NO. COA10-22

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v. Durham County
No. 08 CRS 47172

ERIC WESTROM

Appeal by defendant from judgment entered 19 May 2009 by Judge J.B. Allen, Jr. in Durham County Superior Court. Heard in the Court of Appeals 25 May 2010.

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

Peter Wood, for defendant-appellant.

CALABRIA, Judge.

Eric Westrom ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of violating a domestic violence protection order ("DVPO"). We find no error.

I. Background

Defendant dated Carrie Lorraine Faber ("Ms. Faber") for approximately two years, from 2005 to 2007. After their relationship ended, Ms. Faber was granted a one-year DVPO on 17 April 2008, which forbade contact, including the sending of e-mails, between defendant and Ms. Faber. On 5-6 June 2008, Ms.

Faber received several e-mails that she believed were from defendant.

Consequently, on 7 June 2008, a warrant for defendant's arrest was issued. After defendant was tried and found guilty of violating the DVPO in Durham County District Court, he was sentenced to 60 days in the Durham County Jail. That sentence was suspended and defendant was placed on unsupervised probation for 24 months. Defendant appealed his conviction to the superior court.

Defendant was tried *de novo* before a jury during the 18 May 2009 session of Durham County Superior Court. At trial, the State introduced three e-mails, without objection, alleged to be from defendant. The first e-mail, sent 5 June 2008 ("5 June e-mail"), was sent from the address "statestreet2513@yahoo.com." The body of the e-mail was blank, but Ms. Faber testified that when she initially opened the e-mail it included a message, signed by defendant, that disappeared after she read it. The other two e-mails, sent 6 June 2008 ("6 June e-mails"), were each shown as being sent from Ms. Faber's personal e-mail address and contained a link to an article about mediation.

Ms. Faber testified at trial that she recognized the e-mails as being authored by defendant based on defendant's prior behavior, the sender addresses and the content of the messages. (T pp. 22, 39) The State also introduced an e-mail, without objection, sent by defendant on 27 February 2008, prior to the effective date of the DVPO. ("27 Feb. e-mail") This e-mail was signed by defendant and sent from his personal e-mail address.

At the close of the State's evidence, defendant moved to dismiss the charges and the trial court denied the motion. Defendant then testified on his own behalf and denied that he had sent any of the e-mails to Ms. Faber. At the close of all the evidence, defendant again moved to dismiss the charges and the trial court again denied the motion. On 19 May 2009, the jury returned a verdict finding defendant guilty of violating the DVPO. Defendant was sentenced to 150 days in Durham County Jail. Defendant appeals.

II. Motion to Dismiss

Defendant argues that the trial court erred by denying appellant's motion to dismiss due to insufficient evidence. Encompassed within this argument is defendant's contention that the e-mails introduced by the State at trial constituted inadmissible evidence for lack of proper authentication.[1] We disagree.

A. E-mail Admissibility

Rule 901 of the North Carolina Rules of Evidence "requires that an item of evidence be properly authenticated or identified prior to its admissibility." *Kroh v. Kroh*, 152 N.C. App. 347, 353, 567 S.E.2d 760, 764 (2002)(citing N.C. Gen Stat. § 8C-1, Rule 901

[1] We note that defendant failed to adhere to N.C.R. App. P. 28(b)(6), which requires that an appellant's brief contain an argument, with separately stated questions, in which each question is followed by a "reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." N.C.R. App. P. 28(b)(6) (2009). The record on appeal indicates that defendant's second assignment of error corresponds to the issue of e-mail authentication; however, defendant's brief fails to reference this assignment of error in his argument.

(2009)). By means of illustration, "[t]he statute provides several methods to authenticate evidence." *State v. Taylor*, 178 N.C. App. 395, 413, 632 S.E.2d 218, 230 (2006); N.C. Gen. Stat. § 8C-1, Rule 901(b). Rule 901(b)(4) provides for authentication through "[d]istinctive characteristics and the like[:] [a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." N.C. Gen. Stat. § 8C-1, Rule 901(b)(4).

Defendant did not object to admission of the e-mails at trial. Therefore, defendant is entitled to review only for plain error. *See* N.C.R. App. P. 10(c)(4) (2009). However, while defendant's assignment of error clearly states that the trial court's admission of the e-mails constituted plain error, he does not argue plain error in this portion of his brief. As a result, defendant has failed to comply with N.C.R. App. P. 28(a) and has waived appellate review of this assignment of error.[2] *See State v. Scercy*, 159 N.C. App. 344, 354, 583 S.E.2d 339, 345 (2003). This assignment of error is overruled.

B. Substantial Evidence

Defendant additionally argues that the trial court should have granted his motion to dismiss. "Upon defendant's motion for dismissal, the question for the 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

[2] Defendant is clearly aware of this rule, as he appropriately argues plain error in Sections II and III of his brief, discussed *infra*.

defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion." *State v. Hargrave*, ___ N.C. App. ___, ___, 680 S.E.2d 254, 261 (2009) (citation omitted). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]" *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

In the instant case, defendant was charged with "knowingly violating a valid domestic violation protective order" on or about 5 June 2008 to 6 June 2008. Violation of a valid DVPO is prohibited by N.C. Gen. Stat. § 50B-4.1(a), which states:

> Except as otherwise provided by law, a person who knowingly violates a valid protective order entered pursuant to this Chapter or who knowingly violates a valid protective order entered by the courts of another state or the courts of an Indian tribe shall be guilty of a Class A1 misdemeanor.

N.C. Gen Stat. § 50B-4.1(a) (2009). Thus, we examine whether the State presented sufficient evidence that (1) a valid DVPO had been issued pursuant to North Carolina law and (2) that defendant knowingly violated the order by contacting the victim through e-mails.

At trial, the State introduced defendant's DVPO into evidence. The DVPO stated, and Ms. Faber testified, that it was effective from 17 April 2008 until 17 April 2009. The State presented evidence of three e-mails sent by defendant to Ms. Faber while the

DVPO was in effect. In addition, the State presented an ample amount of circumstantial evidence, including a previous e-mail sent by defendant to Ms. Faber before the DVPO was in effect, supporting its claim that defendant knowingly sent Ms. Faber the e-mails in violation of the order.

Therefore, we conclude that the State presented substantial evidence that defendant willfully violated N.C. Gen. Stat. § 50B-4.1(a). The trial court properly denied defendant's motion to dismiss. This assignment of error is overruled.

III. Prior Bad Acts Evidence

Defendant argues that the trial court erred when it allowed the State to present evidence of alleged prior bad acts by defendant and then failed to give a limiting jury instruction on the use of this evidence. We disagree.

At trial, the State introduced into evidence, without objection, the entirety of the civil DVPO file, 08 CVD 1545. Defendant contends that this file contained inadmissible evidence of alleged prior bad acts of defendant. Defendant did not object to either the admission of the file or the jury instructions at trial. Therefore, our review is limited to plain error. "To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result." *State v. Jones*, 137 N.C. App. 221, 226, 527 S.E.2d 700, 704 (2000).

Under North Carolina law, irrelevant evidence is inadmissible and evidence of prior bad acts is admitted only in limited

circumstances. *See* N.C. Gen. Stat. § 8C-1, Rule 402, Rule 404(b) (2009). Furthermore, if evidence of prior bad acts is admitted, the court must instruct the jury that they may consider it only for the limited purpose for which it was received. *See State v. Burr*, 341 N.C. 263, 292, 461 S.E.2d 602, 617 (1995).

In the instant case, an examination of the transcript reveals that the only portion of the file referenced by the State was the actual DVPO defendant was accused of violating. The remainder of the file, which contained the matters defendant contests, were never discussed during the trial or published to the jury. (T pp. 18, 40) Since the jury was not exposed to any of the contested evidence, a limiting instruction was unnecessary. These assignments of error are overruled.

V. Conclusion

The trial court did not err in admitting any evidence and defendant's motion to dismiss was properly denied. Defendant received a fair trial, free from error.

No error.

Judge HUNTER, Robert C. concurs.

Judge WYNN concurs in the result only.

Report per Rule 30(e).

Judge WYNN concurred in the result only prior to 10 August 2010.