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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-843

Filed: 19 November 2019

Wake County, Nos. 15 CRS 218490, 218494–98, 218500–05

STATE OF NORTH CAROLINA

v.

JAMELL CHA MELVIN and JAVEAL AARON BAKER

Appeal by defendants from judgments entered 4 August 2017 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 23 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin O. Zellinger, for the State.

Sarah Holladay for defendant Melvin.

Kimberly P. Hoppin for defendant Baker.

DIETZ, Judge.

Defendants Jamell Melvin and Javeal Baker appeal their convictions on multiple charges of armed robbery and related offenses. We reject their primary argument—that the trial court should have severed their cases for separate trials—because the argument they assert on appeal is not the argument they raised before

the trial court. We likewise reject their other challenges to the trial court's judgments, all of which are meritless. Accordingly, we find no error in Defendants' criminal judgments. But we allow Melvin's petition for a writ of certiorari, vacate the civil judgment for attorneys' fees entered against him, and remand that matter for further proceedings under our recent decision in *State v. Friend*, __ N.C. App. __, __, 809 S.E.2d 902, 906–07 (2018).

Facts and Procedural History

On 13 July 2015, three armed men entered the office at the Walnut Creek Amphitheater, ordered the office manager and four other employees to get on the ground at gunpoint, and asked for the general manager. The amphitheater hosted a concert the previous weekend and the office manager heard the armed men mention that they knew the armored truck had not arrived that morning to collect the money from the concert. The office manager called the general manager.

When the general manager arrived, one of the armed men pointed a gun at her and told her they would kill an employee if she did not open the safe. The general manager opened the safe, which contained approximately $497,000 in cash. The money in the safe was stored in straps marked with the initials of the Amphitheater cash attendants. The armed men packed the money into bags. When the men weren't looking, the general manager pushed a panic button to alert the police.

After the armed men left with the money, the general manager called the police. Police arrived and discovered a trail of money leading across the parking lot, through woods, and into a swamp. The witnesses to the robbery described the three armed men as African-American, but could not identify them because they had their faces covered during the robbery. One of the men was taller than the other two, around six feet tall, and the two shorter men were about the same size. They were armed with small handguns and one of the men was wearing a tan coat.

A K-9 officer began tracking the suspects and discovered various items including large bundles of money, a backpack containing money, a black t-shirt, a boot submerged in mud, and wallets belonging to two of the amphitheater employees. The K-9 officer's dog led her to a residential area through the woods behind the amphitheater, where they recovered a tan coat covering more money. The track the dog was following continued between several houses and ended at a street. The officer and dog then followed another track across the amphitheater property and located more evidence including clothing, a backpack containing cash, and a green money bag containing a gun.

An officer at the scene, after learning that one of the suspects might be shoeless based on the boots located in the swamp, saw two men walking at a nearby intersection. One of them had no shoes. The deputy stopped the shoeless man and noticed that the bottom of his clothes were wet and muddy. The man, identified as

Adjani Bryant, told police he had been robbed of his clothing. Police conducted another search around the amphitheater the following day and found a pair of black Adidas pants, more clothing, and several stacks of $5 bills.

On 15 July 2015, police received anonymous tips that led them to begin surveilling Defendant Jamell Melvin, his girlfriend Kianna Baker, and their son Defendant Javeal Baker, along with two others, Shymale Robertson and Lorenzo McNeill. Through their investigation, police recovered a large sum of cash from a storage unit, contained in bands with the amphitheater employees' initials on them. Jamell Melvin and Javeal Baker both had visited the storage unit and Melvin's blood and fingerprints were found on a suitcase containing the money.

On 18 August 2015, law enforcement arrested Defendants Jamell Melvin and Javeal Baker along with Kianna Baker, Lorenzo McNeill, and Shymale Robertson. Melvin denied knowing anything about the robbery and Kianna Baker denied that her son Javeal Baker was involved in the robbery. Adjani Bryant admitted his involvement in the robbery and implicated the others as his accomplices.

The State indicted Defendants on six counts of robbery with a dangerous weapon, six counts of conspiracy, and six counts of first-degree kidnapping.

The State moved to join Defendants and Kianna Baker for trial. Defendants objected and moved to sever their trials. The trial court allowed the State's motion to

join Defendants and Kianna Baker for trial and denied Defendants' motions to sever their trials.

Defendants' joint trial began on 10 July 2017. At trial, Ramon Davis testified that Defendants worked for him doing landscaping at the Walnut Creek Amphitheater in 2015. Adjani Bryant testified that, after committing several smaller crimes together, he and Melvin decided to commit a crime that would result in a bigger "score." Bryant testified that it was Melvin's idea to rob the amphitheater because he had worked there and knew about the safe. Bryant testified that Javeal Baker got involved after Bryant and Melvin picked a date for the robbery. He explained that Baker planned to use a .38 mm handgun and brought in Shymale Robertson, who also planned to use a gun. Bryant testified that Melvin drove the group to the amphitheater and waited nearby while Robertson, Bryant, and Baker went in and committed the robbery. After the robbery, Melvin was supposed to pick them up in a nearby neighborhood, but Bryant split from the others and ran through the swamp, losing his shoes and dropping a bag of money. The backpack Bryant dropped contained $116,409.

At the close of the State's evidence, the trial court dismissed five of the six conspiracy counts. Defendants renewed their objections to joinder of their cases. After deliberations, the jury convicted Defendants on six counts of robbery with a dangerous weapon, one count of conspiracy to commit robbery, and five counts of

second-degree kidnapping. The trial court sentenced Melvin to four consecutive terms of 60 to 84 months in prison and sentenced Baker to three consecutive terms of 70 to 96 months in prison. Defendants appealed.

Analysis

I. Denial of motions for severance

Melvin and Baker both argue that the trial court erred in denying their motions to sever their trials. They contend that they asserted antagonistic defenses that compromised their right to a fair trial. As explained below, this argument is not preserved for appellate review.

We review a trial court's decisions on joinder and severance for abuse of discretion. *State v. Tirado*, 358 N.C. 551, 564, 599 S.E.2d 515, 526 (2004). To preserve an argument concerning joinder or severance for appellate review, the defendant must assert that specific argument to the trial court before trial or, if the ground for severance arises only after the trial begins, immediately after that ground becomes apparent. *State v. Walters*, 357 N.C. 68, 79, 588 S.E.2d 344, 351 (2003).

Defendants have not met this preservation requirement. To be sure, Melvin and Baker both sought to sever their cases before trial, but on different grounds than those raised on appeal. In criminal cases, our Supreme Court repeatedly has held that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount."

State v. Sharpe, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996). The defendants in this appeal have done some serious horse-swapping.

We begin with Melvin. Melvin's argument on appeal is straightforward: that his stepson, Baker, presented "a defense antagonistic to Mr. Melvin's." In essence, Melvin contends that Baker's theory at trial was that only one of them could have been the third man involved in the robbery and it wasn't him, it was Melvin.

But tellingly, Melvin never points to any pre-trial argument—either in his written motion to sever or at the hearing on that motion—in which he made this argument to the trial court. Instead, he contends that "[a]t the pre-trial hearing, *counsel for Mr. Baker* indicated that his client would likely present a defense antagonistic to Mr. Melvin's." In other words, Melvin acknowledges that *he* never identified for the trial court what antagonistic defense created a risk of prejudice so serious as to require severance. He relies instead on what Baker argued to the trial court. But, importantly, he concedes in his brief that "Baker's attorney hedged" when describing the issue to the trial court, explaining that "[i]t's not antagonistic defenses necessarily."

Thus, whether the argument Defendants present on appeal is preserved depends on what Baker argued to the trial court. On appeal, Baker first contends that he raised "multiple issues with joinder" at the pre-trial hearing, citing a portion

of the hearing transcript. This is what Baker's counsel said in that portion of the transcript:

> But, there are two severance issues for me. One, I am asking to be severed from Jamell Melvin and from Kianna Baker, and I will get to that later when it's my turn. But the other basis in there is asking to be severed from Shymale Robertson.

Baker's counsel then discussed severance from Shymale Robertson, which was mooted and is not an argument either Melvin or Baker asserts on appeal. Later in the proceeding, Baker's counsel circled back to "asking to be severed from Jamell Melvin and from Kianna Baker." He argued that Baker's case should be severed from Melvin's and Kianna Baker's because those defendants are his stepfather and his mother and that relationship created prejudice:

> I am genuinely concerned that if the son is sitting here at the trial of his mother and father, call it guilt by association, it may even be worse than that just because of the relationship, the assumed relationship between parents and their children, especially someone that is a minor at the time, 17 years old.

This is, of course, not an argument that Melvin and Baker would be asserting antagonistic defenses. It is an entirely different argument.

Baker contends that, after discussing the risk of prejudice from a joint trial with his parents, Baker turned "his attention to the issues concerning antagonistic defenses and evidence." But, tellingly, Baker does not include a transcript cite with this assertion. Because there isn't one.

As Melvin's attorney acknowledges in his briefing, the only arguable time that Baker raised an antagonistic defense argument, he did so by telling the trial court that "it's not antagonistic defenses necessarily":

> But all that evidence about them and what they did concerns me in a trial with Javeal Baker because not only the parental relationship -- and again, the guilt by association times a million that people may attribute to Javeal Baker -- but the paucity of evidence against Javeal Baker as compared to the evidence against his mother and his father. Again, I couched in terms of a fair opportunity to determine Javeal Baker's guilt.
>
> It's not antagonistic defenses necessarily, but there are aspects of that. But that is the bigger side of it.

Baker's counsel then discusses all of the evidence connecting Melvin and the other accused men to the crime and explains that he seeks severance because "it gets back to the point of the lack of evidence against Javeal Baker, but a great deal more evidence against his parents."

This is an argument of Baker's risk of guilt by association with his parents. It is not an argument that there is a risk of prejudice resulting from Baker or Melvin arguing that only one of them could have been the third man at the robbery and the other could not be.

Finally, it is worth noting that both Baker and Melvin had *many* opportunities to simply tell the trial court that joining them together created this risk of antagonistic defenses. First, the prosecutor addressed the issue and argued that there

would not be any antagonistic defenses because all the defendants asserted that they were not present at the scene of the crime:

> So then it comes to a matter of do you have antagonistic defenses under 15A-927, I guess, (c)(2)(a), finding it necessary to promote fair administration of justice. And Your Honor what I would tell you is I don't see any antagonistic defenses in this case. They are all going to deny that they were present. This case is going to be a 100 percent -- well, not 100 percent, but 90 percent attack on Adjani Bryant's credibility. He is the one that puts them all there.

All it would have taken is for either Baker or Melvin to explain to the trial court that the prosecutor mischaracterized their argument; that Baker likely would argue that only one of these two defendants could have been the third man in the robbery and thus they would be arguing theories of the other's guilt that the State would not present in separate trials. Neither defendant ever made that argument.

Similarly, the trial court noted at one point that the parties had mentioned "antagonistic defenses" and explained that he understood the argument to be about the risk created by the testimony of another potential witness, Chicago Smith. The parties could have explained that their antagonistic defense theory was something entirely different. This was their response:

> [BAKER'S COUNSEL]: I agree with the Court's comments, but I don't think this issue that we are talking about, the Chicago Smith, is an antagonistic defense.

Not once in the 83-page transcript of this pre-trial hearing did either of these defendants explain to the court that they were concerned of the risk that Baker or Melvin would assert the sort of antagonistic defenses against each other that they now assert on appeal.

This careful review of the arguments at the pre-trial hearing might seem a bit like splitting hairs, but it is not. We require preservation of this type of "antagonistic defenses" argument for good reason. Once the trial commenced, if Melvin and Baker believed it wasn't going well, they could assert these antagonistic defenses and, if the jury convicted them, seek a new trial on that basis. They could get a second bite at the apple. It is precisely for this reason that our Supreme Court requires defendants to explain the specific basis for a severance argument before trial. *State v. Silva*, 304 N.C. 122, 127, 282 S.E.2d 449, 453 (1981). The only exception to the rule is when, during trial, "severance becomes justified on a ground not previously known to the defendant." *Id.* at 128, 282 S.E.2d at 453. Neither defendant argues that they were unaware of these antagonistic defenses until the trial began.

In sum, the theory on which Defendants rely on appeal is not one they ever raised in the trial court. They swapped horses. And in the context of severance, it is particularly important to prohibit that horse-swapping because severance is a *discretionary* decision of the trial court "which is made prior to trial; the nature of the decision and its timing indicate that the correctness of the joinder must be

determined as of the time of the trial court's decision *and not with the benefit of hindsight*." *Id.* at 127, 282 S.E.2d at 453 (emphasis added).[1] We thus find that the defendants waived their appellate argument concerning severance by failing to assert the theory of severance pursued in this Court to the trial court.

II. Jury instructions

Defendants also raise a series of challenges to the trial court's instructions, but we hold that the trial court acted within its sound discretion, and without error, in those instructions and that, in any event, Defendants failed to show that there was any reasonable possibility that, but for those alleged errors, the jury would have reached a different result. *State v. Babich*, __ N.C. App. __, __, 797 S.E.2d 359, 365 (2017).

a. Failure to repeat limiting instruction on anonymous tips

Both Melvin and Baker argue that the trial court erred by failing to repeat the limiting instruction regarding anonymous tips in response to the jury's request for "any available information of Crime Stopper tips." We disagree.

"The trial judge is not required to repeat instructions correctly given during the original charge, but may do so in his discretion." *State v. Harper*, 96 N.C. App. 36, 43, 384 S.E.2d 297, 301 (1989). "The trial court's decision whether to repeat

[1] Of course, this rule does not apply to grounds for severance that the defendant only discovers after the trial has begun. *Walters*, 357 N.C. at 79, 588 S.E.2d at 351. But Defendants do not argue that they only became aware of these purported antagonistic defenses during trial.

previously given instructions to the jury is reviewed for abuse of discretion." *State v. Smith*, 194 N.C. App. 120, 126, 669 S.E.2d 8, 13 (2008). "The judge is in the best position to determine whether instructions should be repeated, and, in the absence of error in the original charge, needless repetition is undesirable and has been held erroneous on occasion." *Harper*, 96 N.C. App. at 43, 384 S.E.2d at 301. "We have long held that a jury is presumed to follow the instructions given to it by the trial court." *State v. Wiley*, 355 N.C. 592, 637, 565 S.E.2d 22, 52 (2002).

Here, the jury requested information regarding the anonymous tips to law enforcement during the investigation of the robbery. In response to the jury's request, the trial court instructed them that it was their duty to recall the oral testimony about the tips and that there was no documentary evidence presented regarding the tips, but the court denied defense counsel's request to "give them another limiting instruction" on anonymous tips. The trial court did not repeat any of the evidence to the jury or provide them with copies of the evidence.

In light of the fact that the trial court did not provide the jury with any additional information on the anonymous tips and that the trial court had already given the limiting instruction on anonymous tips during the presentation of evidence, we find that the jury was sufficiently instructed on the issue. The jury's request did not indicate that it misunderstood or was not following the instructions in any way. *Id.* Accordingly, we find that the trial court did not abuse its discretion in denying

the request to repeat the limiting instruction on anonymous tips. *Smith*, 194 N.C. App. at 126, 669 S.E.2d at 13.

Moreover, even if the failure to reinstruct was error, Defendants have not shown that the error was prejudicial. Considering the other evidence against Defendants, including witness testimony and physical evidence tying them to the robbery and its proceeds, there is no reasonable possibility that, but for this instruction, the jury would have reached a different result. *Babich*, __ N.C. App. at __, 797 S.E.2d at 365.

b. Instruction on six counts of robbery

Both Defendants next contend that the trial court committed plain error in instructing the jury that it could find them guilty of six separate counts of robbery. Each instruction asked the jury to determine if Defendants took "property of the alleged victim and/or property of Legends Hospitality." Defendants contend that, because all of the stolen money belonged to Legends Hospitality, this disjunctive instruction violated their right to a unanimous verdict. We reject this argument.

Defendants concede this error is unpreserved and thus we review only for plain error. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* In other words, the defendant must show that, "absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 516–17, 723 S.E.2d at 333.

Where "defendants threatened the use of force on separate victims and took property from each of them," the "armed robbery of each person is a separate and distinct offense, for which defendants may be prosecuted and punished." *State v. Johnson*, 23 N.C. App. 52, 56, 208 S.E.2d 206, 209 (1974). For example, where one victim was robbed of personal property and a second victim "was forced to turn over the corporation's money" in a robbery at the same location, this Court has held that "it is clear that the acts constituted two separate offenses of armed robbery." *State v. Gibbs*, 29 N.C. App. 647, 650, 225 S.E.2d 837, 838–39 (1976). And "[o]ur Supreme Court has held that where a trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied. However, . . . where the trial court instructs disjunctively in this manner, there must be evidence to support all of the alternative acts that will satisfy the element." *State v. Johnson*, 183 N.C. App. 576, 582, 646 S.E.2d 123, 127 (2007) (citation omitted). "[T]here is no unanimity problem if it is

possible to match a jury's verdict of guilty with a specific incident after reviewing the evidence, indictment, jury charge, and verdict sheets." *State v. Bates*, 179 N.C. App. 628, 633, 634 S.E.2d 919, 922 (2006).

Here, the jury was instructed that each defendant was charged with six counts of robbery, one for each of the victims present in the amphitheater office at the time of the robbery. For each count, the jury was instructed which alleged victim the count pertained to and that the jury must find "that the defendant took property from the person of another or in [his/her] presence, which is alleged to be items of personal property of the alleged victim and/or property of Legends Hospitality, LLC."

The evidence presented showed that six separate victims were threatened at gunpoint while the perpetrators took items of personal property from each of them along with a large sum of cash belonging to the victims' employer. Accordingly, we hold that the trial court did not err in instructing the jury that it could find Defendants guilty of six separate counts of armed robbery. *See Johnson*, 23 N.C. App. at 56, 208 S.E.2d at 209.

The court's disjunctive instruction was proper because it "merely instruct[ed] the jury disjunctively as to various alternative acts *which will establish an element of the offense*," the taking of the victim's personal property or the taking of property belonging to Legends, both of which would satisfy the same element of the offense. *Johnson*, 183 N.C. App. at 582, 646 S.E.2d at 127. And there was evidence to satisfy

each alternative act because there was witness testimony that the cash belonging to Legends was taken in the presence of all of the victims and that some item of personal property also was taken from each victim. *Id.* Because the instructions and verdict sheets for each count specified to which victim it pertained, "it is possible to match a jury's verdict of guilty with a specific incident." *Bates*, 179 N.C. App. at 633, 634 S.E.2d at 922.

In any event, even assuming error in the jury instructions, that error does not rise to the level of plain error. There was evidence to support each of these convictions based on testimony that Defendants took property—at gunpoint—from six different victims. Thus, this instructional error was not the type of error that was so serious as to render this criminal trial fundamentally unfair and, as a result, undermine the integrity of our justice system. *Lawrence*, 365 N.C. at 518–19, 723 S.E.2d at 334–35. Accordingly, we find no error and certainly no plain error in the trial court's jury instructions.

c. Instruction on doctrine of recent possession

Next, Baker argues that the trial court erred by instructing the jury on the doctrine of recent possession because there was insufficient evidence that Baker had constructive possession of the money found in the storage unit. We disagree.

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

(2009). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973).

Under the doctrine of recent possession, possession of recently stolen property raises a presumption that the possessor stole the property. *State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (1981). In order to invoke the presumption that the possessor is guilty under the doctrine of recent possession, the State must prove that "(1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others…; and (3) the possession was recently after the larceny." *State v. Lee*, 213 N.C. App. 392, 395, 713 S.E.2d 174, 177 (2011). The second prong of the test for application of the doctrine requires that "the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods." *Maines,* 301 N.C. at 674, 273 S.E.2d at 293. A defendant has constructive possession of property if he has the power and intent to control it. *State v. Mewborn,* 200 N.C. App. 731, 736, 684 S.E.2d 535, 539 (2009). When a defendant does not have exclusive control of the premises where the property is found, the State must introduce other circumstantial evidence sufficient

for the jury to find that the defendant had constructive possession. *State v. Davis,* 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989).

Here, we find that there was sufficient evidence to establish that Baker had access to and constructive possession of the money found in the storage unit. There was witness testimony from Lorenzo McNeill that Baker had access to and had visited the storage unit where the money was kept. This was sufficient circumstantial evidence of constructive possession to support the jury instruction on the doctrine of recent possession. *See id.* Accordingly, the trial court did not err in instructing the jury on the doctrine of recent possession because the instruction was supported by the evidence at trial.

And again, for the same reasons discussed above, even assuming error, Baker has not shown the alleged instructional error was prejudicial in light of the other evidence linking him to the robbery. *Babich*, __ N.C. App. at __, 797 S.E.2d at 365.

III. Cumulative error

Melvin next argues that, even if no single error was sufficiently prejudicial to warrant relief on appeal, the cumulative effect of the alleged errors entitles him to a new trial. But because we found that the various errors he asserts on appeal are either not preserved or meritless, we cannot find cumulative error. Cumulative error entitles a defendant to a new trial where several errors "taken as a whole, deprived defendant of his due process right to a fair trial free from prejudicial error." *State v.*

Canady, 355 N.C. 242, 254, 559 S.E.2d 762, 768 (2002). Because we find no error with respect to each of the individual alleged errors, "there is no need to consider defendant's cumulative error argument." *State v. Thompson*, 359 N.C. 77, 106, 604 S.E.2d 850, 871 (2004). We note, however, that none of these alleged errors impacts the heart of the State's case and, even considered cumulatively, there is no reasonable possibility that, but for the alleged errors, the jury would have reached a different result. *Babich*, __ N.C. App. at __, 797 S.E.2d at 365.

IV. Restitution

Melvin next argues that the trial court erred by entering a judgment for restitution that was not supported by the record. We find that any error in the calculation of restitution was waived as invited error and, even if it was not, the restitution judgment properly was supported by the evidence at trial.

"[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995). We review this issue *de novo*. *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011). "[A] restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). "Nonetheless, the quantum of evidence needed to support a restitution award is not high. When . . . there is some

evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *Id.*

In addition, "a defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct. Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Dahlquist*, 231 N.C. App. 575, 584, 753 S.E.2d 355, 361 (2014) (citations omitted).

Here, when the State presented its restitution worksheet showing the sum of $286,412.70 and asked counsel for both parties for input, Melvin's counsel responded, "Your Honor, I think we would agree to that. We would not stipulate, *but take whatever the court rules*." (Emphasis added.) Because Melvin did not challenge the State's restitution evidence, and instead stated that he agreed with the State's evidence, he either invited the error or waived his appellate challenge.

Even if it was not waived, the amount of restitution was supported by the evidence presented at trial regarding the amount taken from the amphitheater and the amounts recovered in the investigation. At trial, the general manager of the amphitheater testified that the robbers took "$497,000 and change" and law enforcement witnesses testified about the amounts that were recovered during their investigation. The State then presented its restitution worksheet for $286,412.70, representing the amount "not either found at the scene, in the book bag, on the track

or in the storage unit." This was sufficient evidence to support the restitution judgment. *Moore*, 365 N.C. at 285, 715 S.E.2d at 849.

V. Attorneys' fees

Finally, Melvin petitioned for a writ of certiorari, asking this Court to review the civil judgment for attorneys' fees the trial court entered against him because it was entered without the required "notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005). This Court has held "that, before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *State v. Friend*, __ N.C. App. __, __, 809 S.E.2d 902, 907 (2018).

Here, the trial court failed to address Melvin directly and give him an opportunity to be heard before entering the judgment for attorneys' fees. In our discretion, we allow Melvin's petition for a writ of certiorari, vacate the civil judgment for attorneys' fees, and remand that matter under *Friend*. N.C. R. App. P. 21(a).

Conclusion

For the reasons discussed above, we find no error in the trial court's judgments, but vacate and remand the judgment for attorneys' fees against Melvin.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges MURPHY and COLLINS concur.

Report per Rule 30(e).