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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-956

Filed 4 June 2024

McDowell County, Nos. 21 CRS 51332, 51334

STATE OF NORTH CAROLINA

v.

WINSTON WILLIAM WEBSTER

Appeal by defendant from judgment entered 21 March 2023 by Judge J. Thomas Davis in Superior Court, McDowell County. Heard in the Court of Appeals 15 May 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Hunter Fritz, for the State.

Irons & Irons, PA, by Ben G. Irons II, for defendant-appellant.

ARROWOOD, Judge.

Winston William Webster (“defendant”) appeals from the trial court’s judgment entered on 21 March 2023 upon a jury verdict finding defendant guilty of trafficking in any mixture containing methamphetamine, possession of methamphetamine with intent to sell or deliver, and intentionally keeping or maintaining a dwelling for keeping or selling a controlled substance. On appeal,

defendant argues the trial court plainly erred by instructing the jury that defendant's guilt could be inferred solely from his control of the home where he was living and that it erred by failing to intervene *ex mero motu* during the State's closing argument. For the following reasons, we find no error.

I. Background

On 29 September 2021, a SWAT team breached a residence previously owned by defendant. Patrol Captain Paul Alkire ("Captain Alkire") obtained a search warrant for the premises based on probable cause that defendant was selling controlled substances from the residence—various traffic stops of vehicles leaving the residence and a confidential informant provided officers with that information. Captain Alkire testified that defendant was the only person he knew to be regularly present at the residence. When officers entered the home, they saw Danny White ("White") sleeping on a bed set up in the living room. Officers took White into custody and removed him from the residence. Lieutenant Jesse Hicks ("Lieutenant Hicks") breached entry to the locked bedroom door and saw defendant and Savannah Jimison ("Jimison") lying on the bed. The pair was escorted out of the home and to the front porch.

As defendant was barefoot on the porch, Lieutenant Hicks testified that defendant asked for his shoes. Patrol Sergeant Jeremiah Lewis heard the request and grabbed a pair of boots directly beside the bed on the side defendant was found. Officer D.J. Barrier looked inside the boots before handing them to defendant and

discovered a “clear crystal substance” inside a bag in the boots. Captain Alkire asked defendant about the bag inside the boot, and defendant told him “it was sugar and that a neighbor had brought it to him.” On cross-examination, Captain Alkire testified that defendant “claimed ownership of the boot.” Captain Alkire further testified that he had warned defendant multiple times of narcotics complaints in the neighborhood where defendant lived.

A continued search of the residence yielded other evidence of drug usage and sale, such as scales, a notebook with defendant’s name on it tracking sales, a bag of approximately 50 grams of methamphetamine under the mattress in the bedroom, and a syringe and tourniquet. Defendant was arrested and later indicted with trafficking in methamphetamine, possession with intent to sell and deliver a Schedule II controlled substance, and possession of a Schedule II controlled substance.

At trial, defendant testified that he had sold his home and was in the process of moving out, but before the sale, he had lived there for about 30 years. He also told the court that the boots given to him on the porch were not his, and he did not ask anyone to bring him shoes. Defendant testified that he was not aware of anyone selling drugs out of his house, and he did not know that the drugs found were in the home. Defendant testified that Jimison was in the bed when he woke up that morning, but he went to bed alone. He did not know whether Jimison used drugs, and he was the only person who regularly lived in the residence and stayed in the

bedroom. Defendant further testified that the new owner of the home was charging him \$20.00 per day until defendant removed his belongings from the house.

At closing argument, the State told the jury that defendant said, “Yeah, that’s my shoe” when handed the boots on the front porch. Additionally, the State argued that defendant selling drugs “contribut[es] to the pain and the loss of other families in this community who have children who are losing their children to the drugs that this man is selling.”

Before instructing the jury, the trial court proposed pattern jury instruction 104.41 regarding actual and constructive possession and added the following:

If you find beyond a reasonable doubt that a substance was found in certain premises, and that the defendant exercised control over those premises, whether or not the defendant owned it, this would be a circumstance from which you may infer that the defendant was aware of the presence of the substance and had the power and intent to control its disposition or use.

Defendant’s counsel did not object to the proposed jury instruction.

On 21 March 2023, a jury found defendant guilty of trafficking in any mixture containing methamphetamine, possession of methamphetamine with the intent to sell or deliver, and intentionally keeping or maintaining a dwelling house for keeping or selling a controlled substance. The trial court dismissed the charge of felony possession of a Schedule II substance at the close of the State’s evidence. The trial court sentenced defendant to an active term of imprisonment of 70 to 93 months for trafficking and a consecutive term of 6 to 17 months for possession with intent to sell

or deliver. The trial court sentenced defendant to another consecutive term of 6 to 17 months for maintaining a dwelling for using, keeping, or selling a controlled substance but suspended the sentence for a period of 24 months of supervised probation beginning when defendant is released from incarceration. Defendant gave oral notice of appeal in open court.

II. Discussion

On appeal, defendant argues that the trial court (1) plainly erred by charging the jury with an unmodified instruction for constructive possession and (2) erred by failing to intervene *ex mero motu* in the State's closing argument. We disagree.

A. Constructive Possession

Because defendant did not object to the jury instructions at trial, this Court reviews for plain error. *State v. Simpson*, 230 N.C. App. 119, 123 (2013) (citing *State v. Lawrence*, 365 N.C. 506, 518 (2012)). Under the plain error standard, a defendant must show that a fundamental error occurred at trial—"that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518 (citations and internal quotation marks omitted).

Defendant here argues that the trial court's addition of the following instruction was error:

If you find beyond a reasonable doubt that a substance was found in certain premises, and that the defendant exercised control over those premises, whether or not the

defendant owned it, this would be a circumstance from which you may infer that the defendant was aware of the presence of the substance and had the power and intent to control its disposition or use.

Specifically, defendant argues that the evidence showed his control of the premises was non-exclusive, and this limited control alone does not allow an inference that defendant was aware of the substance's presence. *See State v. Tate*, 105 N.C. App. 175, 180 (1992) ("Furthermore, where there is no evidence of ownership or of exclusive possession of the premises on which controlled substances are found, constructive possession may be inferred if the defendant has nonexclusive possession of the premises *and* there are accompanying incriminating circumstances." (emphasis added)).

Our courts "will not find prejudicial error in jury instructions where, taken as a whole, they present the law fairly and clearly to the jury. Isolated expressions of the trial court, standing alone, will not warrant reversal when the charge as a whole is correct." *State v. Patton*, 290 N.C. App. 111, 122–23 (2023) (quoting *State v. Graham*, 287 N.C. App. 477, 486–87 (2023)).

We believe it was not error for the trial court to instruct the jury on exclusive control of the premises. There was evidence before the jury that defendant exercised some control over the premises. Whether defendant was in exclusive possession was a question for the jury, and the trial court did not err in including this instruction. Even assuming *arguendo* that defendant did not exclusively control the premises, the

trial court's addition of the instruction regarding exclusive control was not prejudicial error.

The trial court instructed the jury on actual and constructive possession as well as on defendant's physical proximity to substances found, stating that if the jury found beyond a reasonable doubt that "a substance was found in close physical proximity to the defendant, that would be a circumstance from which, together with other circumstances, you may infer that the defendant was aware of the presence of the substance and had the power and intent to control its disposition or use." Along with the instruction for exclusive control, the trial court instructed the jury on another factor it could consider to infer constructive possession. In that charge, the trial court clarified that proximity, together with other circumstances, would lead to an inference of constructive possession—hence, the jury was instructed to consider any circumstances that could have arisen from the evidence that pointed to constructive possession. Read together, the trial court's instructions on constructive possession were not misleading, and the trial court did not err in its instructions.

Furthermore, defendant has not shown how, had the challenged instruction been omitted, the jury's verdict probably would have been different. Although defendant testified that the drugs found did not belong to him, other evidence could have led to the inference that defendant constructively possessed the substances found. Defendant testified that although he no longer owned the home, he was the only person who regularly stayed in the bedroom where the drugs were found. The

substances were found under the mattress and in a shoe, both on the same side of the bed where defendant was sleeping when police arrived. Police discovered a notebook with defendant's name on it containing a ledger of names, weights, and currency amounts. This evidence could have supported the jury's determination that defendant was aware of the drugs' presence and had the power and intent to control them. Thus, the trial court's inclusion of the exclusive control instruction was not prejudicial error.

B. State's Closing Argument

Finally, defendant contends that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument. We disagree.

"Our standard of review dictates that only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Huey*, 370 N.C. 174, 180 (2017) (cleaned up). "A '[g]rossly improper argument is defined as conduct so extreme that it renders a trial fundamentally unfair and denies the defendant due process.'" *State v. Parker*, 377 N.C. 466, 472 (2021) (quoting *State v. Fair*, 354 N.C. 131, 153 (2001)). "Trial counsel is allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom." *State v. McNeil*, 350 N.C. 657, 685

(1999) (citation omitted). Counsel is prohibited “from arguing facts which are not supported by the evidence.” *State v. Wiley*, 355 N.C. 592, 620 (2002).

In its closing argument, the State told the jury that when an officer brought the boots containing the drugs to defendant on the front porch, defendant said, “Yeah, that’s my shoe.” Although this quote is not directly supported by the record, Captain Alkire testified that defendant claimed ownership of the boot when it was brought to the front porch. Defendant testified that he did not tell officers it was his boot. It was not grossly improper for the State to argue this fact, as two witnesses’ testimonies differed with regard to whether defendant owned the boots, and the credibility of the witnesses was an issue reserved for the jury. In fact, the trial court instructed the jury that they were the “sole judges of the credibility of each witness[.]” This instruction offsets any error that could have arisen from the State’s argument, and even so, the State’s argument as to this disputed issue was not so grossly improper as to render defendant’s trial unfair.

Defendant next claims that the trial court should have intervened *ex mero motu* when the State argued defendant was “contributing to the pain and loss of other families in this community who have children who are losing their children to the drugs that this man is selling.” Nothing in the record supports the State’s argument that defendant contributed to the loss of community members, and we assume *arguendo* that this argument was improper. However, this argument is not so grossly improper as to deny defendant due process or influence the jury’s decision. As

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discussed above, there was ample evidence in the record to support defendant's convictions, and defendant has not shown any prejudice caused by this argument. Therefore, the trial court did not err in failing to intervene during the State's closing arguments *ex mero motu*.

III. Conclusion

For all the foregoing reasons, we hold that the trial court committed no prejudicial error.

NO ERROR.

Chief Judge DILLON and Judge ZACHARY concur.

Report per Rule 30(e).