IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-433

Filed: 17 December 2019

Union County, No. 17 CRS 50376

STATE OF NORTH CAROLINA

v.

LACRESHIA FAWN ANDERSON, Defendant.

Appeal by Defendant from judgments entered 3 and 8 August 2018 by Susan E. Bray in Union County Superior Court. Heard in the Court of Appeals 29 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas W. Yates, for the State.

Appellant Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for Defendant-Appellant.

INMAN, Judge.

Lacreshia Fawn Anderson ("Defendant") appeals her convictions following jury verdicts finding her guilty of first-degree burglary and attempted robbery with a dangerous weapon. Defendant argues that the trial court (1) plainly erred when the prosecutor cross-examined her about purported comments and activity on a Facebook account; and (2) failed to provide her notice and an opportunity to be heard before

ordering her to pay attorney's fees. After thorough review of the record and applicable law, we hold that Defendant has failed to demonstrate plain error as to the prosecutor's cross-examination and vacate and remand the trial court's order of attorney's fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence introduced at trial tends to show the following:

Around 10:15 pm on 25 January 2017, Defendant and her cousin Joshua Thomas ("Thomas"), along with Tonorrow Wells ("Wells"), Jeffone Raley ("Raley"), and Ahbu Camps ("Camps") were traveling in a burgundy Chevrolet Suburban from Charlotte to Monroe. While en route, Defendant stated that she "can't go home without no money. I know somewhere we can go where there's some money" and drugs. Defendant then gave Camps, the driver, directions to the address of her friend of ten years Christina Simone Jones ("Jones") and Jones' fiancé, Demeterian Brown ("Brown"). The group arrived not long after and parked on the side of the road, waiting for Jones to return home from her job as a sous-chef.

Around 10:45 pm, Defendant noticed Jones' car and told the group that she was about to pull into the driveway. Raley and Wells quickly exited the Suburban and walked toward Jones' house while the other three stayed behind. Wells did not have a weapon. Raley was brandishing a silver revolver.

As Jones parked, she noticed that she had a flat tire. Jones then went into the house through the garage and called for Brown to come outside and look at the tire. As Jones and Brown opened the door to the garage, Wells and Raley confronted them at gunpoint. A brief struggle ensued, but Wells and Raley eventually overpowered Jones and Brown. After a fruitless search of the home, the two assailants promptly fled toward the Suburban.

Jones called 911 and provided a description of the Suburban and the two suspects who attempted to rob them. Police from the Union County Sheriff's Office then stopped the Suburban about a mile away from Jones' home and discovered Camps in the driver's seat, Wells in the front passenger's seat, and Defendant, Thomas, and Raley sitting in the back seat. Officers arrested only Wells and Raley that night.

Two months later, on 27 March 2017, a Union County Grand Jury indicted Defendant for first-degree burglary and attempted robbery with a dangerous weapon. Defendant's charges came on for trial on 1 August 2018, and two days later the jury found her guilty on both counts. The trial court sentenced Defendant to two consecutive prison terms in the presumptive range of 67-93 months. On 8 August 2018, the trial court ordered Defendant to pay $2,756.85 in attorney's fees.

Defendant gave oral notice of appeal.[1]

II. ANALYSIS

A. Plain Error

At trial, Defendant testified on her own behalf. On cross-examination, the prosecutor asked Defendant if she had a Facebook profile named "Keeshia Kush" (the "Kush profile"). Defendant testified that she did not own the Kush profile, but rather used another profile named "Keeshia Anderson." The prosecutor then showed Defendant a message sent from the Kush profile and asked Defendant if she sent that message, which Defendant denied. After another brief colloquy about the Kush profile, the prosecutor then asked, "So you didn't send a threatening message to Tonorrow Wells about him coming to court?" Defendant said no, and defense counsel objected. The trial court, in a closed hearing, allowed the prosecutor to inquire about the message sent from the Kush profile.[2]

The prosecutor then asked Defendant whether she used the Kush profile "to send a message directed towards Tonorrow Wells," and Defendant denied doing so.

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[1] The State argues Defendant failed to give written notice of appeal under Rule 3 of the North Carolina Rules of Appellate Procedure. However, because Rule 4 of our appellate rules controls, we reject the State's argument, as Defendant properly gave oral notice of appeal. *See* N.C. R. App. P. 4(a)(1) (2018) ("Any party entitled by law to appeal from a judgment or order . . . rendered in a criminal action may take appeal by . . . giving oral notice of appeal at trial[.]").

[2] Defense counsel filed a motion in limine seeking to exclude "any text and/or social media messages" that the State intended to offer as evidence at trial. Defense counsel's basis for her objection was that the State was attempting to admit unauthenticated inadmissible hearsay evidence from the Kush profile. The trial court deferred its decision as to the message's admissibility because the State was not seeking to admit the message, but was merely questioning Defendant about it.

The prosecutor never attempted to admit the message from the Kush profile into evidence. During the remainder of the cross-examination, the prosecutor showed Defendant various posts, comments, and pictures from the Kush profile, depicting not only Defendant, but her spouse and her grandchildren. Each time, Defendant acknowledged herself and the people in the photos, yet denied having any control over the Kush profile, suggesting that someone was using her identity.

Defendant argues that the trial court committed plain error because the prosecutor impermissibly attempted to elicit testimony that Defendant threatened Wells absent evidence linking her to the Kush profile or the alleged threat. Defendant asserts that the prosecutor's illicit cross-examination tarnished her credibility and probably caused the jury to find her guilty.[3] We disagree.

Although defense counsel objected to the admissibility of the Facebook message from the Kush profile, counsel never objected to the line of questioning regarding Defendant's connection to the Kush profile, including questions about photos of Defendant and her family on the Kush profile page. N.C. R. App. P. 10(a)(1) (2018); *see also State v. Crawford*, 344 N.C. 65, 77, 472 S.E.2d 920, 928 (1996) (holding

[3] Defendant also contends that the prosecutor's cross-examination constituted harassment and was inconsistent with his remark during the closed hearing that he would not have any follow-up questions. These arguments, however, are unreviewable because they were not raised at trial and are unrelated to "rulings on the admissibility of evidence" necessary for plain error review. *See State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (reviewing issues for plain error only if they involve "(1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence").

that the issue was unpreserved because the defendant's standing objection at trial did not concern the evidence argued on appeal). We therefore review this issue for plain error. *See, e.g.*, N.C. R. App. P. 10(a)(4) (2019).

> [The plain error rule] is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a *fundamental* right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation marks and citation omitted) (alterations in original).

At trial, Wells testified as follows: He and Camps picked up Defendant, Thomas, and Raley between 3:00 and 4:00 pm on 25 January in Monroe after being invited by Thomas to hang out. Wells had never met either Defendant or Raley before that day. The group then drove to Charlotte. During the ride, Wells was called to his girlfriend's residence to handle a domestic matter involving law enforcement. When that matter was resolved, the group drove back to Monroe around 10:15 pm, and at that time Defendant proposed they rob Jones and Brown.

Defendant, on the other hand, testified as follows: She was in the hospital in

Monroe that afternoon and was discharged at 6:00 pm.[4] Defendant stated her "back went out again" and that she was given morphine and Percocet to mask the pain. Thomas—who was driving his sister's car—then picked up Defendant around 7:00 pm from the hospital. They then dropped off the car at an apartment complex and got into the Suburban driven by Camps, with Wells and Raley already inside. Defendant thought that she was going to be driven to her home in Pageland, South Carolina, but Camps instead headed toward Mecklenburg County. Due to the medication, Defendant slept the majority of the time and only intermittently regained consciousness. Defendant woke up when the police were trying to stop the Suburban and was unaware of the attempted robbery just minutes prior. Defendant further testified that Camps contemplated fleeing the police, but she convinced him to pull over after she started climbing over the seats to try and grab the steering wheel.

Wells and Defendant were the only two of the five companions to testify at trial. Though their testimonies surrounding the attempted robbery differed, assuming *arguendo* that the prosecutor's questions were prohibited, Defendant cannot meet the high burden of demonstrating plain error. Following Wells' arrest, Sergeant Chris Allen of the Union County Sherriff's Office interrogated Wells at the police station. Sergeant Allen testified that Wells informed him that Defendant "was the one that gave them the information of that address to where they could" rob Jones

[4] Defendant's counsel submitted evidence of discharge documents indicating proof of Defendant's admittance into the hospital.

and Brown. Defendant also testified that she had over $20,000 in medical bills that she struggled to pay.

Moreover, the evidence tended to show that only Defendant knew where Jones and Brown lived. No evidence was introduced that Camps, Wells, or Raley ever met Jones or Brown, let alone knew their home address. Defendant and Jones had been friends for over ten years. Jones testified she had been living at her residence for three years and that Defendant had visited many times. Defendant was familiar with where Jones worked, her family, the car she drove, and the frequency of Jones' paychecks.

Defendant asserts that Thomas alone proposed the robbery, relying on her testimony that Thomas knew where Jones lived. Defendant testified on direct examination that Brown's daughter—who was living with Jones and Brown at the time of the attempted robbery[5]—was romantically involved with Thomas' younger brother. Defendant argued at trial, as she does on appeal, that Thomas' brother might have known where Jones lived and would have relayed the information to Thomas. This is speculative, at best. Both Defendant and Jones testified that Thomas had never been to Jones' residence; no evidence was introduced showing that Thomas and his brother ever talked about Jones, Brown, or where they lived; and Defendant did not testify that Thomas concocted the plan to rob Jones and Brown.

[5] Jones' testimony contradicted Defendant's in that Brown's daughter was not living with them at the time, but did acknowledge that she knew where Jones and Brown lived.

Accordingly, even if it was error for the prosecutor to inquire about the message from the Kush profile, we hold that it did not have a probable impact on the result of Defendant's trial.

B. Attorney's Fees

Defendant also argues that she was denied adequate notice and an opportunity to be heard before the trial court ordered her to pay attorney's fees. Although Defendant failed to properly give notice of appeal from this civil judgment, N.C. R. App. P. 3(a), she petitions this Court for a writ of certiorari. Because precedent encourages review of this issue, we grant Defendant's request and review the merits of her argument. *See State v. Baker*, __ N.C. App. __, __, 817 S.E.2d 907, 910 (2018) (granting writ of certiorari because the defendant "did not have the opportunity to be heard on the issue of payment of attorney's fees").

Section 7A-455(b) of our General Statutes provides that the trial court may impose attorney's fees against indigent defendants for costs incurred by appointed defense counsel. Before the trial court may do so, however, it "must afford the defendant notice and an opportunity to be heard." *State v. Friend*, __ N.C. App. __, __, 809 S.E.2d 902, 906 (2018) (citing *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005)); *see also State v. Harris*, __ N.C. App. __, __, 805 S.E.2d 729, 737 (2017) (holding that, "even when the transcript reveals that attorney's fees were discussed following [a] defendant's conviction," the order for attorney's fees "must be

vacated" absent notification of and the opportunity for the right to be heard (quotation marks and citation omitted)).

At the end of the trial, the trial court notified defense counsel that she could submit her hours for attorney's fees. Five days later, defense counsel filed her fees affidavit, and the trial court that same day rendered a civil judgment ordering Defendant to pay attorney's fees in the amount of $2,756.85. Because nothing in the record indicates that the trial court informed Defendant of her right to be heard or that she understood she had that right, *State v. Mayo*, __ N.C. App. __, __, 823 S.E.2d 656, 659 (2019), we vacate the order of attorney's fees and remand this issue to the trial court.

III. CONCLUSION

We hold Defendant cannot demonstrate that the prosecutor's cross-examination constituted plain error. We vacate and remand the trial court's order for attorney's fees.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges BERGER and HAMPSON concur.

Report per Rule 30(e).