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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-881

Filed: 6 June 2017

Wake County, No. 13CRS229939

STATE OF NORTH CAROLINA

v.

MICHAEL ARNOLD GILLESPIE, Defendant.

Appeal by Defendant from judgment entered 24 September 2015 by Judge W. Osmond Smith, III, in Wake County Superior Court. Heard in the Court of Appeals 23 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kathryn J. Thomas, for the State.

Mark Montgomery for the Defendant.

DILLON, Judge.

Michael Arnold Gillespie (“Defendant”) appeals from a judgment convicting him of felonious indecent exposure. After careful review, we find no error.

I. Background

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At trial, the State presented evidence that tended to show that Defendant exposed his genitalia to a mother and her son while the two were leaving a local park. One to three weeks after the incident, the mother identified Defendant from a photograph lineup.

The jury convicted Defendant of felonious indecent exposure. Defendant timely appealed.

II. Standard of Review

Plain error review is limited to whether the alleged instructional or evidentiary error was fundamental. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). “To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.*

“[T]his Court reviews whether a defendant was denied effective assistance of counsel *de novo*.” *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citation omitted and emphasis added).

III. Analysis

Defendant contends that he did not expose himself at a park as alleged as he was at a property showing with a real estate broker. Defendant cites evidence establishing that he provided police with the broker’s contact information. However,

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the State offered testimony from the investigating officer that undercut this narrative, as follows:

Q. And to the best of your ability when Mr. Gillespie provided you the [broker's contact] information did you follow up and verify whether or not the [alibi¹] he had given you was true?

A. *It was not true.*

(emphasis added). Defense counsel did not object to this testimony. Defendant asserts that it was plain error for the court to admit this statement as it constituted improper lay opinion testimony. In the alternative, Defendant contends his trial lawyer's failure to object to these statements constituted ineffective assistance of counsel ("IAC"). We now address Defendant's substantive arguments.

A. It Was Not Plain Error to Admit Police Testimony

Defendant cites *State v. Owen*, 130 N.C. App. 505, 503 S.E.2d 426 (1998), a case applying the *abuse of discretion* standard of review, *see id.* at 515, 503 S.E.2d at 432, for the proposition that admitting improper opinion testimony constitutes *plain error*. We disagree.

In *Owen*, we held that opinion testimony regarding the defendant's account of a shooting was neither "helpful to a clear understanding of [the agent's] testimony"

¹ We need not address the State's argument regarding whether Defendant gave proper notice of alibi as required by N.C. Gen. Stat. § 15A-905. Any reference to the term "alibi" in this opinion is in accordance with its ordinary, dictionary definition, *rather* than the narrower, legal definition suggested in § 15A-905.

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nor helpful for “the determination of a fact in issue[,]” and was therefore *properly excluded* by the trial court pursuant to Rule 701 of our Rules of Evidence. *Id.* at 515, 503 S.E.2d at 433 (quoting N.C. Gen. Stat. § 8C-1, Rule 701).

Assuming, *arguendo*, the disputed testimony at issue here was neither “helpful to a clear understanding of [the officer’s] testimony” nor helpful for “the determination of a fact in issue,” N.C. Gen. Stat. § 8C-1, Rule 701, it is far from clear “that absent [this] error the jury probably would have reached a different verdict,” *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citation omitted). The victim twice identified Defendant as the suspect. At the time of the incident, Defendant lived only five minutes away from the park. Defendant visited the park often, about “300 times a year.”

Absent the alleged improper testimony, there was also evidence in the record from which a jury could have inferred that Defendant had fabricated the alibi. The suspect exposed himself to the victim at approximately 1:30 p.m. There was further testimony from the State, which Defendant does not challenge, establishing that the broker did not see Defendant during the showing at all, which was from 1:15 p.m. until 1:35 p.m. Therefore, we conclude that it was not plain error for the trial court to admit testimony regarding the veracity of Defendant’s alibi.

B. Failure to Object Was Not IAC

To raise a successful IAC claim, a defendant must establish that trial counsel’s

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“performance was deficient and . . . that counsel’s deficient performance prejudiced his defense.” *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “Performance is deficient when counsel’s representation falls beneath an objective standard of reasonableness, or when counsel’s errors are so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.” *State v. Taylor*, 362 N.C. 514, 547, 669 S.E.2d 239, 266 (2008) (citations and internal quotation marks omitted). “[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (citation and internal quotation marks omitted).

We conclude that defense counsel’s *failure to object* to the officer’s testimony did not constitute IAC. During the preceding cross examination, defense counsel interrogated the testifying officer regarding Defendant’s alibi at length. We have reviewed the evidence and conclude that, *even if* Defendant’s counsel erred, it is not reasonably probable that the result of the trial would have been different. Specifically, the disputed testimony of the officer only concerned Defendant’s alibi, that he was at a house showing when the victim claimed that Defendant exposed himself. However, Defendant admitted that the real estate broker did not see him at the house showing. The testimony, otherwise, did not relate to the eyewitness

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account of the victim. Therefore, we conclude that defense counsel's failure to object did not amount to deficient performance or IAC.

IV. Conclusion

The trial court's admission of the testimony did not constitute plain error. Furthermore, defense counsel's failure to object to the testimony did not constitute ineffective assistance of counsel. Accordingly, we find no error in the judgment.

NO ERROR.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).