

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-715

Filed: 18 August 2020

Mecklenburg County, Nos. 17 CRS 234118-119, 234122-123, 032613

STATE OF NORTH CAROLINA

v.

MITCHELL ANDREW TUCKER, Defendant.

Appeal by defendant from judgments entered 30 May 2018 by Judge Jesse B. Caldwell III in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Bethany A. Burgon, for the State.*

*Guy J. Loranger for defendant-appellant.*

YOUNG, Judge.

Where the evidence, taken in the light most favorable to the State, did not permit the jury to infer that defendant knew of the terms of the protective order, the trial court erred in denying defendant's motion to dismiss. Where the evidence did not permit the jury to find that defendant knew of a protective order, it did not permit the jury to find defendant guilty of breaking and entering in violation of a protective order, and the trial court committed plain error in instructing the jury on that theory of guilt. We reverse.

I. Factual and Procedural Background

STATE V. TUCKER

*Opinion of the Court*

Mitchell Andrew Tucker (defendant), a 61-year-old homeless man, met Deanna Pasquarella (Pasquarella), also homeless, in August of 2016. They stayed together in a tent for some time, but in October of 2016, defendant assaulted Pasquarella and threatened her with a knife, after which she moved out of his tent. This incident went unreported. By June of 2017, Pasquarella had turned her life around and was living in an apartment and working at a job. Pasquarella still saw defendant occasionally, and he would periodically spend the night.

In August of 2017, however, defendant again assaulted Pasquarella. This time, police were involved, and defendant was arrested. Pasquarella also filed for and received an *ex parte* domestic violence protective order (the first DVPO) against defendant. This order expired on 6 September 2017. Defendant was served with the first DVPO on 28 August 2017, while defendant was in jail. Defendant was also served with a notice of hearing to be held on 6 September 2017, at which time it would be determined if another DVPO would be entered. Defendant failed to attend the hearing, and on 6 September 2017, a year-long domestic violence protective order (the second DVPO) was entered against defendant. Notice of the second DVPO was placed in the mail on 7 September 2017 and sent to defendant's known address, the Mecklenburg County Jail. Defendant was not residing at the jail when notice was mailed there.

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*Opinion of the Court*

On the morning of 7 September 2017, defendant went to Pasquarella's home. Pasquarella, on seeing defendant through the peephole, fled to a closet and called police. While on the phone, Pasquarella heard defendant break into her apartment. Defendant dragged Pasquarella through the apartment and threatened her with a knife. At this point, police officers entered the apartment and heard defendant exclaim "I'm going to kill you." Officers separated defendant from Pasquarella and restrained defendant.

The Mecklenburg County Grand Jury indicted defendant for violating a civil DVPO while in possession of a deadly weapon, felonious breaking or entering, assault with a deadly weapon, and assault on a female. The Grand Jury subsequently also indicted defendant for attaining the status of an habitual breaking and entering felon. At trial, at the close of the State's evidence and again at the close of all the evidence, defendant moved to dismiss the charges against him. In addition to general motions to dismiss, defendant specifically alleged that the State had failed to prove that defendant had knowledge of the second DVPO. The trial court denied these motions.

The jury returned verdicts finding defendant guilty of violating a protective order while in possession of a deadly weapon, felonious breaking or entering in violation of the second DVPO, assault with a deadly weapon, and assault on a female. Defendant pleaded guilty to the habitual felon charge. The trial court entered