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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1107-2

Filed: 18 December 2018

Pitt County, Nos. 14 CRS 3412, 3452, 57851-54

STATE OF NORTH CAROLINA

v.

WILLIE JAMES LANGLEY, Defendant.

Appeal by Defendant from judgment entered 28 January 2015 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 5 April 2017. By opinion issued 10 July 2017, a unanimous panel of this Court found no error in part, but vacated the trial court's judgment as to Defendant's habitual felon indictment and remanded for a new sentencing hearing without the habitual felon enhancement. Upon review granted by the Supreme Court of North Carolina and by opinion dated 17 August 2018, the Supreme Court reversed and remanded the case to the Court of Appeals to consider Defendant's remaining challenge.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

MURPHY, Judge.

After remand by our Supreme Court, Defendant, Willie James Langley, has one remaining argument to be considered on appeal. A detailed statement of the facts related to Defendant's indictment and trial are stated in this Court's opinion at *State v. Langley*, ___ N.C. App. ___, ___, 803 S.E.2d 166, 172 (2017), *review allowed*, 370 N.C. 278, 805 S.E.2d 483, *rev'd in part*, 371 N.C. 389, 817 S.E.2d 191 (2018).

ANALYSIS

Defendant argues the trial court's jury instructions constructively amended his indictment in violation of N.C.G.S § 15A-923(e), which declares an indictment "may not be amended." **[D Br. 23]** In contrast, the State contends Defendant's argument truly amounts to a plain error challenge of the trial court's jury instructions. **[State Br. 19]** Both in his brief and at oral argument, Defendant cites our plain error rule as a fallback option should we disagree with his characterization of this issue as an amendment of the indictment. **[D Br. 25-26]**

Although he argues otherwise, Defendant's argument is properly classified as a challenge to the trial court's jury instructions. Defendant's brief fails to cite a single case where we have found an indictment was constructively amended by jury instructions. Instead, Defendant relies upon two cases where we evaluated *actual* amendments to indictments. Defendant's citation to those cases only demonstrates our statutes prohibit "any change in the indictment which would substantially alter

the charge set forth in the indictment.” *State v. Stith*, 246 N.C. App. 714, 716, 787 S.E.2d 40, 43 (citing *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984)); *see also* N.C.G.S. § 15A-923(e) (2017). Here, both the indictment and the jury instruction charge the Defendant with attaining habitual felon status, so we are not persuaded by his argument that the instruction actually or constructively change the charge set forth in the indictment. **[R 11; T 366-67]** Consequently, we review the jury instruction for plain error.

In relevant part, Defendant’s indictment states:

[1. T]hat on or about September 11, 2006, the defendant did commit the felony of Felony Larceny, in violation of North Carolina General Statute 14-72(a), and that on or about February 15, 2007, the defendant was convicted of Felony Larceny in the Superior Court of Pitt County, North Carolina; and

[2. T]hat on or about October 08, 2009, the defendant did commit the felony of *Robbery with a Dangerous Weapon*, in violation of North Carolina General Statute 14-87, and that on or about September 21, 2010, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina; and

[3. T]hat on or about August 24, 2011, the defendant did commit the felony of *Robbery with a Dangerous Weapon*, in violation of North Carolina General Statute 14-87.1 [*sic*], and that on or about May 5, 2014, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina

[R 11](Emphasis Added.) At trial, the court instructed the jury to return a guilty verdict if it found the State proved three things beyond a reasonable doubt:

For you to find the Defendant guilty of being an habitual felon the State must prove three things beyond a reasonable doubt. First, that on February 15th, 2007, the Defendant in the General Court of Justice, Superior Court Division of Pitt County was convicted of the felony of larceny that was committed on September 11, 2006, in violation of the laws of the State of North Carolina. Second, that on September 21st, 2010, the Defendant in the General Court of Justice Superior Court Division of Pitt County was convicted of the felony of common law robbery that was committed on October 8th, 2009, in violation of the law of the State of North Carolina. And, third, that on May 5th, 2014, the Defendant in the General Court of Justice, Superior Court Division was convicted of the felony of common law robbery that was committed on August 24th, 2011, in violation of the law of the State of North Carolina.

[T 366-67] Consequently, Defendant argues the trial court's jury instruction was plainly erroneous because it referenced common law robbery rather than robbery with a dangerous weapon. Defendant did not object to the jury instructions during his trial, so we may review the jury instructions only for plain error. N.C. R. App. P. 10(a)(4) (2017) (requiring this Court to review claims not raised at trial only 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) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). To make such a showing, Defendant must establish prejudice, or that the error “had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* Additionally, “because plain error is to be applied cautiously and only in the

exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal citation and quotations omitted).

Defendant argues the jury instruction prejudiced him because “the evidence presented only supported a factual finding that he was *convicted* of common law robbery . . . [and] does not do anything at all to establish beyond a reasonable doubt that he, in fact, had committed *robbery with a dangerous weapon* as the State had accused him” in the indictment. **[D Br 24]** In resolving Defendant’s case, our Supreme Court held, “the habitual felon indictment returned against [D]efendant in this case did effectively allege that [D]efendant had both committed and been convicted of common law robbery.” *State v. Langley*, 371 N.C. 389, 392, 395-96, 817 S.E.2d 191, 197 (2018). Given that the indictment properly alleged that Defendant had committed and been convicted of common law robbery, we cannot find Defendant was prejudiced by a jury instruction stating the same.¹

However, assuming *arguendo* Defendant was prejudiced by the jury instruction, he still fails to show how such an alleged error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Lawrence*, 365 N.C.

¹ It is worth noting that Defendant does not challenge the jury’s finding that he had actually attained habitual felon status and does not argue he had not been convicted of three felonies prior to this case. Where there is “ample evidence of [a] defendant’s individual guilt[,]” it is unlikely even an improper jury instruction would amount to prejudice sufficient to prove plain error. See *State v. Maddux*, ___ N.C. ___, ___, 819 S.E.2d 367, 372 (N.C. 2018).

at 518, 723 S.E.2d at 334 (citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Defendant's argument is technical in nature and involves a portion of a habitual felon charge, the name of the prior felony offense, that our Supreme Court describes as "surplusage unnecessary to the existence of a facially valid indictment." *Langley*, ___ N.C. at ___ 817 S.E.2d at 195-96. Even a prejudicial error does not, by our measure, seriously affect the fairness, integrity or public reputation of judicial proceedings when it arises out of the surplusage of an indictment. Therefore, even if Defendant could show a prejudicial error, which we hold he cannot, his plain error argument fails because the alleged prejudicial error does not satisfy the final prong of *Lawrence*.

CONCLUSION

Defendant fails to show that the jury instruction at trial prejudiced him. Furthermore, Defendant fails to show how such an alleged error seriously affects the fairness, integrity or public reputation of judicial proceedings. Therefore, we hold the trial court's jury instruction was not plainly erroneous.

NO ERROR.

Judges CALABRIA and DIETZ concur.

Report per Rule 30(e).