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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-706

Filed: 6 February 2018

McDowell County, No. 14 CRS 050464

STATE OF NORTH CAROLINA

v.

WALTER SIDNEY MITCHELL

Appeal by defendant from judgment entered 23 January 2017 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 13 December 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Franklin E. Wells, Jr., for defendant-appellant.

ARROWOOD, Judge.

Walter Sidney Mitchell ("defendant") appeals from judgment entered on his conviction for attempting to obtain property by false pretenses. Defendant argues that the trial court erred by admitting two exhibits into evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence and by failing to give a jury instruction on a plea of no contest. For the reasons stated herein, we find no error.

I. Background

On 27 October 2014, defendant was indicted for possession of a stolen motor vehicle in violation of N.C. Gen. Stat. § 20-106 and attempting to obtain property by false pretenses in violation of N.C. Gen. Stat. § 14-100.

Later, the State dismissed the charge of possession of a stolen motor vehicle.

Defendant's case come on for trial at the 12 December 2016 criminal session of McDowell County Superior Court, the Honorable J. Tommy Davis presiding. The State's evidence tended to show as follows: T.J. Edwards ("Edwards") testified that he owned a 1974 Jeep ("the Jeep") and kept it in a shed on his property in Rutherford County. He had last seen the Jeep on 14 March 2014. On 15 March 2014, Edwards discovered that the Jeep was missing and reported it to police. He testified that he had not given anyone permission to take the Jeep and that he did not know defendant.

Tammy Buchanan ("Buchanan"), an employee of Roland's Scrap Yard, testified that on 21 March 2014, defendant and another man arrived at the scrap yard. Buchanan recognized defendant because he had sold items on three to four occasions to the scrap yard. They came in a pickup truck and were hauling a trailer with a 1974 Jeep on the back. Defendant informed Buchanan that he had a "Jeep to sell." Buchanan asked for his identification but defendant did not produce any. Buchanan explained to defendant that she could not conduct a transaction without having "an

ID in front of" her. Defendant and the other man left the scrap yard, leaving the Jeep behind.

A couple of hours later, defendant and Steven Barr ("Barr") arrived at the scrap yard. Barr provided his identification to Buchanan. When Buchanan ran the vehicle identification number of the Jeep through the DMV system, she discovered that the Jeep had been reported stolen. No sale took place at that time.

Ray Roland ("Roland"), the owner of Roland's Scrap Yard, testified that he was not present when defendant and his companion first came to the yard on 21 March 2014, but arrived on the premises while defendant was still there. He had known defendant for four to five years. Roland testified that one to two days prior to 21 March 2014, he had received a call from defendant. Defendant had informed Roland that "he had a truck in the woods that he wanted me to try to get out." Defendant told Roland that somebody had given him the truck. Roland took his wrecker, went out to Owl Hollow in McDowell County, and walked with defendant to the vehicle. Roland testified that the vehicle was a 1974 Jeep and that it was in bad condition with the windows "beat out of it." Roland was unable to get the Jeep out of the woods.

Chris Cook ("Cook"), an investigator with the North Carolina DMV License and Theft Bureau, testified that on 24 March 2014, he received a notification from the McDowell Sheriff's Office that Edwards' Jeep was stolen. He located the Jeep at

Roland's Scrap Yard. Cook testified that defendant had been charged and convicted, pursuant to a plea of no contest, with larceny of the Jeep in Rutherford County. Copies of the judgment and bill of information from Rutherford County concerning the larceny of the Jeep were entered into evidence as the State's Exhibits 1 and 2.

Defendant did not present any evidence.

On 12 December 2016, a jury found defendant guilty of attempting to obtain property by false pretenses. On 23 January 2017, defendant was sentenced as a prior record level VI to 20 to 33 months imprisonment.

Defendant gave timely written notice of appeal on 1 February 2017.

II. Discussion

Defendant presents two issues on appeal. First, defendant argues that the trial court erred by admitting two exhibits into evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence. Second, defendant argues that the trial court erred by failing to give a jury instruction about a plea of no contest. We address each argument in turn.

A. Rule 404(b) Evidence

Defendant argues that the trial court erred by admitting the State's Exhibits 1 and 2 into evidence pursuant to Rule 404(b) of the North Carolina Rules of Evidence and that their admission was inherently prejudicial under Rule 403 of the North Carolina Rules of Evidence. We disagree.

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017). The rule, however, provides for the admission of such evidence if offered "for other purposes, such as proof of motive, opportunity, *intent*, preparation, plan, *knowledge*, identity, or *absence of mistake*, entrapment or accident." *Id.* (emphasis added). Rule 404(b) is a

> general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). "To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted).

Moreover, even if admissible pursuant to Rule 404(b), Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2017). "We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).

We then review the trial court's Rule 403 determination for abuse of discretion." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

Relying on *State v. Wilkerson*, 148 N.C. App. 310, 559 S.E.2d 5 (Wynn, J., dissenting), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 418, 571 S.E.2d 583 (2002), defendant contends that the "bare fact" that he was convicted of two property crimes was inadmissible for any purpose under Rule 404(b) and that admission of these exhibits was inherently prejudicial.

Here, prior to the admission of the State's Exhibits 1 and 2, the trial court conducted a hearing on the admissibility of the exhibits. The State's Exhibit 1 was a judgment from Rutherford County which indicated that defendant pleaded no contest to larceny of a motor vehicle. The State's Exhibit 2 was a bill of information from Rutherford County, demonstrating that defendant pleaded no contest to the larceny of the same 1974 Jeep at the center of this case. The trial court ordered that the State's Exhibits 1 and 2 were admissible to show intent, knowledge, absence of mistake, and chain of circumstances completing the story in regard to the vehicle and its disappearance. The trial court then gave the following limiting instruction:

> Evidence has been received tending to show that the defendant was convicted of larceny of a 1974 Jeep pickup. This evidence was received solely for the purpose of showing that the defendant had the intent, which is a necessary element of the crime charged in this case, that the defendant had the knowledge, which is a necessary element of the crime charged in this case, and the absence of mistake.

> If you believe this evidence, you may consider it but only for the limited purpose for which it was received. You may not consider it for any other purpose.

In *Wilkerson*, the defendant was tried for possession with the intent to sell or deliver cocaine and trafficking in cocaine. *Wilkerson*, 148 N.C. App. at 311, 559 S.E.2d at 6. At trial, the State introduced the testimony of a clerk of court who testified that the defendant had prior convictions for possession of cocaine, possession with the intent to sell or deliver cocaine, and sale and delivery of cocaine. *Id.* Adopting the reasoning set out in the dissent, our Supreme Court barred the admission of the "bare fact of [a non-testifying] defendant's prior convictions[.]" *Id.* at 329, 559 S.E.2d at 17 (Wynn, J., dissenting). The dissent stated that:

> By permitting the State to introduce the bare fact of a defendant's prior conviction, we permit the jury to surmise that the defendant, having once formed the necessary intent or developed the requisite *mens rea*, undoubtedly did so again; after all, another jury has already conclusively branded the defendant a criminal. Such leaps of logic, which inescapably treat the prior conviction as propensity evidence, are prohibited by Rule 404(b); the defendant is impeached without ever taking the stand, and is ineluctably labeled a criminal by the present jury. Thus, introducing the bare fact of a prior conviction under Rule 404(b) fails to satisfy the Rule 403 balancing test, as the only fair interpretation of the purpose behind the State's introduction of such evidence is impermissible: that the evidence is being offered to show the defendant's predisposition to commit the crime charged.

Id. at 328, 559 S.E.3d at 16.

We find the circumstances of the present case distinguishable from those found in *Wilkerson*. In *Wilkerson*, the defendant was charged with possession with the intent to sell or deliver cocaine and trafficking cocaine, and the prior convictions that were admitted were for the possession with the intent to sell or deliver cocaine and sale and delivery of cocaine. However, these prior convictions were not factually related to the defendant's present charges. Thus, the *only* probative value of the evidence of the prior convictions was to show that the defendant had the propensity or disposition to commit an offense of the nature of the crime charged. Whereas here, the probative value of the prior crime was to demonstrate that defendant's conviction of larceny of the exact same Jeep in another county served to explain defendant's actions in the present case; the challenged exhibits served as proof of knowledge, intent, and absence of mistake when defendant attempted to sell the stolen Jeep to Roland's Scrap Yard in exchange for value.[1] The admission of these two exhibits was not merely for propensity purposes. Furthermore, the trial court here was aware of the potential of prejudice and specifically instructed the jury that the State's Exhibits 1 and 2 were admitted for the limited purposes of showing intent, knowledge, and absence of mistake; all permissible purposes under Rule 404(b). *See State v. Shields*,

[1] "The elements of obtaining property by false pretenses are '(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.' " *State v. Ledwell*, 171 N.C. App. 314, 317, 614 S.E.2d 562, 565 (2005) (citing *State v. Childers*, 80 N.C. App. 236, 242, 341 S.E.2d 760, 764 (1986)).

61 N.C. App. 462, 464, 300 S.E.2d 884, 886 (1983) ("The law presumes that the jury heeds limiting instructions that the trial [court] gives regarding the evidence.").

Based on the unique facts of this case, where the prior conviction involved the identical item at issue in the present case, we hold that the trial court did not err in admitting the State's Exhibits 1 and 2. Assuming *arguendo* that admission of these exhibits was error, defendant has failed to demonstrate that it was prejudicial in view of the overwhelming amount of evidence presented by the State. Defendant's argument is overruled.

B. Jury Instruction

In his second and final argument on appeal, defendant contends that the trial court erred by failing to give a jury instruction on a plea of no contest. Defendant asserts that if we are to find that the issue is not preserved, we should review for plain error.

During the charge conference, the trial court discussed the instruction on evidence of similar acts or crimes. Defense counsel stated, "I would request somewhere in that instruction that you state that the defendant pled no contest and was treated as guilty by the Court." The trial court replied:

> Well, that's why I kind of used the defendant was convicted of larceny. You are certainly free to argue that to the jury and show them, based on that exhibit, as to what he did. I don't know that I need to charge it. I think convicted, whether it was by plea, trial, or no contest, whatever, I think that would be the appropriate language for the jury,

> and it will be up to them how they will consider it. But you are certainly free to argue the law in regard to no contest.

Later on, the trial court asked whether there were any objections or specific requests for corrections or additions to the jury instructions, to which both the State and defense counsel replied, "No, sir."

It is well-established that "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection[.]" N.C. R. App. P. 10(a)(2) (2018). However, an issue not preserved by objection and that is not deemed preserved "may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2018).

Here, defendant has failed to properly preserve this issue on appeal, and thus, we review for plain error. Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have

reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Defendant argues that the trial court's "refusal to give this clarifying instruction left the erroneous impression that [defendant's] plea was an admission" and that had the instruction been given, the jury would not have found the necessary intent. We are not convinced.

As the State points out, a no contest plea "admits for the purpose of the particular case all the elements of the offense charged against the defendant and gives the court complete power to sentence the defendant for such offense." *State v. Sellers*, 273 N.C. 641, 651, 161 S.E.2d 15, 22 (1968). Therefore, defendant's plea of no contest admitted the *elements* of the larceny of a vehicle charge only. *See State v. Allen*, 193 N.C. App. 375, 380, 667 S.E.2d 295, 299 (2008) (citation and quotation marks omitted) ("The essential elements of a larceny are that the defendant[] (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of [the] property permanently."). Proof of defendant's intent, knowledge, and absence of mistake in that he knew the Jeep was stolen when he tried to sell it at Roland's Scrap Yard is demonstrated through the larceny conviction, regardless of whether the trial court had distinguished through a jury instruction, the difference between a plea of no contest and a guilty plea. As such, we are unable to find that the trial court's failure to give an instruction on a

plea of no contest amounted to error. In addition, even assuming *arguendo*, that failure to give a jury instruction on a no contest plea was error, we are unable to hold that it would have amounted to plain error in light of the State's evidence of defendant's guilt.

NO ERROR.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).