No. COA-19-620 27-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Lincoln
	)	
IRA VERNARD WILSON	)	

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DEFENDANT-APPELLANT'S BRIEF

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DEFENDANT-APPELLANT'S BRIEF

****

ISSUE PRESENTED

DID THE TRIAL COURT COMMIT PLAIN ERROR WHEN IT FAILED TO INSTRUCT THE JURY ON THE CHARGE OF TRAFFICKING BY DELIVERY?

STATEMENT OF THE CASE

On August 6, 2018, a Lincoln County grand jury indicted Ira Vernard Wilson for trafficking in cocaine by possession, transportation, sale, and delivery. (Rpp. 4-6)

Mr. Wilson was tried at the January 31, 2019 criminal session of Lincoln County Superior Court before Superior Court Judge Carla N. Archie. (Rp. 1) Mr. Wilson was found guilty of all four charges. (Rpp. 24-27) Judge Archie consolidated the trafficking in cocaine by transportation and by possession into

one judgment and the trafficking in cocaine by sale and by delivery into another judgment. Judge Archie sentenced Mr. Wilson to 35-51 months incarceration on both judgments, and ordered the sentences to run consecutively. (Rpp. 24-27)

Written notice of appeal was given on February 7, 2019. (Rp. 28)

STATEMENT OF THE FACTS

On April 26, 2018, Lonnie Leonard was working undercover for the Lincoln County Sherriff's Department. He contacted Mr. Wilson and arranged to buy an ounce of cocaine from him. (Tpp. 14-15, 73) The two arranged to meet at the Dollar General Store on Gastonia Highway. (Tp. 18) Deputy Leonard was outfitted with a camera which recorded sound and image. (Tp. 17)

Deputy Leonard waited 47 minutes for Mr. Wilson. (Tp. 25, 31) During that time the two men exchanged phone calls. After 47 minutes Deputy Leonard's camera stopped recording. (Tp. 31) After the camera stopped recording, Mr. Wilson called Deputy Leonard and told him that his car had broken down in Gaston County. (Tpp. 18-19) Deputy Leonard drove to Gaston County and picked up Mr. Wilson. (Tp. 19) Deputy Leonard waited until they entered Lincoln County, then asked Mr. Wilson for the cocaine, and

gave him money. (Tp. 20) The police executed a traffic stop and arrested Mr. Wilson. (Tp. 21)

SBI analyst Melissa Brill tested the substance and identified it as cocaine. (Tp. 51)

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

The ground for appellate review is N.C. Gen. Stat. § 7A-27(b) (2018).

STANDARD OF REVIEW

The question whether a charge is dismissed as a matter of law when the trial court fails to instruct the jury on the charge is a question of law. *See*, *State v. Williams*, 318 N.C. 624, 350 S.E.2d 353 (1986); *State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000). This Court reviews questions of law *de novo*. Under a *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)(citing *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)).

The question whether the trial court commits plain error by instructing the jury on a crime for which the defendant was not indicted is reviewed for plain error. *Williams*, 318 N.C. at 629, 350 S.E.2d at 356; *Bowen*, 139 N.C. App. at 26, 533 S.E.2d at 253. In a plain error review, this Court determines

whether the error amounts to a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done or that the error is so grave that it amounts to the denial of a fundamental right of the accused. *Bowen*, 139 N.C. App. at 23, 533 S.E.2d at 251-52.

ARGUMENT

I. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO INSTRUCT THE JURY ON THE CHARGE OF TRAFFICKING BY DELIVERY.

A. Introduction

Mr. Wilson was indicted for four offenses: trafficking in cocaine by possession, trafficking in cocaine by transportation, trafficking in cocaine by sale, and trafficking in cocaine by delivery. However, the judge instructed the jury on three offenses: trafficking in cocaine by possession, trafficking in cocaine by transportation, and trafficking in cocaine by sale or delivery. By combining the third and fourth offenses (sale and delivery) into one offense that could be committed in alternate ways (by sale or delivery), the trial court dismissed the fourth offense as a matter of law. Accordingly, the jury's verdict on the fourth offense is a nullity and the matter must be remanded for resentencing.

Because defense counsel did not object to the trial court's failure to instruct on the trafficking in cocaine by delivery, this issue must be reviewed for plain error. As this Court and our Supreme Court repeatedly have held,

the failure to instruct the jury on a charge is a basic violation of due process which constitutes plain error.

B. Relevant facts

Mr. Wilson was indicted for four separate trafficking offenses, including trafficking by sale and trafficking by delivery. (Rpp. 4-6) At the close of all the evidence, defense counsel moved to dismiss all charges. (Tp. 84) The trial court denied the motion. (Tp. 84)

During the charge conference, the trial judge stated it was his intention to instruct on "260.23, drug trafficking by sale or delivery[.]" (Tp. 86) There was no objection.

The jury was instructed, without objection, as follows:

> The defendant has also been charged with trafficking in cocaine, which is the unlawful sale or delivery of 28 grams or more but less than 200 grams of cocaine. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt. First, that the defendant knowingly sold or delivered cocaine to Deputy Leonard. And second, that the amount of cocaine which the defendant sold or delivered was 28 grams or more but less than 200 grams. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant - - the defendant knowingly sold or delivered cocaine to Detective or Deputy Lonnie Leonard and that the amount which he sold or delivered was 28 grams or more but less than 200 grams, it would be your duty to return a verdict of guilty.

(Tpp. 93-94; Rpp. 14-15)

The jury returned four guilty verdicts, including verdicts finding Mr. Wilson guilty of trafficking by sale and trafficking by delivery. (Rpp. 20-21)

Judgment and commitment was entered against Mr. Wilson for four counts of trafficking. The convictions for trafficking by sale and trafficking by delivery were consolidated into a single sentence of 35-51 months incarceration. (Rpp. 24-27)

C. The trial court's failure to instruct the jury on the charge of trafficking by delivery constituted a dismissal of the charge as a matter of law and amounted to plain error.

Although Mr. Wilson was indicted for trafficking by sale and trafficking by delivery, the trial court did not instruct the jury on both offenses. Instead, the trial court instructed the jury on the single crime of "trafficking by sale or delivery," thereby treating sale or delivery as alternative ways of committing a single offense.[1] (Tpp. 93-94; Rpp. 14-15) Specifically, the trial court instructed the jury that in order to find Mr. Wilson guilty, it had to find beyond a reasonable doubt that he "knowingly sold or delivered cocaine[.]" (Tpp. 93-94;

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[1] In North Carolina, trafficking by sale and trafficking by delivery are separate and distinct offenses for which the defendant may be charged, convicted and sentenced separately. *State v. Perry*, 316 N.C. 87, 103-04, 340 S.E.2d 450, 461 (1986). Conversely, possession with intent to sell or deliver is a single offense. While a defendant may be indicted and tried for possession with intent to sell or deliver a controlled substance, the defendant may not be convicted and sentenced for both. *State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990).

Rpp. 14-15) The trial court's failure to instruct Mr. Wilson's jury on trafficking by delivery has two effects on the case. First, it constitutes a dismissal of the indictment as a matter of law, in effect granting defendant's motion to dismiss. Second, it constitutes plain error.

As Mr. Wilson was indicted for the separate and distinct crimes of trafficking by sale and trafficking by delivery, the trial court's failure to instruct the jury on the elements of the trafficking by delivery constituted a dismissal of that charge as a matter of law. "It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986); *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986); *State v. Faircloth*, 297 N.C. 100, 253 S.E.2d 890 (1979); *State v. Cooper*, 275 N.C. 283, 267 S.E.2d 266 (1969); *State v. Lawrence*, 264 N.C. 220, 141 S.E.2d 264 (1965); *State v. Law*, 227 N.C. 103, 40 S.E.2d 699 (1946); *State v. Miller*, 137 N.C. App. 450, 458, 528 S.E.2d 626, 631 (2000).

A "trial court's failure to instruct the jury on [the charged crime is] the equivalent of a dismissal of that crime and all lesser included offenses." *Williams*, 318 N.C. at 625, 350 S.E.2d at 354. "Having brought defendant to trial, the State was bound to prove all the material elements of that charge . . . . The failure of the trial court to submit the case to the jury pursuant to the

crimes charged in the indictment amounted to a dismissal of that charge and all lesser offenses. . . ." *State v. Bowen*, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000)(citing *Williams*, 318 N.C. at 628, 350 S.E.2d at 356). It "is a basic violation of due process" to fail to instruct the jury on a charge. *State v. Walker*, No. COA17-357, 2017 N.C. App. LEXIS 916, *6 (N.C. Court of Appeals, Sep. 6, 2017)(*citing Bowen*, 139 N.C. App. at 26, 533 S.E.2d at 254 (*quoting Williams*, 318 N.C. at 629, 350 S.E.2d at 356)).[2]

The trial court's failure to instruct Mr. Wilson's jury on trafficking by delivery not only constitutes a dismissal of the charge as a matter of law, it rises to the level of plain error. Plain error is an error "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). In both *Walker* and *Bowen*, the trial court failed to instruct the jury on a charged offense. In *Walker*, 2017 N.C. App. LEXIS at *4, the trial court failed to instruct the jury on the charge of felony hit and run. In *Bowen*, 139 N.C. App. at 26, 533 S.E.2d at 253, the trial court failed to instruct the jury on a charge of indecent liberties. In both cases this Court held that the omission of the instruction was plain error requiring the conviction to be vacated. *Bowen*, 139 N.C. App. at 26, 533 S.E.2d at 253-54; *Walker*, 2017 N.C. App. LEXIS at *7. As this Court explained, "'the

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[2] The *Walker* decision is unpublished. Accordingly, a copy of the opinion is attached.

fairness and justice upon which our judicial system is based' requires this result." *Walker*, 2017 N.C. App. LEXIS at *7 (citing *Bowen*, 139 N.C. App. at 26, 533 S.E.2d at 253-54). For that reason, the verdict and the judgment entered against Mr. Wilson for trafficking by delivery are a nullity and the judgment must be vacated.

D. Mr. Wilson was prejudiced by the trial court's entry of judgment and commitment against him for a crime for which the trial court failed to instruct the jury.

Although the trial court failed to instruct the jury on the charge of trafficking by delivery, the trial court accepted the jury's verdict of guilty on the charge. (Tp. 93-94, 101; Rpp. 14-15) The trial judge then consolidated the trafficking by delivery with the trafficking by sale into a single judgment and commitment. (Rpp. 24-27) Therefore, Mr. Wilson is serving a single period of incarceration for both offenses. However, the consolidation of the trafficking by delivery with another offense does not negate the prejudice from the error. This Court has held that two convictions obtained on the same day can be used for different purposes, such that one conviction can be used to calculate the defendant's prior record level and one conviction can be used to enhance a defendant to habitual felon status. *State v. Williams*, 215 N.C. App. 412, 715 S.E.2d 553 (2011). Accordingly, if Mr. Wilson faces subsequent criminal prosecution, both of these offenses can be used against him in the same prosecution.

E. Harmless error analysis is not applicable to this issue.

The Appellant presents this argument in the event that the Appellee asserts that the error is harmless. The Appellee may assert that Mr. Wilson is not entitled to relief for an array of reasons, including: (1) the evidence presented at trial supports his conviction on the charge; (2) the jury was aware of the elements of the offense because the jury instruction which was given (trafficking by sale or delivery) contained the elements of trafficking by delivery, but merely erroneously instructed the jury in the disjunctive; (3) no one at trial, including the defendant, noted the error; (4) defense counsel did not object to the error at trial; and/or, (5) the indictments are consistent with the verdicts. This Court has addressed and rejected those arguments and held that harmless error analysis does not apply when a trial court fails to instruct on a charge. *Bowen*, 139 N.C. App. at 26, 533 S.E.2d at 253.

In *Bowen*, the trial court failed to instruct the jury on one of the five indecent liberties charges. *Id*. On appeal the Appellant argued that by omitting the instruction, the trial court committed plain error and the conviction should be vacated. *Id*. The Appellee advanced the arguments listed above as reasons why the error did not require relief. This Court concluded that the "interest of justice" compelled a different result. *Id*. This Court noted that the Appellee's arguments were "completely contrary" to the Supreme Court's decision in *Williams*. *Id*. This Court concluded that if "all that should

be necessary for us to affirm [a] conviction" is for the indictments and verdict sheets to match, that would stand "completely against the fairness and justice upon which our judicial system is based." *Id.* 139 N.C. App. at 26, 533 S.E.2d at 254. Because the acceptance of a jury verdict and entry of judgment against a defendant for an offense for which the jury was not instructed is "more than erroneous; [it is] a basic violation of due process . . . ." *id.* (quoting *Williams*, 318 N.C. at 629, 350 S.E.2d at 356), this Court held that harmless error analysis is inapplicable.

F. The conviction for trafficking by delivery must be vacated and the matter remanded for a resentencing hearing.

It is well-settled that "[u]nder a consolidated sentence, if one of the counts upon which the conviction is based is set aside, the entire judgment must be remanded for resentencing even if the remaining counts would have been sufficient, standing alone, to justify the consolidated sentence." *Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 18, 657 S.E.2d 673, 684 (2008). Additionally, this Court has addressed the issue of consolidated sentences in the context of the trial court's failure to instruct the jury on a charged offense and has held that a new sentencing hearing is required.

Moreover, this Court recently addressed the specific question whether a remand for a resentencing is required when the trial court fails to instruct on an offense which it then consolidates with another offense for sentencing and

held that a resentencing is required. In *State v. Davidson*, No. COA16-272, 2016 N.C. App. LEXIS 1077 * 6 (N.C. Court of Appeals, Nov. 1, 2016), the trial court failed to instruct the jury on one of two counts of felony larceny.[3] The jury returned a verdict of guilty on that charge and it was consolidated for judgment and commitment with two other offenses. *Id*. 2016 N.C. App. LEXIS at *8. On appeal, the Appellee argued that "because the convictions were consolidated and Defendant was sentenced in the presumptive range, Defendant cannot show that a new sentencing hearing would likely result in a different outcome, and a remand is not required in the case." *Id*. This Court concluded that "in neither *Williams* nor *Bowden* did the Court require the defendants to show that a new sentencing hearing was likely to result in a different outcome before remanding for resentencing on the convictions that had been consolidated with the convictions overturned on appeal." *Id*. Accordingly, such a showing is not required, and the case must be remanded for a resentencing.

G. Conclusion

Mr. Wilson was convicted and sentenced for a crime for which the jury was not instructed. The trial court's failure to instruct the jury on the charged offense amounts to a dismissal as a matter of law of the offense. Accepting a

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[3] The *Davidson* decision is unpublished. Accordingly, a copy of the opinion is attached.

verdict and entering judgment against a defendant for an offense for which the jury was not instructed is a basic violation of due process and constitutes plain error. Accordingly, the judgment for trafficking in cocaine by delivery must be vacated and Mr. Wilson's case remanded for a resentencing.

CONCLUSION

For the foregoing reasons and authorities, Mr. Wilson requests that the judgment for trafficking in cocaine by delivery be vacated and the case remanded for a resentencing.

Respectfully submitted this the 7th day of August, 2019.

(Electronically Filed)
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CERTIFICATE OF COMPLIANCE WITH N.C. R. APP. P. 28(J)(2)

Undersigned counsel hereby certifies that this Brief is in compliance with N.C. R. App. P. 28(j)(2) in that it is printed in 13-point Century Schoolbook font and contains no more than 8,750 words in the body of the Brief, footnotes and citations included, as indicated by the word-processing program used to prepare the Brief.

This the 7th day of August, 2019.

(Electronically Filed)
Katherine Jane Allen
Assistant Appellate Defender

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Brief has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the foregoing Brief has been served upon Ms. Kathy McCraw, Assistant Attorney General, North Carolina Department of Justice, by email to kmccraw@ncdoj.gov.

This the 7th day of August, 2019.

(Electronically Filed)
Katherine Jane Allen
Assistant Appellate Defender

No. COA-19-620 27-B DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
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APPENDIX

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App. 5-7 *State v. Davidson*, No. COA16-272, 2016 N.C. App. LEXIS 1077 (N.C. Court of Appeals, Nov. 1, 2016) (unpublished)

State v. Walker

Court of Appeals of North Carolina

September 6, 2017, Heard in the Court of Appeals; November 7, 2017, Filed

No. COA17-357

Reporter
2017 N.C. App. LEXIS 916 *; 806 S.E.2d 77

STATE OF NORTH CAROLINA v. PIERRE JAMAR WALKER, Defendant.

Notice: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

Prior History: **[*1]** Brunswick County, No. 13CRS1660-64, 13CRS701341.

State v. Walker, 794 S.E.2d 926, 2016 N.C. App. LEXIS 1276 (N.C. Ct. App., Dec. 20, 2016)

Disposition: VACATED IN PART; REMANDED FOR RESENTENCING AND CORRECTION OF CLERICAL ERROR.

Core Terms

trial court, hit and run, civil judgment, prior record, sentencing, notice, attorney's fees, convictions, habitual, costs, impaired driving, plain error, opportunity to be heard, driving, fail to instruct, vacate, clerical error, final amount, impaired, instruct

Counsel: Attorney General Joshua H. Stein, by Special Deputy Attorney General Hal F. Askins, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for Defendant-Appellant.

Judges: MURPHY, Judge. Judges CALABRIA and ZACHARY concur.

Opinion by: MURPHY

Opinion

Appeal by Defendant from judgments entered 24 November 2014 by Judge Gale M. Adams in Brunswick County Superior Court. Heard in the Court of Appeals 6 September 2017.

MURPHY, Judge.

Pierre Jamar Walker ("Defendant") appeals from his convictions for second-degree murder, hit and run leaving the scene of an accident causing property damage ("hit and run"), habitual impaired driving, driving while license revoked ("DWLR"), careless and reckless driving, and exceeding the posted speed limit. He argues the trial court erred by: (1) entering judgment on the hit and run charge, even though the trial court failed to instruct the jury on the charge; (2) imposing costs and attorney's fees as a civil judgment without giving Defendant notice and opportunity to be heard as to the final amount to be imposed; and (3) indicating Defendant had 13 **[*2]** prior record points on the judgment and commitment for habitual impaired driving, even though two of the convictions assigned points were also used to support the conviction for habitual impaired driving. We agree, and vacate both the jury verdict on the hit and run charge and the civil judgment. We remand for resentencing on the charges that were consolidated with the hit and run charge, and for correction of the clerical error.

Background

On 22 February 2013, Defendant was involved in two separate vehicle crashes, one causing the death of another driver, which resulted in his being charged with the following motor vehicle related offenses: second-degree murder, habitual impaired driving, felony death by motor vehicle, multiple counts of DWLR, two counts of reckless driving, exceeding the posted speed limit, fictitious registration, failure to reduce speed to avoid an

accident, hit and run, failure to report an accident, and the infraction of failing to maintain lane control.

Defendant's trial began on 17 November 2014. The trial court granted the State's motion to join all of the motor vehicle related offenses as being based on a series of acts or transactions. At the close of its evidence, **[*3]** the State voluntarily dismissed one count of DWLR, failure to reduce speed to avoid an accident, one count of reckless driving, failure to report an accident, and the infraction of failing to maintain lane control. The State made it clear it was proceeding on the hit and run charge in case 13CRS701341. At the charge conference, the hit and run charge was only indirectly discussed. The trial court then neglected to instruct the jury on any elements of the hit and run charge. Nonetheless, the jury was given a verdict sheet on the hit and run charge, in addition to verdict sheets on all remaining charges. The jury returned a guilty verdict on all charges, including the hit and run charge in case 13CRS701341.

The trial court found Defendant was a prior record level IV offender, with 13 record points, for the purposes of sentencing, and determined Defendant should be sentenced in the aggravated range for the felony convictions.[1] The trial court arrested judgment on the felony death by vehicle conviction, and sentenced Defendant as follows: 270 to 336 months for second-degree murder; 31 to 47 months for habitual impaired driving, to run consecutively at the expiration of the sentence for second-degree **[*4]** murder; and 75 days to run after the expiration of the sentences for the remaining offenses, which were consolidated for sentencing.

The trial court ordered that costs and attorney's fees would be entered as a civil judgment, and, as Defendant's counsel had not yet totaled the hours on the case, Defendant's counsel could submit his fee application later. Defendant gave oral notice of appeal in open court, timely appealing his criminal convictions. The trial court entered the final fee application and judgment on 8 December 2014. Defendant did not file timely written notice of appeal for our Court to enable review of the civil judgment; however, in our discretion, our Court granted writ of certiorari to review the costs and attorney's fees order and the civil judgment entered thereon.

[1] Prior to trial, Defendant admitted the existence of aggravating factors 12 and 12a, concerning his pretrial release and prior probation violations. Defendant also stipulated to aggravating factor 8, that he "knowingly created a great risk of death to more than one person by a means of a weapon or device which would normally be hazardous to the lives of more than one person."

Analysis

I. Failure to Instruct the Jury on the Hit and Run Charge

As the State concedes, Defendant correctly argues the trial court dismissed the charge of hit and run as a matter of law by failing to instruct the jury on the charge. Nevertheless, Defendant did not preserve this issue on appeal by objecting to the trial court's failure to provide an instruction on the hit and run charge at trial. *See* N.C.R. App. P. 10(a)(1) (2014) **[*5]** ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Defendant did not attempt to cure this deficiency by specifically and distinctly alleging plain error on appeal. *See* *State v. Gregory, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996)* ("In limited situations, this Court may elect to review such unpreserved issues for plain error, if specifically and distinctly contended to amount to plain error in accordance with [North Carolina Rule of Appellate Procedure] 10(c)(4)."). However, North Carolina Rule of Appellate Procedure Rule 2 provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2 (2014).

Although Defendant failed to specifically and distinctly allege plain error on appeal, he argued the issue fully and established **[*6]** conclusively that the failure to instruct the jury on a charge amounts to a fundamental error, and cited to cases wherein our Court previously held this same error amounts to plain error. As the failure to instruct the jury on a charge is a basic violation of due process, *State v. Bowen, 139 N.C. App. 18, 26, 533 S.E.2d 248, 254 (2000)* (quoting *State v. Williams, 318 N.C. 624, 629, 350 S.E.2d 353, 356 (1986)*, we

exercise our discretion to invoke North Carolina Rule of Appellate Procedure 2 to suspend Rule 10(c)(4), and review whether the trial court's failure to instruct on the hit and run charge amounted to plain error.

"[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Plain error arises when the error 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) (quotation omitted). "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).

In State v. Bowen, 139 N.C. App. 18, 533 S.E.2d 248 (2000), we vacated a trial court's judgment on an indecent liberties charge where the trial court did not instruct on the charge, holding the "trial court effectively dismissed the indictment of the same" by failing to instruct on the charge. Id. at 26, 533 S.E.2d at 254. *Bowen* relied on State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986), where the trial court instructed the jury on a theory **[*7]** of rape based on age of the victim, even though the indictment charged for first-degree forcible rape. Id. at 628, 250 S.E.2d at 356. In *Williams*, our Supreme Court held that the "failure of the trial court to submit the case to the jury pursuant to the crime charged in the indictment amounted to a dismissal of that charge and all lesser included offenses." Id. at 628, 250 S.E.2d at 356.

The instant case cannot be distinguished from the holding in *Bowen*. The trial court committed plain error in failing to instruct the jury on the hit and run charge, effectively dismissing the charge. "[T]he fairness and justice upon which our judicial system is based" requires this result. *See* Bowen, 139 N.C. App. at 26, 533 S.E.2d at 253-54 (explaining *Williams* requires our Court to vacate a conviction when the trial court did not instruct on the charge, even under plain error review).

We vacate the jury verdict on the hit and run charge in case 13CRS701341, and remand for resentencing on the charges that were consolidated with it.

II. Costs and Attorney's Fees as a Civil Judgment

Defendant argues the trial court erred by imposing costs and attorney's fees as a civil judgment without giving him adequate notice and opportunity to be heard on the final amount of attorney's fees and costs to be imposed.

Rule 3 of the North Carolina Rules of Appellate Procedure requires **[*8]** that an appeal from a civil judgment be made in writing. N.C.R. App. P. 3(a) (2014); *see also* State v. Smith, 188 N.C. App. 842, 845-46, 656 S.E.2d 695, 697 (2008) (explaining the failure to comply with Rule 3(a) in appealing a civil judgment is a jurisdictional defect that warrants dismissal of an appeal). Defendant did not file a written notice of appeal, and, therefore, his appeal of the civil judgment was subject to dismissal. However, on 14 September 2017, our Court granted Defendant's petition for writ of certiorari pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure, and we consider the merits of Defendant's appeal of the civil judgment. We agree with Defendant that the trial court erred by failing to give him adequate notice and opportunity to be heard on the final amount of attorney's fees and costs imposed by the trial court in the civil judgment entered against him.

Section 7A-455(b) of the North Carolina General Statutes "allows the court to enter a civil judgment against a convicted indigent for attorney's fees and costs." State v. Stafford, 45 N.C. App. 297, 300, 262 S.E.2d 695, 697 (1980). "Our courts have upheld the validity of such a judgment provided that the defendant is given notice of the hearing held in reference thereto and an opportunity to be heard" on the amount of attorney's fees and costs. State v. Washington, 51 N.C. App. 458, 459, 276 S.E.2d 470, 471 (1981) (citing State v. Crews, 284 N.C. 427, 201 S.E.2d 840 (1974); State v. Stafford, 45 N.C. App. 297, 262 S.E.2d 695 (1980)); *see also* State v. Webb, 358 N.C. 92, 101-02, 591 S.E.2d 505, 513 (2004) (explaining this rule also applies to costs besides attorney's fees that are entered as a civil judgment **[*9]** under § 7A-455(b)). If a defendant does not receive notice and an opportunity to be heard, our Supreme Court has vacated such judgments "without prejudice to the State's right to apply for a judgment in accordance with [§] 7A-455 after due notice to defendant and a hearing." Stafford, 45 N.C. App. at 300, 262 S.E.2d at 697 (quotation omitted).

Here, there is no indication in the record that Defendant had notice as to the civil judgment's final amount, or an opportunity to be heard on it. Thus, we vacate the civil judgment without prejudice to the State's right to apply for a judgment in accordance with N.C.G.S. § 7A-455 after Defendant receives due notice and an opportunity

to be heard.

III. Prior Record Points on the Habitual Impaired Driving Conviction

Defendant argues the trial court incorrectly assigned and counted record points in calculating his sentence level for his conviction of habitual impaired driving. The State concedes the calculation was incorrect, and we agree.

We review the determination of an offender's prior record level de novo. *State v. Bohler, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009)* (citation omitted). "It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level **[*10]** to be preserved for appellate review." *Id. at 633, 681 S.E.2d at 804* (citations omitted).

A trial court may not use driving while impaired convictions that are used to support the offense of habitual impaired driving to be used thereafter to increase the sentencing level of a defendant. *State v. Gentry, 135 N.C. App. 107, 111, 519 S.E.2d 68, 70-71 (1999)*.

Here, Defendant had three driving while impaired convictions that were used to support the habitual impaired driving conviction. These same convictions were then used to increase the prior record level worksheet from 11 to 13 points. Only two of these points resulted from the inclusion of the three driving while impaired convictions because two of the driving while impaired convictions occurred on the same day. Under *Gentry*, only 11 points should have been used to determine Defendant's record level. *See Gentry, 135 N.C. App. at 111, 519 S.E.2d at 70-71* (explaining that the convictions used to support the offense of habitual impaired cannot be used thereafter to increase the sentencing level of a defendant). However, this error is not prejudicial, because Defendant will remain a prior record level IV even if the trial court corrects the prior record points calculation. *See N.C.G.S. § 15A-1340.14* (2014) (stating prior record level IV offenders have "[a]t least 10, but not more than 13 points").

As the **[*11]** sentence imposed will not be affected by a recalculation of the prior record points, a new sentencing hearing is unnecessary, and we treat this error as a clerical error. *See State v. Everette, 237 N.C. App. 35, 43, 764 S.E.2d 634, 639 (2014)* (holding an error in calculating prior record points that does not affect the prior record level should be treated as a clerical error and remanded to the trial court for correction of the error). We remand for correction of this clerical error.

Conclusion

For the reasons stated above, the trial court erred by entering judgment on the hit and run charge, imposing costs and attorney's fees as a civil judgment without giving Defendant notice and opportunity to be heard as to the final amount to be imposed, and indicating on the judgment for habitual impaired driving that Defendant had 13 prior record points when only 11 points should have been used to determine Defendant's record level.

VACATED IN PART; REMANDED FOR RESENTENCING AND CORRECTION OF CLERICAL ERROR.

Judges CALABRIA and ZACHARY concur.

Report per Rule 30(e).

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State v. Davidson

Court of Appeals of North Carolina

October 24, 2016, Heard in the Court of Appeals; November 1, 2016, Filed

No. COA16-272

Reporter
2016 N.C. App. LEXIS 1077 *; 250 N.C. App. 306; 792 S.E.2d 191; 2016 WL 6440603

STATE OF NORTH CAROLINA v. TOMMY DAVIDSON

Notice: THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE SOUTH EASTERN REPORTER.

PUBLISHED IN TABLE FORMAT IN THE NORTH CAROLINA COURT OF APPEALS REPORTS.

Prior History: [*1] Macon County, Nos. 14 CRS 50638, 50730, 238.

Disposition: NO ERROR IN PART, VACATED AND REMANDED FOR RESENTENCING IN 14 CRS 50638.

Core Terms

felony, trial court, stolen goods, convictions, larceny, breaking and entering, break-in, jewelry, felony possession, plain error, sentenced, instruct, counts, trial court's failure, instruct a jury, larceny charge, consolidated, vacated

Counsel: Attorney General Roy Cooper, by Special Deputy Attorney General Olga Vysotskaya, for the State.

Michael E. Casterline for defendant-appellant.

Judges: TYSON, Judge. Judges STROUD and INMAN concur.

Opinion by: TYSON

Opinion

Appeal by defendant from judgments entered 14 September 2015 by Judge Nathaniel J. Poovey in Macon County Superior Court. Heard in the Court of Appeals 24 October 2016.

TYSON, Judge.

Tommy Davidson ("Defendant") appeals from judgments entered upon his convictions for two counts of felony breaking and entering, felony larceny, felony possession of stolen goods, and attaining habitual felon status. We find no error in part, vacate in part, and remand.

I. Background

A Macon County sheriff's deputy was called to investigate a break-in at the Nelson residence in Franklin on 23 May 2014. Donald Nelson and his wife had returned home from a morning walk to find their back door had been kicked in. A camera, camera accessories, a small amount of money, and some jewelry had been taken. On 3 June 2014, a break-in was reported at the Greene residence in Franklin. Janet Greene and her husband had been **[*2]** out of town for a couple of days and returned home to find their kitchen door had also been kicked in. Mrs. Greene reported numerous pieces of jewelry valued at more than $20,000 missing.

The detective assigned to the case used a computer-generated online database of pawnshops to check for matching descriptions of jewelry against the list provided by Mrs. Greene. On 5 June 2014, the detective discovered that Destiny Swenson, a person previously known to law enforcement, had sold an expensive bracelet matching Mrs. Greene's description to Smoky Mountain Jewelers. The detective visited Smoky Mountain Jewelers and took the bracelet into evidence. Mrs. Greene later identified the bracelet as belonging to her.

A warrant for arrest warrant was issued for Ms. Swenson. The detective questioned Ms. Swenson in the

county detention center on 9 June 2014. Ms. Swenson told the detective that she had been invited to Teresa Corpening's house a few days earlier to buy some jewelry from a man known as "TJ." Ms. Swenson stated TJ, whom she identified as Defendant in court, had a bag full of jewelry, which he assured her was not stolen. Ms. Swenson bought a pair of earrings, and Defendant gave her the **[*3]** bracelet she later sold to Smoky Mountain Jewelers.

The detective next contacted Ms. Corpening, who told him Defendant came to her house with a bag full of jewelry on 3 June 2014 and asked her help to sell it. Ms. Corpening provided the detective with a phone number for Defendant's girlfriend, Victoria Minnihan.

On 11 June 2014, the detective called Ms. Minnihan, who acknowledged that Defendant was her roommate. Detectives went to Ms. Minnihan's home and apprehended Defendant. During questioning, police learned that Defendant had two gold necklaces in his pocket. Defendant was arrested. Ms. Greene later identified one of the necklaces recovered from Defendant as belonging to her.

Detectives obtained a search warrant for Ms. Minnihan's house. They discovered numerous pieces of jewelry located in Defendant's bedroom, a number of which Ms. Greene later identified as belonging to her. Police also found earrings and a camera in the bedroom that were later identified by the Nelsons as belonging to them. Defendant was charged with two counts of felony breaking and entering, two counts of felony larceny, two counts of felony possession of stolen goods, misdemeanor possession of stolen goods, **[*4]** and attaining habitual felon status.

Prior to the start of Defendant's trial on 9 September 2015, the State dismissed one count of felony possession of stolen goods. The transcript reveals the State also voluntarily dismissed another charge of felony possession of stolen goods, but the indictment is not included in the record before this Court.

At the close of all evidence, the State dismissed the misdemeanor possession of stolen goods charge related to Defendant's possession of Mrs. Greene's gold necklace. The charges submitted for the jury's deliberation in the non-habitual phase of the trial were felony breaking and entering and felony larceny in 14 CRS 50638, relating to the Greene break-in, and felony breaking and entering, felony larceny, and felony possession of stolen goods in 14 CRS 50730, relating to the Nelson break-in.

The trial court instructed the jury that Defendant had been charged with two counts of felony breaking and entering: one each against alleged victims, Mr. Donald Nelson and Ms. Janet Greene. The judge informed the jury he would give a single instruction on the elements of that offense, but that the jury was to consider the charges separately during deliberations. **[*5]** He then instructed on those offenses. Next, the trial court instructed on the offense of felony larceny "as it relates to the alleged victim, Donald Nelson." Finally, the trial court instructed the jury on the offense of felony possession of stolen goods as it "relates to the alleged victim, Donald Nelson."

The jury found Defendant guilty of all five remaining offenses. At the habitual felon phase, the jury found Defendant guilty of attaining habitual felon status. The trial court consolidated the two counts remaining in 14 CRS 50638 and sentenced Defendant in the presumptive range to 20 to 33 months imprisonment for those convictions. In 14 CRS 50730, the court arrested judgment on the felony larceny conviction and consolidated the two remaining convictions for judgment. The court sentenced Defendant to a consecutive term of 128 to 166 months imprisonment in 14 CRS 50730. Defendant gave written notice of appeal on 16 September 2015.

II. Issue

Defendant argues the trial court erred in failing to instruct the jury on the necessary elements for the felony larceny charge as it related to the Greene break-in.

III. Standard of Review

Defendant failed to object to the trial court's failure to **[*6]** provide an instruction to the jury on the felony larceny charge related to the Greene break-in. We review his arguments for plain error. *See* N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless 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."); *see also State v. Goss, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007)*, *cert. denied*, *555 U.S. 835, 129 S. Ct. 59, 172 L. Ed. 2d 58 (2008)*.

Unpreserved issues are reviewed for plain error "when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996)*.

Plain error arises when the error is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012)* (quoting *State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)*). "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)*.

IV. Analysis

The State concedes the trial court's failure to instruct the jury on this charge amounted to a dismissal of the charge under this Court's binding case law, *State v. Bowen, 139 N.C. App. 18, 533 S.E.2d 248 (2000)*. In *Bowen*, the defendant argued the **[*7]** trial court committed plain error in failing to instruct the jury on the necessary elements for one of the five indecent liberties charges against him. *Id. at 26, 533 S.E.2d at 253*. This Court agreed and rejected the State's argument that the trial court's failure to instruct was harmless error. *Id.* The other four indecent liberties charges for which the trial court in *Bowen* did provide instruction contained the same elements as the fifth indecent liberties charge. *Id. at 26, 533 S.E.2d at 253-54*. Relying on our Supreme Court's decision in *State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986)*, this Court in *Bowen* vacated the trial court's judgment on the fifth indecent liberties charge, and held "by *not* instructing the jury on case number 97 CRS 6341, the trial court effectively dismissed the indictment of the same." *Bowen, 139 N.C. App. at 26, 533 S.E.2d at 254*.

The relevant facts here closely parallel those in *Bowen* and compel the same result. The trial court instructed the jury on the offense of felony larceny "as it relates to the alleged victim, Donald Nelson." As in *Bowen*, Defendant failed to object to the trial court's failure to provide an instruction for the second offense. Despite the fact that both felony larceny charges contained the same elements, the trial court committed plain error in failing to instruct the jury on the **[*8]** felony larceny charge related to the Greene break-in. The State concedes the trial court's failure to instruct on the second felony larceny charge amounted to a dismissal of that charge, and as such, the trial court's judgment in 14 CRS 50638 must be vacated. *Id.*

We also note the trial court's judgment in 14 CRS 50638 was entered upon consolidated convictions of felony larceny and felony breaking and entering. The State contends that, because the convictions were consolidated and Defendant was sentenced in the presumptive range, Defendant cannot show that a new sentencing hearing would likely result in a different outcome, and a remand is not required in this case. However, in neither *Williams* nor *Bowen* did the Court require the defendants to show that a new sentencing hearing was likely to result in a different outcome before remanding for resentencing on the convictions that had been consolidated with convictions overturned on appeal. *See Williams, 318 N.C. at 632, 350 S.E.2d at 358*; *Bowen, 139 N.C. App. at 33, 533 S.E.2d at 257*. The State fails to show that such a showing is required of Defendant in this case.

V. Conclusion

Defendant does not argue that the trial court erred in entering judgment in case numbers 14 CRS 50730 and 14 CRS 238. We find no error in the judgment **[*9]** entered on the convictions under those case numbers.

The trial court's judgment in 14 CRS 50638 is vacated and the cause remanded for a new sentencing hearing on the felony breaking and entering conviction under that case number.

NO ERROR IN PART, VACATED AND REMANDED FOR RESENTENCING IN 14 CRS 50638.

Judges STROUD and INMAN concur.

Report per Rule 30(e).

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