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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-431

Filed: 21 February 2017

Mecklenburg County, Nos. 14 CRS 20721–24

STATE OF NORTH CAROLINA

v.

CHRISTOPHER JASON HUDSON

Appeal by defendant from judgment entered 21 January 2016 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 October 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant-appellant.

ELMORE, Judge.

Defendant Christopher Jason Hudson appeals from a judgment entered after a jury found him guilty of felonious possession of stolen goods or property, felonious breaking or entering, and felonious larceny after breaking or entering. He contends the trial court erred by giving conflicting jury instructions on the burden of proof. We conclude that defendant received a fair trial, free from error.

I. Background

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Around 9:30 a.m. on 5 March 2014, two men carried a 60-inch flat-screen plasma smart television into Cash American Pawn and presented it to manager James Darden. One of the two men was later identified as defendant. After arguing about price, the two men accepted Darden's offer and agreed to pawn the television for a \$400.00 loan. As part of the transaction, Darden recorded the television's serial number and identification information from a driver's license provided by defendant onto a pawn ticket. Darden also photocopied the driver's license and obtained defendant's fingerprints before giving him the cash loan. After the men left, Darden entered the television's serial number into the Charlotte-Mecklenburg Police Department's (CMPD) pawn tracker system and sent copies of the driver's license and fingerprints to CMPD as required by law.

A few hours later, Crystal Grier returned home from running errands to find that her apartment had been burglarized. Windows on her second floor were shattered, her possessions were strewn about several rooms, and items including her recently purchased 60-inch flat-screen plasma smart television had vanished. Grier immediately called the police and filed a report. Officers Shawn Strayer and David Artieri of the CMPD responded to the call, spoke with Grier, and searched for clues. It appeared a burglar had climbed up a fence and then onto a shed and used a ratchet to smash and enter through a second-story window. No fingerprints or blood were

collected from Grier's home, but the television's serial number was retrieved from the store which sold it.

Officers Strayer and Artieri interviewed several apartment complex residents. At one point, they knocked on an apartment door in an adjacent building and encountered two males, the leaseholder and defendant. After fifteen minutes of interacting with the two men and searching the apartment with the leaseholder's permission, the officers left. Just like the other residents interviewed, these men reported seeing and hearing nothing suspicious.

A break came two days later when Detective David Hunter of the CMPD received a "pawn hit" alerting him of a serial number match. He was directed to Cash America Pawn, where he found the missing television and retrieved the pawn ticket and security camera footage. Because Michael Robinson's identification information was listed on the pawn ticket, he was arrested and interviewed, but he denied any involvement in the burglary and was released. Later, when Officers Strayer and Artieri reviewed the security camera footage, they discovered that Robinson was not one of the two men on video pawning the television but recognized defendant from having interviewed him immediately after the break-in a few days earlier.

After defendant was arrested and interviewed, he eventually admitted that he and his sister's boyfriend broke into Grier's home, transported her television to Cash America Pawn, and pawned it for a \$400.00 loan. Defendant also admitted to using

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a friend's driver's license as the photo identification required to complete the transaction. Defendant was indicted for felony breaking and entering, larceny after breaking and entering, possession of stolen goods, and attaining habitual felon status. During defendant's first trial, the jury hung eleven to one, and the judge declared a mistrial.

During the instant trial, Darden testified that he had been working the counter at Cash America Pawn on 5 March 2014 and had accepted the television for pawn. He explained that for each pawn, he is required by law to obtain the pawnor's fingerprints and send a copy to the CMPD. When the security camera footage of the pawn transaction was published to the jury, Darden explained at one scene that he was collecting fingerprints from one of the men pawning the television, later identified as defendant. The State did not introduce evidence of fingerprint identification of defendant. Defendant presented no evidence.

When charging the jury on the State's burden of proof, the trial court instructed:

The State must prove to you that the defendant is guilty beyond a reasonable doubt.

Now, reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be.

After retiring to deliberate, the jury sent out the following note:

Questions for the judge

(1) The witness from the pawn shop, who made the transaction with the defendant, [Darden,] stated the defendant completed the form, and gave his fingerprints.... One of the jurors wants to know if the fingerprint(s) obtained at the pawn shop matches the defendant[']s fingerprints obtained when he was arrested. (Or should we consider that, or think about it?)

(2) Can we see the list of requirements necessary to determine whether the burden of proof has been met for each charges? [sic] Are there any other documents or guidance we can refer to?

After conferring with trial counsel about its proposed responses outside the presence of the jury, the trial court brought out the jury and addressed its first question by instructing: “[Y]’all are the finders of fact, and you are only to consider the evidence that has been presented in finding the facts.” Defendant lodged no objection.

Subsequently, the jury returned verdicts finding defendant guilty of felonious possession of stolen goods or property, felonious breaking or entering, and felonious larceny after breaking or entering. Defendant entered an *Alford* plea as to attaining habitual felon status. The trial court arrested judgment on the possession of stolen goods conviction and sentenced defendant to 63–88 months of imprisonment. Defendant appeals.

II. Analysis

Defendant contends the trial court's response to "only consider the evidence presented" was erroneous and conflicted with its previous instruction that reasonable doubt may be based on the "lack or insufficiency of the evidence." We disagree.

A. Issue was Preserved

Initially, the State contends defendant failed to preserve this issue for appellate review because he failed to object to or to clarify the trial court's proposed response to the jury's question. We conclude this issue was preserved.

Generally, to preserve the right to full appellate review of an alleged instructional error, a party must object, specifically identify the objectionable portion of the instruction, and then state distinctly the grounds of their objection. N.C. R. App. P. 10(a)(2). However, where a party requests an instruction that is promised but not given, our courts have held that the request alone is sufficient to preserve their right to full appellate review of the issue. *See State v. Keel*, 333 N.C. 52, 56–57, 423 S.E.2d 458, 461 (1992) ("The State's request, approved by the defendant and agreed to by the trial court, satisfied the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and preserved this question for review on appeal."); *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) ("[A] request for an instruction at the charge conference is sufficient compliance with the rule [for preserving jury instruction issues] to warrant our full review on appeal where the

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requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.”).

Here, during the conference regarding the jury's deliberation questions, the trial court and counsel engaged in the following exchange:

THE COURT: All right, we have two questions. I want to read them to you, and then tell you what my response might be. I'll certainly have you weigh in with your thoughts and recommendations. The first question is:

The witness from the pawn shop who made the transaction with the defendant stated the defendant completed the form and gave his fingerprints... One of the jurors wants to know if the fingerprints obtained at the pawn shop matches the defendant's fingerprints obtained when he was arrested. Or should we consider that or think about that?

My response to the question is that all the evidence has been presented. And they're to find the facts based on the evidence that's been presented, and not speculate about other evidence. I'll hear from either one of y'all with regard to that response, additional information, or what you think of it.

[THE STATE]: Your Honor, the State believes that would be the appropriate response.

[DEFENSE COUNSEL]: Just to say that all the evidence has been presented and they can recall it. I don't want the Court to tell them about speculating, because.

THE COURT: Okay. Well, I'll just tell them that all the evidence has been presented and they – the presentation of the evidence has been completed and they're to, uh. And basically that's all.

[DEFENSE COUNSEL]: Yes, your Honor.

When addressing the jury, however, the trial court deviated from its promised response by instructing: “[Y]’all are the finders of fact, and you are only to consider the evidence that has been presented in finding the facts.”

Despite defendant’s failure to object after the trial court gave its altered instruction, we conclude this issue was preserved. When considering the entire exchange, it is clear that defendant objected to that portion of the trial court’s first proposed response that the jury may not speculate about unrepresented evidence, although defendant’s stated grounds of “because” failed to explain why he found this statement objectionable. It is unclear whether defendant objected to the portion of the proposed response that “[the jury is] to find the facts based on the evidence that’s been presented.” This initial objection, standing alone, was insufficient to preserve the issue. *See* N.C. R. App. P. 10(a)(2). However, because the trial court agreed to revise its proposed response based on defendant’s request, a response which defendant approved and then the trial court altered by adding to it, we conclude that defendant’s challenge to the inclusion of this additional language was preserved for appellate review. *See Keel*, 333 N.C. at 56–57, 423 S.E.2d at 461; *Ross*, 322 N.C. at 265, 367 S.E.2d at 891.

B. No Conflicting Instructions on the Burden of Proof

Defendant contends the trial court erred by “answer[ing] the juror’s question, ‘Or should we consider that, or think about it,’ in the negative when they should have been instructed they could consider and think about the lack of evidence.” This erroneous instruction, defendant contends, conflicted with its previous instruction on the burden of proof. Specifically, defendant argues that after the trial court properly instructed the jury that reasonable doubt may be based on “lack or insufficiency of the evidence,” it erroneously instructed “to ‘only consider the evidence presented’ in response to a question about whether they should consider evidence that was not presented.” We disagree and find neither error nor conflict.

“Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*.” *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010) (citation omitted). “This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]” *State v. McGee*, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014) (quoting *State v. Blizzard*, 169 N.C. App. 285, 296–97, 610 S.E.2d 245, 253 (2005)).

Generally, “an error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009)

(citations and internal quotation marks omitted). However, our courts have recognized the principle in criminal and civil cases that “conflicting instructions to the jury upon a material point, the one correct and the other incorrect, must be held for prejudicial error, requiring a new trial, since it cannot be known which instruction was followed by the jury in arriving at a verdict.” *Jones v. Morris*, 42 N.C. App. 10, 13, 255 S.E.2d 619, 621 (1979) (citations omitted); *Keel*, 333 N.C. at 59, 423 S.E.2d at 462 (holding that a new trial was necessary when conflicting instructions were given on the definition of intent required for a first-degree murder conviction on the basis that “[w]hen two instructions are contradictory, we must presume the jury followed the erroneous instruction”). In order to secure this presumption of prejudice, the appealing party must show that the instructions conflicted. *See, e.g., Jones*, 42 N.C. App. at 13, 255 S.E.2d at 621.

Here, the trial court previously instructed that the State had the burden of proving defendant’s guilt beyond reasonable doubt, which may be “based on . . . some or all of the evidence that has been presented, *or lack or insufficiency of the evidence*, as the case may be,” and that if, “[a]fter weighing all of the evidence[, the jury is] not convinced of the guilt of the defendant beyond a reasonable doubt, [it] must find the defendant not guilty.” The trial court also instructed that “all the evidence ha[d] been presented” and that it was the jury’s “duty to decide from this evidence what the facts are.” In response to the jury inquiring about “if the fingerprint(s) obtained at the

pawn shop matche[d] the defendant[']s fingerprints obtained when he was arrested (or should [the jury] consider that . . . ?),” the trial judge instructed: “[Y]’all are the finders of fact, and you are only to consider the evidence that has been presented in finding the facts.”

When viewing the trial court’s response to the jury’s question in light of the entire charge, there is no reasonable cause to believe the jury was misinformed on what it may consider when determining if the State met its burden of proof. The trial court expressly limited its response to “only consider the evidence presented *in finding the facts*” and never addressed the burden of proof, shifted the burden to defendant, nor lowered the State’s burden. Its instruction merely reiterated that the jury may only find its facts based on the evidence presented and not speculative evidence, which was an accurate statement of law. *See, e.g., State v. Harris*, 361 N.C. 400, 403–04, 646 S.E.2d 526, 528–29 (2007) (holding that speculation over the evidence presented cannot support a jury finding on an essential element of the case). Additionally, it did not appear from the jury’s question that they were confused about the burden of proof.¹ Rather, its question centered on receiving additional evidence—whether defendant’s fingerprints matched those on the pawn ticket—after the close of evidence, which is not permitted. Although the trial court’s response more directly

¹ The jury’s second question read: “Can we see the list of requirements necessary to determine whether the burden of proof has been met for each charges [sic]” However, the trial court clarified that the jury sought not reinstruction on the burden of proof but reinstruction on the elements of each offense, which the trial court provided.

addressed this main inquiry about whether the fingerprints matched, rather than the jury's parenthetical inquiry about if it should consider whether the fingerprints matched, it accurately explained the law that the jury may not consider unpresented evidence in finding its facts, and the trial court expressly limited its instruction to this context.

Accordingly, we conclude that the trial court's response was proper and did not conflict with its previous instruction on the burden of proof. Because defendant has failed to establish that the instructions conflicted, he is not entitled to a new trial under the principle of conflicting jury instructions.

C. No Prejudice

Assuming *arguendo* the trial court erred in its response to the jury's question, defendant has failed to demonstrate prejudice. The evidence showed that Grier's stolen television had been pawned at Cash America Pawn. Officer Strayer identified defendant from the security camera video as one of the men he interviewed on the day of the break-in. He testified that he recognized defendant when he reviewed the security camera footage because the man he interviewed had the same facial features; was of the same race, weight, height, and build; and wore the same clothing. The security camera footage of the pawn transaction was published to the jury, and a still photograph from this footage was admitted into evidence. Moreover, Detective Hunter testified that during his interview, defendant eventually confessed that he

and another broke and entered into Grier's apartment, brought her television to Cash America Pawn, and, using a friend's driver's license, pawned it for a \$400.00 loan. A written statement to this same effect, signed by defendant, was also admitted into evidence. Given the overwhelming evidence of defendant's guilt, he has failed to demonstrate a reasonable possibility that, absent the challenged instruction, a different result would have been reached at trial. Accordingly, we overrule defendant's challenge.

III. Conclusion

Despite his failure to object after the altered response was given, defendant's challenge to language added to the trial court's promised response to the jury's question was properly preserved. The trial court's response was proper because it addressed the jury's main inquiry and accurately explained that the jury may not inquire about unpresented evidence nor speculate about the evidence in finding its facts. Defendant failed to establish how the trial court's response conflicted with its previous instruction on the burden of proof. Additionally, defendant cannot establish prejudice. We conclude defendant received a fair trial free from error.

NO ERROR.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).