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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-724

Filed 18 June 2024

Wake County, Nos. 21 CRS 200812-13

STATE OF NORTH CAROLINA

v.

JOSHUE ALBERTO NORIEGA, Defendant.

Appeal by defendant from judgments entered 16 December 2022 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 19 March 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for the State.*

*Richard Croutharmel, for defendant-appellant.*

THOMPSON, Judge.

Joshue Noriega (defendant) appeals his drug-related convictions, contending that the trial court (1) prejudicially erred in allowing trial testimony and references by the prosecutor in the State's closing argument regarding the danger of overdosing on methamphetamine in an attempt to appeal to the emotions of the jury; and (2) committed reversible error by referencing marijuana in the jury instructions for

possession of drug paraphernalia. After careful review, we affirm the trial court.

**I. Factual Background and Procedural History**

Defendant's case came on for trial on 12 December 2022 in Wake County Superior Court. Evidence and testimony at trial tended to show the following: On 17 January 2021, Officers Volstad and Pierson of the Raleigh Police Department were dispatched to a domestic disturbance call at 7809 Texas Drive. When the officers arrived at the Texas Drive address, the neighbor who made the 911 call met them, pointed out the residence—a trailer home—and advised the officers that he had heard “blood curdling screams” and other troubling noises coming from the trailer.

Upon looking in the window of the home, the officers observed a chair that had been overturned and clothes scattered around the living room, leading Volstad and Pierson to believe some kind of altercation might have taken place inside the trailer. The officers also noted a strong odor of green marijuana apparent even from outside the trailer. No one answered when the officers knocked. After announcing themselves as law enforcement, Volstad and Pierson tried the door and finding it unlocked, entered the residence.

The smell of green marijuana was much stronger inside the trailer. As the officers investigated the residence, they found a black bag to the right of the door which contained a glass jar, the contents of which—based on their training and experience—Volstad and Pierson believed to be marijuana. The officers also noticed a vacuum sealer, a pair of digital scales, plastic baggies, two gun cases, and

ammunition in the trailer; however, they found no one injured and no traces of blood so they left the trailer in an effort to determine who was living there.

Several other officers subsequently arrived at the scene, as well as Monica Woodlief, defendant's mother. After acknowledging that defendant was her son and inquiring as to what was happening, Woodlief turned her phone over to Officer Volstad who spoke to defendant, advised him that the officers were investigating a domestic violence incident or a possible kidnapping, and requested that defendant return to the residence.<sup>1</sup> Defendant told Volstad to get out of his house.

When defendant returned to the trailer accompanied by Olivia McLean, he was driving a friend's car. Officers searched the vehicle and found defendant's wallet, which contained his driver's license, in the car's center console, as well as eleven grams of marijuana and \$28 in cash. Officers also located a loaded gun magazine in the door handle of the vehicle but did not recover a weapon. Defendant admitted to Volstad that "all the marijuana" in the trailer belonged to defendant.

While defendant and Olivia McLean were separated, Officer Kristopher Begin spoke with McLean who explained to Begin that she and defendant had been out for the evening celebrating defendant's birthday and had gotten into an argument. When the couple returned to defendant's residence they were still arguing, so McLean requested that defendant take her home. However, upon receiving a call from

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<sup>1</sup> Officer Volstad was also able to speak directly with Olivia McLean, defendant's girlfriend, to verify that she was unharmed.

Woodlief, defendant and McLean returned to the trailer. Officers subsequently recovered defendant's cell phone and approximately \$1200 in cash from McLean.

Law enforcement obtained and executed a search warrant for defendant's residence from which they recovered a vacuum sealer; three digital scales; plastic baggies; marijuana stored primarily in glass jars found throughout the trailer; two grinders, a tray and several plastic baggies, all of which contained marijuana residue; a black duffle bag containing eighty-two grams of marijuana—one jar holding fifty-seven grams and twenty-five grams in ziplock bags; a backpack in which forty-nine grams of marijuana and 484 grams of THC edibles were found; and gun cases and ammunition but no weapons. In the bathroom of the trailer, officers found a backpack containing 244 grams of methamphetamine; Officer Volstad testified at trial that, pursuant to his training and experience, that amount of methamphetamine would be worth thousands of dollars in street value.

On 17 January 2021, defendant was charged with maintaining a dwelling for controlled substances, possessing marijuana paraphernalia, trafficking methamphetamine by possession, possessing marijuana with intent to distribute, and felony possession of marijuana, and defendant was indicted on those charges on 13 July 2021 under file numbers 21 CRS 200812 and 21 CRS 200813. On 11 February 2022, defendant filed a motion to suppress evidence which, after conducting a hearing and reviewing evidence, the trial court denied on 21 March 2022. On 6 June 2022, the grand jury returned a superseding indictment against defendant in file number

21 CRS 200813 for possessing marijuana with intent to distribute, felony possession of marijuana, possessing drug paraphernalia, and possessing methamphetamine with intent to distribute.

Defendant's trial began on 12 December 2022. On 16 December 2022, defendant was found guilty of all charges. The trial court entered two judgments—trafficking methamphetamine by possession in file number 21 CRS 200812, and possession with intent to sell or deliver methamphetamine, possession with intent to sell or deliver marijuana, felony possession of marijuana, possession of drug paraphernalia, maintaining a vehicle/dwelling/place for controlled substances, and possession of marijuana paraphernalia in file number 21 CRS 200813. The court sentenced defendant to ninety to 120 months in prison under 21 CRS 200812 and to an active sentence of six to seventeen months in prison under 21 CRS 200813; however, the court suspended the latter sentence and ordered defendant to have twelve months of supervised probation with regular and special conditions. The trial court further ordered that the sentences were to run consecutively, and that defendant was to pay a \$100,000 fine that the court then converted to a civil judgment. Defendant gave oral notice of appeal in open court upon the pronouncement of the judgments.

## **II. Discussion**

### **A. Evidence Rule 403**

Defendant contends that

[t]he trial court abused its discretion in violation of Evidence Rule 403 by allowing the State to present evidence and argue in closing about the dangerousness of overdosing on methamphetamine as this was the State's attempt to appeal to the jury's emotions on the methamphetamine charges, which had nothing to do with whether [defendant] possessed methamphetamine.

Although the defendant groups the challenged evidence (i.e. Officer's Tierney's testimony) and the prosecution's closing argument statements together, we will review them separately.

**a. Standard of review**

"The appropriate standard of review concerning a trial court's balancing of probative value and unfair prejudice under Rule 403 is abuse of discretion." *State v. Buchanan*, 288 N.C. App. 44, 48, 884 S.E.2d 500, 503 (2023). "Abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *Id.* (citation omitted).

**b. Officer Tierney's testimony**

Relevant evidence is any "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2023). However, under Evidence Rule 403, even if evidence is deemed relevant it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.

Gen. Stat. § 8C-1, Rule 403. Moreover, “evidence which is probative in the State’s case will have a prejudicial effect on the defendant; the question is one of degree.” *State v. Weathers*, 339 N.C. 441, 449, 451 S.E.2d 266, 270 (1994). “Relevant evidence is properly admissible *unless* the judge determines that it must be excluded, for instance, because of the risk of ‘*unfair* prejudice.’ ” *Id.* (emphases added). Our Supreme Court has indicated that under Rule 403, unfair prejudice means “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.” *Id.* (citation omitted). “In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court’s sound discretion.” *Id.* (citation omitted).

The challenged testimony between the prosecutor and Officer Tierney is as follows:

[STATE]: Have you responded to calls where there was methamphetamine involved?

[WITNESS]: This one. Not many off the top of my head, that I can remember.

[STATE]: Okay. And what about overdose calls? Have you responded to any overdose calls before?

[WITNESS]: Yes, I have.

[STATE]: Approximately how many?

[WITNESS]: There [are] multiple in the city a day. It could be one a day, two a day. It all depends.

[STATE]: And you personally have responded to an

overdose call before?

[WITNESS]: Yes, I have.

[STATE]: And based on your experience – let me strike that and go back. Do you have any training in first responding or in first aid?

[WITNESS]: Yeah. We know how to administer Narcan.

[STATE]: What is Narcan?

[DEFENSE COUNSEL]: Your Honor, I'm going to object to the questioning and the relevance.

[THE COURT]: Overruled. You can answer that.

[WITNESS]: What is Narcan, ma'am?

[STATE]: Yes, sir.

[WITNESS]: Basically, it's a drug that's given to help bring somebody back from an opioid overdose.

[STATE]: When you say, "bring someone back," what do you mean?

[WITNESS]: It counteracts the drug.

[STATE]: And based on your experience and your training in first responding, what are some side effects or symptoms when a person overdoses?

[DEFENSE COUNSEL]: I'm going to object.

[THE COURT]: Overruled. You can answer.

[WITNESS]: They stop breathing - - stop breathing, foaming. I've seen that.

[STATE]: Okay. And to your knowledge, can a person



overdose on methamphetamine?

[WITNESS]: I believe so, yes.

[STATE]: No further questions, Your Honor.

Defendant contends that “[t]his case was about possession of methamphetamine and marijuana[,]” and “[t]he fact that someone can overdose on methamphetamine is irrelevant to the issue of whether [defendant] possessed it.” As a result, defendant alleges that the trial court abused its discretion by overruling his objection to Officer Tierney’s testimony because “[s]uch evidence had the effect of misleading the jury into thinking [defendant] was a dangerous man who had to be convicted and put behind bars before someone ingested his dangerous methamphetamine and overdosed on it and died as a result.” We find that defendant’s contentions lack merit.

Defendant was charged with, *inter alia*, possession *with intent to sell and distribute* methamphetamine, not merely *possession of* methamphetamine. Therefore, the effects that methamphetamine could potentially have on the public, to whom such product could be sold and distributed, is relevant evidence. As noted above, evidence that is probative in the State’s case will necessarily be prejudicial to the defendant, *Weathers*, 339 N.C. at 449, 451 S.E.2d at 270, but that does not inherently mean that it is inadmissible and therefore the trial court abused its discretion by admitting the evidence. Upon reviewing the entire record, we find

nothing in the present matter to suggest that the jury’s decision to convict defendant of possession with intent to sell or deliver methamphetamine was solely based on the fact that a potential side effect of the use of methamphetamine is overdosing. Therefore, we hold that the trial court did not abuse its discretion in admitting the aforementioned testimony of Officer Tierney.

**c. The prosecutor’s closing argument**

Turning next to defendant’s challenge regarding a certain portion of the prosecution’s closing argument, we decline to review this issue under the abuse of discretion standard of review. “Our appellate rules provide that, in order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]” *State v. Bradley*, 279 N.C. App. 389, 398, 864 S.E.2d 850, 858 (2021) (internal brackets, internal quotation marks, and citation omitted). Here, defendant failed to object to the challenged portion of the State’s closing argument; thus, the issue is not preserved for appeal.

**B. Jury Instruction**

Generally, “[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 to consider its verdict . . . .” N.C.R. App. P. 10(a)(2) (2022). However, “[t]his Court reviews unpreserved claims of error in jury instructions for plain error.” *State v. Wohlers*, 272 N.C. App. 678, 682, 847 S.E.2d 781, 784 (2020). “A party arguing plain error on appeal must show a fundamental error occurred at trial.”

*Id.* (citation and internal quotation marks omitted). “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.” *Id.* (citation and internal quotation marks omitted). “Because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* (citation, internal quotation marks and brackets omitted). Moreover, “[f]or plain error to be found, it must be *probable*, not just *possible*, that absent the instructional error the jury would have returned a different verdict.” *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016) (emphases added).

Defendant’s second contention is couched as an error of jury instruction, contending that the trial court “plainly and reversibly erred by instructing the jury on the possession of drug paraphernalia charge that it could find [defendant] guilty of that offense if it found he intended to use a vacuum sealer and baggies to process, prepare, package, repack, store, contain, and/or conceal marijuana.” However, defendant’s actual argument is that the language found in the challenged jury instruction does not match the language of the indictment, not that the language of the jury instruction was erroneous as it pertained to the charge for which the instruction was given. Defendant did not raise a motion regarding an issue with the indictment during pretrial motions, thus any issue with the indictment is not preserved on appeal. Moreover, defendant neither objected to the proposed jury

instruction during the charge conference, nor at trial when the instruction was given to the jury. Thus, we look to the pattern jury instruction versus the jury instruction given at trial, for the possession of drug paraphernalia charge, to determine if there was plain error.

On appeal, defendant has failed to convince this Court that there was any error, much less plain error, with the jury instruction. Defendant was charged and indicted on the charge of possession of drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22. The pattern jury instruction for this charge reads as follows:

[t]he defendant has been charged with unlawfully and knowingly [using] [possessing with intent to use] drug paraphernalia.

For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

**First**, that the defendant [possessed] [used] certain drug paraphernalia. “Drug paraphernalia” means all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act.

**Second**, that the defendant did this knowingly. A person possesses drug paraphernalia knowingly when the defendant is aware of its presence, and has either by [himself] [herself] [together with others] both the power and intent to control the disposition or use of said paraphernalia.

**And Third**, that the defendant did so with the intent to use said drug paraphernalia in order to (*name unlawful use; e.g. process*) a controlled substance which would be unlawful to possess. (*Name substance*) is a controlled substance in North Carolina that is unlawful to possess.)

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant unlawfully and knowingly [used] [possessed with intent to use] certain drug paraphernalia in order to (*name unlawful use; e.g., process*) a controlled substance which would be unlawful to possess, then it would be your duty to return a verdict of guilty. If you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

N.C.P.I.–Crim. 260.95 (2014).

The trial court prepared jury instructions regarding each charge, sent the proposed jury instructions to each party, and then went through each instruction during the charge conference to determine whether either party had any objections. For defendant's possession of drug paraphernalia charge, the trial court proposed the following jury instruction:

[t]he defendant has been charged with unlawfully and knowingly possessing with intent to use drug paraphernalia.

For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

**First**, that the defendant possessed certain drug paraphernalia, to wit, a vacuum sealer and baggies. Drug paraphernalia means all equipment, products, and materials of any kind that are used to facilitate or intended or designed to facilitate violations of the Controlled Substances Act.

**Second**, that the defendant did this knowingly. A person possesses drug paraphernalia knowingly when the defendant is aware of its presence and has, either by himself or together with others, both the power and intent

to control the disposition or use of said paraphernalia.

**And third**, that the defendant did so with the intent to use said drug paraphernalia in order to process, prepare, package, repackage, store, contain, and/or conceal a named controlled substance which would be unlawful to possess. Marijuana is a controlled substance in North Carolina that is unlawful to possess.

If you find from the evidence beyond a reasonable doubt that on or about [17 January] 2021, the defendant unlawfully and knowingly possessed with the intent to use certain drug paraphernalia, to wit, a vacuum sealer and baggies, in order to process, prepare, package, repackage, store, contain and/or conceal a controlled substance, which would be unlawful to possess, then it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Basing our review strictly on the language and directive of the pattern jury instruction versus the jury instruction given on defendant's possession of drug paraphernalia charge, we find that the trial court did not commit error; it followed the directive of the pattern instruction precisely. Thus, we find no error in the trial court's jury instruction on defendant's charge of possession of drug paraphernalia.

### **III. Conclusion**

Based on our careful review and the analysis above, we conclude that the trial court did not abuse its discretion in violation of Evidence Rule 403 regarding Officer Tierney's testimony pertaining to potential dangers of methamphetamine, nor did the trial court commit plain error when giving the jury instruction for defendant's possession of drug paraphernalia charge. For these reasons, we affirm the judgments

of the trial court.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).