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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-967

Filed 20 August 2024

Beaufort County, Nos. 20 CRS 51204–05

STATE OF NORTH CAROLINA

v.

MANTIN VANN BELL, Defendant.

Appeal by Defendant from judgment entered 21 February 2023 by Judge Wayland J. Sermons Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 29 May 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Stuart M. Saunders, for the State.

Thomas, Ferguson & Beskind, LLP, by Kellie Mannette, for Defendant-Appellant.

CARPENTER, Judge.

Mantin Vann Bell (“Defendant”) appeals from judgment after a jury convicted him of one count of each of the following: resisting a public officer, assaulting a government official, Class E opium trafficking, and possessing drug paraphernalia. On appeal, Defendant argues that the trial court plainly erred by failing to instruct

the jury on lesser included offenses of Class E opium trafficking. After careful review, we discern no error.

I. Factual & Procedural Background

On 30 November 2020, a Beaufort County grand jury indicted Defendant for resisting a public officer, assaulting a government official, trafficking in opium, and possessing drug paraphernalia. On 20 February 2023, the State began trying Defendant in Beaufort County Superior Court, and evidence tended to show the following.

On 16 September 2020, now-Captain Russell Davenport of the Beaufort County Sheriff's Office was surveilling Defendant's home, located in Washington, North Carolina. Viewing through binoculars, Captain Davenport saw Defendant leave his home, approach the passenger side of a white SUV that had just arrived in front of his home, and remove a blue bag from his waistband.

Captain Davenport suspected Defendant was selling drugs to the occupants of the SUV, so he radioed other surveilling officers and told them to approach Defendant. When Defendant saw the approaching officers, he tossed the blue bag into the SUV and fled, but the officers caught and detained him. Captain Davenport saw Defendant toss the blue bag into the SUV and saw pills fly from the bag inside the SUV.

There were three people in the SUV: the driver, the right front passenger, and the left rear passenger. Investigator Greg Rowe, part of the surveillance team,

detained the occupants and photographed the SUV's interior. Investigator Rowe's photographs showed a blue bag, which contained white pills, lying on the SUV's dashboard. The photographs also showed loose pills on the dashboard, the front passenger seat, and the floorboard. The loose pills matched those remaining inside the blue bag.

Including those found in the blue bag and those scattered in the SUV, officers recovered sixty-one pills. The pills contained oxycodone, an opium derivative, and they weighed 22.69 grams altogether. Defendant presented no evidence suggesting that the pills belonged to occupants of the SUV, rather than the blue bag he tossed into the SUV.

Defendant did not object to any of the trial court's jury instructions and did not request additional instructions. On 21 February 2023, the jury convicted Defendant of all charges. The trial court issued two judgments: one sentencing Defendant to 150 days of imprisonment, and another sentencing Defendant to between 90 and 120 months of imprisonment. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issue

The issue on appeal is whether the trial court plainly erred by not instructing the jury on any lesser included charges of Class E opium trafficking.

IV. Analysis

On appeal, Defendant argues that the trial court plainly erred by not instructing the jury on any lesser included charges of Class E opium trafficking. We review preserved challenges to jury instructions de novo. *See State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). But here, Defendant failed to object to the trial court’s jury instructions, so Defendant failed to preserve his jury-instruction argument for our review. *See Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(b)(1)) (“In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that issue.”).

In criminal cases, however, we will “review unpreserved issues for plain error when they involve either (1) errors in the judge’s instructions to the jury, or (2) rulings on the admissibility of evidence.” *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citing *State v. Sierra*, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994)). But we will only review for plain error if the defendant “specifically and distinctly” argues that the trial court plainly erred. *See State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995); *see also* N.C. R. App. P. 10(a)(4) (allowing review of certain unpreserved arguments in criminal appeals only “when the judicial action questioned is specifically and distinctly contended to amount to plain error”).

Here, Defendant “specifically and distinctly” argues that the trial court’s jury instructions were plainly erroneous. *See Frye*, 341 N.C. at 496, 461 S.E.2d at 677.

Accordingly, despite Defendant failing to object to the trial court’s jury instructions, we will review them for plain error. *See Gregory*, 342 N.C. at 584, 467 S.E.2d at 31.

A defendant must pass a three-part test in order to establish that an error was plain:

First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a probable impact on the outcome, meaning that absent the error, the jury probably would have returned a different verdict. Finally, the defendant must show that the error is an exceptional case that warrants plain error review, typically by showing that the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Reber, 900 S.E.2d 781, 786 (N.C. 2024) (citations and quotation marks omitted).

The second prong of plain error requires a defendant to show that, because of the trial court’s error, a different verdict “is significantly more likely than not.” *Id.* at 787. In other words, the defendant must show that an acquittal is “almost certain[],” “presumabl[e],” or “doubtless.” *Id.* (citing NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) and MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2007)).

“It is the duty of the trial court to instruct the jury on the law applicable to the substantive features of the case arising on the evidence” *State v. Robbins*, 309 N.C. 771, 776, 309 S.E.2d 188, 191 (1983). Sometimes this duty includes instructing the jury on a lesser included offense, which is a crime “composed of some, but not all,

of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime.” *Lesser included offense*, BLACK’S LAW DICTIONARY (11th ed. 2019).

“An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater.” *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citing *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841 (1995)). “The test is whether there ‘is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.’” *Id.* at 562, 572 S.E.2d at 772 (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)).

“When the State’s evidence is positive as to each element of the crime charged and there is no conflicting evidence relating to any element, submission of a lesser included offense is not required.” *State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988) (citing *State v. Hall*, 305 N.C. 77, 84, 286 S.E.2d 552, 556 (1982)). In other words, an instruction on a lesser included offense requires more than a defendant’s “mere denial” of the State’s allegations. *Id.* at 461, 364 S.E.2d at 353 (citing *State v. Horner*, 310 N.C. 274, 283, 311 S.E.2d 281, 288 (1984)).

“The crime of trafficking in opium, N.C. Gen. Stat. § 90-95(h)(4), contains two essential elements. Defendant must engage in the: ‘(1) knowing possession (either actual or constructive) of (2) a specified amount of [opium].’” *State v. Hunt*, 249 N.C.

App. 428, 432, 790 S.E.2d 874, 878 (2016) (alteration in original) (quoting *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987)). Possession of four or more grams of opium, but less than fourteen grams of opium, is a Class F felony; possession of fourteen or more grams of opium, but less than twenty-eight grams of opium, is a Class E felony. N.C. Gen. Stat. § 90-95(h)(4)(a)–(b) (2023).

Subsection 90-95(h)(4) covers opium derivatives, *Hunt*, 249 N.C. App. at 432, 790 S.E.2d at 878 (citing *State v. Ellison*, 366 N.C. 439, 443, 738 S.E.2d 161, 164 (2013)), and simple opium possession is a lesser included offense of trafficking in opium, *id.* at 432, 790 S.E.2d at 878 (citing *State v. McCracken*, 157 N.C. App. 524, 528, 579 S.E.2d 492, 495 (2003)). Similar to simple opium possession, Class F opium trafficking is also a lesser included offense of Class E opium trafficking. *State v. Holmes*, 142 N.C. App. 614, 619–20, 544 S.E.2d 18, 21–22 (2001).

Here, Defendant argues that the trial court should have instructed the jury on simple opium possession and Class F opium trafficking because it was “reasonable to infer that the pills on the dashboard, or on the seat, or on the floor, were pills belonging to the occupants of the car.” Thus, according to Defendant, a rational jury could have convicted him of a lesser included charge of Class E opium trafficking, and thus acquitted him of Class E opium trafficking, because a rational jury could have attributed some of the pills to the occupants of the SUV.

Defendant’s argument, however, is simply a “mere denial” of the State’s allegations. *See Maness*, 321 N.C. at 461, 364 S.E.2d at 353. On the other hand, the

State presented “positive [evidence] as to each element of the crime charged.” *See id.* at 461, 364 S.E.2d at 353. Specifically, the State presented evidence that Defendant knowingly possessed 22.69 grams of oxycodone pills, which he tossed into an occupied SUV. Without presenting any evidence to the contrary, Defendant has failed to show that a rational jury would have acquitted him of Class E opium trafficking and convicted him of a lesser included charge. *See Millsaps*, 356 N.C. at 561, 572 S.E.2d at 771.

Accordingly, the trial court correctly declined to instruct the jury on lesser included charges of Class E opium trafficking. *See id.* at 561, 572 S.E.2d at 771. Because the trial court did not err, it did not plainly err. *See Reber*, 900 S.E.2d at 786.

V. Conclusion

We hold that the trial court did not err by declining to instruct the jury on lesser included charges of Class E opium trafficking.

NO ERROR.

Judge TYSON concurs.

Judge MURPHY concurs in result only.

Report per Rule 30(e).