An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-348

Filed: 2 January 2018

Wake County, No. 15 CRS 220320-21

STATE OF NORTH CAROLINA

v.

JEFFREY GILBERT BOYLES, Defendant.

Appeal by defendant from judgments entered 18 November 2016 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 19 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Ellen A. Newby, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

ZACHARY, Judge.

Where defendant failed to show that the trial court abused its discretion in denying defendant's motion for a mistrial based on jury misconduct, we find no error. Where defendant did not establish prejudice, the trial court's failure to *sua sponte*

provide a limiting jury instruction was not plain error, and trial counsel's failure to request a limiting instruction did not constitute ineffective assistance of counsel.

Background

In April 2015, defendant Jeffrey Boyles and the victim began dating, eventually living together in the victim's apartment. In early September 2015, the victim told defendant that she wanted to end the relationship, and defendant began searching for a new place to live.

Defendant had nowhere to stay on the evening of 9 September 2015, so the victim allowed defendant to sleep on her couch. The victim told defendant that he needed to be out of her apartment by the time she left for work the next morning. Defendant agreed.

When the victim woke the next morning, she began getting ready for work and told defendant that it was time for him to leave. Defendant begged to stay, but the victim insisted that he go somewhere else. The two argued back and forth, and when it was time for the victim to leave for work, defendant refused to leave. Defendant told the victim that "[t]his is going to be the last day of my life, and you're not going to work today." Threatening to "commit suicide by police," defendant told the victim that he was going to hold her hostage in the apartment, tie her up, and call the police. When the police arrived, defendant planned to hold a knife to the victim's throat, prompting the officers to shoot him.

Defendant held the victim hostage in her apartment for the next several hours, and his behavior veered from violent and threatening, to crying about how much he loved the victim. At one point, defendant proposed to the victim after threatening to kill her. When the victim refused the proposal, defendant began to prepare his police suicide plan. Defendant threw the victim down and began cutting his wrists with scissors. The victim tried to escape, but defendant pulled her back in by her hair. Defendant then bound the victim's wrists together with zip ties, and threatened to murder the victim and her family.

Meanwhile the victim's daughter and her co-workers were calling the victim repeatedly. However, defendant had placed the victim's phone out of her reach so that she could not call for help. Although the victim heard her phone alerts, she was unable to answer.

The victim tried to escape the apartment several times. In her final escape attempt, the victim ran for the door, but defendant tackled her to the ground. On top of the victim, defendant threatened to kill her, and began choking her. The victim was strangled so that she could hardly breathe, but she managed to whisper, "Our moms are watching you." Both of their mothers had recently passed away, and this statement prompted defendant to let go of the victim's neck.

The victim then heard her phone vibrating again, and told defendant, "If you don't let me answer these phone calls, someone is going to send the police over here[.]"

Defendant gave the victim her phone, but told her, "You have a choice to make. You either take me back or you call the police." Despite his permission, the victim was terrified. She quickly sent text messages to her daughter saying "911 it's bad," "911," and "911 at apartment." The victim immediately deleted the messages so that defendant could not read them, which infuriated defendant. Defendant squeezed the victim's phone and shattered it in his hands.

After a few minutes, the victim calculated that the police were nearby. Fearing that defendant might hurt her more before the officers arrived, the victim told defendant that he needed to let her go outside because her daughter had, in fact, called the police. Defendant forced the victim to change from the shirt he had ripped and escorted her outside to wait for the police. Detective Green of the Holly Springs Police Department arrived moments later and spotted defendant and the victim outside. When defendant saw the officer arriving, he said to the victim, "You make this go away. You make this stop."

Defendant insisted that the victim give her statement to the officer with defendant standing next to her. Detective Green refused defendant's request and separated defendant and the victim. When a second officer arrived, Detective Green took the victim's statement. The victim told Detective Green what had happened during the preceding few hours. Detective Green noticed bruising around the victim's neck and on her wrists. Detective Green then took defendant's statement.

Defendant's statement substantially reflected the victim's account of events. Defendant was placed under arrest.

On 1 December 2015, defendant was indicted for one count of assault by strangulation, one count of first-degree kidnapping, one count of injury to personal property exceeding $200, and one count of interfering with an emergency communication. On 5 January 2016, defendant entered pleas of not guilty. The case was tried before a jury beginning on 14 November 2016.

On 18 November 2016, the jury found defendant guilty of assault by strangulation, false imprisonment, injury to personal property, and interfering with emergency communications. The trial court consolidated the offenses for purposes of sentencing and sentenced defendant to 6 to 17 months' imprisonment, suspended on the condition that defendant be subject to 24 months' supervised probation. Defendant gave oral notice of appeal in open court.

Discussion

On appeal, defendant argues (1) that the trial court abused its discretion when it denied defendant's motion for a mistrial based on jury misconduct, (2) that the trial court committed reversible error when it admitted Detective Green's hearsay testimony recounting the victim's statement as substantive evidence, (3) that the trial court committed plain error by failing to instruct the jury that Detective Green's hearsay testimony should be considered solely for corroborative purposes, (4) that his

trial counsel's failure to request a limiting instruction constituted ineffective assistance of counsel, and (5) that the trial court dismissed the charge of interference with emergency communications as a matter of law when the court incorrectly instructed the jury on that charge as set forth in the indictment. Each of defendant's contentions lack merit.

I. Defendant's Motion for a Mistrial

During the trial, it was brought to the trial court's attention that, during a recess, a court employee overheard one of the jurors state to several other jurors that "we need to make sure we listen to nothing but the facts and . . . ." That was the only portion of the conversation that the employee had overheard. The court employee did not hear the other jurors respond or express any sort of opinion.

Defendant moved for a mistrial. The trial court declined to "speculate that anything was discussed among the jurors or that anything else was said beyond that which was heard[.]" The court then denied defendant's motion for a mistrial, reasoning that "what was heard does not rise to a level of there being some compromise of this case so as to warrant the sensational determination of a mistrial." The State requested that the trial court make further inquiry into the matter in order to determine the extent of the prejudice, if any, in more detail, but the court declined to do so.

Defendant argues that the trial court committed reversible error by denying his motion for a mistrial and by failing to conduct an inquiry of the jury in order to determine the extent of the potential prejudice. Defendant contends that this error entitles him to a new trial. We disagree.

A. Standard of Review

"[A] trial court's decision to grant or deny a motion for mistrial on the basis of juror misconduct" will be upheld absent a showing of abuse of discretion. *State v. Salentine*, 237 N.C. App. 76, 81, 763 S.E.2d 800, 804 (2014). "An abuse of discretion occurs 'only upon a showing that the judge's ruling was so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 91, *disc. review denied*, 343 N.C. 754, 473 S.E.2d 620 (1996)). "The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991) (citing *State v. Gilbert*, 47 N.C. App. 316, 319, 267 S.E.2d 378, 379 (1980)).

B. Analysis

Trial courts have an obligation to investigate and to make an appropriate inquiry whenever juror misconduct is alleged. *State v. Harris*, 145 N.C. App. 570, 576, 551 S.E.2d 499, 503 (2001). Nevertheless, "[w]hen jury misconduct is alleged, the trial court is vested with the 'discretion to determine the procedure and scope of

the inquiry.' " *State v. Gurkin*, 234 N.C. App. 207, 212, 758 S.E.2d 450, 454 (2014) (quoting *State v. Burke*, 343 N.C. 129, 149, 469 S.E.2d 901, 910 (1996)). "An examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous[.]" *State v. Aldridge*, 139 N.C. App. 706, 713, 534 S.E.2d 629, 635, *disc. review denied*, 353 N.C. 269, 546 S.E.2d 114 (2000). The trial court must question the jury in order to determine the extent of the misconduct *only* where " 'there is *substantial reason to fear* that the jury has become aware of improper and prejudicial matters[.]' " *Harris*, 145 N.C. App. at 577, 551 S.E.2d at 503-04 (quoting *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991)).

In the instant case, upon learning of the potential misconduct, the trial court conducted an examination of the court employee who overheard the conversation. The trial court determined that the situation did not require any further investigation. Not only was the overheard statement vague, but the remaining jurors appeared to have abided by the court's initial instructions when they ignored the lone juror's comment. Moreover, defendant was unable to point to how the nebulous statement—"We need to make sure we listen to nothing but the facts"—prejudiced defendant. *See Gurkin*, 234 N.C. App. at 212, 758 S.E.2d at 454 ("When asked by the court, defense counsel could not say how defendant was prejudiced.").

Based on the court employee's testimony, the trial court had no "substantial reason to fear" that the lone juror's comment was prejudicial. *Black*, 328 N.C. at 196, 400 S.E.2d at 401. While the more prudent "course of action might have been for the trial court to have conducted a *voir dire*" of the jury, "the trial court was by no means required to do so[.]" *Harris*, 145 N.C. App. at 578, 551 S.E.2d at 504. We do not question the trial court's discretion in conducting a limited inquiry and refusing to declare a mistrial based solely on the vague comment of one juror. Accordingly, we hold that the trial court did not err.

II. Defendant's Hearsay Objection

At trial, defendant objected on hearsay grounds to Detective Green's testimony recounting the victim's statement after the incident. The State indicated that the victim was still available to testify, and the trial court overruled defendant's objection on that ground.

Defendant argues that the trial court's reliance on the victim's availability was an incorrect legal principle upon which to base the testimony's admissibility. According to defendant, the testimony was admissible for corroborative purposes only, and the jury should have been instructed accordingly. Defendant maintains that he is entitled to a new trial because the verdict would have been different had the jury not been allowed to consider the testimony for substantive purposes.

A. Standard of Review

A trial court's ruling on the admission of hearsay evidence is reviewed *de novo*. *State v. Hazlewood*, 187 N.C. App. 94, 98, 652 S.E.2d 63, 66 (2007) (citation omitted).

B. Analysis

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2016). Hearsay evidence is generally inadmissible unless it falls under an exception provided by the Rules of Evidence or other statute. N.C. Gen. Stat. § 8C-1, Rule 802 (2016).

Even where hearsay does not fall under an exception, it may nevertheless be admitted where it is not introduced for its substantive truth, but rather to corroborate a witness's trial testimony. "[I]t is well-settled that a witness'[s] prior consistent statements are admissible to corroborate the witness'[s] sworn trial testimony." *State v. Beane*, 146 N.C. App. 220, 231, 552 S.E.2d 193, 200 (2001). When hearsay is admitted for such purpose, the opposing party is entitled to a limiting instruction on the corroborative nature of the testimony. *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988). However, if the defendant has not "specifically request[ed] an instruction restricting the use of evidence which corroborates the testimony of a witness, the admission of the evidence and the failure of the trial judge to give a limiting instruction is not error." *State v. Sauls*, 291 N.C. 253, 261, 230 S.E.2d 390, 394-95 (1976) (citation omitted).

In the present case, the State concedes that the trial court admitted Detective Green's hearsay testimony for an incorrect reason—*i.e.*, because the victim was available. However, the State argues that the testimony would have been admissible nevertheless in order to corroborate the victim's in-court testimony. In that defendant did not request that the trial court restrict the jury's use of the testimony accordingly, the State contends it was not error for the testimony to be admitted without the limiting instruction. We agree.

While not admissible for the reason that the victim was "available," Detective Green's hearsay statements were nevertheless admissible in order to corroborate the victim's in-court testimony. *See Beane*, 146 N.C. App. at 231, 552 S.E.2d at 200. When the trial court overruled defendant's objection, it was trial counsel's duty and responsibility to inquire as to whether the testimony was being admitted for corroborative purposes and, if so, to request a limiting instruction. Because defendant did not do so, the admission of that testimony is not error. *See e.g., State v. Bryant*, 282 N.C. 92, 97, 191 S.E.2d 745, 749 (1972).

Likewise, the trial court's failure to *sua sponte* instruct the jury that Detective Green's testimony could only be considered for corroborative purposes did not amount to plain error. *See State v. Stevens*, 228 N.C. App. 352, 358-59, 745 S.E.2d 64, 69 (2013).

To establish plain error, "a defendant must demonstrate that a fundamental error occurred[.]" *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Such error will be found "only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is . . . something 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) (citations and internal quotation marks omitted). In other words, "[t]o 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." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation and quotation marks omitted). Prejudice requires that the defendant establish "that absent the 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).

In the instant case, the error certainly affected the right of defendant to have the testimony's admissibility limited to its corroborative nature. *See State v. Erby*, 56 N.C. App. 358, 361, 289 S.E.2d 86, 88 (1982). However, given the overwhelming evidence presented against defendant at trial, that error cannot be said to have risen to a level of plain error.

Defendant argues that the case was fundamentally a swearing match, particularly with regard to whether defendant strangled the victim. This, according

to defendant, makes the introduction for its truth of Detective Green's testimony concerning the victim's statements so prejudicial as to constitute plain error. However, there was ample evidence to support the jury's verdict, even absent Detective Green's testimony. The jury was presented with photographic evidence of the victim's bruising, the victim's daughter's description of her mother's bruising when she arrived on the scene, and a crisis counselor's testimony that she was still able to see the bruises on the victim's neck five days after the incident. The jury was also able to rely on the victim's own testimony at trial. Additionally, the jury was presented with defendant's admission to Detective Green that he pushed the victim to the floor and grabbed the victim by her neck in order to stop her from leaving. Accordingly, even if the trial court had limited the jury's consideration of Detective Green's testimony, defendant cannot show that doing so probably would have resulted in a different verdict. Defendant thus cannot establish plain error.

III. Ineffective Assistance of Counsel

In the alternative, defendant argues that he is entitled to a new trial because his trial counsel's failure to request a limiting instruction on the corroborative nature of Detective Green's testimony constituted ineffective assistance of counsel. This argument is also without merit.

A. Standard of Review

Claims alleging ineffective assistance of counsel are reviewed *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). Ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001).

B. Analysis

In the present case, because the record contains sufficient information to resolve defendant's allegations, defendant's ineffective assistance of counsel claim is proper for a decision by this Court on direct appeal. "[T]he transcript of proceedings in the present case contains sufficient information to determine whether [the] objection should have been made and, further, whether defense counsel's failure to raise [the] objection under the circumstances constitutes ineffective assistance of counsel." *State v. Blakeney*, 352 N.C. 287, 308, 531 S.E.2d 799, 815 (2000).

In order to establish ineffective assistance of counsel, a defendant must first show " 'that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.' " *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). In order to 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." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. If this Court is able to "determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

In the instant case, defendant's trial counsel failed to request a limiting instruction on the corroborative nature of Detective Green's hearsay testimony. However, as explained in Section II, *supra*, there was ample evidence presented at trial to support the victim's account of events. In that we have held that defendant failed to establish that a limiting instruction would probably have resulted in a different verdict, we necessarily conclude that defense counsel's failure to request a limiting instruction did not constitute ineffective assistance of counsel.

IV. Interfering with Emergency Communications Charge

Lastly, defendant argues that his conviction of interfering with emergency communications under N.C. Gen. Stat. § 14-286.2(a) must be vacated. Defendant maintains that N.C. Gen. Stat. § 14-286.2(a) provides the elements of two separate offenses, of which he was indicted for only one, and that the jury was instructed without objection on the elements of the incorrect offense. Defendant argues that this

constituted a dismissal of the charge of interfering with emergency communications as a matter of law, as well as amounting to plain error requiring reversal.

A. Standard of Review

Where no objection was made to a set of jury instructions, a subsequent challenge to the propriety of those instructions is reviewed for plain error. *See State v. Williams*, 318 N.C. 624, 629, 350 S.E.2d 353, 356 (1986); *State v. Bragley*, 321 N.C. 201, 213-14, 362 S.E.2d 244, 251 (1987). Plain error is error that is "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *Bragley*, 321 N.C. at 213, 362 S.E.2d at 251.

B. Analysis

It is axiomatic that "a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." *State v. Bowen*, 139 N.C. App. 18, 24, 533 S.E.2d 248, 252 (2000). "The failure of the trial court to submit the case to the jury pursuant to the crime charged in the indictment amount[s] to a dismissal of that charge[.]" *Williams*, 318 N.C. at 628, 350 S.E.2d at 356.

N.C. Gen. Stat. § 14-286.2(a) (2016) provides:

> A person who intentionally interferes with an emergency communication, knowing that the communication is an emergency communication, and who is not making an emergency communication himself, is guilty of a Class A1 misdemeanor. In addition, a person who interferes with a communications instrument or other emergency

> equipment with the intent to prevent an emergency communication is guilty of a Class A1 misdemeanor.

Defendant would have us hold that the two clauses contained in Section 14-286.2(a) set forth two distinct and separate crimes: the first being a *direct* interference with a *currently occurring* emergency communication, and the second being the *prevention* of an emergency communication by means of interfering with a *communications instrument*. No court in this State has held that N.C. Gen. Stat. § 14-286.2(a) contains two separate crimes. Indeed, that section is entitled "[o]ffen*se*," rather than offen*ses*."

The statute defines the term "intentionally interferes" as including:

> forcefully removing a communications instrument . . . from the possession of another, hiding a communications instrument . . . from another, . . . damaging or otherwise interfering with communications equipment or connections between a communications instrument . . . , and any other type of interference that makes it difficult or impossible to make an emergency communication[.]

N.C. Gen. Stat. § 14-286.2(b1)(2) (2016). The definition of "Emergency communication" "includes communications to law enforcement agencies or other emergency personnel, or other individuals, relating *or intending to relate* that an individual is or is reasonably believed to be, or reasonably believes himself or another person to be, in imminent danger of bodily injury[.]" N.C. Gen. Stat. § 14-286.2(b1)(1) (2016) (emphasis added). These definitions make clear that the first clause

encompasses the prevention of an emergency communication, as well as the damaging of a communications instrument.

Defendant's indictment is consistent with this reading of the statute. The indictment sets forth the particular conduct that N.C. Gen. Stat. § 14-286.2(a) proscribes pursuant to the second clause and the definition section of N.C. Gen. Stat. § 14-286.2(b1):

> [d]efendant unlawfully and willfully did interfere with the communications instrument by smashing the victim's phone, making it inoperable for the victim to seek emergency assistance with the intent to prevent emergency communication from being made to Wake County Communications by taking the phone of [the victim] and throwing it to the ground damaging it rendering it inoperable. This act was done in violation of N.C.G.S. § 14-286.2.

Likewise, the jury was instructed on the elements of the crime of interference with emergency communications. Those elements are: (1) defendant interfered with an emergency communication; (2) defendant acted intentionally and with knowledge that the communication was an emergency communication; and (3) defendant was not, at that time, making an emergency communication himself. The trial court instructed the jury that:

> [f]or you to find the defendant guilty of [interfering with an emergency communication], the State must prove three things beyond a reasonable doubt. First, that the defendant interfered with an emergency communication. Second, that the defendant acted intentionally and with knowledge that the communication was an emergency communication.

> And third, that at the time the defendant was not making an emergency communication himself.

Thus, the trial court properly instructed the jury on the elements of the crime charged. Moreover, the jury was instructed pursuant to the North Carolina Pattern Jury Instructions for the crime of "Interfering With Emergency Communications." *See State v. Ballard*, 193 N.C. App. 551, 555, 668 S.E.2d 78, 81 (2008) ("This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions.") (citation and quotation marks omitted). Although the indictment provided more detail, it was not error for the trial court to omit reference to those details in the jury instructions. N.C. Gen. Stat. § 14-286.2(a)'s second clause simply reiterates that a defendant will be guilty of the crime of interfering with emergency communications regardless of whether the victim has yet to begin making the emergency communication, and regardless of the precise means that the defendant employs to prevent the communication. Defendant has failed to cite any authority supporting an alternative reading. Finally, we are unable to conceive of any prejudice to defendant by the omission from the pattern jury instructions of the second clause; in fact, including the definitions would appear to have placed defendant squarely within the confines of the proscribed conduct, to his prejudice.

Because the indictment and the jury instructions properly set forth the elements of the crime of interfering with emergency communications, we find no error.

Conclusion

For the aforementioned reasons, we hold that defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges DAVIS and BERGER concur.

Report per Rule 30(e).