IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-694

Filed: 16 July 2019

Hertford County, Nos. 16CRS281-83, 16CRS50283

STATE OF NORTH CAROLINA

v.

DEANGELO DEVONTE SMALLWOOD, Defendant.

Appeal by Defendant from Judgment entered 8 November 2017 by Judge Cy A. Grant in Hertford County Superior Court. Heard in the Court of Appeals 27 March 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M.A. Kelly Chambers, for the State.

Meghan Adelle Jones for Defendant-Appellant.

INMAN, Judge.

Defendant Deangelo Devonte Smallwood ("Defendant") appeals his convictions following jury verdicts finding him guilty of three counts of attempted first-degree murder, one count of assault with a deadly weapon with intent to kill, one count of assault on a child under the age of twelve, two counts of felonious assault with a deadly weapon with intent to kill inflicting serious injury, and one count of

discharging a weapon into an occupied vehicle in operation. Defendant argues that (1) the trial court plainly erred in admitting hearsay testimony from a police officer; and (2) the trial court did not afford him notice and an opportunity to be heard before entering an award of attorney's fees. After careful review of the record and applicable law, we hold that Defendant has failed to show plain error in the admission of the officer's testimony, so his judgment of conviction is upheld, but we vacate the order requiring him to pay attorney's fees and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence introduced at trial tended to show the following facts:

In March 2016, Travis Eley ("Travis"), his girlfriend Trechelle Walton ("Trechelle"), and their two-year-old son, S.E.,[1] were living in a mobile home park in Hertford County. On Saturday 26 March 2016, Travis and his family decided to have a cookout; Travis' brother and his brother's girlfriend attended, and Trechelle babysat her infant nephew.

While Travis and his brother were outside drinking portions of a "12 pack" of beer, they noticed that there was a large crowd congregated and socializing outside a neighbor's mobile home nearby. In the midst of the crowd, Travis saw Defendant, Earl Powell ("Earl"), Antwon Vaughn ("Antwon"), and Shenandoah Perry ("Shenandoah"). Defendant and the others were members of the Crips gang who were

[1] We use the above pseudonym to preserve the child's anonymity.

trying to "take over" the park, while Travis was an inactive member of the rival Bloods gang.

Eventually, Earl and Antwon walked over to where Travis was staying. Although Earl initially acted "like he was trying to holler" and talk, he swung his fist at Travis, and the two started fighting. Trechelle, who was in the trailer at the time with S.E. and her nephew, heard the commotion and went outside. Travis and Earl were fighting for almost one minute before a gunshot was heard in their vicinity. Trechelle ran back into the trailer and called her nephew's grandmother to come and pick him up. Trechelle then put S.E. into her car and convinced Travis to get in the car after the fight ended. Before they drove off, Earl pointed a 40-caliber pistol at Travis, but someone intervened before anything escalated.

Travis first traveled to his uncle's house to get his pistol. When Travis and Trechelle found that his uncle was not home, Trechelle drove them to the store and Travis bought a "40-ounce Bud Ice," and they then went to her mother's residence without retrieving the sought-after gun. Trechelle's mother urged Travis not to go back to the mobile home park. Shortly thereafter, Travis received a phone call from a friend saying that Earl fired bullets into his mobile home. Again, Trechelle's mother warned Travis not to go back to his home—as she suspected it was a setup—and gave Travis $100 for a hotel.

Although Travis agreed to not return to his mobile home, when he and his family left Trechelle's mother's residence around 11:30 p.m., they realized that their identifications and other personal items were still at their home. Hoping to quickly get their belongings without detection, Travis and Trechelle drove to the neighborhood and first observed the area from afar. As they slowly drove toward the mobile home, neither Travis nor Trechelle saw anyone. After a neighbor's floodlight came on, Travis and Trechelle saw Defendant, Shenandoah, Antwon, and Earl shooting at the car. Shenandoah first fired with a shotgun. Defendant then fired a chrome pistol. Approximately 40 to 50 shots were fired at the car. Although S.E. was not injured, Travis and Trechelle sustained serious gunshot wounds. Trechelle was shot in the right side of the head and Travis was shot in the head, losing an eye.

At Travis' direction, Trechelle drove to the Murfreesboro Police Department. Once there, they were transported by ambulance to the hospital. At around 2:30 a.m., at the hospital, Travis spoke with Sheriff Dexter Hayes ("Sheriff Hayes") of the Hertford County Sheriff's Office and identified Defendant, Earl, Antwon, and Shenandoah as the assailants.

On 31 May 2016, Defendant was indicted on three counts of attempted first-degree murder, one count of assault with a deadly weapon with intent to kill, one count of assault on a child under twelve years of age, two counts of assault with

a deadly weapon with intent to kill inflicting serious injury, and one count of discharging a firearm into occupied property.

Defendant's cases came on for trial on 6 November 2017. The State called witnesses, including Travis, who testified on direct examination about his conversation with Sheriff Hayes on the night of the shooting:

> [STATE:] So when you saw [Sheriff] Hayes what if anything did you say to him?
>
> [TRAVIS:] I told him that—I was like, [Sheriff Hayes], I ain't a snitch. . . . But they are trying to kill my girl and my son, so I'm snitching.
>
> [STATE:] So what did [Sheriff] Hayes say to you?
>
> [TRAVIS:] He was like, Travis, you sure? You know you can't change it. Are you sure now? I'm like, no, I'm sure. I'm telling, man, I'm going to tell you who it was. It was Shenandoah Perry, [Defendant], Earl and [Antwon]. I just told him how it was straight like that.
>
> [STATE:] And what did he say if anything when you said that?
>
> [TRAVIS:] *He was like, Travis, I believe you*.
>
> [STATE:] He said he believed you?
>
> [TRAVIS:] Yeah, he said, you know, *I believe you*.

(emphasis added). Defendant's counsel did not object to this testimony.

The jury found Defendant guilty on all counts. The trial court sentenced Defendant on all charges, including three consecutive terms of 15 to 19 years in

prison, with credit for 593 days spent in confinement before trial. Defendant gave oral notice of appeal.

The trial court later ordered Defendant to pay $10,522.50 in attorney's fees.

II. ANALYSIS

A. Hearsay Statement

Defendant contends that the trial court plainly erred in admitting testimony by Travis that Sheriff Hayes said he believed Travis, as it "bolster[ed] the credibility" of his testimony. For the following reasons, assuming without deciding that Sheriff Hayes' statement was inadmissible hearsay, Defendant has failed to show plain error.

While failing to object to an issue at trial normally prevents appellate review, N.C. R. App. P. 10(a)(1), we can "review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996); *accord* N.C. R. App. P. 10(a)(4). To show 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." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320-21 (2015) (quotations and citation omitted).

Both Travis and Trechelle testified that Defendant was among the individuals who shot at them. Travis testified that he had known Defendant "all his life" and had seen him earlier that day. Travis further testified that, because the neighbor's light activated when he and Trechelle drove back to their residence, he was able to clearly see that Defendant was one of the shooters and was wielding a chrome pistol. Additionally, Trechelle had known Defendant since she was in high school and frequently saw him at the mobile home park for the last three years, including the day of the shooting. Trechelle testified that Defendant, with three other individuals, shot at her and Travis. Sheriff Hayes and other officers also testified at trial and recounted what Travis told them—that Defendant and the three other men shot at him and his family.

Defendant argues that Travis' and Trechelle's "credibilit[ies] [were] likely tarnished in the eyes of the jury" because defense counsel impeached their testimony on cross-examination. Travis previously testified in a separate trial that he "[did not] know what [Defendant] was shooting," contrary to his testimony in the present case that Defendant held a chrome pistol. Trechelle told officers at the hospital and testified in a previous probable cause hearing that two men, rather than four, shot at her and Travis. Because Travis and Trechelle were "crucial" to the State's case, Defendant contends that the State lacked "other substantial circumstantial evidence linking [Defendant] as [the] perpetrator of the charged offenses."

Defendant further argues that Travis' "credibility also suffered" because he was previously convicted of other crimes and testified that Defendant "robbed him a week prior to the events," suggesting that Travis "was motivated by revenge and gang-related issues." Were it not for Hayes' out-of-court statement that he believed Travis, Defendant argues that the outcome of his trial probably would have been different.

Even presuming there was a *possibility* that the out-of-court statement had an effect on the jury, Defendant has not demonstrated a *probability* that Sheriff Hayes' statement moved the jury enough to deem Travis' testimony sufficiently credible to convict Defendant. *See Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330 (imposing a "heavier burden on the defendant" when required to prove plain error in lieu of harmless error). In describing Defendant's burden, our Supreme Court has held that:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice[.]

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (alterations in original) (internal quotation marks omitted).

In support of his argument, Defendant first asserts, citing no authority, that Sheriff Hayes' statement was likely afforded greater credibility because he is a sworn

law enforcement officer. It is for the jury, and the jury alone, to make credibility determinations, and not the duty of this Court on appeal to look at the evidence in the record and decide which witness' statement should be given more weight than another's. *Tindle v. Denny*, 3 N.C. App. 567, 569, 165 S.E.2d 351, 353 (1969).

Similarly, while Defendant argues that there were contradictions, discrepancies, and ill-conceived motivations in Travis' and Trechelle's testimonies, it was the jury's duty to determine the credibility and weight of all the evidence.

Based on our review of the record, we cannot conclude that Defendant suffered from an error so severe that it "seriously affect[ed] the fairness, integrity or public reputation of [our] judicial proceedings." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quotations and citation omitted). Accordingly, we reject Defendant's contention that the trial court committed plain error in not excluding Sheriff Hayes' out-of-court statement.

B. Attorney's Fees

Defendant next argues that the trial court erred by ordering payment of attorney's fees against him absent notice and an opportunity to be heard. Defendant failed to file a notice of appeal, pursuant to Rule 3(a) of our rules of Appellate Procedure, regarding the money judgment issued against him. However, Defendant requests that this Court use its discretionary power under Rule 2 to grant his petition for *writ of certiorari* to review the trial court's imposition of attorney's fees. Because

we are persuaded by this Court's precedent, we grant Defendant's request and review this issue on its merits. *See State v. Friend*, __ N.C. App. __, __, 809 S.E.2d 902, 905 (2018) (issuing *writ of certiorari* because the defendant's "argument on the issue of attorneys' fees [was] meritorious").

Section 7A-455 of our General Statutes allows the trial court to order an indigent defendant to pay attorney's fees incurred by court-appointed counsel. *See State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005). But we have concluded that "[b]efore imposing a judgment for [] attorneys' fees, the trial court must afford the defendant notice and an opportunity to be heard." *Friend*, __ N.C. App. at __, 809 S.E.2d at 906 (citing *Jacobs*, 172 N.C. App. at 235, 616 S.E.2d at 316; *State v. Crews*, 284 N.C. 427, 442, 201 S.E.2d 840, 849 (1974)).

The record and transcript indicate, and the State concedes, that Defendant was given no such notice or opportunity. At the end of the trial, the trial court stated that Defendant would be responsible for attorney's fees, but no amount was calculated by counsel or the trial court. It was not until 27 November 2017—almost three weeks after Defendant's trial concluded—that the trial court ordered Defendant to pay over $10,000 in attorney's fees. *See Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317 (vacating trial court's order of attorney's fees because the defendant was not notified or given an opportunity to be heard on the "appointed attorney's total hours or the total amount of fees imposed").

Here, as in *Friend*, "the trial court did not inform [Defendant] of his right to be heard on the issue of attorneys' fees, and nothing in the record indicates that [Defendant] understood he had that right." __ N.C. App. at __, 809 S.E.2d at 907. We thus vacate the trial court's entry of attorney's fees and remand to the trial court for further proceedings not inconsistent with this opinion.

NO ERROR IN PART, VACATED IN PART, AND REMANDED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).