IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-18

Filed: 31 December 2020

Cumberland County, Nos. 17 CRS 58593, 58594

STATE OF NORTH CAROLINA

v.

MARCUS ELLIOTT

and

TRE MONTREL PARKER, Defendants.

Appeal by defendants from judgments entered 4 February 2019 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 23 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberley A. D'arruda and Deputy Attorney General Kristine M. Ricketts, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant Marcus Elliott.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for defendant-appellant Tre Montrel Parker.

YOUNG, Judge.

Where the record shows that the jury reached a unanimous verdict, defendants' rights to a unanimous jury verdict was not violated. Where defendants assented to the trial court's purportedly ambiguous jury instructions, any error in those instructions amounted to invited error, and we decline to address such arguments on appeal. We find no error.

I. Factual and Procedural Background

On 3 July 2017, Steven Flowers (Flowers) was driving a vehicle containing passengers Marcus Elliott (Elliott), Tre Montrel Parker (Parker), and Devine McLeod (McLeod). At some point, one of the group expressed a desire for marijuana, so Flowers contacted Kyle McCarty (McCarty), and the group traveled to McCarty's trailer-home to obtain it. Flowers parked the vehicle, and Elliott, Parker, and McLeod approached the home, and discussed robbing McCarty. Upon arriving at McCarty's trailer, Parker knocked on the door, offered McCarty $20, and asked for "some weed." McCarty went into his home to retrieve the drugs. Parker then drew a gun, and Elliott donned a ski mask; the two entered McCarty's home. McLeod remained outside until he heard a gunshot, at which time he peeked into the trailer, and saw Parker holding a gun and standing over McCarty. The three fled to Flowers' car, and Parker admitted that he "bodied" McCarty.

McCarty was home that night, with two overnight guests. One of his guests, Irie Wells (Wells), was awakened when he heard McCarty speaking to someone; he

saw the door was open but could not see who was at the door. Wells turned and saw two other people in the house, one with a gun pointed toward him. He saw the person with the gun go to a corner and engage in a scuffle, and then he heard a gunshot. The gunshot awoke McCarty's other guest, Kenya Wilson (Wilson), who saw one person with a gun, and another staring at McCarty on the floor; she also saw a third man with tattoos, later identified as McLeod, enter and quickly exit the trailer. After the gunshot, the two men inside the home took McCarty's phone and gun and Wells' phone and fled the trailer. Wells ran behind them to close the door, then turned to check on McCarty and noticed blood on the floor.

Wilson called 911, and Wells spoke to the operator. He indicated that he knew the three men who were in the home, and identified Elliott and McLeod, but not Parker, by name. Later, he identified all three, and noted that Elliott and Parker were the two individuals in the trailer with guns, while McLeod was the person who briefly stepped inside after the gunshot. Wilson identified Elliott as "Marcus," but did not know his last name. She further identified him as the person who stood in front of her with a gun. She identified Parker as the person standing over McCarty's body. She identified McLeod as the person who briefly stepped inside. Prior to the evening, she had never seen Parker or McLeod.

Elliott was indicted for the first-degree murder of McCarty, robbery with a dangerous weapon of McCarty's phone and gun, and felonious conspiracy to commit

robbery with a dangerous weapon. Parker was likewise indicted for first-degree murder, robbery with a dangerous weapon, and felonious conspiracy.

Parker moved to sever, but the trial court granted the State's motion for joinder, and the cases against Elliott and Parker (collectively, defendants) were tried together. The jury returned verdicts finding both defendants not guilty of murder, but guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. Based on his prior record level, the trial court sentenced Elliott to a minimum of 25 months and a maximum of 42 months for conspiracy, and a minimum of 64 months and a maximum of 89 months for robbery, in the presumptive range, to be served consecutively in the custody of the North Carolina Department of Adult Correction. Likewise based on prior record level, the court sentenced Parker to a minimum of 33 months and a maximum of 52 months for conspiracy, and a minimum of 84 months and a maximum of 113 months for robbery, in the presumptive range, to be served consecutively in the custody of the North Carolina Department of Adult Correction.

Both defendants gave notice of appeal "with regards to the robbery charges" in open court.

II. Certiorari

Defendants have each filed petitions for writ of certiorari with this Court. Defendants contend that their notice of appeal of "the robbery charges" was sufficient

to give notice of appeal from the convictions for both robbery and conspiracy, but acknowledging that this may not be the case, defendants seek certiorari to review both charges. In our discretion, we grant both defendants' petitions for writ of certiorari, and permit review of both conspiracy charges as well as both robbery charges.

III. Jury Instructions

Although defendants have filed separate briefs on appeal with this Court, they raise the same arguments. In their first argument, defendants contend that the trial court, in its instructions to the jury, violated defendants' right to a unanimous jury verdict. We disagree.

A. Standard of Review

Our Constitution and General Statutes mandate that a criminal verdict must be unanimous. N.C. Const. Art. I, § 24; N.C. Gen. Stat. § 15A-1237(b) (2019). We review alleged constitutional and statutory violations *de novo*. *State v. Spence*, 237 N.C. App. 367, 372, 764 S.E.2d 670, 675 (2014); *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011).

B. Analysis

In their respective indictments, defendants were charged, *inter alia*, with the robbery with a dangerous weapon of McCarty. However, in its jury instruction on robbery, the trial court did not specify McCarty as the victim. Defendants contend

that this vague language would have permitted the jury to improperly convict them for the robbery of Wells.

Neither defendant objected to this jury instruction, either during the jury charge conference or when the trial court instructed the jury. However, defendants argue that this instruction violated their right to a unanimous jury verdict, which is preserved for appeal regardless of actions taken or not taken by trial counsel.

Defendants are correct in principle. Our Supreme Court has held that, "[w]here the error violates the right to a unanimous jury verdict under Article I, Section 24, it is preserved for appeal without any action by counsel." *State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009). Defendants also correctly note that a jury instruction can be "fatally ambiguous, thereby resulting in an uncertain verdict in violation of defendant's right to a unanimous verdict." *State v. Lyons*, 330 N.C. 298, 301, 412 S.E.2d 308, 311 (1991) (hereinafter *Lyons I*).

Defendants contend that the ambiguity at issue arises from the evidence. To wit: While the State presented evidence that defendants conspired to and ultimately did rob McCarty at gunpoint, the State also presented evidence that defendants stole Wells' phone at gunpoint. As such, defendants argue, the jury instruction – which did not specify that the jury had to find defendants guilty of the robbery *of McCarty* – was "fatally ambiguous," and thereby violated their right to a unanimous verdict.

In *Lyons I*, the jury instruction at issue was a disjunctive one. The trial court instructed the jury that it could find the defendant guilty if it found that he assaulted "Douglas Jones *and/or* Preston Jones." *Id*. at 302, 412 S.E.2d at 311. This Court, on appeal, held that the disjunctive instruction "resulted in an ambiguous and uncertain verdict in violation of defendant's right to be convicted by a unanimous jury." *Id*. On appeal from our decision, our Supreme Court agreed. *Id*. at 302, 412 S.E.2d at 311-12.

In the instant case, however, the jury was not instructed in the disjunctive. The jury was not permitted to find defendants guilty of robbery, or conspiracy to rob, McCarty and/or Wells. In fact, the trial court did not identify the victim at all; in its instruction, the trial court merely stated that the charge included taking property "from the person of another or in the person's presence[,]" and did so "by endangering or threatening that person's life with the use or threatened use of a firearm," and formed a conspiracy to do so.

Two of our prior unpublished decisions are enlightening on this issue. First, in *State v. Lyons*, 244 N.C. App. 544, 781 S.E.2d 351 (2015) (unpublished) (hereinafter *Lyons II*), this Court noted that the jury instruction on robbery by firearm was not disjunctive. Rather, the instruction referred to a single victim, and its use of such language complied with the North Carolina Pattern Jury Instructions. As such, we held that the trial court did not erroneously violate the defendant's right to a

unanimous verdict. Similarly, in *State v. McLaughlin*, ___ N.C. App. ___, 845 S.E.2d 207 (2020) (unpublished), this Court noted that the indictment at issue named only one victim. We held that there was no ambiguity as to the victim alleged, or as to the evidence in the case, which showed that property was stolen from a specific victim. We further noted that there was no evidence of confusion by the jury as to the instructions or record of ambiguity in the verdict, and therefore that the defendant's right to a unanimous jury verdict was not violated.

Although those two cases are unpublished, and therefore not binding upon this Court, we find their reasoning compelling. In the instant case, as in *McLaughlin*, the indictment named only one victim – McCarty. As in *Lyons II*, the trial court's instruction comported with the North Carolina Pattern Jury Instruction on felony robbery with a firearm, N.C.P.I.-Crim 217.20. Moreover, while the trial court's instructions on robbery and conspiracy did not explicitly name McCarty as the victim, the court's instruction on murder did. Certainly, even had there been some confusion, the explicit reference to McCarty in the murder instruction clarified that the robbery and conspiracy charges likewise concerned him as the victim.

Moreover, not only is there no evidence in the record of a lack of unanimity, the opposite is in fact true. When the jury returned from deliberations with its verdicts, the clerk specifically asked whether those verdicts were unanimous, and requested a show of hands. The jury showed its unanimity accordingly. The State

then asked that the jury be polled. Each juror was asked to confirm the unanimous verdict, on each charge and as to each defendant, individually. They did so in the affirmative. It is beyond dispute that the jury verdict was unanimous. We therefore hold that defendants have failed to demonstrate that the trial court, in its jury instructions, violated their right to a unanimous verdict.

IV. Fatal Variance

In their second argument, defendants contend that the trial court committed plain error in failing to specify the robbery victim in its jury instructions, creating a fatal variance between the jury instructions and the indictment. However, because this is in fact invited error, we decline to address it on appeal.

A. Standard of Review

"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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

Defendants again challenge the trial court's jury instruction. As, again, they concede they failed to preserve this challenge via timely objection, they request that we review the argument for plain error.

However, plain error is the result of a failure to preserve objection at trial. In the instant case, defendants did not merely fail to preserve their objections to the jury instructions – they were actively involved in the crafting of those instructions. Accordingly, this more resembles a matter of invited error.

Our General Statutes provide that "[a] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2019). Such conduct is called "invited error." This Court has held that "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), *writ denied, disc. review denied,* 355 N.C. 216, 560 S.E.2d 141 (2002). The State cites numerous cases in which our Supreme Court has held that a defendant's participation in the crafting of jury instructions, as opposed to merely the failure to object to them, constitutes invited error. For example, in *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999), the defendant argued that the trial court erred in failing to give certain instructions on mitigating factors to the jury. In

fact, the trial court specified to the defendant the instructions it intended to give, and asked whether the defendant assented, which he did. Our Supreme Court, upon review, noted that "[d]efense counsel thus agreed with this proposed language, made no objection to it, and neither suggested nor provided any other language either orally or in writing. Thereafter, the trial court instructed the jury exactly as it had indicated. Defense counsel did not object at this point either, though given the opportunity." *Id.* at 569, 508 S.E.2d at 274. Based on this, the Court concluded that, "[w]here a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal." *Id.* at 570, 508 S.E.2d at 275. *See also State v. Wilkinson*, 344 N.C. 198, 236, 474 S.E.2d 375, 396 (1996) (holding that error is invited error, not plain error, where "defendant consented to the manner in which the trial court gave the instructions to the jury"); *State v. Harris*, 338 N.C. 129, 150, 449 S.E.2d 371, 380 (1994) (holding that, where the defendant agreed at the charge conference that the court could instruct the jury as it proposed, "it was invited error and we shall not review it").

In the instant case, the trial court made extensive inquiry as to the parties' agreement with the jury instructions. At the charge conference, the court presented counsel with copies of its proposed instructions and went through them, page by page, asking if there were any objections. Defendants did raise some objections to some jury instructions. For example, as concerns the murder instruction, defense counsel

asked that the court not instruct the jury on a lack of provocation. However, neither defendant objected to the jury instructions at issue. To the contrary, with regard to the alleged ambiguity in the specific instruction at issue, the following colloquy took place:

> THE COURT: All right page 6, the second part of the robbery with a dangerous weapon. And seventh that the Defendant obtained the property by endangering or threatening the life of that person because looking at the indictment although the cellphone was allegedly taken from Mr. Wells it's not charged in the indictment.
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> MR. HANCOCK: Yes, ma'am.
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> THE COURT: So threatening the life of that person. Any objections?
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> MR. GERALD: No, Your Honor.
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> MR. GEORGE: No, Your Honor.

The trial court explicitly noted that there was a potential for ambiguity in the instruction, noted that the robbery of Wells was not charged in the indictment, and asked whether the parties assented to the instruction. Each defense counsel agreed. Defendants were given an additional, later opportunity to review the instructions in their entirety, and again counsel for each stated their agreement. And again, at the close of its actual instructions to the jury, the trial court asked whether defendants had any "objections or corrections or requests[,]" and again defendants each assented to the instructions given.

It is abundantly clear that defendants were given ample opportunities to raise objection to this instruction, specifically. They not only failed to object, they actively agreed and assented to it. It is further clear that this was not an oversight; defendants raised objections to other jury instructions during the charge conference. From this we can infer that their assent to the instruction at issue was deliberate. Accordingly, we hold that this was not plain error, but invited error. As such, we decline to review it on appeal.

NO ERROR.

Judges DILLON and INMAN concur.

Report per Rule 30(e).