IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-139

Filed: 19 November 2019

Mecklenburg County, No. 15 CRS 232060

STATE OF NORTH CAROLINA

v.

IMHOTEP MUATA IYAPO

Appeal by defendant from judgment entered 22 March 2018 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jasmine S. McGhee, for the State.

Winifred H. Dillon for defendant-appellant.

BRYANT, Judge.

Where defendant invited the error he asserts on appeal, we overrule his assignment of error regarding the submission of lesser-included offenses. Where the trial court properly sentenced defendant as a prior record level V offender, we affirm the trial court's ruling.

On the morning of 5 September 2015, Officer J. Littlejohn of the Charlotte-Mecklenburg Police Department (CMPD) responded to multiple 911 calls from the

home of Joscelyn Shaw involving a domestic violence incident with defendant Imhotep Iyapo. Defendant had previously lived and been romantically involved with Shaw. After their relationship ended, defendant moved out of the house and Shaw began dating Darrell Speed.

Upon arrival at Shaw's house, Officer Littlejohn spoke to Shaw, who was standing at the end of her driveway, and reported that defendant had used a sledgehammer to break the windows of the cars outside of her house, as well as the house itself. Officer Littlejohn made his way up the driveway where he encountered defendant, who then said, "I did it. I broke everything." Defendant was arrested and placed inside the police car. Speed, the owner of one of the demolished vehicles parked in the driveway, arrived just as defendant was being transported from Shaw's house. Defendant threatened Speed by saying, "I'll be back for you."

In the early morning of 6 September 2015, Speed awoke to find defendant standing over him, holding a drill. Speed had been sleeping in the master bedroom with Shaw when he felt the heat from the drill bit as it penetrated his skull and traveled towards the back of his head; his pillow was soaked in blood. Defendant said to Shaw, "See what you made me do?" and yelled at Speed to get out of the house. Defendant then struck Speed with the drill and kicked him as he left the house. Speed was able to drive his car to a nearby fire station, then he was transported to

the hospital. Speed underwent surgery for his injuries, which included a skull fracture and two lacerations.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), first-degree burglary, and injury to personal property.[1] On 19 March 2018, the Honorable Forrest D. Bridges, Superior Court Judge of Mecklenburg County, presided over the trial. At the close of the State's evidence, the trial court dismissed the charge of first-degree burglary.

The trial court charged the jury on the original charged offense—AWDWIKISI—and three lesser-included offenses: 1) assault with a deadly weapon inflicting serious injury ("AWDWISI"); 2) assault with a deadly weapon with intent to kill ("AWDWIK"); and 3) guilty of assault with a deadly weapon ("AWDW"). Alternatively, the jury could find defendant not guilty. On 22 March 2018, the jury found defendant guilty of the lesser-included offense: AWDWISI.

The trial court calculated defendant's prior record level to be a Level V, with fourteen prior record points, and he was sentenced to an active term of thirty-five to fifty-four months. Defendant did not give notice of appeal in open court at the conclusion of the trial; however, on 28 March 2018, his trial counsel appeared before the trial court and purported to enter notice of appeal on behalf of defendant.

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[1] The charge of injury to personal property was later dismissed by the State before trial.

On appeal, defendant argues the trial court: I) committed plain error by not instructing the jury on a lesser-included offense, and II) erred by sentencing him as a prior record level V offender.

As a threshold matter, defendant filed a petition for writ of certiorari asking this Court to review his appeal because his notice of appeal was not properly given in open court at trial.

Rule 4 of the North Carolina Rules of Appellate Procedure ("Appeal in Criminal Cases—How and When Taken") provides that notice of appeal from a judgment or order from the trial court in a criminal action must be orally given *at trial*, or in writing within 14 days of the entry of the judgment or order appealed from. N.C.R. App. P. 4(a) (2019). Failure to do so deprives this Court of appellate jurisdiction. *See State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) ("[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal."). Moreover, "[w]hile this Court cannot hear defendant's direct appeal, it does have the discretion to consider the matter by granting a petition for writ of certiorari." *Id.*; *see also* N.C.R. App. P. 21(a)(1) (2019) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court 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[.]").

Here, it is apparent in the record that defendant did not give proper notice of appeal. A careful reading of Rule 4 provides that oral notice of appeal can only be given in the criminal session when defendant's actual trial is held. Nevertheless, we acknowledge that while defense counsel appeared before the trial court and entered notice of appeal on defendant's behalf—four days after defendant's trial—the trial proceedings of his underlying charges had already concluded. Defendant did not submit a written notice of appeal within the fourteen-day period nor did he give an oral notice of appeal *at the conclusion of his trial*. Thus, consistent with Rule 4, defendant lost his right to appeal for failing to file proper notice of appeal within the time limits.

However, having acknowledged his appeal is untimely and considering the circumstances upon which defendant inadvertently filed improper notice of appeal, we believe the circumstances are appropriate to grant a writ of certiorari under Rule 21(a)(1) and exercise our discretion to address his issues on appeal. *See* N.C.R. App. P. 21(a)(1).

I

First, defendant argues the trial court erred by failing to submit to the jury a lesser-included offense of misdemeanor assault inflicting serious injury ("AISI"). Having acknowledged that he had an opportunity to object at trial but did not, defendant now argues for plain error review to support his contention that he was

entitled to the instruction because the jury should have decided whether the drill was a deadly weapon. We disagree.

Generally, a defendant, who challenges jury instructions or evidentiary issues in criminal appeals "not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action," must demonstrate plain error on appeal. N.C.R. App. P. 10(a)(4) (2019); *see also State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) ("For error to constitute plain error, 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." (internal citation and quotation marks omitted)).

Notwithstanding plain error review, a defendant cannot assert on appeal that he was prejudiced by errors which he invited by his actions, including lesser-included offenses given to the jury. *See State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991) ("A criminal defendant will not be heard to complain of a jury instruction given in response to his own request."); *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 383 (1996) ("[T]his Court has consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests."); *see also State v. Hope*, 223 N.C. App. 468, 472, 737 S.E.2d 108, 111 (2012) ("[A] defendant who invites error has waived his right to all appellate review

concerning the invited error, including plain error review." (citation and quotation marks omitted)).

In the instant case, the record reveals that defendant was given an opportunity during the charge conference to request jury instructions for lesser-included offenses of his original charge:

> [THE COURT]: What, if any, lesser-included offenses are there?
>
> [THE STATE]: Your Honor, the State doesn't feel that there are any lesser-included offenses here.
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> [THE COURT]: Defendant agree? Is it all or nothin'?
>
> [DEFENSE COUNSEL]: We do agree.
>
> [THE COURT]: Really?
>
> [DEFENSE COUNSEL]: May [defense counsel] approach *ex parte*, briefly? Can we have just a minute?

At the close of the *ex parte* hearing, which occurred outside the presence of the State, the verdict sheet was later updated at defendant's request to instruct the jury on the desired lesser-included offenses:

> [THE COURT]: [Defendant] is back in the courtroom now. And if I understand correctly, the defendant and his counsel now request that the verdict sheet include possible verdicts of: Assault with a deadly weapon with intent to kill, inflicting serious injury; assault with a deadly weapon, inflicting serious injury; assault with a deadly weapon with intent to kill; assault with a deadly weapon; and not guilty. Is that correct?
>
> [DEFENSE COUNSEL]: Yes, sir.

[THE COURT]: Okay. That will be the possible verdicts.

Based on the following exchange, it is clear that any error in not instructing the jury on AISI was invited by defendant, who expressly indicated which instructions to provide——notably absent was the charge of AISI—and in fact did not object to the proposed instructions of the lesser-included offenses that were given. "Having invited the error, defendant cannot now claim on appeal that he was prejudiced by the instruction." *State v. Basden*, 339 N.C. 288, 303, 451 S.E.2d 238, 246 (1994). Thus, defendant's argument is overruled as he is not entitled to any relief and will not be heard to complain on appeal.

II

Finally, defendant argues the trial court erred in sentencing him as a Level V offender "because the evidence presented by the State only supported a prior record level of IV," and thus, entitles him to a new sentencing hearing. Specifically, defendant argues that "[b]ecause of the trial court's erroneous assessment of two additional prior record points, [he] was sentenced at an illegal prior record level." We disagree.

The determination of a prior record level, based on a calculation of points assigned for prior convictions, is a question of law. *State v. Powell*, 223 N.C. App. 77, 81, 732 S.E.2d 491, 494 (2012). "For purposes of sentencing, a trial court must (1) ascertain the type and number of the defendant's prior convictions, (2) calculate the

sum of the points assigned for each conviction, and (3) based upon the defendant's total points, determine the defendant's prior record level." *Id*. at 80, 732 S.E.2d at 493.

As indicated in N.C.G.S. § 15A-1340.14, the existence of a prior conviction requires a factual finding which may be established by, *inter alia*, "[s]tipulation of the parties" or "[a]n original or copy of the court record of the prior conviction." N.C.G.S. § 15A-1340.14(f)(1)–(2) (2017). In North Carolina, the classification of felonious prior convictions from other jurisdictions by default is a "Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony[.]" *Id*. § 15A-1340.14(e). Moreover, a prior Class I felony conviction results in an assignment of two points. *Id*. § 15A-1340.14(b)(4).

In the instant case, the number of points accumulated by defendant establishes that he was properly sentenced at a prior record level of V. Defendant's prior record level worksheet introduced during sentencing showed that he had six qualifying prior felony convictions from New York and New Jersey. Pursuant to the statutory default provision, each felony conviction was labeled as a Class I felony, and defendant was assigned two points. *See id*. § 15A-1340.14(e).

During the sentencing hearing, the State presented the trial court with another qualifying prior conviction—a federal conviction for conspiracy to possess with intent to distribute a quantity of heroin. Defendant stipulated to the federal

conviction, offered to provide copies of the judgment to the trial court, and the worksheet was modified, without objection by defendant, to reflect the federal conviction—classified as a Class I felony. Defendant was assigned two more points; resulting in a total of fourteen points. *See id.* § 15A-1340.14(c)(5) (stating that a defendant with at least 14, but not more than 17 points is a level V offender). Additionally, when asked specifically by the trial court if there was a disagreement about the two-point addition, defendant responded, "No, sir."

Thus, defendant's failure to dispute the existence of his prior convictions, including the federal conviction, are clearly sufficient to meet the State's burden of proving that prior convictions exist, that defendant is the same person as the offender named in the prior convictions, and that the prior offenses carried point values of two. *See id.* § 15A-1340.14(f) ("The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction.").

Accordingly, we affirm defendant's sentence as the trial court did not err in sentencing him as a prior record level V offender.

AFFIRMED.

Judges TYSON and BROOK concur.

Report per Rule 30(e).