDANT]: No, ma'am.

[THE STATE]: That you'd been growing it in the backyard.

[DEFENDANT]: Yes, ma'am.

¶ 26 Considering this testimony, defendant has not demonstrated a reasonable probability that the outcome at trial would have been different had a complete instruction been given. Under a less stringent harmless error analysis, if the omitted element is "uncontested and supported by overwhelming evidence, then the error is harmless . . . ." *State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010) (citing *Neder v. United States*, 527 U.S. 1, 19, 144 L. Ed. 2d 35, 53 (1999)). Moreover, "[i]n a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Neder*, 527 U.S. at 19, 144 L. Ed. 2d at 53. Thus, defendant is not entitled to resentencing on a verdict of simple possession.

IV. Conclusion

¶ 27 Defendant has not contested the legitimacy of the felony judgment records at issue, nor has he demonstrated the State would be unable to authenticate them had an objection been timely raised. The omission of the weight element from the trial court's instruction to the jury on felonious possession of marijuana was not

prejudicial, given the amount defendant possessed was uncontested and supported by overwhelming evidence at trial. For the foregoing reasons, we discern no plain error in this case.

NO PLAIN ERROR.

Judges DILLON and WOOD concur.

Report per Rule 30(e).