NO. COA14-774

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2015

STATE OF NORTH CAROLINA

v.

Robeson County
No. 11CRS051134, -051135

SAMUEL AARON JACOBS
Defendant.

Appeal by Defendant from judgments entered 24 January 2014 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 19 November 2014.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Karen A. Blum, for the State.

Kevin P. Bradley, for Defendant-appellant.

DILLON, Judge.

Samuel Aaron Jacobs ("Defendant") appeals from convictions for assault with a deadly weapon with intent to kill inflicting serious injury, attempted second-degree kidnapping, and violation of a domestic violence protective order with a deadly weapon. For the following reasons, we reverse and remand for resentencing.

I. Background

On 14 March 2011, Defendant was indicted for attempted first-degree murder; first-degree kidnapping, enhanced by knowingly

violating a domestic violence protective order pursuant to G.S. 50B-4.1(d); assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), enhanced by knowingly violating a domestic violence protective order pursuant to G.S. 50B-4.1(d); and violation of a domestic violence protective order with the use of a deadly weapon.

Defendant was tried on all charges at the 13 January 2014 Criminal Session of Robeson County Superior Court. The State's evidence tended to show that in September 2010, Christy Smith[1] received a domestic violence protective order ("DVPO"), valid for one year against Defendant to prevent him from contacting her. Five months later, Ms. Smith was confronted by Defendant at a gas pump outside a convenience store. During the encounter, Defendant stabbed Ms. Smith multiple times before she was able to escape into the store.

The jury acquitted Defendant of the attempted first-degree murder charge. The jury, however, found Defendant guilty of three crimes: (1) attempted second-degree kidnapping, a Class F felony, enhanced to a Class D felony pursuant to N.C. Gen. Stat. § 50B-4.1(d) because Defendant knew the behavior was in violation of a DVPO; (2) AWDWIKISI, a Class C felony, enhanced to a Class B2

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[1] A pseudonym.

felony also pursuant to G.S. 50B-4.1(d); and (3) violation of a DVPO with a deadly weapon pursuant to G.S. 50B-4.1(g), a Class H felony.

The trial court sentenced Defendant to a term of 180 to 225 months of imprisonment for the AWDWIKISI conviction; a consecutive term of 73 to 97 months of imprisonment for the attempted second-degree kidnapping conviction; and a consecutive term of 8 to 10 months of imprisonment for the violation of a DVPO with a deadly weapon conviction. Defendant gave oral notice of appeal at trial.

II. Analysis

On appeal, Defendant argues that the trial court erred in (1) submitting to the jury the element of knowing violation of a DVPO to enhance the punishment for the AWDWIKISI and attempted second-degree kidnapping convictions[2]; and (2) in sentencing him for attempted second-degree kidnapping as a class D felony.

A. Enhancement under G.S. 50B-4.1(d)

Defendant's first argument pertains to the application of N.C. Gen. Stat. § 50B-4.1(d)(2011) to his convictions for AWDWIKISI

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[2] Defendant argues in the alternative that if the enhancement was correct, the trial court erred in entering judgment on both the conviction for AWDWIKISI in knowing violation of a DVPO and on the conviction for violation of a DVPO with a deadly weapon. However, based on our resolution of Defendant's first argument, we need not address Defendant's argument in the alternative.

and attempted second-degree kidnapping. G.S. 50B-4.1 contains nine subsections; however, only subsections (a), (d) and (g) are relevant in understanding Defendant's argument here.

Subsection (a) of G.S. 50B-4.1 makes it a class A1 misdemeanor to knowingly violate a valid DVPO.

Subsection (g) enhances a misdemeanor violation of a DVPO to a Class H felony where the violation occurs while the defendant possesses a deadly weapon.

Subsection (d) provides that a person who commits another felony knowing that the behavior is also in violation of a DVPO shall be guilty of a felony one class higher than the principal felony. However, subsection (d) provides that the enhancement "shall not apply to a person who is charged with or convicted of a Class A or B1 felony or to a person charged under subsection (f) or subsection (g) of this section." *Id.*

In the present case, Defendant was convicted of two felonies, which were each enhanced pursuant to subsection (d) of G.S. 50B-4.1 as the jury determined that these felonies involved behavior which Defendant knew was in violation of the DVPO. Specifically, his conviction for AWDWIKISI, a Class C felony, was enhanced to a

Class B2 felony; and his conviction for attempted second-degree kidnapping, a Class F felony, was enhanced to a Class D felony.[3]

Defendant argues that, since G.S. 50B-4.1(d) is not to be applied to "persons charged . . . under subsection (g)" of the statute, the G.S. 50B-4.1(d) enhancements should not have been applied in his case to *any* of his felony convictions since he was "a person" who was also charged (and convicted) under subsection (g). In other words, Defendant argues that the G.S. 50B-4.1(d) enhancements do not apply to *any* felonies a person might be convicted of, no matter the class, where that *person* was also charged with a Class A felony, a Class B1 felony, or under subsection (f) or (g) of G.S. 50B-4.1.

The State argues essentially that the phrase "person charged" in G.S. 50B-4.1(d) should be interpreted to mean "the conviction." Thusly, subsection (d) only prohibits convictions for the Class A and B1 felonies as well as the Class H felonies under subsections (f) and (g) of that statute from being enhanced; but subsection (d) does not prohibit the enhancement of *other* felonies such as AWDWIKISI and attempted kidnapping from being enhanced, even where

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[3] The trial court enhanced Defendant's conviction for attempted second-degree kidnapping, not one class higher, see G.S. 50B-4.1(d), but two classes higher than the principal felony. This issue is addressed in section II, subsection (B.) of this opinion.

the defendant was also charged with a Class A or B1 felony or a felony under subsection (f) or (g) of the statute.

"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). Our Supreme Court has further stated that

> [w]hen a statute is unambiguous, this Court will give effect to the plain meaning of the words without resorting to judicial construction. [C]ourts must give [an unambiguous] statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.

State v. Davis, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010) (alterations in original) (quotation marks and citations omitted).

We believe the limiting language in G.S. 50B-4.1(d) - that the subsection "shall not apply to a person charged with or convicted of" certain felonies - is unambiguous and means that the subsection is not to be applied to "the person," as advocated by Defendant, *rather than* to certain felony convictions of the person, as advocated by the State. Accordingly, we hold that it was error for Defendant's convictions for AWDWIKISI and for attempted second-degree kidnapping to be enhanced pursuant to G.S. 50B-4.1(d) since he was "a person charged" under subsection (g) of

that statute. Therefore, we reverse these sentence enhancements and remand for resentencing.

We understand that adopting the construction advocated by Defendant may lead to some interesting results in other cases. For example, a person who is charged with and convicted of second-degree sexual offense, a Class C felony, *see* N.C. Gen. Stat. § 14-27.5 (2011), would be guilty and punished as a Class B2 offender if the act was also in violation of a DVPO. However, this Class C felony conviction could not be enhanced under G.S. 50B-4.1(d) if the defendant was, in fact, initially "charged" with first-degree rape, a Class B1 felony, see N.C. Gen. Stat. § 14-27.2 (2011) – even though he was only convicted of second-degree sexual offense – since he would be "a person who is charged with" a Class B1 felony.

The State's interpretation, however, would require this Court to ignore the plain meaning of the words used by the General Assembly in subsection (d). That is, the State's interpretation might be correct if subsection (d) provided that it "shall not apply to *convictions*" for certain felonies. Since the statute refers to "the persons" and also refers to persons who are "charged with" OR "convicted of" certain felonies, we must agree with Defendant.

Further, if the General Assembly had intended for the limitation in subsection (d) to apply to the *convictions* rather than *the persons* charged or convicted, there would have been no need to include the limitation that "Class A" felonies not be subject to enhancement because there is no felony class higher than Class A.

B. Sentencing attempted second-degree kidnapping

Defendant contends and the State concedes that the trial court erred in sentencing Defendant as a Class D felon for attempted second-degree kidnapping enhanced based on knowing violation of a DVPO pursuant to G.S. 50B-4.1(d). As stated above, we review questions of statutory interpretation *de novo*. *Largent*, 197 N.C. App. at 617, 677 S.E.2d at 517.

Second-degree kidnapping is punishable as a Class E felony. N.C. Gen. Stat. § 14-39(b) (2011). Therefore, *attempted* second-degree kidnapping is a Class F felony. *See* N.C. Gen. Stat. § 14-2.5 (2011) ("Unless a different classification is expressly stated, an attempt to commit . . . a felony is punishable under the next lower classification as the offense which the offender attempted to commit"). Defendant, however, was sentenced two classes higher as a Class D felon for this conviction. As determined above, the trial court erred in enhancing this felony

based on language in G.S. 50B-4.1(d) and Defendant should have properly been sentenced for this conviction as a Class F felony.

III. Conclusion

For the forgoing reasons, we reverse the trial court's judgments for AWDWIKISI, and attempted second-degree kidnapping and remand for resentencing to remove the G.S. 50B-4.1(d) enhancement on these convictions and for further correction of Defendant's offense class in the attempted second-degree kidnapping judgment.

REVERSED AND REMANDED.

Judges BRYANT and DIETZ concur.