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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-954

Filed: 20 June 2017

Craven County, No. 14 CRS 053685

STATE OF NORTH CAROLINA

v.

COREY LOPEZ JOHNSON

Appeal by defendant from judgment entered 30 March 2016 by Judge W. Allen Cobb, Jr. in Craven County Superior Court. Heard in the Court of Appeals 8 March 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Perry J. Pelaez, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

ELMORE, Judge.

Defendant Corey Lopez Johnson appeals from a judgment entered after a jury convicted him of attempted common law robbery, resisting a public officer, two counts of assault on a female, and he pled guilty to attaining habitual felon status. The State's evidence tended to show that, late one Halloween night, 31 October 2014,

defendant assaulted two females who were walking home after barhopping in downtown New Bern, attempted to steal one's purse, and then fled the scene when an officer arrived.

On appeal, defendant contends the trial court abused its discretion under Rule 403 of the North Carolina Rules of Evidence by admitting evidence that (1) defendant made a post-arrest concession that he had just served over a decade in prison because he was a habitual felon and (2) a knife was reportedly recovered from the crime scene hours after the incident. Defendant also contends (3) he was deprived of his Sixth Amendment right to effective assistance of counsel *per se* because his trial counsel during closing argument conceded to the jury, without defendant's consent, that defendant attacked the victims only after he was sprayed with mace, thereby allegedly admitting defendant's guilt as to the two assault on a female charges.

Because defendant failed to preserve for appellate review the first two issues he raises and failed to satisfy his burden of demonstrating that these alleged errors were prejudicial in light of the overwhelming evidence of his guilt of the crimes charged, we conclude defendant received a fair trial free from prejudicial error. Additionally, because the record is insufficiently developed to address his ineffective assistance of counsel (IAC) claim on direct appeal, we dismiss this claim without prejudice to his right to reassert it during a subsequent motion for appropriate relief (MAR) proceeding before the trial court.

I. Background

On 3 August 2015, defendant was indicted for one count of attempted common law robbery; one count of resisting, delaying, and obstructing an officer; two counts of assault on a female; and for attaining habitual felon status.

At trial, the State presented the following evidence: During the evening of 31 October 2014, Andrea Drake arrived at Lauren Heffinger's apartment in historic New Bern to prepare for a night of Halloween barhopping. Lauren resided at 812 Pollock Street, an old house divided into separate apartments, located within walking distance to multiple downtown drinking establishments.

According to Lauren's testimony, after dressing in their Halloween costumes, Lauren and Andrea walked to a nearby bar, Prohibition, around 8:00 p.m. After visiting two other bars that evening, Bear Town Tavern and Harvey Mansion, Lauren and Andrea started back for Lauren's apartment around 1:30 a.m. During their walk, Lauren noticed a man, she later determined was defendant, crossing a field, walking directly toward them. Concerned, Lauren and Andrea turned around and took an alternate route back to Lauren's apartment. Eventually, the girls reached the Pollock Street house.

The entrance to Lauren's apartment was located at the rear of the house, down a "decent length" side driveway. After walking down the driveway and approaching Lauren's apartment door, defendant unexpectedly "came up behind [Andrea]" and

“placed [her] in a headlock.” The girls screamed. Defendant warned: “[S]hut the F up.” After Lauren “realized this was not a joke,” she sprayed defendant in the face with a can of mace attached to her key ring. Lauren “started spraying [and] never stopped spraying the entire time.”

Enraged, defendant released Andrea, “shoved her [to] the ground,” and then “ran at” and “hit [Lauren] so hard [she] flew in the air.” Defendant ran to a mud puddle on the driveway to rinse his eyes. Lauren retrieved her cell phone from her purse and called 911, but “[b]efore [she] could say anything [defendant] tackled [her] again and [her] phone flew out of [her] hands.” Lauren “continued to spray [defendant] with mace,” and defendant alternated between rinsing his eyes in the puddle and tackling Lauren. At one point, defendant “came up behind [Lauren], and [they] basically started like wrestling back and forth, and eventually [defendant] started tugging at [her] pocketbook, but [Lauren] never stopped spraying the mace.” Although defendant was pulling on the straps of Lauren’s pocketbook, “[i]t was wrapped around [her] arm and [she] continued throwing [her] elbows, . . . spraying the mace in his eyes.” The girls kept screaming, and defendant kept yelling at them to be quiet. As an officer pulled into the driveway, defendant threatened he was “going to kill [Lauren]” and then sprinted away. Defendant never got the pocketbook away from Lauren.

Andrea provided similar testimony. Relevant here, Andrea testified that after she and Lauren started home from downtown New Bern and walked “a ways into [Lauren’s] driveway,” defendant “came out of the bushes” and attacked her by putting her in a “bear hug type thing.” After wrestling with defendant, Andrea eventually broke free and witnessed defendant attack Lauren two or three separate times. After the first time, Andrea saw defendant grab Lauren and the straps of her pocketbook. After the second or third time, Andrea saw defendant grab the bag component of Lauren’s pocketbook. Eventually, an officer arrived and defendant fled.

Anne Wessel, who also rented an apartment in the Pollock Street house, testified that on Halloween night, she awoke to “horrific screams.” When she looked out her window, she “saw [Lauren] being thrown around the driveway” “like a rag doll” by a “large man.” Anne saw Andrea screaming on the driveway. Anne then saw an officer pull into the driveway “and the gentleman r[u]n.”

Officer Bandon Dale of the New Bern Police Department (NBPD) testified that, on Halloween night, he was patrolling with his windows down in downtown New Bern and overheard screaming and people yelling for help. After identifying the source of the commotion and pulling into the driveway of the Pollock Street house, Officer Dale saw Andrea lying on the ground, bleeding, and Lauren lying on the ground, screaming. He saw defendant stand up near Lauren and as Officer Dale exited his patrol car, he heard defendant threaten: “I’m going to . . . kill you . . .” When Officer

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Dale instructed “stop,” defendant fled. Officer Dale radioed to headquarters, took chase on foot, and then quickly tackled and handcuffed defendant. At some point during the excitement, defendant defecated in his pants, which, regrettably, smeared onto Officer Dale’s uniform. After interviewing the girls, Officer Dale was given leave to change his uniform pants.

Officer Kevin Bryce of the NBPD testified that, on Halloween night, he overheard Officer Dale’s radio call about the foot chase. When Officer Bryce had arrived at the scene, Officer Dale had already apprehended defendant. Defendant was placed into the backseat of Officer Bryce’s patrol car for transport to the police station for processing. While Officer Dale went home to change his uniform pants, Officer Bryce waited with defendant in the fingerprinting room, and defendant repeatedly asked with what he was being charged.

Officer Bryce, having arrived later and only having transported defendant, admitted he was uncertain of the charges, but he did not engage in any other meaningful communication with defendant. Eventually, defendant stated: “I really messed up my life this time. I’ll never see the streets again.” When Officer Bryce asked what he meant, defendant explained that “he had already done eleven years for . . . habitual felon, habitual B & E motor vehicles.”

Defendant testified on his own behalf. According to defendant, on Halloween night, after visiting a bar in downtown New Bern, he was drunkenly walking home

on Pollock Street when he noticed people walking in front of him. As he approached closer, a girl turned around, screamed, and, without warning, sprayed his eyes with mace. Admittedly enraged, defendant ran to a puddle on a nearby driveway to rinse his eyes. Then, “[a]s [defendant] was getting ready to walk away, a car pulled up and someone got out and [he] just took off.” Defendant testified that he did not realize it was a patrol car or that an officer had instructed him to stop. After running a few steps, defendant stumbled, fell, defecated in his pants, and then “was immediately put in handcuffs.” Defendant denied ever putting his hands on Lauren and Andrea, attempting to steal Lauren’s purse, or fleeing from an officer.

After the presentation of evidence, the court charged the jury on attempted common law robbery, two counts of assault on a female, and one count of resisting an officer. The jury returned verdicts finding defendant guilty of all charges and defendant pled guilty to attaining habitual felon status. The trial court consolidated the convictions and entered a judgment sentencing defendant to 97 to 120 months of imprisonment. Defendant appeals.

II. Analysis

On appeal, defendant contends the trial court abused its discretion under Rule 403 by admitting over objection Officer Bryce’s testimony concerning defendant’s post-arrest admission that he had just spent over a decade in prison because he was a habitual felon and Lauren’s testimony that a knife was reportedly recovered from

the crime scene hours after the incident. Defendant argues these two pieces of evidence were irrelevant under Rule 401 and should have been excluded as unfairly prejudicial under Rule 403.

Rule 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2015). Under Rule 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” N.C. Gen. Stat. § 8C-1, Rule 403 (2015). However, because defendant failed to preserve for appellate review his Rule 401 and Rule 403 challenges to these two pieces of evidence, we decline to reach the merits of these issues. *See, e.g., State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 738 (2016) (reversing this Court for reaching the merits of the defendant’s argument on an issue he failed to preserve for appellate review).

A. Defendant’s Post-Arrest Remarks

During direct-examination, Officer Kevin Bryce testified that when he was waiting with defendant at the police station, defendant stated, “ ‘I really messed up my life this time. I’ll never see the streets again.’ ” When Officer Bryce testified that he asked defendant, “[w]hat do you mean by that?” defense counsel lodged a bare objection and asked to approach the bench. After an unrecorded bench conference,

the trial court overruled defendant's objection, and Officer Bryce testified that defendant "made the statement that he had already done eleven years for I think habitual felon, habitual B & E motor vehicles."

After the jury was excused for an afternoon recess, the following exchange occurred concerning defendant's prior objection to Officer Bryce's testimony:

THE COURT: Let the record reflect that the jury has been excused from the courtroom.

Before we get to anything after the close of the State's case, there was one matter that came up during the evidence when one of the victims was on the stand and you asked her a question about you want to preserve something for the record there?

[DEFENSE]: That is correct, your Honor. I'd like to preserve my objection during . . . Officer Bryce's testimony that the defendant made a voluntary statement about him . . . just getting out of prison.

. . . .

We're objecting to that being admitted into evidence your Honor, for the record.

If anything we would ask the Court or tell the Court that we believe that any probative value that the jury could have got out of oh, [defendant] told me he just got out of prison ten years, just told me he was a habitual felon, any probative value would substantially be outweighed by the prejudicial effect that it had on the jury.

[T]here was no testimony that the crime had anything to do with truthfulness or anything, basic I guess 403 test was that any probative value was very small and prejudicial effect was very large.

THE COURT: What says the State?

[PROSECUTION]: Your Honor, it was a statement that he made voluntarily on his own in the booking room, and your Honor—

THE COURT: There was no custodial interrogation involved. No, I believe you said there's no Miranda problems.

[DEFENSE]: That's correct, your Honor.

THE COURT: Your objection is noted, overruled. Court determines it was a voluntary statement.

Because defendant objected to this evidence solely under Rule 403 prejudice grounds, he waived his right to appellate review of any Rule 401 relevancy challenge. *See State v. Knight*, 340 N.C. 531, 559, 459 S.E.2d 481, 498 (1995) (“[A]t trial defendant objected to the admission of this evidence solely on the basis of Rule 403 . . . and has technically waived appellate review on the issue of the relevance of this evidence.” (citing N.C. R. App. P. 10(b)(1))); *see also State v. Lloyd*, 354 N.C. 76, 97, 552 S.E.2d 596, 613 (2001) (“Because defendant objected to the admission of this photograph solely on the basis of Rule 403 . . . , he has waived appellate review on the issue of the relevance of the photograph.” (citing N.C. R. App. P. 10(b)(1); *Knight*, 340 N.C. at 559, 459 S.E.2d at 498)). Accordingly, we decline to address the merits of defendant's Rule 401 challenge. *See Snead*, 368 N.C. at 816, 783 S.E.2d at 738.

Although defense counsel appears to have objected to Officer Bryce's testimony on Rule 403 grounds, the transcript reveals that the trial court overruled his objection on the basis that his post-arrest statements were voluntary, and, therefore, were admissible. Defendant's counsel concedes in his appellate brief: "Apparently misconstruing the basis of [defense counsel's] objection, the trial court overruled the objection based on its conclusion that [defendant's] statement had been voluntary."

Under Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure,

In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection, . . . *stating the specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context. *It is also necessary for the complaining party to obtain a ruling upon the party's . . . objection*

N.C. R. App. P. 10(a)(1) (emphasis added).

Accordingly, because defendant failed to obtain a ruling on his precise Rule 403 objection, he failed to preserve his Rule 403 challenge for appellate review and we thus decline to address it. *See Snead*, 368 N.C. at 816, 783 S.E.2d at 738; *see also Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 195–96, 657 S.E.2d 361, 363–64 (2008) (emphasizing that "Rule 10(b) 'is not simply a technical rule of procedure'" and explaining that "a party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal." (citations omitted)). Further, although unpreserved evidentiary

error in criminal cases may be reviewed for plain error, defendant has not contended this alleged error amounted to plain error. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (“To have an alleged error reviewed under the plain error standard, the defendant must ‘specifically and distinctly’ contend that the alleged error constitutes plain error.” (citations omitted)).

Presuming, *arguendo*, defendant preserved this issue and the court improperly admitted Officer Bryce’s testimony, defendant failed to demonstrate “a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial” N.C. Gen. Stat. § 15A-1443(a) (2015). As previously explained, the State presented overwhelming evidence, including testimony by the two victims, an independent eyewitness, and the arresting officer, supporting defendant’s convictions for the crimes charged. Accordingly, defendant has failed to satisfy his burden of showing that the alleged error was prejudicial—much less that it amounted to plain error.

B. Crime-Scene Knife

Defendant next contends the trial court abused its discretion under Rule 403 by admitting over objection Lauren’s testimony indicating that defendant used a knife during the altercation. However, because defendant failed to strike the portion of Lauren’s testimony related to the knife, he waived his right to appellate review of the issue.

According to police reports, someone had called NBPD several hours after the incident to report the discovery of a knife found at the crime scene. Before trial, defendant filed a motion *in limine* to prevent the introduction of evidence pertaining to this knife. At a pretrial hearing on the matter, the State conceded that it did not intend to introduce evidence of the knife, and the trial court granted defendant's motion to that extent. During Lauren's direct-examination, however, when she was describing the incident, the following exchange occurred:

[LAUREN]: [S]omeone came up behind [Andrea]. You know at that point . . . it was hard to even catch on to what was happening and [Andrea] was placed in a headlock.

. . . .

[PROSECUTION]: When you say a headlock [C]an you describe that?

[LAUREN]: I think it might have been his right arm around her neck, you know at that point there was no spotlight in my back yard and the next morning *when the knife was found* I realized then that that was what he was holding around her neck.

[DEFENSE]: Objection your Honor.

THE COURT: Overruled.

(Emphasis added.) Defense counsel never moved to strike Lauren's answer.

Because "the question [did] not indicate the inadmissibility of the answer," *State v. Adcock*, 310 N.C. 1, 19, 310 S.E.2d 587, 598 (1984), and defense counsel never moved to strike the portion of Lauren's answer relating to the knife, defendant has

waived appellate review of this issue, *id.* (“When the question does not indicate the inadmissibility of the answer, defendant should move to strike as soon as the inadmissibility becomes known. Failure to so move constitutes a waiver.” (citing *State v. Battle*, 267 N.C. 513, 519–20, 148 S.E.2d 599, 604 (1966)); *see also State v. Quick*, 329 N.C. 1, 29, 405 S.E.2d 179, 196 (1991) (“[D]efendant failed to move to strike the testimony he considered objectionable, thereby waiving his right to assert error on appeal.” (citing *Adcock*, 310 N.C. at 19, 310 S.E.2d at 597–98; *Battle*, 267 N.C. at 519–20, 148 S.E.2d at 604)). Accordingly, we decline to address the merits of this argument. *See Snead*, 368 N.C. at 816, 783 S.E.2d at 738.

C. Ineffective Assistance of Counsel

Finally, defendant contends he was deprived of his Sixth Amendment right to effective assistance of counsel because his trial counsel during closing argument conceded to the jury, without defendant’s consent, that defendant attacked the victims. This concession, defendant asserts, amounted to an admission of guilt as to the two assault on a female charges. *See State v. Brunson*, 187 N.C. App. 472, 478, 653 S.E.2d 552, 556 (2007) (“[T]he essential elements of assault on a female are (1) assault (2) upon a female person (3) by a male person at least 18 years of age.” (citing N.C. Gen. Stat. § 14-33(c)(2) (2005))). Therefore, defendant contends, his defense counsel’s remarks amounted to *per se* ineffective assistance of counsel under *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507–08 (1985) (holding that a defendant

receives *per se* ineffective assistance of counsel when “the defendant’s counsel admits the defendant’s guilt to the jury without the defendant’s consent”), *cert. denied*, 476 U.S. 1123 (1986).

We review *de novo* whether a defendant was denied effective assistance of counsel. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citation omitted).

Generally, this Court “indulges the presumption that trial counsel’s representation is within the boundaries of acceptable professional conduct,” giving counsel “wide latitude in matters of strategy.” To prevail on an ineffective assistance of counsel claim, a defendant must show that trial counsel’s conduct “‘fell below an objective standard of reasonableness.’ ” This requires a showing that, first, trial counsel’s performance was so deficient that he or she “was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment,” and second, this deficient performance prejudiced the defense, such that the errors committed by trial counsel deprived the defendant of a fair trial.

State v. Goss, 361 N.C. 610, 623, 651 S.E.2d 867, 875 (2007) (internal citations omitted). However, under *Harbison*, “a defendant receives ineffective assistance of counsel *per se* when counsel concedes the defendant’s guilt to the offense or a lesser included offense without the defendant’s consent.” *State v. Berry*, 356 N.C. 490, 512, 573 S.E.2d 132, 147 (2002) (citing *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507–08).

Here, defendant testified in his defense that, although he was enraged after being sprayed with mace, he never touched either of the victims. Yet during closing argument, defendant's trial counsel stated:

Members of the jury, today we've heard two very different views or accounts of what happened, what the witnesses stated to you, the prosecution and what [defendant] testified to as defense. I mean they are very wide. But I think what we can all agree is, is that *no testimony that [defendant] did not attack [Lauren] until after he was sprayed with pepper mace.*

. . . *Who did [defendant] attack?* The one with nothing. Nothing that he could go and grab.

. . . .

After the third time that he attacked her, according to [Lauren], you heard [Andrea's] testimony, she didn't know what he was going over [sic]. He could have very well been going after the pepper mace, which makes perfect sense that somebody spraying pepper mace would be enraged by this person. You're trying to attack -- this is according to their testimony, that he could have been going for the pepper mace. It was in close proximity.

. . . .

Okay. Keep in mind when you're deliberating -- I am reasonably certain that he was attempting to take her pocketbook -- *if you have any doubt, not that he attacked her*, not that he was yelling, but that did he attempt to take her pocketbook, he never demanded the pocketbook.

He never went after anything else. He stayed there twenty-thirty minutes and he tussled, and *he never attacked [Lauren] until after he was sprayed with the pepper spray*, and he testified to that, that enraged him.

The victims testified [defendant] was in an enraged state. Well he may have been enraged, may have some intent to do something, but it wasn't to rob [Lauren].

You see how big [defendant] is. I mean, ask yourself if his intent when he came up behind them was to take a pocketbook don't you think he would have went about it a different way. Would he not just have tried to grab the pocketbook and snatch it off [Lauren's] arm instead of grabbing [Andrea]. Think about that.

Now the decision you're going [to] have to make is a very important decision. Keep in mind if I'm not -- you're not entirely convinced there's some doubt you know what he may attacked them, [sic] but I have doubt that [he] actually was intending to rob the person when he stuck around for thirty minutes, when he went after the person that didn't have a pocketbook first, when he never demanded a pocketbook.

When you know probably going to attract attention of people yelling, and there's we know that *he did not drive to [Lauren] until after he was sprayed with pepper mace* [sic].

(Emphasis added.) Defense counsel then urged the jury to find defendant not guilty of attempted common law robbery, but never addressed the resisting an officer or two assault on a female charges.

Because the record is insufficiently developed to consider defendant's IAC claim in this direct appeal, we decline to address this claim and dismiss it without prejudice. *See State v. Al-Bayyinah*, 359 N.C. 741, 752–53, 616 S.E.2d 500, 509–10 (2005) (dismissing IAC claim brought on direct appeal without prejudice to pursue

collateral relief where “[t]rial counsel’s strategy and the reasons therefor are not readily apparent from the record, and more information must be developed to determine if defendant’s claim satisfies the *Strickland* test”); *see also State v. House*, 340 N.C. 187, 196–97, 456 S.E.2d 292, 297 (1995) (dismissing *Harbison* IAC claim brought on direct appeal without prejudice to pursue collateral relief where record was “silent as to whether defendant did or did not consent to his attorney’s concession of guilt”).

III. Conclusion

Because defendant waived his right to appellate review of his challenges to the admission of Officer Bryce’s testimony that defendant made a post-arrest concession that he just served over a decade in prison because he was a habitual felon and of Lauren’s testimony that a knife was reportedly recovered from the crime scene hours after the incident, we decline to reach the merit of these arguments. Nonetheless, in light of the overwhelming evidence of defendant’s guilt of the crimes charged, defendant failed to satisfy his burden of demonstrating how the admission of these two pieces of evidence amounted to prejudicial error—much less plain error. Additionally, because the record is inadequately developed to consider defendant’s IAC claim on direct appeal, we decline to address it and dismiss it without prejudice to defendant’s ability to reassert it in a subsequent MAR before the trial court.

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NO PREJUDICIAL ERROR IN PART; DISMISSED WITHOUT PREJUDICE
IN PART.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).