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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-686

No. COA21-114

Filed 7 December 2021

Caldwell County, No. 17 CRS 53916, 18 CRS 1529-30

STATE OF NORTH CAROLINA

v.

DUSTY RAY WHISENANT

Appeal by defendant from judgment entered 26 September 2019 by Judge James Morgan in Caldwell County Superior Court. Heard in the Court of Appeals 3 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Jodi L. Regina, for the State.

Sandra Payne Hagood for defendant-appellant.

TYSON, Judge.

¶ 1 Dusty Ray Whisenant ("Defendant") appeals from judgments entered after a jury convicted him of two counts of forgery and two counts of uttering forged paper and pleading guilty to attaining habitual felon status. We find no error at trial, but vacate the judgment and remand for a prior record level re-calculation, sentencing, and for a hearing on attorney fees.

I. Background

¶ 2 Indicted co-conspirator Janna Marie Good was visiting at her friend's home on the evening of 11 December 2017. Good's friend asked Defendant, who was also present at Good's friend's home, to give Good a ride home. Good did not know Defendant, but left with him, believing he was going to drive her home.

¶ 3 Defendant did not drive Good home, instead, he drove to his father's house. Good did not insist on being taken to her home, because she did not want to wake and upset her mother by coming home late at night. Good slept on Defendant's father's couch that night.

¶ 4 On the morning of 12 December 2017, Defendant and Good were getting into Defendant's truck. Defendant said he needed to make some money. Defendant then loaded a dishwasher that was sitting next to his father's driveway into the bed of his truck.

¶ 5 Following several stops, Defendant and Good went to Virginia Hash's house. Hash was eighty-two years old and lived alone. Hash's family and Defendant knew each other. Hash, who had a stroke a few weeks before trial, testified she heard her dog barking on the morning of 12 December 2017. Hash testified she checked to see why her dog was barking and found a man and woman standing inside her kitchen. Hash could not recall what had happened. She did not give anyone permission to sign her checks on her behalf other than her daughter and son-in-law Billy Absher.

¶ 6 Good testified she did not know Hash, but Defendant had stated he knew Hash. Upon arrival at Hash's house, Defendant exited his truck and talked to Hash. It appeared to Good that Hash knew Defendant. Good stayed inside the truck while Hash and Defendant went inside of Hash's house.

¶ 7 Defendant returned to the truck to unload the dishwasher. Good told Defendant she needed to use the restroom. Defendant told her she could use the restroom inside of Hash's house. After Defendant unloaded the dishwasher into the basement of Hash's house, both Defendant and Good went inside Hash's house.

¶ 8 After using the restroom, Good overheard Hash having Defendant fill out a check for the dishwasher as she was leaving Hash's home through the kitchen. Good observed Defendant filling out a check and then seeing Hash sign it. Once inside the truck, Defendant told Good he had the check for the dishwasher and a "couple more." Defendant told Good he did not have any identification, so he was going to make the other checks he had payable to her and she would cash them. Good agreed to this plan.

¶ 9 The check for the dishwasher was numbered 3043, and the blank checks were numbered 3044 and 3045. Defendant signed Hash's signature onto checks 3044 and 3045. Defendant and Good drove through the drive-through of two banks and then to a convenience store. At the banks, Defendant and Good cashed 3044 and 3045. Good gave the money she had obtained from cashing the checks to Defendant. After

the stop at the convenience store, Defendant and Good returned to Hash's house to bring her cigarettes. Defendant then drove Good to her mother's house.

¶ 10 Absher testified he had been Hash's son-in-law for 32 years and held her power of attorney for over 3 years. On 12 December 2017, Absher saw a check had been drawn on Hash's account for approximately $106.00. Absher called Hash to ask about the check, Hash told him she had bought a washing machine and had given Defendant a check to get her some cigarettes.

¶ 11 The next day Absher was notified a second check was presented against Hash's account. He called Hash, who told him she had not written any other checks. Absher and Hash filed a report with the Caldwell County Sheriff's Department and closed her account at Capital Bank.

¶ 12 Absher went to Hash's house, found two checks, numbers 3044 and 3045, were missing from her checkbook. Absher notified the bank of the second missing check, 3045. Capital Bank informed Absher this check had been presented against the account, but the bank had issued a stop payment order. Absher and his wife, Hash's daughter, testified they recognized Hash's signature only on check number 3043.

¶ 13 Absher also testified Hash had purchased a dishwasher, not a washing machine as she had told him, the dishwasher was dirty, and the water supply line to it appeared to have been cut with a knife.

¶ 14 Good and Defendant presented check number 3044 on 12 December 2017 in

the amount of $200.00 to the drive through of Members' Credit Union. The check was made out to Good as payee and Good endorsed the check. The branch manager, Jennifer Young, testified she verified Good was in the passenger seat of Defendant's truck. Young also testified to corroborate the video footage of the drive-through window.

¶ 15 Larry Cheek, the owner of Cheek's Grill & Convenience store testified Good went to the counter of his store and presented check number 3045 in the amount of $200.00 on 12 December 2017. The check was made out to Good as payee and she had endorsed it. Cheek testified he knew Defendant personally and saw him on the camera outside in the truck Good had arrived in.

¶ 16 Defendant cashed check number 3043 in the amount of $106.36 at Capital Bank in the drive through window on 12 December 2017. Defendant presented his photo identification to complete the transaction.

¶ 17 Good was charged with forgery and uttering check numbers 3044 and 3045 and a misdemeanor charge of obtaining property by false pretense. Pursuant to a plea agreement, Good pleaded guilty to one count of felonious forgery. The State dismissed the other forgery charge, both uttering charges, and the obtaining property by false pretense charge. Good was sentenced to a 24-month term suspended and placed on supervised probation. Good's plea agreement also required her to "testify truthfully" when the State tried Defendant. At some time prior to Defendant's trial, Good was

incarcerated for a probation violation and was awaiting a hearing.

¶ 18 Defendant was indicted for two counts of forgery, two counts of uttering forged paper, and attaining habitual felon status. Defendant was convicted of two counts of forgery and uttering forged paper on 26 September 2019. Defendant pleaded guilty to attaining habitual felon status. The trial court consolidated all counts for judgment and sentenced Defendant to an active term of incarceration of 44 to 65 months. Defendant failed to give timely notice of appeal.

II. Jurisdiction

¶ 19 Defendant's petition for writ of certiorari was allowed by this Court 28 August 2020 to review the judgment entered 26 September 2019. This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-1444(g) (2019) and N.C. R. App. P. 21(a).

III. Issues

¶ 20 Defendant argues the trial court committed plain error by allowing the State to bolster Good's testimony, erred by sentencing him as a prior record level V offender, and erred by entering a civil judgment for attorney's fees without providing Defendant with prior notice and an opportunity to be heard.

IV. Good's testimony

¶ 21 Defendant argues the trial court committed plain error by allowing Good's testimony where she read the portion of her plea agreement requiring her to testify

truthfully at trial and allowing the State to ask questions about her truthfulness and believability on direct examination.

A. Standard of Review

¶ 22 Defendant concedes his trial counsel failed to object to the challenged testimony and the issue is not preserved on appeal. Unpreserved issues are reviewed for plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

> [Plain error] is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings[.]

Id. (citations and internal quotation marks omitted).

¶ 23 "[T]o establish plain error [the] defendant must show that a fundamental error occurred at his trial and that the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012) (citations and internal quotation marks omitted).

B. Analysis

¶ 24 The Supreme Court of North Carolina has held "[t]he jury is the lie detector in the courtroom and is the *only proper entity* to perform the ultimate function of every

trial — determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) (emphasis supplied). Following this long-standing rule, this Court has held "[i]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citation omitted).

¶ 25 N.C. Gen. Stat. § 15A-1054(c) (2019) ensures the jury is to be made aware when a state's witness is testifying under a grant of immunity or a plea agreement. *See State v. Morgan*, 60 N.C. App. 614, 617, 299 S.E.2d 823, 826 (1983) ("[P]rovides a series of safeguards to protect against the 'reputed unreliability of witnesses who are receiving *quid pro quo* for their testimony.'"(citation omitted)). N.C. Gen. Stat. § 15A-1054 requires the State to notify the defendant in advance of truthful testimony to be elicited at trial in exchange for a plea agreement or a grant of immunity. In *State v. McCord*, this Court allowed the introduction of a plea agreement and plea transcript into evidence based upon N.C. Gen. Stat. § 1A-1, Rule 401 (2019). *State v. McCord*, 140 N.C. App. 634, 658, 538 S.E.2d 633, 648 (2000). This Court held the elicited evidence was relevant to the jury to determine the codefendant's credibility. *Id.*

¶ 26 Defendant further argues the trial court committed plain error in allowing the State to ask: "[A]re you being truthful with us?" However, this testimony was elicited after Good had explained her plea agreement and how she had violated the terms and conditions of probation she had received under the plea agreement. Good's credibility

had been attacked by the State. *See State v. Covington*, 315 N.C. 352, 357, 338 S.E.2d 310, 314 (1986).

¶ 27 The State can ask questions concerning truthfulness after a witnesses' credibility is attacked. *State v. Chapman*, 359 N.C. 328, 364, 611 S.E.2d 794, 821 (2005). Defendant has failed to show the trial court committed plain error in allowing the State to introduce the evidence of the plea agreement Good had entered into with the State and by allowing the State to examine the truthfulness of Good after her credibility was attacked. Defendant's argument is overruled.

V. Prior Record Level

¶ 28 Defendant argues, and the State concedes, he had a total of 13 prior criminal history points placing him in a record level IV for felony sentencing instead of the incorrect calculation of 14 criminal history points, which had placed him in a record level V for felony sentencing. In light of the State's concession, we vacate Defendant's sentence of 44 to 65 months and remand for resentencing with the proper calculation of 13 prior criminal history points and a record level IV as conceded.

VI. Civil Judgment

¶ 29 Defendant argues, and the State also concedes, the trial court erred by entering a civil judgment for attorney's fees without providing Defendant with notice and opportunity to be heard. Defendant's civil judgment is also vacated and this cause remanded for a noticed hearing to provide Defendant with the opportunity to be heard

on the imposition of attorney's fees as a civil judgment. *See State v. Friend*, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018).

VII. Conclusion

¶ 30 The trial court did not commit plain error by allowing the State to introduce the evidence of the plea agreement Good had entered into with the State, and by allowing the State to question the truthfulness of Good after her credibility was attacked on direct examination for her probation violation.

¶ 31 Defendant's sentence was imposed under an improper calculation of criminal history points, which placed him as a prior record level V. Defendant's sentence is vacated and the case is remanded for resentencing as conceded by the State.

¶ 32 Defendant's civil judgment for fees is vacated and the case is remanded to provide Defendant with notice and an opportunity to be heard on the imposition of a civil judgment for attorney's fees, as also conceded. Defendant's underlying convictions remain undisturbed. *It is so ordered.*

NO ERROR AT TRIAL, JUDGMENT VACATED AND REMANDED FOR HEARING AND RESENTENCING.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).