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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-892

Filed: 1 March 2016

Wake County, No. 12 CRS 202821-22

STATE OF NORTH CAROLINA

v.

COREY DONTEZ LANE, Defendant.

Appeal by defendant from judgment entered 21 March 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 16 December 2015.

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

Staples Hughes, Appellate Defender, by Constance E. Widenhouse, Assistant Appellate Defender, for defendant-appellant.

ZACHARY, Judge.

Where defendant failed to demonstrate that his case was prejudiced by evidence of unrelated bad acts, the trial court did not commit plain error. Where the restitution award was not supported by evidence, the trial court erred in ordering restitution. We vacate and remand for a proper determination of restitution.

I. Factual and Procedural Background

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In the summer of 2011, Sunny Kumar and Guarav Kharva started a business, buying and selling cellular phones on Craigslist and eBay. Sometime in the middle of 2011, Kumar purchased a phone listed on Craigslist by a man going by the name “Tyshawn.” Kumar later identified “Tyshawn” as Corey Lane (defendant). Over the next six months, Kumar and Kharva purchased phones from defendant thirty or forty times, paying defendant a total of roughly \$30,000 or \$40,000. During that time, Kumar and Kharva also purchased phones from other sellers, reselling them on eBay for a profit of roughly \$100 per phone. When they tried to sell some phones on eBay that they had purchased from defendant, Kumar and Kharva discovered that some were stolen. Kumar and Kharva nonetheless continued to purchase phones from defendant, but performed checks, and rejected any phones that appeared stolen.

On 25 January 2012, defendant called Kumar to inform him that defendant would have fifteen or seventeen phones to sell, which was a larger amount than any previous purchase. The next morning, Kumar and Kharva met defendant to purchase the phones. Defendant had far fewer than expected, but said that he would have more that evening. That evening, defendant called them and told them to meet him for the sale. Kumar and Kharva arrived as requested, carrying a total of \$3,100 in cash between them. After Kumar and Kharva entered defendant’s car, the vehicle was approached by two masked men with guns. One then took a cell phone, wallet, car keys, and \$800 cash from Kumar, while the other took \$2,300 cash, keys, and a

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wallet from Kharva. Kharva's wallet, which was empty, was returned. There was conflicting evidence as to whether the robbers took anything from defendant. There was testimony that defendant's door was not opened and that nothing was taken from him, but there was also testimony that one of the robbers demanded money and that defendant was screaming. Further, although defendant had a phone in his hand during and after the robbery, he refused to call 911. As the robbers fled, they dropped some of the money. Kumar and Kharva recovered some of this money, and defendant picked up \$100, claiming that he too had been robbed. After the robbery, Kumar and Kharva fled. Later, defendant contacted Kumar with offers of more phones; when Kumar declined, he "felt threatened" by defendant's response, although he could not state any specific threat made.

Defendant was indicted for two counts of robbery with a dangerous weapon and two counts of conspiracy to commit robbery with a dangerous weapon. The matter came on for trial in Wake County Superior Court on 26 February 2013. At the close of the State's evidence, and again at the close of all the evidence, defendant moved to dismiss the charges; these motions were denied. The jury found defendant guilty of both counts of robbery. However, the jury could not reach a unanimous verdict on the conspiracy charges, so the trial court declared a mistrial and dismissed those charges. The trial court consolidated the robbery convictions, and sentenced defendant in the presumptive range to an active term of 67-93 months imprisonment.

The trial court also ordered defendant to pay the sum of \$3,750 in restitution to the victims, Kumar and Kharva.

On 24 July 2014, this Court granted defendant's petition for writ of *certiorari* for his untimely appeal.

II. Prior Record

In his first argument, defendant contends that the trial court committed plain error in admitting his prior record into evidence. We disagree.

A. Standard of Review

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (citations and quotations omitted).

B. Analysis

At trial, Kumar and Kharva testified that some of the phones they purchased from defendant were stolen, and that afterward they rejected some phones he

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attempted to sell to them. Defendant argues that the fact that these phones were stolen was not relevant to the questions of whether defendant aided and abetted the masked men, or conspired with them to commit the robbery. Defendant contends that it was therefore error to admit this testimony. Because defendant failed to preserve this issue with timely objection at trial, we review it for plain error.

Defendant's burden under plain error review is to demonstrate that the alleged error, in this case the testimony that some phones previously purchased from defendant were stolen, had a "probable impact" on the outcome of the jury. *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333. In the instant case, the evidence tended to show that the practice between defendant and Kumar and Kharva was that defendant would call them and invite them to meet, that they would meet at a place and time of his selection, and that they would bring cash for the purchase. The evidence further tended to show that on 25 January 2012, defendant invited Kumar and Kharva to meet, and they were set upon by masked gunmen who robbed them, but barely spared defendant a glance. Assuming, *arguendo*, that the admission of this evidence was error, it does not appear that its exclusion would have had any impact. The jury still would have seen evidence that Kumar and Kharva were lured to a location by defendant, and that they were robbed in defendant's presence while defendant went unmolested.

Defendant further argues that this constituted improper character evidence. Rule 404(b) of the North Carolina Rules of Evidence prohibits evidence of a person's past bad acts for the purpose of showing conformity with those acts. Here, however, the evidence was not admitted for that purpose. The evidence did not, in fact, indicate that defendant had stolen the phones. Rather, it established a relationship between defendant and Kumar and Kharva. Selling stolen phones and committing armed robbery are two different matters, and we decline to accept defendant's contention that evidence of one is improper character evidence that shows a propensity for the other.

The burden is on defendant to establish that this evidence was prejudicial. While we acknowledge that the evidence against defendant at trial was not overwhelming, we hold that he has failed to demonstrate that this particular testimony had a probable impact on the jury. We hold therefore that defendant has failed to demonstrate plain error.

This argument is without merit.

III. Restitution

In his second argument, defendant asserts that the trial court erred in ordering him to pay restitution. We agree.

A. Standard of Review

On appeal, we review *de novo* whether the restitution order was "supported by evidence adduced at trial or at

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sentencing.” *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (citation omitted). “The amount of restitution must be limited to that supported by the record[.]” N.C. Gen. Stat. § 15A–1340.36 (2009). Unsworn statements made by the prosecutor are insufficient to support the amount of restitution ordered. *State v. Wilson*, 340 N.C. 720, 727, 459 S.E.2d 192, 196 (1995) (citation omitted). However, when “there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal.” *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986).

State v. Wright, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011). “[A] defendant's failure to specifically object to the trial court's entry of an award of restitution does not preclude appellate review.” *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777-78 (2010) (citations omitted).

B. Analysis

In addition to its judgment, the trial court entered a restitution worksheet, ordering defendant to pay restitution to Kumar in the amount of \$800, and Kharva in the amount of \$2,950, for a total of \$3,750 in restitution. Defendant contends, however, that the State failed to present sufficient evidence to support this amount.

At trial, Kumar testified that one of the robbers took his keys, wallet, phone, and \$600 cash. He told police, however, that the sum of \$800 was taken from him. Kumar further testified that, after the robbery, he recovered \$140 in money that he found on the ground.

Kharva testified that he had \$2,300 cash taken from him, as well as a wallet and keys. He further testified that, after the robbery, he and Kumar found several \$20 bills on the ground that the robbers left behind.

Our standard of review is not to weigh or compare the evidence, but simply to determine whether the restitution award was supported by evidence. While there is some evidence to support the trial court's determination that Kumar was robbed of \$800, and ought to receive as much in restitution, we hold that there is no evidence to support a restitution award of \$2,950 to Kharva. The State suggests in its brief that this award might include the value of the cell phones taken, but we do not find that the record supports such a determination.

We remand this case to the trial court for a proper determination of restitution based upon the evidence adduced at trial.

IV. Conclusion

Assuming, *arguendo*, that it was error for the trial court to admit evidence that the phones defendant sold to Kumar and Kharva were stolen, defendant has failed to meet his burden of showing that this evidence had a "probable impact" on the jury's determination of guilt, and as such has failed to show that the trial court committed plain error. However, the evidence at trial does not support the trial court's restitution order, which must be vacated and remanded for a proper determination of restitution supported by the evidence.

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NO PLAIN ERROR IN PART, VACATED AND REMANDED IN PART.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).