NO. COA11-502

NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v. Lincoln County
No. 08 CRS 53405

JACKIE LEE DOVER, SR.

Appeal by Defendant from judgment entered 17 September 2010 by Judge F. Lane Williamson in Lincoln County Superior Court. Heard in the Court of Appeals 12 October 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Gilda C. Rodriguez for Defendant.

STEPHENS, Judge.

Procedural History and Evidence

On 16 February 2009, the Lincoln County Grand Jury returned an indictment against Defendant Jackie Lee Dover, Sr., for breaking and entering a motor vehicle, felonious larceny, and

felonious possession of stolen goods.[1] The charges against Defendant arise from events occurring at approximately 11:00 p.m on 7 September 2008.[2]

The evidence at trial tended to show the following: Officer Jeremy Wilson ("Wilson") of the Lincoln County Sheriff's Department observed "a small pickup truck with mattresses stacked over the cab of the truck still wrapped in plastic." His suspicions aroused, Wilson drove to a nearby business, known as Factory Mattress Sales, but did not see any broken windows or open doors. Wilson then stopped the truck, which was driven by Defendant. Defendant's son and the son's wife were passengers.

Defendant admitted he had picked up the mattresses at Factory Mattress Sales, but claimed he had permission to do so. Wilson contacted Officer Michael Reep ("Reep") and asked him to further investigate the premises of Factory Mattress Sales for signs of criminal activity. Reep found an unsecured trailer behind the business and a lock lying on the ground nearby. The owner of Factory Mattress Sales, Mark Dixon ("Dixon"), was called to the scene of the stop and identified the mattresses as having come from his trailer. Dixon stated that he often placed

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[1]On 9 November 2009, a superseding indictment charging the same offenses issued.

[2]The indictment lists the date of offense as 8 September 2008, possibly because the events took place near midnight.

old mattresses and used furniture in a trash pile in front of the store for people to take, but that these particular mattresses had been secured in the trailer and not discarded. He testified further that he had not given Defendant permission to take the mattresses.

Defendant's first trial in April 2010 resulted in a mistrial. His second trial took place at the 13 September 2010 criminal session of Superior Court in Lincoln County. On 15 September 2010, Defendant moved to suppress evidence, contending that Wilson lacked probable cause to stop his truck. The court denied this motion. The jury found Defendant guilty of felonious breaking and entering a motor vehicle, felonious larceny, and felonious possession of stolen goods. Defendant then admitted habitual felon status. The trial court sentenced Defendant to 107 to 138 months in prison. Defendant appeals.

Discussion

Defendant brings forward three arguments on appeal: that (1) the trial court erred in allowing the State to introduce evidence of his son's out-of-court statement; (2) trial counsel provided ineffective assistance; and (3) the trial court erred when it failed to arrest judgment on the felonious possession conviction. We agree the court erred by failing to arrest

judgment on the felonious possession of stolen goods conviction, but find no error in Defendant's trial.

Out-of-Court Statement

Defendant first argues that the trial court erred in allowing the introduction of his son's out-of-court statement in violation of the Confrontation Clause. We disagree.

Because Defendant did not object at trial, we review only for plain error. N.C. R. App. P. 10(a)(4)(2011). Plain error

> is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a ***fundamental*** error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, . . . or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Black, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983) (internal quotation marks and citation omitted). "Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." ***State v. Walker***, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

The Confrontation Clause of the Sixth Amendment to the United States Constitution preserves a party's right of cross-examination. *State v. Fox*, 274 N.C. 277, 290-91, 163 S.E.2d 492, 501-02 (1968). This right is violated when in a joint trial, "a non-testifying codefendant's extrajudicial confession, which implicates his codefendant[]," is admitted. *State v. Gonzalez*, 311 N.C. 80, 92, 316 S.E.2d 229, 236 (1984).

Here, Defendant asserts that the following out-of-court statement, made by his son to Lieutenant Dwight Shehan after the son's arrest, implicates Defendant:

> On this date about 6:00 p.m. I called my dad and asked him if he was still going tonight. He said yes. He had spoken earlier about going to Lincolnton to pick up mattresses. He said that he had permission to get used mattresses per owner. We left from 5426 West Liberty Hill Road, my address, and came to Lincolnton. W[e] drove to the Factory Mattress store, parked and walked back to the semi trailer which was open slightly about two inches and began to carry them to the truck. We also took two string trimmers and a gas can and placed them in the bed of the truck and loaded the mattresses on top. We threw ropes over the mattresses and secured them and drove off. Shortly after a police officer stopped us. I'm sorry for my actions.

We see no error in the admission of this statement. The statement does not implicate Defendant because, as noted above, Defendant told police officers that he had permission to take

certain mattresses and his son's statement appears to corroborate that account rather than incriminate Defendant. Further, Defendant's assertion that, without the statement, a jury would not have found that he entered the trailer is unpersuasive. Dixon testified that the mattresses had been locked in the trailer the prior evening. Reep testified that he found the trailer door ajar with a broken lock. In light of this evidence, we conclude that even had the statement not been admitted, the jury would likely have reached the same result. Accordingly, we overrule this argument.

Ineffective Assistance of Counsel

Defendant next argues that he was denied effective assistance of counsel. We disagree.

To prevail in a claim for ineffective assistance of counsel, Defendant must show:

> (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Garcell, 363 N.C. 10, 51, 678 S.E.2d 618, 644 (2009) (internal citations and quotation marks omitted). "A strong presumption exists that a counsel's conduct falls within the

range of reasonable professional assistance." *State v. Frazier*, 142 N.C. App. 361, 367, 542 S.E.2d 682, 687 (2001). Further, if "there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

Defendant first contends that his trial counsel did not argue his motion to suppress vigorously enough. However, the following evidence shows Wilson had probable cause to stop Defendant, and thus, that the motion would have been denied regardless of any argument by counsel: Wilson did not see mattresses in the trash pile when he drove by the mattress store earlier in the evening and Defendant was half a mile from the mattress store when Wilson observed him with the stack of plastic-enclosed mattresses, not discarded ones, in his truck around 11:00 p.m. on a day when the mattress store was closed. Because there was no reasonable ground for suppression, Defendant cannot show prejudice.

Next, Defendant contends his trial counsel was ineffective for failing to object to the State's motion to join the Defendant's case and his son's case and to the introduction of

his son's out-of-court statement. Defendant argues that these failures were prejudicial because the State would not have been able to prove breaking and entering and larceny without the out-of-court statement. However, as discussed above, the admission of the out-of-court statement was not error. Therefore, trial counsel's failure to object to it was not error.

Defendant's final contention is based on his counsel's failure to move to dismiss for an alleged fatal variance in the indictment. In the indictment, the name of the mattress store was listed as "Factory Mattress Sales of Lincolnton, LLC", but it was referred to as "Factory Mattress Sales, Incorporated" by Dixon at trial.

"[A] fatal variance results in larceny cases where title to the property is laid in one person by the indictment and proof shows it in another." *State v. Wallace*, 71 N.C. App. 681, 689, 323 S.E.2d 403, 409 (1984) (citation and quotation marks omitted). In *Wallace*, this Court found no fatal variance where there was a "slight discrepancy between the corporate name given in the indictment and that given by [an employee at trial]." *Id.*

Here, the slight discrepancy was not a fatal variance and thus counsel did not provide ineffective assistance by failing

to move to dismiss on this basis. Accordingly, we overrule Defendant's ineffective assistance of counsel arguments.

Arrest Judgment

Finally, Defendant argues, and the State concedes, that the trial court erred by failing to arrest judgment on the felonious possession of stolen goods conviction.

"[T]hough a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses." *State v. Perry*, 305 N.C. 225, 236-37, 287 S.E.2d 810, 817 (1982), *overruled on other grounds by State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010). This error is not cured by consolidation of the judgments. *State v. Owens*, 160 N.C. App. 494, 499, 586 S.E.2d 519, 523 (2003).

Here, the mattresses were the "property" involved in both the felonious larceny and felonious possession of stolen goods convictions. Therefore, we vacate Defendant's conviction for felonious possession of stolen goods and remand to the trial court for entry of judgment and resentencing on the remaining convictions.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART; VACATED and REMANDED IN PART.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).