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NO. COA09-836

NORTH CAROLINA COURT OF APPEALS

Filed: 16 February 2010

STATE OF NORTH CAROLINA

v.

Anson County
Nos. 06 CRS 051689
& 07 CRS 000158

DONALD JOSEPH SIMPSON

Appeal by defendant from judgment entered 26 September 2007 by Judge Mark Klass in Superior Court, Anson County. Heard in the Court of Appeals 8 December 2009.

Attorney General Roy Cooper, by Assistant Attorney General Nancy E. Scott, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

WYNN, Judge.

N.C. Gen. Stat. § 15-176 prohibits the State from compelling a defendant to be tried "in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress." N.C. Gen. Stat. § 15-176 (2009). Defendant Donald Joseph Simpson was tried, over his objection, in clothing acknowledged by the court to be his prison uniform. Although this was error, Defendant has not shown any prejudice resulting from the violation of the statutory mandate. We therefore affirm Defendant's conviction.

Defendant was charged with assault inflicting serious bodily injury, assault with a deadly weapon inflicting serious injury, assault on a law enforcement officer inflicting serious injury, assault on a government official, and attaining habitual felon status. Defendant pled not guilty and was tried at the 24 September 2007 Criminal Session of Anson County Superior Court. Before the trial, Defendant objected to being compelled to stand trial in his prison uniform.

The State argued that there was nothing in Defendant's dress to indicate that he was an inmate, as he was dressed in "white pants, white T-shirt, and tennis shoes." The State observed that it would become apparent early on that Defendant was an inmate since the assault was alleged to have occurred in prison. The trial court denied Defendant's request to obtain street clothes:

THE COURT: Well, since this is a case involving assault on a government official, I understand from in prison, I think that's going to be pretty obvious that he's in custody. I don't think we can get around that.

[Defense Counsel]: It would be difficult, Judge. . . .

THE COURT: I think the jurors are going to figure out they don't let you wear normal clothes in prison. I think that's an easy assumption.

[Defense Counsel]: Yes sir.

THE COURT: Normally I think it would be a valid problem. But in this situation, I don't think so.

Defendant was then tried in his prison uniform.

At trial, the State's evidence tended to show that one Gary Prentiss was working at Brown Creek Correctional Institution as a corrections officer on or about 7 September 2006. Officer Prentiss

testified that Defendant was an inmate at the facility, and that he encountered Defendant in the housing unit on that day around 4 p.m. Officer Prentiss testified that Defendant refused to step to the front of his bunk for the inmate count and Prentiss informed Defendant he would be written up.

Officer Prentiss was on duty in the outside yard after the count, and the yard emptied as the inmates went in for dinner. Defendant stayed in the yard. Defendant approached Officer Prentiss to talk and got angry as they talked. Officer Prentiss asked Defendant to return to housing if he was not going to eat, and Defendant kneeled to tie his shoe. Officer Prentiss turned his attention away, and he felt a blow to the head. He was stunned and blinded, and he fell down. He was hit several more times about the head. Officer Prentiss looked up from the ground and saw Defendant hitting him with a rock.

Officer Prentiss was able to get away and call for help on his radio. Other officers responded. Officer Prentiss testified that he had bruising around his left eye, a concussion, a broken bone near his eye, a broken nose, broken teeth, and a separated thumb as a result of the attack.

At the close of the State's evidence, the State dismissed the charge of assault on a law enforcement officer inflicting serious injury. The jury found Defendant not guilty of assault with a deadly weapon inflicting serious injury. The jury found Defendant guilty of assault inflicting serious bodily injury, and guilty of assault on a government official. Defendant then pled guilty to

attaining habitual felon status. The court arrested Judgment on the assault on a government official charge. The court entered Judgment and Commitment for the assault inflicting serious bodily injury conviction as a habitual felon, in the mitigated range, on 26 September 2007. Defendant now appeals the denial of his request to obtain street clothing for his trial.

Defendant argues that the trial court erred when it denied his motion not to appear at trial in his prison uniform.

N.C. Gen. Stat. § 15-176 provides:

It shall be unlawful for any sheriff, jailer or other officer to require any person imprisoned in jail to appear in any court for trial dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, And no person charged with a criminal offense shall be tried in any court while dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress,

N.C. Gen. Stat. § 15-176 (2009). The statute does not necessarily make it unlawful for a prisoner to appear in court in his prison uniform; but it forbids the State from compelling such an appearance. *State v. Smith*, 155 N.C. App. 500, 507, 573 S.E.2d 618, 623 (2002), *disc. rev. denied*, 357 N.C. 255, 583 S.E.2d 287 (2003). We have found no error, for example, when a defendant did not object and declined an opportunity to change his clothes. *Id.* Defendant in the present case, however, objected to his appearing before the jury in his prison uniform.

I. Statutory Error

The State argues that Defendant's clothing was not identifiable as prison garb, and that the record does not support the assertion that Defendant was tried in identifiable prison clothes. The State observes that Defendant was tried in white pants, white T-shirt, and white tennis shoes. Thus, says the State, there was nothing to indicate that his clothing was prison issue, or that he was an inmate. The State cites numerous federal cases in which defendants' clothing was found not to constitute recognizable prison clothing.¹ Only two North Carolina cases are on point.

In *State v. Westry*, 15 N.C. App. 1, 189 S.E.2d 618, cert. denied, 281 N.C. 763, 191 S.E.2d 360 (1972), defendants were tried in gray shirts and gray trousers. "The record discloses that the defendants . . . through their counsel, each objected to being placed on trial 'in a gray shirt and gray trousers.'" *Id.* at 13, 189 S.E.2d at 625. On appeal, defendants argued that N.C. Gen. Stat. § 15-176 had been violated. This Court disagreed, observing that "[t]here is no evidence that a gray shirt and gray trousers are the uniform or dress of a prisoner or that they were anything other than ordinary civilian dress." *Id.* Moreover, defendants in

¹Defendant argues that the trial court also violated his rights under the U.S. Constitution. See *Estelle v. Williams*, 425 U.S. 501, 512-13, 48 L. Ed.2d 126, 135 (holding that the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, but that the absence of objection negates the compulsion.) The State's review of federal cases is sufficient to rebut this argument. It does not affect our review under North Carolina law, however, as state law may provide greater protection to the accused than the federal Constitution requires. See *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103-04 (1998).

Westry declined the invitation to wear the clothes in which they had been arrested. *Id.*

The defendant in *State v. Berry*, 51 N.C. App. 97, 275 S.E.2d 269, *disc. review denied*, 303 N.C. 182, 280 S.E.2d 454 (1981), objected to appearing at trial in prison clothes. He was "dressed in green pants, tennis shoes, white socks and a white T-shirt." *Id.* at 101, 275 S.E.2d at 272. This Court held, on the basis of *Westry*, that there was no violation of N.C. Gen. Stat. § 15-176. "In the instant case, there has been no showing by defendant that he was required *by his jailers* to appear in prison garb. In fact, just as in *Westry*, there has been no affirmative showing that defendant was in fact dressed in a prison uniform." *Id.* at 102, 275 S.E.2d at 273.

Westry and *Berry* are factually distinguishable from the case before us. As the above quotations indicate, the defendants in both cases were not able to demonstrate on appeal that they had in fact been tried in their prison uniforms. Such is not the case here. The trial court in the present case recognized that Defendant's white pants and white T-shirt constituted his prison uniform. Instead of following the literal meaning of the statute, the trial court seized on the fact that the offense was alleged to have occurred in prison. The trial court found the violation of § 15-176 innocuous because "the jurors are going to figure out they don't let you wear normal clothes in prison."

Although this may have been "an easy assumption," it was one that the trial court was statutorily prohibited from making. We

observe that § 15-176 does not state that prisoners may not be compelled to appear in a *recognizable* prison uniform. If this was the intent of our Legislature, it would have been so expressed. Rather, the statute prohibits compelling a defendant to appear "in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress." N.C. Gen. Stat. § 15-176. Defendant in this case was compelled to appear in his prison uniform over his objection and despite his request for street clothes. The procedure violated the plain language of the statute.

II. Prejudicial Error

"[A] new trial does not necessarily follow a violation of statutory mandate. . . . Defendants must show not only that a statutory violation occurred, but also that they were prejudiced by this violation." *State v. Love*, 177 N.C. App. 614, 623, 630 S.E.2d 234, 240-41 (citations omitted), *disc. review denied*, 360 N.C. 580, 636 S.E.2d 192-93 (2006). In the present case, neither party addresses the proper remedy for the violation. Defendant does not pursue his analysis beyond the conclusion that there was an error, and the State asserts flatly that no violation occurred at all.

Because we hold that the error was one of state law, the burden is on Defendant to show prejudice resulting from the error. See N.C. Gen. Stat. § 15A-1443 (2009). Defendant has made no such showing. Considering the fact that Defendant was incarcerated at the time of the offense, Defendant has failed to demonstrate prejudice resulting from his appearing in a prison uniform over and above that which resulted from the admissible evidence at trial.

No prejudicial error.

Judge CALABRIA and Judge BEASLEY concur.

Report per Rule 30(e).