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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1127

Filed: 5 July 2017

New Hanover County, No. 15 CRS 054781

STATE OF NORTH CAROLINA

v.

PASHION ELLISON

Appeal by defendant from judgments entered 26 May 2016 by Judge Ebern T. Watson III in New Hanover County Superior Court. Heard in the Court of Appeals 19 June 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Center for Death Penalty Litigation, Inc., by Vernetta R. Alston, for defendant.

DIETZ, Judge.

Defendant Pashion Ellison appeals her convictions and sentence for larceny and conspiracy to commit larceny. Ellison and her sister were arrested for stealing items from a T.J. Maxx store.

As explained below, we reject Ellison's challenge that the jury instructions were flawed and permitted the jury to convict Ellison for her sister's crimes. Although

the instructions occasionally alternated between the terms “defendant” and “defendants,” the trial court instructed the jury that the guilt or innocence of one defendant was not dependent on the guilt or innocence of the other defendant and that the jury must consider each defendant’s case separately and individually. Accordingly, we find no error in the jury instructions.

Ellison also challenges the trial court’s award of restitution. The State concedes that the restitution award is erroneous because it is not supported by sufficient evidence, and we agree. We therefore vacate the award of restitution and remand for further proceedings on that issue.

Facts and Procedural History

On 25 April 2015, a loss prevention employee at a T.J. Maxx store in Wilmington became suspicious of Defendant Pashion Ellison and her sister. Through store security cameras, the employee saw Ellison’s sister cut a loss prevention sensor from a bag and discard it in her shopping cart. The employee also saw Ellison and her sister stuffing handbags, clothing, and shoes into a bag in their shopping cart. Ellison’s sister later left the store with the stolen items. Using security footage, law enforcement identified Ellison and her sister and arrested them.

The jury convicted Ellison of larceny from a merchant and conspiracy to commit felony larceny. The trial court sentenced her to two consecutive suspended terms of 6 to 17 months in prison and placed her on supervised probation for 18

months. The trial court also ordered Ellison to pay \$4,000.00 in restitution. Ellison timely appealed.

Analysis

I. Jury Instruction Concerning Separate Guilt

Ellison first argues that the trial court committed plain error by failing to clearly instruct the jury that it should determine the guilt or innocence of each defendant separately. Ellison contends that the trial court interchangeably used the words “defendant” and “defendants” throughout its instructions, thus permitting the jury to convict Ellison based on her sister’s actions. As explained below, we reject this argument.

Ellison concedes that we must review this issue for plain error. “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “To show that an error was fundamental, a defendant must establish 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.* (citation and quotation marks omitted). “[P]lain error is to be applied cautiously and only in the exceptional case” where the error “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* (citations and brackets omitted).

Ellison correctly observes that in a trial like this one, involving multiple defendants, it is reversible error to use a jury charge “which is susceptible to the construction that the jury should convict all if it finds one guilty.” *State v. Tomblin*, 276 N.C. 273, 276, 171 S.E.2d 901, 903 (1970). But that did not occur here.

The trial court instructed the jury that it must “consider each instruction I have given you separately and individually as it relates to each individual defendant.” The trial court further instructed the jury to “[r]emember to consider each of the instructions I have just read to you in relation to each of the defendants, both separately and individually. And you will consider the guilt or the innocence of these defendants separately.” Thus, even if an occasional switch between “defendant” and “defendants” might have confused the jury—and we are not persuaded that it did—the trial court explained in clear terms that the jury could not convict Ellison unless it concluded that she, individually, satisfied all the elements of the charged offenses. Thus, we find no error in the trial court’s instructions and certainly no plain error.

II. Restitution

Ellison next challenges the trial court’s award of restitution. The State concedes that the restitution award is erroneous and we agree.

“The amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing.” *State v. Mauer*, 202 N.C. App. 546, 551, 688 S.E.2d 774, 777 (2010). “A restitution worksheet, unsupported by

testimony, documentation, or stipulation, is insufficient to support an order of restitution.” *State v. Blount*, 209 N.C. App. 340, 348, 703 S.E.2d 921, 927 (2011) (internal citation and quotation marks omitted). “[N]o objection is required to preserve for appellate review issues concerning the imposition of restitution.” *State v. Smith*, 210 N.C. App. 439, 443, 707 S.E.2d 779, 782 (2011).

Here, the State concedes that there was no evidence presented regarding the value of the items taken from the store and that Ellison did not stipulate to the values listed on the restitution worksheet. Accordingly, we must vacate the award of restitution. We remand “for the trial court to determine the amount of damage proximately caused by defendant’s conduct and to calculate the correct amount of restitution.” *State v. Moore*, 365 N.C. 283, 286, 715 S.E.2d 847, 849-50 (2011).

Conclusion

We find no error in the trial court’s judgment except for the award of restitution. We vacate the restitution award and remand for further proceedings.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges ELMORE and BERGER concur.

Report per Rule 30(e).