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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1309

Filed: 6 September 2016

Wake County, Nos. 12 CRS 224404, 13 CRS 368

STATE OF NORTH CAROLINA

v.

RAKEED DIVONE SELLERS

Appeal by defendant from judgment entered 18 December 2013 by Judge Shannon R. Joseph in Wake County Superior Court. Heard in the Court of Appeals 25 April 2016.

Roy Cooper, Attorney General, by Michael T. Henry, Assistant Attorney General, for the State.

Jones Bullock, PLLC, by Brandi Jones Bullock, and Robert L. Sirianni, Jr., Pro Hac Vice, for defendant-appellant.

DAVIS, Judge.

Rakeed Divone Sellers (“Defendant”) appeals from his convictions for habitual misdemeanor assault, assault on a female, and attaining the status of an habitual felon. On appeal, he contends that the trial court (1) erred by sentencing him for habitual misdemeanor assault; and (2) improperly allowed him to be sentenced as an habitual felon. After careful review, we vacate in part and remand for resentencing.

Factual Background

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The State presented evidence at trial tending to establish the following facts: On 26 October 2012, Defendant arranged to pick up his three-year-old daughter and her mother, Nickara Boykin (“Boykin”), early in the evening and take them out to dinner. However, Defendant did not actually arrive until around midnight.

When Defendant arrived, he was noticeably intoxicated and irritated. Given Defendant’s condition, Boykin determined that it would be best for them to drop off their daughter at her grandmother’s house and instructed Defendant to do so. Defendant and Boykin began arguing and continued to argue during the drive to Boykin’s grandmother’s house.

After dropping off their daughter, Boykin told Defendant to take her to the home of her friend, Unitra Burrell (“Burrell”). While en route, Defendant and Boykin continued to argue until Defendant punched Boykin in the eye, causing her to temporarily lose vision. Defendant then proceeded to choke her.

Upon arriving at Burrell’s house, Boykin ran inside and asked Burrell to use her phone to call 911 and report Defendant’s actions. Burrell handed Boykin her phone and noticed visible marks on Boykin’s face and neck, including a black eye.

Shortly after Boykin called 911, Officer T.A. Brown (“Officer Brown”) with the Raleigh Police Department arrived at Burrell’s house and took down Boykin’s account of the incident. He then photographed her injuries, which included a black eye,

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bruises on her face, a cut on her mouth, and red marks around her neck. Officer Brown obtained an arrest warrant and arrested Defendant later that morning.

On 10 December 2012, Defendant was indicted on charges of assault on a female, habitual misdemeanor assault, and assault inflicting physical injury by strangulation. On 29 January 2013, Defendant was further indicted on the charge of attaining the status of an habitual felon.

A jury trial was held beginning on 16 December 2013 before the Honorable Shannon R. Joseph in Wake County Superior Court. The jury convicted Defendant of misdemeanor assault on a female and acquitted him of the charge of felony assault by strangulation. During the sentencing phase of trial, the trial court enhanced Defendant's misdemeanor assault on a female conviction to habitual misdemeanor assault. Defendant thereafter pled guilty to attaining habitual felon status. The trial court sentenced him to 70-93 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

I. Habitual Misdemeanor Assault

Defendant's first argument on appeal is that the trial court erred by sentencing him for the felony of habitual misdemeanor assault as opposed to misdemeanor assault on a female. Specifically, he contends that because he (1) was not convicted of habitual misdemeanor assault; (2) did not plead guilty to habitual misdemeanor

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assault; and (3) did not stipulate to the fact that he inflicted physical injuries upon Boykin, the trial court lacked the authority to sentence him for that offense.

Defendant failed to object at trial to the alleged sentencing error he now challenges on appeal. However, “[o]ur Supreme Court has held that an error at sentencing is not considered an error at trial for the purpose of N.C. Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure and therefore no objection is required to preserve the issue for appellate review.” *State v. Jeffery*, 167 N.C. App. 575, 579, 605 S.E.2d 672, 674 (2004) (citation, quotation marks, and brackets omitted).

N.C. Gen. Stat. § 14-33.2 provides that

[a] person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33 and causes physical injury, or G.S. 14-34¹, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation. A conviction under this section shall not be used as a prior conviction for any other habitual offense statute. A person convicted of violating this section is guilty of a Class H felony.

¹ N.C. Gen. Stat. § 14-34 provides that “[i]f any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor.” N.C. Gen. Stat. § 14-34 (2015). Because there is no evidence that Defendant possessed a firearm during his assault upon Boykin, this provision is inapplicable to the present case.

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N.C. Gen. Stat. § 14-33.2 (2015). N.C. Gen. Stat. § 14-33, in turn, provides, in pertinent part, that “any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she . . . [a]ssaults a female, he being a male person at least 18 years of age[.]” N.C. Gen. Stat. § 14-33(c)(2) (2015).

Thus, the essential elements of habitual misdemeanor assault stemming from an assault on a female are that “(1) defendant was convicted of two previous misdemeanor assaults² . . . ; (2) defendant assaulted [a female] . . . ; and (3) the assaults caused physical injuries.” *State v. Garrison*, 225 N.C. App. 170, 174, 736 S.E.2d 610, 613 (2013). This Court has held that

[u]nlike habitual felon status, habitual misdemeanor assault *is a substantive offense* and a punishment enhancement (or recidivist, or repeat-offender) offense. The statute treats the defendant’s prior assault convictions as elements of habitual misdemeanor assault. It does not, however, impose punishment for these previous crimes, but instead imposes an enhanced punishment for the latest offense.

State v. Sydnor, __ N.C. App. __, __, 782 S.E.2d 910, 913 (2016) (internal citations, quotation marks, and brackets omitted and emphasis added); *State v. Smith*, 139 N.C. App. 209, 212, 533 S.E.2d 518, 519-20 (“A close analysis of the precise wording of the habitual offender statutes in North Carolina reveals the intent of the Legislature that

² In the present case, Defendant stipulated at trial to two prior convictions for assault on a female.

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habitual misdemeanor assault be *a substantive offense* rather than merely a status for purposes of sentence enhancement.” (emphasis added), *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000).

Unlike habitual misdemeanor assault, the misdemeanor offense of assault on a female does not require infliction of a physical injury upon the victim. Rather, the latter offense only requires “(1) an assault, (2) upon a female person, (3) by a male person, (4) who is at least eighteen years old.” *Garrison*, 225 N.C. App. at 173, 736 S.E.2d at 613 (citation and quotation marks omitted).

In essence, Defendant is making two arguments: (1) the trial court lacked authority to sentence him for the crime of habitual misdemeanor assault because the jury did not convict him of that crime, and he did not plead guilty to that offense; and (2) in addition, he could not be lawfully sentenced for habitual misdemeanor assault because the trial court never found that he inflicted physical injury upon Boykin.

The confusion in this case stems from the fact that the trial court — for reasons that are unclear from the record — did not expressly instruct the jury on the offense of habitual misdemeanor assault even though Defendant had been indicted for that offense.³ Instead, the only charges the jury was instructed on were the misdemeanor charge of assault on a female and the felony charge of assault inflicting physical injury by strangulation.

³ We note that a pattern instruction exists for the offense of habitual misdemeanor assault. *See* 1 N.C.P.I. — Crim. 208.45A (2015).

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At the charge conference, the following exchange occurred:

[THE PROSECUTOR]: For that indictment number or the elements of assault on female, I'm going to ask that in the first element you add that the defendant inflicted physical injury because this is an element of habitual misdemeanor assault even though it's not usually of assault on female by itself.

THE COURT: That's fair. The indictment says giving her a black eye. Is that the language that you would like or inflicting injury?

[THE PROSECUTOR]: Just inflicting physical injury. That's the --

THE COURT: Does Defendant want to be heard on that?

[DEFENDANT'S TRIAL COUNSEL]: No. That sounds appropriate.

THE COURT: So the language would be "by punching her with a closed fist, inflicting physical injury."

[THE PROSECUTOR]: Inflicting physical injury simply because that's what misdemeanor assault requires.

THE COURT: I will add that both in the first element and in the summary instructions.

[THE PROSECUTOR]: Thank you, Your Honor.

The trial court then proceeded to instruct the jury as follows with regard to the misdemeanor assault on a female charge:

THE COURT: . . . In File Number 12 CRS 224404, the defendant, a male person, has been charged with

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assault on a female. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt:

First, that the defendant intentionally assaulted Nickara Boykin by punching her in the left eye with a closed fist *inflicting physical injury*;

Second, that Nickara Boykin was a female person;

And, third, that the defendant was a male person at least 18 years of age.

If you find from the evidence beyond a reasonable doubt that on or about October 27, 2012, the defendant was a male person at least 18 years of age and that he intentionally punched Nickara Boykin in the left eye with a closed fist, *inflicting physical injury*, and that Nickara Boykin is a female person, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphasis added).

Thus, while purporting to instruct the jury on the misdemeanor offense of assault on a female, the trial court inserted the additional element of physical injury, an element that — as stated above — is an element of habitual misdemeanor assault but not misdemeanor assault on a female. For this reason, Defendant is incorrect in his assertion that no finding was ever made in the trial court that he inflicted physical injury upon Boykin.

Nevertheless, we are troubled by the fact that the jury was never told in its instructions that it was being asked to determine whether Defendant was guilty of habitual misdemeanor assault. To be sure, because Defendant's indictment alleged habitual misdemeanor assault, the trial court possessed subject matter jurisdiction

over this charge. *See State v. Herman*, 221 N.C. App. 204, 206, 726 S.E.2d 863, 864 (2012) (trial court acquires subject matter jurisdiction over charges properly alleged in defendant's indictments). Therefore, the trial court *could* have instructed the jury on habitual misdemeanor assault. Critically, however, it failed to do so.

Thus, because the jury was never asked to return a verdict on habitual misdemeanor assault and, consequently, no verdict was ever rendered by the jury on that offense, the trial court erred in sentencing Defendant for that crime. Consequently, we vacate Defendant's habitual misdemeanor assault conviction.

II. Habitual Felon Status

Defendant also argues that the trial court erred in sentencing him as an habitual felon because he was not found guilty of any underlying felony. We agree.

The Habitual Felons Act, provides for indictment as a habitual felon of a defendant who has been convicted of or pled guilty to three felony offenses. The effect of such a proceeding is to enhance the punishment of those found guilty of crime[s] who are also shown to have been convicted of other crimes in the past. The Habitual Felons Act does not authorize an independent proceeding to determine defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony, and the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony.

State v. Cheek, 339 N.C. 725, 727, 453 S.E.2d 862, 863 (1995) (internal citations and quotation marks omitted).

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“In other words, the habitual felon indictment cannot be the sole charge on which the State proceeds at trial.” *State v. Blakney*, 156 N.C. App. 671, 674, 577 S.E.2d 387, 390, *disc. review denied*, 357 N.C. 252, 582 S.E.2d 611 (2003). Rather, “the habitual felon indictment is necessarily ancillary to the [underlying] indictment for the substantive felony.” *Cheek*, 339 N.C. at 727, 453 S.E.2d at 863.

As noted above, Defendant ultimately pled guilty to attaining habitual felon status. “By pleading guilty, [a] defendant thus waive[s] his right to challenge the [habitual felon] indictment on the ground[s] that the information [contained] in the indictment was incorrect.” *State v. McGee*, 175 N.C. App. 586, 588, 623 S.E.2d 782, 784, *disc. review denied*, 360 N.C. 489, 632 S.E.2d 768 (2006).

However, Defendant is *not* precluded from making the argument that he has actually raised in this appeal — that is, the argument that the trial court erred in accepting his guilty plea to attaining habitual felon status because he was not actually convicted at trial of an underlying felony. This argument is valid because the jury acquitted him of the felony charge of assault by strangulation and, as discussed above, he was never actually convicted of the felony of habitual misdemeanor assault. Rather, the only offense for which he was actually convicted was assault on a female.

Since that misdemeanor offense cannot serve as the underlying conviction to which habitual felon status could attach, the trial court erred in accepting his guilty

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plea to habitual felon status and in sentencing him as an habitual felon. *See State v. Little*, 121 N.C. App. 619, 620, 468 S.E.2d 423, 424 (1996) (“[B]ecause its predicate felony conviction no longer stands, the jury verdict finding defendant guilty as an habitual offender . . . must also be set aside and the judgment entered thereon vacated. The matter thus must be remanded for the resentencing and entry of a corrected judgment on the remaining convictions[.]”).

Conclusion

For the reasons stated above, we vacate Defendant’s habitual misdemeanor assault conviction, vacate Defendant’s habitual felon guilty plea, and remand for resentencing.

VACATED IN PART; REMANDED FOR RESENTENCING.

Chief Judge McGEE and Judge STEPHENS concur.

Report per Rule 30(e).