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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-275

Filed 19 February 2025

Wayne County, Nos. 19CRS1990–2009, 21CRS1235–36

STATE OF NORTH CAROLINA

v.

TIMOTHY LEE DAVIS, Defendant.

Appeal by defendant from judgments entered 22 November 2022 by Judge William W. Bland in Wayne County Superior Court. Heard in the Court of Appeals 16 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Charles G. White, for the State-appellee.

Gilda C. Rodriguez for defendant-appellant.

GORE, Judge.

Defendant Timothy Lee Davis appeals the judgments for larceny by an employee and attaining habitual felon status. Defendant argues the trial court erred by determining he waived his right to court appointed counsel for the habitual felon status hearing. Additionally, he argues the trial court erred by admitting the State's exhibits twenty-one and twenty-two, and by allowing certain testimony by a forensic

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accountant. Upon careful review of the record and the briefs, we reverse in part and remand and determine no plain error in part.

I.

Defendant was employed by Best Sand and Gravel, Inc. (“Best”) as a mechanic that maintained Best’s equipment. Defendant’s job included ordering parts for Best’s heavy equipment. The process involved ordering parts from a particular salesman and receiving a purchase order number for each transaction. The salesman would charge the company’s credit card, provide an invoice for the order, and would ship the parts. The company kept records of all the purchase orders and invoices. The salesmen for these orders and one of Best’s managing supervisors noticed defendant was purchasing multiple duplicates of parts and was ordering these more often than necessary for the equipment. A managing supervisor discovered the same additional parts were listed for sale on eBay and were shipped from Kenly or Princeton.

The Sheriff’s Department investigated the issue and discovered the eBay seller accounts were registered to defendant and defendant’s wife and listed his location in Kenly. Best paid a forensic accountant to review the transactions to determine if defendant committed employee fraud. The forensic accountant put together a report that included two spreadsheets listing the dates of the purchase orders and invoices with sales from the two eBay accounts. Defendant resigned from Best after he was interviewed by the investigator. Defendant was later charged and indicted with twenty-one counts of larceny by employee and indicted for having attained habitual

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felon status.

At trial, the State had the two spreadsheets by the forensic accountant admitted and had the forensic accountant testify to how the spreadsheets were prepared. Defendant stipulated to the admission of the spreadsheets, labeled exhibits twenty-one and twenty-two. After initially stipulating to the admission of both exhibits, defendant objected to the forensic accountant's testimony. Outside the jury's presence, defendant argued the exhibits and the accountant's testimony constituted inadmissible lay opinion. After voir dire, defendant agreed to the State limiting the accountant's testimony to describing how the spreadsheets were put together and conceded he had already stipulated to the admission of the spreadsheets. The State continued questioning the accountant and once again questioned the witness about the exhibits in the jury's presence; defendant did not object. On cross-examination, defendant asked the forensic accountant how he compiled the spreadsheets in exhibits twenty-one and twenty-two.

The jury returned guilty verdicts on all twenty-one counts of larceny by employee. The trial court allowed defense counsel to confer with defendant as to how he wanted to proceed with the habitual felon phase of the trial. Defense counsel moved to withdraw as counsel because he could not get defendant to answer how he wanted to proceed. The trial court attempted to elicit direction from defendant and defendant gave various answers from stating he would plead guilty, to stating he would "do the time," to stating that he understood in part the habitual felon charge

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and his right to a trial by jury on the charge, and to claiming his son was the culprit for the charges. Defendant also communicated he wouldn't survive in jail, that he knew where drugs and drug dealers were, and that he wanted to talk with someone to stop the drugs. When asked by the trial court if defendant wanted to keep his attorney for the habitual felon phase, he stated "yes" and "that would be fine if he stays my lawyer to get the sentencing done." When the trial court told defendant his attorney wanted to withdraw, defendant communicated he didn't know if a lawyer would "do [him] any good." Defendant also stated his attorney could assist him but that it was "up to [his attorney]" and that it didn't matter to him.

The trial court told defendant he had a right to an attorney, it told defendant it was unlikely to appoint another attorney if it did allow the motion to withdraw, and it told defendant that having granted the motion to withdraw, "this means you are representing yourself. Do you understand that?" Defendant replied, "Yes. Yes, sir, I guess, sir, yes, sir." The trial court found defendant "waived [his] right to court appointed counsel" because he did "not communicat[e] effectively and [he did not] allow [his] attorney to effectively represent [him]." During the habitual felon trial, defendant requested an attorney multiple times. The jury found defendant had attained the status of habitual felon. Accordingly, defendant was convicted of multiple counts of larceny by employee and of having attained habitual felon status. Defendant was sentenced to four consecutive terms of 97 to 129 months imprisonment. Defendant timely appealed.

II.

Defendant raises the following two issues for our review: (1) whether the trial court erred when it determined defendant waived his right to court-appointed counsel; and (2) whether the trial court erred by allowing the admission of the State's exhibits twenty-one and twenty-two and by allowing certain testimony of the State's forensic accountant into evidence. We consider each issue in turn.

A.

Defendant argues he did not forfeit his right to court-appointed counsel nor waive his right by waiver of conduct. Instead, he argues he wanted to keep his attorney and communicated this desire. Conversely, the State argues defendant either forfeited his right to court-appointed counsel or waived his right to court-appointed counsel through his conduct. "We review de novo a trial court's determination that a defendant has either waived or forfeited the right to counsel." *State v. Simpkins*, 373 N.C. 530, 533 (2020) (cleaned up).

Both the Federal Constitution and our State Constitution guarantee the right to counsel and consider this right "to be fundamental in character." *State v. Harvin*, 382 N.C. 566, 584 (2022). Yet, a defendant also has the right to represent himself and waive the right to counsel. *Simpkins*, 373 N.C. at 534. To ensure a defendant voluntarily and knowingly waives this right, our General Assembly enacted section 15A-1242 that mandates the trial court "conduct a thorough inquiry." *Id.* Specifically, the trial court must ensure that "(1) the defendant was clearly advised

of the right to counsel, including the right to assignment of counsel; (2) the defendant ‘[u]nderstands and appreciates the consequences’ of proceeding without counsel; and (3) the defendant understands what is happening in the proceeding as well as ‘the range of permissible punishments.’” *Id.* (quoting N.C.G.S. § 15A-1242 (2019)). Once the trial court conducts this inquiry, it can be assured that a defendant’s “waiver is knowing, intelligent, and voluntary.” *Harvin*, 382 N.C. at 585.

Our Supreme Court has also recognized another means by which a defendant may relinquish his constitutional right to counsel. A defendant may forfeit the right to counsel through his conduct. *Simpkins*, 373 N.C. at 535.

Forfeiture of counsel is separate from waiver because waiver requires a knowing and intentional relinquishment of a known right whereas forfeiture results in the loss of a right regardless of the defendant’s knowledge thereof and irrespective of whether the defendant intended to relinquish the right. In other words, if a defendant has forfeited his or her right to counsel, then a trial court is not required to determine, pursuant to N.C.G.S. § 15A-1242, that the defendant knowingly, understandingly, and voluntarily waived such right before requiring him to proceed *pro se*.

Harvin, 382 N.C. at 586 (cleaned up). A defendant may forfeit his right to counsel through “aggressive, profane, or threatening behavior,” or when his “display of conduct . . . constitutes a [s]erious obstruction of the proceedings.” *Id.* at 587. Examples of a “serious obstruction of the proceedings” include: “refus[al] to obtain counsel after multiple opportunities to do so, refus[al] to say whether he or she wishes to proceed with counsel, refus[al] to participate in the proceedings, or [the] continual hir[ing] and fir[ing of] counsel and significantly delay[ing] the proceedings.” *Id.*

In the present case, defendant argues his conduct did not rise to the level of egregious conduct, as described in *Simpkins* and *Harvin*, to amount to forfeiture. We agree.

In *Harvins*, our Supreme Court determined the defendant's behavior did not result in forfeiture. In support, it reasoned that the "defendant did not use any profanity, make any threats, or act in an assaultive, aggressive, or discourteous manner. . . . [nor] show any contempt for the trial court's authority[.]" 382 N.C. at 589. Rather, the defendant's relief of multiple court-appointed attorneys through the attorneys' own volition or defendant's request "did not demonstrate the type or level of obstructive and dilatory behavior" that would constitute a "serious obstruction of the proceedings." *Id.* at 592.

Likewise, in *Simpkins*, our Supreme Court determined the defendant "did not engage in such serious misconduct as to warrant forfeiture of the right to counsel." 373 N.C. at 539. The defendant made untimely objections, spoke out of turn, argued with the trial court, insisted he have counsel that was "not paid for by the State of North Carolina," and challenged the trial court's jurisdiction. *Id.* The *Simpkins* Court stated that while the defendant's conduct was "probably highly frustrating, [it] was not so egregious that it frustrated the purposes of the right to counsel itself." *Id.* The *Simpkins* Court further stated that because the conduct did not rise to the level of egregious conduct necessary to trigger forfeiture, the trial court was required to conduct the mandated section 15A-1242 inquiry "prior to appointing standby counsel

and permitting [the defendant] to proceed pro se.” *Id.* at 541.

Both *Simpkins* and *Harvins* referred to *State v. Montgomery*, *State v. Brown*, and *State v. Joiner*, as examples of cases that warranted findings of forfeiture. In *Montgomery*, the Court pointed to the defendant using profanity to disrupt the court proceedings, “multiple findings of contempt,” and assaulting his attorney in court to constitute forfeiture of the right to counsel. *Simpkins*, 373 N.C. at 536 (citing *Montgomery*, 138 N.C. App. 521 (2000)).

In *Brown*, the defendant “refused to answer whether he wanted assistance of counsel at three different pretrial hearings, repeatedly and vigorously objected to the trial court’s authority to proceed, and utilized the hiring and firing of counsel to delay the trial.” *Simpkins*, 373 N.C. at 537 (citing *Brown*, 239 N.C. App. 510 (2015) (cleaned up)). In *Joiner*, the defendant “offered evasive and bizarre answers” and “refused to participate by refusing to acknowledge understanding, answering in contradictory ways, refusing to answer at all, yelling obscenities and being otherwise extremely disruptive.” *Simpkins*, 373 N.C. at 537 (citing *Joiner*, 237 N.C. App. 513 (2014)) (internal quotation marks and citations omitted).

In the present case, we determine defendant’s conduct did not rise to the level of egregious conduct sufficient to warrant forfeiture of the right to counsel. The trial court determined defendant “waived [his] right to court appointed counsel” because he did “not communicat[e] effectively and [he did not] allow [his] attorney to effectively represent [him]. While it was likely very frustrating and “circular,” as the

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trial court stated, to navigate whether defendant wanted counsel and how he wanted to proceed on the habitual felon status charge, defendant did not argue, nor act belligerent, and spoke respectfully to the trial court. Further, defendant also affirmatively acknowledged he did want to retain counsel when asked directly by the court. Accordingly, we now consider whether defendant waived his right to counsel through waiver by conduct.

Defendant argues he did not waive his right to counsel through his conduct. Whereas the State argues that defendant's refusal to "voice his preference" to either his attorney or the trial court even after the trial court warned it was unlikely to appoint new counsel if it granted the attorney's motion to withdraw amounted to waiver by conduct. We have previously determined that a "hybrid situation combin[ing] elements of waiver and forfeiture" through "waiver by conduct" may result in defendant relinquishing his right to counsel. *State v. Blakeney*, 245 N.C. App. 452, 464 (2016). A defendant's conduct may be "less severe" than forfeiture in the case of waiver by conduct. *Id.* at 465. In such situations, the trial court must warn the defendant "about the consequences of his conduct, including the risks of proceeding *pro se*" and it must "conduct the inquiry mandated by [section] 15A-1242, in order to ensure that [the] defendant underst[ands] the implications of appearing *pro se*." *Id.* at 465–66.

We have carefully reviewed the arguments presented on this topic and reviewed the transcript in detail to determine de novo whether defendant waived his

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right to counsel through this hybrid situation. We determine that while defendant's conduct was evasive and nonresponsive at times, the trial court did not fully comply with section 15A-1242. The trial court did not warn defendant of the risks of proceeding pro se. The only warning we see in the record is the trial court's warning it was unlikely to appoint new counsel if it granted defense counsel's motion to withdraw, and the trial court asked defendant if he understood he would be representing himself. Additionally, defendant indicated he did want to keep his lawyer two different times when asked directly by the trial court. Only when the trial court would state that the attorney was requesting to withdraw would defendant state, "that's fine," and "whatever he wants." Given the lower threshold for waiver in this hybrid situation, the trial court's truncated explanations of defendant's right to counsel dispersed throughout the transcript does not fulfill its obligation to conduct the inquiry within section 15A-1242. Therefore, defendant is entitled to a new trial on whether he attained habitual felon status.

B.

Defendant also argues the trial court plainly erred by allowing the State to admit two exhibits and by allowing certain testimony by the State's forensic accountant witness. We disagree.

Defendant concedes he failed to properly object to the admission of the exhibits and the portion of the forensic accountant's testimony related to these exhibits. Accordingly, defendant seeks plain error review of the admission of the exhibits and

testimony. “Under the plain error rule, errors or defects affecting substantial rights may be addressed even though they were not brought to the attention of the trial court.” *State v. Gregory*, 342 N.C. 580, 584 (1996). We review under the plain error rule when the defendant “specifically and distinctly contend[s] [the action questioned] amount[s] to plain error” on appeal. N.C.R. App. P. 10(a)(4).

Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to appellant of a fair trial.

Gregory, 342 N.C. at 586.

Defendant argues the forensic accountant’s testimony about the State’s exhibits twenty-one and twenty-two “constituted inadmissible lay opinion” that amounted to plain error. Defendant refers to Rule 701 of the Rules of Evidence that states lay opinion testimony “is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. R. Evid. 701. Defendant also argues that the witness gave an opinion and was not properly admitted as an expert witness. However, we do not see anywhere in the record that the witness gave an opinion about the exhibits apart from on voir dire, which of course was not brought before the jury. It appears defendant’s argument is that the information contained in the exhibits (spreadsheets compiled with information admitted in other exhibits) and the witness’s testimony about the information was in

and of itself an opinion. Upon review, we discern no plain error.

Defendant stipulated to the admission of the challenged exhibits and conceded to that fact in the record. Defendant also agreed to the State asking the witness about how he compiled the two spreadsheet exhibits and sought similar testimony on cross-examination. Exhibits twenty-one and twenty-two are simply evidence compiled into spreadsheets based upon similar dates that existed in other admitted exhibits. The witness only testified as to how the evidence was compiled and how his office matched the similar dates. The jury was free to determine whether the evidence supported a guilty verdict. Because the witness did not give his opinion on the compiled evidence and because the evidence was admitted in other exhibits, the trial court did not plainly err by admitting exhibits twenty-one and twenty-two nor did it plainly err by allowing the limited testimony of the forensic accountant.

III.

For the foregoing reasons, we determine no plain error in part, and we reverse in part and remand for a new trial on the habitual felon charge.

REVERSED IN PART AND REMANDED, NO PLAIN ERROR IN PART.

Judges HAMPSON and FREEMAN concur.

Report per Rule 30(e).