IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-31

No. COA20-91

Filed 16 February 2021

Guilford County, No. 18 CRS 070242, 19 CRS 025204

STATE OF NORTH CAROLINA

v.

VINSON PERNELL LINDSEY, Defendant.

Appeal by Defendant from judgment entered by Judge R. Stuart Albright in Guilford County Superior Court on 28 August 2019. Heard in the Court of Appeals 27 January 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Bryan G. Nichols, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for the Defendant.

JACKSON, Judge.

¶ 1 The issue in this case is whether the trial court committed plain error by misplacing the word "willfully" when instructing the jury regarding the elements of failure to register as a sex offender under N.C. Gen. Stat. § 14-208.9. We hold that Defendant has not demonstrated plain error in the jury instructions.

I. Factual and Procedural Background

¶ 2 On 3 September 1987, Vinson Pernell Lindsey ("Defendant") pleaded guilty to two counts of second-degree sexual offense and one count of indecent liberties with a minor. Upon his release from prison in 1997, Defendant became subject to the requirements of N.C. Gen. Stat. § 14-208, which governs the registration and monitoring of sex offenders. Specifically, N.C. Gen. Stat. § 14-208.9 requires that sex offenders notify the local sheriff of any change of address by "report[ing] in person and provid[ing] written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." N.C. Gen. Stat. § 14-208.9(a) (2019).

¶ 3 On 8 March 2017, Defendant moved from 1118 Summit Avenue in Greensboro, North Carolina to 314 Ardale Drive in High Point, North Carolina—both addresses located within Guilford County. As required by the statute, Defendant appeared in person at the Guilford County Sheriff's Office and submitted the proper form notifying the sheriff of his address change. In May 2017, Defendant left the residence at 314 Ardale Drive after his girlfriend, Regina Bush, called the police and had him forcibly removed. After that point, Defendant became homeless and was living out of his car. He soon lost his job and was unable to pay for an apartment or hotel room, and was unable to secure housing with friends or family. On 9 January 2019, after two years of homelessness, Defendant had saved up enough money from doing odd

jobs that he was able to pay to rent an apartment.

¶ 4 However, Defendant never notified the Guilford County Sheriff that he had moved out of the residence at 314 Ardale Drive, nor did he report his homelessness to the sheriff. Neither did he notify the sheriff of his new address when he ultimately found new lodging in January 2019.

¶ 5 On 18 February 2019, Defendant was indicted for failure to register as a sex offender under N.C. Gen. Stat. § 14-208.9. Prior to trial, Defendant stipulated that he had been convicted of a reportable sex offense and was under a duty to comply with all requirements of the sex offender registration statute.

¶ 6 The matter came on for trial before the Honorable R. Stuart Albright in Guilford County Superior Court on 26 August 2019. Judge Albright presided over a two-day trial. On 27 August 2019, the jury found Defendant guilty of failure to register as a sex offender, and the following day Defendant also pleaded guilty to being a habitual felon. The trial court sentenced Defendant to 66 to 92 months in prison in the 28 August 2019 judgment entered upon the jury's verdict.

¶ 7 During trial, Deputy Patrick Murphy of the Guilford County Sheriff's Office testified that in August 2017, a letter was sent to Defendant's last known address which was returned as undeliverable. Deputy Murphy then attempted to reach Defendant by phone on 17 August 2017. A person purporting to be Defendant answered the phone, and Deputy Murphy explained that Defendant must come to the

sheriff's office to complete his new address verification within three business days. The person responded affirmatively, telling Deputy Murphy that he would be in within the next two days. Defendant did not come into the sheriff's office during August 2017.

¶ 8 Deputy Murphy tried to contact Defendant by phone again on 14 November 2017, and left a message reiterating that Defendant needed to come into the office to update his address. Deputy Murphy called Defendant again in December 2017 and left a similar message, again with no response. Another letter was sent to Defendant's last known address in March 2018, which was also returned as undeliverable.

¶ 9 On 9 March 2018, Deputy Murphy made an in-person visit to Defendant's last known address—314 Ardale Drive. A young man answered the door and informed Deputy Murphy that Defendant no longer lived there, and that he had moved out as of May 2017. Accordingly, on 14 March 2018, Deputy Murphy obtained an arrest warrant for Defendant for failing to register his address. The warrant was not served until 4 January 2019, when Defendant was finally located by the High Point Police Department.

¶ 10 Parker Howley, a High Point police officer, read the warrant aloud for Defendant upon his arrest. Officer Howley testified that after reading the warrant, Defendant told him that he had not updated his address because "I had just broke up

with that girl, and [I] was homeless. And I just never went back to tell them that I had moved out, and I just don't know why I didn't." Officer Howley testified that he had not immediately written down this statement but instead made a mental note of it and shared it with Deputy Parker approximately 30-45 minutes later—that "it wasn't word for word, but it was as close to being accurate as it could be."

¶ 11 During Defendant's testimony at trial, he denied ever having spoken with Deputy Murphy on the phone. Defendant testified that he didn't know that he was required to update his address with the sheriff when he had no address to report, because the sheriff's office had never informed him he was required to report his homelessness. However, Defendant admitted on cross-examination that he knew he was required to go into the sheriff's office whenever he had a change of address but had failed to do so.

II. Petition for Certiorari

¶ 12 As an initial matter, we must first address the deficiencies in Defendant's notice of appeal. On 28 August 2019, Defendant's counsel gave notice of appeal in open court and also filed a written notice of appeal. However, in both the verbal and written notices of appeal, trial counsel stated that the appeal was only from the trial court's earlier ruling on Defendant's motion to suppress—not from the judgment of conviction.

¶ 13 Ordinarily, "when a defendant has not properly given notice of appeal, this

Court is without jurisdiction to hear the appeal" and the appeal must be dismissed. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320–21 (2005). For example, in *State v. Miller*, 205 N.C. App. 724, 696 S.E.2d 542 (2010), we dismissed the defendant's appeal because the defendant had erroneously appealed only from the denial of his motion to suppress, and had "failed to appeal from his final judgment." *Id*. at 725, 696 S.E.2d at 543.

¶ 14 However, Defendant seeks to cure this defect by filing a petition for writ of certiorari, requesting that we review the 28 August 2019 Judgment and Commitment in the exercise of our discretion. In his petition, Defendant concedes that his appeal was defective, but argues that we nevertheless should allow review because (1) Defendant indicated elsewhere that he desired to appeal his underlying felony conviction; (2) Defendant has lost his right to appeal through no fault of his own; (3) allowing certiorari would serve the interests of justice; and (4) the State has not been prejudiced by the deficiency. We agree with Defendant.

¶ 15 Appellate Rule 21(a)(1) provides that a writ of certiorari may be issued "when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1). This rule allows an appellate court to "review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner." *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997).

¶ 16 This Court has previously allowed a defendant's petition for writ of certiorari

under similar circumstances—i.e., when a defendant mistakenly appeals only from the trial court's ruling on a motion to suppress, rather than the final judgment. *See, e.g., State v. Smith*, 246 N.C. App. 170, 174–75, 783 S.E.2d 504, 507–08 (2016) (allowing the defendant's petition for writ of certiorari to review the underlying judgment where the defendant's trial counsel indicated he was appealing "only from the suppression motion"); *State v. Jackson*, 249 N.C. App. 642, 646, 791 S.E.2d 505, 509 (2016), *aff'd per curiam*, 370 N.C. 337, 807 S.E.2d 141 (2017) (allowing the defendant's petition for writ of certiorari to review the underlying judgment where the defendant's notice of appeal "only indicated that he was appealing from the order denying his motion to suppress").

¶ 17 Moreover, there are several compelling reasons in favor of allowing Defendant's petition. First, in other portions of the record, Defendant has indicated his intention to appeal his underlying conviction—for example, the plea transcript of Defendant's habitual felon indictment states that Defendant "reserves the right to appeal the underlying felony conviction in 18 CRS 70242 as well as all pretrial rulings related to the instant case." Second, it is clear that Defendant is not at fault for the deficiencies in his appeal; rather, the deficiencies stem from a mistake by trial counsel. *See State v. Hammonds*, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012) (allowing the defendant's petition for writ of certiorari when "it is readily apparent that defendant has lost his appeal through no fault of his own, but rather as a result

of sloppy drafting of counsel"). Third, we believe that Defendant has raised a meritorious legal issue regarding the jury instructions that were utilized by the trial court here. *See State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) ("[T]he Court of Appeals may choose to grant [a writ of certiorari] to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause."). Finally, although the State opposes Defendant's petition, the State does not identify any prejudice it suffered as a result of this defect in Defendant's appeal. Accordingly, we choose to exercise our discretion to allow Defendant's petition for writ of certiorari.

III. Analysis

¶ 18 Defendant's sole argument on appeal involves a challenge to the instructions given to the jury regarding his charge of failure to register as a sex offender. Specifically, Defendant contends that the trial court erred by failing to consistently instruct the jury as to the willfulness element of this offense. We hold that Defendant is unable to establish that the trial court committed plain error in instructing the jury because he has not demonstrated that any error had a probable impact on the jury's ultimate finding of guilt.

¶ 19 As Defendant did not request a modification to the pattern jury instruction and did not raise any objection to the jury instructions at trial, we review his claims only for plain error. *See State v. Juarez*, 369 N.C. 351, 357–58, 794 S.E.2d 293, 299 (2016)

("Because defendant did not object to the [jury] instruction as given at trial, we consider whether this instruction constitutes plain error."). Our Supreme Court has described the standard for plain error review as follows:

> 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity, or public reputation of judicial proceedings.

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

¶ 20 Accordingly, in order to demonstrate plain error in the jury instructions here, Defendant must show that: (1) a serious instructional error occurred, and (2) this error had a probable impact on the jury's ultimate verdict.

A. Instructional Error

¶ 21 We first address the nature of the alleged instructional error. Defendant contends that the trial court committed a serious error by misplacing the key word "willfully" in its jury instructions, resulting in an instruction that does not match the language of the statute.

¶ 22 The statute provides, in pertinent part, that "[i]f a person required to register

changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered." N.C. Gen. Stat. § 14-208.9(a) (2019).

¶ 23 During trial, the trial court provided the jury with two separate instructions explaining the elements of this offense. In the first instruction—which Defendant does not challenge—the trial court explained as follows:

> As you know, the Defendant has been charged with willfully failing to comply with the sex offender registration law. For you to find the Defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that the Defendant was a resident of this State.
>
> Second, that the Defendant had previously been convicted of a reportable offense for which the Defendant must register.
>
> And, third, the Defendant willfully failed to provide written notice of a change of address in person at the Sheriff's Office no later than three business days after the change of address to the Sheriff's Office in the county with whom the Defendant had last registered.

¶ 24 Defendant agrees that the instructions up to this point were correct. However, Defendant challenges the language used in the trial court's final mandate to the jury, which reads as follows:

> Therefore, if you, the jury, find from the evidence beyond a reasonable doubt that on or about the alleged date the

> Defendant was a resident of this state, that the Defendant had previously been convicted of a reportable offense for which the Defendant must register, *and that the Defendant willfully changed the Defendant's address and failed to provide written notice of the Defendant's new address* in person at the Sheriff's Office no later than three business days after the change of address to the Sheriff's Office in the county with whom the Defendant last registered, then it would be your duty to return a verdict of guilty as to this charge. [1]

(Emphasis added.)

¶ 25 Defendant contends that the italicized language in this instruction contains a misplaced modifier—arguing that the word "willfully" should have been attached to the phrase "failed to provide written notice," rather than the phrase "changed the Defendant's address." Because of this misplaced modifier, Defendant asserts that the mandate failed to clearly inform the jury that he must have *willfully failed to report his change of address* to be guilty (as opposed to simply willfully changing his address), which in effect lessened the State's burden of proof on this element of the offense.

¶ 26 On this point, we are inclined to agree with Defendant that it was likely error for the trial court to misplace the word "willfully" in its final mandate to the jury. This Court recently addressed this precise issue in *State v. Solomon*, 250 N.C. App. 184, 791 S.E.2d 540, 2016 WL 6080846, at *4–*6 (2016) (unpublished). Though this

[1] This language is drawn from Pattern Criminal Instruction 207.75.

opinion is unpublished and thus non-binding, N.C. R. App. P. 30(e)(3) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority."), we nevertheless find its analysis instructive on this issue. The defendant in *Solomon* was similarly convicted of failure to register as a sex offender after the jury was presented with Pattern Criminal Instruction 207.75. *Id*. at *5. On appeal, the defendant likewise argued that the instructions given by the trial court erred "by misplacing the word 'willfully' with regard to the notification element of the charge." *Id*. at *4. We ultimately agreed with the defendant and held that "the pattern instruction does not track the statutory language," explaining that

> The statute clearly requires the State to prove not only that a defendant failed to update his address, but that he willfully failed to do so. The portion of the pattern instruction challenged by Defendant does not track the statutory language verbatim and does not specify whether the adverb "willfully" modifies not only the verb phrase "changed address" but also the verb phrase "failed to provide written notice of the Defendant's new address."

Id. at *5 (citation omitted).

¶ 27 Due to the ambiguous placement of the word "willfully" in the pattern jury instruction, we agree with the *Solomon* Court—the pattern jury instruction here does not properly reflect the language of the statute and was therefore probably erroneous.

B. Prejudice

¶ 28 However, even presuming that it was error for the trial court to misplace the

term "willfully" in its jury instructions, Defendant still cannot demonstrate that this mistake amounted to plain error that would have altered the outcome of his trial. Defendant asserts that the erroneous instruction on willfulness was prejudicial because willfulness was the central contested issue in this case—his primary defense was that he did not know he was required to report a changed address while homeless. We disagree.

¶ 29 First, there was sufficient evidence to allow the jury to reasonably conclude that Defendant's failure to update his registered address was willful. *See Solomon*, 2016 WL 6080846, at *6 (finding no evidence of prejudice where "the State produced evidence that Defendant's failure to report his changed address was willful"). Here, though Defendant initially testified at trial that he did not believe he was required to notify the sheriff of his homelessness, on cross-examination he later admitted that he knew he was required to report any change in address but had failed to do so. Moreover, Deputy Murphy's testimony indicated that he made contact with Defendant by phone in August 2017 and informed him that he must come in to register his change of address, and left similar messages on Defendant's phone in November and December of 2017. Thus, in light of (1) Defendant's admission that he knew he was required to report his changes of address, and (2) Deputy Murphy's testimony regarding his many attempts to contact Defendant, we do not believe that the jury's ultimate determination would have differed if the alleged defect in the jury

instructions had been cured.

¶ 30 Second, any harmful effect of this erroneous instruction was mitigated by the first instruction provided to the jury, which correctly stated the willfulness standard. The impact of an error in jury instructions must be viewed in the context of the instructions as a whole, and a single isolated error is rarely sufficient to support reversal. *See State v. Roache*, 358 N.C. 243, 311, 595 S.E.2d 381, 424 (2004) ("A jury instruction must be evaluated as a whole. If the entire instruction is an accurate statement of the law, one isolated piece that might be considered improper or wrong on its own will not be found sufficient to support reversal."); *see also State v. McWilliams*, 277 N.C. 680, 684–85, 178 S.E.2d 476, 479 (1971) ("A [jury] charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct.").

¶ 31 Here, the first instruction correctly explained that Defendant could only be found guilty if the jury found that "the Defendant willfully failed to provide written notice of a change of address." It was only the second instruction that misplaced the word "willfully." Thus, viewing the jury instructions in their entirety, we do not believe the erroneous placement of the word "willfully" in the second instruction had any probable effect on the jury's ultimate determination of guilt.

IV. Conclusion

¶ 32 Because we do not believe the instructional error had any probable effect on

the jury's ultimate determination of guilt, we hold that Defendant has failed to demonstrate that this error amounted to plain error.

NO PLAIN ERROR.

Judges HAMPSON and CARPENTER concur.

Report per Rule 30(e).