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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1232

Filed: 18 October 2016

Camden County, No. 13-CRS-50019, 13-CRS-50026

STATE OF NORTH CAROLINA,

v.

DEMETRIUS BOWSER, Defendant.

Appeal by Defendant from judgments entered 15 October 2014 by Judge Reuben F. Young in Camden County Superior Court. Heard in the Court of Appeals 13 April 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Brenda Menard, for the State.

Ward, Smith, & Norris, P.A., by Kirby H. Smith, III, for Defendant-appellant.

INMAN, Judge.

Defendant Demetrius Bowser ("Defendant") appeals from the judgments entered upon his convictions for first degree burglary, robbery with a firearm, and feloniously conspiring to commit robbery with a firearm. On appeal, Defendant argues that the trial court erred by allowing only one juror to take notes during the trial and to take those notes into the jury room during deliberation, and by not instructing the jury in its final charge regarding how the juror's notes should be used

during deliberations. We hold that the trial court did not commit error and acted within its discretion. Defendant also argues, and we agree, that the trial court's award of restitution is not supported by competent evidence in the record. Accordingly, we vacate and remand the award of restitution.

I. Background

The State's evidence tended to show the following:

On 20 January 2013, Allen Boose contacted[1] Tyche Blackwell and invited her to his home. Boose and Blackwell had previously dated, and they were still friends and engaged in sexual intercourse after the break up. When Boose texted Blackwell, Blackwell was with the Defendant and Johnathan Peak at Defendant's home. Prior to that evening, Defendant and Blackwell had discussed Boose, and Defendant stated that "he wanted to get [Boose]." Defendant directed Blackwell to tell Boose that she was coming over, and to instruct Boose to wait in the bed and leave his door unlocked. Blackwell followed Defendant's instructions and sent a text message to Boose saying she was coming over, to wait for her in his bedroom, and to leave the door unlocked. Defendant gave Blackwell black straps and told her to tie Boose to the headboard of his bed.

Blackwell arrived at Boose's home around 9:30 that evening, entered through the unlocked door and went to Boose's bedroom, where he was waiting for her.

[1] Boose testified that he texted Blackwell about coming over on 20 January 2013. However, Blackwell testified that Boose called her about coming over.

Blackwell then told Boose she wanted to try something new, and used the straps given to her by Defendant to tie Boose's ankles together and his wrists together. Blackwell placed Boose's phone on the dresser and texted on her phone for approximately ten minutes while Boose laid tied on his bed.

While Boose and Blackwell were in Boose's bed, three men clothed in all black with red coverings over their faces entered Boose's bedroom. Upon entering, one of the men said, "You know what it is." Blackwell recognized two of the three men as Defendant and Peak, but did not recognize the third man. Boose did not recognize any of the men. Peak removed Blackwell from the bedroom and brought her to the living room, where Defendant joined them and tied Blackwell's wrists together with a computer cord. One man removed a pillow from a pillowcase and put the pillowcase over Boose's head.

The men asked Boose about the location of drugs, and Boose replied that he did not deal in drugs anymore. Upon Boose's response, he was struck on the head with a gun. The men also asked Boose about the location of money, the key to his safe, and his prescription pain pills. During the entire encounter, Boose was struck on his head by a gun at least five times. Upon the last strike, Boose remembered about money he set aside for a Disney World trip, and told the men the money was located in the top drawer of his dresser. The men took that money, told Boose not to move, and then left Boose's home.

When the men left, Blackwell called out to Boose. Boose untied himself, removed the pillowcase from his head, and untied Blackwell's wrists. Boose told Blackwell to leave his home, because he suspected Blackwell had something to do with the robbery. Blackwell tried to leave, but she could not find her keys. After speaking with Blackwell, Boose called the police and reported that someone had broken into his home. The police arrived at Boose's home, and Boose spoke with them and then went to the Albemarle hospital to treat his injuries.

While still at Boose's home, Blackwell told police the facts stated above, except she denied any prior knowledge or involvement in the burglary and robbery. Later that night, Blackwell spoke to Detective Joe Riggs at the sheriff's office. In that interview, Blackwell gave the same account.

The next day, Blackwell spoke again with Detective Riggs, who was joined by Officer Max Robeson. At first, Blackwell stuck with her original story and stated she had no involvement with the incident. Once Officer Robeson told Blackwell that the officers did not believe her and discussed her phone records and text messages with Boose, Blackwell admitted her involvement. Blackwell told officers that she was with Defendant and Peak the night of the incident, that Defendant instructed her on what to tell Boose before arriving at his home, and that Defendant instructed her to tie up Boose.

On 21 January 2013 and 29 January 2013, Defendant was charged by warrant with first degree burglary, robbery with a dangerous weapon, assault with a deadly weapon resulting in serious injury, and conspiracy to commit robbery with a dangerous weapon. On 6 March 2013, the Camden County Grand Jury returned a true bill on the same charges.

Defendant's case was called for trial in Camden County Superior Court. On the first day of trial, after a break taken during Blackwell's testimony, the courtroom bailiff alerted the trial court that Juror Number One was taking notes. The trial court then notified counsel that Juror Number One was taking notes. The trial court stated that note taking by jurors was in the court's discretion, and that the court was inclined to allow Juror Number One to continue taking notes, but to prohibit the other jurors, who had not been taking notes, to commence note taking. The trial court asked if there were any objections to his proposed instructions, to which both the State and Defendant's counsel responded in the negative.

When the jury returned, the trial court informed the jury that Juror Number One could continue taking notes and that her notes could be used during deliberation to refresh her memory. Additionally, the trial court instructed the jury, consistent with a pattern jury instruction prepared by the North Carolina Conference of Superior Court Judges, with regard to juror notetaking. Those instructions cautioned against giving notes undue significance, that the notes should not be considered

evidence, and that the notes could only be disclosed to fellow jurors during deliberation. During a break later that morning, the trial court reminded the jurors of the prior instructions regarding note taking.

On 15 October 2014, the jury found Defendant guilty of first degree burglary, robbery with a firearm, and feloniously conspiring to commit robbery with a firearm. The jury found Defendant not guilty of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to a minimum term of 73 months to a maximum term of 100 months for the first degree burglary charge, a minimum term of 73 months to a maximum term of 100 months for the robbery with a firearm charge, and a minimum term of 29 months to a maximum term of 47 months for the conspiracy to commit robbery with a firearm charge. Defendant was also required to pay $19,000.00 in restitution. Defendant appeals his convictions and order to pay restitution.

II. Juror Number One's Notes

Defendant contends the trial court committed plain error by allowing only one juror, Juror Number One, to take notes during Defendant's trial, and by allowing Juror Number One to take the notes into the jury room. We disagree.

The North Carolina Rules of Appellate Procedure state, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C. R. App. P. 10(a)(1). Although plain error

review may apply to some issues on appeal, notwithstanding absence of an objection at trial, plain error review is inapplicable to issues which "fall within the realm of the trial court's discretion." *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000).

"Except where the judge, on the judge's own motion or the motion of any party, directs otherwise, jurors may make notes and take them into the jury room during their deliberations." N.C. Gen. Stat. § 15A-1228 (2015). The general standard of review regarding jurors taking notes is abuse of discretion. *State v. Crawford*, 163 N.C. App. 122, 127, 592 S.E.2d 719, 723 (2004). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Here, the trial court learned after trial testimony had begun that Juror Number One was taking notes. Upon this discovery, the trial court used its discretion and allowed Juror Number One to continue taking notes. The trial court then informed counsel that the court would give the jury instructions with regard to taking notes and would prohibit the other jurors from taking notes. The trial court then invited counsel to make any objections to allowing Juror Number One to continue taking notes, and not allowing the other jurors to commence taking notes. Defendant failed to object. As such, Defendant waived his right to appeal this issue.

Even *assuming arguendo* that Defendant preserved the right to appeal this issue, the trial court did not abuse its discretion in allowing Juror Number One, and only Juror Number One, to take notes. First, it should be noted that the standard of review for this issue is abuse of discretion, not plain error. Jury note taking is a matter within the trial court's discretion, and is, thus, subject to review for abuse of discretion. *Steen*, 352 N.C. at 256, 536 S.E.2d at 18 ("[T]his Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now."). Once alerted that Juror Number One had been taking notes, the trial court instructed the jury consistent with the pattern jury instruction regarding juror notetaking and the use of juror notes. N.C.P.I.–Crim. 100.30 (2011).

The trial court did not abuse its discretion. The trial court made no decision on note taking prior to the beginning of trial. However, upon learning of Juror Number One's notes, the trial court allowed her to continue taking notes. The trial court did not allow other jurors to begin taking notes, as Juror Number One's notetaking was discovered after testimony had begun. The trial court's decision was not manifestly unsupported by reason and was not so arbitrary that it could not have been the result of a reasoned decision. It was reasonable to allow one juror to continue taking notes, since that juror had already commenced note taking. It was not unreasonable to prohibit the commencement of note taking by the other jurors, because they could not make notes capturing all of the trial testimony. Thus, we

hold that even if Defendant preserved this issue for appeal, the trial court did not abuse its discretion.

III. Jury Instructions

Next, Defendant argues the trial court committed plain error by failing to instruct the jury on how to use Juror Number One's notes during its deliberations in the final jury charge. We disagree.

The North Carolina Rules of Appellate Procedure generally do not allow a jury charge or omission therefrom to be the basis of an issue presented on appeal, unless the party objected before the jury retired to consider its verdict. N.C. R. App. P. 10(a)(2). However, in criminal appeals, even without an objection, this Court can review challenges to jury instructions and evidentiary issues for plain error. N.C. R. App. P. 10(a)(4); *see also State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted). In determining whether plain error was committed, this Court examines the entire record and decides whether the instructional error

had a probable impact on the jury's finding of guilty. *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378–79 (1983).

This Court presumes that a jury followed the instructions provided by the trial court. *State v. Smith*, 359 N.C. 199, 214, 607 S.E.2d 607, 619 (2005); *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (1993) (citation omitted); *State v. Young*, 368 N.C. 188, 213–14, 775 S.E.2d 291, 308 (2015) (citation omitted). Moreover, if a trial court gives a certain instruction during the trial, it is not error if the trial court does not repeat the instruction later in the final charge. *See State v. Davis*, 167 N.C. App. 770, 773, 607 S.E.2d 5, 8 (2005) (citing *State v. Hockett*, 309 N.C. 794, 800, 309 S.E.2d 249, 252 (1983)); *see also State v. Spinks*, 24 N.C. App. 548, 551, 211 S.E.2d 476, 478 (1975).

The State argues the Defendant waived his right to appeal this issue. The State contends that because Defendant failed to object to the jury instructions, that Defendant waived any appellant argument regarding the instruction. We disagree. Notwithstanding Defendant's failure to object to the jury instructions at trial, Defendant has not lost his right to appeal this issue. As the North Carolina Supreme Court held in *Lawrence*, the appellate court may review challenges to jury instructions and evidentiary issues for plain error, even absent an objection. 365 N.C. at 516, 723 S.E.2d at 333. Thus, we now review the trial court's jury instructions for plain error.

Here, upon learning that Juror Number One was taking notes, the trial court gave limiting instructions on how the notes were to be used by the jury.[2] Although these instructions were not repeated in the final jury charge, the content of the instructions regarding the use of juror notes in deliberations would have been the same as the instructions previously given. So the omission of these jury instructions in the final jury charge was not error. *See Davis*, 167 N.C. App. at 773, 607 S.E.2d at 8; *see also Spinks*, 24 N.C. App. at 551, 211 S.E.2d at 478. Accordingly, we conclude that the trial court did not commit plain error in its final instructions to the jury.

IV. Order of Restitution

Finally, Defendant argues the trial court committed plain error by ordering Defendant to pay $19,000.00 in restitution when there was no evidence offered to

[2] The trial court's instructions closely followed the pattern jury instructions regarding jury note taking, which do not require that the judge repeat the instructions in the closing charge to the jury. N.C.P.I. § 100.30. Specifically, the trial court gave the following instructions:

> With regard to the juror who is taking notes, I need to give you the following instructions and that is that when you begin your deliberations you may use your notes to help refresh your memory as to what was said in court. I do caution you, however, not to give your notes or the notes of any other jurors any undue significance. While taking notes a juror may fail to hear important portions of the testimony. Any notes taken by you are not to be considered evidence in this case. Your notes are not an official transcript of the trial, and for that reason you must remember that in your jury deliberation – deliberations, notes are not to be entitled to any greater weight than individual recollection of other jurors.
>
> If you do take notes, which you are, and you may continue to take notes, you may disclose them only to your fellow jurors during your deliberations. You're not to show them to anyone else, and while I permit you to take notes, I want to instruct you to please listen intently at all times to the testimony.

support the award of restitution. The State concedes that the evidence provided for the amount of restitution is insufficient under North Carolina law. We agree.

Even without a specific objection, "the trial court's entry of an award of restitution . . . is deemed preserved for appellate review . . . ." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (citations omitted). "A trial court's judgment ordering restitution 'must be supported by evidence adduced at trial or at sentencing.'" *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)). This issue is reviewed *de novo* on appeal. *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011).

For an order of restitution to be supported by evidence, the amount cannot be based on "guess or conjecture." *State v. Daye*, 78 N.C. App. 753, 758, 338 S.E.2d 557, 561 (1986). Furthermore, "a restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010) (citation omitted). If an order of restitution is not supported by sufficient evidence, the proper remedy is to vacate the part of the judgment regarding restitution. *Daye*, 78 N.C. App. at 754, 338 S.E.2d at 559.

In the instant case, Defendant failed to object to the trial court's award of restitution. However, Defendant's right to appeal this issue is not lost. *Shelton*, 167

N.C. App. at 233, 605 S.E.2d at 233. The trial court ordered Defendant to pay restitution in the amount of $19,000.00. The only references to $19,000.00 being taken from Boose are in the warrant, indictment, and a Restitution Worksheet submitted by the State. There was no testimony at trial or at the sentencing hearing regarding exactly how much money Defendant and his co-conspirators took from Boose. Boose testified that the men took some money from his home, but Boose never testified as to the amount taken. Then, at sentencing, the State submitted a Restitution Worksheet requesting $19,000.00 of restitution.

Under controlling case law, this evidence is insufficient to support an award of restitution. Therefore, we vacate the order of restitution and remand to the trial court for a new hearing to determine the appropriate amount of restitution.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges ELMORE and McCULLOUGH concur.

Report per Rule 30(e).