IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-51

Filed: 21 July 2020

Onslow County, No. 16 CRS 050667

STATE OF NORTH CAROLINA

v.

ENRIQUE MICHAEL RAY, Defendant.

Appeal by Defendant from judgment entered 5 July 2018 by Judge Richard Kent Harrell in Onslow County Superior Court. Heard in the Court of Appeals 18 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Corrine Lusic, for the State.

Shelly Bibb DeAdder, for defendant-appellant.

MURPHY, Judge.

Defendant, Enrique Michael Ray, appeals his conviction for failure to report an address change as a sex offender. Defendant argues the State did not offer substantial evidence that he changed his address to trigger the required notification. However, the State need only show Defendant was not conducting daily living

activities at his registered address. The trial court did not err in denying Defendant's motion to dismiss.

Further, where a defendant has not preserved an issue for appellate review, we review for plain error. However, we will not review for plain error when a defendant invited the error. Here, Defendant elicited the challenged testimony and waived his right to all appellate review concerning the same. In the alternative, Defendant argues he received ineffective assistance of counsel based on Defense Counsel's failure to object to the admission of out-of-court statements. The Record before us is inadequate and precludes our review of Defendant's ineffective assistance of counsel claim. Accordingly, we dismiss this claim without prejudice to Defendant's right to file a motion for appropriate relief in the trial court.

BACKGROUND

Defendant is a registered sex offender residing in Onslow County. On 8 December 2015, Defendant registered a change-of-address with the Onslow County Sheriff's Office, listing a new address ("registered address"). Defendant lived at this address with his girlfriend, Ward ("Ward"), her two children, and Ward's mother, Petteway ("Petteway").

On 29 January 2016, Officer John Getty ("Getty") visited the registered address to investigate an anonymous phone tip alleging Defendant no longer lived at the registered address. During Getty's visit, Defendant was not at the residence.

Getty spoke with Petteway, who stated, "I'm not going to lie. For the last two weeks, [Defendant] has not been there," referring to the registered address. After his initial visit to the registered address, Getty did not physically locate Defendant at the residence or elsewhere until his eventual arrest.

On 1 February 2016, Getty obtained an arrest warrant for Defendant and made phone contact with Defendant to notify him of the warrant. Getty testified that during this call, Defendant allegedly indicated that he was "staying at the Triangle Inn because a man was staying at his residence for a few days." Defendant also told Getty that he and Ward checked into the Triangle Motor Inn, a motel in Jacksonville, on 23 January 2016 and checked out on 29 January 2016. Getty obtained motel receipts from the Triangle Motor Inn, which indicated that Ward paid for a room from 23 January 2016 to 29 January 2016. Defendant was subsequently indicted for failure to register a change-of-address in violation of N.C.G.S. § 14-208.11(a)(2) (2017). On 27 March 2016, Defendant was arrested near the Triangle Motor Inn.

At trial, Getty testified about his investigation and initial failure to physically locate Defendant. On direct examination, the State sought to introduce Petteway's out-of-court statement, "I'm not going to lie. For the last two weeks, [Defendant] has not been [at the registered address]," in order to prove Defendant left the registered address and failed to notify the Onslow County Sheriff within three business days of the change in address. The trial court sustained Defendant's objection to this line of

questioning as inadmissible hearsay. However, during cross-examination, Defendant asked Getty about the investigation process and why he had not searched the home for Defendant's clothes or other evidence to determine whether Defendant was living at the registered address. Getty answered, "When I asked [Petteway], was [Defendant] residing at this residence, [Petteway] told me not for the last two weeks, so I didn't have to search." Defendant did not object to this answer and thereafter called Getty to testify for the Defense. On Defendant's direct examination, Getty once more stated that "[he] believed [Petteway] 100 percent, that [Defendant] was not residing there for the last two weeks" in response to why he did not question any other residents at the registered address. Defendant did not object or move to strike Getty's testimony, nor did he seek a limiting instruction.

Defendant moved to dismiss all charges at the close of the State's evidence and again at the close of all the evidence. The trial court denied both motions. Defendant was convicted of all charges and received an active sentence of 76 to 104 months. Defendant timely appealed.

ANALYSIS

A. Motion to Dismiss

Defendant argues the trial court erred in denying his motion to dismiss based on insufficient evidence. To survive a motion to dismiss, the State must present substantial evidence of (1) each essential element of the offense charged, and (2) the

defendant being the perpetrator of the offense. *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016). Substantial evidence, as it pertains to the elements of the offense charged, is any relevant evidence that a reasonable mind might accept as adequate to support a conclusion when viewed in the light most favorable to the State. *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005); *Chekanow*, 370 N.C. at 492, 809 S.E.2d at 549-50. Here, whether Defendant was the perpetrator is not at issue; thus, we examine whether the State presented "substantial evidence of each essential element constituting the offense for which the accused was tried[.]" *State v. Alford*, 329 N.C. 755, 759-60, 407 S.E.2d 519, 522 (1991).

To prove Defendant failed to report an address change, the State had to show "(1) [D]efendant is a person required to register; (2) [D]efendant change[d] his or her address; and (3) [D]efendant failed to notify the [Onslow County Sheriff] of the change of address within three business days of the change." *State v. Barnett*, 223 N.C. App. 65, 69, 733 S.E.2d 95, 98 (2012); N.C.G.S. § 14-208.9(a) (2017). Defendant argues the evidence does not reasonably support the jury finding Defendant changed his address or failed to notify the Onslow County Sheriff of the change-of-address within three business days of the change. Although Defendant never notified the Onslow County

Sheriff of an address change, he argues the State failed to present substantial evidence to prove he changed his address so as to trigger the required notification.

Specifically, Defendant argues the State's evidence failed to establish *where* he conducted his daily activities in order to prove he changed his address. "[T]he sex offender registration statutes operate on the premise that everyone does, at all times, have an 'address' of some sort, even if it is a homeless shelter, a location under a bridge or some similar place." *State v. Worley*, 198 N.C. App. 329, 338, 679 S.E.2d 857, 864 (2009). A sex offender's address, for purposes of registration, is where the offender is conducting daily living activities, even if temporarily. *State v. Abshire*, 363 N.C. 322, 331, 677 S.E.2d 444, 451 (2009) (superseded by statute on other grounds). "The State can show that [a] defendant changed his address simply by showing that he was no longer residing at the last registered address because everyone does, at all times, have an address of some sort." *State v. McFarland*, 234 N.C. App. 274, 281, 758 S.E.2d 457, 463 (2014) (internal quotation marks omitted). Defendant misapprehends the State's burden to prove a change-of-address, as "[t]he State is not required to show what [a] defendant's new address was." *Id.* at 280, 758 S.E.2d at 463. Instead, "[t]he State is simply required to show that [a] defendant changed his address." *Id.* Accordingly, we only examine whether the State presented substantial evidence to show that Defendant did not conduct his daily activities at his registered address.

Here, the State presented substantial evidence to withstand a motion to dismiss as to whether Defendant changed his address from 23 January 2016 to 29 January 2016. In his statement to Getty, Defendant indicated he "had check [sic] into the Triangle Motor Inn with his girlfriend [Ward] on 01-23-16 until he checked out on 01-29-16, and then went to [Ward's] sister's residence somewhere in Georgetown." When Getty asked Defendant why he left the registered address, Defendant stated he was "staying at the Triangle Inn because a man was staying at his residence for a few days." Receipts from the Triangle Motor Inn indicated Defendant's girlfriend, Ward, purchased a room from 23 January 2016 to 29 January 2016. From Defendant's own admissions and the hotel receipts, the jury could reasonably infer that Defendant conducted his living activities outside his registered address, even if temporarily. Furthermore, "proof that [D]efendant was not living at his registered address is proof that his address had changed" to trigger required notification. *McFarland*, 234 N.C. App. at 281, 758 S.E.2d at 463. Defendant never notified registering officers after leaving his registered address for a "few days." Therefore, we conclude the State presented substantial evidence, taken in the light most favorable to the State, to show Defendant changed his address without notifying the Onslow County Sheriff within three days of the address change. The trial court did not err in denying Defendant's motion to dismiss.

B. Petteway's Out-of-Court Statements

1. Invited Error

Defendant argues the trial court committed plain error in failing to strike *ex mero motu* Petteway's out-of-court statement. "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Patterson*, 249 N.C. App. 659, 664, 791 S.E.2d 517, 521 (2016) (quoting *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991)); *see also* N.C. R. App. P. 10(a)(1). "Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence." *State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985). "Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).

Defendant challenges testimony elicited from Getty that reiterated Petteway's out-of-court statement, "I'm not going to lie. For the last two weeks, [Defendant] has not been [at the registered address]." During the State's direct examination of Getty, Defendant lodged a single, sustained objection to the State's attempted introduction of Petteway's out-of-court statement. Defendant failed to object to similar testimony, elicited on cross-examination, in response to his own questions. Defendant also failed to object to similar testimony elicited during his direct examination of Getty.

Defendant challenges this testimony for the first time on appeal and such challenges may only be reviewed, if at all, for plain error because "the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979); *see also Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330.

Additionally, "[s]tatements 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." *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007). "[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001); *see also* N.C. Gen. Stat. § 15A-1443(c) (2019) ("A defendant is not prejudiced by . . . error resulting from his own conduct.").

On cross-examination, Defendant elicited testimony from Getty stating that "[w]hen I asked [Petteway], was [Defendant] residing at this residence, [Petteway] told me not for the last two weeks, so I didn't have to search." Defendant did not object to this answer and thereafter called Getty to testify for Defendant. During Defendant's direct examination, Getty once more stated that "[he] believed [Petteway] 100 percent, that [Defendant] was not residing there for the last two weeks" in response to Defendant's question as to why Getty did not interview any other residents at the registered address. Defendant elicited this testimony that was

of a similar character to Getty's previously excluded testimony. We conclude Defendant has waived his right to appellate review of any error that may have resulted from the admission of Petteway's out-of-court statement. Therefore, we do not review for plain error. *Barber*, 147 N.C. App. at 74, 554 S.E.2d at 416.

2. Ineffective Assistance of Counsel

In the alternative, Defendant argues he received ineffective assistance of counsel based on Defense Counsel's failure to object to the admission of Petteway's statements. "Generally, a claim of ineffective assistance of counsel should be considered through a motion for appropriate relief before the trial court in post-conviction proceedings and not on direct appeal." *State v. Allen*, 262 N.C. App. 284, 285, 821 S.E.2d 860, 861 (2018). "A motion for appropriate relief is preferable to direct appeal because in order to defend against ineffective assistance of counsel allegations, the State must rely on information provided by [the] defendant to trial counsel." *State v. Stroud*, 147 N.C. App. 549, 554, 557 S.E.2d 544, 547 (2001) (internal quotation marks omitted).

Here, our review is limited to the Record "without the benefit of information provided by [D]efendant to trial counsel, as well as [D]efendant's thoughts, concerns, and demeanor, that could be provided in a full evidentiary hearing on a motion for appropriate relief." *Id.* at 554-55, 557 S.E.2d at 547 (internal quotation marks and citation omitted). Accordingly, we decline to review Defendant's ineffective

assistance of counsel claim where "the [R]ecord before this Court is inadequate and precludes our review of whether Defendant's counsel was ineffective and whether counsel's errors, if any, were prejudicial." *Allen*, 262 N.C. App. at 286, 821 S.E.2d at 862. Defendant's ineffective assistance of counsel claim is dismissed without prejudice as to his right to file a motion for appropriate relief with the trial court.

CONCLUSION

The trial court did not err in denying Defendant's motion to dismiss. The State presented substantial evidence to prove Defendant at least temporarily changed his address and failed to notify the last registering sheriff of the address change within three business days. We do not review the admission of out-of-court statements for plain error where the error was invited by the Defendant. We dismiss Defendant's ineffective assistance of counsel claim without prejudice to Defendant's right to file a motion for appropriate relief in the trial court.

NO ERROR IN PART; DISMISSED IN PART.

Judges INMAN and BERGER concur.

Report per Rule 30(e).