IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-86

No. COA19-1012

Filed 16 March 2021

Carteret County, Nos. 16 CRS 55856; 17 CRS 844

STATE OF NORTH CAROLINA

v.

ROBERT SHEPARD AKA ROBERT SHEPHERD

Appeal by Defendant from Judgment entered 13 November 2018, by Judge Joshua Willey, Jr., in Carteret County Superior Court. Heard in the Court of Appeals 27 January 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for defendant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Robert Shepard aka Robert Shepherd (Defendant) appeals from a Judgment entered upon a jury verdict convicting him of Presenting a False Statement to Procure an Insurance Policy and his pleading guilty to being a Habitual Felon. The Record, including evidence presented at trial, tends to reflect the following:

¶ 2 On 10 April 2017, a Carteret County Grand Jury indicted Defendant for Presenting a False Statement to Procure Benefit of Insurance Policy in violation of N.C. Gen. Stat. § 58-2-161(b)(1) arising from an allegedly fraudulent insurance claim Defendant submitted to Governmental Employees Insurance Company (GEICO). Subsequently, on 11 July 2017, Defendant was also indicted for being a Habitual Felon.

¶ 3 The case came on for trial in Carteret County Superior Court on 13 November 2018. At trial, Christopher Cutrer (Cutrer), a GEICO adjuster, testified that Defendant filed an insurance claim with GEICO on 12 October 2016 (2016 Claim). Defendant's 2016 Claim alleged GEICO's insured, a person named Nora Reels (Reels), ran over Defendant's left foot with her car. During Cutrer's initial claim investigation, Defendant told Cutrer he was hitchhiking on the side of a road when a car, driven by Reels, "backed up and ran over his left foot." Defendant obtained Reels's insurance information. However, he claimed he did not obtain contact information for either Reels or the driver who stopped for him, asserting he did not think the other driver saw the incident. Defendant further reported there were no other witnesses, and the police were not called.

¶ 4 The morning after the alleged accident, Defendant sought medical attention at a local hospital. He had bruising to his left foot but no broken bones. Defendant told

the nurse he had never been in an accident before and had no prior issues with his left foot.

¶ 5 Cutrer testified he observed "red flags" regarding Defendant's 2016 Claim. Cutrer pursued the 2016 Claim further and reviewed a claim database system where he found another claim filed by Defendant in 2014 (2014 Claim) with Allstate Insurance Company (Allstate), which also involved Reels.

¶ 6 Cutrer referred the 2016 Claim case to Kelly Blackmore (Blackmore), a GEICO special investigator who investigates "questionable claims." Blackmore testified she investigated the 2016 Claim to determine what happened and whether Reels and Defendant knew each other. Blackmore started her review of the claim with a database search for claim history. In that search, she found Defendant's 2014 Claim involving Reels. Blackmore further discovered Reels was listed as a contact person and next-of-kin in Defendant's medical records from the 2014 Claim. Blackmore's investigation also found Reels in a list of Defendant's possible relatives and that Defendant and Reels shared "19 addresses, 11 phone numbers, and one shared vehicle."

¶ 7 Blackmore went to Reels's house to interview her and asked Reels if she knew Defendant. Reels told Blackmore she knew of Defendant but only saw him around town. After Defendant cancelled multiple interviews with Blackmore, Defendant finally met with Blackmore. During this meeting, Defendant claimed he was not

related to Reels, and his only relationship with Reels was a long time ago. However, Blackmore's investigation had also uncovered a birth certificate for a child listing Reels as the mother and Defendant as the father.

¶ 8 The State also called the Allstate adjuster, Weeks, to the stand to testify about Defendant's 2014 Claim. Defendant's 2014 Claim with Allstate involved a similar accident where Reels allegedly ran over Defendant's left foot with her car.

¶ 9 The State called Defendant's probation officer, Officer Downey, to testify as to his knowledge of the relationship between Reels and Defendant. Officer Downey explained, "I've supervised [Defendant] for seven months, and then I guess Larry has had him for about a year and a half . . . [Larry is] another probation officer that I work with." Defendant did not object to this statement in open court. Officer Downey explained he knew Reels was Defendant's girlfriend, and when he conducted house visits, he always saw Reels and Defendant together.

¶ 10 On 15 November 2018, the jury found Defendant guilty of Presenting a False Statement to Procure Payment of Insurance Policy. Defendant pled guilty to being a Habitual Felon and was sentenced to 90 to 120 months in prison. Defendant filed written Notice of Appeal on 15 November 2018.

Issue

¶ 11 The sole issue on appeal is whether the trial court committed plain error when it allowed into evidence the statement from Defendant's probation officer, "I guess

Larry has had him for about a year and a half . . . [Larry is] another probation officer that I work with."

Analysis

¶ 12 Defendant argues the trial court erred when it allowed Officer Downey's testimony, "I guess Larry has had him for about a year and a half . . . [Larry is] another probation officer that I work with." Defendant contends this evidence was irrelevant and unfairly prejudicial to him because it did not relate to any issue before the jury. Defendant further submits that had this statement not been allowed at trial, the jury would probably not have found him guilty of Presenting a False Statement to Procure Benefit of Insurance Policy. Defendant concedes he did not preserve this issue for appeal by objecting to the statement at trial.

¶ 13 "In criminal cases, unpreserved issues may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." *State v. Worley*, 268 N.C. App. 300, 303, 836 S.E.2d 278, 282 (2019) (citation and quotation marks omitted). Because Defendant failed to object to this statement at trial, he is only entitled to plain error review. *Id.*

¶ 14 Plain error is error which is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). " '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[.]' " *State v. Massenburg*, 234 N.C. App. 609, 612, 759 S.E.2d 703, 706 (2014) (quoting *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)). "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).

¶ 15 Here, even if we were to assume, without deciding, the trial court's admission of this single statement was otherwise erroneous, in light of the substantial and overwhelming evidence of Defendant's guilt, Defendant failed to establish the jury would probably have reached a different result had the evidence not been admitted. Thus, any such error would not amount to plain error.

¶ 16 Here, the evidence reflects Defendant reported to Cutrer that he had never been in an accident before and, during medical treatment arising from the alleged 2016 incident, claimed he had never suffered any prior injury to his left foot. Both of these statements were contradicted by his 2014 Claim. Moreover, Defendant's 2016 Claim was almost identical to his 2014 Claim. Significantly, both involved Reels running over Defendant's left foot with her vehicle. Perhaps most central to the case, during the 2016 Claim investigation, Defendant maintained he did not know Reels or that he had a past relationship with her. The evidence, however, clearly shows that

Reels and Defendant had an ongoing and close relationship. For example, the evidence tended to show: Reels and Defendant lived at the same house; Reels was Defendant's emergency contact at the hospital; they shared 19 addresses, 11 phone numbers, and a vehicle; and they had a child together.

¶ 17 Therefore, as a result of this substantial and overwhelming amount of evidence of Defendant's guilt and, specifically, his relationship with Reels, even had the trial court excluded the superfluous statement from Officer Downey, we cannot conclude the jury would have probably reached any different result. Thus, Defendant has failed to meet his burden under the plain error standard to demonstrate had the challenged testimony been excluded the jury would have reached a different result. Consequently, the trial court did not commit plain error by failing to exclude the challenged testimony in the absence of an objection by Defendant.

Conclusion

¶ 18 Accordingly, for the foregoing reasons, we conclude there was no plain error and uphold the Judgment entered against Defendant upon the jury's verdict and Defendant's pleading guilty to being a Habitual Felon.

NO PLAIN ERROR.

Judges CARPENTER and JACKSON concur.

Report per Rule 30(e).