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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-390

Filed: 5 June 2018

Wayne County, No. 14 CRS 050339-40

STATE OF NORTH CAROLINA,

v.

CHRISTOPHER DEAN YATER, Defendant.

Appeal by defendant from judgment entered on or about 10 December 2015 by Judge Paul L. Jones in Superior Court, Wayne County. Heard in the Court of Appeals 4 October 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Franklin E. Wells, Jr. for defendant-appellant.

STROUD, Judge.

Defendant Christopher Dean Yater ("defendant") appeals from his conviction of first degree burglary and robbery with a dangerous weapon. On appeal, defendant argues that the trial court erred when it admitted into evidence a report which was hearsay and in violation of the best evidence rule and defendant's right to confront witnesses against him. Defendant also contends that the trial judge made

impermissible comments on the strength of his case. We find no error with the trial court's judgment.

Background

"No, nothing good starts in a getaway car."[1] Defendant should have considered this bit of musical wisdom from Taylor Swift back in January 2014 when he made the fateful decision to give three men a ride. His passengers committed a robbery and shot a man during the robbery. On or about 3 November 2014, defendant was charged with attempted first degree murder, first degree burglary, robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, first degree kidnapping, and second degree kidnapping relating to that robbery on 17 January 2014. The issues defendant raises on appeal relate solely to the judge's comments and evidence introduced at trial, so we will not go into the details of the entire factual scenario that led to these charges.

The matter came on for a jury trial on 7 December 2015. The State called as one of its witnesses Detective Michael Kabler, who testified that he and another detective -- Detective Baker -- interviewed defendant, and during that videotaped interview, defendant made a statement. Afterwards, Detective Kabler wrote a report summarizing that interview.

[1] Taylor Swift & Jack Antonoff, *Getaway Car*, Reputation (Big Machine Records 2017).

At the close of the State's evidence, the trial court granted defendant's motion to dismiss the charges of attempted first degree murder, first degree kidnapping, and second degree kidnapping. The jury could not reach a unanimous verdict on the charge of assault with a deadly weapon with intent to kill, so that charge was also dismissed. Defendant was convicted of first degree burglary and robbery with a dangerous weapon. Defendant timely appealed his conviction to this Court.

Analysis

I. Detective Kabler's Report

Defendant argues on appeal that the trial court erred when it admitted into evidence Detective Kabler's report because it violated the best evidence rule, was inadmissible hearsay, and violated defendant's right to confront witnesses against him.

a. Standard of review

At trial, defendant specifically objected to the admission of the report and argued it was "hearsay and violates the confrontation clause." "When a defendant objects to the admission of evidence, we consider whether the evidence was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Blackwell*, 207 N.C. App. 255, 257, 699 S.E.2d 474, 475 (2010) (citation, quotation marks, comma, and brackets omitted).

But defendant did not mention the best evidence rule to the court below when lodging his objection to the admission of Detective Kabler's report. This argument was not preserved for review. *See, e.g., State v. Hernandez*, 227 N.C. App. 601, 608, 742 S.E.2d 825, 829 (2013) ("According to well-established North Carolina law, where a theory argued on an appeal was not raised before the trial court, the argument is deemed waived on appeal." (Citation, quotation marks, and brackets omitted)). And defendant has not requested plain error review on appeal. *See State v. Ross*, 207 N.C. App. 379, 392, 700 S.E.2d 412, 421 (2010) ("Defendant also makes no argument as to plain error and therefore waives his right to plain error review on this issue."). Defendant has waived his right to plain error review of this issue.

b. Hearsay

Defendant argues that the report contained inadmissible hearsay. "The trial court's determination as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal." *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293 (2011) (citation omitted).

Rule 801 of the North Carolina Rules of Evidence defines hearsay as "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). But under Rule 801(d), "[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own

statement[.]" N.C. Gen. Stat. § 8C-1, Rule 801(d)(A). Defendant claims that the report is "double" hearsay because it recounts what another detective -- Detective Baker -- told Detective Kabler. But Detective Kabler's report states that while Detective Baker conducted the initial interview with defendant, *both* detectives ultimately interviewed him together. Afterwards, Detective Kabler produced his report. The portion of the report that the jury heard contained admissions by defendant, which were admissible as an exception to the hearsay rule under Rule 801(d). The trial court did not err in admitting the report on these grounds.

c. Confrontation Clause

Finally, defendant contends that the report "contains information that violates [defendant's] right to confront witnesses against him." A portion of Detective Kabler's report recounted his interview with another individual who did not testify at defendant's trial. But that portion of the report was never heard or seen by the jury. Thus, it was not admitted as evidence and did not violate the Confrontation Clause. The trial court expressed concern about publishing Detective Kabler's report to the jury because it contained statements referencing third parties, so the State withdrew its request. The only portion of the report that the jury heard was during Detective Kabler's testimony when he recalled what defendant had said to him. His testimony made no reference to information received from non-testifying witnesses, and the jury

never heard or saw any statements by third parties that may have been mentioned in the report. No Confrontation Clause violation occurred.

II. Trial Judge's Comments

Finally, defendant argues that he is entitled to a new trial because the trial judge made impermissible comments regarding defendant's trial counsel that amounted to an expression of opinion on defendant's guilt. Specifically, defendant contends that "[t]he trial court repeatedly belittled defense counsel by critical comments both in and outside the presence of the jury." Defendant argues that the comments violated N.C. Gen. Stat. § 15A-1222 (2017) and N.C. Gen. Stat. § 15A-1232 (2017), the North Carolina Code of Judicial Conduct, and defendant's constitutional rights to due process of law and effective assistance of counsel.

"This Court uses a totality of the circumstances test to evaluate whether a judge's comments cross into the realm of impermissible opinion." *In re D.M.B.*, 196 N.C. App. 775, 777, 676 S.E.2d 66, 68 (2009) (Citation and quotation marks omitted). Under N.C. Gen. Stat. § 15A-1222, "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." Similarly, under N.C. Gen. Stat. § 15A-1232, "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize, or recapitulate the evidence, or to explain the application of the law to the evidence." And Canon 3A.(3) of the Code of

Judicial Conduct provides that "a judge should be patient, dignified and courteous to . . . lawyers and . . should require similar conduct of lawyers . . . subject to the judge's direction and control."

Defendant has not demonstrated that the trial court violated these statutes or the Code. First, when evaluating under N.C. Gen. Stat. § 15A-1222, we disregard any comments the trial court made outside the presence of the jury. *See In re D.M.B.*, 196 N.C. App. at 777, 676 S.E.2d at 68 ("We note that section 15A-1222 is inapplicable when the judge's comments are not made in the presence of the jury.").

Most comments noted in defendant's brief were made when the jury was not present. Defendant has not pointed out any instance in the record of the trial court expressing an opinion on defendant's guilt in the jury's presence. The trial court made only comments to control the examination of witnesses in the presence of the jury. The only relevant statements the trial court made in the presence of the jury were: (1) when the judge directed defendant's counsel to "Have a seat" after overruling his objection on leading during the prosecutor's direct examination of a witness; and (2) when the judge stated "And watch your manners" to defense counsel during cross examination of a detective.

As this Court explained in *State v. Parker*, 185 N.C. App. 437, 449-50, 651 S.E.2d 377, 385-86 (2007):

> [T]he courts of our State have long held that the scope and manner of examination of witnesses are matters which are

> ordinarily governed by the trial judge who may take appropriate measures to restrict improper questioning by counsel. . . . [T]he plain language of section 15A-1222 prohibits the trial court from expressing an opinion on a fact to be decided by the jury. N.C. Gen. Stat. § 15A-1222. Because the propriety of counsel's cross-examination was not an issue of fact for the jury to determine, [the trial judge's] actions or comments in no way violated section 15A-1222 of the Criminal Procedure Act."

Here, as in *Parker*, the trial court's comments did not amount to an impermissible opinion but rather simply related to examination of witnesses. *Parker*, 185 N.C. App. at 449-50, 651 S.E.2d at 385-86.

And even if any of the trial court's comments could be construed as the expression of an opinion, it is only when such comments result in prejudicial error that the defendant is entitled to a new trial. *See, e.g., State v. Jones*, 347 N.C. 193, 211, 491 S.E.2d 641, 652 (1997) ("Assuming *arguendo* that any of the above comments by the trial court could be construed to constitute the expression of an opinion, every such impropriety by the trial court does not result in prejudicial error. Whether a trial court's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, and the burden of showing prejudice is upon the defendant. Defendant has failed to show such prejudice in this case. . . . Defendant has pointed to no statement by the trial court which, taken either in isolation or together with all other allegedly improper statements, can be said to constitute a prejudicial expression of opinion on an issue

of fact or an intimation of a position deleterious to defendant's case. Thus, this assignment of error is overruled." (Citations omitted)). Defendant cannot establish prejudicial error from these comments.

Conclusion

We find no error with the trial court's judgment.

NO ERROR.

Judges HUNTER and TYSON concur.

Report per Rule 30(e).