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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-158

Filed 19 September 2023

Wayne County, Nos. 18 CRS 1396, 18 CRS 52883-84

STATE OF NORTH CAROLINA

v.

JOHNNY J. THOMAS, JR.

Appeal by defendant from the jury verdict and judgment entered 24 February 2022 by Judge William W. Bland in Wayne County Superior Court.

Heard in the Court of Appeals 29 August 2023.

*Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.*

*Public Defender Jennifer Harjo, by Assistant Public Defender Max E. Ashworth, III, for defendant-appellant.*

PER CURIAM.

Johnny J. Thomas, Jr. (“defendant”), appeals from the jury verdict and judgment convicting him of possession of a firearm by a felon. For the following reasons, we find no error.

I. Background

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In 2018, police received a search warrant for defendant's home after investigating him for illegally selling alcohol. Before executing the warrant, police stopped defendant for having a suspended license while driving his truck. After an officer asked defendant whether he had weapons in his truck, defendant stated that his wife's gun might be in one of the truck's compartments. Because the officer knew defendant had a previous felony conviction, the officer believed he had probable cause to search the vehicle. The search revealed a .357 revolver in the truck's toolbox.

Shortly after the traffic stop, police arrived at defendant's home to execute the search warrant, where they learned that defendant's son was also living there. The search of the home revealed a broken .22 caliber rifle in the front bedroom, a .380 handgun and ammunition in the master bedroom, and various bottles of alcohol.

Defendant was later charged in three indictments with (1) possessing a firearm by a felon under N.C. Gen. Stat. § 14-415.1; (2) driving while license revoked under N.C. Gen. Stat. § 20-28(a); and (3) two counts of possessing or selling alcoholic beverages without a permit or license under N.C. Gen. Stat. § 18B-304. The indictment for possessing a firearm by a felon stated that defendant "unlawfully, willfully and feloniously possess[ed] and ha[d] in his custody, care and control a Smith and Wesson .357 revolver, a Highpoint .380 handgun, and a .22 caliber rifle, which are all firearms[.]" The matter came on for trial on 21 February 2022 in Wayne County Superior Court.

At trial during the charge conference, the trial judge, the State, and defense

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counsel discussed whether the jury instructions required that the jury identify which of the three firearms defendant possessed for the purposes of jury unanimity. However, the trial judge ultimately decided that the instructions do not require the jury to specify which of the three firearms defendant possessed. The trial judge also ruled that it would be improper for defendant to argue during closing that the jury unanimously agree on which firearm defendant possessed.

For the possession of a firearm by a felon charge, the jury instructions required the State to prove two elements: (1) that defendant was convicted of a felony offense on 5 May 2009 and (2) that, after 5 May 2009, defendant possessed a firearm. Specifically, the instructions stated:

If you find from the evidence beyond a reasonable doubt that the defendant was convicted of the felony of Voluntary Manslaughter that was committed on May 22, 2008, in violation of the laws of the State of North Carolina, and that the defendant, after being convicted of that felony on May 5, 2009, possessed a firearm, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty.

Therefore, neither the instructions nor the verdict form allowed the jury to specify which firearms defendant possessed.

The jury found defendant guilty of all charges, and the judge sentenced him to three judgments, including a 20-33 month active imprisonment term for possessing a firearm by a felon. Defendant filed notice of appeal on 7 March 2022.

II. Discussion

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On appeal, defendant argues that his right to a unanimous verdict was violated when the jury instructions and verdict form did not identify which firearms he possessed. Specifically, defendant argues that because “half of the jury could have believed [defendant] possessed the pistol in his truck and the other half could have believed [defendant] possessed the .22 caliber rifle found in his home[,]” the verdict was not unanimous. We disagree.

A. Standard of Review

The failure to object to alleged errors by the trial court does not waive appellate review of whether the defendant’s right to a unanimous verdict has been violated. *State v. Holden*, 160 N.C. App. 503, 507, 586 S.E.2d 513, 516 (2003) (citing *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)), *disc. review allowed, writ allowed*, 358 N.C. 238, 593 S.E.2d 786, *aff’d per curiam*, 359 N.C. 60, 602 S.E.2d 360 (2004).

To determine whether a defendant’s right to a unanimous verdict was violated, this Court must examine whether the statute “criminalizes a single wrong or multiple discrete and separate wrongs[.]” *State v. Petty*, 132 N.C. App. 453, 461, 512 S.E.2d 428, 434 (1999) (citations omitted). If “the statute criminalizes two or more discrete and separate wrongs, [then this Court] must examine the verdict, the charge, the jury instructions, and the evidence to determine whether any ambiguity as to unanimity has been removed.” *Id.* at 461-62, 512 S.E.2d at 434 (citing *State v. Lyons*, 330 N.C. 298, 307, 412 S.E.2d 308, 314 (1991); *State v. Foust*, 311 N.C. 351, 317 S.E.2d 385 (1984)).

B. Right to a Unanimous Verdict

Our state Constitution provides that a defendant may not “be convicted of any crime but by the unanimous verdict of a jury in open court[.]” N.C. Const. art. 1, § 24; *see also* N.C. Gen. Stat. § 15A-1237(b) (2022) (“The verdict must be unanimous, and must be returned by the jury in open court.”). An issue may develop as to whether a verdict is unanimous when the “trial court instructs a jury that it may find the defendant guilty of the crime charged . . . on alternative grounds,” thus creating a risk that “some jurors may find the defendant guilty of the crime charged on one ground, while other jurors may find the defendant guilty on another ground.” *Petty*, 132 N.C. App. at 460, 512 S.E.2d at 433. “Where each alternative ground constitutes a separate and distinct offense, the risk of a nonunanimous verdict arises.” *Id.* (citation omitted).

However, “[t]here is no risk of a nonunanimous verdict . . . where the statute under which the defendant is charged criminalizes ‘a single wrong’ that ‘may be proved by evidence of the commission of any one of a number of acts[.]’ ” *Id.* (quoting *State v. Hartness*, 326 N.C. 561, 566-67, 391 S.E.2d 177, 180 (1990)). “[T]he difference is whether the . . . underlying acts are separate offenses or whether they are merely alternative ways to establish a single offense.” *State v. Almond*, 112 N.C. App. 137, 144, 435 S.E.2d 91, 96 (1993).

For example, in *Hartness*, our Supreme Court explained that “the crime of indecent liberties is a single offense which may be proved by evidence of the

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commission of any one of a number of acts.” 326 N.C. at 567, 391 S.E.2d at 180. Therefore, the judge’s instructions that the jury could find the defendant guilty “upon a finding that defendant either improperly touched the boy or induced the boy to touch him” was proper. *Id.* at 567, 391 S.E.2d at 181; *see also State v. Oliver*, 343 N.C. 202, 215, 470 S.E.2d 16, 24 (1996) (explaining that even if “some jurors . . . found defendant was under the influence of an impairing substance and that some jurors . . . found defendant’s alcohol concentration was 0.08 or more at some relevant time after driving, the fact remains that jurors unanimously found defendant guilty of the single offense of impaired driving.”).

Here, the statute in question criminalizes a single wrong—the possession of “any firearm” by “any person who has been convicted of a felony[.]” N.C. Gen. Stat. § 14-415.1(a) (2022); *see State v. Garris*, 191 N.C. App. 276, 285, 663 S.E.2d 340, 348 (2008) (finding that the legislature did not intend “for N.C. Gen. Stat. § 14-415.1(a) to impose multiple penalties for a defendant’s simultaneous possession of multiple firearms” and holding that the defendant could be “sentenced only once for possession of a firearm by a felon based on his simultaneous possession of both firearms.”); *see also State v. Wiggins*, 210 N.C. App. 128, 134, 707 S.E.2d 664, 670 (2011) (holding that—under *Garris*, 191 N.C. App. 276, 663 S.E.2d 340—the defendant could be sentenced only once for possession of a firearm by a felon based on his “use of firearms that he simultaneously obtained and used while committing three substantive offenses over a period of approximately two hours.”).

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Therefore, like in *Hartness* and *Oliver*, there is no risk of a non-unanimous verdict because the statute criminalizes a single wrong that can be proved by evidence that defendant possessed any of the three firearms. In other words, what matters is that each juror found that defendant possessed a firearm; it is irrelevant, then, whether the jury found defendant possessed either the .357 revolver or the .22 caliber rifle.

Because N.C. Gen Stat. § 14-415.1 does not criminalize two or more separate wrongs, we do not need “to determine whether any ambiguity as to unanimity has been removed.” *Petty*, 132 N.C. App. at 461-62, 512 S.E.2d at 434 (citations omitted). Accordingly, defendant’s right to a unanimous verdict was not violated when the jury instructions and verdict form did not specify which firearm defendant possessed.

III. Conclusion

For the foregoing reasons, we conclude defendant’s sole argument on appeal is without merit. The trial court’s judgment is affirmed.

NO ERROR.

Panel consisting of:

Chief Judge STROUD and Judges ARROWOOD and COLLINS.

Report per Rule 30(e).