IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1086

Filed: 6 September 2016

Alamance County, Nos. 09 CRS 7504, 55483, 55401

STATE OF NORTH CAROLINA

v.

MATTHEW DEVON FIELDS

Appeal by defendant from judgment entered 14 October 2014 by Judge W. Osmond Smith, III, in Alamance County Superior Court. Heard in the Court of Appeals 13 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Ryan F. Haigh, for the State.

Rudolph Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

CALABRIA, Judge.

Matthew Devon Fields ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of conspiracy to commit first-degree murder. On appeal, defendant contends that the trial court committed plain error in declining to instruct the jury on diminished capacity. The trial court did not commit plain error.

I. Factual and Procedural Background

The facts underlying this case are fundamentally the same as those in its companion case, *State v. Dixon*, COA15-350 (unpublished). We incorporate those facts by reference, and summarize the relevant facts below.

The mother of Robert Dennis Dixon ("Dixon") had died, and his father, Cardwell Dixon ("Cardwell"), had married a woman named Sara ("Sara"). Cardwell was later declared incompetent, Sara was appointed guardian of the person, and Cardwell was placed in a nursing facility. The expense of Cardwell's medical bills was such that it exceeded his income, ultimately requiring Sara to liquidate several of Cardwell's assets. Dixon, angered at what he perceived to be Sara's misuse of his inheritance, conspired with Thomas Friday ("Friday") to have Sara killed. Dixon agreed to pay Friday in exchange for Friday finding a person unknown to Dixon and killing Sara. Friday chose defendant for the task, and on 28 November 2007, Friday and defendant broke into Sara's home and killed her.

Defendant was ultimately indicted for first-degree murder, conspiracy to commit first-degree murder, first-degree burglary, and possession of a firearm by a convicted felon.

At trial in Alamance County Superior Court, defendant requested that the jury be instructed on the defense of diminished capacity with respect to the charges of first-degree murder and first-degree burglary. Defendant's arguments relied upon the expert testimony of forensic psychiatrist Dr. George Corvin. In response to

defendant's request, the State noted that Dr. Corvin's report showed defendant "not to be intellectually functionally impaired or have an intellectual disability[,]" that Dr. Corvin "never opined anything specifically as to [defendant's] mental capacity at the time [of the offense,]" and that Dr. Corvin testified that, in his opinion, defendant's mental ability "did not prevent him from carrying out any of the acts on that night." The trial court denied defendant's request for an instruction on diminished capacity.

The jury returned verdicts finding defendant guilty of conspiracy to commit murder and possession of a firearm by a convicted felon, and not guilty of first-degree murder or first-degree burglary. The trial court sentenced defendant to 189-236 months for conspiracy to commit murder and 15-18 months for possession of a firearm by a felon, both sentences to run consecutively and to be served in the North Carolina Department of Adult Correction.

Defendant appeals.

II. Ineffective Assistance of Counsel

As an initial matter, we recognize that defendant argues in a footnote to his brief that should this Court determine that defendant failed to properly preserve this issue for appeal, thereby subjecting this appeal to plain error review, then defendant's counsel at trial rendered ineffective assistance by failing to properly request the jury instruction as it related to the conspiracy charge in order to preserve the issue for appeal. Although defendant cites two cases in support of this argument, defendant

places the claim in a footnote and fails to make an argument in support of the claim. Therefore, to what extent this argument was proffered on appeal, it is deemed abandoned. *See* N.C.R. App. P. 28(b)(6).

III. Diminished Capacity

In his sole argument on appeal, defendant contends that the trial court erred in denying his request for an instruction on diminished capacity. We disagree.

A. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

The Supreme Court of North Carolina "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "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).

B. Possession of a Firearm by a Felon

We note first that the offense of possession of a firearm by a felon lacks a mental state component, and that therefore the defense of diminished capacity would have no impact on such a charge. Defendant concedes this in his reply brief, and acknowledges that the present appeal is not from his conviction for possession of a firearm by a felon, but from his conviction for conspiracy to commit murder. As defendant acknowledges that he does not appeal from his conviction of possession of a firearm by a felon, we find no error in that conviction, notwithstanding the remainder of this opinion.

C. Plain Error

We now turn to defendant's argument on appeal. Defendant contends that the trial court erred when it declined to instruct the jury on the defense of diminished capacity as it relates to the charge of conspiracy, after considerable evidence was

presented at trial to support the instruction and to contest the element of defendant's specific intent to commit first-degree murder. We disagree.

We must first determine whether this issue was properly preserved for appeal. The North Carolina Rules of Appellate Procedure require that a party objecting to "any portion of the jury charge or omission therefrom . . . [must] stat[e] distinctly that [instruction] to which objection is made and the grounds of the objection[.]" N.C.R. App. P. 10(a)(2). Defendant's requested instruction for the diminished capacity defense specifically and only references the defense's application to the charges of first-degree murder and first-degree burglary. The instruction makes no mention of the crime of conspiracy to commit murder or how the jury should apply the defense to evidence presented regarding the specific intent required for conspiracy. Nor did defendant's arguments at trial suggest that the defense would apply to anything other than these two charges. For the foregoing reasons, we hold that defendant failed to preserve this issue for appeal.

An issue not preserved by objection at trial or by rule of law may nevertheless be presented on appeal when the action is "specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4). "To establish plain error, defendant must show that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. In other words, a defendant must show "that, absent the error, the

jury probably would have returned a different verdict" in order to prevail under plain error review. *Id.* at 519, 723 S.E.2d 335.

Even assuming, *arguendo*, that the trial court erred in denying defendant's requested jury instruction on diminished capacity, defendant has failed to show any prejudice. On appeal, defendant has the burden of demonstrating that the jury would probably have returned a different verdict had the diminished capacity instruction been given. Defendant's expert did not offer testimony showing that defendant was unable to form the specific intent to conspire to commit first-degree murder. However, the State's expert testified suggesting that defendant was able to form specific intent for each offense charged, despite his lower IQ. The State's evidence would have permitted the jury, even had a diminished capacity instruction been given, to nonetheless find defendant guilty.

Further, although defendant contends that his withdrawal from the overt act of murder or burglary constitutes a defense, we note that a conspiracy becomes complete when it is agreed upon, not when the overt act is committed. *See State v. Horton*, 275 N.C. 651, 657, 170 S.E.2d 466, 470 (1969) (holding that because conspiracy "does not require an overt act, an attempted withdrawal by one of the conspirators before an overt act in furtherance of the agreement will not prevent a verdict of guilty of conspiracy[,]" and that it is not "necessary for the purpose of the conspiracy to be accomplished in order for a verdict of guilty to stand"). Even so, the

trial court did instruct the jury on the defense of withdrawal; the jury nonetheless found him guilty.

D. Conclusion

Given the jury's ability to rely upon the State's evidence in reaching its verdict, and defendant's inability to successfully assert the defense of withdrawal, we hold that defendant has failed to demonstrate that the alleged error prejudiced the outcome of this case. As such, defendant has failed to show that the trial court committed plain error in declining to instruct the jury on diminished capacity as a defense to conspiracy.

NO PLAIN ERROR.

Judges HUNTER and TYSON concur.

Report per Rule 30(e).