IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1358

Filed: 17 July 2018

Alamance County, Nos. 16 CRS 3028, 55237

STATE OF NORTH CAROLINA

v.

GRADY CALLAWAY FOGLEMAN

Appeal by defendant from judgment entered 19 July 2017 by Judge G. Bryan Collins, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 16 July 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason R. Rosser, for the State.

Winifred H. Dillon for defendant-appellant.

DAVIS, Judge.

Grady Callaway Fogleman ("Defendant") appeals from his convictions for felony larceny, obtaining property by false pretenses, and attaining the status of a habitual felon. On appeal, he argues that the trial court committed plain error by allowing a lay witness to testify as to his guilt. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from error.

Factual and Procedural Background

The State presented evidence tending to establish the following facts: Defendant and Alfonzo Dark had known each other for several years and had helped each other with small logging or tree-trimming jobs. On 7 September 2016, Defendant contacted Dark about borrowing Dark's chainsaw and climbing gear for a job. Dark told Defendant that he did not have time to help him with a job, but Defendant stated that he did not need Dark's help on the job because he had another man helping him.

Dark informed Defendant that he had pawned his climbing gear but agreed to redeem the gear so that Defendant could use it. In return, Defendant agreed to pay Dark a share of the $300 he was going to receive for the work. Dark picked up Defendant in his truck and went to the pawn shop. Dark paid approximately $120 to redeem the climbing gear and a weed eater from the pawn shop. Defendant and Dark then went to Dark's house and retrieved Dark's chainsaw and a gas can.

Typically, Dark would use a wrench and a file when cutting trees, especially when the chain of the saw was dull. Dark asked Defendant if he needed a wrench and a file for the chainsaw because it had a dull chain. Although Defendant did not have a wrench and a file in his possession, he told Dark that he did not need these tools for the job.

Dark subsequently drove Defendant to a bar in Graham, North Carolina. Defendant got out of the truck and proceeded to remove the climbing gear, chainsaw, gas can, and some rope from the truck bed. Because Dark had become suspicious that Defendant was not actually using the items for a job, he instructed Defendant to put the items back. Defendant refused to put them back into the truck and walked away from the truck with the items. He promised to return them, and Dark warned him that if the items were not returned by 5:00 p.m. that day he would "call the law."

When Defendant did not return the items that evening, Dark proceeded to drive around looking for Defendant. He was unable to locate Defendant and reported the incident to the police. An investigating officer later discovered that the climbing gear and chainsaw had been pawned by Defendant at a pawn shop in Burlington, North Carolina. Defendant was arrested and charged with felony larceny, obtaining property by false pretenses, and attaining the status of a habitual felon.

A jury trial was held on 18 and 19 July 2017 before the Honorable G. Bryan Collins, Jr. in Alamance County Superior Court. On 19 July 2017, the jury found Defendant guilty of felony larceny and obtaining property by false pretenses. That same day, Defendant pled guilty to attaining the status of a habitual felon. The trial court consolidated Defendant's convictions and sentenced him to a term of 67 to 93 months imprisonment. Defendant gave oral notice of appeal in open court.

Analysis

Defendant's sole argument on appeal is that the trial court committed plain error by allowing Dark to testify as to his opinion of Defendant's guilt. Because Defendant failed to object to this testimony at trial, we review his argument only for plain error. *See* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless 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.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

Rule 701 of the North Carolina Rules of Evidence states as follows:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. R. Evid. 701. "[W]itnesses are not permitted to offer their opinions of whether a defendant is guilty." *See State v. Wagner*, __ N.C. App. __, __, 790 S.E.2d 575, 579 (2016) (citation, quotation marks, and brackets omitted), *disc. review denied*, 369 N.C. 483, 795 S.E.2d 221 (2017).

During direct examination, Dark testified as follows:

> [PROSECUTOR:] Okay. So when you told him you had to go to a doctor's appointment with your wife, what, if anything, occurred next?
>
> [DARK:] He said that he wouldn't need me in particular because Porky was going to help him. And I said, well, the climbing gear is in pawn at Super Save Pawn and it's going to cost me $100 to get it out. And he said the job paid $300. So, I figured, I said, well, I won't make anything on that after you pay the help. *And he said that he would pay the help out of his, which was another red flag because he wouldn't have made nothing either.*
>
> [PROSECUTOR:] You said that was another red flag because of what?
>
> [DARK:] Because if he paid the helper out of his and gave me half, which would have been $150, by the time he paid the helper, he wouldn't have had anything much left.
>
> [PROSECUTOR:] Did the defendant do those on those three previous jobs? Did he ever pay out of his half the helper?
>
> [DARK:] Sometimes he paid part of it. . . . [O]n one occasion, he had went to the job and took up some of the money before the job even got done. And then when we got paid, he just split with me what was left and I wind up paying the helper out of my part.

. . . .

[PROSECUTOR:] . . . After you picked up the saddle and the spikes from Super Save, what did you do next?

[DARK:] I proceeded back to my house because he needed the chainsaw and we unlocked my shed. And [Defendant] goes into my shed because he, you know, that's where I kept my saw. And he picks the saw up and came out. And I got the gas can and came out. And I told him that he was going to need a wrench and a file and he said he didn't need the wrench nor the file and the saw was dull. *And that was another red flag because you don't cut trees without a wrench or a file.* Because the first thing that happens, your chain might jump off and you won't get anything done. So that was another red flag that there wasn't no trees to be cut.

[PROSECUTOR:] And you had stated earlier that he showed up, he didn't have no tools on him?

[DARK:] He didn't have no tools.

[PROSECUTOR:] Did you see -- did he produce a wrench or a file?

[DARK:] He didn't have no wrench nor a file.

[PROSECUTOR:] You're saying you can't cut trees without that?

[DARK:] Well, a professional wouldn't go cut trees without a file and a wrench.

[PROSECUTOR:] Okay.

[DARK:] Especially when the saw is already dull.

(Emphasis added.)

Defendant contends that the trial court erred in allowing Dark to testify that some of Defendant's actions should have raised "red flags." He argues that this testimony improperly invaded the province of the jury because it was Dark's opinion that Defendant was guilty of crimes for which he was charged. We disagree.

We addressed a nearly identical issue in *State v. Wagner*, where the defendant challenged the testimony of a lay witness that his behavior should have raised "red flags." *Wagner*, __ N.C. App. at __, 790 S.E.2d at 579. In *Wagner*, the defendant was charged with statutory rape, incest, and sex offenses with a child. The defendant's wife testified at trial that there had been "red flags that [she] should have picked up on" between the defendant and the child victim during the child's prior visits to his home. *Id.* at __, 790 S.E.2d at 579 (emphasis omitted).

On appeal, the defendant challenged the admission of his wife's testimony, asserting that it was an "improper opinion that Defendant was, in fact, guilty of the crimes with which he was charged." We held the wife's testimony "was not offering an opinion as to Defendant's guilt. Rather, she was merely responding to a question on direct examination as to whether she had ever observed any unusual behavior involving Defendant and [the child] while [the child] was visiting their home." *Id.* at __, 790 S.E.2d at 579. Thus, we held that the admission of the testimony was not error. *Id.* at __, 790 S.E.2d at 579.

Here, as in *Wagner*, Dark's challenged testimony was not an expression of Defendant's guilt of the crimes of felony larceny and obtaining property by false pretenses. Rather, his use of the phrase "red flag" merely emphasized the unusual nature of the statements Defendant had made to Dark. Dark first testified that Defendant stated he was going to do a job for which he would inevitably earn no profit. Dark then testified that Defendant had stated that although he needed a chainsaw for the job he did not require a wrench or a file. Dark — who had been cutting trees for "60 years or better" — thus testified as to his belief that it was abnormal for Defendant to work a job cutting trees where he would (1) not make any money; and (2) not possess the proper tools required for the job.

Thus, because his testimony demonstrated his own rational perception and was helpful to an understanding of why Defendant's statements were unusual given the circumstances, Dark's testimony was admissible and did not invade the province of the jury. *See Wagner*, __ N.C. App. at __, 790 S.E.2d at 579. Accordingly, the trial court did not err — let alone commit plain error — by allowing his testimony into evidence.

Conclusion

For the reasons stated above, we conclude Defendant received a fair trial free from error.

NO ERROR.

Judges CALABRIA and BERGER concur.

Report per Rule 30(e).