IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-272

Filed: 1 November 2016

Macon County, Nos. 14 CRS 50638, 50730, 238

STATE OF NORTH CAROLINA

v.

TOMMY DAVIDSON

Appeal by defendant from judgments entered 14 September 2015 by Judge Nathaniel J. Poovey in Macon County Superior Court. Heard in the Court of Appeals 24 October 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Olga Vysotskaya, for the State.

Michael E. Casterline for defendant-appellant.

TYSON, Judge.

Tommy Davidson ("Defendant") appeals from judgments entered upon his convictions for two counts of felony breaking and entering, felony larceny, felony possession of stolen goods, and attaining habitual felon status. We find no error in part, vacate in part, and remand.

I. Background

A Macon County sheriff's deputy was called to investigate a break-in at the Nelson residence in Franklin on 23 May 2014. Donald Nelson and his wife had returned home from a morning walk to find their back door had been kicked in. A camera, camera accessories, a small amount of money, and some jewelry had been taken. On 3 June 2014, a break-in was reported at the Greene residence in Franklin. Janet Greene and her husband had been out of town for a couple of days and returned home to find their kitchen door had also been kicked in. Mrs. Greene reported numerous pieces of jewelry valued at more than $20,000 missing.

The detective assigned to the case used a computer-generated online database of pawnshops to check for matching descriptions of jewelry against the list provided by Mrs. Greene. On 5 June 2014, the detective discovered that Destiny Swenson, a person previously known to law enforcement, had sold an expensive bracelet matching Mrs. Greene's description to Smoky Mountain Jewelers. The detective visited Smoky Mountain Jewelers and took the bracelet into evidence. Mrs. Greene later identified the bracelet as belonging to her.

A warrant for arrest warrant was issued for Ms. Swenson. The detective questioned Ms. Swenson in the county detention center on 9 June 2014. Ms. Swenson told the detective that she had been invited to Teresa Corpening's house a few days earlier to buy some jewelry from a man known as "TJ." Ms. Swenson stated TJ, whom she identified as Defendant in court, had a bag full of jewelry, which he assured her

was not stolen. Ms. Swenson bought a pair of earrings, and Defendant gave her the bracelet she later sold to Smoky Mountain Jewelers.

The detective next contacted Ms. Corpening, who told him Defendant came to her house with a bag full of jewelry on 3 June 2014 and asked her help to sell it. Ms. Corpening provided the detective with a phone number for Defendant's girlfriend, Victoria Minnihan.

On 11 June 2014, the detective called Ms. Minnihan, who acknowledged that Defendant was her roommate. Detectives went to Ms. Minnihan's home and apprehended Defendant. During questioning, police learned that Defendant had two gold necklaces in his pocket. Defendant was arrested. Ms. Greene later identified one of the necklaces recovered from Defendant as belonging to her.

Detectives obtained a search warrant for Ms. Minnihan's house. They discovered numerous pieces of jewelry located in Defendant's bedroom, a number of which Ms. Greene later identified as belonging to her. Police also found earrings and a camera in the bedroom that were later identified by the Nelsons as belonging to them. Defendant was charged with two counts of felony breaking and entering, two counts of felony larceny, two counts of felony possession of stolen goods, misdemeanor possession of stolen goods, and attaining habitual felon status.

Prior to the start of Defendant's trial on 9 September 2015, the State dismissed one count of felony possession of stolen goods. The transcript reveals the State also

voluntarily dismissed another charge of felony possession of stolen goods, but the indictment is not included in the record before this Court.

At the close of all evidence, the State dismissed the misdemeanor possession of stolen goods charge related to Defendant's possession of Mrs. Greene's gold necklace. The charges submitted for the jury's deliberation in the non-habitual phase of the trial were felony breaking and entering and felony larceny in 14 CRS 50638, relating to the Greene break-in, and felony breaking and entering, felony larceny, and felony possession of stolen goods in 14 CRS 50730, relating to the Nelson break-in.

The trial court instructed the jury that Defendant had been charged with two counts of felony breaking and entering: one each against alleged victims, Mr. Donald Nelson and Ms. Janet Greene. The judge informed the jury he would give a single instruction on the elements of that offense, but that the jury was to consider the charges separately during deliberations. He then instructed on those offenses. Next, the trial court instructed on the offense of felony larceny "as it relates to the alleged victim, Donald Nelson." Finally, the trial court instructed the jury on the offense of felony possession of stolen goods as it "relates to the alleged victim, Donald Nelson."

The jury found Defendant guilty of all five remaining offenses. At the habitual felon phase, the jury found Defendant guilty of attaining habitual felon status. The trial court consolidated the two counts remaining in 14 CRS 50638 and sentenced Defendant in the presumptive range to 20 to 33 months imprisonment for those

convictions. In 14 CRS 50730, the court arrested judgment on the felony larceny conviction and consolidated the two remaining convictions for judgment. The court sentenced Defendant to a consecutive term of 128 to 166 months imprisonment in 14 CRS 50730. Defendant gave written notice of appeal on 16 September 2015.

II. Issue

Defendant argues the trial court erred in failing to instruct the jury on the necessary elements for the felony larceny charge as it related to the Greene break-in.

III. Standard of Review

Defendant failed to object to the trial court's failure to provide an instruction to the jury on the felony larceny charge related to the Greene break-in. We review his arguments for plain error. *See* N.C.R. App. P. 10(a)(4) ("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."); *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).

Unpreserved issues are reviewed 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).

IV. Analysis

The State concedes the trial court's failure to instruct the jury on this charge amounted to a dismissal of the charge under this Court's binding case law, *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000). In *Bowen*, the defendant argued the trial court committed plain error in failing to instruct the jury on the necessary elements for one of the five indecent liberties charges against him. *Id.* at 26, 533 S.E.2d at 253. This Court agreed and rejected the State's argument that the trial court's failure to instruct was harmless error. *Id.* The other four indecent liberties charges for which the trial court in *Bowen* did provide instruction contained the same elements as the fifth indecent liberties charge. *Id.* at 26, 533 S.E.2d at 253-54. Relying on our Supreme Court's decision in *State v. Williams*, 318 N.C. 624, 350 S.E.2d 353 (1986), this Court in *Bowen* vacated the trial court's judgment on the fifth indecent liberties charge, and held "by *not* instructing the jury on case number 97

CRS 6341, the trial court effectively dismissed the indictment of the same." *Bowen*, 139 N.C. App. at 26, 533 S.E.2d at 254.

The relevant facts here closely parallel those in *Bowen* and compel the same result. The trial court instructed the jury on the offense of felony larceny "as it relates to the alleged victim, Donald Nelson." As in *Bowen*, Defendant failed to object to the trial court's failure to provide an instruction for the second offense. Despite the fact that both felony larceny charges contained the same elements, the trial court committed plain error in failing to instruct the jury on the felony larceny charge related to the Greene break-in. The State concedes the trial court's failure to instruct on the second felony larceny charge amounted to a dismissal of that charge, and as such, the trial court's judgment in 14 CRS 50638 must be vacated. *Id.*

We also note the trial court's judgment in 14 CRS 50638 was entered upon consolidated convictions of felony larceny and felony breaking and entering. The State contends that, because the convictions were consolidated and Defendant was sentenced in the presumptive range, Defendant cannot show that a new sentencing hearing would likely result in a different outcome, and a remand is not required in this case. However, in neither *Williams* nor *Bowen* did the Court require the defendants to show that a new sentencing hearing was likely to result in a different outcome before remanding for resentencing on the convictions that had been consolidated with convictions overturned on appeal. *See Williams*, 318 N.C. at 632,

350 S.E.2d at 358; *Bowen*, 139 N.C. App. at 33, 533 S.E.2d at 257. The State fails to show that such a showing is required of Defendant in this case.

V. Conclusion

Defendant does not argue that the trial court erred in entering judgment in case numbers 14 CRS 50730 and 14 CRS 238. We find no error in the judgment entered on the convictions under those case numbers.

The trial court's judgment in 14 CRS 50638 is vacated and the cause remanded for a new sentencing hearing on the felony breaking and entering conviction under that case number.

NO ERROR IN PART, VACATED AND REMANDED FOR RESENTENCING IN 14 CRS 50638.

Judges STROUD and INMAN concur.

Report per Rule 30(e).