

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-925

Filed: 5 May 2015

Pitt County, Nos. 13 CRS 2383-85, 13 CRS 54359, 13 CRS 54365, 13 CRS 54367

STATE OF NORTH CAROLINA,

v.

LINWOOD EARL DUFFIE, Defendant.

Appeal by defendant from judgments entered 21 November 2013 by Judge Robert H. Hobgood in Pitt County Superior Court. Heard in the Court of Appeals 7 January 2015.

Roy Cooper, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State.

Paul F. Herzog for defendant-appellant.

DAVIS, Judge.

Linwood Earl Duffie (“Defendant”) appeals from judgments entered upon jury verdicts finding him guilty of three counts of common law robbery, three counts of conspiracy to commit robbery with a dangerous weapon, and attaining habitual felon status. On appeal, Defendant contends that the trial court erred in (1) admitting a videotaped interview of Kumetrius Friason (“Friason”), Defendant’s co-perpetrator; (2) its instruction to the jury defining the term “firearm”; and (3) sentencing him to consecutive sentences based on a misapprehension of N.C. Gen. Stat. § 14-7.6. After

careful review, we conclude that Defendant received a fair trial free from prejudicial error but remand for resentencing.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 22 April 2013, Defendant drove Friason, his girlfriend's 16 year-old son, to Emerald City Internet Café ("Emerald City"), which featured online sweepstakes games in which players were eligible to win cash prizes. While Defendant went inside and played games, Friason waited in Defendant's car. After some time, Friason went inside Emerald City with a bandana covering his face and demanded that the cashier, Zapora Washington ("Washington"), "give [him] the money." As Friason was emptying the cash register, Washington noticed that he was holding a gun by his side. Friason put the money in a bag and exited the café. Defendant then ran out the door of the café, telling Washington that he was going to go find the person who had robbed the store. Defendant drove to Hopkins Apartments to pick up Friason who was waiting there with the money from the robbery. Friason kept "a little bit" of the money, and Defendant "got the rest."

Six days later on 28 April 2013, Defendant drove Friason to a Family Dollar store in Winterville, North Carolina. Defendant stayed in his car while Friason entered the store, told the two employees on duty that "this [is] a robbery," pointed a gun, and said "give me your money." Friason took money from the cash register and

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from one of the employees' wallets. Friason then told the employees to "lay down on the floor and don't even look up. Don't say a word. . . . if you move, I'll come back and I'll shoot both of you." Friason ran out of the store, and Defendant picked him up in the parking lot of a nearby gas station. Defendant and Friason "split" the "thousand or two" dollars from the Family Dollar store robbery.

On 30 April 2013, Defendant and Friason committed a third robbery at a Trade Mart convenience store in Greenville, North Carolina. Defendant parked his car behind a nearby Outback Steakhouse, and Friason exited the vehicle and entered the Trade Mart. He covered his face with a bandana and approached the two cashiers. Friason "really didn't say nothing, [he] just had the gun pointed towards them and they gave [him] the money." Friason obtained approximately \$1,000.00 from the Trade Mart and "split it" with Defendant. Defendant then drove Friason back to Friason's house.

On 21 May 2013, law enforcement officers apprehended Defendant and Friason after receiving information from Martin Lichty ("Lichty"), a witness who observed Defendant's vehicle parked near a Dollar General store in Beaufort County. Lichty noticed that the license plate on Defendant's vehicle was obscured by a black rag, which he thought was "suspicious," and that the driver of the vehicle had "shot across the street" in the same direction as a person who was "dressed in all black" and proceeding on foot. Shortly thereafter, Lichty saw the vehicle leaving a car wash. He

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noticed that there were now two occupants in the vehicle and the rag that had previously covered the license plate had been removed. Lichty dialed 911 and gave the dispatcher the tag number and a description of the vehicle. A resulting investigation led law enforcement officers to Defendant, who was arrested at the Carriage House Apartments complex later that day.

On 14 October 2013, a Pitt County grand jury returned bills of indictment charging Defendant with three counts of robbery with a dangerous weapon, three counts of conspiracy to commit robbery with a dangerous weapon, and having attained the status of an habitual felon. The indictments also alleged two statutory aggravating factors: (1) that Defendant “induced Kumetrius Friason to participate in the commission of the offense or occupied a position of leadership or dominance of Kumetrius Friason”; and (2) that Defendant “took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense.”

A jury trial was held before the Honorable Robert H. Hobgood beginning on 18 November 2013. At the close of the State’s evidence, the trial court reduced the three counts of robbery with a dangerous weapon to common law robbery but denied Defendant’s motion to dismiss or reduce the counts of conspiracy to commit robbery with a dangerous weapon. The jury found Defendant guilty of all charges, including attaining the status of an habitual felon, and also found that for each offense the State had proven the existence of an aggravating factor — that Defendant had

induced Friason to participate in the commission of the offense or occupied a position of leadership or dominance over Friason — beyond a reasonable doubt. The trial court entered judgment on the jury’s verdicts and sentenced Defendant as an habitual felon to three consecutive sentences of 150 to 192 months imprisonment for each of the common law robbery offenses. The trial court consolidated the three conspiracy to commit robbery with a dangerous weapon offenses and imposed a concurrent sentence of 50 to 72 months. Defendant gave oral notice of appeal in open court.

Analysis

Defendant’s brief addresses the following three issues: (1) the admission of a videotaped interview of Friason by law enforcement officers; (2) the trial court’s instruction to the jury defining the term “firearm”; and (3) the trial court’s interpretation of N.C. Gen. Stat. § 14-7.6 as mandating the imposition of consecutive terms of imprisonment when sentencing an habitual felon.¹ We address each of these arguments in turn.

I. Admission of Videotaped Interview

Defendant first argues on appeal that the admission of a videotaped interview between law enforcement officers and Friason constituted plain error because some

¹ In the “Questions Presented” section of his appellate brief, Defendant raised the additional issue of whether the trial court erred by denying his motion to dismiss the three counts of conspiracy to commit robbery with a dangerous weapon. However, Defendant failed to include any substantive argument addressing this issue in the remainder of his brief. Accordingly, this issue is deemed abandoned on appeal. See N.C.R. App. P. 28(b)(6) (explaining that any issue “not presented in a party’s brief, or in support of which no reason or argument is stated, will be taken as abandoned”).

portions of the video that were “highly inflammatory” to Defendant were not “muted” or referenced with specificity in the trial court’s curative instruction to the jury. Defendant asserts that the officers questioning Friason repeatedly attacked Defendant’s character during the interview by referring to him in derogatory terms, calling him — among other things — a “coward” and “a piece of crap” who was “trying to set [Friason] up to take the fall.”

Defendant concedes that his trial counsel only objected once during the presentation of the video to the jury — an objection which was sustained by the trial court and followed by a curative instruction in which the court instructed the jury to disregard the words “career criminal” and “habitual” that had been used to describe Defendant. As such, Defendant requests that we review the admission of the remainder of the videotaped interview for plain error. The plain error doctrine “is to be applied cautiously and only in the exceptional case” and requires a defendant to demonstrate that the asserted error “had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

A. Rule 403 Argument

Defendant’s primary argument concerning the admission of the video is that its probative value was substantially outweighed by the danger of unfair prejudice to him such that the trial court should have excluded the video under Rule 403 of the

North Carolina Rules of Evidence. Pursuant to Rule 403, a trial court may exclude relevant evidence if it determines that the probative value of such evidence “is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C.R. Evid. 403.

However, it is well established that plain error review is inapplicable to issues that “fall within the realm of the trial court’s discretion,” which include a trial court’s determination as to the admissibility of evidence based on the Rule 403 balancing test. *State v. Cunningham*, 188 N.C. App. 832, 837, 656 S.E.2d 697, 700 (2008) (citation and quotation marks omitted). For this reason, Defendant’s Rule 403 argument concerning the admission of the video is overruled. *See id.* (refusing to review under plain error standard defendant’s argument relating to trial court’s application of Rule 403).

B. Admission for Corroborative Purposes

Defendant also contends that the statements contained in the video did not corroborate Friason’s trial testimony and, therefore, constituted inadmissible hearsay that “injected fundamental unfairness into [Defendant’s] trial.” Because, unlike his argument based on Rule 403, this contention does not involve a purely discretionary ruling by the trial court, plain error review is appropriate.

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The prior consistent statements of a witness may be offered at trial for corroborative, nonhearsay purposes. *State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 740-41 (2009). “Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.” *State v. Lloyd*, 354 N.C. 76, 103, 552 S.E.2d 596, 617 (2001) (citation and quotation marks omitted). “In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness’s testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony.” *Id.* (citation omitted). The trial court “has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes.” *State v. Bell*, 159 N.C. App. 151, 155, 584 S.E.2d 298, 301 (2003) (citation and quotation marks omitted), *cert. denied*, 358 N.C. 733, 601 S.E.2d 863 (2004).

Defendant claims that while Friason’s statements in the videotaped interview suggested that Defendant had influence over him and induced him to commit the robberies, these implications were absent from his trial testimony. Consequently, he asserts, the prior statements were “contradictory” to Friason’s testimony at trial and were “not admissible under the guise that [the statements] tended to add weight or credibility to his trial testimony.”

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Our Supreme Court has explained that “prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness’ in-court testimony.” *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992). As such, when a prior statement substantially strengthens or confirms in-court testimony, “it is not rendered incompetent by the fact that there is some variation. Such variations affect only the weight of the evidence which is for the jury to determine.” *Lloyd*, 354 N.C. at 104, 552 S.E.2d at 617 (citations and quotation marks omitted).

Here, Friason’s statements during the interview established a timeline of the robberies, an account of how they were committed, and Friason’s and Defendant’s respective roles in the commission of the crimes — topics that were all covered in his testimony at trial. While the statements Friason made in his interview did, in fact, contain the additional suggestion that he likely would not have committed the robberies absent Defendant’s involvement, the statements made during the interview did not contradict his trial testimony and, indeed, his accounts of the robberies in both contexts were substantially similar. Both during his interview and at trial, Friason consistently acknowledged that going to the various stores was his idea, that Defendant transported them to each location, and that he and Defendant split the proceeds of the robberies. Accordingly, we cannot conclude that the trial court

committed error — much less plain error — in admitting the videotape for corroborative purposes.²

II. Jury Instruction Defining “Firearm”

Defendant next argues that the trial court erred in defining the term “firearm” in its jury instructions. Both at trial and in his videotaped interview, Friason referred to the weapon he carried during the robberies as a “BB gun” or a “fake gun.” In response to a question from the jury as to “how the law defines firearm in regards to the conspiracy charge,” the trial court instructed the jury that a firearm “is a weapon that when fired, that the projectile fired therefrom can cause death or serious bodily injury to a human being if the projectile strikes and enters a vital part of the human body.”

Defendant acknowledges that his trial counsel failed to object to this instruction and that as a result, he is entitled only to plain error review on appeal as to this issue. As noted above, under the plain error standard, Defendant bears the burden of demonstrating to this Court that the instructional error “had a probable

² Defendant also argues that Friason’s statements in the interview were the only evidence of the aggravating factor that Defendant “took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense” and therefore contradicted his trial testimony. Contrary to the contentions made in Defendant’s brief, however, this aggravating factor was not even submitted to the jury for determination. Rather, the only aggravating factor actually submitted to the jury was whether Defendant “induced Kumetrius Friason to participate in the commission of the offense or occupied a position of leadership or dominance of Kumetrius Friason.” As such, Defendant cannot show that the admission of such evidence prejudiced him. *See State v. Simpson*, ___ N.C. App. ___, ___, 748 S.E.2d 756, 760 (2013) (explaining that defendant must establish prejudice in order to show plain error).

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impact on the jury’s finding that the defendant was guilty.” *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (citation and quotation marks omitted).

Defendant contends that the trial court plainly erred in giving this instruction because (1) “Friason testified, without contradiction, that he used a BB gun in all of the cases for which [Defendant] was on trial”; and (2) the General Assembly has recognized a distinction between firearms and BB guns. However, we need not determine the propriety of the trial court’s definitional instruction because even assuming, without deciding, that the instruction was erroneous, Defendant has failed to show sufficient prejudice to warrant a finding of plain error.

Here, Defendant was convicted on the charge of *conspiracy* to commit robbery with a dangerous weapon — not the charge of robbery with a dangerous weapon itself. “[C]riminal conspiracy is an agreement between two or more persons to do an unlawful act [and] no overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.” *State v. Bindyke*, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975). Notably, Defendant does not argue on appeal that the instruction was erroneous on the theory that the evidence only supported a finding of the lesser-included offense of conspiracy to commit common law robbery. Indeed, as noted above, Defendant has abandoned on appeal his contention that the trial court erred in denying his motion to dismiss the charges of conspiracy to commit robbery with a

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dangerous weapon. Rather, he appears to be contending that the instruction was misleading solely because of Friason's testimony that he used a BB gun or a "fake gun" to actually commit the robberies.

However, proof that a dangerous weapon was actually used to commit the robberies was not required to establish that Defendant and Friason *conspired* to commit the robberies with a dangerous weapon. *See id.* at 616, 220 S.E.2d at 526 ("The conspiracy is the crime and not its execution."). While a determination of whether the instrument used was, in fact, a firearm capable of endangering life would have been necessary to the resolution of the issue of whether Defendant was guilty of robbery with a dangerous weapon, that issue was never placed before the jury because the trial court reduced the robbery with a dangerous weapon charges to common law robbery at the conclusion of the State's case.³

Accordingly, Defendant has not established prejudice from the trial court's instruction. *See Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335 (concluding that defendant could not "show the prejudicial effect necessary" to establish plain error

³ While not the basis for our ruling on this issue, we note that the evidence presented at trial did not conclusively establish that the weapon used in the commission of the robberies was, in fact, a BB gun. The weapon was never recovered, and witnesses testified both that the weapon appeared to be real and that the robber had threatened to shoot them if they did not comply with his demands. *See State v. Joyner*, 312 N.C. 779, 787, 324 S.E.2d 841, 846 (1985) (upholding trial court's denial of motion to dismiss robbery with a dangerous weapon charge despite fact that defendant presented evidence indicating that weapon used was inoperative because "the statement of the robber to the victim during the course of the robbery that he would kill the victim" constituted evidence that weapon was capable of endangering or threatening life of victim).

where trial court's jury instruction regarding conspiracy to commit robbery with a dangerous weapon was erroneous).

III. Sentencing

Defendant's final argument on appeal is that this matter must be remanded for resentencing because the trial court imposed consecutive sentences based on a misapprehension of N.C. Gen. Stat. § 14-7.6. We agree.

N.C. Gen. Stat. § 14-7.6 provides that

[w]hen an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article (except where the felon has been sentenced as a Class A, B1, or B2 felon) be sentenced at a felony class level that is four classes higher than the principal felony for which the person was convicted; but under no circumstances shall an habitual felon be sentenced at a level higher than a Class C felony. In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used. *Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section.*

N.C. Gen. Stat. § 14-7.6 (2013) (emphasis added).

During the sentencing hearing, the trial court sentenced Defendant as an habitual felon to three consecutive terms of imprisonment for his three common law robbery convictions, stating that "the law requires consecutive sentences on habitual felon judgments." However, based on the language of N.C. Gen. Stat. § 14-7.6, a trial

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court is only required to impose a sentence consecutively to “any sentence being served by” the defendant. *Id.* Thus, if the defendant is not currently serving a term of imprisonment, the trial court may exercise its discretion in determining whether to impose concurrent or consecutive sentences. *See* N.C. Gen. Stat. § 15A-1354(a) (2013) (explaining that generally “sentences may run either concurrently or consecutively, as determined by the court”).

In *State v. Nunez*, 204 N.C. App. 164, 169, 693 S.E.2d 223, 227 (2010), we analyzed the meaning of nearly identical language contained in N.C. Gen. Stat. § 90-95, which describes the penalties for various drug offenses and states that “[s]entences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.” This Court determined that the above-quoted language

means that if the defendant is already serving a sentence, the new sentence under N.C. Gen. Stat. § 90-95(h) must run consecutively to that sentence. It does not mean that when a defendant is convicted of multiple trafficking offenses at a term of court that those sentences, as a matter of law, must run consecutively to each other. When this occurs, the trial court has the discretion to run the sentences either consecutively or concurrently.

Id.

We conclude that the same is true of the corresponding language in N.C. Gen. Stat. § 14-7.6. As such, because Defendant was not already serving a sentence at the time of the sentencing hearing, the trial court was incorrect in its belief that

consecutive sentences were mandatory in this case. We must therefore remand for resentencing so the trial court may properly exercise its discretion in determining whether Defendant's sentences should run consecutively or concurrently. *See id.* at 170, 693 S.E.2d at 227 (remanding for resentencing where "trial court erroneously believed that it was mandated by law to impose consecutive sentences" and explaining that "[w]hen a trial judge acts under a misapprehension of law, this constitutes an abuse of discretion").

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial, free from prejudicial error. We remand, however, for a new sentencing hearing so the trial court may (1) exercise its discretion as to whether Defendant should receive consecutive or concurrent terms for his offenses; and (2) sentence Defendant accordingly.

NO PREJUDICIAL ERROR AT TRIAL; REMANDED FOR RESENTENCING.

Judges ELMORE and TYSON concur.