IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-357

Filed: 7 November 2017

Brunswick County, No. 13CRS1660-64, 13CRS701341

STATE OF NORTH CAROLINA

v.

PIERRE JAMAR WALKER, Defendant.

Appeal by Defendant from judgments entered 24 November 2014 by Judge Gale M. Adams in Brunswick County Superior Court. Heard in the Court of Appeals 6 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Hal F. Askins, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for Defendant-Appellant.

MURPHY, Judge.

Pierre Jamar Walker ("Defendant") appeals from his convictions for second-degree murder, hit and run leaving the scene of an accident causing property damage ("hit and run"), habitual impaired driving, driving while license revoked ("DWLR"), careless and reckless driving, and exceeding the posted speed limit. He

argues the trial court erred by: (1) entering judgment on the hit and run charge, even though the trial court failed to instruct the jury on the charge; (2) imposing costs and attorney's fees as a civil judgment without giving Defendant notice and opportunity to be heard as to the final amount to be imposed; and (3) indicating Defendant had 13 prior record points on the judgment and commitment for habitual impaired driving, even though two of the convictions assigned points were also used to support the conviction for habitual impaired driving. We agree, and vacate both the jury verdict on the hit and run charge and the civil judgment. We remand for resentencing on the charges that were consolidated with the hit and run charge, and for correction of the clerical error.

Background

On 22 February 2013, Defendant was involved in two separate vehicle crashes, one causing the death of another driver, which resulted in his being charged with the following motor vehicle related offenses: second-degree murder, habitual impaired driving, felony death by motor vehicle, multiple counts of DWLR, two counts of reckless driving, exceeding the posted speed limit, fictitious registration, failure to reduce speed to avoid an accident, hit and run, failure to report an accident, and the infraction of failing to maintain lane control.

Defendant's trial began on 17 November 2014. The trial court granted the State's motion to join all of the motor vehicle related offenses as being based on a

series of acts or transactions. At the close of its evidence, the State voluntarily dismissed one count of DWLR, failure to reduce speed to avoid an accident, one count of reckless driving, failure to report an accident, and the infraction of failing to maintain lane control. The State made it clear it was proceeding on the hit and run charge in case 13CRS701341. At the charge conference, the hit and run charge was only indirectly discussed. The trial court then neglected to instruct the jury on any elements of the hit and run charge. Nonetheless, the jury was given a verdict sheet on the hit and run charge, in addition to verdict sheets on all remaining charges. The jury returned a guilty verdict on all charges, including the hit and run charge in case 13CRS701341.

The trial court found Defendant was a prior record level IV offender, with 13 record points, for the purposes of sentencing, and determined Defendant should be sentenced in the aggravated range for the felony convictions.[1] The trial court arrested judgment on the felony death by vehicle conviction, and sentenced Defendant as follows: 270 to 336 months for second-degree murder; 31 to 47 months for habitual impaired driving, to run consecutively at the expiration of the sentence for second-degree murder; and 75 days to run after the expiration of the sentences for the remaining offenses, which were consolidated for sentencing.

[1] Prior to trial, Defendant admitted the existence of aggravating factors 12 and 12a, concerning his pretrial release and prior probation violations. Defendant also stipulated to aggravating factor 8, that he "knowingly created a great risk of death to more than one person by a means of a weapon or device which would normally be hazardous to the lives of more than one person."

The trial court ordered that costs and attorney's fees would be entered as a civil judgment, and, as Defendant's counsel had not yet totaled the hours on the case, Defendant's counsel could submit his fee application later. Defendant gave oral notice of appeal in open court, timely appealing his criminal convictions. The trial court entered the final fee application and judgment on 8 December 2014. Defendant did not file timely written notice of appeal for our Court to enable review of the civil judgment; however, in our discretion, our Court granted writ of certiorari to review the costs and attorney's fees order and the civil judgment entered thereon.

Analysis

I. Failure to Instruct the Jury on the Hit and Run Charge

As the State concedes, Defendant correctly argues the trial court dismissed the charge of hit and run as a matter of law by failing to instruct the jury on the charge. Nevertheless, Defendant did not preserve this issue on appeal by objecting to the trial court's failure to provide an instruction on the hit and run charge at trial. *See* N.C.R. App. P. 10(a)(1) (2014) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Defendant did not attempt to cure this deficiency by specifically and distinctly alleging plain error on appeal. *See State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) ("In limited situations, this

Court may elect to review such unpreserved issues for plain error, if specifically and distinctly contended to amount to plain error in accordance with [North Carolina Rule of Appellate Procedure] 10(c)(4).”). However, North Carolina Rule of Appellate Procedure Rule 2 provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2 (2014).

Although Defendant failed to specifically and distinctly allege plain error on appeal, he argued the issue fully and established conclusively that the failure to instruct the jury on a charge amounts to a fundamental error, and cited to cases wherein our Court previously held this same error amounts to plain error. As the failure to instruct the jury on a charge is a basic violation of due process, *State v. Bowen*, 139 N.C. App. 18, 26, 533 S.E.2d 248, 254 (2000) (quoting *State v. Williams*, 318 N.C. 624, 629, 350 S.E.2d 353, 356 (1986)), we exercise our discretion to invoke North Carolina Rule of Appellate Procedure 2 to suspend Rule 10(c)(4), and review whether the trial court’s failure to instruct on the hit and run charge amounted to plain error.

"[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error arises when the error 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) (quotation omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

In *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000), we vacated a trial court's judgment on an indecent liberties charge where the trial court did not instruct on the charge, holding the "trial court effectively dismissed the indictment of the same" by failing to instruct on the charge. *Id.* at 26, 533 S.E.2d at 254. *Bowen* relied on *State v. Williams*, 318 N.C. 624, 250 S.E.2d 353 (1986), where the trial court instructed the jury on a theory of rape based on age of the victim, even though the indictment charged for first-degree forcible rape. *Id.* at 628, 250 S.E.2d at 356. In *Williams*, our Supreme Court held that the "failure of the trial court to submit the case to the jury pursuant to the crime charged in the indictment amounted to a dismissal of that charge and all lesser included offenses." *Id.* at 628, 250 S.E.2d at 356.

The instant case cannot be distinguished from the holding in *Bowen*. The trial court committed plain error in failing to instruct the jury on the hit and run charge, effectively dismissing the charge. "[T]he fairness and justice upon which our judicial system is based" requires this result. *See Bowen*, 139 N.C. App. at 26, 533 S.E.2d at 253-54 (explaining *Williams* requires our Court to vacate a conviction when the trial court did not instruct on the charge, even under plain error review).

We vacate the jury verdict on the hit and run charge in case 13CRS701341, and remand for resentencing on the charges that were consolidated with it.

II. Costs and Attorney's Fees as a Civil Judgment

Defendant argues the trial court erred by imposing costs and attorney's fees as a civil judgment without giving him adequate notice and opportunity to be heard on the final amount of attorney's fees and costs to be imposed.

Rule 3 of the North Carolina Rules of Appellate Procedure requires that an appeal from a civil judgment be made in writing. N.C.R. App. P. 3(a) (2014); *see also State v. Smith*, 188 N.C. App. 842, 845-46, 656 S.E.2d 695, 697 (2008) (explaining the failure to comply with Rule 3(a) in appealing a civil judgment is a jurisdictional defect that warrants dismissal of an appeal). Defendant did not file a written notice of appeal, and, therefore, his appeal of the civil judgment was subject to dismissal. However, on 14 September 2017, our Court granted Defendant's petition for writ of certiorari pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate

Procedure, and we consider the merits of Defendant's appeal of the civil judgment. We agree with Defendant that the trial court erred by failing to give him adequate notice and opportunity to be heard on the final amount of attorney's fees and costs imposed by the trial court in the civil judgment entered against him.

Section 7A-455(b) of the North Carolina General Statutes "allows the court to enter a civil judgment against a convicted indigent for attorney's fees and costs." *State v. Stafford*, 45 N.C. App. 297, 300, 262 S.E.2d 695, 697 (1980). "Our courts have upheld the validity of such a judgment provided that the defendant is given notice of the hearing held in reference thereto and an opportunity to be heard" on the amount of attorney's fees and costs. *State v. Washington*, 51 N.C. App. 458, 459, 276 S.E.2d 470, 471 (1981) (citing *State v. Crews*, 284 N.C. 427, 201 S.E.2d 840 (1974); *State v. Stafford*, 45 N.C. App. 297, 262 S.E.2d 695 (1980)); *see also State v. Webb*, 358 N.C. 92, 101-02, 591 S.E.2d 505, 513 (2004) (explaining this rule also applies to costs besides attorney's fees that are entered as a civil judgment under § 7A-455(b)). If a defendant does not receive notice and an opportunity to be heard, our Supreme Court has vacated such judgments "without prejudice to the State's right to apply for a judgment in accordance with [§] 7A-455 after due notice to defendant and a hearing." *Stafford*, 45 N.C. App. at 300, 262 S.E.2d at 697 (quotation omitted).

Here, there is no indication in the record that Defendant had notice as to the civil judgment's final amount, or an opportunity to be heard on it. Thus, we vacate

the civil judgment without prejudice to the State's right to apply for a judgment in accordance with N.C.G.S. § 7A-455 after Defendant receives due notice and an opportunity to be heard.

III. Prior Record Points on the Habitual Impaired Driving Conviction

Defendant argues the trial court incorrectly assigned and counted record points in calculating his sentence level for his conviction of habitual impaired driving. The State concedes the calculation was incorrect, and we agree.

We review the determination of an offender's prior record level de novo. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citation omitted). "It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Id.* at 633, 681 S.E.2d at 804 (citations omitted).

A trial court may not use driving while impaired convictions that are used to support the offense of habitual impaired driving to be used thereafter to increase the sentencing level of a defendant. *State v. Gentry*, 135 N.C. App. 107, 111, 519 S.E.2d 68, 70-71 (1999).

Here, Defendant had three driving while impaired convictions that were used to support the habitual impaired driving conviction. These same convictions were then used to increase the prior record level worksheet from 11 to 13 points. Only two

of these points resulted from the inclusion of the three driving while impaired convictions because two of the driving while impaired convictions occurred on the same day. Under *Gentry*, only 11 points should have been used to determine Defendant's record level. *See Gentry*, 135 N.C. App. at 111, 519 S.E.2d at 70-71 (explaining that the convictions used to support the offense of habitual impaired cannot be used thereafter to increase the sentencing level of a defendant). However, this error is not prejudicial, because Defendant will remain a prior record level IV even if the trial court corrects the prior record points calculation. *See* N.C.G.S. § 15A-1340.14 (2014) (stating prior record level IV offenders have "[a]t least 10, but not more than 13 points").

As the sentence imposed will not be affected by a recalculation of the prior record points, a new sentencing hearing is unnecessary, and we treat this error as a clerical error. *See State v. Everette*, 237 N.C. App. 35, 43, 764 S.E.2d 634, 639 (2014) (holding an error in calculating prior record points that does not affect the prior record level should be treated as a clerical error and remanded to the trial court for correction of the error). We remand for correction of this clerical error.

Conclusion

For the reasons stated above, the trial court erred by entering judgment on the hit and run charge, imposing costs and attorney's fees as a civil judgment without giving Defendant notice and opportunity to be heard as to the final amount to be

imposed, and indicating on the judgment for habitual impaired driving that Defendant had 13 prior record points when only 11 points should have been used to determine Defendant's record level.

VACATED IN PART; REMANDED FOR RESENTENCING AND CORRECTION OF CLERICAL ERROR.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).