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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-581

No. COA21-751

Filed 16 August 2022

Surry County, Nos. 19 CRS 51921, 19 CRS 847

STATE OF NORTH CAROLINA

v.

THEODORE ROBERT KUHL, JR., Defendant.

Appeal by Defendant from judgment entered 24 June 2021 by Judge Joseph N. Crosswhite in Surry County Superior Court. Heard in the Court of Appeals 6 April 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kunal J. Choksi, for the State.

W. Michael Spivey for Defendant.

JACKSON, Judge.

¶ 1 Theodore Robert Kuhl, Jr., ("Defendant") appeals from judgment entered after a jury found him guilty of sale or delivery of methamphetamine and of being a habitual felon. After careful review, we find no plain error.

I. Background

A. Facts

¶ 2 On 19 December 2018, Defendant purchased methamphetamine from his neighbor as an informant for Detective John Hawks of the Surry County Sherriff's Office. Prior to the purchase, Detective Hawks "explained all the rules" of a controlled purchase, and Defendant was equipped with audio and video recording equipment and money with which to make the purchase. Detective Hawks paid Defendant approximately $100 to $150 after the purchase was complete. Defendant and Detective Hawks later spoke about Defendant making a similar purchase from another individual, but Defendant refused to do it for the amount of money Detective Hawks offered. Defendant did not perform any additional controlled purchases for Detective Hawks after 19 December 2018.

¶ 3 Sergeant Warren Wade White, Jr., is a narcotics detective for the Stokes County Sherriff's Office, and during the events described below, Sergeant White acted as an undercover officer for the Mt. Airy Police Department and the Surry County Sherriff's Office in a narcotics investigation targeting Defendant. On or before 1 May 2019, Sergeant White called Defendant and arranged to purchase from Defendant an "8-ball" (slang for 3.2 to five grams) of methamphetamine for $200. On 1 May 2019, Sergeant White was equipped with an audio and video recording device and drove to Defendant's home with two other undercover officers. Throughout his interactions with Defendant, Sergeant White wore plain clothes, drove an unmarked car, and did

not carry a badge. Sergeant White did not identify himself as a law enforcement officer, nor did Defendant refer to him as one.

¶ 4 Sergeant White gave Defendant $200 to cover the cost of the "8-ball," and Defendant went next door to obtain the methamphetamine. In less than ten minutes, Defendant returned and gave Sergeant White a plastic bag containing a crystal-like substance which was later confirmed to be three grams of methamphetamine. Sergeant White then gave Defendant an additional $20.

¶ 5 Defendant was indicted on 7 October 2019 for one count of possession of Schedule II methamphetamine with the intent to manufacture, sell and deliver it, and one count of sale or delivery of methamphetamine. Defendant had previously been convicted of unrelated felonies in 1993, 1997, and 2000, and therefore was indicted as a habitual felon on 16 December 2019.

¶ 6 At trial, Defendant admitted that he purchased methamphetamine for Sergeant White on 1 May 2019. However, Defendant relied on the affirmative defense of entrapment. Defendant also testified that he knew Sergeant White was a law enforcement officer and that he made the purchase on 1 May because he thought he was helping collect evidence against his neighbor.

B. Jury Instructions

¶ 7 At the charge conference, the trial court reviewed the verdict sheet and the intended jury instructions with counsel for the State and Defendant, making

references to various sections of the Pattern Jury Instructions. The only instruction Defendant specifically requested was on "impeachment of Defendant by prior conviction." Although Defendant did not request it, the trial court stated its intention to give "concluding instructions."[1] Defendant did not object to the proposed jury instructions.

¶ 8 The trial court advised both parties to listen carefully as the jury instructions were presented because the court's computer had malfunctioned while preparing the instructions. After closing arguments, the trial court read the jury instructions as proposed but omitted the "concluding instructions," thereby not specifically stating that the verdict must be unanimous. Defendant did not object to the instructions that were given.

¶ 9 The trial court allowed both parties to examine the proposed verdict sheet, and neither party objected to its contents. The top of the verdict sheet stated, "We, the jury, unanimously find Defendant, Theodore Robert Kuhl Jr:" followed by spaces to check "guilty" or "not guilty" for each of the two substantive counts. After less than an hour and a half the jury returned a verdict. The foreperson verbally confirmed

[1] North Carolina Pattern Instructions for Criminal Cases 101.35, titled "Concluding Instructions . . ." contains, in relevant part, the charge that "[a]ll twelve of you must agree to your verdict. You cannot reach a verdict by majority vote."

that the jury reached a unanimous verdict as to both counts. The clerk then read the verdict aloud:

> CLERK: Members of the jury, in the matter of the *State of North Carolina vs. Theodore Robert Kuhl, Jr.* you have returned a verdict of not guilty to count 1 of possess with intent to manufacture, sale and deliver a schedule II controlled substance. And guilty of count 2, sale or deliver schedule II, controlled substance. Is this your verdict, so say you all?
>
> (Affirmative response from jury.)
>
> THE COURT: If each member of the jury agrees with that verdict, would you raise your hand.
>
> (Show of hands from jury)
>
> THE COURT: Thank you. You may put your hands down. Let the record reflect that every member raised their hand indicating unanimous consent.

Defendant did not request that the jury be polled.

¶ 10 Following the verdict, the trial court conducted proceedings for the habitual felon charge, and the same jury returned a verdict of guilty. During the instructions for this count, the trial court included the directive that "[a]ll 12 of you must agree to your verdict. You cannot reach a verdict by majority vote." Following the verdict's announcement, the trial court entered a judgment and sentenced Defendant to 132 months to 171 months in prison.

¶ 11 Defendant gave notice of appeal in open court.

II. Analysis

¶ 12 On appeal, Defendant argues that the trial court erred by not instructing the jury that its decision must be unanimous regarding the possession and sale of methamphetamine charges. We disagree.

A. Preservation

¶ 13 In North Carolina, "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]" N.C. Const. art. I § 24. Upon the announcement of the jury's verdict, the defendant, as well as the prosecutor, has an "immemorial" right to have the jury polled to ensure that it "is really the verdict of all, and that no one has been deceived or coerced" during deliberations. *State v. Young,* 77 N.C. 498, 498-99 (1877). *See also State v. Holadia*, 149 N.C. App 248, 259-60, 561 S.E.2d 514, 522 (2002) (citing *Davis v. State*, 273 N.C. 533, 541, 160 S.E.2d 697, 703 (1968)) (explaining that the purpose of jury polling is to give the court and the parties certainty that the verdict was unanimous, "as a corollary to [a defendant's] right to a unanimous verdict"). Because the defendant has the right to have the jury polled, "a trial judge is not required to charge the jury that its verdict must be unanimous" in the absence of a request. *State v. Ingland*, 278 N.C. 42, 47, 178 S.E.2d 577, 580 (1971). Further, a "party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires[.]" N.C. R. App. P. 10(a)(2). However, issues concerning jury instructions in criminal trials that are not preserved by objection may

still be presented on appeal "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4).

¶ 14 "It is well established that 'when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.'" *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (quoting *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)). Defendant relies upon this proposition, as well as N.C. Gen. Stat. § 15A-1235(a), in his preservation argument. The statute, titled "Length of deliberations; deadlocked jury" and enacted six years after the decision in *Ingland*, states that "[b]efore the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty." N.C. Gen. Stat. § 15A-1235(a) (formerly 1977 S.L. Ch. 711 § 1). However, even after the enactment of this statute, our Supreme Court has held that "in the absence of a request, a judge is not . . . required to charge the jury in general about the need for [a] unanimous verdict[.]" *State v. Sturdivant*, 304 N.C. 293, 305, 283 S.E.2d 719, 728 (1981) (citing *Ingland*, 278 N.C. at 47, 178 S.E.2d at 580; *State v. Hinton*, 14 N.C. App. 564, 567, 188 S.E.2d 698, 700 (1972)) (relying again on a defendant's right to have the jury polled).

¶ 15 At trial, Defendant did not request a jury instruction on unanimity, did not object when such instruction was omitted, and did not exercise his right to have the

jury polled after the verdict's announcement. Thus, Defendant did not preserve the issue of the jury's instruction on unanimity for appellate review. However, because Defendant contends the trial court plainly erred, we review for plain error under N.C. R. App. P. 10(a)(4). "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). An error is fundamental if a defendant establishes prejudice, showing that "after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.'" *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

B. No Plain Error in Failing to Instruct on Unanimity under N.C. Gen. Stat. § 15A-1235

¶ 16 As noted above, "it is well settled law in this jurisdiction that, in the absence of a request, a judge is not even required to charge the jury in general about the need for [a] unanimous verdict since the defendant always has the right to have the jury polled." *Sturdivant*, 304 N.C. at 305, 283 S.E.2d at 728. Defendant argues that N.C. Gen. Stat. § 15A-1235 mandates a trial judge to give an instruction on unanimity in every case. We disagree.

¶ 17 The title of the statute, "Length of deliberations; deadlocked jury," indicates that any mandate it contains applies when a jury is unable to agree on a verdict. Our Supreme Court articulated this in *State v. Easterling*, holding that "[t]his statute is

now the proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict." 300 N.C. 594, 608, 268 S.E.2d 800, 809 (1980). Defendant points to no decision in this jurisdiction, nor have we found one, which requires reference to N.C. Gen. Stat. § 15A-1235 before any indication that a jury is deadlocked. *See, e.g.*, *State v. Evans*, 346 N.C. 221, 226, 485 S.E.2d 271, 274 (1997) (stating that N.C. Gen. Stat § 15A-1235 "contains guidelines for instructing a deadlocked jury"); *State v. Lyons*, 343 N.C. 1, 21, 468 S.E.2d 204, 213-14 (1996) ("This Court has held that it is not error for the trial court to give less than the full instruction set out in N.C.G.S. § 15A-1235 when the jury does not indicate that it is deadlocked or having difficulty reaching a unanimous verdict.") (citing *State v. Williams*, 339 N.C. 1, 39-40, 452 S.E.2d 245, 268 (1994)).

¶ 18 There is no indication in the record that the jury in this case was ever deadlocked. Therefore, the trial judge was not required to reference any part of N.C. Gen. Stat. § 15A-1235. Accordingly, it was not error to omit an instruction on unanimity under the statute. Nonetheless, despite not specifically requested by Defendant, the trial court told Defendant at the charge conference that it intended to give "concluding instructions," which under the North Carolina Pattern Jury Instructions specifically include an instruction that the verdict must be unanimous. *See* N.C.P.I.—Crim. 101.35. However, even assuming *arguendo* that the trial court

erred by omitting the unanimity instruction after stating it would do so, we cannot say that the error was so fundamental or prejudicial that it amounted to plain error.

¶ 19 "Not every violation of the procedures embodied in Chapter 15A amounts to prejudicial error." *Easterling*, 300 N.C. at 608, 268 S.E.2d at 809. For example, in *Easterling*, our Supreme Court held that an erroneous instruction, warning the jury of the burden on the court of a mistrial, was not prejudicial when "[t]he record provide[d] not the slightest indication that the jury was in fact deadlocked in its deliberations, or in any other way open to pressure by the trial judge to 'force' a verdict, at the time the charge was given." *Id.* at 609, 268 S.E.2d at 809. *See State v. Pate*, 187 N.C. App. 442, 449-50, 653 S.E.2d 212, 217 (2007) (holding that an erroneous instruction, reminding the deadlocked jury of the time and money already spent in the case, was not prejudicial, i.e. did not have a probable impact on the jury's finding of guilt, where "[t]he State presented evidence which included, *inter alia*, eyewitness testimony and the signed confession of defendant"). *See also State v. Harris*, 253 N.C. App. 322, 336-37, 800 S.E.2d 676, 686 (2017) (holding that "[w]hile the trial court did err in failing to give the full supplemental jury instructions required by N.C. Gen. Stat. § 15A-1235, Defendant will receive no relief from this error as it was neither plain nor prejudicial").

¶ 20 Here, Defendant has failed to point to any record evidence indicating that the jury was ever deadlocked, that the jury's verdict was not unanimous, or that the jury

was "in any other way open to pressure by the trial judge[.]" *Easterling*, 300 N.C. at 609, 268 S.E.2d at 809. First, Defendant did not request that the trial court give such an instruction, did not object to the jury charge as given, and did not request that the jury be polled. Second, the verdict sheet explicitly states that the verdict was unanimous, and all jury members raised their hands when the trial court asked in open court if they agreed with the verdict, demonstrating that their verdict was in fact unanimous. Finally, the State offered convincing evidence, including oral testimony, video evidence, and Defendant's own admission, that Defendant delivered methamphetamine to Sergeant White. Thus, after examination of the entire record, we cannot say that a lack of a specific unanimity instruction had a "probable impact on the jury's finding that the defendant was guilty," and Defendant has therefore failed to show that the alleged error was "fundamental." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, we hold that the trial court's failure to give the unanimity instruction was not plain error.

III. Conclusion

¶ 21 We therefore hold that the trial court's omission of the unanimity instruction was not so fundamental or prejudicial that it amounted to plain error.

NO PLAIN ERROR.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).