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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-779

Filed: 4 August 2020

Moore County, Nos. 17 CRS 527, 50878

STATE OF NORTH CAROLINA

v.

RUSSELL RUFUS MCLAUGHLIN

Appeal by defendant from judgment entered 9 May 2018 by Judge Tanya T. Wallace in Moore County Superior Court. Heard in the Court of Appeals 31 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Ebony J. Pittman, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

BRYANT, Judge.

Where there was no ambiguity in the jury instructions given by the trial court, we hold there was no error. Further, the trial court did not err in ordering defendant to pay restitution to Tommy's Crown, Inc.

On 1 May 2017, defendant Russell Rufus McLaughlin was indicted for felonious breaking or entering, felony larceny after breaking or entering, felony

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possession of stolen goods, and habitual breaking and entering. On 7 May 2018, the matter was tried before the Honorable Tanya T. Wallace, Judge presiding.

The State's evidence at trial tended to show that on the early morning of 29 March 2017, a store employee of Tommy's Crown, Inc., arrived and discovered broken glass near the store's entrance. A rock had been thrown through a window of the store. The employee called 911, and her employer, Ihab Tairi. Tairi and officers with the Moore County Sheriff's Department arrived at the scene immediately thereafter. It was discovered that four cartons of cigarettes were missing, along with \$500 cash.

According to the officers, the store's surveillance video showed an individual wearing a blue shirt, breaking the glass front door, entering the store, taking items, and then exiting the store. Officers located shoeprints that lead away from the store to a nearby residence at 242 Brookside Road—later identified to be defendant's residence. The shoeprints also matched a shoeprint found on a piece of glass from the store's front door.

A search warrant was obtained and executed on defendant's residence. There, officers located four cartons of cigarettes under a blue shirt and shoes which matched the shoeprints that lead from the scene to the residence. The items were seized, and defendant was arrested. While in custody, defendant admitted to taking items from the store.

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At the close of the trial, a jury found defendant guilty of felonious breaking or entering, felony larceny after breaking or entering, and felony possession of stolen goods. Defendant subsequently pled guilty to habitual breaking and entering. The trial court sentenced defendant to 44 to 65 months imprisonment and ordered \$550 restitution to Tommy's Crown, Inc.

On 24 October 2018, this Court entered an order granting defendant's petition for writ of certiorari to review the trial court's 9 May 2018 judgment, due to defendant's failure to properly give notice of appeal. Defendant, recognizing the trial court's order granting his petition for writ of certiorari may not cover his appeal of the civil judgment of restitution, filed a separate petition for writ of certiorari to permit appellate review of the order of restitution. In our discretion, we allow defendant's alternative petition, and we review the order of restitution.

On appeal, defendant argues the trial court erred by I) instructing the jury on the larceny charge such that his right to a unanimous jury verdict was violated, and II) ordering restitution to a corporation that had been dissolved.

I

Defendant argues the trial court erred in its jury instructions on felony larceny after breaking or entering. Specifically, defendant argues that "the evidence at trial was ambiguous as to whether the stolen merchandise was owned by Ihab Tairi or

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Tommy's Crown, Inc., and the jury instructions did not specify the owner of the property that was stolen[.]” We disagree.

Defendant contends that his issue is automatically preserved without objection—and therefore, should be reviewed *de novo* by this Court—because it affects his constitutional right to a unanimous jury verdict under Art. 1, Sect. 24 of the North Carolina Constitution and under N.C. Gen. Stat. § 15A-1237. The violation of a right to a unanimous jury verdict under Article 1, Section 24 is automatically preserved for appeal without any objection by counsel. *State v. Wilson*, 363 N.C. 478, 681 S.E.2d 325 (2009). N.C.G.S. § 15A-1237 automatically preserves, as a statutory mandate, the issue of jury unanimity without objection. We review the question of a unanimous jury verdict *de novo*. *State v. Surrett*, 217 N.C. App. 89, 719 S.E.2d 120 (2011). In doing so, this Court examines “the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed.” *State v. Petty*, 132 N.C. App. 453, 461–62, 512 S.E.2d 428, 434 (1999).

Defendant acknowledges that he made no objection to the jury instructions at trial and urges us to determine this issue has been preserved under the constitution and under the statute (15A-1237). Defendant contends the matter should be reviewed for harmless error beyond a reasonable doubt. Alternatively, defendant requests this Court's review for plain error.

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In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4). “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). In our opinion, regardless of whether this issue should be deemed preserved as a matter of law, or reviewed for plain error, defendant’s challenge cannot stand.

Defendant was charged with felony larceny after breaking or entering. To obtain a conviction, the State must prove that the defendant acted in violation of N.C. Gen. Stat. § 14-72(b)(2). As the statute indicates, the jury is required to find that the defendant, after breaking and entering “(1) took the property of another; (2) carried it away; (3) without the owner’s consent, and (4) with the intent to deprive the owner of the property permanently.” *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983); *see also* N.C.G.S. §§ 14-72 and 14-54(a) (2019).

In the instant case, the indictment alleged the following in pertinent part:

[T]hat on or about [March 29, 2017], . . . defendant ... unlawfully, willfully and feloniously did steal, take, and

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carry away four cartons of cigarettes and one lighter, the personal property of Tommy's Crown, Inc., an entity capable of owning property, pursuant to a violation of Section 14-54 of the General Statutes of North Carolina.

The trial court relied on the pattern jury instructions for felonious larceny after breaking and entering and instructed the jury as follows:

The defendant has been charged with felonious larceny.

First, that the defendant took property belonging to another person.

Second, that the defendant carried away the property.

Third, that the victim did not consent to the taking and carrying away of the property.

Fourth, at the time of the taking the defendant intended to deprive the victim of its use permanently.

Fifth, that the defendant knew he was not entitled to take the property.

And [S]ixth, that the property was taken from the building during a breaking or entering.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant took and carried away another person's property without the victim's consent after a breaking or entering knowing he was not entitled to -- not entitled to take it, and intending at the time of the taking to deprive the victim of its use permanently, and the taking was from a building, and that he was not entitled to taking it at the time of the taking to deprive the victim of its use permanently, it would be your duty to return a verdict of guilty.

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If you do not so find or if you have a reasonable doubt about one or more of these things, it would be your duty to return a verdict of not guilty.

Generally, “[j]ury instructions in accord with a previously approved pattern jury instruction provide the jury with an understandable explanation of the law,” and this Court has recognized “that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions.” *State v. Ballard*, 193 N.C. App. 551, 555, 668 S.E.2d 78, 81 (2008) (citation and quotation marks omitted). However, defendant directs this Court’s attention to *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991), in arguing that the jury instructions were fatally ambiguous because the instructions *only* required the jury to determine whether the stolen property belonged to another person, as opposed to deciding whether the stolen property belonged to Tommy’s Crown, Inc. or Ihab Tairi.

In *Lyons*, the defendant was charged with malicious assault and battery after hiding in the bushes and shooting both Douglass Jones and Preston Jones. *Id.* During the trial, the jury was instructed that in order to find the defendant guilty of malicious assault and battery, they were required to find “that the defendant had the intent to kill Douglas Jones and/or Preston Jones.” *Id.* at 302, 412 S.E.2d at 311. On appeal, the defendant argued that the jury instructions were disjunctive and fatally ambiguous. *Id.* at 301, 412 S.E.2d at 311. The North Carolina Supreme Court agreed and held that the instruction was “fatally ambiguous because the jury could have returned a verdict of guilty without all twelve jurors agreeing that [the] defendant

assaulted a particular individual.” *Id.* at 307, 412 S.E.2d at 314; *see also id.* (“[I]t is impossible to determine what the jury found and whether the verdict was unanimous [because] the instructions resulted in an uncertain and thus defective verdict in violation of [the] defendant’s constitutional right to be convicted by a unanimous jury.”).

Contrary to *Lyons* where the indictment was disjunctive and named two possible victims, the indictment in the instant case named only one victim, Tommy’s Crown, Inc. There was no ambiguity as to the victim in the instant case. Defendant’s argument—which is, in essence, that the evidence presented at trial was ambiguous, and therefore, the indictment itself was ambiguous—is without merit. The evidence at trial showed the items were taken from Tommy’s Crown, Inc., and that Tommy’s Crown, Inc., was owned by Tairi. There was no ambiguity and the evidence presented sufficiently satisfied the element of “property of another.”

The evidence at trial established that defendant gained entry to Tommy’s Crown, Inc., by throwing a rock through the window and that defendant took items from the store including four cartons of cigarettes. Tairi, the owner of the business incorporated as Tommy’s Crown, Inc., testified that he reviewed the video surveillance from the store which showed defendant entering the store on the morning of 29 March 2017 and taking items from the store. The surveillance video was entered in to evidence and played for the jury.

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The Moore County Chief of Police testified to conducting the videotaped interview of defendant's admission to the crimes:

Q. And at the sheriff's office did you have an opportunity to speak with [defendant]?

A. Yes, sir, I did.

.....

Q. What, if anything, did [defendant] tell you about what had happened at Tommy's Crown[, Inc.,] that morning?

A. That he got up sometime earlier that morning and went to the service station and he picked up a rock and threw it through the window front glass, busted it out, and went in to retrieve some cigarettes and some lighters, and then he left and went back towards his residence, which was behind Tommy's Crown[, Inc.]

The jury viewed the video of defendant at the store and his videotaped admission, numerous photos showing his footprints and shoes matching the footprints found at his home, as well as the blue shirt and cartons of cigarettes recovered from his home. The overwhelming evidence at trial showed there was no error in the trial court's instructions. The record does not reflect that the jury was confused by the instructions nor was there any evidence in the record of any ambiguity in the verdict. Having noted herein that there was no ambiguity in the evidence nor in the trial court's instructions to the jury, we hold defendant suffered no violation of his right to a unanimous verdict. Defendant's argument is overruled.

II

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Lastly, defendant argues the trial court erred in ordering restitution to Tommy's Crown, Inc., because the corporation had been dissolved at the time of entry of the restitution order. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1340.34, "when sentencing a defendant convicted of a criminal offense, the court shall determine whether the defendant shall be ordered to make restitution to any victim of the offense in question." "Victim" is defined as a "person [who is] directly and proximately harmed as a result of the defendant's commission of the criminal offense." *Id.* Further, if the victim is not an individual, the North Carolina Supreme Court has held that the allegations and therefore, bills of indictment must note that the victim is a legal entity capable of owning property. *See State v. Thornton*, 251 N.C. 658, 111 S.E.2d 901 (1960). The victim's name must be given, along with "the fact that it is a corporation . . . unless the name itself imports a corporation." *Id.* at 662, 111 S.E.2d at 903 (citation omitted).

N.C. Gen. Stat. § 55-14-05 provides, in pertinent part, that a dissolved corporation can continue its corporate existence for the purpose of winding up its affairs, which may include: prosecuting and/or defending actions involving the dissolved corporation in its corporate name; collecting assets; or any other act appropriate to wind up and liquidate its business and affairs.

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Here, the evidence established that Tommy's Crown, Inc., the corporation and named victim in the indictment, was directly and proximately harmed by the commission of the crimes that occurred in March 2017. In turn, defendant was indicted for his criminal conduct, prosecuted accordingly, and ordered to make restitution to Tommy's Crown, Inc. While it is true that Tommy's Crown, Inc., was administratively dissolved prior to the entry of the restitution order, Tommy's Crown, Inc., was, in fact, an existing corporation at the time the acts were committed.¹ Thus, Tommy's Crown, Inc., would not be barred from collecting restitution from defendant because the action arose prior to dissolution, and is considered to be part of the winding up process. Accordingly, we hold the trial court did not err in requiring defendant to pay restitution to Tommy's Crown, Inc.

NO ERROR.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).

¹ Tommy's Crown, Inc. was administratively dissolved on 15 March 2018, and the trial court's restitution order was entered 9 May 2018.