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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-836

Filed: 6 June 2017

Union County, Nos. 14 CRS 53012, 53027

STATE OF NORTH CAROLINA

v.

ALEXANDER PAUL SAINT CLAIR

Appeal by defendant from judgments entered 3 March 2016 by Judge Ted S. Royster in Union County Superior Court. Heard in the Court of Appeals 8 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Derek L. Hunter, for the State.

Jeffrey William Gillette for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from judgments entered upon his convictions for first degree burglary, robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and safecracking. We find no error in part, vacate in part, and remand for a new hearing on sentencing and restitution.

The evidence at trial established the following factual background. At around 10:30 p.m. on 5 June 2014, Jennell and William Curd were sitting in their living room

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when three young men entered their home through the back door. The three men brandished guns, were dressed in black, and had covered their faces with masks. Two men stayed near the Curds while the third retrieved a small safe from the Curds' bedroom. The men then left the Curds' house quickly; the entire incident took a minute or less. A fourth man stayed in a car during the robbery.

After retrieving the safe, the men jumped in the waiting car and drove away. One of the men, Nicholas Upton, was able to open the safe by pulling on the handle. Mr. Upton testified that the safe contained cash and old coins. The men divided the money and Mr. Upton received approximately \$700 to \$800, after using part of his share of the money to pay a debt that he owed one of his co-defendants. Mr. Upton turned himself into the police about two weeks later and provided the investigating officers with information that led to defendant's arrest.

At the time of the incident, defendant and his wife were living in West Columbia, South Carolina. Defendant testified that on the evening of 5 June 2014, he returned home around 8:30 p.m. and that his wife arrived home around 9:00 p.m. Both defendant and his wife testified that they made dinner, watched television, and went to bed that night.

Defendant was indicted on charges of first-degree burglary, robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and safecracking. A jury found defendant guilty of all four charges. The trial court

sentenced defendant to consecutive terms of 64-89 months' and 25-42 months' imprisonment. Defendant gave notice of appeal in open court.

I. Safecracking Conviction

Defendant argues, and the State concedes, that the trial court's instructions to the jury on the offense of safecracking allowed the jury to convict defendant on a theory of the offense that was materially different from the allegations of the indictment. Defendant and the State agree that this constitutes a fatal variance between the indictment and the jury charge. *See State v. Watson*, 272 N.C. 526, 527, 158 S.E.2d 334, 335 (1968) ("It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegation and proof must correspond.")

The means by which a defendant opens a safe is an essential element of the offense of safecracking. *State v. Ross*, ___ N.C. App. ___, ___, 792 S.E.2d 155, 158 (2016). N.C. Gen. Stat. § 14-89.1 (2015) defines the offense of safecracking as follows:

(a) A person is guilty of safecracking if he unlawfully opens, enters, or attempts to open or enter a safe or vault:

- (1) By the use of explosives, drills, or tools; or
- (2) Through the use of a stolen combination, key . . . or other fraudulently acquired implement or means; or
- (3) Through the use of a master key, duplicate key or device made or obtained in an unauthorized manner . . . or other surreptitious means; or
- (4) By the use of any other safecracking implement or means.

(b) A person is also guilty of safecracking if he unlawfully

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removes from its premises a safe or vault for the purpose of stealing, tampering with, or ascertaining its contents.

In this case, the indictment alleged that defendant unlawfully, willfully and feloniously did “attempt to open and enter, and did open and enter, a safe which was the property of Jennell Curd . . . *by the following means: use of tools.*” (emphasis added). However, the trial court instructed the jury that it could find defendant guilty if the State proved that he removed the safe from its premises “for the purpose of either stealing, tampering with or ascertaining the contents of the safe[.]” Thus, defendant was charged with safecracking by use of tools, but the jury was instructed on a different theory of safecracking - removing the safe from its premises for the purpose of stealing its contents. *See* N.C. Gen. Stat. § 14-89.1(a)(1), (b) (2015). We agree with the parties that there was a fatal variance between the allegations in the indictment for safecracking and the trial court’s instructions to the jury on this offense, because there was a material difference between the offense charged in the indictment and the offense contained in the trial court’s jury instruction. *See Ross*, ___ N.C. App. at ___, 792 S.E.2d at 158-59.

As defendant failed to object to the jury instruction at trial, we review the trial court’s instruction for plain error. Plain error is an error that is “so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation omitted). Under the plain error rule, the defendant must establish not only that there was

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error, but that absent the error, the jury probably would have reached a different result. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

The record is devoid of any evidence that the Curds' safe was opened by use of tools. Indeed, Mr. Upton testified that he pulled the safe open with his hands. Therefore, if the jury had been instructed on the theory of safecracking alleged in the indictment, it could not have found defendant guilty. "This is precisely the prejudice required to show plain error: that, but for the erroneous instruction, the jury likely would have reached a different result." *Ross* at ___, 792 S.E.2d at 160. Because the trial court plainly erred in instructing the jury on the charge of safecracking, we must vacate defendant's conviction. In addition, we remand this case to the trial court for resentencing, because defendant's safecracking conviction was consolidated for judgment with his conspiracy conviction. *See State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) (holding that when offenses are consolidated for judgment, the proper procedure is "to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated").

Defendant also argues that the trial court erred in denying his motion to dismiss the charge of safecracking. Given our disposition above, we need not reach this argument. Defendant has not raised any other arguments related to his trial, and we therefore find no error as to his remaining convictions.

II. Restitution

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Next, defendant argues, and the State concedes, that the trial court erred by entering a restitution award in the amount of \$4,745. Defendant contends that the amount of restitution is not supported by the evidence. We agree.

“The amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing.” *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777 (2010). To justify an order of restitution, “there must be something more than a guess or conjecture as to an appropriate amount of restitution.” *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 399 (1997) (internal quotation omitted). This Court has held that “[a] restitution worksheet, unsupported by testimony, documentation, or stipulation, is insufficient to support an order of restitution.” *Mauer*, 202 N.C. App. at 552, 688 S.E.2d at 778 (citation omitted).

The evidence shows that a safe was stolen from the Curds’ residence, which contained cash, a coin collection, and currency from other countries. At sentencing, the State submitted a restitution worksheet requesting restitution in the amount of \$4,745. The only document supporting the award was the restitution worksheet, which is insufficient to support a restitution award. *See id.* at 348, 703 S.E.2d at 927. Accordingly, the trial court’s restitution award is not supported by the evidence, and we must remand this case for the trial court to determine the amount of restitution.

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

Judges BRYANT and DAVIS concur.

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Report per Rule 30(e).