IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1090

Filed: 16 May 2017

Pitt County, No. 14CRS056115

STATE OF NORTH CAROLINA

v.

LEE V. BOYD, Defendant.

Appeal by Defendant from judgment entered 21 March 2016 by Judge Alma L. Hinton in Pitt County Superior Court. Heard in the Court of Appeals 6 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General William P. Hart, Jr., for the State.

W. Michael Spivey for the Defendant.

DILLON, Judge.

Lee V. Boyd ("Defendant") appeals from a judgment convicting him of failing to report a new address by a registered sex offender. After careful review, we find no error.

I. Background

In August 2007, Defendant was convicted of attempted second degree kidnapping, which the court found to be "a reportable conviction involving a minor." As a result, Defendant was required to maintain registration on the North Carolina Sex Offender and Public Protection Registry.

In September 2012, Defendant was released from prison. Upon his release, Defendant registered as a sex offender under a certain address ("Registered Address") in Greenville.

In July 2014, a detective from the Pitt County Sheriff's Office visited the Registered Address on four separate occasions to verify Defendant's residency. However, Defendant was not present during any of the detective's visits. On his first visit, the detective was told by Defendant's uncle and grandmother that Defendant had been staying at the Registered Address roughly two to three nights per week. On the last visit, the detective was informed by Defendant's uncle that Defendant had spent only one night at the Registered Address during the entire month. Subsequently, Defendant was arrested and charged for failing to report a new address by a registered sex offender in violation of N.C. Gen. Stat. § 14-208.11.

A jury found Defendant guilty of willful failure to report a change of address "as a person required by Article 27A of Chapter 14 of the General Statutes to register." Defendant gave notice of appeal in open court.

II. Analysis

Defendant was convicted of violating N.C. Gen. Stat. § 14-208.11(a)(2) (2015), 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.

Defendant contends that he should be granted a new trial as the trial court: (1) improperly admitted testimony of a law enforcement officer and (2) erroneously instructed the jury that attempted second degree kidnapping is a reportable offense. Alternatively, Defendant avers that his conviction should be vacated as there was insufficient supporting evidence. We address these arguments in turn.

A. No Plain Error In Admitting Police Testimony

Defendant asserts that the trial court's admission and failure to strike, *ex mero motu*, an officer's testimony regarding non-existent provisions of N.C. Gen. Stat. § 14-208, the statute governing the registration of sex offenders, constitutes plain error. We disagree.

To prevail on plain error review, Defendant must demonstrate that absent the officer's testimony "the jury *probably* would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citations and internal quotation marks omitted; emphasis added).

A conviction for failing to comply with the change of address requirements for a registered sex offender under N.C. Gen. Stat. § 14-208.11 requires proof beyond a

reasonable doubt that: "(1) the defendant is a person required to register; (2) the defendant changes his or her address; and (3) the defendant fails to notify the last registering sheriff of the change of address within three business days of the change." *State v. Barnett*, 223 N.C. App. 65, 69, 733 S.E.2d 95, 98 (2012) (citations omitted).

On appeal, Defendant contends that the officer testified incorrectly that the law does not permit a registered offender to spend more than four days per month or fourteen days per year away from his registered residence and that this testimony gave the jury an incorrect basis upon which to decide whether Defendant had changed his address without notifying authorities. Defendant acknowledges that he did not preserve this issue for appeal by making a timely objection pursuant to N.C. R. App. P. 10(a)(1). Accordingly, Defendant requests that this Court review for plain error pursuant to N.C. R. App. P. 10(a)(4).

Assuming, *arguendo*, that admitting, and failing to strike, the testimony at issue was error, it does not rise to the level of plain error because the overwhelming evidence at trial indicated Defendant had changed his address. Specifically, the testimonies of Defendant's uncle and the detective indicate Defendant spent only one night at the Registered Address over the course of a three week period in July 2014, that Defendant's family residing at the Registered Address did not know where he was staying during that period, and that Defendant had stopped regularly living at the Registered Address. Accordingly, Defendant has not demonstrated that absent

the officer's testimony concerning the law, "the jury probably would have reached a different verdict." *See Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (citations and internal quotation marks omitted). Therefore, Defendant's assignment of error is overruled.

B. No Plain Error in Jury Instruction

Defendant next asserts the trial court committed error in instructing the jury as to the second element of failing to report a change of address by a sex offender, that the Defendant had been convicted of a reportable offense for which the Defendant must register. As with the previous issue, Defendant acknowledges he did not make a timely objection to the jury instruction to preserve the issue for appeal pursuant to N.C. R. App. P. 10(a)(1). Accordingly, Defendant requests that this Court review for plain error pursuant to N.C. R. App. P. 10(a)(4).

Defendant asserts the trial court erred by instructing the jury that they could find that Defendant had been previously convicted of a reportable offense *if* they found that "on August 10th of 2007, in Pitt County Superior Court, the Defendant was convicted of attempted second degree kidnapping[.]" Specifically, Defendant contends that attempted second degree kidnapping is only a reportable offense if the victim was (1) not his child, and (2) the victim was a minor. *See* N.C. Gen. Stat. § 14-208.6(1m) (defining an "offense against a minor" for sex offender registration purposes). Defendant ultimately contends that the jury instruction did not require

the jury to find that the victim was not Defendant's child and that the victim was a minor.

After carefully examining the record, we note that any error that may exist in the disputed jury instructions was invited by Defendant. A "defendant is not prejudiced by . . . error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2013). Therefore, "a defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error, including plain error review." *State v. Barber,* 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (citation omitted). "Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal." *State v. White,* 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998) (citation omitted); *see also State v. Wilkinson*, 344 N.C. 198, 235-36, 474 S.E.2d 375, 396 (1996) (holding that error was invited when defendant consented to the manner in which the trial court gave instructions to the jury.)

Here, Defendant's trial counsel expressly stated during closing arguments:

> Secondly, the Defendant had previously been convicted of a reportable offense for which he must register. And the Judge is going to tell you that attempted second degree kidnaping [sic] is a registerable offense. I told you that at the beginning. . . . I'm not arguing with it. It's clear as day.

Additionally, during the charge conference, Defendant's trial counsel consented to the instruction regarding attempted second degree kidnapping being a reportable offense.

Further, at his trial convicting him of attempted second degree kidnapping, the trial court found that the conviction was a reportable offense, a finding that Defendant never appealed. "[W]hen a fact has been . . . decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed." *State v. Dial*, 122 N.C. App. 298, 305, 470 S.E.2d 84, 89 (1996) (citation omitted).

This assignment of error is overruled.

C. No Error in Denying Motion to Dismiss

Finally, Defendant asserts the trial court erred in denying his motion to dismiss. Defendant argues there was insufficient evidence presented at trial that Defendant was a person required to register under the Sex Offender and Public Protection Registration Programs, N.C. Gen. Stat. § 14-208. For the foregoing reasons, Defendant has waived this assignment of error.

Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount' " in the appellate courts. *State v. Sharpe,* 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring,* 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). According to Rule of Appellate Procedure 10, in order to preserve a question for appellate review, the party must state the specific grounds for the ruling the party desires the court to make. N.C. R. App. P. 10(a)(1) (2016).

"The defendant may not change his position from that taken at trial to obtain a 'steadier mount' on appeal." *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (1991) (citation omitted).

Here, the motion to dismiss was heard in the trial court and defense counsel stated the following:

> At the close of the State's evidence, I would move for the Court to dismiss the charge for failing to report a new address as a sex offender. Even in the light most favorable to the State, the State has not shown there was a new address. In fact, their main witness, [Defendant's uncle], came up and said he in fact was living there. So I think that even taking all the evidence in the light most favorable to the State, it doesn't add up to failing to report a new address as a sex offender. And I'd ask the Court to dismiss it.

Our reading of Defendant's trial counsel's argument, viewed in context, shows that Defendant's motion to dismiss was based entirely on an argument that the State failed to prove the second element of the charged offense, that Defendant had changed his address. For the first time on appeal, Defendant argues insufficient evidence that he was a person who was required to register at all. Because Defendant presents a different theory on appeal than argued at trial, Defendant's assignment of error as to his motion to dismiss was not properly preserved. N.C. R. App. P. 10(a)(1). Therefore, Defendant's assignment of error is waived.

NO ERROR.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).