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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-376

Filed: 3 April 2018

Mecklenburg County, No. 13 CRS 229505, 13 CRS 229508

STATE OF NORTH CAROLINA,

v.

CORDARES ALFONZO TAYLOR, Defendant.

Appeal by Defendant from judgment entered 17 August 2016 by Judge Jeffrey P. Hunt in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General M. Shawn Maier and Assistant Attorney General Kristen J. Uicker, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for Defendant-Appellant.

INMAN, Judge.

Cordares Alfonzo Taylor (“Defendant”) appeals by writ of certiorari from a judgment entered after a jury convicted him of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. Defendant argues that the trial court committed plain error by allowing an officer to testify about statements made by Defendant during an interview when a recording of the interview was

simultaneously played for the jury. Specifically, Defendant argues that the officer's testimony violated the best evidence rule and was not admissible under the rule's exception for "other evidence" because: (1) knowing that the audio recording was poor quality at the time of the interview, the officer did not instruct Defendant to speak louder; and (2) the original recording was produced and, thus, secondary evidence regarding the recording was barred. Because we are not convinced that the jury would have reached a different result absent this testimony, we hold that Defendant has failed to demonstrate that the trial court plainly erred.

Factual & Procedural History

At trial, the State's evidence tended to show the following:

On 20 July 2013, Wade Simuel ("Simuel") left Club Cameo in Charlotte on foot to meet his friends. A white car occupied by three men pulled up beside him, and one man asked Simuel if he wanted to purchase marijuana. Conflicting evidence was presented as to Simuel's interest in purchasing marijuana. Defendant's cousin—seated in the front passenger seat—exited the car with a gun and patted Simuel down, as Defendant—seated in the back seat—pointed a gun out the window at Simuel. The men removed approximately \$400 from Simuel's wallet, returned his wallet and phone, and drove away. Simuel called the police and described the vehicle and the three men. A few hours later, Defendant and the two other occupants of the

car described were seized by police at a gas station and, after being identified by Simuel, arrested.

Following his arrest, Defendant was transported to the Mecklenburg County Law Enforcement Center. Detective Michael Peacock (“Detective Peacock”) of the Charlotte-Mecklenburg Police Department advised Defendant of his Miranda rights, and Defendant agreed to speak with him. Detective Peacock recorded his interview with Defendant.

On 29 July 2016, Defendant was indicted for conspiracy to commit robbery with a dangerous weapon and robbery with a dangerous weapon. The case came on for trial a month later, on 15 August 2016, Judge Jeffrey P. Hunt presiding.

At trial, the State called Detective Peacock to testify about his interview with Defendant after the robbery and introduced the recording of the interview with Defendant into evidence. Defendant did not object to the State’s submission of the recording. Detective Peacock stated that the recording accurately reflected the interview and that the recording equipment was working correctly on the morning of the interview.

When the recording was played for the jury, various segments were difficult to hear and some were inaudible. Detective Peacock’s voice was audible throughout the recording. Detective Peacock attributed the poor sound quality to a “[h]orrible [recording] system,” which made Defendant’s statements “very difficult to hear.” The

prosecutor paused the recording approximately twenty-five times to ask Detective Peacock for clarification as to what Defendant said.

Defendant testified that on the day of the robbery, he ingested Xanax and Ecstasy and drank alcohol. He testified that “[i]t’s really blurry because it [has] been so long.” When asked if he recalled the recorded interview, Defendant testified that “I don’t remember being in that interview room or being asked all the, all the questions.” He testified that he did not remember all of his statements included in the recording.

On 17 August 2016, a jury returned a verdict finding Defendant guilty on both charges. The trial court sentenced Defendant to serve 64 to 89 months in prison for robbery with a dangerous weapon and imposed a consecutive suspended sentence of 25 to 42 months for conspiracy to commit robbery with a dangerous weapon.

Appellate Jurisdiction

Following the trial court’s pronouncement of Defendant’s sentence from the bench, defense counsel gave oral notice of appeal and requested appointment of the Appellate Defender. The trial court then explained, and requested that the record reflect, that the two sentences were to run consecutively. The trial then concluded, and defense counsel failed to renew the notice of appeal. Concerned about a potential technical defect in the oral notice of appeal, Defendant’s appellate counsel filed a

petition seeking review of the judgment through issuance of a writ of certiorari on 17 April 2017.

Pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure, notice of appeal may be given either orally at trial, or in a writing filed “with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]” N.C. R. App. P. 4(a) (2017). Here, although Defendant’s trial counsel provided oral notice of appeal following sentencing, it is unclear whether the trial court’s additional comments regarding the consecutive nature of Defendant’s sentences rendered it necessary for defense counsel to renew the notice of appeal.

Rule 21 of the North Carolina Rules of Appellate Procedure authorizes appellate review by writ of certiorari:

in appropriate circumstances . . . when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C. [Gen. Stat.] § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21(a)(1). In our discretion, to the extent that the notice of appeal was technically deficient, we allow Defendant’s petition for writ of certiorari for the purpose of reviewing the judgment entered.

Analysis

Defendant argues that the trial court plainly erred in admitting Detective Peacock's testimony regarding his recorded interview with Defendant because the testimony violated the best evidence rule, as set out in the North Carolina Rules of Evidence. We disagree because assuming, without deciding, the trial court erred in allowing Detective Peacock to testify in regard to the interview, Defendant has failed to show that the testimony had a probable impact on the jury's finding of guilt.

I. Standard of Review

Defendant concedes that he neither objected to the introduction of the recording of the interrogation, nor did he object to Detective Peacock's testimony regarding the recording. As such, our review is limited to the plain error standard. N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."). "Plain error only applies when the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Howard*, 215 N.C. App. 318, 322, 715 S.E.2d 573, 576 (2011) (internal quotation marks and citations omitted). Under plain error review, a defendant has the burden to "show that but for the alleged error, the jury would have returned a different verdict." *State v. Martinez*, 149 N.C. App. 553, 560, 561 S.E.2d 528, 532 (2002) (citation omitted).

II. Discussion

Defendant argues that the trial court's admission of Detective Peacock's testimony regarding the interrogation violated the principles established in Rules 1002-1008 of the North Carolina Rules of Evidence, commonly referred to as the best evidence rule. The best evidence rule provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." N.C. Gen. Stat. § 8C-1, Rule 1002 (2015). "The best evidence rule requires that secondary evidence offered to prove the contents of a recording be excluded whenever the original recording is available." *State v. York*, 347 N.C. 79, 91, 489 S.E.2d 380, 387 (1997). However, "[t]he original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]" N.C. Gen. Stat. 8C-1, Rule 1004.

Defendant contends the inaudible portions of the recording render the recording "destroyed." Defendant concedes there is no evidence in the record that Detective Peacock proceeded in bad faith. But Defendant argues that "[i]n the same way that a bad-faith actor is prohibited from benefiting from his destruction of a writing, the [S]tate should be prohibited from benefitting through the police knowingly creating a poor-quality recording and then testifying concerning its content." In the alternative, Defendant argues that Detective Peacock's testimony

was “other evidence” barred by the best evidence rule since the original recording was played for the jury. Because Defendant has not shown that the jury would have reached a different verdict without Detective Peacock’s testimony, we need not address whether the trial court erred in allowing Detective Peacock’s testimony regarding his interview with Defendant.

Defendant does not contest the accuracy of Detective Peacock’s testimony; he only argues that it “allowed the [S]tate to conclude its case with a presentation of [Defendant’s] recorded interrogation that was much more compelling than the actual recording.” Defendant contends that Detective Peacock’s “summaries” of Defendant’s responses on four topics—(1) the weapon possessed by and used by Defendant; (2) that someone in the car stole money from the victim; (3) Defendant’s motive for committing the robbery; and (4) Defendant’s possession of money following the robbery—provided duplicative evidence concerning the most critical elements of the case and, therefore, had a probable impact on the jury. We are unpersuaded. Because Detective Peacock’s testimony regarding these topics was consistent with Defendant’s audible statements in the recording, which were of the same or greater probative value, we are unable to discern how Detective Peacock’s “summaries” had a probable impact on the jury.

Defendant challenges four portions of Detective Peacock’s testimony.

First, at trial, during an inaudible portion of the recorded interview, the prosecutor paused the recording and asked Detective Peacock to “tell the jury what [Defendant] was saying there[,]” to which Detective Peacock responded, “that he had the revolver in his hand and laid it on his lap, and he showed it to [Simuel].” Defendant’s statements in the audible portions of the recording are consistent with Detective Peacock’s testimony. Defendant acknowledged that he possessed a gun at the time of the robbery, stating “[the revolver] wasn’t even mine but I touched it” and “I never got out of the car . . . [but] when [Simuel] got up on the car, he seen it.” Thus, Detective Peacock’s testimony regarding Defendant’s statements was consistent with Defendant’s audible statement in the recording.

Second, when the prosecutor paused the recording during another inaudible portion of the interview and again asked Detective Peacock to tell the jury what Defendant was saying at that time, Detective Peacock testified “[h]e said he did not take anything out of the wallet. That the driver took something out of the wallet, and he didn’t take anything.” Defendant’s audible statements clarify that another person in the car took Simuel’s property. When asked who took the money out of Simuel’s wallet, Defendant stated “I didn’t take nothing out” and “the driver took the money.” Accordingly, Detective Peacock’s testimony regarding the stealing of money by one of the occupants of the car was consistent with Defendant’s own audible statements in the recording.

Third, during an inaudible portion of the interview, the prosecutor paused the recording and asked Detective Peacock “[i]f you can recall, what is he saying there.” Detective Peacock testified that Defendant “was basically saying they were rolling around. Didn’t have money to do anything.” Consistent with Detective Peacock’s statement, in an audible portion of the interview, Defendant expressed their motive for the crime, stating that “we ain’t got no money to get in really.” Thus, Detective Peacock’s testimony was consistent with Defendant’s own audible statements.

Fourth, when the prosecutor paused another inaudible portion of the interview and asked Detective Peacock what Defendant said, Detective Peacock testified, “I believe he said, I got \$50.” In an audible portion of the interview, Defendant admitted to obtaining money during the course of the robbery. When asked how much money he received from the robbery, Defendant stated “I got \$60.” Detective Peacock’s testimony that Defendant possessed money after the robbery, even though the precise amount was inconsistent with Defendant’s own audible statement of equal or greater probative value, was materially consistent.

Moreover, in considering whether Defendant can establish plain error, it is noteworthy that the testimony of the victim—Simuel—corroborated the account of the incident conveyed in Detective Peacock’s testimony and heard in the audible portions of Defendant’s interview. Simuel testified that the man in the back seat had a revolver and did not say anything, “he just had the gun out the window.” Simuel

also testified that “[a]t that point they had my phone, my wallet. But they just took my money and just gave me everything back.” Simuel testified that he had around \$395 or \$400 and that the driver returned his phone and wallet. Simuel’s account of the incident was unvaried from Detective Peacock’s testimony about Defendant’s statement and Defendant’s audible statements in the recording.

In sum, Detective Peacock’s testimony regarding his interview with Defendant—unchallenged by Defendant at trial—was materially consistent with Defendant’s audible statements in the recording and Simuel’s testimony. Defendant cites no authority holding that inadmissible evidence materially consistent with other relevant evidence of equal probative value is prejudicial because of its consistency. Thus, Defendant has failed to show that the testimony had a probable impact on the jury’s finding of guilt.

Conclusion

For the aforementioned reasons, Defendant has failed to demonstrate that the jury would have reached a different result absent Detective Peacock’s challenged testimony.

NO ERROR.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).