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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-321

Filed: 17 December 2019

Watauga County, No. 17 CRS 51070

STATE OF NORTH CAROLINA

v.

JOSEPH HINTON

Appeal by defendant from judgments entered 26 July 2018 by Judge R. Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 14 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General David L. Gore, III, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant.

ARROWOOD, Judge.

Joseph Hinton (“defendant”) appeals from judgments entered on his convictions for first-degree burglary and conspiracy to commit first-degree burglary. Defendant contends the trial court erred by (1) taking judicial notice of sunset without the proper foundation, (2) not taking judicial notice of civil twilight, (3) not instructing the jury on civil twilight, and (4) ordering defendant to pay restitution without any

evidence to support such award. For the following reasons, we find no error in part and reverse in part.

I. Background

On 27 November 2017, defendant was indicted on charges of assault with a deadly weapon with intent to kill inflicting serious injury; first-degree burglary; conspiracy to commit first-degree burglary; and discharging a firearm into occupied property causing serious bodily injury. On 23 July 2018, defendant was tried before a jury. The evidence at trial tended to show the following.

At approximately 8:00 p.m. on 26 March 2017, Lee Cool (“Cool”) heard people enter the apartment he shared with three other housemates as he lay in his basement bedroom. Cool was a second-year student at Appalachian State University who sold marijuana, and possessed 20 vacuum sealed bags of marijuana in his room at that time. Upon hearing footsteps, Cool yelled upstairs but no one responded. However, the people walking around immediately stopped. Becoming suspicious, Cool grabbed his shotgun and loudly racked a bullet in the chamber. He then heard people run out of the apartment. Cool went upstairs to the living room and, looking out the window, saw three males in hoodies walking away. Cool opened his front door and called out to the males, who then scattered and ran into the woods nearby.

After the males ran away, Cool walked out of his apartment and looked at the cars in the parking lot. He recognized all of the cars present except for a white sedan.

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Suspecting the three males had driven the white sedan, Cool took a picture of the car's license plate. Discovering the car doors were unlocked, he then searched the car for information about its owner and occupants. He seized a set of keys, a wallet, cell phone, and gun magazine from the car. As Cool walked back to his apartment with the items, one of the three males walked towards him with his hands up. Cool told the man he had just taken some items from the man's car and then ran back into his apartment, locking the door behind him.

Cool searched the wallet he took from the white sedan and found a driver's license for a Tykeem Woodard ("Woodard"). Five to ten minutes later, a black male walked up to the front door of the apartment, carrying a pistol. Cool watched him through the large window in his front door. The man demanded Cool return the items he had taken from the white sedan. Cool initially refused, and began arguing with the man through the door. During this exchange, the man did not point his gun at Cool, but kept his finger on the trigger. After approximately five minutes, Cool agreed to return the cell phone to the man. The man retrieved the cell phone, and demanded the rest of the items. Cool refused to return them.

The man at the door wiggled the door knob a few times, but was unable to gain entry because the door was locked. He then returned to his car. A couple minutes later, Cool felt what he believed to be a gunshot to his head, which became covered with blood. After he was sure the men had left, Cool went to his neighbor Paul Sneyd

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(“Sneyd”) for help. Sneyd had heard people arguing outside of his apartment as he was about to eat dinner. Approximately ten minutes later, he heard four gunshots. Upon hearing the gunshots, Sneyd texted Cool at 8:18 p.m., asking if Cool was OK. Shortly after that, Cool ran over to Sneyd’s apartment, asking for help. Sneyd took Cool to the Watauga Medical Center emergency room, where hospital staff subsequently notified the Watauga County Sheriff’s Department they were treating a gunshot wound.

Cool told investigating officers he believed he was shot by the man at his front door, but was unable to identify the man. Officers later learned that Woodard and Amate Dawes (“Dawes”) were involved in the incident, and charged them both with conspiracy to commit first-degree burglary. Woodard and Dawes pled guilty to the conspiracy charge and agreed to testify against Joseph Hinton as part of a plea arrangement with the State. Woodard testified that he, Dawes, and defendant initially planned to buy marijuana from Cool but later decided to take it instead. Dawes testified that he, Woodard, and defendant went to Cool’s apartment intending to steal his marijuana. While defendant went into Cool’s apartment, Dawes and Woodard waited outside in the car. After a few minutes, they saw defendant run out of the apartment, claiming Cool had a gun. The three of them then ran into the woods nearby.

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When they returned to the car, Dawes realized Cool had taken his cell phone. He grabbed a gun and confronted Cool at his apartment door, demanding that Cool return his cell phone and the other items taken from the car. After retrieving the cell phone, Dawes returned to the car and told Woodard and defendant that Cool refused to hand over the other items. Dawes testified defendant then took the gun and got out of the car, heading towards Cool's apartment. Dawes subsequently heard four gunshots. Woodard testified that defendant told him he thought that he had shot Cool.

During the trial, the State asked the trial court to take judicial notice that on 26 March 2017, sunset occurred at 7:44 p.m. and civil twilight ended at 8:10 p.m. in Boone, North Carolina. The State provided the trial court with a printout of a U.S. Naval Observatory ("USNO") webpage showing the time of sunset and civil twilight in Boone, North Carolina on 26 March 2017 in support of its request. The trial court took judicial notice that sunset occurred at 7:44 p.m. on 26 March 2017, but made no mention of civil twilight. The trial court instructed the jury that the time of sunset on 26 March 2017 was a judicially noticed fact that the jury may, but was not required to, accept as conclusive.

At the close of the State's case, defendant moved to dismiss all charges against him. The trial court denied the motion. Defendant was found guilty of first-degree burglary and conspiracy to commit first-degree burglary. He was sentenced to

consecutive terms of 64 to 89 months imprisonment and 25 to 42 months imprisonment. As a condition of the judgment, the trial court ordered defendant to pay \$9,672.59 in restitution. Defendant timely appealed.

II. Discussion

On appeal, defendant challenges his conviction for first degree-burglary, arguing that any offense he committed did not occur at nighttime. To that effect, defendant contends the trial court erred by (1) taking judicial notice of sunset without the proper foundation, (2) not taking judicial notice of civil twilight, and (3) not instructing the jury on civil twilight. Defendant further assigns as error the trial court's order that he pay restitution, absent any evidence to support such award.

“[T]he decision as to whether judicial notice of facts should be taken is left to the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion.” *State v. McDougald*, 38 N.C. App. 244, 248, 248 S.E.2d 72, 77 (1978).

1. Judicial Notice

Defendant first argues the trial court erred by taking judicial notice that sunset occurred at 7:44 p.m. in Boone, North Carolina because the State failed to lay the proper foundation. Specifically, defendant contends that a computer printout of an otherwise reputable source of information was not of such indisputable accuracy

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as would justify judicial reliance. In addition, defendant asserts the State improperly sought to admit the document into evidence. We disagree.

First-degree burglary is “the unlawful breaking and entering of an occupied dwelling or sleeping apartment, at nighttime, with the intent to commit a felony therein.” *State v. McCormick*, 204 N.C. App. 105, 111, 693 S.E.2d 195, 198 (2010). North Carolina has no statutory definition of nighttime. Instead, “our courts adhere to the common law definition of nighttime as that time after sunset and before sunrise ‘when it is so dark that a man’s face cannot be identified except by artificial light or moonlight.’” *State v. Barnett*, 113 N.C. App. 69, 74, 437 S.E.2d 711, 714 (1993) (citations omitted). “[I]f the State fails to present substantial evidence that the crime charged occurred during the nighttime, a defendant is entitled to have charges of burglary against him dismissed.” *State v. Smith*, 307 N.C. 516, 518, 299 S.E.2d 431, 434 (1983).

Here, in order to prove the element of nighttime, the State requested the trial court take judicial notice of the timing of sunset and civil twilight in Boone, North Carolina on 26 March 2017. “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” N.C. Gen. Stat. § 8C-1, Rule 201(b) (2018). If a party seeks judicial notice of a fact falling under the

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second part of this test, the source from which the information is drawn must be “a document of such indisputable accuracy as [would] justif[y] judicial reliance.” *State v. Dancy*, 297 N.C. 40, 42, 252 S.E.2d 514, 515 (1979).

“We believe that, in the case of facts such as the time of sunset and the phase of the moon, a document of ‘indisputable accuracy’ contemplates material from a primary source in whose hands the gathering of such information rests.” *State v. Canady*, 110 N.C. App. 763, 766, 431 S.E.2d 500, 501 (1993). In *Dancy*, our Supreme Court used its discretionary authority to take judicial notice of the phase of the moon on its own initiative, relying on the records of the USNO. 297 N.C. at 42, 252 S.E.2d at 515.

In the present case, the State presented evidence through witness testimony that defendant committed the charged offense between 8:00 p.m. and 8:18 p.m. The State also provided records from the USNO to support its request that the trial court take judicial notice that on 26 March 2017, sunset in Boone, North Carolina occurred at 7:44 p.m. and civil twilight ended at 8:10 p.m. Defendant argues that because the document provided to the trial court was only a computer printout of a webpage from the USNO website, it was not a document of such indisputable accuracy as would justify judicial reliance. We are not persuaded by this argument.

The USNO is an official government resource tasked with gathering and recording data about the earth, sun and moon, including the precise timing of sunset

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and civil twilight. It has been recognized and relied upon by North Carolina courts as a primary source of such information. *See Dancy*, 297 N.C. at 42, 252 S.E.2d at 515. In this instance, the particular information from USNO that the State sought to offer was published only in digital format on the USNO's official government website. Thus, it was not an abuse of discretion for the trial court to take judicial notice of sunset based on the printout from USNO's official government website.

Defendant further contends the State offered no foundation for this document, marked as "Exhibit 11," and could thus not enter it into evidence. However, to the extent the State presented the document for purposes of supporting its request for judicial notice, and not as admissible evidence, it was not required to lay a foundation. *See* N.C. Gen. Stat. § 8C-1, Rule 901(a). Thus, defendant's argument is without merit.

Defendant next argues the trial court erred by not taking judicial notice of civil twilight, where the same source offered to support judicial notice of sunset was also offered to support a request for judicial notice of civil twilight. We agree that the trial court erred in not also taking judicial notice of civil twilight, but hold this error was harmless. "A court shall take judicial notice if requested by a party and supplied with the necessary information." N.C. Gen. Stat. § 8C-1, Rule 201(d). Here, the State offered the same USNO document in support of its request that the timing of both sunset and civil twilight be judicially noticed. Because the trial court determined the State provided it with the necessary information to support judicial notice of the

timing of sunset, and did in fact take judicial notice of sunset, it was required to take judicial notice of the timing of civil twilight as well. Failure to do so was error. However, such error was harmless given our common law definition of nighttime does not contemplate civil twilight.

Defendant argues the trial court did not commit harmless error. According to defendant, “nighttime does not begin necessarily at sunset. Rather, nighttime can begin at twilight, which is the time when diffused light from the sun illuminates the atmosphere after sunset.” Thus “a reasonable juror could believe nighttime begins at [the end of] civil twilight.” Defendant essentially asks this Court to redefine the common law definition of nighttime adopted by North Carolina courts long ago. However, we are bound by our precedent, which makes clear nighttime is the time period after sunset, and before sunrise, “when it is so dark that a man’s face cannot be identified except by artificial light or moonlight.” *Barnett*, 113 N.C. App. at 74, 437 S.E.2d at 714 (internal quotation marks and citations omitted). Because our definition of nighttime does not contemplate civil twilight, it has no bearing on the matter. Thus, taking judicial notice of civil twilight would not have changed the jury’s verdict. Accordingly, the trial court did not commit reversible error by not taking judicial notice of civil twilight.

2. Jury Instruction

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Defendant's argument the trial court committed plain error by not instructing the jury on civil twilight similarly fails. Because defendant failed to object to the jury instruction at trial, and thus failed to preserve the issue on appeal, we review the instruction for plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Under plain error analysis, this Court will reverse the trial court's decision only if there was error, and such error "is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . ." *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996). "In deciding whether a defect in the jury instruction constitutes 'plain error', the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79.

"[I]t is the duty of the trial court to instruct the jury on all of the substantive features of a case." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988) (citations omitted). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citations omitted). "All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court's instruction thereon." *Loftin*, 322 N.C. at 381, 368 S.E.2d at 617. Defendant asserts the trial court was obligated to instruct the jury on any evidence from which a reasonable juror could believe the breaking or entering of Cool's apartment did not

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occur during the nighttime, which is a defense to burglary. By not instructing the jury that civil twilight ended at 8:10 p.m., defendant contends the trial court committed plain error because it failed to instruct the jury on a substantive and material feature of the case.

Defendant is mistaken in his belief that the end of civil twilight was a substantial and material feature of the case. As discussed *supra*, our common law definition of nighttime does not depend on the timing of civil twilight, but rather on sunset and sunrise. Moreover, the crucial inquiry is whether “it is so dark that a man’s face cannot be identified except by artificial light or moonlight.” *Barnett*, 113 N.C. App. at 74, 437 S.E.2d at 714 (quotation marks and citations omitted). Here, in addition to requesting the trial court take judicial notice that sunset occurred at 7:44 p.m., the State also provided evidence that it was dark outside when defendant committed the charged offense. Specifically, the State’s evidence showed Cool told detectives it was dark outside when he heard people break into his apartment around 8:00 p.m., 16 minutes after sunset. Cool also needed to use the flash feature on his phone in order to take a picture of the license plate of the car defendant and his accomplices had traveled in. The trial court later gave the following instruction to the jury:

For you [to] find [] defendant guilty of [burglary] the State must prove five things beyond a reasonable doubt. . . . [including] that the breaking and entering was during the nighttime. The law considers it to be nighttime

when it is so dark that a person's face cannot be identified except by artificial light or moonlight.

Thus, the trial court properly instructed the jury on the substantive and material features of the case, including what the State needed to prove regarding the element of nighttime. Because civil twilight has no legal significance in the determination of whether an offense was committed during the nighttime, the trial court committed no error by not instructing the jury that civil twilight ended at 8:10 p.m.

3. Restitution

Finally, defendant contends the trial court erred by ordering defendant to pay restitution without any evidence to support such award. We agree.

“[N]o objection is required to preserve for appellate review issues concerning the imposition of restitution.” *State v. Smith*, 210 N.C. App. 439, 443, 707 S.E.2d 779, 782 (2011) (citing *State v. Mumford*, 364 N.C. 394, 402-03, 699 S.E.2d 911, 917 (2010)). We review an award of restitution in a criminal case *de novo*. *State v. Wright*, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011).

A trial court can “require that the defendant make restitution to the victim or the victim's estate for any injuries or damages arising directly and proximately out of the offense committed by the defendant.” N.C. Gen. Stat. § 15A-1340.34(b) (2017). An award of restitution “must be supported by evidence adduced at trial or at sentencing.” *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011) (citation

and quotation marks omitted). When no evidence supports the award, the award of restitution will be vacated and remanded. *Id.*

In the present case, the trial court, on its own initiative, inquired during sentencing about the restitution ordered in the co-defendants' cases. The clerk informed the trial court that the co-defendants had been ordered to pay restitution in the amount of \$9,672.59. The State offered no testimony or documentation supporting a similar award in defendant's case. Though the trial court informed defendant it was considering awarding defense counsel attorney's fees, it made no mention of awarding restitution as well. Nevertheless, a restitution worksheet detailing the amount to be paid by defendant was included in the Record, and defendant was ordered to pay \$9,672.59 in restitution as part of his sentence. "This Court has held, however, that a restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010) (citation omitted). Accordingly, it was error for the trial court to order defendant to pay restitution absent any evidence to support such award.

II. Conclusion

For the foregoing reasons, we hold the trial court did not commit reversible error with regard to issues of judicial notice and jury instructions, but we reverse the restitution award and remand the matter to the trial court for further determination.

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NO ERROR IN PART, REVERSED IN PART.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).