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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-35

Filed: 20 October 2020

Vance County, Nos. 17CRS000705, 52287, 52289, 52386-88

STATE OF NORTH CAROLINA

v.

JEREMY ODELL WALKER, Defendant.

Appeal by Defendant from judgments entered 26 March 2019 by Judge Josephine K. Davis in Vance County Superior Court. Heard in the Court of Appeals 25 August 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Wes Saunders, for the State.*

*Michael E. Casterline for the Defendant.*

DILLON, Judge.

Jeremy Odell Walker (“Defendant”) appeals from judgments entered upon jury verdicts finding him guilty of second-degree murder and five counts of discharging a weapon into an occupied dwelling.

I. Background

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This matter stems from a series of events which occurred at the trailer of Dontae Wallace (“Mr. Wallace” or the “victim”) over two days in August 2017.

Defendant’s sister (Alisha Walker) lived with Mr. Wallace and had three children with him. She had a child from another relationship who also lived in the trailer. Also staying at the trailer was Rebecca Robertson, a friend of Mr. Wallace.

On the night of 9 August 2017, Ms. Walker and Mr. Wallace were fighting. They were drinking and using drugs, and Ms. Walker sustained injuries from the fight.

The next day, on 10 August 2017, the father of Defendant and Ms. Walker asked Defendant to pick up Ms. Walker and the four children from the trailer. Defendant arrived with his girlfriend at Mr. Wallace’s trailer to retrieve his sister and her three children. However, Mr. Wallace would not allow his three children to leave, taking them back inside the trailer. Defendant, his girlfriend, and Ms. Walker all testified that Mr. Wallace pointed a gun at them. Ms. Robertson, though, testified that she did not see a gun and that Defendant had threatened to return and “shoot up the house.” Defendant left with his girlfriend, his sister, and his sister’s child she had from another relationship, leaving behind the three children his sister had with Mr. Wallace.

Later that night, Defendant returned to the trailer with his girlfriend, his older brother, and a Mr. Williams to retrieve the other three children and his sister’s

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personal property. Defendant and Mr. Williams knocked at the front door while Defendant's brother started circling around the trailer. Shots were fired from inside the trailer, striking and wounding Defendant's brother. Defendant started shooting towards the trailer with his own shotgun, which fatally injured Mr. Wallace inside the trailer. Defendant and his companions left to take his brother to the hospital.

Defendant was indicted for the first-degree murder of Mr. Wallace and five counts of discharging a weapon into an occupied dwelling for firing his shotgun into the trailer five times. Following a jury trial, Defendant was found guilty of second-degree murder and five counts of discharging a weapon into an occupied dwelling. Defendant appealed from all judgments.

II. Analysis

Defendant makes several arguments on appeal, which we address in turn.

A. Testimony from Witness Rebecca Robertson

Defendant's first argument is a constitutional argument, regarding the testimony of Ms. Robertson (the victim's friend) who had testified that Defendant had threatened the victim. Specifically, Defendant contends that Ms. Robertson gave false testimony as to whether she had been offered anything in exchange for her testimony, as she had been charged with obstruction of justice for removing the victim's weapon from the scene after the shooting.

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Defendant argues that his rights under *Napue v. Illinois* have been violated. 360 U.S. 264 (1959). Indeed, the United States Supreme Court held in *Napue v. Illinois* that a defendant's due process rights under the Fourteenth Amendment to the United States Constitution are violated when a prosecutor fails to alert the court of testimony from a State witness known by the prosecutor to be false. *Id.* at 265, 272. North Carolina has incorporated *Napue* into our State's caselaw. *See, e.g., State v. Allen*, 360 N.C. 297, 626 S.E.2d 271 (2006); *State v. Williams*, 341 N.C. 1, 459 S.E.2d 208 (1995).

In the present case, approximately four hours before trial, Ms. Robertson's attorney filed a letter in Defendant's court file. The letter instructed Ms. Robertson to appear for Defendant's trial because "part of [her] condition of release is that [she] return to Henderson for purposes of testifying against the defendants who actually murdered Mr. Wallace."

Defendant, however, failed to object to Robertson's apparent false testimony, and we do not ordinarily consider a constitutional argument for the first time on appeal. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). Defendant, though, argues on appeal that he was unaware of the letter. In his brief, Defendant claims this letter was only served upon the State and that he did not have time to become aware of this filing before trial.

Based on the record before us, it is unclear whether Defendant was actually aware of the letter that was in his court file. We, therefore, do not reach Defendant's *Napue* constitutional argument on the merits, as the argument was not raised at trial. Our ruling, though, is without prejudice to Defendant to file a motion for appropriate relief with the trial court on this issue or to the State to argue at any such hearing that any error was not prejudicial to Defendant.

### B. Jury Instructions

Defendant also argues that the trial court committed plain error by failing to instruct the jury on the specific weapons offense charged in the indictments. We agree.

Defendant was indicted for five counts of discharging a weapon into an occupied dwelling for firing his weapon into the trailer, Class D felonies. The trial court instructed the jury on the greater charge of discharging a weapon into an occupied dwelling *inflicting serious bodily injury*, a Class C felony. The trial court only instructed on this charge once, and not five times. The jury returned a guilty verdict on five counts of the Class D felony, the charges for which he was indicted.

Defendant essentially makes two arguments why the trial court committed plain error in this regard.

First, Defendant contends that the trial court committed plain error for instructing on the wrong charge. Although the charge as instructed contained all the

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elements of the crimes for which Defendant was indicted and convicted, the error was that the trial court added an element in the instruction. We do not believe that there is a reasonable probability that the result would have been different had the trial court not included the extra element in its charge. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks omitted) (“[P]lain error . . . is a fundamental error . . . where it can be fairly said the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.”).

Second, Defendant argues that the trial court erroneously instructed on only one count rather than five counts. During the jury charge, the trial court stated that “Defendant ha[d] been charged with discharging a firearm into an occupied dwelling . . . .” Though the trial court never stated “one count,” the trial court failed to note in the charge how many counts Defendant had been charged with . . . that Defendant had been charged with *five counts* of discharging a firearm into an occupied dwelling.

For the reasoning stated in *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000), we conclude that the trial court’s failure to instruct on each count, and on the specific crime charged, constitutes reversible error. In *Bowen*, our Court held that a trial court’s failure to instruct on a specific count, where a defendant was indicted for multiple counts of the same crime, constituted a dismissal of that indictment. *Id.* at 26, 533 S.E.2d at 254. As a result, the jury was only allowed to convict Defendant of a single count.

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III. Conclusion

Defendant was convicted of second-degree murder and five counts of discharging a weapon into an occupied dwelling. Though the trial court instructed the jury on the crime of discharging a weapon into an occupied dwelling, the trial court failed to instruct the jury on *five counts*. Accordingly, we reverse the convictions on these five counts and remand with instructions to the trial court to enter judgment on one of these counts.

With respect to the second-degree murder conviction, we conclude that Defendant received a fair trial, free from reversible error.

DISMISSED IN PART, REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge MURPHY concur.

Report per Rule 30(e).