IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-28

No. COA20-62

Filed 16 February 2021

Wilson County, Nos. 18 CRS 051062-64

STATE OF NORTH CAROLINA

v.

MYRON JARVEL HARRIS

Appeal by Defendant from Judgments entered 6 June 2019, by Judge Wayland J. Sermons, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 12 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Gail E. Carelli, for the State.

William D. Spence for defendant-appellant.

Hampson, Judge.

Factual and Procedural Background

¶ 1 Myron Jarvel Harris (Defendant) appeals from Judgments entered 6 June 2019, upon jury verdicts finding him guilty of Misdemeanor Breaking and Entering, Misdemeanor Injury to Personal Property, Felony Larceny of a Motor Vehicle, and Felony Fleeing to Elude Arrest. The evidence in the Record before us tends to show

the following:

¶ 2 On the evening of 23 March 2018, Defendant visited his girlfriend's house after work where he "had a couple of beers. Got high a little bit." Later, early in the morning hours of 24 March 2018, Defendant left to go for a drive. As Defendant was driving his 2014 Ford Fusion and doing donuts in the street, North Carolina Highway Patrol Trooper Francisco Munoz was returning to his station to file a report. Trooper Munoz saw Defendant's car "doing donuts[,]" activated his emergency lights, and saw Defendant step outside his car. However, before Trooper Munoz could speak with Defendant, Defendant got back into his car and attempted to flee. In his attempt, Defendant made a sharp turn and landed his car in a nearby ditch, which allowed Trooper Munoz to use his patrol car microphone to instruct Defendant to put his hands up.

¶ 3 Defendant again exited his car but did not comply with Trooper Munoz's commands. Instead, Defendant got back into his car and fled again. Trooper Munoz followed Defendant until Defendant ran his car into the brick front porch of a nearby home, bringing it to a stop. Trooper Munoz waited in his patrol car for backup from the Wilson Police Department.

¶ 4 Unknown at the time to Trooper Munoz, Defendant had again left his car and made his way down the street to Breyander Hawkins's house. At around 2:15 a.m., Hawkins awoke to loud banging outside. Hawkins peered through her front window

and witnessed Defendant get in the driver's seat of her Chrysler 300. She watched the car roll down her driveway and into the street striking a parked van.

¶ 5 After the crash, Defendant got out of Hawkins's car and ran across the street to a neighboring apartment belonging to Barbara Denise Fuller. Fuller testified around two or three in the morning she woke up to the sound of her front door opening and glass breaking in her kitchen. She walked to the kitchen and saw a man, "just standing there . . . snatching stuff out [of the] cabinet and throwing it on the floor." Fuller ran to tell her boyfriend someone was in the house and called the police to report the break-in. Officers from the Wilson Police Department arrived and apprehended Defendant. The officers determined Defendant was too combative to administer field sobriety tests, and Defendant was transported to the emergency room.

¶ 6 Defendant was ultimately arrested later on 24 March 2018, and on 14 January 2019, a grand jury indicted him on charges of Felony First-Degree Burglary, Misdemeanor Injury to Personal Property, Misdemeanor Hit and Run, Felony Larceny of a Motor Vehicle, and Fleeing to Elude Arrest. Defendant's case came on for trial on 3 June 2019. At the close of the State's evidence, Defendant moved to dismiss the charges against him. After taking Defendant's Motion to Dismiss under consideration, the trial court dismissed the charges of First-Degree Burglary and Hit and Run, while the charges of Felony Larceny of a Motor Vehicle, Felony Fleeing to

Elude Arrest, Misdemeanor Breaking and Entering, and Misdemeanor Injury to Personal Property remained pending.

¶ 7 Defendant testified in his defense. Defendant recounted the events of the night of 23 March 2018, and early in the morning of 24 March 2018, beginning with his going to his girlfriend's house where he "had a couple of beers. Got high a little bit." Defendant recalled driving around that night:

> I was doing donuts in the middle of the street. The police had came. [sic] Then I guess the state trooper had came, [sic] you know, let me see your hands. I showed him my hands. I told him I didn't have any weapons on me or anything like that. Then I got back in my car and I pulled over onto Mercer Street. So when I pulled over right I was right there beside the post office on Mercer Street and then I stopped. The police didn't come. He didn't get behind me or anything so I kept going.

¶ 8 Defendant next testified he hit a curb and left his car, running up the street. He continued:

> I remember knocking on someone door and the lady opened the door and I went in because I was gasping for air. I guess I was tired. And she open the door. I went in and -- let's see. I was gasping for air. I guess I broke some plates or anything like that but I don't remember breaking the plates. . . . I didn't know where I was at really. I thought I was back where my car was.

¶ 9 When asked about Hawkins's Chrysler, Defendant testified: "I thought I got into, actually to be honest, I thought I got into my own car back at where I wrecked my car." Defendant conceded he did not have the keys; however, despite that Defendant stated he "got in it and . . . tried to put it in reverse or drive but it backed

up."

¶ 10 At the close of all the evidence, Defendant renewed his Motion to Dismiss. The trial court denied Defendant's Motion and instructed the jury on the remaining charges, including the defense of voluntary intoxication. The jury returned verdicts finding Defendant guilty of Misdemeanor Breaking and Entering, Misdemeanor Injury to Personal Property, Felony Larceny of a Motor Vehicle, and Felony Fleeing to Elude Arrest. The trial court announced in open court it was consolidating Defendant's two misdemeanor convictions for sentencing purposes into an active sentence of 120 days. For both Class H felony convictions of Larceny of a Motor Vehicle and Fleeing to Elude Arrest, the trial court sentenced Defendant to consecutive, active sentences of ten to twenty-one months. Defendant gave notice of appeal in open court.

Issues

¶ 11 There are four issues before this Court: Whether the trial court (I) erred in denying Defendant's Motion to Dismiss the charge of Larceny of a Motor Vehicle; (II) plainly erred in failing to instruct the jury on unauthorized use of a motor vehicle as a lesser-included offense to the charge of Felony Larceny of a Motor Vehicle; (III) abused its discretion in sentencing Defendant at the maximum of the presumptive range; and (IV) erred in the sentence imposed on the written judgment form for 18 CRS 51062.

Analysis

I. Motion to Dismiss

¶ 12 We review a trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). However, "[u]pon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations and quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

¶ 13 Larceny of a Motor Vehicle falls in our general statutes under Felony Larceny. *See* N.C. Gen. Stat. § 14-72(a) (2019); *see also State v. Sakobie*, 157 N.C. App. 275, 283, 579 S.E.2d 125, 131 (2003). Felony Larceny is defined as "[l]arceny of goods of the value of more than one thousand dollars[.]" N.C. Gen. Stat. § 14-72(a). "To convict a defendant of larceny, it must be shown that he (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." *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983) (emphasis added) (citations omitted).

¶ 14 Here, Defendant contends the trial court erred in denying his Motion to Dismiss the charge of Felony Larceny of a Motor Vehicle made at the close of all the evidence because there was not substantial evidence he intended to permanently deprive Hawkins of her car. Defendant argues on appeal his testimony at trial that in his intoxicated state, he mistakenly thought Hawkins's Chrysler was his own Ford Fusion refutes that he intended to deprive her of it permanently. Defendant's argument is not persuasive.

¶ 15 The evidence in this case, viewed in the light most favorable to the State, provides a clear picture: Defendant, while fleeing from law enforcement, first drove his own car into a ditch and subsequently crashed it. He fled away from that scene to the Hawkins residence, where he broke into and took Hawkins's car to continue his flight and escape apprehension, albeit in unsuccessful fashion. From this evidence, it may certainly be inferred—and a jury may conclude—Defendant intended to permanently deprive Hawkins of her car. Moreover, Defendant was permitted to argue, and the trial court instructed the jury on, the defense of voluntary intoxication as a defense negating his intent on the facts of the case.

¶ 16 Thus, taking the evidence in the light most favorable to the State, as we must,

there is substantial evidence sufficient to reach the jury on the charge of Felony Larceny. Accordingly, the trial court did not err in denying Defendant's Motion to Dismiss.

II. Jury Instructions

¶ 17 Defendant next contends the trial court plainly erred by failing to instruct the jury on the lesser-included offense of unauthorized use of a motor vehicle. "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002) (citations omitted). We "review unpreserved issues for plain error when they involve . . . errors in the judge's instructions to the jury[.]" *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "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) (citation omitted).

¶ 18 "The offense of larceny [of a motor vehicle] requires the State to prove the defendant possessed the intent to permanently deprive the owner of the property, while the offense of unauthorized use of a motor vehicle does not." *State v. Hole*, 240 N.C. App. 537, 540, 770 S.E.2d 760, 763 (2015). Defendant argues the jury should have been instructed on the lesser-included offense of unauthorized use of a motor

vehicle because he did not have the intent to permanently deprive Hawkins of her car. Here, the trial court instructed the jury regarding the specific intent required to support Felony Larceny of a Motor Vehicle—"at the time of the taking the defendant intended to deprive the victim of its use permanently." The trial court also instructed the jury on the defense of voluntary intoxication:

> In order for you to find the defendant guilty of felonious larceny, you must find, among the other things, beyond a reasonable doubt that the defendant possessed the mental capacity to form a specific intent to permanently deprive the owner of the motor vehicle. If, as a result of intoxication, drug condition or a lack of mental capacity, the defendant did not have a specific intent to do so, the defendant is not guilty of felonious larceny.

Ultimately, the jury returned a verdict finding Defendant guilty of Felony Larceny of a Motor Vehicle.

¶ 19 In *State v. Hole*, this Court considered whether "the trial court committed plain error by failing to instruct the jury on the lesser-included offense of unauthorized use of a motor vehicle[.]" *Id.* at 539, 770 S.E.2d at 762. In *Hole*, the defendant was charged with Felony Larceny of a Motor Vehicle after taking the car of another patron at the bar where he was drinking. *Id.* at 538, 770 S.E.2d at 761. The defendant crashed the car shortly thereafter and was charged with Felony Larceny of a Motor Vehicle. At the defendant's trial, he asserted he was "too intoxicated to form the requisite intent to commit larceny[,]" and the trial court instructed the jury on the defense of voluntary intoxication. *Id.* at 539, 541, 770 S.E.2d 762-63. The jury

ultimately returned a verdict finding the defendant guilty of felony larceny of a motor vehicle. On appeal, this Court held, "[u]nder plain error review and in light of [the voluntary intoxication] instruction, defendant has not shown the absence of an instruction on unauthorized use of a motor vehicle impacted the jury's larceny verdict." *Id.* at 542, 770 S.E.2d at 763.

¶ 20 Like in *Hole*, here, Defendant has not demonstrated that an instruction on the unauthorized use of a motor vehicle would have produced a different result at trial. The trial court instructed the jury: "If, as a result of intoxication, drug condition or a lack of mental capacity, the defendant did not have a specific intent to do so, the defendant is not guilty of felonious larceny." The jury accordingly found Defendant guilty of Felony Larceny of a Motor Vehicle; it did not find his voluntary intoxication prevented him from forming specific intent. Defendant argues his case is distinguishable from *Hole* because he testified he mistakenly thought Hawkins's car was his own. Defendant's argument, however, fails to meaningfully distinguish *Hole* precisely because his argument that the reason for his alleged mistake was the fact he was too intoxicated to realize the car was not his. Indeed, there is no other evidence of any other reason Defendant mistook Hawkins's Chrysler 300 for his own then-inoperable Ford Fusion. Therefore, the trial court did not plainly err when it did not instruct the jury on unauthorized use of a motor vehicle.

III. Sentencing

¶ 21 Defendant next contends the trial court abused its discretion when it sentenced Defendant to 120 days active sentence for the misdemeanor convictions of Breaking and Entering and Injury to Personal Property and consecutive, active sentences of ten to twenty-one months for Felony Larceny of a Motor Vehicle and Felony Fleeing to Elude Arrest. Defendant correctly notes that his sentences are the statutory maximum allowed within the presumptive range. However, Defendant argues the trial court's sentences "were based, at least in part, on [D]efendant's comments and attitude in addressing the [trial court] and the District Attorney's statements as to [D]efendant's recent alleged criminal activity and conduct[,]" and therefore were an abuse of discretion.

¶ 22 "A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Massenburg*, 234 N.C. App. 609, 615, 759 S.E.2d 703, 708 (2014) (citations and quotation marks omitted). Moreover, "[a] sentence within the statutory limit will be presumed regular and valid." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). However, "[i]f the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence . . . the sentence is in violation of defendant's rights." *Id.* (citation omitted).

¶ 23 Here, prior to imposing Defendant's sentences, the trial court and Defendant had the following exchange:

> THE DEFENDANT: I did not steal no car, sir.
>
> THE COURT: Jury says you did.
>
> THE DEFENDANT: That's the jury. I was there. I did not try to steal the car. I was under the influence. . . .
>
> THE COURT: Sounds like you're not getting it thought. My question to you was: What have you done about your drug problem? You gave me an answer that flies in the face of the jury. No, you don't have a drug problem?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Well, what happened on March 24th last year?
>
> THE DEFENDANT: I was drinking.
>
> THE COURT: And smoking PCP. You said so on the stand.
>
> THE DEFENDANT: Yes, sir.
>
> . . . .
>
> THE COURT: How often do you use?
>
> THE DEFENDANT: Every once in a while.
>
> THE COURT: How often is every once in a while?
>
> THE DEFENDANT: To be honest, when I feel like it.
>
> THE COURT: When you feel like it. You just do what you feel like; right?

> THE DEFENDANT: No, sir.
>
> THE COURT: What do you do then?
>
> THE DEFENDANT: What you mean?
>
> THE COURT: You say I do it when I feel like it.
>
> THE DEFENDANT: Yes, sir. I don't have a habit. I barely even drink or use.
>
> THE COURT: Well, your behavior and now your attitude --
>
> THE DEFENDANT: I don't have an attitude.
>
> THE COURT: -- tells me something different. You don't have an attitude?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Then you get to determine that not me. Huh? Is that -- you're shaking your head yes. Right?
>
> THE DEFENDANT: That's your opinion, sir.
>
> . . . .
>
> THE COURT: Whose opinion counts the most in this courtroom right now as to the rest of your life?
>
> THE DEFENDANT: Yours.
>
> THE COURT: Well, why would you act like you're acting to me? Doesn't make any sense to me. The jury has just convicted you. I got to sentence you and here you are just being bull headed.

Then, when Defendant concluded, the State proceeded to inform the trial court of several recent encounters Defendant had with law enforcement where he was

allegedly under the influence of PCP and requested the trial court impose the maximum sentence in the presumptive range for each of Defendant's four convictions.

¶ 24 After reviewing the Record and transcript, we cannot conclude the trial court abused its discretion and considered "irrelevant and improper matters" or those outside the Record when sentencing Defendant. Although the State discussed matters outside the Record prior to sentencing, the Record also reflects the trial court declined the State's recommended sentences and consolidated Defendant's misdemeanor convictions for judgment before imposing Defendant's ultimate sentences.

¶ 25 Defendant cites the trial court's comment, "You gave me an answer that flies in the face of the jury[,]" and its statements Defendant had an "attitude" and was "bull headed" as indicative that the trial court improperly considered Defendant's behavior and demeanor in sentencing. However, taken in context, the trial court's first comment was in response to Defendant's statement that he did not steal Hawkins's car after the jury already returned a guilty verdict. The trial court's later comments regarding Defendant's purported attitude and calling him "bull headed" in light of Defendant's responses to questions about his substance use or any treatment efforts may be superfluous; however, "it clearly appears that defendant was sentenced upon the jury verdicts and the evidence upon which the verdicts were based." *State v. Bright*, 301 N.C. 243, 261, 271 S.E.2d 368, 379 (1980); *see id.* at 262, 271 S.E.2d at

380 ("[W]e cannot, under the facts of this case, say that defendant was prejudiced or that defendant was more severely punished" as a result of the trial court's comments.). Accordingly, Defendant's sentence was not entered under an abuse of discretion. Moreover, even assuming the trial court did consider improper or irrelevant factors, Defendant has not met his burden of demonstrating he was more severely punished as a result. *See id.* at 261, 271 S.E.2d at 379-80 ("When the validity of a judgment is challenged, the burden is on the defendant to show error amounting to a denial of some substantial right." (citation omitted)).

IV. Clerical Error

¶ 26 Last, Defendant argues, and the State concedes, the trial court's written judgment in 18 CRS 51062 does not reflect the sentence rendered in open court. Indeed, the written judgments show Defendant's misdemeanor convictions as two, consecutive active sentences of 120 days. "[W]hen it is apparent from the transcript that a clerical error has been committed on the written order, remand is appropriate so that the trial court can correct the clerical error." *In re O.D.S.*, 247 N.C. App. 711, 721, 786 S.E.2d 410, 417 (2016) (citation omitted).

¶ 27 Here, the Record is clear the trial court intended Defendant's misdemeanor convictions be consolidated for judgment, stating at sentencing: "18-CRS-51062 show[s] the defendant was found guilty of misdemeanor breaking and entering, injury to personal property, Class 1 and Class 2? . . . Consolidate them for one Class 1

judgment. Let him be in prison for a minimum maximum 120 days. That will be an active sentence." Accordingly, we remand the Judgment in 18 CRS 51062 to the trial court to correctly reflect the sentence rendered in open court.

Conclusion

¶ 28 Accordingly, for the foregoing reasons, the trial court did not err in denying Defendant's Motion to Dismiss or in instructing the jury. The trial court did not abuse its discretion in sentencing Defendant. However, we remand the Judgment in 18 CRS 51062 to the trial court for correction of the clerical error.

NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).