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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-159

No. COA20-420

Filed 20 April 2021

Union County, No. 17 CRS 50228

STATE OF NORTH CAROLINA

v.

KRISTY LYNN BROOKS

Appeal by defendant from judgment entered 11 July 2019 by Judge Kevin M. Bridges in Union County Superior Court. Heard in the Court of Appeals 23 February 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Melody R. Hairston, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant.

ARROWOOD, Judge.

¶ 1 Kristy Lynn Brooks (“defendant”) appeals from judgment entered 11 July 2019 following her conviction for felony obstruction of justice. Defendant contends that the trial court erred in its jury instructions on felony obstruction of justice. For the following reasons, we affirm the trial court’s order.

I. Background

¶ 2 On 27 February 2017, a Union County grand jury indicted defendant on a charge of felonious obstruction of justice. The matter came on for trial on 9 July 2019 in Union County Superior Court, the Honorable Kevin M. Bridges presiding. The State’s evidence tended to show as follows.

¶ 3 Defendant and Billy Michael Rape, Jr. (“Father”) are the parents of a daughter born on 8 November 2011. Defendant and Father were involved in a lengthy custody dispute beginning shortly after their daughter was born. A temporary custody order was entered on 10 December 2012 granting primary custody to defendant and visitation to Father. Defendant did not allow visitation between 9 June 2013 and September 2014, but visitation resumed between September 2014 and November 2014.

¶ 4 A permanent custody order was entered on 24 February 2015 awarding primary physical custody to defendant and establishing a visitation schedule. Defendant again refused to allow visitation, and on 2 December 2015 the trial court entered a commitment order for civil contempt based on defendant’s failure to comply with the 24 February custody order. The order included findings that “[f]or more than one year, the [defendant] has willfully refused to allow [Father] to have visitation with their child as ordered in the Feb[ruary] 24, 2015 order[,]” and that in open court, “[defendant] testified that she would continue to refuse said visitation.”

The order required defendant to be taken into custody until she purged herself of contempt, which required her to sign a sworn affidavit that she would comply with the February 2015 custody order. Defendant signed the required affidavit, attesting that she would comply with the visitation order, not interfere with Father's court-ordered visitation schedule, and seek mental health treatment.

¶ 5 The trial court found that defendant had purged herself of contempt, and after defendant's release from jail her daughter was returned to her custody on 6 December 2015. Although Father was scheduled to have visitation on 12 December 2015, defendant did not drop their daughter off. Father filed an emergency custody motion with a hearing set for 31 December 2015, and defendant failed to appear for the hearing. Father was awarded emergency custody at the hearing and additional court dates were set into 2016; defendant failed to appear at any 2016 hearings. Father did not see or have any contact with defendant or their daughter until 30 January 2017.

¶ 6 At the close of the State's evidence, defendant's trial counsel made a motion for a directed verdict and to dismiss the charge, which the trial court denied. Defendant's trial counsel renewed the motion at the close of all evidence, and the trial court denied the renewed motion.

¶ 7 The trial court gave jury instructions on both felony and misdemeanor obstruction of justice. The instruction for felony obstruction of justice was as follows:

STATE V. BROOKS

2021-NCCOA-159

Opinion of the Court

The Defendant has been charged with felony common law obstruction of justice. For you to find the [defendant] guilty of this offense the State must prove three things beyond a reasonable doubt:

First, that the Defendant obstructed justice by signing a notarized Affidavit to purge herself of civil contempt and secure her release from jail in which she agreed to abide by a Court Order with regards to the visitation schedule of her minor child and then failing to return the minor child back to the minor child's father . . . in violation of the order and contrary to her sworn Affidavit. Obstruction of justice consists of any act that prevents, obstructs, impedes or hinders public or legal justice.

Second, that the Defendant acted unlawfully and willfully.

Third, that this offense was committed with deceit and intent to defraud.

Intent is a mental attitude seldom [provable] by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant unlawfully and willfully obstructed justice by signing a notarized Affidavit to purge herself of civil contempt and secure her release from jail in which she agreed to abide by a Court Order with regards to the visitation schedule of her minor child and then failing to return the minor child back to the minor child's father . . . in violation of the order and contrary to her sworn Affidavit, and that the offense was committed with deceit and intent to defraud, it would be your duty to return a verdict of guilty of felony obstruction of justice.

¶ 8 In instructing on misdemeanor obstruction of justice, the trial court noted that the only difference was that the State was not required to prove that the “offense was committed with deceit and intent to defraud.” Defendant did not object to the jury instructions at trial.

¶ 9 The jury found defendant guilty of felonious obstruction of justice. The trial court sentenced defendant to a term of 4 to 14 months imprisonment, suspended for 12 months. The sentence was suspended on the condition that defendant pay court costs, undergo 12 months of supervised probation, pay supervision fees, and abide by regular conditions of probation and special conditions of abiding by all custody and visitation orders, completion of 24 hours of community service within 90 days, and provision of a DNA sample.

¶ 10 On 19 July 2019, defendant filed written notice of appeal.

II. Discussion

¶ 11 Defendant contends that the trial court committed plain error by “not instructing the jury that it had to find that [defendant] had the requisite intent to deceive at the time she signed the affidavit to purge herself of civil contempt,” which defendant argues allowed the jury to convict her of felonious obstruction of justice “if it found that she developed the intent to deceive at any time in the 10-day window between her signing the affidavit and failing to return [her daughter].” We disagree.

¶ 12

An assignment of error in a criminal case that is unpreserved is reviewed for plain error. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). “For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *Id.* at 518, 723 S.E.2d at 334 (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). “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.* (citations omitted). Because plain error is to be “applied cautiously and only in the exceptional case,” the error is generally one that “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

¶ 13

Although defendant asserts that the act serving as the basis for the obstruction charge “was her signing the affidavit to purge civil contempt and secure her release from prison[.]” the indictment indicates a broader basis:

defendant named above unlawfully, willfully, and feloniously did obstruct justice by swearing to and signing a notarized affidavit on December 2, 2015 in order to purge herself of civil contempt in 11 CVD 3817 and secure her release from jail and in the affidavit agreed to abide by the Order of the Court dated February 24, 2015, specifically with regards to the visitation schedule regarding her minor child. Furthermore, the defendant failed to return the minor child back to the minor child’s father . . . on December 11, 2015 in violation of the aforementioned valid court order and contrary to her own sworn affidavit. This

offense was committed with deceit and intent to defraud.

¶ 14 The indictment also provides a date range of offenses between 2 December 2015 and 30 January 2017, which encompasses the date that defendant signed the affidavit as well as the period of time that defendant withheld their daughter from visitation. Evidence was presented at trial to establish that defendant violated the terms of the custody order as alleged in the indictment. Additionally, the jury instructions were consistent with the language of the indictment. Defendant has failed to show that the jury instructions constituted a fundamental error that had any effect on the jury's finding that defendant was guilty. Accordingly, the jury was properly instructed to consider defendant's actions during the time period established by the indictment in connection with the obstruction charge.

¶ 15 Defendant also contends that the State failed to show that defendant had the requisite intent to defraud, specifically that the "State had to show, and the jury had to find, that [defendant] signed the affidavit knowing that she had no intention of following it and doing so in order to deceive the court and get out of jail." "Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred." *State v. Smith*, 211 N.C. 93, 95, 189 S.E. 175, 176 (1937). Additionally, our Supreme Court has considered evidence of a defendant's actions in denying access to their daughter in holding that there was sufficient evidence to

support the defendant's conviction for obstruction of justice. *State v. Ditenhafer*, 373 N.C. 116, 129, 834 S.E.2d 392, 401 (2019). In this case, the State presented sufficient direct and circumstantial evidence for a reasonable juror to infer that defendant had the requisite intent to defraud. Accordingly, the trial court did not err in instructing the jury.

III. Conclusion

¶ 16 For the foregoing reasons, we hold that the trial court did not plainly err in instructing the jury on felonious obstruction of justice, and find no other error at trial.

AFFIRMED.

Judges COLLINS and GORE concur.

Report per Rule 30(e).