IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-2

Filed: 18 October 2016

Johnston County, No. 13 CRS 055281

STATE OF NORTH CAROLINA,

v.

ANTHONY RAY SOLOMON, Defendant.

Appeal by Defendant from judgment entered 21 January 2015 by Judge Charles H. Henry, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 11 May 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for Defendant-Appellant.

INMAN, Judge.

Evidence of a sex offender's conviction in 1987 and a judgment sentencing him to a minimum of 12 years in prison was sufficient to prove that the offender was released from prison after the effective date of the sex offender registration statute and thus was required to register and to notify the sheriff when his address changed.

Anthony Ray Solomon ("Defendant") appeals from his conviction following a jury trial for failure to report his change of address to update the sex offender registry.

He contends that the trial court erred by denying a motion to dismiss the charge for insufficient evidence and by erroneously instructing jurors regarding the elements of the offense. After careful review, we hold that the trial court did not err in denying the motion to dismiss and that Defendant has failed to demonstrate plain error in the jury instructions.

Factual & Procedural Background

The State's evidence at trial tended to show the following:

Defendant was found guilty of second-degree rape in 1987 and sentenced to a prison term of 12 to 40 years. More than 25 years later, on 10 December 2012, Defendant visited the Johnston County Sheriff's Office to update his residential address for the state sex offender registry. On 29 April 2013, Defendant again visited the Johnston County Sheriff's Office to verify his residential address for the state sex offender registry. Captain Chris Strickland of the Johnston County Sheriff's Office, who is responsible for enforcing state sex offender registry laws in that county, personally met with Defendant on both occasions.

In August 2013, Defendant was placed on supervised probation for a criminal conviction and was assigned to probation officer Brian Burrell.[1] Officer Burrell's duties included visiting Defendant at his residence at least once a month. Defendant

[1] The conviction underlying Defendant's probationary sentence, which was excluded from evidence and not disclosed to the jury, was for attempting to obstruct justice in November 2012. Defendant pleaded guilty to that offense on 26 August 2013 after being charged with failing to register as a sex offender.

provided Officer Burrell with the same address on Strickland Drive that Defendant had provided for the sex offender registry. Officer Burrell told Defendant to expect a visit at his residence and also instructed Defendant to report to Officer Burrell's office on 27 September 2013.

Officer Burrell visited the Strickland Drive address several times in September 2013 seeking to meet with Defendant. Defendant was never there. During the fourth visit, Defendant's aunt and grandmother, who lived at the house, told Officer Burrell that Defendant had not lived at the address since being placed on probation and that Defendant had not visited the address in the past couple of weeks. Officer Burrell reported this information to Captain Strickland and filed a probation violation report alleging that Defendant failed to live at the address reported to and approved by his probation officer. Defendant reported for the scheduled office visit on 27 September 2013 and was arrested for violating the terms of his probation.

Defendant was indicted on 12 November 2013, and in superseding indictments on 3 November 2014 and 2 December 2014,[2] on a charge of failing to report his change

[2] The final indictment alleged not only that Defendant had failed to appear in person and provide written notification to the local sheriff of Defendant's change of address, but also that Defendant "did forge and submit under false pretenses the information and verification notice required . . ." by verifying to the sheriff's office that he was moving to the Strickland Drive address. However, the final indictment did not refer to N.C. Gen. Stat. § 14-208.11(a)(4), which delineates this specific offense and the State did not prosecute Defendant for providing a false address.

of address for the sex offender registry in violation of N.C. Gen. Stat. § 14-208.11 (A)(2).[3]

At trial, the State introduced evidence through the testimony of Officer Burrell, Captain Strickland, and Defendant's aunt and grandmother. Defendant presented no evidence.

Defendant's counsel moved to dismiss the charge at the close of the State's evidence on three grounds: "one, that the indictment is defective; two, that the evidence is insufficient as to each and every element of the crime charged; and three, we allege there is a fatal variance between the evidence presented and the indictment." Defense counsel declined the trial court's invitation to present argument on the motion. The trial court denied the motion.

The trial court instructed the jury on the elements of the charged offense, including that Defendant had previously been convicted of a reportable offense for which he was required to register as a sex offender. The trial court instructed the jury, without objection by Defendant's counsel, that "[i]f you find beyond a reasonable [doubt] that on February 5, 1987, in Johnston County Criminal Superior Court, the Defendant was convicted of second-degree rape, then this would constitute a

[3] Defendant was simultaneously indicted on a charge of having attained the status of a habitual felon as defined by N.G. Gen. Stat. § 14-7.1. Jurors were not informed of that charge during the trial and following the return of their verdict of guilty for failing to provide an accurate address for the sex offender registry, Defendant admitted having attained habitual felon status as part of a plea arrangement. Defendant's status as a habitual felon is not at issue on appeal.

reportable offense for which the Defendant must register." The trial court also instructed the jury, without objection by Defendant's counsel, that another element of the offense was that "the Defendant willfully changed address and failed to provide written notice of the Defendant's new address . . ." to the sheriff's office within three days of moving.

The jury returned a verdict of guilty. Defendant was sentenced to a prison term of 77 to 105 months. Defendant appeals.

Analysis

Defendant was convicted of violating N.C. Gen. Stat. § 14-208.11(a)(2) (2013), which provides that a person who is required to register as a sex offender commits a felony if he fails to update his address with the local sheriff with whom he last registered.

I. Motion to Dismiss

Defendant contends that because the State failed to present sufficient evidence that his conviction for second-degree rape in 1987, nine years before the sex offender registration statute became effective, was a "reportable conviction" within the scope of the statute, the trial court erred in denying his motion to dismiss the charge for insufficiency of the evidence. We disagree.

A. Appellate Jurisdiction

The State contends that Defendant failed to preserve this issue for appeal because Defendant's counsel did not present the argument to the trial court. Defendant's motion to dismiss for grounds including insufficiency of the evidence served to preserve this issue, even though counsel did not articulate the specific argument presented on appeal. *See State v. Pender*, ___ N.C. ___, ___, 776 S.E.2d 352, 360 (2015) (holding that an insufficiency of the evidence argument was preserved for appeal for all charges when defense counsel only specifically discussed insufficiency of the evidence for one charge, but argued that the State "ha[d] not met their burden[]"); *see also State v. Mueller*, 184 N.C. App. 553, 559, 647 S.E.2d 440, 446 (2007) (holding that the defendant did preserve his right to appeal sufficiency of the evidence as to all thirty-six charges even though defense counsel presented specific arguments to the trial court as to only five of the charges). So long as the specific argument falls within the general theory of insufficiency of the evidence in a criminal case, we will not hold that a defendant has attempted to "swap horses between courts in order to get a better mount." *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002). Consequently, we address the merits of Defendant's arguments.

B. Standard of Review

This Court reviews the trial court's denial of a motion to dismiss *de novo*. *Pender* at ___, 776 S.E.2d at 360. Upon a defendant's motion for dismissal, the question for the trial court is whether there is substantial evidence (1) of each

essential element of the offense charged, or of a lesser offense included therein, and (2) of the defendant's being the perpetrator of such offense. *Id.* at __, 776 S.E.2d at 360 (citation omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate . . . , or would consider necessary to support a particular conclusion." *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (internal quotation marks and citations omitted). In this determination, all evidence is considered "in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *Id.* at 412-13, 597 S.E.2d at 746.

C. Sufficiency of the Evidence of a Reportable Conviction

The crime of failure by a sex offender to notify the appropriate sheriff of the offender's change of address contains three essential elements: (1) the defendant is a person required to register; (2) the defendant changed his address; and (3) the defendant failed to notify the sheriff of his new address within the statutory deadline. *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009), *superseded on other grounds by statute* (citations omitted). The crime is a creature of statute – Chapter 14, Article 27A of the North Carolina General Statutes – enacted by the General Assembly in 1995 and known as the Amy Jackson Law. 1995 N.C. Sess. Law 545. The statutes within Article 27A became effective 1 January 1996 and apply "to all

persons convicted on or after that date, and to all persons released from a penal institution on or after that date. *Id.*, § 3.

Defendant argues that the State failed to present evidence that he was required to register as a sex offender, because his rape conviction pre-dated the sex offender registration statutes and because the State presented no evidence that Defendant remained in prison for that conviction on or after the effective date of the statutes. We disagree.

The judgment of conviction, which was admitted into evidence, reveals that Defendant was sentenced to serve a minimum of a dozen years in prison in 1987. This evidence was sufficient to allow a reasonable inference that Defendant remained in prison eleven years later when the amended sex offender statute became effective, so that Defendant was required to register as a sex offender. Also, the evidence that Defendant twice reported to the Johnston County Sheriff's Office to update his address for the sex offender registry would allow the reasonable inference that Defendant was required to register.

In *State v. Holmes*, 149 N.C. App. 572, 562 S.E.2d 26 (2002), this Court found no error in the trial of a defendant convicted for failing to register as a sex offender based upon convictions in 1991 for taking indecent liberties with a minor. The defendant challenged whether the State had produced substantial evidence that he was required to register as a sex offender. *Id.* at 577, 562 S.E.2d at 31. This Court

noted that the State had submitted into evidence "two court files containing judgments entered against defendant . . . for taking indecent liberties with a minor" and held that the court files were sufficient to establish that the defendant was a sex offender required to register. *Id*. at 578, 562 S.E.2d at 31. So it follows that in this case, the 1987 judgment of conviction reflecting the offense and the sentence was sufficient to satisfy the element that Defendant had a prior reportable conviction requiring him to register as a sex offender.

Defendant argues that the Fair Sentencing Act, which applied to his rape sentence, could have allowed him to be released earlier than 1996. We are not persuaded. Even if there were evidence suggesting that Defendant obtained an early release – there is none – when reviewing the trial court's denial of Defendant's motion to dismiss, this Court must allow the State the benefit of every reasonable inference. *Garcia*, 358 N.C. at 412-13, 597 S.E.2d at 746.

II. Jury Instructions

Defendant argues that the trial court committed plain error by instructing jurors that Defendant's prior conviction required him to register as a sex offender and by misplacing the word "willfully" with regard to the notification element of the charge. Considering the challenged instructions in light of all the jury instructions and the entire record, we hold that any error in the jury instructions did not rise to the level of plain error.

A. Appellate Jurisdiction

Defendant's trial counsel did not object to the jury instructions he challenges on appeal and expressed agreement to the instructions, subject only to his motion to dismiss the charge. The State argues that Defendant therefore waived his right to challenge any of the instructions. Defendant argues that errors in the instructions violated his constitutional right to due process and constituted plain error. Rule 10(a)(4) of the North Carolina Rules of Appellate Procedure provides:

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

We therefore review the challenged instructions for plain error.

B. Standard of Review

To establish plain error, a defendant must show that the erroneous jury instruction was a fundamental error that 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). The erroneous instruction must be viewed in light of the entire record. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

C. Peremptory Instruction That Defendant's Prior Conviction was Reportable

Defendant argues that in the case of a sex offender who was convicted prior to 1 January 1996, the effective date of the sex offender registration statutes, the State

must prove that the sex offender was released from a prison sentence for the sex offense after that date, because otherwise the offender would not be required to register at all. In any criminal case of a defendant whose release date from prison determines whether he is subject to a criminal statute, the defendant's date of release from prison is a factual issue and should to be determined by the jury. However, neither this Court nor the North Carolina Supreme Court has previously delineated this rule with respect to the sex offender registration statutes. It appears that this issue was not raised by the defendant in *State v. Holmes*, who, like Defendant here, was subject to the sex offender registry as a result of his release date from prison as opposed to the date of his sex offense. *Holmes*, 149 N.C. App. 572, 562 S.E.2d 26.

The 1987 judgment of conviction sentencing Defendant to a prison term of 12 to 40 years provided ample support for jurors to find that Defendant remained in prison for rape 11 years later when the sex offender registration statutes became effective. Based on this evidence, assuming *arguendo* that the trial court erred in not submitting this factual issue to the jury, the error did not have a probable impact on the jury's verdict. Further, because Defendant's counsel advised the trial court during sentencing that Defendant had served "twenty-some years" in prison following his rape conviction, it is clear from the record that Defendant was not prejudiced by the instruction given.

D. Jury Instruction Regarding Failure to Notify Sheriff of a Changed Address

Defendant's final argument is that the trial court committed plain error in its instruction to jurors regarding the failure to report a change of address because the pattern jury instruction, which the trial court followed, misplaced the word "willfully" in a manner that relieved the State of its burden of proof. We agree with Defendant that the pattern instruction does not track the statutory language that more explicitly applies the term "willfully" to the defendant's failure to give notice of an address change. But a review of the entire record, including the entirety of the jury instructions and evidence that Defendant was well aware of the requirement to update his address, precludes him from demonstrating plain error.

N.C. Gen. Stat. § 14-208.11(a) provides that a person required to register who "willfully does any of the following is guilty of a Class F felony: . . . [F]ails to notify the last registering sheriff of a change of address as required by this Article." N.C. Gen. Stat. § 14-208.11(a)(2) (2015). The trial court instructed jurors in conformity with Pattern Criminal Instruction 207.75 that to find Defendant guilty, they must find that he was a resident of North Carolina, that he had been convicted of a reportable offense for which he was required to register as a sex offender, and that "the Defendant willfully changed address and failed to provide written notice of the Defendant's new address, in person, at the sheriff's office . . . ." The statute clearly requires the State to prove not only that a defendant failed to update his address, but that he willfully failed to do so. N.C. Gen. Stat. § 14-208.11(a)(2). The portion of the

pattern instruction challenged by Defendant does not track the statutory language verbatim and does not specify whether the adverb "willfully" modifies not only the verb phrase "changed address" but also the verb phrase "failed to provide written notice of the Defendant's new address."

This Court recently addressed this very issue in an unpublished decision earlier this year, *State v. Knight*, ___N.C. App. ___, 787 S.E.2d 464, 2016 WL 2648704 (2016) (unpublished), which in turn referenced a similar unpublished decision, *State v. Simpson*, 218 N.C. App. 201, 721 S.E.2d 407, 2012 WL 123860 (2012) (unpublished) addressing the same issue. The defendants in both the *Knight* and the *Simpson* cases appealed from their convictions for failing to notify the local sheriff of their addresses for the sex offender registry, and both argued, as Defendant argues here, that the word "willfully" was misplaced in the pattern instruction. The Court in *Simpson* dismissed the appeal because the defendant had not preserved the error and did not argue that it was plain error. 218 N.C. App. at 201, 2012 WL 123860, at *2-3. The Court in *Knight* held that Defendant had failed to demonstrate plain error:

> Even assuming, without deciding, that the word 'willfully' is misplaced in the pattern instruction, we believe a reasonable jury would still have understood the instruction to require that the State show both that defendant willfully changed his address and willfully failed to provide written notice of the change. The instruction does not make sense if read otherwise.

___ N.C. App. at ___, 2016 WL 2648704, at *7. Because it is unpublished, the *Knight* decision is non-binding. However, we find the Court's analysis in that case instructive as we consider the identical issue – although not an identical record – in this case.

Assuming without deciding that the instruction was error, Defendant is entitled to relief only if this Court concludes that the instruction had a probable impact on the jury's guilty verdict.

> [T]he plain error rule . . . 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 the error has 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'

Walker, 316 N.C. at 39, 340 S.E.2d at 83 (quoting *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983)) (emphasis in original). "In other words, the appellate court must determine that the error in question 'tilted the scales' and caused the jury to convict the defendant." *Id.* at 39, 340 S.E.2d at 83 (quoting *Black*, 308 N.C. at 741, 303 S.E.2d at 807).

Here, the State produced evidence that Defendant's failure to report his changed address was willful, so it is not probable that if given instructions that

expressly emphasized that element of the offense, the jury would have reached a different verdict. Defendant had provided the sheriff's office with written verification of his address for the sex offender registry on two occasions before September 2013, when authorities discovered he did not live at the last reported address and had failed to provide an accurate change of address.

Assessing the probable impact of an error in jury instructions also requires considering the erroneous instruction in the context of all instructions provided. *State v. Roache*, 358 N.C. 243, 311, 595 S.E.2d 381, 424 (2004). Another portion of the pattern instruction given by the trial court stated that "the Defendant has been charged with willfully failing to comply with the sex offender registration law." Defendant's trial counsel also reminded jurors in his closing argument that they had to find Defendant not guilty unless they were persuaded beyond a reasonable doubt that he had "willfully" violated the law.

In sum, Defendant's argument that the placement of the word "willfully" in the jury instruction caused the jury to find him guilty is speculative and insufficient to meet the plain error standard.

Conclusion

The State presented sufficient evidence to support Defendant's conviction for failing to notify the sheriff of his changed address. Although the trial court's

instructions were erroneous, we hold that Defendant has not shown error that had a probable effect on the jury's guilty verdict.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges ELMORE and MCCULLOUGH concur.

Report per Rule 30(e).