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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-308

Filed 20 June 2023

Carteret County, Nos. 20CRS51579, 20CRS525

STATE OF NORTH CAROLINA

v.

DESMON EUGENE LOCKLEAR, Defendant.

Appeal by defendant from judgment entered 18 August 2021 by Judge Douglas B. Sasser in Superior Court, Carteret County. Heard in the Court of Appeals 10 January 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Deborah M. Greene, for the State.

Law Offices of Bill Ward & Kirby Smith, P.A., by Kirby H. Smith, III, for defendant-appellant.

STROUD, Chief Judge.

Defendant appeals from a judgment entered upon his conviction of possession of a cellphone by an inmate and of attaining habitual felon status. We conclude that the trial court did not commit plain error by admitting evidence Defendant pled guilty to the charged offense at a Department of Public Safety disciplinary hearing. We also

deny Defendant's petition for writ of *certiorari* regarding his habitual felon status.

I. Background

At the time of the underlying offense, Defendant was incarcerated at the Carteret Correctional Center ("Carteret Correctional"), a minimum-security facility. On 9 June 2020, correctional officers witnessed Defendant enter a dormitory he was not permitted to access.

A. Evidence of Search

Both parties presented evidence, and the facts of this case are best divided into two stages: the underlying search of Defendant and a plea he entered based on contraband found during that search. As to the search, the State's evidence tended to show Sergeant Garver, the "[o]fficer [i]n [c]harge" who witnessed Defendant enter the dormitory, called Defendant into a nearby duty station.¹ Defendant initially attempted to "veer off and go a different direction across the yard" and "just started heading across the facility not paying attention to [the officers'] calls to" Defendant. Sergeant Garver testified he "had to walk out of the office and walk in front of [Defendant] and tell him I need him in my office."

Officer Willis and Officer Coleman were also in the duty station. After calling Defendant in, Sergeant Garver instructed Officer Willis to conduct "a complete search [of Defendant], which is all clothing, items, and person." "Officer Willis began to put

¹ Correctional officers testified the "duty station" is a general-purpose office with "control post[s] and sergeants' offices[.]" and also included the break room area.

on gloves for the search at that time[.]” at which point Defendant “bolted, [and] tried to run past Officer Willis.” Defendant was intercepted by Officers Willis and Coleman. Sergeant Garver then called for assistance. Defendant attempted to flee the duty station a second time, but Officer Parker, responding to Sergeant Garver’s call, was able to intercept Defendant “about 20 feet outside of the door” where Officer Parker “assist[ed] [Defendant] to the ground.”

Officer Willis searched Defendant while he was on the ground. Officer Willis “patted [Defendant] down, and felt something in his pocket.” Officer Willis pulled a pair of shorts Defendant was wearing under his pants “up out of his pants and retrieved [a] cellphone out of” the right pocket of Defendant’s shorts. Officer Willis’s testimony was corroborated by the testimony of Officer Coleman, who witnessed Officer Willis remove a “black cellular telephone” from Defendant’s right side, and the testimony of Sergeant Garver, who saw Officer Willis locate the cellphone in Defendant’s shorts pocket while they were getting Defendant back on his feet. Sergeant Garver testified Officer Willis was patting down Defendant’s “waist and pants area” before handing Sergeant Garver the cellphone. Officer Willis, Officer Coleman, and Sergeant Garver all gave corroborative testimony, even though they were sequestered during trial.² Cellphones are considered contraband at Carteret

² We note Defendant filed a motion to sequester the State’s witnesses on the first day of trial, 16 August 2021. This motion requested the trial court “sequester the witnesses in this case pursuant to N.C.G.S. 15A-1225 and N.C. R. EVID. 615 so that the witnesses will be excluded from the courtroom

Correctional. The State introduced photographs of the cellphone during its presentation of evidence.

Defendant also presented evidence. Defendant offered the testimony of Mr. Houston, another inmate at Carteret Correctional who was incarcerated at the same time as Defendant and who testified Defendant walked through the off-limits dormitory and was stopped by correctional officers. The officers asked Defendant questions; Defendant walked to the duty station; and the officers searched Defendant. Mr. Houston did not see the officers remove anything from Defendant, and after other inmates began congregating to witness the search, correctional officers instructed the crowd to disperse and go back to their dormitories. Mr. Houston also testified he was standing “about a good 25 to 30 feet” away from Defendant during the search of Defendant, and the crowd was “hectic, with all the guys.” During cross-examination, the State elicited testimony from Mr. Houston that he had been convicted of, among other offenses, “fictitious invoke [of] an officer”³ and obstructing justice.

Defendant testified and confirmed he was called over to the duty station and officers patted him down. Defendant heard the officers call for a complete search on the radio, and Defendant became paranoid “because it seemed like there was more

where they cannot hear the testimony of other witnesses.” The trial court granted this motion on the first day of trial.

³ The record is not clear if “fictitious invoke [of] an officer” is meant to include the felony offense of impersonating a law enforcement officer. See N.C. Gen. Stat. § 14-277 (2020).

officers coming in than required for the job.” Defendant also testified he became paranoid because he had consumed K2, a type of “synthetic marijuana,” earlier that day and because of social unrest he witnessed on the news. Defendant further testified he had attempted to run, was apprehended, and was searched, but denied having a cellphone on 9 June 2020.

B. Evidence of Guilty Plea

Based on Defendant’s possession of a cellphone, a disciplinary proceeding was initiated. The State’s evidence included testimony by Investigator Willis,⁴ who testified he performed disciplinary investigations at Carteret Correctional. Investigator Willis was assigned to investigate Defendant’s possession of a cellphone on 9 June 2020, took statements from the officers involved in the search, and was emailed a statement by Defendant from another officer at Bertie Correctional, where Defendant had been transferred following the incident on 9 June 2020. Investigator Willis found the officers’ “statements to be consistent[,]” and afterward created a report of his findings which he forwarded to a disciplinary hearing officer (“DHO”).

Mr. Morton, the Carteret Correctional warden, testified possession of a cellphone is a “high class offense” that automatically warrants a disciplinary hearing by a DHO, who is an “independent investigator,” and “not on the same shift[.]” The DHO completes an investigation; sends his findings to an “independent referring

⁴ Investigator Willis is a different person than Officer Willis.

authority,” often a sergeant or captain-lieutenant; and after the authority reviews the findings, the DHO meets with the offender. After the DHO meets with an offender, the DHO may ask the offender to enter a plea of guilty or not guilty. “[I]n this case, D[efendant] pled guilty on 6/24/20 for possession of [a] cellphone and disobeying an order.” A Department of Public Safety (“DPS”) Disciplinary Report and record of hearing, which documented Defendant’s guilty plea, were admitted into evidence during Mr. Morton’s testimony, and Defendant did not object to the report or Mr. Morton’s testimony.⁵

Defendant also testified an investigation was made into what happened on 9 June 2020 and that he took part in a disciplinary hearing where he pled guilty because he felt he had no other choice; Defendant testified he pled guilty to get out of restrictive housing so he “could go get a job or get in school so [he] could work [his] time down to [his] minimum instead of doing any extra days in prison.” Defendant testified that if an offender pleads guilty at the disciplinary hearing they get a lesser punishment, and if they are found guilty they get a full punishment; therefore Defendant felt incentivized to plead guilty.

C. Procedural History

⁵ At the time Defendant was incarcerated the Department of Public Safety operated prisons in North Carolina through the Division of Adult Correction. As part of a restructuring in the 2021-2023 budget, the Division of Adult Correction was removed from under the Department of Public Safety and established as a separate, cabinet-level agency, the Department of Adult Correction. *See* 2021 N.C. Sess. Laws 180, § 19C.9.(a) *et seq.*

Ultimately, Defendant was indicted for possession of a cellphone or other wireless communication device by an inmate in the custody of the Division of Adult Correction on 17 August 2020. Defendant was also indicted as a habitual felon on 17 August 2020, based upon the possession of a cellphone charge and an additional three felonies unrelated to the events on 9 June 2020.

Defendant was tried 16 August through 18 August 2021, in Superior Court, Carteret County. On 18 August 2021, the jury returned a verdict that Defendant was guilty of possession of a cellphone by an inmate. Defendant then pled guilty to having attained habitual felon status and gave oral notice of appeal. A written judgment was entered on both the possession of a cellphone by an inmate and habitual felon convictions on or about 18 August 2021.

II. Jurisdiction for Issues on Appeal

Defendant presented two issues on appeal. The first arises from the jury trial on the charge of possession of a cellphone or other wireless communication device by an inmate. Defendant gave oral notice of appeal in open court as to this conviction, and we have jurisdiction to review the first issue under North Carolina General Statute § 15A-1444(a). *See* N.C. Gen. Stat. § 15A-1444 (2021).

The second issue arises from the trial court's acceptance of his plea to being a habitual felon after the jury trial on the possession of a cellphone felony charge. Defendant contends he has a right to appeal the acceptance of his guilty plea, but also filed a petition for a writ of *certiorari* with this Court requesting this Court review

the merits of his appeal. Defendant does not have a right to appeal the adjudication of his habitual felon status because Defendant has not alleged any error that falls under North Carolina General Statute § 15A-1444. *See* N.C. Gen. Stat. § 15A-1444(a1)-(a2) (granting a narrow right to appeal from a guilty plea). In our discretion, we deny Defendant’s petition for a writ of *certiorari* and only address his first issue on appeal.

III. Possession of a Cellphone by an Inmate

Defendant contends the trial court committed plain error “by allowing evidence that D[efendant] had pled guilty to possession of a cell phone in a Disciplinary Hearing conducted by the North Carolina Department of Public Safety.” For the reasons below, we disagree.

A. Standard of Review

Defendant has acknowledged he failed to object at trial to evidence regarding his disciplinary hearing plea, so this argument was not preserved at trial. However, as Defendant has “specifically and distinctly” contended the admission of the evidence amounted to plain error, *see* N.C. R. App. P. 10(a)(4), we therefore engage in plain error review:

We now reaffirm our holding in *Odom* and clarify how the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. 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.” See *id.* (citations and quotation marks omitted); see also *Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (stating “that absent the error the jury probably would have reached a different verdict” and concluding that although the evidentiary error affected a fundamental right, viewed in light of the entire record, the error was not plain error). Moreover, because plain error is to be “applied cautiously and only in the exceptional case,” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378, the error will often be 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 (quoting *McCaskill*, 676 F.2d at 1002).

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

B. Admission of Evidence of Guilty Plea

Defendant asserts admitting evidence of the disciplinary hearing guilty plea, including both Mr. Morton’s testimony on the plea and the DPS Disciplinary Report documenting his plea, was plain error because admission of evidence that Defendant pled guilty at the disciplinary hearing allowed the jury to assume he was guilty of possessing a cellphone while incarcerated. Defendant argues the existence of contradictory testimony means the admission of the guilty plea “likely affected the jury’s verdict.” The State argues, “even assuming that the trial court erred in admitting the Disciplinary Report, because the State presented ample other evidence of Defendant’s guilt, Defendant cannot show that, absent the error, the jury probably would have reached a different result.”

“[A]fter examination of the entire record,” *id.*, the assumed error likely did not

impact the jury's verdict because there was plentiful evidence for the jury to find Defendant was guilty of possessing a cellphone as an inmate other than Defendant's plea. The State presented: (1) testimony from Officer Willis, who searched Defendant, that Officer Willis "pulled [Defendant's] black shorts up out of his pants and retrieved the cellphone out of his pocket[;]" (2) testimony by Officer Coleman that he witnessed Officer Willis search Defendant and locate a "black cellular telephone[;]" (3) testimony by Sergeant Garver that he witnessed Officer Willis search Defendant and locate the cellphone; (4) testimony by Investigator Willis that he took statements from Officer Willis and Officer Parker and found "those statements to be consistent[;]" and (5) photographs of the cellphone that were admitted into evidence. Officer Willis, Officer Coleman, and Sergeant Garver all gave corroborative testimony. *See State v. Lloyd*, 354 N.C. 76, 103, 552 S.E.2d 596, 617 (2001) ("Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." (quotation marks omitted)). Furthermore, although Defendant presented evidence he did not possess a cellphone while incarcerated, the jury was free to determine the credibility of Defendant's and the State's evidence on whether Defendant possessed the cellphone. *See State v. McCutcheon*, 281 N.C. App. 149, 153, 867 S.E.2d 572, 577 (2021) ("The jury's role is to . . . assess witness credibility[.]" (quotation marks omitted)). The jury could have reached its verdict that Defendant was "guilty of possession of a mobile telephone by an inmate[.]" (capitalization altered), in the absence of evidence of Defendant's plea, and even in light of

Defendant's contradictory testimony.

For the reasons above, the admission of evidence of Defendant's plea at the DPS disciplinary hearing did not have a "probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. The trial court did not commit plain error.

IV. Conclusion

We conclude the trial court committed no plain error by admitting evidence of Defendant's plea at the DPS disciplinary hearing because, even assuming the evidence was erroneously admitted, Defendant has not shown prejudice as the error did not have a probable impact on the jury's determination of his guilt.

NO PLAIN ERROR.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).