IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-106

Filed 5 December 2023

Buncombe County, Nos. 21CRS80768–77

STATE OF NORTH CAROLINA

v.

DONTE DERELL SHINE, Defendant.

Appeal by defendant from judgments entered 11 March 2022 by Judge Jacqueline D. Grant in Buncombe County Superior Court. Heard in the Court of Appeals 18 October 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General John H. Schaeffer, for the State-appellee.

Joseph P. Lattimore for defendant-appellant.

GORE, Judge.

Defendant, Donte Derell Shine, appeals his convictions for attempted first-degree murder, assault with a deadly weapon with intent to kill or inflict serious injury, discharge of a firearm into an occupied dwelling resulting in serious bodily injury, and discharge of a firearm into an occupied dwelling. The trial court handed down multiple sentences for the judgments. Defendant seeks review of two of the

trial court's evidentiary rulings and a portion of the jury instructions. Upon review, we determine there is no reversible error and no plain error.

I.

Defendant met Amy Huerta ("Amy") while working together at McDonald's. Amy was married to Eric Huerta ("Eric") at the time but left him in 2020 because of a romantic relationship with defendant. Amy and defendant began living together, first at her house on Hanover Street and later at his apartment on Emily Rose Lane. Amy testified defendant frequently thought she would go back to Eric and repeatedly threatened her that "if [she] left him, [she] would never be . . . free." Amy testified that defendant pulled out his gun when he made these threats, so she was "just scared" and "thought if [she] stayed there, [she] would end up dead." Six months into the relationship, on 24 January 2021, Amy left her relationship with defendant and went to Eric's house on Hanover Street.

The evening of 24 January 2021, Amy texted defendant stating she left him, and defendant attempted to call her. Defendant began repeatedly calling Amy and sending threatening text messages such as: "You better answer the phone or shit is about to go down"; "When your sister[']s kids get shot you will see"; "If you think I'm bluffing you about to find out"; "Did you hear those gunshots"; "The next one will be going into the house"; "Going to Eric's now"; "Okay, let's see if Eric can protect himself"; "I bet you're here at Eric's"; "You might want to call me because shit is about to go down"; and lastly, "Amy." Around 10 P.M., gunshots were heard outside Amy's

mother's house, on Taylor Mountain Road, and Eric received a text that stated, "You're a dead man walking Eric." Eric testified he saw defendant's car outside their house the night of the shooting. Shortly after Amy received the last text from the string of defendant's text messages, gunshots were heard outside of Eric's house. Amy and Eric began crawling on the ground attempting to get to their daughter's room while the gunshots were fired. As they were crawling, one of the bullets hit Eric in the back and Amy quickly called 9-1-1. Eric survived but had a portion of his lungs removed on account of the shooting.

Following the shooting, police arrived and investigated the scene of the crime. Police reviewed the text messages on Amy's phone, matched the timing of those text messages with the 9-1-1 call they received earlier from the gunshots heard at Taylor Mountain Road, and contacted Verizon to ping defendant's location. Verizon advised police that defendant's phone number changed early that morning. Police located defendant at his home on Emily Rose Lane and arrested him. Police obtained a search warrant that specified an intent to search cell phones that could send texts, included the defendant's old and new number in the search warrant affidavit, and specified the criminal charges. During the search, police discovered shell casings, and a partially full box of ammunition that had similar features to the rounds discovered at Eric's home and Amy's mother's home.

Police also discovered a red iPhone and unlocked the cell phone to search the data as part of the permission granted by the search warrant. Detectives extracted

all the phone's data, which included an email address, dshine1992@icloud.com, and data that revealed the phone number changed from defendant's old number to the new number. There were internet searches on the iPhone just prior to the number changing that explored "Asheville shooting suspect" and "Howe [sic] to Change Your Verizon Phone Number Online." Utilizing the phone's data, an expert cell site analyst determined the iPhone's location on 24 January 2021; it was located at Taylor Mountain Road and at or near Eric's home during the times the gunshots were fired.

Defendant was indicted with ten charges: (1) assault with a deadly weapon with intent to kill and inflicting serious injury; (2) discharging a weapon into an occupied property resulting in serious bodily injury of Eric Huerta; (3) attempted first-degree murder of Eric Huerta; (4)–(8) five counts of discharging a weapon into an occupied dwelling; (9) attempted first-degree murder of Amy Huerta; and (10) assault with a deadly weapon with intent to kill Amy Huerta. Defendant pleaded not guilty, waived counsel, and represented himself at the jury trial starting on 28 February 2022. Defendant filed a Motion to Suppress the data found on the red iPhone, which was denied during a pretrial hearing. The jury returned guilty verdicts on all the charges. The trial court handed down multiple sentences and arrested judgment on the assault with a deadly weapon with the intent to kill Amy Huerta conviction. Defendant orally and timely appealed the final judgments.

II.

Defendant appeals of right pursuant to sections 7A-27(b) and 15A-1444(a). Defendant seeks de novo review of the trial court's jury instructions because he argues the trial court violated his right to a unanimous verdict. *See State v. Mueller*, 184 N.C. App. 553, 575 (2007) ("A defendant's failure to object at trial to a possible violation of his right to a unanimous jury verdict does not waive his right to appeal on the issue, and it may be raised for the first time on appeal."). Defendant also seeks plain error review of two evidentiary rulings because he concedes he failed to preserve these arguments during trial. He argues the trial court plainly erred: (1) by admitting evidence from the seized red iPhone; and (2) by admitting the Verizon phone records.

We apply plain error review "cautiously and only in the exceptional case." *State v. Lawrence*, 365 N.C. 506, 518 (2012) (citation omitted). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Id.* Defendant has the burden to prove the error was fundamental by "establish[ing] 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.* (internal quotation marks and citation omitted). With this standard in mind, we now consider defendant's plain error arguments.

A.

Defendant first argues that the search warrant that led to the seizure of his red iPhone was a general warrant. Specifically, he argues the warrant allowing

seizure of electronic devices was "insufficiently particular" and "overbroad." We disagree.

General warrants are warrants that give "blanket authority," lack probable cause, and are banned by our Constitution. *State v. Hilton*, 378 N.C. 692, 713 (2021). Therefore, "search warrant[s] must particularly describe the place to be searched, as well as the activities and objects which are the subjects of the proposed search." *Brooks v. Taylor Tobacco Enterprises, Inc.*, 298 N.C. 759, 762 (1979). This particularity requirement "leaves nothing to the discretion of the officer executing the warrant as to the premises to be searched and the activities or items which are the subjects of the proposed search." *Id.*

In the present case, despite defendant's arguments to the contrary, the trial court did not plainly err by denying defendant's motion to suppress evidence obtained by seizure of the red iPhone. The State's search warrant satisfied the requirements of individualized suspicion and particularity. Law enforcement attached an extensive affidavit specifying a request to search and seize the phone identified by its number and newly assigned number. Law enforcement described the messages sent to the victims leading up to the incident, the need to track the phone's locations, and they specified the desired forensic extraction of information from the phone. Finally, the search warrant specified the alleged crimes that were the basis for the search warrant. Therefore, we discern no error, much less plain error, in the trial court's

denial of the motion to suppress and the admission of the evidence extracted from the red iPhone.

B.

Next, defendant argues the trial court plainly erred by admitting the Verizon records of text messages between defendant and Amy, because the records were not properly certified under Rule 902. We discern no plain error.

Defendant takes issue with the missing notarization of the certificates included with Verizon's text message records that were admitted under Rule 803(6) business records exception and Rule 902(8) self-authenticating acknowledged documents. *See* N.C. R. Evid. 803(6), 902(8). The State argues notarization is not required with all affidavits. In support of this argument, the State cites to *Gyger v. Clement* to demonstrate our Supreme Court does not require a notarization when the party makes the statement under penalty of perjury. 375 N.C. 80, 85 (2020).

Under plain error review we need not address this nuance of law, because the record demonstrates the text messages would still be in the record even without admission of the Verizon records. Both victims testified during the trial that they received threatening text messages from defendant and testified to the substance of those messages. Accordingly, there was no fundamental error on account of the Verizon records nor did these records have "a probable impact on the jury's finding that . . . defendant was guilty." *Lawrence*, 365 N.C. at 518.

C.

Finally, defendant argues the trial court erred by giving a disjunctive jury instruction stating the jury could convict defendant of attempted first-degree murder if defendant attempted to kill Eric Huerta and/or Amy Huerta. Defendant argues this led to ambiguity and the possibility he did not receive a guilty verdict by a unanimous jury, which was a violation of his constitutional right under N.C. Const. art. I, § 24. We disagree. As previously stated, we consider this issue under de novo review.

During the jury charge, the trial court gave the following instruction for the attempted first-degree murder charges:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date of January 24th, 2021, the defendant intentionally attempted to kill Eric Huerta and/or Amy Huerta with a deadly weapon and performed an act designed to bring this about, but which fell short of the completed crime and that, in performing this act, the defendant acted with malice, with premeditation, and with deliberation, it would be your duty to return a verdict of guilty of attempted first degree murder.

Defendant argues this instruction caused the jury to believe it could find defendant guilty of the attempted murder charge if he intentionally sought to kill either Eric or Amy. In contrast, the State argues any error in this instruction was harmless because the jury received two verdict forms, one with Eric Huerta's name and one with Amy Huerta's name. According to the State, the two verdict forms resolved any confusion because each form required unanimous jury consent.

Disjunctive jury instructions may result in reversible error if the error is not harmless. *See State v. Diaz*, 317 N.C. 545, 553–54 (1986), *abrogated on other grounds by State v. Hartness*, 326 N.C. 561, 566 (1990). Defendant relies upon *State v. Lyons* to support his argument that the error is reversible, whereas the State relies upon *State v. Hartness* to demonstrate any error was harmless. In *Lyons*, the Court determined the jury instructions were "fatally defective because they . . . allow[ed] a jury to return a verdict of guilty for a single offense if the jury found that the defendant committed either of two underlying acts, either of which [were] in itself a separate crime." 330 N.C. 298, 307 (1991).

The *Lyons* Court contrasted the case with *Hartness*, because in *Hartness* "a single wrong [was] established by a finding of various alternative elements." *Lyons*, 330 N.C. at 306. Put differently, a jury could be split in its determination of the type of conduct committed if the various types of conduct established the defined element of the crime, which in that case was indecent liberties with a child. *Id.* Further, the Court reiterated that a determination of disjunctive instructions "would not always render a resulting verdict fatally ambiguous. In some cases, an examination of the verdict, the charge, the initial instructions by the trial judge to the jury, and the evidence may remove any ambiguity created by the charge." *Id.* at 307 (cleaned up).

In the present case, regardless of any error committed, we determine it was harmless because the record includes two jury verdict forms for attempted first-degree murder, one that explicitly listed Eric and one that listed Amy. Any confusion

by the jury that could raise concerns of a disjunctive instruction, was cured by the need for the jury to unanimously decide each verdict form. Within the transcript, the jury unanimously agreed with each attempted first-degree murder verdict. Accordingly, any error by the trial court's jury charge was harmless.

III.

For the foregoing reasons, we determine the trial court did not plainly err, and any error during the jury charge was harmless.

NO ERROR.

Judge COLLINS and Judge FLOOD concur.

Report per Rule 30(e).