IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-450

Filed: 15 November 2016

Hyde County, Nos. 15-CRS-63, 15-CRS-50006

STATE OF NORTH CAROLINA

v.

MICHAEL FARROW, Defendant.

Appeal by Defendant from judgments entered 8 December 2015 by Judge Jack W. Jenkins in Hyde County Superior Court. Heard in the Court of Appeals 2 November 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Wyatt Orsbon, for the Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Michael Farrow ("Defendant") was convicted by a jury of one count of taking indecent liberties with a child and found a habitual felon. The trial court sentenced Defendant to 132 to 171 months in prison, and imposed lifetime satellite-based monitoring ("SBM") upon his release. Defendant petitions this Court for writ of certiorari to review his convictions for plain error, alleging the trial court failed to instruct the jury on the defense of accident and improperly allowed the State to

introduce irrelevant evidence of past convictions during the habitual felon phase of the trial. Defendant also asserts he is entitled to a separate hearing to assess whether the imposition of lifetime SBM is reasonable, pursuant to *Grady v. North Carolina*. 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015) (per curiam). We grant Defendant's petition, limiting review to his contention with respect to *Grady*, and remand to the trial court for a new hearing to determine whether Defendant's enrollment in the SBM program is reasonable.

I. Facts and Procedural Background

On 18 May 2015, the Hyde County grand jury indicted Defendant on one count of taking indecent liberties with a child and as a habitual felon.

On 7 December 2015, the case came to trial. The evidence tended to show the following: Twelve-year-old "Donna"[1] testified first, on 7 February 2015, Donna and her mother "Carol" lived in their home in Engelhard, North Carolina. While Donna and her mother were "taking out [Donna's] hair" in the living room, her uncle Alvin Spencer ("Alvin") and Defendant came to the house looking for a ride home to Fairfield. Carol said she would give them a ride after she finished taking the braids out of Donna's hair. While they waited, Defendant went to use the bathroom.

Donna testified Defendant emerged from the bathroom roughly five minutes later, sweating, staggering, and looking as if he were "drunk" or "like he was high or

[1] Both parties have used the same pseudonym to protect the identity of the minor victim and her mother.

something." Carol then used the bathroom. While Donna was sitting on the floor, leaning against a chair with her legs propped up on a table, Defendant suddenly reached over and "grabbed" and "squeezed" her vagina. Donna began to cry and ran to tell her mother.

Donna heard her mother confront Defendant, who claimed "he tripped over the table and accidentally touched [Donna] between [her] legs, or an accident." However, Donna testified Defendant did not trip, and specifically denied on cross examination that Defendant staggered or tripped when he grabbed her.

Donna went to her room and closed the door. She heard Defendant offer Carol money not to tell her grandfather. Defendant then came to Donna's room and tried to apologize, but she pushed him out. Defendant and Alvin then left, and deputies came to the house to take Donna's statement.

"Carol" testified that on 7 February 2015, she and her twelve-year-old daughter "Donna" were in their home in Engelhard, North Carolina. Defendant and Alvin, came to the home looking for a ride. Carol asked them to wait until she finished taking extensions out of Donna's hair. Subsequently, Defendant asked Carol if he could use her restroom. Defendant remained in the bathroom long enough to arouse her uncle's suspicion and Alvin went to check on him. Defendant then emerged from the bathroom "sweating." Carol could smell beer on him, but did not notice him slurring his words or stumbling. Carol then used the bathroom.

After Carol came out of the bathroom, Donna came and told her "Michael rubbed me between my legs." Carol confronted Defendant, who claimed he had merely "tripped over the table and accidentally touched [Donna] between [her] legs." Defendant then offered Carol money not to tell the police. Defendant tried to go into Donna's room to apologize, but Donna "push[ed] him out of her room, telling him to get out of her room and leave her alone because he know[s] what he did." After Defendant left the home, Carol called both her father and the Hyde County Sherriff's office to report the incident.

Deputy Joseph Smith ("Deputy Smith") testified next. He responded to the call and interviewed Donna. Deputy Smith testified Donna told him while Carol was in the bathroom, Defendant "come over beside her and stood there and put his finger over her mouth as if he was telling her to be quiet. Then he reached down and grabbed her between her legs." The State rested.

Defendant offered no evidence. Defendant did not request the court issue any jury instructions and offered no objections whatsoever at the charge conference. The jury subsequently found Defendant guilty of one count of taking indecent liberties with a child.

In the habitual felon phase of the trial, the State called Brandy Pugh ("Ms. Pugh"), the Hyde County Clerk of Court. Ms. Pugh testified she maintained copies of all court documents, including criminal judgments. During her testimony, the State

introduced three exhibits, each a copy of a prior felony judgment against Defendant. Ms. Pugh testified as to the content of these three judgments, stating Defendant had been previously convicted of possession with intent to sell and deliver cocaine, forgery, and breaking and entering. However, both Ms. Pugh's testimony and the unredacted judgments themselves revealed Defendant had also been convicted for selling cocaine, uttering a forged instrument, and larceny. Defendant did not object to the introduction of these exhibits or to their publication to the jury.

After the State rested, Defendant testified on his own behalf. Defendant challenged his forgery conviction, claiming the judgment against him was forged because he never signed the plea agreement. The jury subsequently found Defendant was a habitual felon. Defendant was sentenced as a Level VI offender and sentenced to 132 to 171 months in prison.

After sentencing, the trial court found Defendant was a recidivist on the strength of a previous conviction for taking indecent liberties with a child. The trial court then stated "the fact that he is a recidivist sort of eliminates a lot of the decision-making on it . . . because it's sort of a *fait accompli*, I think." The trial court subsequently sentenced Defendant to lifetime SBM upon release. Defense counsel did not object to the imposition of SBM.

At trial, defense counsel gave oral notice of appeal twice, once after the jury found him guilty of taking indecent liberties, and once after the jury found Defendant

was a habitual felon. However, counsel failed to give oral notice after sentencing, as required by N.C.R. App. P. 4(a)(1), and failed to give written notice within 14 days of the sentence as per N.C.R. App. P. 4(a)(2). As a result, Defendant lost his right to appeal for failure to give timely notice, and petitions this Court to review his claims via a Writ of Certiorari, pursuant to N.C.R. App. P. 21.

II. Jurisdiction

The Court of Appeals has the discretion "to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1) (2016). "A petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Rouson,* 226 N.C. App. 562, 563-64, 741 S.E.2d 470, 471 (2013) (quoting *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)).

III. Standard of Review

When a defendant fails to bring objections to jury instructions or evidentiary matters at trial, this Court may review subsequent challenges under the plain error rule. *State v. Wiley*, 355 N.C. 592, 615-16, 565 S.E.2d 22, 39-40 (2002).

In order to satisfy the plain error standard, "a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the

error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and quotation marks omitted). Our Supreme Court has stated that "plain error is to be applied cautiously and only in the exceptional case" where the error is "one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518, 723 S.E.2d at 334 (internal quotation marks and citations omitted).

We review constitutional issues *de novo*. *Piedmont Triad Reg'l Water Auth. V. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

IV. Analysis

A. Petition for Writ of Certiorari

Defendant's first two claims do not present this Court with "good and sufficient cause" to grant his petition. *Rouson,* 226 N.C. App. at 563-64, 741 S.E.2d at 471. First, Defendant asserts the trial court committed plain error by failing to instruct the jury on the defense of accident. Jury instructions are required when there is "substantial evidence of each element of the defense when 'the evidence [is] viewed in the light most favorable to the defendant.'" *State v. Hudgins*, 167 N.C. App. 705, 709, 606 S.E.2d 443, 446 (2005) (quoting *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000), *disc. rev. denied*, 353 N.C. 386, 547 S.E.2d 25 (2001)).

Here, Defendant did not present any evidence of an accident to the trial court. Defendant did not testify at trial that he tripped, nor did he call any witnesses to

testify that he tripped. Defendant asserts Donna and Carol's testimony that Defendant initially claimed he tripped constituted sufficient evidence to infer a conflict in the evidence to entitle him to the accident instruction.

We disagree. Both women testified Defendant did not trip. Both women testified Defendant subsequently apologized and attempted to stave off prosecution with money. Taking this testimony in the light most favorable to the Defendant, the record does not contain any evidence from Defendant of a conflict of witnesses showing the touching to be accidental.

Second, Defendant claims the trial court committed plain error by publishing unredacted versions of the three exhibits which showed Defendant had been convicted of more than just the three felonies the State sought to rely upon to prove his habitual felon status. Defendant correctly asserts the trial court erred by allowing the introduction of such evidence. *State v. Lotharp*, 148 N.C. App. 435, 444-45, 559 S.E.2d 807, 812, *rev'd on other grounds*, 356 N.C. 420, 571 S.E.2d 583 (2002).

However, Defendant does not show he has been prejudiced from this error. Given the jury received uncontested evidence of three prior qualifying convictions, we must conclude the jury would not have reached a different decision. While Defendant challenged the legitimacy of his forgery conviction, such an attempt to collaterally attack an underlying conviction is impermissible both in this Court and at sentencing. *State v. Creason*, 123 N.C. App. 495, 500, 473 S.E.2d 771, 773 (1996).

Moreover, the trial court properly instructed the jury as to the procedure it was required to follow in order to find the Defendant had attained habitual felon status. *Lotharp*, 148 N.C. at 445, 559 S.E.2d at 812.

As a result, we hold the record does not show "good and sufficient cause" to grant Defendant's petition for certiorari with respect to these claims.

B. *Grady* Hearing

Finally, Defendant claims the trial court erred by failing to conduct a separate hearing to determine whether SBM was a reasonable search, as required by *Grady v. North Carolina*, 135 S. Ct. 1368, 191 L. Ed. 2d 459 (2015). We agree, grant his petition, and reverse and remand for a hearing to determine the reasonableness of lifetime SBM.

In *Grady*, the United States Supreme Court held in a per curiam opinion that despite being "civil in nature," our state's SBM program "effects a Fourth Amendment search." 135 S. Ct. at 1371, 191 L. Ed. 2d at 462. Because the Fourth Amendment prohibits only unreasonable searches, the Court held the "ultimate question of the program's constitutionality" depended on the reasonableness of the search. *Id.* This in turn depends upon the "totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* Thus, before the State can impose satellite based monitoring, a defendant is entitled to a "reasonableness" hearing. *Id.*

Subsequently, our Court held the State bears the burden of proof of reasonableness. *State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 527 (2016). We have also held a trial court must do more than just "summarily conclude[]" the imposition constitutes a reasonable search or seizure. *State v. Morris*, ___ N.C. App. ___, ___, 783 S.E.2d 528, 529 (2016) (trial court erred when it merely acknowledged *Grady* and found SBM was reasonable without engaging in the required inquiry into the totality of the circumstances). Thus, when a defendant has been subjected to lifetime SBM without a reasonableness inquiry, the proper remedy is to remand to the trial court for a new hearing. *See, e.g.*, *State v. Collins*, ___ N.C. App. ___, ___, 783 S.E.2d 9, 16 (2016); *Blue*, ___ N.C. App. at ___, 783 S.E.2d at 527; *Morris*, ___ N.C. App. at ___, 783 S.E.2d at 529-30.

Since Defendant was sentenced to lifetime SBM nine months after *Grady* without a reasonableness hearing, we reverse the trial court's order imposing SBM and remand for a new hearing.

REMANDED.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).