IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1017

Filed: 16 June 2020

Lincoln County, No. 17 CRS 52768

STATE OF NORTH CAROLINA

v.

MATTHEW BRENT WHITE

Appeal by defendant from judgment entered 17 April 2019 by Judge Todd Pomeroy in Lincoln County Superior Court. Heard in the Court of Appeals 12 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Colin Justice, for the State.

Carella Legal Services, PLLC, by John F. Carella, for defendant-appellant.

BRYANT, Judge.

Where defendant failed to object at trial to the issues he now challenges on appeal and where the record reveals no fundamental error occurred at trial, the trial court committed no plain error.

Factual and Procedural History

On 29 June 2017, defendant Matthew Brent White was placed on probation following his conviction for sale and delivery of a Schedule II controlled substance

and ordered to be placed on electronic monitoring. On 25 June 2018, defendant was indicted on one count of feloniously interfering with an electronic monitoring device. The indictment alleged the following:

> [O]n or about [25 July 2017], in [Lincoln County], defendant [] unlawfully, willfully and feloniously did knowingly and without authority remove, destroy, or circumvent the operation of an electronic monitoring device that is being used for the purpose of monitoring a person who was wearing an electronic monitoring device as a condition of probation.
>
> The electronic monitoring was imposed on [d]efendant named above in Lincoln County File Number 16CRS51484, Sell and Delivery of a Schedule II Controlled Substance, a Class G felony.

This matter came on for trial on 15 April 2019 before the Honorable Todd Pomeroy, Judge presiding. A jury was empaneled to hear the case.

The State's evidence at trial tended to show that on the morning of 26 July 2017, Officer Dustin McSwain, defendant's supervising probation officer, read a message indicating that defendant's ankle monitor had died the previous evening. Defendant had failed to report to the probation office for his scheduled meeting earlier that day, and Officer McSwain was unable to locate defendant because his unit had no charge. Officer McSwain testified that when defendant was placed on probation, the required conditions involving electronic monitoring were explained to him, and included "[h]ow he must not tamper with the equipment, not remove it without permission, must keep it fully charged . . . [and] must acknowledge the messages and respond[.]" The monitoring report, which logged the GPS points on defendant's ankle

monitor, revealed that defendant had left the Lincoln Wellness Center—where Officer McSwain had taken him the previous day for help with substance abuse issues—and returned to his home. The monitoring report was introduced and admitted into evidence without objection. The report corroborated Officer McSwain's testimony that defendant had received audio messages alerting him to charge the monitor. Defendant acknowledged receiving seven messages before his monitor died. Acknowledgment is indicated once the monitor emits an audible beeping sound, and the wearer then touches the device to play the message. Defendant was eventually located and placed under arrest.

Officer McSwain filed a probation violation report alleging that defendant had failed to comply with the electronic monitoring program by failing to charge his unit. Defendant later admitted to this violation at his probation hearing.

At the close of evidence, the jury found defendant guilty as charged. The trial court sentenced defendant to seven to eighteen months imprisonment, suspended his active term, and ordered supervised probation for twenty-four months, which included drug screens and electronic monitoring.

On 26 April 2019, defendant wrote a *pro se* letter to the trial court stating, "[he] didn't have a fair trial [and felt that he] was kinda [sic] pushed into [an] agreement." Defendant, acknowledging that his notice of appeal was insufficient, filed a petition for writ of certiorari asking this Court to review his proposed issues on appeal. In our discretion, we allow defendant's petition and review the merits of his appeal.

On appeal, defendant argues the trial court committed plain error by allowing the State to introduce evidence of defendant's probation violation hearing and by failing to give a pattern jury instruction regarding admission of that evidence.

Analysis

Defendant argues the trial court erred by allowing evidence of his probation violation hearing to be admitted at trial. Specifically, defendant argues that because probation violation hearings are subject to a lower standard of proof than that required to obtain a criminal conviction, the evidence of the probation violation hearing was irrelevant and misleading to the jury. In addition, defendant argues that the jury was not properly instructed on the evidence because the trial court did not provide jury instructions "on the nature of the probation hearing and the necessity of considering all the circumstances regarding the alleged admission." Acknowledging he did not raise and preserve any objections at trial to the issues he now raises on appeal, defendant requests we review this appeal for plain error. *See* N.C.R. App. P. 10(a)(4). We find no plain error.

Rule 10 of the North Carolina Rules of Appellate Procedure allows plain error review in criminal cases where judicial action is questioned on issues not preserved at trial. *See id.* "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.* (citation and quotation marks omitted).

"Rules 401 and 402 [of the North Carolina Rules of Evidence] establish the broad principle that relevant evidence—evidence that makes the existence of any fact at issue more or less probable—is admissible unless the Rules provide otherwise." *State v. Peterson*, 179 N.C. App. 437, 453, 634 S.E.2d 594, 608 (2006) (citation omitted). Rule 403 excludes the admission of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2019).

In the instant case, the State called Officer McSwain to testify regarding the violations that formed the basis of his probation violation report and the process which followed.

> [THE STATE]: Do you have a copy of your violation report handy in your file there?
>
> [MCSWAIN]: Yes, sir, I do.
>
> . . . .
>
> [THE STATE]: And after seeing that report, do you recall what the exact term[s] and conditions of probation [were] that you listed?

. . . .

[MCSWAIN]: I alleged that he violated the condition of probation in that he be assigned to electronic house arrest monitoring program for the specified agreement [to] obey all the rules and regulations of the program until discharged. And it violates [sic] that he violated on that one in that he failed to properly charge the unit and maintain it as required.

[THE STATE]: And coincidentally, is that also the same basis for the charge that we're here for in court today?

[MCSWAIN]: Yes, sir. Yes, sir, it is.

[THE STATE]: Okay. And when you file a violation report, I believe you said earlier that you bring them before a judicial official [at] some point?

[MCSWAIN]: Yes, sir.

[THE STATE]: And with a superior court probation violation, what judicial official do they eventually wind in front of?

[MCSWAIN]: Superior Court Judge.

[THE STATE]: Okay. So, a judge such as his honor who is here in court today?

[MCSWAIN]: Yes, sir.

[THE STATE]: And is there a probation violation hearing that occurs?

[MCSWAIN]: Yes, sir, there is.

[THE STATE]: And what's the purpose of that?

[MCSWAIN]: To determine if the allegations that the probation officer made are valid.

> . . . .
>
> [THE STATE]: Okay. And was -- did you have to testify in that probation hearing?
>
> [MCSWAIN]: No, sir, I did not.
>
> [THE STATE]: And why was that?
>
> [MCSWAIN]: He admitted guilt.
>
> [THE STATE]: Admitted guilt or did he admit that he had violated the terms of...
>
> [MCSWAIN]: He admitted he had violated the terms of his probation.

Defendant argues that the aforementioned testimony was prejudicial "as [it] left the jury free to conclude that [defendant] had already admitted guilt to the crime before a Superior Court Judge" or that he "was found guilty upon proof beyond a reasonable doubt." However, as noted above, the State made sure Officer McSwain corrected his testimony to reflect that defendant admitted violating the terms of his probation. Further, on cross-examination, when explicitly asked by defendant about probation violation hearings, Officer McSwain affirmed that the level of proof is different for a probation violation hearing as opposed to a criminal trial. This inquiry by defendant, *albeit* brief, could be considered invited error. *See* N.C. Gen. Stat. § 15A-1443(c) (2019) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."); *see also State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) ("Statements elicited by a defendant

on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law.").

Even assuming *arguendo* it was error, and not invited error, to allow evidence of the probation violation hearing, we reject defendant's assertion that Officer McSwain's testimony falsely "gave the impression that [defendant] had 'admitted guilt' to the crime charged[.]" Officer McSwain's testimony stated the different burden imposed on the State to convict defendant of felonious interference with an electronic monitoring device. Further, the instructions provided to the jury properly stated the appropriate burden of proof required by the State—beyond reasonable doubt—before the jury could convict defendant.

At trial, the parties stipulated that defendant had been placed on supervised probation following his felony conviction and that as a condition of defendant's probation, he was to wear an electronic monitoring device. Thus, the only remaining element for the State to prove was that defendant knowingly and without authority circumvented the operation of his electronic monitoring device. *See* N.C. Gen. Stat. § 14-226.3(b)(3) (2019) (To obtain a conviction, the State must prove that the defendant "*knowingly* and without authority remove[d], destroy[ed], or circumvent[ed] the operation of an electronic monitoring device that is being used . . . as a condition of probation." (emphasis added)).

According to Officer McSwain, defendant was instructed several times to charge his ankle monitor prior to his arrest for failing to comply. Officer McSwain

testified that he had advised defendant not to tamper with, damage, or remove the equipment while on probation. Defendant was aware that he had been ordered to "keep it charged so that it [could] perform[] [the] required function." Officer McSwain also testified that during the relevant time frame, he had instructed defendant to charge his monitor upon release from the wellness center because the battery was low. Yet, defendant failed to charge his monitor when he returned home at approximately 8:30pm—despite receiving audio messages from 10:00pm until 12:30am to charge his monitor. Officer McSwain testified that defendant acknowledged the audio messages until the monitor died, and he described in detail the process of acknowledging messages on the ankle monitor:

> [THE STATE]: [D]id you check with . . . the Wellness Center to see where he was . . .
>
> . . . .
>
> [MCSWAIN]: [T]hat's what I did after I finished looking through all the points on his electronic monitoring. . . . I pulled up the tracking points on the interface. It showed that [defendant] had left . . . [the] Wellness Center, and that he actually returned to his home at roughly 8:30pm. . . . Roughly 10:00pm -- once the unit is a certain level of low charge, it begins to send voice-- or audio messages to the individual telling them to charge it. There are logs of this where it says, "message sent." "Message acknowledged" and there's timestamps. To acknowledge the message, the individual has to place their finger on a small divot on the machine, kind of the same way you have to open up a smartphone screen. At that point, it will acknowledge the message, and the message will play. This repeats pretty steadily, and constantly, I'd say once every ten minutes, if

not once every five until you do what the message asks. In this case, charge the unit.

As I continued to review the points, these messages were sent up until right around 12:30am on the 26th. At that point, the messages then began to give a fail to deliver. The only time the audio messages fail to deliver to these units are if there is no GPS [signal], in which case it sends out a GPS jam alert, or if the battery is completely dead. . .

. . . .

[THE STATE]: And how does that electronic monitoring device notify the probationer who is wearing it, hey, you need to touch this unit to recognize you got the message you were just referring to?

[MCSWAIN]: It sends an audible beeping sound to you to get your attention to tell you to touch the area. Once you touch the area, then it plays the audio message. They can be anywhere from low battery, charge unit, to call your officer now.

[THE STATE]: So, it actually audibly tells the probationer what they need to do?

[MCSWAIN]: Yes, sir.

[THE STATE]: And in this case, you said numerous messages were sent?

[MCSWAIN]: Yes, sir. And they were also acknowledged, which meant that the individual had to place his finger on the device and hear the instruction coming through.

. . . .

[THE STATE]: And what message -- or what audio message, rather, was stated to the probationer that was acknowledged?

[MCSWAIN]: "Low battery. Charge unit."

Officer McSwain thereafter filed the probation violation report.

Defendant presented no evidence at trial and did not object to the admission of any evidence or jury instructions. The evidence presented by the State was sufficient to prove beyond a reasonable doubt that defendant *knowingly* tried to circumvent the operation of the device by failing to charge his monitor as clearly instructed by his probation officer and required by the terms of his probation. On this record, defendant can show no plain error.

Conclusion

Defendant has failed to demonstrate it is probable that the jury would have reached a different result had the disputed evidence been excluded from the record or had the jury been instructed as he argues on appeal. Therefore, defendant's arguments are overruled.

NO ERROR.

Judge BERGER concurs.

Judge MURPHY concurs in result only.

Report per Rule 30(e).