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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA26-469

Filed 18 November 2026

Graham County, Nos. 22CR000357-370, 22CR299142-370

STATE OF NORTH CAROLINA

v.

KEITH MARK TIPTON, Defendant.

Appeal by defendant from judgments entered 16 May 2025 by Judge Gregory R. Hayes in Graham County Superior Court. Heard in the Court of Appeals 14 October 2026.

Attorney General Jeff Jackson, by Assistant Attorney General Gabriel Jimenez-Medina, for the State.

William D. Spence for defendant-appellant.

GORE, Judge.

Defendant appeals from judgments entered upon jury verdicts finding him guilty of trafficking in buprenorphine by possession, possession with intent to sell or deliver buprenorphine, possession of ammunition in violation of a domestic violence protective order, and simple possession of marijuana. Defendant contends the trial court failed to conduct the inquiry required by N.C.G.S. § 15A-1242 before allowing

him to proceed *pro se*, abused its discretion by denying his request for a brief recess to consult standby counsel before testifying, and plainly erred by failing to instruct the jury on lesser grades of trafficking and simple possession. Defendant timely appealed, and this Court has jurisdiction under N.C.G.S. § 7A-27(b) (2025). Because defendant validly waived counsel, the trial court did not abuse its discretion in declining to grant an additional recess, and the evidence did not support instructions on lesser-included offenses, we conclude that defendant received a fair trial, free from prejudicial error.

I. Factual and Procedural Background

On 21 March 2022, the district court renewed a domestic violence protective order against defendant through 23 March 2023. A Graham County sheriff's deputy served defendant with the renewed order, which prohibited him from possessing firearms.

On 18 September 2022, defendant contacted the sheriff's office concerning an armed individual, who had been present at a property on Beech Creek Road. When Deputy Andrew Bennett responded, defendant showed him an AR-style rifle and stated that he had obtained a .30-06 rifle and had access to a .40-caliber handgun. After learning that defendant was subject to the protective order, officers obtained a warrant and searched the property the following day. Defendant fled into the woods but was apprehended with four .40-caliber cartridges inside his pocket. Officers recovered firearms and ammunition from a camper on the property and found a

prescription bottle containing orange tablets and tablet fragments.

A forensic scientist separated the bottle's contents into 58 visually consistent orange tablets, orange powder and tablet fragments, and one white tablet. He chemically tested one of the orange tablets and separately tested the powder and fragments; both samples contained buprenorphine. The tested tablet weighed 0.40 grams, the remaining 57 tablets weighed 22.52 grams, and the powder and fragments weighed 10.43 grams, for a combined weight of 33.35 grams. Although an investigating officer had initially recorded 85 tablets weighing 34.2 grams, the laboratory counted 58 tablets. The trial court therefore allowed the State to amend the number of tablets alleged in the possession-with-intent count from 85 to 58. The trafficking count continued to allege possession of 28 grams or more of a mixture containing buprenorphine.

The matter came on for trial during the 12 May 2025 Criminal Session of Graham County Superior Court. Attorney Mitchell Brewer had been appointed to represent defendant, but defendant informed the trial court that he wished to represent himself. The court advised defendant the three firearm offenses then pending were Class H felonies carrying maximum terms of 39 months, that possession with intent to sell or deliver a Schedule III controlled substance was a Class I felony carrying a maximum term of 24 months, and that trafficking in 28 grams or more of buprenorphine carried a mandatory term of 225 to 282 months and a mandatory $500,000 fine. The court identified the marijuana charge among the

pending offenses but did not separately state its maximum punishment. After the court warned defendant about the disadvantages of self-representation, defendant stated, "I choose to represent myself." The court allowed him to proceed *pro se* and appointed Brewer as standby counsel.

The following morning, the court again advised defendant of his right to appointed counsel and asked whether he understood the consequences of self-representation, the nature of the charges and proceedings, and the range of permissible punishments. Defendant answered affirmatively. The court clarified that defendant was waiving representation by appointed or retained counsel, while retaining Brewer's assistance as standby counsel, and defendant agreed. Defendant also executed a written waiver of assigned counsel. Before the presentation of evidence, the State dismissed the remaining charges other than possession of ammunition in violation of the protective order, possession with intent to sell or deliver buprenorphine, trafficking in 28 grams or more of buprenorphine, and possession with intent to sell or deliver marijuana.

After the State rested, the trial court explained defendant's options regarding the presentation of evidence and advised him that he could consult Brewer about whether to testify. The court then recessed for fourteen minutes. Defendant called and examined two witnesses. After the second witness testified, defendant stated that he intended to testify, requested five minutes to confer with Brewer, and asked that Brewer conduct his direct examination. The court declined to take another

recess or permit Brewer to conduct the examination. The transcript nevertheless reflects that defendant conferred with Brewer before being sworn approximately two minutes later.

During the charge conference, defendant agreed that the verdict sheet for trafficking should provide only the choices of guilty of possessing 28 grams or more of buprenorphine or not guilty. Although defendant requested and received lesser-included-offense instructions on the two possession-with-intent charges, he did not request an instruction on any lesser grade of trafficking or on simple possession as a lesser-included offense of trafficking. After the court instructed the jury, defendant stated that he had no objections or requests for modifications.

The jury found defendant guilty of possession of ammunition in violation of the protective order, possession with intent to sell or deliver buprenorphine, trafficking in 28 grams or more of buprenorphine, and the lesser-included offense of simple possession of marijuana. The trial court imposed a mandatory term of 225 to 282 months' imprisonment and a $500,000 fine for trafficking, a concurrent term of 6 to 17 months for possession with intent to sell or deliver buprenorphine, and a consecutive term of 6 to 17 months for possession of ammunition. The court imposed a suspended sentence for simple possession of marijuana. Defendant gave oral notice of appeal.

II. Analysis

Defendant argues the trial court erred by permitting him to represent himself,

denying his request for a five-minute recess to consult standby counsel, and failing to instruct the jury on lesser-included trafficking offenses. We address each argument in turn.

A. Waiver of Counsel

Defendant first contends the trial court failed to conduct the thorough inquiry required by N.C.G.S. § 15A-1242 before permitting him to represent himself. We disagree.

We review de novo whether a defendant validly waived the right to counsel. *State v. Simpkins*, 373 N.C. 530, 533 (2020); *State v. McGirt*, No. 91A25, slip op. at 6 (N.C. Aug. 14, 2026). A defendant may waive counsel and proceed *pro se* if the defendant clearly and unequivocally elects self-representation and the waiver is knowing, intelligent, and voluntary. *McGirt*, slip op. at 6–7; *State v. Thomas*, 331 N.C. 671, 673–74 (1992). Section 15A-1242 permits a defendant to proceed without counsel only after the trial court conducts a thorough inquiry and is satisfied that the defendant: (1) "has been clearly advised" of the right to counsel, including appointed counsel when applicable; (2) "understands and appreciates the consequences" of proceeding without counsel; and (3) "comprehends the nature of the charges and proceedings and the range of permissible punishments." N.C.G.S. § 15A-1242 (2025). We determine whether these requirements were satisfied from the record as a whole and the totality of the circumstances. *McGirt*, slip op. at 6–7; *State v. Atwell*, 383 N.C. 437, 447 (2022).

Defendant acknowledges he wanted to represent himself. He nevertheless contends that his waiver was invalid because the court did not ask several background questions suggested in *State v. Moore*, 362 N.C. 319, 327–28 (2008), incompletely described the permissible punishments, did not place him under oath during the colloquies, and obtained only a written waiver of assigned counsel. Considered in context, none of these circumstances establishes noncompliance with § 15A-1242.

The court advised defendant he remained entitled to appointed counsel and Brewer was prepared to represent him. It strongly discouraged self-representation and warned defendant he lacked an attorney's knowledge of jury selection, evidentiary rules, and objections. Defendant acknowledged those disadvantages but stated that they presented a "chance" he was willing to take and expressly declared, "I choose to represent myself."

The following morning, the court again addressed the three statutory requirements, and defendant affirmed that he understood his right to counsel, the consequences of self-representation, the charges and proceedings, and the permissible punishments. Defendant elected to represent himself. His acceptance of Brewer as standby counsel did not make that election equivocal because Brewer remained available only to advise him, not to provide in-court representation. *See McGirt*, slip op. at 11.

The court was not required to ask every question suggested in *Moore*. Those

questions are intended to assist trial courts but are "in no way required" to satisfy § 15A-1242. *Moore*, 362 N.C. at 328. Although using the full checklist remains the best practice, *State v. Fenner*, 387 N.C. 330, 337 (2025), the ultimate inquiry is whether the record establishes a knowing and voluntary waiver. Defendant responded coherently, explained his decision, and demonstrated that he understood the distinct roles of trial and standby counsel. The court had also reviewed the case files, which contained a forensic evaluator's conclusion that defendant had full capacity to participate in the proceedings.

The record likewise establishes defendant's comprehension of the charges and permissible punishments. The court identified all pending charges, including the marijuana charge, and asked whether defendant understood the nature and possible punishment "for all of those charges." Defendant answered affirmatively. The court then advised him of the 39-month maximum for each Class H felony, the 24-month maximum for the Class I possession-with-intent offense, the mandatory trafficking sentence and fine, and the possibility of consecutive sentences. Although the court did not separately state that the marijuana offense carried the same Class I maximum or identify the minimum sentences for the lower-class felonies, this Court has held that § 15A-1242 requires specific advice concerning the possible maximum punishment. *State v. Lindsey*, 271 N.C. App. 118, 127 (2020). The court provided that information, and defendant again confirmed the following morning that he understood the range of permissible punishments before executing a sworn written

waiver.

This case therefore differs from *State v. Ingram*, No. COA25-83, slip op. at 21–24 (N.C. Ct. App. Mar. 18, 2026). There, the defendant's earlier waivers did not encompass separate charges added through later indictments, and the trial court never advised the defendant about those charges or their punishments. *Id.* Here, the marijuana charge already existed, was identified during the waiver inquiry, carried the same Class I maximum the court explained, and was encompassed by defendant's subsequent oral confirmation and written waiver.

Finally, neither the lack of an oath during the oral colloquies nor the wording of the written waiver invalidated defendant's election. Section 15A-1242 contains no oath requirement, and defendant's written waiver was sworn. Although the form designated a waiver of assigned counsel rather than all assistance of counsel, that designation was consistent with defendant's retention of Brewer as standby counsel. The court expressly clarified that defendant was waiving full representation by appointed or retained counsel while retaining limited standby assistance, and defendant agreed. The written form must be considered with that oral exchange rather than in isolation. *See McGirt*, slip op. at 7, 11.

Considering the two colloquies, defendant's repeated election to represent himself, and his sworn written waiver, the trial court conducted the inquiry required by § 15A-1242 and properly determined that defendant knowingly, intelligently, and voluntarily waived in-court representation. We overrule this argument.

B. Consultation with Standby Counsel

Defendant next argues the trial court abused its discretion by denying his request for a five-minute recess to consult standby counsel before testifying. We discern neither an abuse of discretion nor prejudice.

A trial court has broad authority to control the mode and order of presenting evidence and examining witnesses. N.C.G.S. § 8C-1, Rule 611(a) (2025). Whether to grant a recess, and the length of any recess, rests within the trial court's sound discretion. *State v. Goode*, 300 N.C. 726, 729–30 (1980). A defendant seeking relief must demonstrate both a clear abuse of discretion and harmful prejudice. *State v. Williams*, 361 N.C. 78, 80–81 (2006).

Because the decision whether to testify ordinarily cannot be made intelligently until the State rests, the defendant must receive a meaningful opportunity to consider that decision at that time. *Goode*, 300 N.C. at 730; *Williams*, 361 N.C. at 80–83. The defendant is not, however, automatically entitled to a recess of any particular duration. *Goode*, 300 N.C. at 730.

Here, immediately after the State rested, the court explained defendant's right to testify or remain silent, the consequences of either choice, the effect of presenting evidence on the order of closing arguments, and the State's right to cross-examine him. The court expressly advised defendant that he could consult Brewer about the decision and then took a fourteen-minute recess. Defendant thereafter called two witnesses and confirmed that he intended to testify before requesting another recess.

These circumstances are unlike *Goode* and *Williams*, in which the defendants were denied a meaningful opportunity to consult counsel after the State rested.

Moreover, although the court declined to take an additional recess, defendant conferred with Brewer before being sworn approximately two minutes later. Defendant does not identify any advice he was unable to obtain or any testimony he would have omitted or presented differently. His assertion that additional time might have altered his decision to testify is speculative and does not establish prejudice.

The court also acted within its discretion by declining defendant's request that Brewer conduct his direct examination. A defendant has no right to a hybrid arrangement in which the defendant proceeds *pro se* while standby counsel performs selected advocacy functions before the jury. *See State v. Thomas*, 134 N.C. App. 560, 562–63 (1999).

The court afforded defendant a meaningful opportunity to consider whether to testify and permitted him to consult standby counsel before taking the stand. Defendant has shown neither an abuse of discretion nor prejudice from the denial of an additional five-minute recess. We overrule this argument.

C. Lesser-Included-Offense Instructions

Defendant finally argues the trial court plainly erred by failing to instruct the jury on trafficking by possession of at least 14 but less than 28 grams of buprenorphine, trafficking by possession of at least 4 but less than 14 grams, and

simple possession of buprenorphine. We disagree.

During the charge conference, defendant agreed that the jury should receive only the choices of guilty of trafficking by possession of 28 grams or more or not guilty. He requested no lesser trafficking instruction and later stated that he had no objection to the court's instructions. We need not determine whether defendant's express assent constituted invited error because, even under the plain-error standard he invokes, he cannot establish instructional error.

To establish plain error, a defendant must show that a fundamental error occurred, that the error probably affected the jury's verdict, and that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *State v. Reber*, 386 N.C. 153, 158 (2024). An instruction on a lesser-included offense is required only when the evidence would permit a rational jury to convict the defendant of the lesser offense while acquitting him of the greater. *State v. Millsaps*, 356 N.C. 556, 561 (2002). When the State presents positive evidence of every element of the charged offense and no conflicting evidence concerns those elements, the trial court need not submit a lesser offense. *Id.* at 562; *State v. Maness*, 321 N.C. 454, 461 (1988).

The distinguishing element among the trafficking grades at issue is the weight of the mixture containing the opioid. *See* N.C.G.S. § 90-95(h)(4) (2021). The State's forensic scientist chemically tested one of the 58 orange tablets, each of which shared the same color, shape, and imprint, and identified buprenorphine. Contrary to

defendant's characterization, the second tested sample was not another intact tablet; it consisted of the orange powder and tablet fragments, which also tested positive for buprenorphine. The tablets, powder, and fragments weighed a combined 33.35 grams. Even subtracting each stated margin of uncertainty yields a weight of 33.17 grams, more than five grams above the statutory threshold.

Although visual identification alone is insufficient to establish the chemical composition of a suspected controlled substance, *State v. Ward*, 364 N.C. 133, 147–48 (2010), an analyst need not chemically test every visually consistent tablet. In *State v. Lewis*, 243 N.C. App. 757, 759–60 (2015), chemical testing of one tablet, together with visual confirmation that the remaining tablets shared its size, shape, form, and imprint, established the composition and quantity of the entire group. Likewise, representative testing of tablets from visually consistent populations was sufficient in *State v. Hunt*, 249 N.C. App. 428, 432–35 (2016). The testing performed here therefore provided positive evidence that the entire 33.35-gram mixture contained buprenorphine.

The discrepancies identified by defendant supplied no evidence supporting a lesser trafficking grade. The investigating officer's initial weight of 34.2 grams and the laboratory weight of 33.35 grams both exceeded the 28-gram threshold. Likewise, the amendment from 85 to 58 tablets concerned the separate possession-with-intent count and did not alter the trafficking allegation or the laboratory weight. Defendant's cross-examination challenged the analyst's methodology but produced no

conflicting measurement or affirmative evidence that any tablet contained a different substance or that the mixture weighed less than 28 grams.

Because no evidence permitted a rational jury to find that defendant possessed a quantity between 4 and 28 grams, the trial court did not err by declining to submit lesser trafficking offenses. Defendant therefore cannot establish plain error. We overrule this argument.

III. Conclusion

Defendant knowingly, intelligently, and voluntarily waived in-court representation after the trial court conducted the inquiry required by N.C.G.S. § 15A-1242. The court did not abuse its discretion in addressing defendant's request to consult standby counsel before testifying, and defendant has not shown prejudice from the denial of an additional recess. Finally, the evidence did not support instructions on lesser-included trafficking offenses. Defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges TYSON and WOOD concur.

Report per Rule 30(e).