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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-195

Filed 3 December 2024

Macon County, No. 22CRS263147

STATE OF NORTH CAROLINA

v.

BRACH ALAN BRASIER, Defendant.

Appeal by defendant from conviction entered 16 August 2023 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 10 September 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General John Payne, for the State-appellee.*

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

GORE, Judge.

Defendant Brach Alan Brasier appeals his judgment for 70 to 93 months' imprisonment for trafficking and the consecutive sentences for possession of methamphetamine, maintaining a dwelling for controlled substances, and possession of drug paraphernalia, all of which were suspended for 24 months' supervised probation at the completion of his trafficking sentence. Specifically, defendant argues

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the trial court committed structural error by refusing defendant's request to continue the trial to release his court-appointed counsel and retain private counsel who was on secured leave at the time. He also argues the trial court committed plain error by failing to instruct the jury on the additional knowledge instruction for trafficking by possession of fentanyl. Upon review of the record and the briefs, we discern no structural error nor plain error.

**I.**

On 7 August 2022, probation officers arrived at defendant's house to make contact with defendant's girlfriend, who lived at the house and was on supervised probation. Upon arrival, the probation officers saw the door ajar and immediately saw defendant who attempted to close the door. While they were speaking with defendant, they noticed both defendant's brother, Kelly Brasier, and Ivory Talent were in the house; both were on active probation. The probation officers saw Ivory reaching toward her bra, and also saw burnt aluminum foil pieces and a glass smoking pipe with a crystal residue on a table in front of Ivory and Kelly. The probation officers also saw a box that contained multiple see-through plastic baggies filled with white powder that appeared to be a controlled substance, and later determined to be fentanyl and cocaine.

The probation officers called law enforcement for assistance and did a pat down of both defendant and Kelly. The probation officers testified that defendant appeared to be "erratic" and under the influence of some substance. Defendant had a small

plastic baggie with a crystal-like substance in his pocket. The officers seized a small piece of foil with a narcotic that Ivory removed from her bra. Defendant told the probation officer, “if we can just flush the bigger baggie, we’ll have learned our lesson.”

At first, no one claimed ownership of the items discovered, however, once law enforcement told defendant, Kelly, and Ivory they would all be charged for the substances and paraphernalia, defendant told the officer he wanted to take the charges. Law enforcement found the following additional items by searching the house: tinfoil, plastic wrap, unused aluminum foil cut in small pieces, a bag containing several hundred individual plastic bags, a jar of white powder filled with a cutting agent, a digital scale, and a methamphetamine pipe. Defendant admitted he had used methamphetamine within the past twenty-four hours. Defendant was charged with trafficking in opium or heroin possession, possession with intent to sell or deliver methamphetamine, maintaining a dwelling for controlled substances, and possession of drug paraphernalia.

The trial court assigned counsel to defendant in September 2022, and defendant first appeared before the court in January 2023. A motion to continue was entered after denial of defendant’s motion for bond reduction. On 11 April 2023, defendant failed to appear when his case was called; the trial court increased his bond, and upon his late arrival put him in custody until his trial. The case was again

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continued. Defendant again appeared before the trial court on 26 June 2023. He refused the plea deal and the trial court refused to decrease his bond amount.

On 14 August 2023, defendant's trial commenced. At the beginning of trial, defendant moved to continue the trial until October and requested to waive his court-appointed counsel stating he wanted to retain different counsel, Raymond Large. He stated he had hired Large, who was on secured leave for vacation. The State communicated they talked with Large, and that Large said he would not take the case because the State was not willing to agree to it given the age of the case.

Defendant alleged he spoke with Large after the State did and was told to relieve his court-appointed counsel at the court appearance and that Large would take his case. Defendant further articulated that he wanted to get different counsel even if Large would not take his case rather than have the public defender. The trial court asked defendant's court-appointed counsel, Parker, if he was ready to try the case and whether defendant had issues with him. Parker stated he was ready to try the case, and that defendant did not have any issues with him. Defendant also requested to have his original court-appointed attorney back, who was appointed to him at the beginning of his case prior to the appointment of Parker in September 2022. The trial court stated, "I do not find your representations to the [c]ourt about hiring private counsel to be credible. I think it appears to be nothing more than a delay tactic. This is an older case." The trial court denied defendant's motion.

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At trial, defendant denied ownership of the drugs and he denied knowledge of the fentanyl, the controlled substance in the larger baggie, that he previously requested the probation officer flush. Defendant testified his girlfriend who lived with him used fentanyl, and although he had used it before, his “drug of choice” was methamphetamine. Defendant testified about his knowledge that 4 to 14 grams of fentanyl is the required amount for a trafficking charge whereas it takes 28 grams of methamphetamine for a trafficking charge. The forensic analyst testified the larger baggie contained approximately 11.8 grams of fentanyl.

Upon the close of both the State’s and defendant’s cases in chief, the trial court instructed the jury on the multiple indictments against defendant. The trial court stated the following for the trafficking by possession of fentanyl indictment:

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

First, that the defendant knowingly possessed a mixture containing fentanyl, which is an opiate or opioid.

And, second, that the amount of the possessed mixture containing fentanyl weighed more than 4 grams, but less than 14 grams.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant knowingly possessed a mixture containing fentanyl and the amount of the mixture which defendant possessed was . . . more than 4 grams, but less than 14 grams, 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 both of these things, it would be your duty to return the

verdict of not guilty.

Defendant did not contest this portion of the jury instruction. The jury returned guilty verdicts for the original indictments, with the one exception of selecting the lesser-included offense of possession of methamphetamine rather than the indictment for possession with intent to manufacture, sell, or deliver. The trial court entered judgment against defendant and sentenced him to 70–93 months' imprisonment for trafficking by possession, with consecutive sentences for the remaining convictions suspended for 24 months' supervised probation following completion of his trafficking sentence. Defendant timely appealed.

## II.

Defendant seeks review of two issues: (1) whether the trial court committed structural error by denying his request to continue the trial to retain a private lawyer, who was on secured leave, to represent him; and (2) whether the trial court plainly erred by not instructing the jury on the additional knowledge instruction for the controlled substance he possessed for the trafficking by possession instruction. Defendant seeks de novo review of the structural error argument and plain error review of the jury instructions.

### A.

Defendant seeks review of the trial court's denial of his motion to continue the trial to substitute his court appointed counsel for retention of private counsel. A motion to continue a trial is generally reviewed for abuse of discretion, but when the

reason for the continuance is based upon a constitutional right, we review de novo. *State v. McFadden*, 292 N.C. 609, 611 (1977). Our Courts consider the defendant's right to counsel of their choice to be an expression of the Sixth Amendment right to assistance of counsel. *Id.* at 612. Yet, this right "is not absolute and is balanced against the need for speedy disposition of the criminal charges and the orderly administration of the judicial process." *State v. Chavis*, 141 N.C. App. 553, 562 (2000) (cleaned up). If the trial court discerns a defendant "weapon[izing]" this right "for the purpose of obstructing and delaying his trial," the defendant may lose this constitutional right. *McFadden*, 292 N.C. at 616.

Defendant attempts to distinguish his case from *Chavis*, but having considered this case alongside *McFadden*, *Chavis* is more factually aligned to defendant's case. In *Chavis*, we considered the defendant's motion to continue his trial to replace his counsel for private counsel. 141 N.C. App. at 562. Utilizing the same standard of review, we determined defendant's motion was properly denied by the trial court. *Id.* Specifically, we pointed to the following factual circumstances that outweighed the defendant's right to counsel of his choice: (1) the defendant did not have any conflict with his current counsel; (2) it was the morning of trial; (3) the defendant's alleged choice for private counsel was not in the courtroom; (4) there was no evidence of financial arrangements with said private counsel, or with any other private counsel; and (5) the trial had already been rescheduled twice. *Id.*

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In the present case, similar factual circumstances existed for the trial court to deny defendant's motion to continue the trial. Defendant was assigned counsel in August and September 2022. Defendant went before the court on 24 January 2023, 11 April 2023, and 26 June 2023, prior to his trial date on 14 August 2023. The trial court granted multiple continuances prior to the trial. There is no evidence in the record that defendant had any conflicts or issues with his appointed counsel. On the morning of trial, defendant requested the continuance to retain a specific private attorney, Large, who was on secured leave. Defendant did not present any evidence of a financial arrangement with this private counsel and the prosecution communicated he spoke with Large, who stated he would not take the case because the prosecution was unwilling to agree to a continuance due to the age of the case.

Additionally, the trial court asked defendant's appointed counsel, Parker, if there were any issues between he and defendant, to which Parker specified that defendant told him there were no issues between them. Defendant's appointed counsel articulated he was prepared for trial. Based upon this information, the trial court stated, "I do not find your representations to the [c]ourt about hiring private counsel to be credible. I think it appears to be nothing more than a delay tactic." Notably, defendant had prior opportunities to seek new counsel and to communicate that request to the court prior to the morning of trial, but he did not.

This case is unlike *McFadden*. In *McFadden*, the defendant sought and obtained counsel, Mr. Powell, of his choice "long before the case was called for trial."



292 N.C. at 615. The morning of the trial, a junior associate of Mr. Powell's law firm appeared and told the judge that Mr. Powell had an ongoing case in federal court and requested a continuance because the junior associate had only met with the defendant ninety minutes prior to trial and was unprepared for the case. *Id.* at 610. The trial court denied the request and required the junior associate to represent the defendant. *Id.* On appeal, our Supreme Court held that the trial court erred by denying the request to continue the trial and that it not only deprived the defendant of his right to counsel of his choice, but that it also deprived him of effective assistance of counsel. *Id.* at 616–17.

In the present case, defendant's appointed counsel was prepared to try the case and had been working with defendant for more than six months. Defendant gave no indication, nor is there any indication in the record, that he would be deprived of his right to counsel through the appointed counsel, or any other circumstances. The trial court balanced defendant's request with the evidence available to it and ultimately determined defendant's request appeared to be a delay tactic that lacked credibility. Accordingly, after considering the circumstances surrounding defendant's request, we determine that the trial court did not commit structural error by denying defendant's motion for a continuance to select different counsel.

**B.**

Next, defendant argues the trial court plainly erred by failing to include an additional footnoted jury instruction for knowledge of the substance he possessed as

an element of the trafficking charge. Defendant argues that because he testified that he did not know that the substance was fentanyl, it was the trial court's duty to include the additional knowledge component in the jury instructions. Defendant failed to object to this additional instruction during conferencing and after the jury charge. Pursuant to Rule 10(a)(2) and 10(a)(4), we limit our review to whether the trial court committed plain error. *See* N.C.R. App. P. 10(a)(2), (a)(4). For an error to amount to plain error it "must be so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached. *State v. Collins*, 334 N.C. 54, 62 (1993) (internal quotation marks and citations omitted).

Defendant was charged with trafficking fentanyl by possession. There is a presumption that defendant has the requisite "guilty knowledge" when the State brings "a prima facie showing that the defendant has committed . . . trafficking by possession." *State v. Galaviz-Torres*, 368 N.C. 44, 48 (2015). But "when the defendant denies having knowledge of the controlled substance that he has been charged with possessing . . . the existence of the requisite guilty knowledge becomes a determinative issue of fact about which the trial court must instruct the jury." *Id.* at 49. Even if the trial court errs by failing to instruct the jury on the additional footnote instruction for knowledge of the controlled substance in N.C.P.I. Crim. 260.17, under plain error review, if there is substantial evidence in the record that contradicts the

defendant's assertions he lacked knowledge, it will not result in reversal. *Id.* at 53–54.

In the present case, the trial court did not plainly err by failing to include the footnoted knowledge instruction in N.C.P.I. 260.17. Defendant argues the trial court should have included the following additional instruction for the trafficking by possession of fentanyl: “and [defendant] knew that what he possessed was fentanyl.” Defendant analogizes his case to *State v. Coleman* to demonstrate the trial court plainly erred when it did not give the additional footnoted pattern jury instruction. In *Coleman*, we determined the trial court plainly erred by failing to give the additional footnoted knowledge instruction because the only evidence available in the record supported defendant's contention that he did not know what substance he possessed. 227 N.C. App. 354, 362 (2013).

However, in this case, there is evidence in the record to contradict defendant's assertion he did not know the controlled substance was fentanyl. Defendant testified his girlfriend that lived with him used fentanyl, he testified he had used fentanyl before (although this was not the drug of his choice), he testified (and the officer testified) that he asked the officer “if we can just flush the bigger baggie, we'll have learned our lesson”; he claimed all the drugs/charges after first denying the drugs were his; and at trial testified instead to a lack of knowledge to all of the drug paraphernalia and drugs throughout his house, claiming he had just arrived home and did not know about any of it.

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Considering this evidence under plain error review, we cannot say a fundamental error occurred at trial such that a jury would have determined a different outcome with the omitted knowledge instruction. Therefore, we determine the trial court did not plainly err by omitting the footnoted knowledge instruction within N.C.P.I. 260.17 during the jury charge.

**III.**

For the foregoing reasons, we discern no structural error nor plain error.

NO ERROR.

Judges STROUD and HAMPSON concur.

Report per Rule 30(e).