NO. COA14-463

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

STATE OF NORTH CAROLINA

v.	Wake County No. 12 CRS 204285, 206010
JAIRED ANTONIO JONES Defendant	12 CRS 003090, 13 CRS 003100, 003101

Appeal by Defendant from judgments entered 10 July 2013 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 23 September 2014.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Melissa H. Taylor, for the State.

Appellate Defendant Staples Hughes, by Assistant Appellate Defendant John F. Carella, for Defendant-appellant.

DILLON, Judge.

Jaired Antonio Jones ("Defendant") appeals from convictions for interfering with a witness, assault on a female, habitual misdemeanor assault, five counts of habitual violation of a domestic violence protective order ("DVPO"), and attaining the status of habitual felon. For the following reasons, we find no error in part, vacate three of Defendant's convictions for

habitual violation of a DVPO and the conviction for assault on a female, and remand for resentencing on these judgments.

I. Background

Defendant was indicted on a number of charges arising from his "on-and-off-again," five-year relationship with Ms. Smith[1], the mother of his child. On 21 February 2012, Ms. Smith took out a temporary restraining order against Defendant due to a pattern of violent behavior he had exhibited towards her. The next day, Defendant confronted Ms. Smith as she attempted to deliver Defendant's personal items that were in her home to his father's apartment. During the confrontation, Defendant became physically violent towards Ms. Smith. Police arrived on the scene and arrested Defendant.

Defendant was subsequently served the restraining order while in jail. In spite of the restraining order, Defendant contacted Ms. Smith at least twice by telephone. After Ms. Smith had the protective order extended to a full year, Defendant sent Ms. Smith three letters between 23 March 2012 to 18 June 2012 asking her to drop the charges and not come to court.

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[1] A pseudonym.

Defendant was tried by a jury and found guilty of assault on a female, five counts of habitual violation of a DVPO (for the two phone calls and three letters), and interfering with a witness (for the three letters). Defendant pled guilty to attaining the status of habitual felon based on past felonies unrelated to his relationship with Ms. Smith.

The trial court entered three separate judgments: (1) a judgment sentencing Defendant as a habitual felon to a term of 127 to 165 months of imprisonment for the interfering with a witness conviction; (2) a consolidated judgment for the assault on a female conviction, which was upgraded to habitual misdemeanor assault, and sentenced Defendant as a habitual felon to a consecutive term of 128 to 166 months imprisonment; and (3) a consolidated judgment for the five habitual violation of DVPO convictions, sentencing Defendant as a habitual felon to a consecutive term of 128 to 166 months imprisonment. Defendant filed timely notice of appeal from the trial court's judgments.

II. Analysis

Defendant makes three arguments on appeal, which we address in turn.

A. Habitual Violation of DVPO and Interfering with Witness

In his first argument, Defendant contends that the trial court erred in sentencing him for three of the five habitual violation of DVPO counts. Specifically, he argues that he should not have been sentenced on the three counts which were based on his three letters to Ms. Smith since these communications also form the basis for his conviction for interfering with a witness. We agree.

1. Appellate Review

Before reaching the merits of Defendant's argument, we address the State's contention that Defendant failed to properly preserve his argument, citing *State v. Potter*, 198 N.C. App. 682, 680 S.E.2d 262 (2009). We disagree and believe this issue is controlled by our Supreme Court's 2010 opinion in *State v. Davis*, 364 N.C. 297, 698 S.E.2d 65 (2010).

North Carolina Rule of Appellate Procedure 10(a)(1) requires that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" Defendant admits that he did not raise a specific objection at trial regarding this sentencing error, but, citing *State v. Davis*, 364 N.C. 297, 698 S.E.2d 65, argues that this issue of statutory interpretation is properly before us.

In *Davis*, the defendant argued that he could not be convicted for *both* felony death by vehicle *and* second degree murder arising from the same conduct because the felony death by vehicle statute expressly states that a defendant could be convicted and sentenced for felony death by vehicle "[u]nless the conduct is covered under some other provision of law providing greater punishment[.]" *Id.* at 301-02, 698 S.E.2d at 67-68. Our Supreme Court held that the defendant's argument that the trial court acted "contrary to statutory mandate" was preserved, "notwithstanding [his] failure to object at trial." *Id.* at 301, 698 S.E.2d at 67 (citation and quotation marks omitted).

In *Potter*, the defendant argued that the trial court committed a statutory error by sentencing him on *both* robbery with a dangerous weapon *and* habitual misdemeanor assault based on misdemeanor assault on a female. 198 N.C. App. at 684, 680 S.E.2d at 263. The misdemeanor assault on a female statute, G.S. 14-33(c), contained the language "[u]nless the conduct is covered under some other provision of law providing greater punishment[.]" *Id.* at 684 n.2, 680 S.E.2d at 263 n.2 (emphasis omitted). This Court held that the defendant's argument was not preserved based on N.C. Gen. Stat. § 15A-1444(a1) because the

defendant was sentenced in the presumptive range for both convictions. *Id.* at 684-85, 680 S.E.2d at 264.

We note, however, that the judgments entered by the trial court against the defendant in *Davis* indicate that the defendant was sentenced in the presumptive range, like the defendant in *Potter*. To the extent that our Court's holding in *Potter* conflicts with our Supreme Court's holding in *Davis* on this issue, we must follow *Davis*; and, therefore, we hold that Defendant's argument is properly before us, notwithstanding his failure to object at trial and notwithstanding that he was sentenced within the presumptive range. We next turn to review Defendant's substantive statutory arguments.

2. Substantive Statutory Analysis

Defendant contends that the trial court erred in entering judgment and sentencing him on *both* three counts of habitual violation of a DVPO *and* one count of interfering with a witness based on the same conduct, sending three letters to the alleged victim asking her not to show up for his court date. Defendant concludes that based on this error, we should vacate the three convictions for habitual violation of a DVPO based on the letters and remand for resentencing. The State argues that based on our opinion in *State v. Hines*, 166 N.C. App. 202, 600

S.E.2d 891 (2004), Defendant did not receive improper double punishment.

"Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009). As our Supreme Court has stated:

> [t]he intent of the Legislature controls the interpretation of a statute. When a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction.

Davis, 364 N.C. at 302, 698 S.E.2d at 68.

Habitual violations of DVPO's are covered under N.C. Gen. Stat. § 50B-4.1 (2013), which generally provides in subsection (a) that the violation of a DVPO is a Class A1 misdemeanor and further provides in subsection (f) that "*[u]nless covered under some other provision of law providing greater punishment*, any person who knowingly violates a [DVPO], after having been previously convicted of two offenses under this Chapter, shall be guilty of a Class H felony. *Id.* (emphasis added). Defendant argues that the phrase "[u]nless covered under some other provision of law providing greater punishment," means he could not be punished for habitual violation of a DVPO, a class H felony, if he was also being punished for interfering with a

witness, a Class G felony for the same conduct. We believe Defendant's interpretation is consistent with interpretations by our appellate courts of the phrase "[u]nless covered under some other provision of law providing greater punishment" found in other criminal statutes. *See Davis*, 364 N.C. at 304, 698 S.E.2d at 69 (finding that this clause in N.C. Gen. Stat. § 20-141.4(b) "indicates the General Assembly was aware . . . that other, higher class offenses might apply to the same conduct" and in that situation "the General Assembly intended an alternative: that punishment is *either* imposed for the more heavily punishable offense *or* for the section 20-141.4 offense, but not both." (emphasis in original)); *State v. Jamison*, ___ N.C. App. ___, ___, 758 S.E.2d 666, 671 (2014); *State v. Williams*, 201 N.C. App. 161, 174, 689 S.E.2d 412, 419 (2009).

As to the three letters sent by Defendant, we note that the indictment for interfering with a witness specifically alleged Defendant's "course of conduct of sending [the witness and victim] *letters* asking her to not come to court" as the basis for the indictment. Defendant's indictment for habitual violations of DVPO charges Defendant with three counts based on the three letters sent to the victim. At trial, only three letters from Defendant to the victim were presented into

evidence. As both convictions were based on these same three letters and Defendant was convicted and sentenced for both offenses, the trial court violated the statutory mandate of N.C. Gen. Stat. § 50B-4.1(f).

We are not persuaded by the State's argument that *State v. Hines* controls. In *Hines*, the defendant was convicted of robbery with a dangerous weapon and of aggravated assault on a handicapped person under N.C. Gen. Stat. § 14-32.1. The defendant argued that the punishment for both crimes violated the statutory language of G.S. 14-32.1(e), which contains the language "[u]nless [defendant's] conduct is covered under some other provision of law providing greater punishment[.]" 166 N.C. App. at 208, 600 S.E.2d at 896. This Court, though acknowledging prior holdings regarding this phrase in other statutes, overruled the defendant's argument, stating "North Carolina courts have consistently allowed convictions for both robbery with a dangerous weapon and felonious assault." *Id.* at 208-09, 600 S.E.2d at 896-97. Our Supreme Court in *Davis* distinguished *Hines* stating "that separate sentences for aggravated assault on a handicapped person and the greater felony of robbery with a dangerous weapon were permissible as punishing distinct conduct--an assault and a robbery." 364 N.C.

at 305, 698 S.E.2d at 69-70. Here, unlike *Hines*, the convictions were based on the same conduct, Defendant communicating with the victim through three letters. The State's argument is overruled.

Accordingly, we vacate Defendant's three convictions for habitual violations of DVPO based on the three letters he sent the victim and remand the consolidated judgment to resentence Defendant as a habitual felon for the two habitual violations of the DVPO convictions based on his two phone calls to the victim.

B. Habitual Misdemeanor Assault and Assault on Female

In his second argument, Defendant contends that the trial court erred in sentencing him for *both* habitual misdemeanor assault *and* assault on a female since both convictions arose out of his assault on Ms. Smith at his father's apartment. The State contends that the sentence was proper, noting that although the misdemeanor assault on a female conviction appears on the judgment, "[t]here was no separate sentence entered for Defendant's crime of assault on a female."

Defendant's statutory challenges to the trial court's judgment are preserved, notwithstanding his failure to object at trial. *Davis*, 364 N.C. at 301, 698 S.E.2d at 67. We apply *de*

novo review to Defendant's argument. *Largent*, 197 N.C. App. at 617, 677 S.E.2d at 517.

For the crime of "assault on a female," the statute states in relevant part:

> (c) *Unless the conduct is covered under some other provision of law providing greater punishment*, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor[.]
>
> . . . .
>
> (2) Assaults a female, he being a male person at least 18 years of age[.]

N.C. Gen. Stat. § 14-33(c)(2) (2013) (emphasis added). Recently, this Court in *State v. Jamison*, held this "prefatory clause [in N.C. Gen. Stat. § 14-33(c)] unambiguously bars punishment for assault on a female when the conduct at issue is punished by a higher class of assault." ___ N.C. App. ___, ___, 758 S.E.2d 666, 671 (2014). Assault on a female can be upgraded pursuant to N.C. Gen. Stat. § 14-33.2 (2013), to a felony where the defendant has prior assault convictions as set forth in that statute.

Here, the jury found Defendant guilty of assault on a female, a class A1 misdemeanor, and, based on his admissions to prior convictions for assault, the trial court upgraded this conviction to "habitual misdemeanor assault" pursuant to G.S.

14-33.2, a Class H felony. As Defendant had pled guilty to attaining the status of habitual felon, his conviction for this Class H felony was upgraded to a Class D felony. However, the judgment also lists the underlying misdemeanor conviction for assault on a female and also upgrades it to a Class D felony. As determined in *Jamison*, the trial court could not administer punishment for both habitual misdemeanor assault, a Class H felony, and assault on a female, a class A1 misdemeanor, based on the unambiguous phrase "[u]nless the conduct is covered under some other provision of law providing greater punishment[,]" in G.S. 14-33(c). These convictions were based on the same conduct as they were derived from the same indictment for assault on a female. We also note that although, Defendant pled guilty to attaining the status of habitual felon, N.C. Gen. Stat. § 14-7.6 only permits a "felony" to be upgraded as part of attaining the status of habitual felon, not a misdemeanor. Therefore, we hold that the trial court erred in including on the judgment the misdemeanor conviction for assault on a female. Accordingly, we vacate the assault on a female conviction listed on the judgment and remand for resentencing of Defendant as a habitual felon on the habitual misdemeanor assault conviction.

C. Jury Instructions—Interfering With A Witness

Lastly, Defendant contends that the trial court erred in instructing on the charge of "interfering with a witness" because "it [was] immaterial that the victim was regularly summoned or legally bound to attend" as this instruction effectively negated the State's burden to prove the first element of this offence that "a person was summoned as a witness in a court of this state." Defendant cites *State v. Shannon*, ___ N.C. App. ___, 750 S.E.2d 571 (2013) and *State v. Neely*, 4 N.C. App. 475, 166 S.E.2d 878 (1969) in support of his argument. The State argues that the trial court's instruction was correct because *Shannon* and *Neely* state that the first element is established if the victim is a "prospective witness" and the instruction clarifies this element pursuant to these holdings.

Here, defense counsel objected to the trial court's instruction on the charge of interfering with a witness, preserving this issue for appeal. *See* N.C. R. App. P. 10(a)(2). We review a trial court's rulings regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). In *Shannon*, this Court summarized the *Neely* holding as follows:

> In *State v. Neely*, a witness testified against the defendant during the defendant's initial trial[.] After the defendant was convicted in that court and had appealed to

> the superior court for a trial *de novo*, the defendant threatened the witness. Defendant was subsequently convicted of intimidating a witness and appealed to this Court. On appeal, the defendant argued that his conviction should have been dismissed because, when the threat was made, the witness had already completed his testimony in the first trial and was not under a subpoena to testify in the superior court trial. This Court rejected the defendant's argument, noting that the witness "was in the position of being a prospective witness" because, at the time of the threat, the defendant had already appealed for a trial *de novo* and the defendant was trying to prevent the witness from testifying in the superior court trial. The Court further explained that because "[t]he gist" of the offense of intimidating a witness is the obstruction of justice, "'[i]t is immaterial . . . that the person procured to absent himself was not regularly summoned or legally bound to attend as a witness.'"

___ N.C. App. at ___, 750 S.E.2d at 573-74 (citations omitted). The *Shannon* Court stated that *Neely* established "that 'prospective witness' was the standard by which to determine whether an individual qualifies as being a 'person summoned or acting as such witness' under N.C. Gen. Stat. § 14-226(a)." *Id.* at ___, 750 S.E.2d at 574-75 (emphasis omitted).

Here, the trial court instructed the jury on the elements of "interfering with a witness[,]" including the first element, which is at issue in Defendant's argument:

> First, that a person was summoned as a

> witness in a court of this state. *You are instructed that it is immaterial that the victim was regularly summoned or legally bound to attend.*

(Emphasis added.) The second sentence in the first element is from a footnote in the pattern jury instructions which cites to this Court's holding in *Neely*.

Here, the State had not introduced into evidence a summons for Ms. Smith to testify. Therefore, in order to clarify this issue for the jury, the trial court included the portion of the instruction italicized above to show that the victim need only be a "prospective witness" for this element to be satisfied. Evidence supporting Ms. Smith's "prospective witness" status included testimony that she had been summoned several times, she had received a letter from the District Attorney informing her that she would be a witness, and she was named as the victim on the indictment. Although, as Defendant contends, the footnote does not include the words "prospective witness[,]" it functionally informs the jury that Ms. Smith did not have to have a summons to be protected under this statute, as held in *Neely* and *Shannon*. Therefore, Defendant's argument is overruled.

III. Conclusion

Based on the foregoing, we find no error in part, vacate three of Defendant's convictions for habitual violations of a DVPO (13CRS003101), vacate Defendant's conviction for assault on a female (12CRS204285), and remand for resentencing on these consolidated judgments, as discussed above.

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

Judge HUNTER, Robert C. and Judge DAVIS concur.