NO. COA11-101
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v. Sampson County
Nos. 10 CRS 50300-01

JAMIE BYRD

Appeal by defendant from judgment entered 5 October 2010 by Judge Russell J. Lanier, Jr. in Sampson County Superior Court. Heard in the Court of Appeals 29 August 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Anne J. Brown, for the State.

Richard Croutharmel, for defendant-appellant.

CALABRIA, Judge.

Jamie Byrd ("defendant") appeals from a judgment entered upon jury verdicts finding him guilty of attempting to obtain property by false pretenses, second degree trespass, and attaining the status of an habitual felon. We find no error in part and dismiss without prejudice in part.

I. Background

On 14 February 2010, defendant entered a Walmart store in Clinton, North Carolina, carrying two receipts. Defendant placed a hair relaxer, an electric drill, and a container of antifreeze ("the items") in a shopping cart then returned to the front of the store, where he obtained return stickers for the items. Defendant proceeded to the customer service department. After presenting receipts listing the hair relaxer and antifreeze to Walmart employee Doris Brownley ("Brownley"), defendant asked to return those items for cash. Defendant did not have a receipt which included the electric drill; therefore, he requested a gift card rather than cash in exchange for it.

Brownley became suspicious because one of defendant's receipts indicated that an employee discount had been used on the transaction. When Brownley questioned defendant regarding the whereabouts of this employee, defendant stated that he did not know that information. Brownley notified her supervisor about her suspicions, and her supervisor in turn notified the store's asset protection coordinator, Cyrus Edward Fuller ("Fuller"). While waiting for Fuller to arrive, Brownley indicated to defendant that the transaction for his return would take a few minutes. While he initially stated that he would

wait, defendant eventually walked off and left the items at the customer service department.

After receiving a description of defendant, Fuller exited the store and located defendant in the parking lot. Fuller recognized defendant from a previous encounter when he had informed defendant that he was not welcome at the store. Fuller contacted law enforcement.

Detective Alpha Clowney ("Det. Clowney") of the Clinton Police Department arrived and arrested defendant. Det. Clowney took defendant to the Sampson County Detention Center and advised defendant of his ***Miranda*** rights. Defendant executed a waiver of these rights and told Det. Clowney that he had removed the items from the Walmart shelves and had planned to exchange them at customer service using the receipts, which he had obtained from a friend. Defendant also stated that he changed his mind and left the store without the receipts or the items.

Defendant was subsequently indicted for attempting to obtain property by false pretenses and second degree trespass. Beginning 4 October 2010, defendant was tried by a jury in Sampson County Superior Court. At trial, defendant's counsel admitted he was guilty of second degree trespass during her closing argument. After closing arguments concluded, the trial

court instructed the jury on the applicable law. During its instructions on unanimity, the trial court committed the following *lapsus linguae*: "Now a verdict is not a verdict until all 12 jurors agree unanimously. ***This means you can't do it by unanimous vote.*** Now when you have agreed upon a unanimous verdict . . . ." (Emphasis added).

The jury returned unanimous verdicts finding defendant guilty of attempting to obtain property by false pretenses and second degree trespass. The case then proceeded to the habitual felon phase. When instructing the jury during this phase, the trial court did not repeat an instruction on unanimity. However, the trial court did tell the jury that "[a]ll of the rules I gave you earlier on in the first phase apply to this." The jury then returned a unanimous verdict finding defendant guilty of attaining the status of an habitual felon. The trial court consolidated the convictions and sentenced defendant to a minimum of 101 months to a maximum of 131 months in the North Carolina Department of Correction. Defendant appeals.

II. Jury Instructions

Defendant argues that the trial court erred when it (1) instructed the jury on unanimity during the predicate felony

phase of his trial; and (2) failed to give a specific unanimity instruction during the habitual felon phase. We disagree.

"[W]e review jury instructions contextually and in their entirety. The charge will be held to be sufficient if it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed." *State v. Bivens*, ___ N.C. App. ___, ___, 693 S.E.2d 378, 380 (2010)(internal quotations, citation and brackets omitted). "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *State v. Blizzard*, 169 N.C. App. 285, 297, 610 S.E.2d 245, 253 (2005). Additionally, "[t]his Court has repeatedly held that a lapsus linguae not called to the attention of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction." *State v. Baker*, 338 N.C. 526, 565, 451 S.E.2d 574, 597 (1994).

Defendant did not object to the trial court's instructions at trial. Therefore, our review is limited to plain error. *See* N.C.R. App. P. 10(a)(4) (2011). "Under the plain error rule, a

new trial will be granted for an error to which no objection was made at trial only if a defendant meets a heavy burden of convincing the Court that, absent the error, the jury probably would have returned a different verdict." *State v. Bronson*, 333 N.C. 67, 75, 423 S.E.2d 772, 777 (1992).

A. Predicate Felony Phase

In the instant case, the trial court, during the predicate felony phase of defendant's trial, instructed the jury on unanimity as follows:

> Now a verdict is not a verdict until all 12 jurors agree unanimously. *This means you can't do it by unanimous vote.*
>
> Now when you have agreed upon a unanimous verdict, your foreperson should properly mark the spaces on the verdict form, sign it, date it, knock on the door, and you will be returned to the courtroom to announce your verdict.

(Emphasis added). Defendant contends that the emphasized portion of the jury instruction was confusing and may have misled the jury into believing its verdict was not required to be unanimous. In support of his argument, defendant cites *State v. Parker*, in which this Court held it was prejudicial error to instruct the jury that "[y]ou cannot return a verdict without a majority vote." 29 N.C. App. 413, 414, 224 S.E.2d 280, 281 (1976).

However, *Parker* is distinguishable from the instant case. First, the defendant in *Parker* was not required to meet the "heavy burden" of plain error review. Moreover, the trial court's instruction in the instant case only referenced a unanimous verdict, and thus, unlike *Parker*, the jurors could not have been misled by its *lapsus linguae* into believing that they could reach a verdict by majority vote, as "majority vote" was never mentioned.

In the instant case, the verdict sheets returned by the jury clearly indicated on their face that the verdicts were unanimous for both charges: "We the jury, by unanimous verdict, find the defendant, Jamie Byrd, [g]uilty . . . ." Furthermore, when they were polled, as a group, by the clerk of court, the jurors affirmatively responded that they had agreed to the verdicts, which further demonstrated that their verdict was unanimous. Under these circumstances, defendant has failed to meet his burden of establishing plain error. This argument is overruled.

B. Habitual Felon Phase

Defendant also argues that the trial court erred by failing to instruct the jury on unanimity during the habitual felon phase of defendant's trial. Prior to deliberations, the trial

court did not specifically instruct the jury on unanimity, but rather instructed the jury in a truncated fashion, referencing the instructions given during the predicate felony phase: "All of the rules I gave you earlier on in the first phase apply to this."

Assuming, *arguendo*, that the trial court erred by instructing the jury in this fashion, defendant has once again failed to meet his burden for establishing plain error. As during the predicate felony phase, the jury returned a verdict that stated on its face that it was unanimous: "We the jury, by unanimous verdict, find the defendant, Jamie Byrd, [g]uilty of [attaining the status of an] habitual felon." In addition, the jury affirmatively approved the verdict when polled by the clerk of court. This argument is overruled.

III. Ineffective Assistance of Counsel

Defendant argues that he received ineffective assistance of counsel ("IAC") when his counsel admitted that he was guilty of second degree trespassing during her closing argument. We dismiss this argument without prejudice.

"Ordinarily, to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) 'counsel's performance was deficient' and (2) 'the deficient performance

prejudiced the defense.'" *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011)(quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). "Ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Campbell*, 359 N.C. 644, 691, 617 S.E.2d 1, 30 (2005)(internal quotations, citation, and brackets omitted). "However, when it appears to the appellate court further development of the facts would be required . . . the proper course is for the Court to dismiss the defendant's [claim] without prejudice." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006).

In the instant case, defendant's counsel admitted that he was guilty of second degree trespass during her closing argument. Defendant's counsel told the jury, "I would submit to the jury as it relates to the issue of second-degree trespass, [defendant is] guilty of that." Over the course of her remaining argument, defendant's counsel stated to the jury on three additional occasions that defendant was guilty of second

degree trespass. Our Supreme Court has held that IAC, ***per se***, exists "in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." ***State v. Harbison***, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985). This Court has recently reaffirmed this principle. ***State v. Maready***, ___ N.C. App. ___, ___, 695 S.E.2d 771, 778, ***disc. rev. denied***, 364 N.C. 329, 701 S.E.2d 247 (2010)("Because our Supreme Court has not overruled ***Harbison*** . . . we are bound by this precedent.").

However, it cannot be determined from the record whether or not defendant gave his counsel permission to admit he was guilty of second degree trespass during closing arguments. Therefore, we must dismiss defendant's IAC claim without prejudice to his ability to file a motion for appropriate relief in superior court, where a full evidentiary hearing can be conducted in order to ascertain if defendant consented to his counsel's actions.

IV. Conclusion

Defendant failed to meet his burden of establishing that the trial court's instruction to the jury on unanimity was plain error, as there is sufficient evidence in the record to conclude that the jury reached unanimous verdicts on all charges. Based

on the record before this Court, we cannot adequately review defendant's IAC claim. Accordingly, this claim is dismissed without prejudice to defendant's right to raise it in a motion for appropriate relief.

No error in part and dismissed in part.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).