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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1316

Filed: 7 August 2018

Durham County, No. 16 CRS 51289,

STATE OF NORTH CAROLINA

v.

HOLLY JO FOOR

Appeal by defendant from judgments entered 3 February 2017 by Judge Rebecca W. Holt in Durham County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Karen A. Blum, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

DAVIS, Judge.

Holly Jo Foor ("Defendant") appeals from her convictions for assault with a deadly weapon inflicting serious injury and robbery with a dangerous weapon. On appeal, Defendant argues that the trial court erred by (1) admitting into evidence a pair of scissors unconnected to the offenses for which she was charged; (2) failing to

require the redaction of certain portions of a videotape of her pre-trial interrogation; and (3) ordering Defendant to pay restitution in the amount of $500. After a thorough review of the record and applicable law, we conclude that Defendant received a fair trial free from prejudicial error but remand for a new restitution hearing.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: On the morning of 10 February 2016, Angelica Madden-Ballek was decorating cakes at Pahuatlan Panaderia, a bakery in Durham, North Carolina. At some point that morning, Madden-Ballek observed Defendant enter the bakery, walk to the back of the store, look around, and leave the bakery. For approximately 20 minutes, Defendant continued to walk around the cars parked in the parking lot directly outside the bakery. At some point, Defendant reentered the bakery.

Cecilia Castillo Lechuga entered the bakery shortly after 9:00 a.m. to buy some bread. Lechuga observed Defendant walking around inside the store and saw her step outside of the store. Once Defendant left the bakery, Lechuga observed that she was still "looking towards the . . . inside [of] the store."

When Lechuga entered the store, Bonerges Claudino, the owner of the bakery, was preparing to take money from the cash register to the bank. As he was collecting the money, he observed Defendant walking back and forth near the cars parked directly in front of the store and peering through the window of the bakery. Claudino

recognized Defendant because he had "seen her several other times around the store or in other surroundings." Claudino alerted the bakery's manager to Defendant's suspicious actions, and he left the bakery to go to the bank.

Shortly after Claudino left for the bank, Lechuga bought her bread and walked outside the bakery to her car. After she opened her car door and sat down in the driver's seat, Defendant "attacked [her] with a knife[,]"[1] and Lechuga in turn grabbed Defendant's hand in order to protect herself. The two women struggled momentarily, and eventually Defendant cut Lechuga's hand with the knife. Defendant then reached into Lechuga's open car door, grabbed Lechuga's pocketbook, and fled from the scene.

Andrew Sobha was working at an Advance Auto Parts store next to the bakery at the time that Defendant attacked Lechuga. He saw the altercation in the bakery's parking lot and immediately ran out of the store to help Lechuga. As he approached, he observed that Lechuga's hand was cut and that she was trying to keep Defendant away from her. Sobha testified that Defendant "had a knife and she was trying to go right back at the lady that she cut."[2]

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[1] In her statement to police officers, Lechuga described this weapon to be a "pink knife[.]"

[2] Sobha described Defendant's knife to be "orange with black" or "red and black . . . ." When asked what the knife looked like, he responded that it resembled a switchblade knife more than a kitchen knife.

By the time Defendant fled, a group of people had gathered around Lechuga, including Sobha, Madden-Ballek, the bakery's manager, and other store customers. Defendant was subsequently apprehended by the officers from the Durham Police Department. Upon searching a book bag in Defendant's possession, officers discovered a pair of orange and gray scissors. Defendant was charged with assault with a deadly weapon inflicting serious injury and robbery with a dangerous weapon.

A jury trial was held beginning on 30 January 2017 before the Honorable Rebecca W. Holt in Durham County Superior Court. The State presented testimony from Lechuga, Madden-Ballek, Claudino, Sobha, and eight other witnesses. Defendant did not testify.

At trial, the State admitted into evidence the scissors found in Defendant's possession. The State also presented to the jury a video interview of Defendant conducted by Investigator Bradley Frey at the Durham Police Department.

On 3 February 2017, the jury found Defendant guilty of assault with a deadly weapon inflicting serious injury and robbery with a dangerous weapon. The trial court sentenced Defendant to a term of 23 to 40 months imprisonment for the assault conviction along with a consecutive term of 59 to 83 months imprisonment for the robbery conviction. The court also ordered Defendant to pay Lechuga $500 in restitution. Defendant gave oral notice of appeal in open court.

Analysis

I. Admission of Scissors

Defendant first contends that the trial court erred by allowing the State to admit into evidence the orange and gray scissors found in her book bag despite a lack of testimony from any of the witnesses that the scissors were connected to the attack on Lechuga. Defendant argues that Lechuga described the weapon that cut her to be a "pink knife." Thus, she asserts, the scissors lacked relevance to the crime and were therefore inadmissible.

Evidence is relevant if it has "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. R. Evid. 401. Although relevance is a legal standard subject to *de novo* review, a trial court's determination as to relevancy is accorded "great deference on appeal." *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (citation omitted), *cert. denied*, 565 U.S. 1081, 181 L. Ed. 2d 529 (2011).

In cases where evidence lacking relevance under Rule 401 is erroneously admitted, such "errors are subject to harmless error analysis on appeal." *State v. Williams*, 232 N.C. App. 152, 168, 754 S.E.2d 418, 428 (citation and quotation marks omitted), *disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014). In such cases,

> the burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. The admission of evidence which is technically inadmissible will be treated as

> harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.

Id. at 168, 754 S.E.2d at 429 (citation and brackets omitted).

Even assuming — without deciding — that the trial court erred by admitting the scissors into evidence, Defendant has failed to demonstrate that the introduction of the scissors was prejudicial to her defense. The State presented overwhelming evidence of Defendant's guilt. Lechuga and Sobha both testified that Defendant (1) attacked Lechuga as she was getting into her car; (2) struggled with her in the parking lot; (3) cut her hand with a small weapon; (4) stole her purse from her vehicle; and (5) fled from the parking lot. The State also presented a video that confirmed the witnesses' version of the events.

Thus, Defendant has failed to show that the admission of the scissors prejudiced her defense. Accordingly, this argument is overruled.

II. Redaction of Video

Defendant next argues that the trial court erred by admitting into evidence the unedited pre-trial video interview of her that was conducted by Investigator Frey. Specifically, Defendant argues that the trial court should have redacted portions of the video interview during which Investigator Frey "repeatedly accused [her] of lying."

During the interview at the Durham Police Department, Investigator Frey stated to Defendant that video surveillance had captured her attacking and robbing Lechuga outside the bakery. In response, Defendant denied that she had committed the robbery at which point Investigator Frey stated, "I don't want you to just sit here and lie to me." At a later point during the interview, Defendant once again told Investigator Frey that she had not committed the robbery, and he responded that "you're not going to cooperate and you're going to lie to me . . . ." Defendant stated that she was, in fact, cooperating because she had not asked for a lawyer, and Investigator Frey responded that "just cause you're not asking for a lawyer doesn't mean you're not lying and omitting what's happening."

This Court has stated that

> the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court. As such, the wholesale publication of a recording of a police interview to the jury, especially law enforcement's investigatory questions, might very well violate the proscriptions against admitting hearsay or Rule 403. In such instances, trial courts would need to redact or exclude the problematic portions of law enforcement's investigatory questions/statements.

State v. Miller, 197 N.C. App. 78, 94, 676 S.E.2d 546, 556, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (2009).

Defendant further asserts that these statements by Investigator Frey during the interview amounted to impermissible lay opinion testimony. In support of her argument, she cites *State v. Castaneda*, 215 N.C. App. 144, 149, 715 S.E.2d 290, 294, *disc. review denied*, 365 N.C. 354, 718 S.E.2d 148 (2011), in which this Court held that "[i]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury and that testimony to the effect that a witness is credible, believable, or truthful is inadmissible." *Id.* at 149, 715 S.E.2d at 294 (citation and quotation marks omitted).

Once again, however, even assuming *arguendo* that the trial court should have redacted the portions of the video that Defendant asserts were inadmissible, she has failed to show that the comments made by Investigator Frey rose to the level of prejudicial error. As discussed above, the evidence against Defendant was overwhelming, including testimony from multiple eyewitnesses and video surveillance footage during which Defendant can be seen attacking Lechuga. Based on this evidence of Defendant's guilt, she is unable to show that the admission of the unredacted video constituted reversible error.

III. Restitution

Finally, Defendant argues that the trial court's restitution award was not supported by competent evidence. We agree.

"A trial court's entry of an award of restitution is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18) even without a specific objection." *State v. Sydnor*, 246 N.C. App. 353, 358, 782 S.E.2d 910, 915 (2016) (citation omitted). This Court has held that "[t]he amount of restitution ordered by the trial court must be supported by competent evidence presented at trial or sentencing." *State v. Davis*, 206 N.C. App. 545, 551, 696 S.E.2d 917, 921 (2010) (citation and quotation marks omitted).

Here, the trial court entered a restitution order requiring Defendant to pay $500 in restitution to Lechuga. However, the State concedes that the evidence presented at trial was insufficient to support a $500 restitution award.

The record reveals that the court's award was based simply upon a worksheet on which the prosecutor requested restitution in the amount of $500 and the prosecutor's unsworn statement to the court seeking an award in this amount. However, it is well established that "a restitution worksheet, unsupported by testimony or documentation is insufficient to support an order of restitution." *Davis*, 206 N.C. App. at 552, 696 S.E.2d at 922 (citation and quotation marks omitted).

We note that some evidence was offered at trial tending to support a restitution award. Lechuga testified that her "bank card, [her] consular ID, one passport, [and] about 200 or 300 dollars" was taken when Defendant stole her pocketbook. Thus, we remand for a new hearing to determine an appropriate award of restitution. *See State*

v. Moore, 365 N.C. 283, 286, 715 S.E.2d 847, 849 (2011) (remanding for trial court to determine amount of damage caused by defendant's actions and calculate correct amount of restitution where "some evidence" supported an award of restitution); *Sydnor*, 246 N.C. App. at 359, 782 S.E.2d at 915 (vacating restitution award and remanding for new hearing to calculate proper amount of restitution where evidence supported a restitution award but was too vague to support the $5,000 amount awarded).

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error but remand for a rehearing on restitution.

NO PREJUDICIAL ERROR AT TRIAL; REMANDED FOR NEW RESTITUTION HEARING.

Judges DILLON and INMAN concur.

Report per Rule 30(e).