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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-660

Filed: 20 March 2018

Washington County, No. 16 CRS 50017-18

STATE OF NORTH CAROLINA

v.

VICKIE EGAN KOHLER

Appeal by Defendant from judgments entered 9 November 2016 by Judge Wayland J. Sermons Jr. in Washington County Superior Court. Heard in the Court of Appeals 12 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kacy L. Hunt, for the State.

Winifred H. Dillon for Defendant-Appellant.

INMAN, Judge.

Vickie Egan Kohler ("Defendant") appeals from judgments entered upon jury verdicts finding her guilty of assault on a law enforcement officer and resist, delay, or obstruction of an officer ("RDO"). After careful review, we hold Defendant has failed to demonstrate that the trial court plainly erred.

Factual and Procedural History

On 12 January 2016, Defendant was attending criminal district court in support of her daughter, who was in custody and had a case on the court's calendar that day. The daughter was sitting in the jury box while Defendant and two male companions were sitting nearby. Deputy Brock Harris of the Washington County Sheriff's Office ("WCSO") was providing security in the courtroom. He observed Defendant's companions speak to the daughter and ordered them to stop. After they continued to communicate, Deputy Harris asked Defendant's companions to leave the courtroom. The men complied, but then Defendant began to talk with her daughter. As a result, Deputy Harris told Defendant to leave the courtroom as well.

As Defendant was exiting the courtroom, she pushed on the exit door with significant force. At that moment, WCSO Chief Deputy Arlo Norman, who heard a disturbance in the courtroom and approached to help, was struck by the door and by Defendant, who collided with his shoulder.

After briefly ensuring everything in the courtroom was in order, Chief Deputy Norman followed Defendant to the elevator, which closed before he could enter. A few seconds later, the fire alarm in the elevator was activated. Chief Deputy Norman pursued Defendant by way of the stairs, caught up with her in a parking lot, and ordered Defendant to return. After she failed to comply, Chief Deputy Norman and another deputy ran after Defendant and placed her under arrest. She continued to

resist Chief Deputy Norman's commands and eventually had to be physically escorted back into the courthouse.

Defendant was charged with assault on a government official, RDO, and activating a false fire alarm and, following a trial in Washington County District Court on 5 May 2016, she was found guilty of all charges.

Defendant appealed to superior court for a trial *de novo* before a jury. The trial was conducted on 9 November 2016. At the conclusion of the evidence, the trial court dismissed the activating a false fire alarm charge for lack of evidence. The jury then returned verdicts finding Defendant guilty of assault on a government official and RDO. The trial court sentenced Defendant to consecutive suspended sentences of 150 days for the assault on a government official conviction and 60 days for RDO. Defendant was placed on supervised probation for twenty-four months. Defendant entered timely written notice of appeal.

Analysis

Defendant's sole argument is that the trial court erred when it instructed the jury on the offense of RDO. Specifically, Defendant contends that the court's instruction for RDO varied from the magistrate's order charging Defendant with RDO, such that her RDO conviction must be vacated. After careful review, we disagree.

Defendant concedes that she did not object to the trial court's challenged instruction and that, as a result, our review is limited to plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotations marks and citations omitted).

"It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Jackson*, 218 N.C. 373, 376, 11 S.E.2d 149, 151 (1940). "Correspondingly, the failure of the allegations [of the indictment] to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support [the] resulting conviction." *State v. Hicks*, 239 N.C. App. 396, 407, 768 S.E.2d 373, 379 (alterations in original, internal quotation marks and citation omitted), *cert. denied*, 368 N.C. 267, 772 S.E.2d 731 (2015).

The elements of RDO are set out in N.C. Gen. Stat. § 14-223, as follows: "If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2017). "For a warrant to charge a

defendant with resisting, delaying, or obstructing an officer in discharging or attempting to discharge a duty of his office in violation of [N.C. Gen. Stat. §] 14-223, the warrant must indicate the official duty the officer was discharging or attempting to discharge." *State v. Waller*, 37 N.C. App. 133, 135, 245 S.E.2d 808, 810 (1978).

In this case, Defendant was charged in a magistrate's order rather than an arrest warrant. The magistrate's order charging Defendant with RDO stated:

> I, the undersigned, find that the defendant named above has been arrested without a warrant and the defendant's detention is justified because there is probable cause to believe that on or about the date of offense shown and in the county named above the defendant named above unlawfully and willfully did resist, delay and obstruct CHIEF DEPUTY ARLO NORMAN, a public officer holding the office of CHIEF DEPUTY WITH THE WASHINGTON COUNTY SHERIFF'S OFFICE, by FAILING TO STOP AFTER BEING TOLD AND CONTINUALLY PULLING AWAY. *At the time, the officer was discharging and attempting to discharge a duty of his office by ATTEMPTING TO BRING MRS. KOHLER BACK TO MAGISTRATES OFFICE FOR ASSAULT ON A GOVERMENT OFFICIAL.*

(emphasis added). However, when the trial court instructed the jury on this offense, it did not identify Chief Deputy Norman's duty in the same way:

> The Defendant has been charged with willfully and unlawfully resisting, delay, and obstructing a public officer in discharging and attempting to discharge a duty of his office.
>
> Now, I charge for you to find the Defendant guilty of this offense, the State must prove five things beyond a reasonable doubt:

> First, the victim was a public officer. A deputy sheriff is a public officer.
>
> Second, the Defendant knew or had reasonable grounds to believe that the victim was a public officer.
>
> Third, that the victim was discharging or attempting to discharge a duty of his office. *Maintaining order in the courthouse is a duty of a public officer.*
>
> Fourth, that the Defendant resisted, delayed or obstructed the victim in discharging or attempting to discharge a duty of his office.
>
> And fifth, that Defendant acted willfully and unlawfully, that is, intentionally and without justification or excuse.

(emphasis added). Defendant argues that the difference between the description of the officer's duty as described in the magistrate's order (bringing Defendant to the magistrate's office to charge her with assault) and the trial court's description of the officer's duty (maintaining order in the courthouse) in its jury instruction constituted a fatal variance between the charge and the instruction and amounts to plain error.

Although the descriptions in the magistrate's order and the jury instructions are different, they are not contradictory. Attempting to bring to the magistrate's office a person who has just assaulted an officer in the courthouse falls within the broader description of maintaining order in the courthouse.

Assuming *arguendo* that the difference between the charging instrument and the trial court's instructions was material and constituted a fatal variance, Defendant has not shown plain error. "Plain error review places 'the burden . . . on the defendant

to show that absent the error the jury probably would have reached a different verdict.' " *State v. Graham*, 223 N.C. App. 150, 154, 733 S.E.2d 100, 103 (2012) (quoting *State v. Bellamy*, 159 N.C. App. 143, 147, 582 S.E.2d 663, 667 (2003)). "For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict." *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016). This showing must be made even in cases where an instruction could allow a jury to convict on a theory of the crime that was not part of the charging instrument. *See State v. Martinez,* ___ N.C. App. ___, ___, 801 S.E.2d 356, 361 (2017) ("[U]nder *[State v.] Boyd*, [222 N.C. App. 160, 730 S.E.2d 193 (2012), *rev'd for the reasons stated in the dissenting opinion*, 366 N.C. 548, 742 S.E.2d 798 (2013),] a reviewing court is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the jury relied on the inappropriate theory.").

Defendant has not made the required showing in this case. Instead, she makes the conclusory assertion that the trial court's error was plain error because it involved a fatal variance. However, there was ample evidence to allow the jury to convict defendant of RDO based upon her conduct resisting arrest. Chief Deputy Norman offered the following uncontroverted testimony at trial:

> Q. What, if anything, did you say to [Defendant] when you caught up to her?

A. I told her that she was going to be arrested for assaulting me and—and not obeying my commands when we got down to the parking lot.

Q. You mean when you called for her to come back?

A. Yeah.

Q. Okay. And what, if anything, was her immediate reaction at that point?

A. She just start cussing and ranting and raving. I just told her to just—no need for the arguing. Just come with me. Just come with me. At one point, she even tried to still get into the vehicle, and I kind of pulled on her arm a little bit.

Q. Well, now, that's—that's my next question. After you told her she was going to be arrested and she needed to come with you, did she immediately comply with your request?

A. No, sir. No, sir.

Q. Okay. You mentioned she tried to still get in your [sic] car after you had told her—

A. She turned back around to go like still towards the door. We were probably just a matter of feet from the door.

Q. All right. What, if anything, did you say or do at that point?

A. I just told her to come with me. Come with me. I told her I wasn't going to argue with her. Just come with me and we'll explain in more detail when we get in the courthouse.

Q. Was the second time you told her to come with you?

> A. Yes.
>
> Q. Did she comply at that point?
>
> A. No. I had to—I had to get her moving in the direction of coming back to the courthouse.
>
> Q. You assisted her a little?
>
> A. Yes. I assisted her a little bit. Yes, sir.
>
> Q. Did she comply with your request when coupled with your assist?
>
> A. No. Never. It was always arguing and she didn't do anything and stop touching me. And it was everything other than basically what I was telling her, asking her.
>
> Q. How many times would you say you requested or commanded her to comply with your requests?
>
> A. Three, four or five times.

This testimony clearly shows that Defendant was resisting, delaying, and obstructing Chief Deputy Norman as he was trying to bring her back to the magistrate's office. In light of this undisputed evidence, Defendant cannot show that the jury probably would have reached a different verdict but for the trial court's alleged instructional error. Accordingly, we hold that Defendant received a fair trial, free from prejudicial error.

Conclusion

For the foregoing reasons, we hold there was no error.

NO ERROR.

Judges BRYANT and HUNTER concur.

Report per Rule 30(e).