IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-195

Filed: 15 December 2020

Burke County, No. 16 CRS 53902

STATE OF NORTH CAROLINA

v.

STEVEN ALLEN WOODY, Defendant.

Appeal by defendant from judgment entered 28 June 2018 by Judge Casey M. Viser in Burke County Superior Court. Heard in the Court of Appeals 7 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Tien Cheng, for the State.

Law Office of Kellie Mannette, PLLC, by Kellie Dorise Mannette, for defendant-appellant.

BERGER, Judge.

On June 28, 2018, a Burke County jury convicted Steven Allen Woody ("Defendant") of first-degree burglary. He was acquitted of felony larceny. Defendant was sentenced to 55 to 78 months in prison, ordered to pay $330.00 in restitution, and ordered to have no contact with the victims and Zion Baptist Church.

Defendant appeals, alleging the trial court erred when it (1) failed to instruct the jury on eyewitness identification procedures; (2) admitted a lock pick kit into evidence; (3) sentenced Defendant as a prior record level II without prior notice of a sentencing point; (4) imposed an unconstitutional punishment by issuing a no contact order; and (5) ordered Defendant to pay restitution in the amount of $330.00.

Factual and Procedural Background

On November 24, 2016, Mr. Donald Keith Rose and Mrs. Shane Rose hosted family members at their home, a parsonage on the grounds of Zion Baptist Church in Morganton, North Carolina. Mr. Rose was the pastor of the Zion Baptist Church.

That evening, Mrs. Rose was awakened by an intruder who had entered their bedroom. Mrs. Rose testified that the intruder placed his hand on her leg while she was in bed, and asked, "[a]re you going to lay there and watch me kill him or are you going to get up?" At that moment, Mrs. Rose sat up and struck the intruder, while Mr. Rose lunged at the intruder from across the bed. The intruder then fled the house, and the Roses reported the incident to law enforcement. Later, the Roses noticed that a set of keys to the house and church were missing.

Officer James Koerner responded to the 911 dispatch. Officer Koerner and Mr. Rose assessed the damage and found that the basement door had been forced open and damaged during the break-in. The alarm system directly inside of the basement door had also been damaged, even though it had not been armed that evening. Mrs.

Rose described the intruder as a lean, six-foot white male with a scruffy beard, wearing blue jeans, work boots, a Carhartt coat, and a camouflage hat.

Around 8:00 a.m., several members of the church came to help repair the parsonage. Specifically, they changed the locks and replaced the broken basement door. Later that day, Detective Steven Ritchie arrived at the parsonage to investigate the burglary. At trial, Detective Ritchie testified that the presence of the church members impaired his ability to collect fingerprints because they had repaired the alarm system, the doors, and the locks.

On November 29, 2016, unrelated to the present case, Detective Ritchie conducted a regular probation check on Defendant. While in Defendant's residence, Detective Ritchie noticed a brown Carhartt coat on the couch with a voltmeter in one pocket and a lock picking kit in the other. Detective Ritchie also observed a pair of heavy work boots. Based on his personal observations, Detective Ritchie requested that an administrative specialist create a photo lineup with a picture of Defendant.

Detective Daniel Strauss administered the photo lineup to Mrs. Rose. Until that point, Detective Strauss was not involved in the investigation. Detective Ritchie, who was present in the room, handed Mrs. Rose the photos in separate folders and "told [her] to look at them based on the description that [she] had given." Detective Strauss testified that during the photo lineup, Mrs. Rose began shaking and became

visibly upset when she saw Defendant's photo. Mrs. Rose immediately identified Defendant as the intruder.

Based on the positive identification, the detectives obtained an arrest warrant and executed a search warrant on Defendant's residence. Detectives seized a brown Carhartt coat, a pair of brown boots, a camouflage baseball cap with net-like backing, and a lock pick kit from Defendant's residence.

Defendant was indicted for first-degree burglary and larceny pursuant to burglary. On June 28, 2018, Defendant was convicted of first-degree burglary, but he was acquitted on the larceny charge. At sentencing, Defendant's attorney stipulated, and the trial court found, Defendant to be a prior record level II for felony sentencing. The trial court sentenced Defendant to 55 to 78 months in prison. The trial court further ordered Defendant to pay $330.00 in restitution, and that Defendant have no contact with the Roses or Zion Baptist Church.

Defendant appeals, alleging the trial court erred when it (1) failed to instruct the jury on eyewitness identification procedures; (2) admitted the lock pick kit into evidence; (3) sentenced Defendant as a prior record level II offender when the record does not indicate the State gave proper notice; (4) imposed an unconstitutional punishment by issuing a no contact order; and (5) ordered Defendant to pay restitution in the amount of $330.00.

Analysis

I. Jury Instructions

Defendant contends that the trial court erred when it did not instruct the jury on compliance and purported noncompliance with the Eyewitness Identification Reform Act (the "EIRA"). Specifically, Defendant alleges that Detective Ritchie's presence in the room in which the photo lineup was conducted by Detective Strauss violated the independent administrator requirement in the EIRA.[1]

The EIRA sets forth a detailed procedure that must be followed when conducting a photo lineup. *See* N.C. Gen. Stat. § 15A-284.52(b) (2019).

Detective Strauss, who had received training in administering photo lineups, was an independent administrator for the photo lineup in this case. The transcript reflects that the photo lineup administered by Detective Strauss complied with the requirements of N.C. Gen. Stat. § 15A-284.52.

Defendant essentially contends that the mere presence of an investigating officer at a photo lineup is evidence of noncompliance. However, no such prohibition is found in the plain language of N.C. Gen. Stat. § 15A-284.52. To the contrary, the EIRA addresses situations in which an investigating officer may administer a photo lineup. *See* N.C. Gen. Stat. § 15A-284.52(b)(1), (c) (2019). When an independent administrator is not used, alternative methods of conducting a photographic lineup

[1] Defendant did not object to the jury instructions at trial, or otherwise request an instruction on compliance or noncompliance with the EIRA. Defendant asserts that if this issue is not preserved as a matter of law that the trial court committed plain error when it failed to properly instruct the jury. We assume, without deciding, that the issue was preserved for appellate review.

are permitted pursuant to N.C. Gen. Stat. § 15A-284.52(c). However, "any alternative method shall be carefully structured to achieve neutral administration." N.C. Gen. Stat. § 15A-284.52(c).

This Court has previously determined that an investigating officer who is present and administers a photo lineup does not violate the neutral administration requirement of the EIRA. *See State v. Gamble*, 243 N.C. App. 414, 422, 777 S.E.2d 158, 165 (2015) (holding that the investigating officer "achieved neutral administration by using the statutory method" for non-independent administrators under N.C. Gen. Stat. § 15A-284.52(c)(2)). Thus, even if Detective Ritchie played a role in administering the photo lineup, the transcript reflects that Detective Strauss followed the EIRA's procedure for "achiev[ing] neutral administration" of the photo lineup. N.C. Gen. Stat. § 15A-284.52(c).

Because the photo lineup administered to Mrs. Rose complied with the EIRA, Defendant was not entitled to a jury instruction on noncompliance pursuant to N.C. Gen. Stat. § 15-284.52(d). *See State v. Boozer*, 210 N.C. App. 371, 383, 707 S.E.2d 756, 766 (2011) ("[B]ecause [defendant] did not present evidence of noncompliance with the statute's requirements at trial, the remedies of subsection (d)(3) are not available to him.").

Here, administration of the photo lineup complied with the EIRA, and Defendant was not entitled to an instruction on noncompliance. Thus, the trial court did not err when it did not instruct the jury on noncompliance with the EIRA.

II. The Lock Pick Kit

Defendant concedes that he failed to object to the admission of the lock pick kit at trial. Defendant argues that the trial court committed plain error when it admitted the lock pick kit into evidence because it was (1) inadmissible under Rules 401 and 402 of the North Carolina Rules of Evidence; and (2) unfairly prejudicial under Rule 403 of the North Carolina Rules of Evidence.

"Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). All relevant evidence is generally admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (2019). However, relevant "evidence may be excluded 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).

The decision of "[w]hether to exclude relevant evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Stager,* 329 N.C. 278, 308, 406 S.E.2d 876, 893 (1991). Our Supreme Court has stated that plain error

review is not available on evidentiary issues within the trial court's discretion. *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000) ("[T]his Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now.").

Unlike Rule 403, determinations of relevance pursuant to Rule 401 "are not discretionary and therefore are not reviewed under the abuse of discretion standard[.]" *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citation omitted). Thus, plain error review is available to Defendant only on the determination of relevance. However, it is well settled that while "[a] trial court's rulings on relevancy are technically not discretionary, [ ] we accord them great deference on appeal." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011) (citations omitted).

> 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).

Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted). "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) (citation omitted).

Our Supreme Court has stated that "[w]e have interpreted Rule 401 broadly and have explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994) (citations and quotation marks omitted).

> Rule 401 sets a standard to which trial judges must adhere in determining whether proffered evidence is relevant; at the same time, this standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has *any* logical tendency to prove any fact that is of consequence.

Wallace, 104 N.C. App. at 502, 410 S.E.2d at 228 (emphasis in original).

Here, Defendant has failed to demonstrate that the trial court erred when the lock pick kit was admitted into evidence. Detective Ritchie was conducting a probation check when he observed the lock pick kit in Defendant's Carhartt coat. The coat matched the description of the clothing worn by the individual who broke into the Roses' home. Defendant's possession of the lock pick kit was relevant as circumstantial evidence of Defendant's identity as the perpetrator, as well as his intent and preparation to commit the burglary. *See State v. Robinson*, 115 N.C. App. 358, 363, 444 S.E.2d 475, 478 (1994) ("Although the tools possessed by [the] defendant were capable of legitimate use, under the circumstances shown by the State, a

legitimate inference can be drawn that [the] defendant possessed the screwdriver and icepick for the purpose of breaking into the building.").

Thus, the trial court did not err when it admitted the lock pick kit into evidence, and Defendant cannot demonstrate plain error.

III. Notice of Prior Record Level

Defendant next argues the trial court erred when it failed to determine whether the State provided notice of its intent to prove that Defendant committed the crimes charged while on probation, parole, or post-release supervision in accordance with N.C. Gen. Stat. § 15A-1340.16(a6) (2019). On appeal, the State concedes the matter should be remanded to the trial court for resentencing. *See State v. Snelling*, 231 N.C. App. 676, 682, 752 S.E.2d 739, 744 (2014) (remanding for resentencing to determine if the State provided sufficient notice of its intent to seek probation point or whether the defendant waived such statutory requirement). Accordingly, we vacate the trial court's judgment and remand for resentencing.

IV. No Contact Order

Defendant next argues that the no contact order imposed by the trial court amounted to an unconstitutional punishment. Specifically, Defendant contends that the no contact order violates Article 11, Section 1 of the North Carolina Constitution, which provides:

> The following punishments only shall be known to the laws of this State: death, imprisonment, fines, suspension of jail

> or prison term with or without conditions, restitution, community service, restraints on liberty, work programs, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.

N.C. Const. Art. XI, § 1.

The State again agrees with Defendant, and requests that the judgment be vacated and that the trial court conduct a new sentencing hearing pursuant to *State v. Curmon*, 171 N.C. App. 697, 615 S.E.2d 417 (2005).[2] Accordingly, we vacate the no contact order and remand to the trial court for resentencing.

VI. Restitution

Defendant argues there was insufficient evidence to support the restitution award as the sum ordered was based solely on the restitution worksheet. We agree.

"[T]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing." *State v. Wilson,* 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995) (citation omitted). "The unsworn statement of the prosecutor is insufficient to support the amount of restitution ordered." *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (*purgandum*).

Here, the State presented evidence at trial concerning damage to the parsonage door and security system. However, the only information provided to the

[2] *See contra State v. Hunt*, 221 N.C. App. 48, 727 S.E. 2d 584 (2012) (holding that a no contact order entered pursuant to N.C. Gen. Stat. § 15A-1340.50 as part of the civil regulatory scheme does not violate N.C. Const. Art. XI, § 1). In addition, this opinion should not be read or interpreted to impair a trial court's ability to impose no contact provisions as a condition of probation.

trial court concerning the amount of damage was the restitution worksheet provided by the prosecutor and Defendant's request that the restitution amount of $330.00 be paid from work-release payments. While "the quantum of evidence needed to support a restitution award is not high[,]" *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011), there was insufficient evidence here to support the award.

Therefore, we vacate the award of restitution in the amount of $330.00, and remand to the trial court to determine the amount of restitution, if any. *State v. Hunt*, 250 N.C. App. 238, 253, 792 S.E.2d 552, 563 (2016).

Conclusion

For the foregoing reasons, the trial court did not err when it did not instruct the jury on compliance or noncompliance with the EIRA. Further, the trial court did not err when the lock pick kit was admitted into evidence without objection. However, we remand this matter for a new sentencing hearing consistent with the terms of this opinion.

NO ERROR IN PART; VACATED IN PART; REMANDED IN PART.

Judge ZACHARY concurs.

Judge BROOK concurs in result only.

Report per Rule 30(e).