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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-6

Filed 5 November 2024

Onslow County, No. 21 CRS 52722

STATE OF NORTH CAROLINA

v.

JOHNNIE CHADWICK

Appeal by defendant from judgment entered 7 June 2023 by Judge Henry L. Stevens in Onslow County Superior Court. Heard in the Court of Appeals 27 August 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Katashia L. Cooper, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

ZACHARY, Judge.

Defendant Johnnie Chadwick appeals from the trial court's judgment entered upon a jury's verdict sentencing him for trafficking in opium or heroin and possession of drug paraphernalia. Defendant's sole argument on appeal is not preserved for appellate review. Therefore, we dismiss his appeal.

BACKGROUND

On 6 September 2022, an Onslow County grand jury returned a true bill of indictment charging Defendant with one count each of (1) trafficking in opium or heroin by possession; (2) possession of a Schedule II controlled substance with intent to manufacture, sell, or deliver; (3) possession of drug paraphernalia; and (4) felony conspiracy to commit trafficking in opium.

Defendant's case came on for jury trial on 6 June 2023. On 7 June 2023, the jury returned a verdict finding Defendant guilty of (1) trafficking in opium or heroin by possession; (2) possession of a Schedule II controlled substance; and (3) possession of drug paraphernalia. The jury returned a verdict of not guilty of conspiracy to commit trafficking in opium or heroin. That same day, the trial court arrested judgment on the conviction for possession of a Schedule II controlled substance and sentenced Defendant to a term of 70 to 93 months in the custody of the North Carolina Department of Adult Correction for his remaining convictions.

Defendant gave oral notice of appeal.

DISCUSSION

Defendant's sole argument on appeal is that "the trial court committed reversible error when it instructed the jury it could convict [him] of trafficking by possession on a theory of constructive possession." According to Defendant, during the charge conference, the trial court indicated to the parties "that it would instruct only on actual possession and would not give a constructive possession instruction";

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however, in actuality, “the trial court instructed [the jury] on both actual and constructive possession[,] although there was insufficient evidence to support an instruction on constructive possession.”

Our review of the record reveals that the trial court stated its intent to instruct the jury on both actual and constructive possession, and that Defendant did not object to this instruction or the jury charge.

“A party may not make any portion of the jury charge . . . the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection” N.C.R. App. P. 10(a)(2). Jury instructions to which a defendant does not object at trial may be reviewed on appeal for plain error. *State v. Foye*, 220 N.C. App. 37, 44, 725 S.E.2d 73, 79 (2012); *accord* N.C.R. App. P. 10(a)(4) (“In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.”). Yet, a defendant who fails to specifically and distinctly contend that the trial court’s instruction constituted plain error waives his right to appellate review of the issue on that basis. *State v. Truesdale*, 340 N.C. 229, 233, 456 S.E.2d 299, 301 (1995).

In the instant case, the trial court notified the State and defense counsel at the charge conference that, as concerns the offense of trafficking by possession: “I

included in there . . . [Pattern Jury Instruction] 104.[4]1, actual versus constructive possession.”

North Carolina Pattern Jury Instruction for Criminal Cases 104.41—titled “Actual–Constructive Possession”—provides, in pertinent part:

Possession of [a substance] may be either actual or constructive. A person has actual possession of [a substance] if the person has it on the person, is aware of its presence, and (either alone or together with others), has both the power and intent to control its disposition or use.

A person has constructive possession of [a substance] if the person does not have it on the person but is aware of its presence, and has (either alone or together with others), both the power and intent to control its disposition or use. A person’s awareness of the presence of the [substance] and the person’s power and intent to control its disposition or use may be shown by direct evidence or may be inferred from the circumstances.

NOTE WELL: Use the following paragraph to charge on constructive possession of a substance or article found in close physical proximity to the defendant.

. . . .

NOTE WELL: Use the following paragraph to charge on constructive possession of a substance or article on premises or in a place, e.g., a vehicle, not in close physical proximity to the defendant.

. . . .

N.C.P.I.—Crim. 104.41 (internal footnote omitted).

Here, the trial court further indicated: “Since [the contraband] was found on [Defendant’s] person[,] I was not going to include the portion that talks about if it was

found in close proximity to the defendant or in an area under his control *I was going to not include those two optional portions.*” (Emphasis added). The court then asked if the parties had anything to argue “with regard[] to that instruction[.]” to which defense counsel responded: “No, sir.” Thereafter, as to the charge of trafficking in opium or heroin by possession, the trial court instructed the jury regarding actual and constructive possession in accordance with N.C.P.I.—Crim. 104.41 but did not give the two optional charges relevant to constructive possession.

Defendant did not object to this “portion of the instruction to which he now assigns error.” *Truesdale*, 340 N.C. at 232, 456 S.E.2d at 301. “He thus failed to preserve this issue for appellate review[.]” *id.*, and any argument concerning the trial court’s instruction may only be reviewed for plain error. *See* N.C.R. App. P. 10(a)(4); *Foye*, 220 N.C. App. at 44, 725 S.E.2d at 79.

Because Defendant does not specifically and distinctly contend that the trial court’s instruction on constructive possession amounted to plain error, Defendant has therefore waived his right to appellate review of this issue. *Truesdale*, 340 N.C. at 233, 456 S.E.2d at 301. Defendant’s argument is overruled, and we dismiss his appeal. *See State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994).

CONCLUSION

For the reasons stated herein, Defendant has waived appellate review of the trial court’s jury instructions in this case. We therefore dismiss Defendant’s appeal.

DISMISSED.

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Judges MURPHY and GORE concur.

Report per Rule 30(e).