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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-614

Filed: 6 February 2018

Wilson County, Nos. 15CRS52815–16, 16CRS1081

STATE OF NORTH CAROLINA

v.

ROY MCALLISTER

Appeal by defendant from judgments entered 31 October 2016 by Judge Marvin K. Blount III in Wilson County Superior Court. Heard in the Court of Appeals 14 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Anna M. Szamosi, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant.

DIETZ, Judge.

Defendant Roy McAllister challenges his conviction for violating a domestic violence protective order. McAllister's arguments all stem from an apparently mistaken reference in the charging instrument to a temporary, three-day protective

order that preceded the one-year consent order in effect at the time of McAllister's alleged acts.

As explained below, we hold that there was substantial evidence of each essential element of the charged offense and thus the trial court properly denied McAllister's motion to dismiss. McAllister's remaining arguments are unpreserved, fail to rise to the level of plain error, or, in the case of his ineffective assistance claims, are unsuited for review on direct appeal. We therefore reject McAllister's arguments and find no error in the trial court's judgments.

Facts and Procedural History

Roy McAllister and Sarah,[1] the victim, began a romantic relationship in 2014. McAllister later became physically abusive and Sarah ended the relationship. On 25 January 2015, Sarah applied for an *ex parte* domestic violence protective order. On 26 January 2015, the trial court entered a temporary, three-day protective order lasting until 29 January 2015. On 29 January 2015, the day the temporary order was set to expire, McAllister and Sarah signed a consent order that extended the terms of the temporary order for one year.

McAllister repeatedly violated the protective order on 6, 7, and 9 July 2015 by texting Sarah, going to her workplace, and following Sarah home from work, prompting her to call the police.

[1] We use a pseudonym to protect the victim's identity.

On 9 July 2015, a magistrate issued a warrant for McAllister's arrest for violating the protective order. Importantly, the warrant referenced the domestic violence protective order entered on 26 January 2015—*i.e.*, the temporary, *ex parte* order, rather than the 29 January 2015 order actually in effect in July 2015.

On 14 July 2015, roughly a week after the magistrate issued the warrant, McAllister broke into Sarah's home, beat her, and raped her. The State indicted McAllister on multiple felony charges including second-degree rape, second-degree kidnapping, and felony breaking and entering, as well as a second charge of violating a domestic violence protective order.

McAllister's first domestic violence charge ultimately was consolidated with these new charges and he went to trial. The jury found McAllister guilty of second-degree rape, second-degree kidnapping, misdemeanor breaking or entering, and two counts of misdemeanor domestic violence protective order violation.

McAllister timely appealed the judgments, challenging only his conviction on the first of the two misdemeanor domestic violence protective order charges, which was based on his actions on 6, 7, and 9 July 2015.

Analysis

I. Sufficiency of the evidence

McAllister first challenges the trial court's denial of his motion to dismiss for insufficient evidence. McAllister's argument is straightforward: the warrant charging

McAllister alleged that on 6, 7, and 9 July 2015, he violated a domestic violence protective order issued on 26 January 2015. But the 26 January 2015 protective order was a temporary, *ex parte* order that expired three days later, when the parties consented to a one-year protective order on the same terms. Thus, McAllister argues, the trial court should have granted his motion to dismiss because it is undisputed that the relevant protective order had expired many months before his alleged acts.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65–66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

The offense of violating a domestic violence protective order has three essential elements: (1) knowingly (2) violating (3) a valid domestic violence protective order. N.C. Gen. Stat. § 50B-4.1(a). The State presented sufficient evidence of each of these essential elements. McAllister challenges the evidence supporting the third element, arguing that the 26 January 2015 protective order covered only the time period until 29 January 2015 and "the State introduced no evidence of any violative conduct

during that timeframe." But McAllister does not dispute that the jury heard evidence of a valid protective order covering the July 2015 time period and evidence that McAllister knowingly violated that protective order on 6, 7, and 9 July 2015. Thus, there was substantial evidence to support each essential element of the offense for which he was convicted. As explained below, the remainder of McAllister's arguments are not directed at the evidence, but instead at the State's allegations in the charging instrument. We address those arguments below.

II. Fatal variance in the charging instrument

McAllister argues that the evidence at trial "did not conform with the allegations in the warrant." In other words, McAllister argues that there was a fatal variance between the State's charging allegations and the evidence at trial.

A fatal variance between the indicting instrument and the evidence at trial is grounds for dismissal of a criminal charge. *State v. Williams*, 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981). But this argument must be raised at trial to be preserved for appeal. *State v. Everette*, 237 N.C. App. 35, 40, 764 S.E.2d 634, 638 (2014). McAllister concedes that he did not raise this issue at trial and thus it is not preserved for review on appeal. McAllister asks this Court to invoke Rule 2 of the Rules of Appellate Procedure and excuse his failure to preserve this issue. In our discretion, we decline to do so.

As explained above, the charging instrument contained the essential elements of the offense of violating a domestic violence protective order. Moreover, the trial record indicates that McAllister understood he was charged with violating the 29 January 2015 protective order in effect in July 2015, and McAllister had a full and fair opportunity to defend against that charge. Thus, this case does not present the sort of extraordinary circumstances that would warrant suspending our Rules of Appellate Procedure in the interests of justice.

McAllister also argues that, if this Court declines to invoke Rule 2, it should determine whether McAllister's trial counsel was constitutionally ineffective for failing to preserve the fatal variance issue for appeal. Again, we decline to address this issue. Counsel's decision not to raise this issue is a fact-intensive one not suited for review on direct appeal. *See State v. Friend*, __ N.C. App. __, __, __ S.E.2d __, __, No. COA17-309 (Jan. 16, 2018). We dismiss this portion of McAllister's appeal without prejudice to pursue it in a motion for appropriate relief.

III. Jury instruction

Finally, McAllister argues that the trial court erred when it instructed the jury on the offense of violating a domestic violence protective order without specifying that McAllister is guilty only if he violated the temporary, three-day protective order actually referenced in the warrant.

McAllister concedes that he did not object to the trial court's instruction and we must therefore review this issue under the plain error standard of review. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Id.* Our Supreme Court has emphasized that plain error is to be "applied cautiously and only in the exceptional case," for example where the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.*

This is not one of those cases. Even assuming the trial court erred in its instruction, this error does not rise to the level of plain error. The trial record demonstrates that McAllister and his counsel understood he was charged with violating a valid domestic violence protective order—a protective order to which McAllister consented and which contained the same terms as the temporary order that preceded it. McAllister never disputed at trial (and does not dispute on appeal) that this protective order exists and applied to him in July 2015.

Simply put, this is not an exceptional case and our ruling does not create any risk of a miscarriage of justice or harm to the public reputation of our criminal proceedings. To the contrary, the trial record shows that McAllister had a full and fair opportunity to defend himself against a charge that both he and his counsel understood—that his actions on 6, 7, and 9 July 2015 violated a valid domestic

violence protective order that prohibited him from contacting the victim. Accordingly, we find no plain error in the trial court's jury instructions.

Conclusion

We find no error in the trial court's denial of the motion to dismiss and no plain error in the trial court's instructions to the jury. We dismiss McAllister's ineffective assistance of counsel claim without prejudice.

NO ERROR IN PART; NO PLAIN ERROR IN PART; DISMISSED IN PART.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).