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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-465

Filed: 4 February 2020

Alexander County, Nos. 17 CRS 50848–49

STATE OF NORTH CAROLINA

v.

MICHAEL DWAYNE STACY

Appeal by defendant from judgments entered 25 July 2018 by Judge Julia Lynn Gullett in Alexander County Superior Court. Heard in the Court of Appeals 16 October 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Marilyn Fuller, for the State.*

*Daniel J. Dolan for defendant.*

DIETZ, Judge.

Defendant Michael Dwayne Stacy appeals two firearm-related convictions and sentences. The State alleged that Stacy drove his car past two motorcycle riders and fired multiple shots in the air using a stolen handgun.

Stacy contends that the trial court committed plain error by admitting hearsay evidence in the investigating officers' written notes. This argument fails because

Stacy has not shown that the alleged error had a probable effect on the jury's verdict—the standard for prejudice in plain error cases. We therefore find no plain error in Stacy's criminal judgments.

Stacy also challenges the assessment of the same costs in each of his criminal judgments and the entry of a civil judgment against him for those costs and for the attorneys' fees of his court-appointed counsel. As explained below, we vacate and remand both the costs and attorneys' fees judgments under recent, controlling precedent from this Court. *State v. Rieger*, \_\_ N.C. App. \_\_, \_\_, 833 S.E.2d 699, 703 (2019); *State v. Friend*, 257 N.C. App. 516, 522–23, 809 S.E.2d 902, 906–07 (2018).

### **Facts and Procedural History**

On the night of 21 June 2017, Andrew Hefner and John Logan Self were riding their motorcycles on a public road when a black Lexus with chrome wheels, a thirty-day tag, and darkly tinted windows sped past them. Both men heard gunshots and saw someone waving a gun out the driver's side window of the Lexus. Neither Hefner nor Self recalled seeing the driver.

Deputy Jacob Lemley got the call reporting the incident that evening. Seconds later, Deputy Lemley saw a black Lexus matching the description from the call. Deputy Lemley stopped the Lexus and, after approaching the driver's side, saw Defendant Michael Dwayne Stacy in the driver's seat. A woman sat next to Stacy in the front passenger seat and an infant sat behind them in the backseat.

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Deputy Lemley ordered everyone to exit the car and obtained Stacy's consent to search it. A second officer, Deputy Daniel Beal, arrived at the scene and told Stacy that two men riding motorcycles had heard gunshots from a black Lexus resembling Stacy's. While searching the car, Deputy Lemley noticed the glovebox was locked. While the search continued, law enforcement brought Hefner and Self to the scene, where they positively identified Stacy's car as the one they encountered earlier. Stacy then agreed to hand over the glovebox key. The woman in the front passenger seat had the key hidden down her shirt.

When Deputy Lemley unlocked the glovebox, he found a Glock 22 semi-automatic firearm with only six rounds remaining in its fifteen-round magazine. As the officer examined the firearm, Stacy said, "I'll go ahead and tell you that it's stolen . . . [i]f you can get a Glock with sights for \$300, then you would do the same thing . . . I have to protect my family."

Deputy Lemley ran the gun—a weapon commonly issued to law enforcement officers—through his computer system and discovered it was a service weapon that had been stolen from a Burke County deputy. The officers arrested Stacy that night and charged him with possession of a firearm by a felon, possession of a stolen firearm, and going armed to the terror of the public.

Stacy's jury trial took place on 24 July 2018, where Deputy Lemley and Deputy Beal testified on behalf of the State. Both officers were asked to write statements

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about the night of Stacy's arrest, and the trial court admitted both statements into evidence without any objection from Stacy. Deputy Beal's statement mentions "Michael Stacy being reported driving down the road, waving a gun and shooting it to scare some guys on motorcycles." Deputy Lemley's statement asserts that Hefner and Self "positively identified the Lexus/Michael Stacy as being the vehicle and the driver who had passed them and fired shots into the air."

The jury found Stacy guilty of the two possession charges. At sentencing, the trial court entered two separate criminal judgments. The first sentenced Stacy to 17 to 30 months of imprisonment for possession of a firearm by a felon, and ordered Stacy to pay \$522.50 in court costs, \$2,280.00 in attorney's fees, and a \$60.00 attorney appointment fee. The second judgment sentenced Stacy to 10 to 21 months for possession of a stolen firearm and ordered Stacy to pay \$372.50 in costs which were for the same items assessed in the first judgment. Finally, the trial court ordered that a civil judgment be entered pursuant to N.C. Gen. Stat. § 7A-455 for the attorney's fees. Stacy appealed.

Stacy acknowledges that his notice of appeal violated Rules 3 and 4 of the Rules of Appellate Procedure and he has petitioned for a writ of certiorari to ensure this Court reaches the merits of his appellate arguments. We agree that the notice of appeal is defective, but likewise agree that it is the result of "sloppy drafting" and reflects Stacy's unquestionable desire to appeal. *See State v. Hammonds*, 218 N.C.

App. 158, 162–63, 720 S.E.2d 820, 823 (2012). This Court routinely allows petitions for a writ of certiorari in this circumstance and, in our discretion, we do so here as well.

Stacy also seeks a writ of certiorari to review the civil judgments entered against him. Although it is less common for this Court to issue a writ of certiorari to review a civil judgment, again in our discretion we will do so because, as explained below, Stacy has asserted meritorious arguments. *See Friend*, 257 N.C. App. at 519, 809 S.E.2d at 905.

### **Analysis**

#### **I. Admission of the officers' written statements**

Stacy first challenges the admission of Deputy Lemley's and Deputy Beal's written statements. Stacy concedes he did not object to the admission of these statements at trial and, therefore, we review this issue for plain error. *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.* “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.” *Id.* In other words, the defendant must show that, “absent the error, the jury probably would have returned a different verdict.” *Id.* at 519, 723 S.E.2d at 335.

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The State acknowledges that the officers' written statements contained hearsay from the eyewitnesses. But the State contends that those hearsay statements were admissible to corroborate other trial evidence from those witnesses. Stacy, by contrast, argues that the officers' written statements were not corroborative because they implied that the eyewitnesses identified Stacy as the driver. Stacy contends that this contradicts the other trial evidence concerning these witnesses' statements, which indicated that neither witness could identify the driver.

Even if we assume the officers' written statements were admitted in error, Stacy cannot meet the high burden to show plain error. The State's other evidence showed that the two eyewitnesses saw the driver of a black Lexus fire a gun out of the driver's side window; that Deputy Lemley saw Stacy driving a black Lexus later that night; that the witnesses identified Stacy's car as the one they encountered earlier that night; and that law enforcement found a stolen gun inside Stacy's car with evidence that it had fired a number of shots. Stacy admitted to the officers that the gun belonged to him.

Simply put, the officers' written statements supported the State's case, but they were not vital to that case. Although, absent that evidence, the jury *could* have reached a different verdict, Stacy fails to meet the high burden of showing that "absent the error, the jury *probably would have* returned a different verdict." *Id.*

(emphasis added). Accordingly, we find no plain error in the admission of the officers' written statements.

## **II. Assessment of costs**

Next, Stacy argues that the trial court erred when it assessed the same costs against him twice, once for each criminal judgment. In the time since the trial court's cost assessment, this Court has clarified the standard for assessing costs for related charges. *State v. Rieger*, \_\_ N.C. App. \_\_, \_\_, 833 S.E.2d 699, 703 (2019). In *Rieger*, we held that "[w]hen multiple criminal charges arise from the same underlying event or transaction and are adjudicated together in the same hearing or trial, they are part of a single 'criminal case' for purposes of N.C. Gen. Stat. § 7A-304." *Id.* "In this situation, the trial court may assess costs only once, even if the case involves multiple charges that result in multiple, separate judgments." *Id.*

This case is controlled by *Rieger*. We therefore vacate the trial court's imposition of costs and remand for entry of a new judgment that assesses costs only once for these related criminal judgments.

## **III. Attorneys' fees**

Finally, Stacy contends that the trial court failed to give him notice and an opportunity to be heard before imposing attorney's fees and related attorney appointment fees. As with the issue of costs, this Court recently clarified what trial courts must do to afford indigent defendants notice and opportunity to be heard on

this issue. *State v. Friend*, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018). In *Friend*, we held that “before entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue.” *Id.* “Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.” *Id.*

Stacy’s sentencing transcript indicates that the trial court never personally addressed Stacy about these fees and there is no other evidence in the record demonstrating that Stacy received notice of his right to be heard. Thus, under *Friend*, we vacate this civil judgment and remand for further proceedings on this matter.

Because we vacate and remand both the costs and attorneys’ fees portions of the challenged judgments, we need not address Stacy’s remaining arguments concerning those judgments, as they may be mooted on remand.

### **Conclusion**

We find no plain error in the trial court’s criminal convictions. We vacate the assessment of court costs in the trial court’s criminal sentence, the corresponding civil



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judgment for costs, and the civil judgment for attorney's fees, and remand those matters for further proceedings in the trial court.

NO PLAIN ERROR IN PART; VACATED AND REMANDED IN PART.

Judges INMAN and YOUNG concur.

Report per Rule 30(e).