IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1066

Filed: 17 July 2018

Wake County, No. 14 CRS 211495

STATE OF NORTH CAROLINA,

v.

CARL ANTHONY FREEMAN

Appeal by defendant from judgment entered 12 August 2016 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 4 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert T. Broughton, for the State.

Lisa Miles for defendant-appellant.

ZACHARY, Judge.

Defendant Carl Anthony Freeman appeals from his conviction for possession of a firearm by a convicted felon. On appeal, he argues that the trial court erred by admitting a police officer's testimony (1) that the firearm was placed under the driver's seat from the driver's seat position; (2) that there was no evidence that anyone else in the car was engaged in criminal activity regarding the firearm; (3) that

defendant was a gang member; and (4) that gang members are more likely to commit violent crimes and carry firearms. After careful review, we find no reversible error.

Background

On 21 May 2014, Officer Gavin Conley of the Raleigh Police Department was conducting "proactive patrols" in Southeast Raleigh as part of the RPD's gang suppression unit. While Officer Conley was in the parking lot of a convenience store, he heard loud music coming from a silver Pontiac on New Bern Avenue. The volume of the music seemed to violate the Raleigh City Code, so he initiated a stop of the vehicle.

Officer Conley observed that there were three individuals in the vehicle: defendant in the driver's seat, Quintell Whitted in the front passenger seat, and Jeremy Hartsfield in the backseat. Officer Conley recognized Jeremy Hartsfield as a member of the G Shine Blood gang and as a convicted felon, but he did not recognize Quintell Whitted. Officer Conley also recognized defendant as a member of the "8-Trey Gangster Crip gang[,]" knew that defendant was on probation for a previous felony conviction for assault with a deadly weapon inflicting serious injury, and knew that defendant's driving privileges had been revoked.

Upon the arrival of additional officers, Officer Conley asked defendant to step out of the vehicle. Officer Conley then frisked defendant for weapons, and found none. The other two individuals remained inside the vehicle during this time. At this point,

Officer Conley asked defendant "if there was anything illegal in the vehicle," to which defendant responded, "[n]o, you can go ahead and check; just make it quick." Officer Conley then instructed defendant and the other two individuals to sit on the curb.

During his search of the vehicle, Officer Conley observed open containers of alcohol in the floorboard behind the driver's seat, near where Hartsfield had been sitting. Subsequently, Officer Conley conducted a probable cause search of the vehicle, during which he found a pistol under the driver's seat. He then handcuffed defendant, put on gloves, and took possession of the weapon. The weapon was submitted to CCBI and no fingerprints were found.

At trial, Officer Conley testified that the pistol was located under the front third of the driver's seat, leaning against the hump under the driver's seat with the "barrel facing towards the rear of the vehicle," and with the grip of the pistol toward the front of the vehicle. Over defendant's objection, Officer Conley also testified that the weapon appeared to have been placed "from the front leaning over reaching under and placing it in there" and that no one else in the vehicle was "involved in criminal activity in [regard] to that firearm . . . ."

Officer Conley further testified over defendant's general objection that "statistics show that gang members are involved in more violent crimes" and that "it's been shown that gang members are more likely to carry a firearm than others."

Defendant did not object at trial to Officer Conley's additional testimony that defendant was an member of the "8-Trey Gangster Crip" gang.

Discussion

I. Officer's Lay Opinion Testimony

Defendant argues on appeal that the trial court erred in admitting the lay opinion testimony of Officer Conley (1) as to the direction from which the gun had been placed under the driver's seat; and (2) as to whether "either of the other occupants was engaged in criminal activity 'in regards to that firearm.' " We disagree.

A. Standard of Review

First, defendant challenges the admission of Officer Conley's lay opinion testimony regarding the direction from which the firearm was placed under the driver's seat of the vehicle on the basis that it was an "improper extension of Rule 701." However, at trial, defendant objected to the admission of this testimony on the basis that it was speculative, a Rule 602 issue. "A party may not assert at trial one basis for objection to the admission of evidence, but then rely upon a different basis on appeal." *In re K.D.*, 178 N.C. App. 322, 326, 631 S.E.2d 150, 153 (2006) (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)). As a result, defendant failed to preserve this issue and it is subject to plain error review. *State v. Elkins*, 210 N.C. App. 110, 121, 707 S.E.2d 744, 752 (2011). "[T]o show plain error, 'defendant must convince this Court not only that there was error, but that absent

the error, the jury probably would have reached a different result[.]' " *Id.* (quoting *State v. Allen,* 360 N.C. 297, 310, 626 S.E.2d 271, 282 (2006)). "[W]e must be convinced that any error was so 'fundamental' that it caused a 'miscarriage of justice.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

Defendant also challenges the admission of Officer Conley's lay opinion testimony regarding the involvement of the other two passengers with the firearm. Defendant did not object to this testimony at trial; therefore, this issue is also subject to plain error review.

B. Analysis

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 701, " 'a lay witness may testify as to his or her opinion, provided the opinion is rationally based upon his or her perception and is helpful to the jury's understanding of the testimony' or the determination of a fact in issue." *Elkins*, 210 N.C. App. at 117, 707 S.E.2d at 750 (quoting *State v. Anthony*, 354 N.C. 372, 411, 555 S.E.2d 557, 583 (2001), *cert. denied,* 536 U.S. 930, 153 L. Ed. 2d 791 (2002)); N.C. Gen. Stat. § 8C-1, Rule 701 (2017). "[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." *State v. Wright,* 151 N.C. App. 493, 495, 566 S.E.2d 151, 153 (2002) (citation and quotation marks omitted). "While a witness may not testify regarding a legal standard or conclusion where the standard is a legal term of art that carries a specific legal meaning not readily apparent, . . . opinion testimony

regarding underlying factual premises is permissible." *State v. Hart*, 179 N.C. App. 30, 35, 633 S.E.2d 102, 106 (2006) (citations omitted).

Defendant maintains that "Officer Conley's testimony amounted to an opinion on . . . defendant's guilt." In support of this argument, defendant cites this Court's opinion in *State v. Carrillo*, 164 N.C. App. 204, 595 S.E.2d 219 (2004). In *Carrillo*, a package containing illegal drugs was mailed to the defendant's residence. *Id.* at 205-06, 595 S.E.2d at 221. On appeal, the defendant argued that "the trial court committed plain error in allowing law enforcement officers to testify to their opinions regarding [the] defendant's knowledge that the package contained illegal drugs and that [the] defendant realized he had been caught." *Id.* at 209, 595 S.E.2d at 223. This Court held that the trial court erred when it permitted "the officers to offer their opinions of whether [the] defendant was guilty." *Id.* at 210, 595 S.E.2d at 223. However, we concluded that this error did not rise to plain error because the defendant "failed to show that without [the officers'] testimony the jury would have reached a different verdict." *Id.* at 210-11, 595 S.E.2d at 224. This Court cited the additional evidence at trial, stating:

> Evidence at trial showed that the package was intercepted by the U.S. Customs agents and contained three ceramic turtles with a substantial amount of cocaine concealed inside. The package was mailed from a location in Mexico that U.S. Customs agents had identified as a mail origination point for cocaine sent to the United States. The package was addressed to [the] defendant at his residence. [The] [d]efendant accepted the package. It was found

> inside his residence minutes after he had taken possession of it. Broken pieces of similar turtles containing traces of cocaine were also found inside his apartment.

Id. at 210-11, 595 S.E.2d at 224.

Carrillo is distinguishable from the present case. Here, neither statement of opinion from Officer Conley amounts to a legal standard or conclusion regarding defendant's guilt. Both of these opinions are rationally based upon Officer Conley's perception and would be helpful to the jury in determining the factual issues in this case. *See Elkins*, 210 N.C. App. at 120, 707 S.E.2d at 751. Accordingly, the trial court did not err in admitting this testimony.

In addition, even if the admission of this testimony were error, defendant has failed to demonstrate that the jury would probably have reached a different result absent this testimony. There was substantial circumstantial evidence incriminating defendant, including the facts that the firearm was located under the driver's seat where defendant was seated, the position of the firearm indicated placement from the front floorboard area, and, as the State emphasizes, "the [dry] condition of the firearm on the floorboard . . . even though much of the back of the car was wet with spilled alcohol. . . ." also indicated placement from the front floorboard area. Thus, the admission of Officer Conley's testimony did not prejudice defendant's trial. Accordingly, we conclude that there was no plain error.

II. Ineffective Assistance of Counsel

Defendant also argues that, "[i]n the alternative, the defendant has been deprived of his right to the effective assistance of counsel." We disagree.

"A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970)). "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *Id*. at 561-62, 561 S.E.2d at 248 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). To establish ineffective assistance of counsel, there is a two part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 80 L. Ed. 2d at 693.

In the present case, because we have already determined that defendant was not prejudiced by the admission of Officer Conley's testimony, we can conclude that defendant was also not prejudiced by counsel's failure to object to the admission of

this testimony. Accordingly, defendant has failed to establish that he was deprived of his right to effective assistance of counsel. *See id*.

III. Officer's Testimony that Defendant was a Gang Member and that Gang Members are More Likely to Commit Gun Violence

Defendant next argues that the trial court committed plain error in admitting Officer Conley's testimony that defendant was a known gang member and that gang members are more likely to commit violent crimes and carry firearms. We disagree.

A. Standard of Review

Prior to trial, defendant made a motion *in limine* to prevent the State from admitting the testimony of Officer Conley that he recognized defendant as a member of the gang "8-Trey Gangster Crip." This motion was denied, and at trial the testimony was admitted without objection. During the trial, Officer Conley also testified over general objection that gang members are more likely to carry guns and commit violent crimes.

As to the appropriate standard of review, defendant failed to renew his objection to Officer Conley's testimony regarding defendant's gang membership, and as a result, defendant failed to preserve this issue for appellate review. *See State v. Bodden*, 190 N.C. App. 505, 510, 661 S.E.2d 23, 27 (2008). Accordingly, this issue is subject to plain error review, which we discussed above. Under plain error review, "[w]here there exists overwhelming evidence of defendant's guilt, a defendant cannot

make such a showing." *State v. Gayton*, 185 N.C. App. 122, 124, 648 S.E.2d 275, 278 (2007).

Defendant also failed to preserve for appellate review the issue of whether the trial court erred in admitting Officer Conley's testimony regarding the propensity of gang members to commit violent crimes and carry firearms. " 'In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.' " *State v. Perkins*, 154 N.C. App. 148, 151, 571 S.E.2d 645, 647 (2002) (quoting *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) and citing N.C.R. App. P. 10(b)(1)). " 'A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence.' " *Id*. at 152, 571 S.E.2d at 648 (quoting *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996)).

At trial, defense counsel offered two general objections to Officer Conley's testimony regarding the propensity of gang members to commit violent crimes and carry firearms. When asked "the reason for wanting to target gangs and their membership[,]" Officer Conley responded that "[s]tatistics show that gang members are involved in more violent crimes." At that point, defense counsel raised a general objection, which the trial court overruled. A short time later, Officer Conley further

testified that "It's -- through training and experience, it's -- it's shown that gang members are more likely to carry a firearm." Defense counsel again raised a general objection to this testimony, which the trial court overruled on the grounds that "It's subject to cross-examination[] . . . ." The trial transcript does not clearly indicate the grounds for defense counsel's objections. Accordingly, defendant failed to preserve this issue for appeal and we review for plain error. *Perkins*, 154 N.C. App. at 152, 571 S.E.2d at 648.

B. Analysis

"Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2017). " 'Relevant evidence' means 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 (2017). However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2017).

Moreover, character evidence is inadmissible for the purpose of proving that the person acted in conformity therewith. N.C. Gen. Stat. § 8C-1, Rule 404(a) (2017). "North Carolina courts have long held that membership in an organization may only be admitted if relevant to the defendant's guilt." *State v. Hinton*, 226 N.C. App. 108, 113, 738 S.E.2d 241, 246 (2013) (citations omitted). " '[E]vidence that has not been

connected to the crime charged and which [has] no logical tendency to prove any fact in issue [is] irrelevant and inadmissible.'" *Id.* (quoting *State v. Privette*, 218 N.C. App. 459, 479-80, 721 S.E.2d 299, 314 (2012)).

In the present case, defendant has failed to show that the admission of either Officer Conley's testimony regarding defendant's gang membership or his testimony regarding gang members' propensity to commit violent crimes and carry firearms amounts to plain error. Assuming, *arguendo*, that the admission of the gang testimony was error, it was not prejudicial error.

On appeal, defendant simply asserts that "[u]ndoubtedly, the officer's testimony, about his 'knowledge' of the defendant's alleged gang affiliation and his 'knowledge' that gang members are involved in more violent crimes and more likely to carry guns, carried the day for the State." In support of this argument, defendant cites jury notes to argue that "[c]learly the jury was not 'overwhelmed' with the [S]tate's evidence":

> Court Exhibit 1 is a note from the jury asking "how much circumstance is enough to satisfy awareness? What is required to prove awareness? Can we get a copy of the law?" Court Exhibit 2 is a subsequent note, stating "we are at an impass [sic]. We cannot come to a unanimous verdict."

This argument is insufficient to establish that the admission of Officer Conley's testimony was prejudicial. The notes indicate that the jury was properly focused on whether defendant was in possession of the firearm, and not on the allegations that

defendant was a gang member and thus more likely to possess a firearm. Moreover, there was substantial circumstantial evidence of defendant's guilt, including the testimony that the firearm was found under defendant's seat, the position of the firearm under defendant's seat, and the condition of the firearm, as previously discussed. Defendant has failed to show that absent the "gang testimony," the jury would probably have reached a different result. Accordingly, we conclude that the admission of this testimony was not plain error.

Conclusion

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

NO PREJUDICIAL ERROR.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).