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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-731

No. COA22-132

Filed 1 November 2022

Beaufort County, No. 19 CRS 51767

STATE OF NORTH CAROLINA

v.

PRISCILLA ANNE MODLIN

Appeal by defendant from judgments entered on 1 July 2021 by Judge John E. Nobles Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 23 August 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.

DIETZ, Judge.

¶ 1 Defendant Priscilla Anne Modlin appeals multiple drug-related convictions. As explained below, we find no plain error in her unpreserved evidentiary and instructional challenges. We also find no error at sentencing but remand for the trial court to arrest judgment on the conviction for delivery of a controlled substance.

Facts and Procedural History

¶ 2 In 2019, Investigator Neal of the Beaufort County Sheriff's Office arranged for an informant to attempt a controlled drug purchase from Defendant Priscilla Anne Modlin. The informant planned to leave money in an empty car for Modlin. Modlin would retrieve the money and replace it with methamphetamine.

¶ 3 On 4 June 2019, Investigator Neal placed a motion-activated camera in the back seat of the informant's car and placed money in the center console of the front seat. Modlin later contacted the informant and asked him to bring the money to her. The motion-activated camera recorded the informant opening the car door and removing something from the center console. The informant then met with Modlin while possessing a concealed audio recording device.

¶ 4 Later, Modlin and the informant communicated using mobile phone messaging apps and the informant messaged Modlin asking, "Is it there?" Modlin responded, "I'm getting ready to head that way."

¶ 5 The motion-activated camera in the car shows Modlin opening the car door and putting an item in the center console. Modlin then messaged the informant again saying "Newport pack." The informant returned to the car and found a Newport cigarette box in the center console and contacted law enforcement. Officers retrieved the box and its contents, which laboratory testing identified as 1.9 grams of methamphetamine.

¶ 6 The State charged Modlin with possession with intent to manufacture, sell, or deliver a controlled substance, sale of a controlled substance, and delivery of a controlled substance.

¶ 7 At trial, the jury saw the video recordings from the motion-activated camera and heard the audio recording of the informant and Modlin. Investigator Neal provided the foundation for this evidence. He testified to the jury and explained the operation of the camera inside the car. He testified that the camera would only operate for 45 to 60 seconds at a time, once activated by motion, and also explained other aspects of the recording, such as why the time stamp did not work properly and displayed an incorrect date. Investigator Neal also testified about the audio recording of the meeting between the informant and Modlin and how he recognized Modlin's voice from previous interactions with her when Modlin was an informant for the Sheriff's Office.

¶ 8 The jury returned guilty verdicts on all counts. The trial court sentenced Modlin to 6 to 17 months in prison on the possession charge, and 13 to 25 months on the sale of a controlled substance charge. The court did not sentence Modlin on the delivery of a controlled substance charge, explaining that the court considered that charge and the corresponding sale charge to be "the same thing." But the court did not arrest judgment on the delivery charge.

¶ 9 Modlin timely appealed the trial court's judgments.

Analysis

I. The trial court's instructions to prospective jurors

¶ 10 Modlin first argues that the trial court erred by informing prospective jurors that the case involved charges not actually set for trial at that proceeding.

¶ 11 Although the State initially planned to bring to trial multiple drug-related charges from different incidents—on 26 January 2019, 14 May 2019, and 5 June 2019—the State only pursued the 5 June 2019 charges, apparently because of delays in laboratory testing.

¶ 12 During its initial explanation of the charges to the prospective jury pool, the trial court explained that the State charged Modlin with drug-related offenses from all three dates. Modlin's counsel did not object when the trial court referenced the additional charges.

¶ 13 Modlin argues that the trial court's misstatement gave prospective jurors a "distorted view" of the case by suggesting a pattern of drug activity over time that was not supported by the trial evidence. She also contends that a statute, N.C. Gen. Stat. § 15A-1213, requires that "prior to selection of jurors," the judge must "briefly inform the prospective jurors, as to each defendant, of the charge" against the defendant. Thus, Modlin argues, the trial court violated a statutory mandate by referencing charges not part of the trial and that this statutory violation is subject to appellate review with any preservation requirement.

¶ 14 We do not agree that this error falls within the narrow category of "statutory mandates" that are not subject to error preservation. Instructional errors typically are subject to preservation requirements. *State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999). This practice makes sense because these sorts of errors, if addressed to the trial court in a timely way, readily can be corrected through a remedial instruction. *State v. Oliphant*, 228 N.C. App. 692, 696, 747 S.E.2d 117, 121 (2013). Accordingly, we hold that this alleged error is subject to preservation requirements and, as a result, is subject to plain error review if unpreserved. Modlin asserted a plain error argument in the alternative, and we therefore address it.

¶ 15 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Plain error should be "applied cautiously and only in the exceptional case" where the error seriously affects "the fairness, integrity or public reputation of judicial proceedings." *Id.*

¶ 16 Applying this standard, Modlin has not met her burden to show plain error. The purpose of Section 15A-1213 is to "orient the prospective jurors" about the nature of the case without the "use of the stilted language of indictments and other

pleadings." *State v. Long*, 58 N.C. App. 467, 471, 294 S.E.2d 4, 8 (1982). Here, the jury that ultimately heard the case properly was instructed only on the charges presented at trial. Because the reference to the other charges occurred only once during the jury selection phase—long before the State presented its evidence and the court instructed the jury on the applicable law—Modlin has not shown that, but for these reference to these other charges before the trial even began, the jury probably would have reached a different verdict at the conclusion of the trial. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. In any event, because the trial concerned only evidence of the charged offenses, and the jury properly was instructed on these offenses, the alleged error is not the sort of "exceptional" error that deprived Modlin of a fair trial or that calls into question the integrity of the justice system. *Id.* Accordingly, we find no plain error in the trial court's instructions to the prospective jurors.

II. Authentication of video and audio recordings at trial

¶ 17 Modlin next argues that the State failed to lay a proper foundation and failed to authenticate the video and audio of the drug transaction between Modlin and the informant. Modlin acknowledges that she failed to object to the introduction of this evidence and thus, again, we review it for plain error.

¶ 18 In a criminal trial, a party "may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements."

N.C. Gen. Stat. § 8-97. Under Rule 901 of the Rules of Evidence, these foundation and authentication requirements are satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. R. Evid. 901(a); *State v. Pryor*, 278 N.C. App. 812, 2021-NCCOA-421, ¶ 12.

¶ 19 Our case law establishes "three significant areas of inquiry for a court reviewing the foundation for admissibility of a videotape: (1) whether the camera and taping system in question were properly maintained and were properly operating when the tape was made, (2) whether the videotape accurately presents the events depicted, and (3) whether there is an unbroken chain of custody." *State v. Jones*, 176 N.C. App. 678, 683, 627 S.E.2d 265, 268 (2006).

¶ 20 Similarly, Rule 901(b)(5) of the Rules of Evidence provides that an audio recording may be authenticated "whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." N.C. R. Evid. 901(a)(5).

¶ 21 Here, Investigator Neal testified that the video recording shown to the jury was the same as the one he viewed when he retrieved it from the camera installed in the informant's vehicle. He further testified that he used a motion-activated camera and that he was familiar with the use and operation of that camera. He also testified about the chain of custody for the recordings from the camera, detailing his use of a

chain of custody form and how he secured the recordings along with other evidence from the investigation. Finally, the transaction depicted on the recording was corroborated by other accompanying testimony at trial, including messages between Modlin and the informant discussing that drug transaction.

¶ 22 Similarly, with respect to the audio recording, Investigator Neal testified that he was generally familiar with Modlin and her voice from her "involvement with methamphetamine" and "her prior involvement with the Beaufort County Sheriff's Office drug unit." Investigator Neal had previously worked with Modlin in 2018, when she served as a confidential informant for "four or five" cases. He further testified that he reviewed the audio recording in preparation for trial and that it was the same recording he initially listened to when he recovered it from the informant. He also explained to the jury what the recording was and what information it contained, before the jury heard the recording.

¶ 23 In light of this testimony and evidence, we are not persuaded that the State failed to lay a proper foundation or to authenticate the video and audio recording. But, even if there were an error, that error, again, is not so "exceptional" that it deprived Modlin of a fair trial or called into question the integrity of the justice system. Thus, we again find no plain error in this evidentiary challenge.

III. Trial court's comments following sentencing

¶ 24 Modlin next argues that the trial court erred by considering her failure to

accept a plea offer as a basis for imposing the court's chosen sentence.

¶ 25 During sentencing, Modlin commented, "I didn't do this," and denied any involvement in the drug transaction. After the trial court announced its sentences, which were within the presumptive range for the offenses, the trial court addressed Modlin. The court stated that, "I really have a problem sometimes when people don't accept responsibility. . . . I just don't feel like we can get anywhere with it. Probation would not have been appropriate if you're not wrong to start with."

¶ 26 At the time of sentencing, the trial court was aware that Modlin had rejected a plea offer from the State. Modlin contends that the court's comments following announcement of her sentences indicate that the court based its sentence on her decision to go to trial instead of pleading guilty.

¶ 27 "A criminal defendant may not be punished at sentencing for exercising her constitutional right to trial by jury." *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). "Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result." *Id.*

¶ 28 Here, one cannot reasonably infer from the trial court's comments that the court imposed a sentence based on Modlin's failure to accept a plea offer. Instead, the trial court's comments indicate that the court chose not to find a mitigating factor

based on acceptance of responsibility—one potentially supporting a probationary sentence—because Modlin continued to maintain at sentencing that she had no involvement in the crimes. *See* N.C. Gen. Stat. § 15A-1340.16(e)(15). Because we conclude that the trial court did not base its sentencing determination on Modlin's decision not to accept a plea offer, we find no error in the sentences imposed by the trial court.

IV. Judgments for both sale and delivery

¶ 29 Finally, Modlin claims that the trial court erred by sentencing Modlin for both sale of a controlled substance and delivery of a controlled substance.

¶ 30 Although a defendant may be indicted and tried for both of these offenses arising from a single transaction, the defendant cannot be convicted and sentenced for both offenses. *State v. Moore*, 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990). Instead, when the jury returns guilty verdicts on both offenses, the trial court should arrest judgment on one of the offenses and sentence the defendant for the other.

¶ 31 Here, Modlin was tried in separate counts on separate offenses of sale of a controlled substance and delivery of a controlled substance. The jury returned guilty verdicts on both counts. When the trial court announced the sentence, the court indicated that it understood the legal principle from *Moore* and that it was sentencing Modlin based solely on the conviction for sale of a controlled substance.

¶ 32 When addressing these two convictions, the court explained that "I really

consider them the same thing basically. I'm going to impose a sentence of not less than 13 months, no more than 25 months." This was the presumptive sentencing range for the offense of sale of a controlled substance, a class G felony. The offense of delivery of a controlled substance, a class H felony, carries a different presumptive range. N.C. Gen. Stat. § 90-95(b)(1).

¶ 33 Thus, "it is clear from the facts of this case how the trial court calculated the sentence it imposed on defendant" and likewise clear that the trial court did not sentence the defendant for the offense of delivery of a controlled substance and intended to arrest judgment on that conviction. *State v. Canady*, 271 N.C. App. 766, 769, 844 S.E.2d 353, 356 (2020). Nevertheless, the record does not reflect the trial court's decision, and the judgment form lists convictions for both offenses (although the court only sentenced Modlin for the sale conviction). We therefore remand this case for the trial court to record its decision to arrest judgment on the charge of delivery of a controlled substance.

Conclusion

¶ 34 We find no plain error in the trial court's judgments, but we remand for the trial court to arrest judgment on the conviction for delivery of a controlled substance as the court indicated during sentencing.

NO PLAIN ERROR IN PART; NO ERROR IN PART; REMANDED IN PART.

Chief Judge STROUD and Judge ZACHARY concur.

Report per Rule 30(e).