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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-333

Filed: 15 January 2019

Bladen County, Nos. 15 CRS 51969, 16 CRS 33–35

STATE OF NORTH CAROLINA

v.

MONTISE A. MITCHELL

Appeal by defendant from judgments entered 24 August 2017 by Judge Rebecca W. Holt in Bladen County Superior Court. Heard in the Court of Appeals 16 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

Richard J. Costanza for defendant.

DIETZ, Judge.

Defendant Montise Mitchell appeals his convictions for first degree murder, attempted first degree murder, and two counts of conspiracy to commit first degree murder.

Mitchell argues that the trial court committed plain error by allowing testimony regarding his refusal to speak to law enforcement or, in the alternative,

that he received ineffective assistance of counsel when his attorney failed to object to that testimony. Mitchell also argues that the trial court erred by allowing the jury to convict him on two separate counts of conspiracy because the evidence only showed the existence of one agreement to commit a crime.

As explained below, Mitchell did not meet his burden to establish plain error and his ineffective assistance of counsel claim is unsuited for review on direct appeal. The State concedes error on the conspiracy issue and, having reviewed the record, we agree. We therefore vacate one of the conspiracy convictions and remand for further proceedings consistent with this opinion.

Facts and Procedural History

In 2013, Defendant Montise Mitchell worked at Smithfield Packing with cousins Robert and Antwan Council. One evening after work, Mitchell waited by Robert Council's truck and attacked Robert because Mitchell had seen Robert talking to Mitchell's girlfriend. The next day, Mitchell broke the window of Robert's truck. Sometime after these incidents, Robert and Antwan Council ran into Mitchell in Antwan's neighborhood. Robert and Mitchell got into a fight and Antwan stopped Mitchell from getting a gun out of his car.

In 2015, Robert and Antwan Council started getting calls saying that Mitchell "was looking for [them] and what he was going to do to [them]." On 8 November 2015, shortly after they started receiving threatening calls about Mitchell, Robert went to

his cousin Darrell Council's house where he met up with Darrell, Antwan, Isiah Long, Mitchell's sister Shanika Mitchell, and Mitchell's girlfriend D'Nazya Downing. The group hung out in and around Darrell's truck talking and smoking marijuana for about two hours. Shanika and D'Nazya then asked Antwan and Darrell to take them back to Shanika's house. After Antwan and Darrell dropped off Shanika and D'Nazya, they were driving away when Antwan saw Mitchell walking across the road in front of them with a gun. When Mitchell reached the center of the road, he started shooting at Darrell's car. Antwan ducked and heard gunshots from two shooters. He identified Mitchell as one of the two shooters, but could not identify the other. Antwan was not hit. He got out of the car and saw two people running from the scene. Darrell was shot and killed.

On 4 January 2016, the State indicted Mitchell for first degree murder, attempted first degree murder, discharging a firearm into an occupied vehicle, and two counts of conspiracy to commit first degree murder. The case went to trial.

At trial, Robert Council testified about his history with Mitchell and the events leading up to the shooting. Isiah Long testified that, on the day of the shooting, Shanika's and D'Nazya's demeanors changed from happy and joking earlier in the day to quiet and serious after they started sending and receiving numerous text messages later in the day. Antwan Council testified about the 2013 altercations with Mitchell, but said that he and Robert had no further problems with Mitchell until the

shooting. Antwan testified about the evening leading up to the shooting, recounting that Shanika and D'Nazya were very quiet that evening in contrast to their demeanors earlier in the day. He testified that the two women were texting constantly on the ride back to Shanika's house. When Antwan and Darrell dropped them off, Antwan said, "See you later" and Shanika responded, "Nah, you ain't got to worry about that." Antwan described the shooting and identified Mitchell as one of the two shooters.

D'Nazya Downing testified that she had a child with Mitchell and had been dating him for several months. She testified that she and Shanika sent text messages to Mitchell while they were hanging out with Darrell and Antwan. Mitchell asked her if Antwan and Darrell were armed and she told Mitchell they were not. She then texted Mitchell that Antwan and Darrell were going to drive her back to Shanika's house. Mitchell told her he was going to shoot Antwan and Darrell and asked her to let him know when she arrived home. She texted Mitchell to let him know when she had been dropped off. Several minutes later, she heard multiple gunshots. A few minutes later, Mitchell showed up at Shanika's house. Mitchell told D'Nazya to remain quiet and destroy her phone.

Detective Morgan Johnson testified that he was the lead investigator in the case and that police recovered 21 shell casings from the scene in two different groupings, indicating that there were two shooters. He testified that Mitchell became

a suspect after Antwan identified him.

At the close of evidence, the trial court denied Mitchell's motion to dismiss and the jury later convicted Mitchell of all charges. The trial court arrested judgment on the discharging a firearm charge. The court then consolidated the first degree murder count and one of the conspiracy counts and sentenced Mitchell to life in prison without the possibility of parole. The court consolidated the attempted first degree murder count with the second conspiracy count and sentenced Mitchell to a consecutive term of 150 to 192 months in prison. Mitchell timely appealed.

Analysis

I. Admission of testimony regarding Mitchell's silence

Mitchell first argues that the trial court committed plain error by admitting an officer's testimony that Mitchell refused to speak with him during the investigation. Mitchell contends that this testimony violated his Fifth Amendment rights because it was, in effect, a comment on Mitchell's constitutionally protected right to remain silent when questioned by law enforcement. Mitchell concedes that he did not object to this testimony at trial. As explained below, we find no plain error.

Unpreserved evidentiary challenges are reviewed for plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "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." *Id.* In other words, the defendant must "show that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335. Plain error should be "applied cautiously and only in the exceptional case" where the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 518, 723 S.E.2d at 334.

Here, on redirect examination of Detective Johnson, a State witness, the State elicited the following testimony:

> [PROSECUTOR]. And in this instance, did you have an opportunity to interview Christopher Baldwin?
>
> [JOHNSON]. Yes, I did.
>
> [PROSECUTOR]. Did you have an opportunity to interview Shanika Mitchell?
>
> [JOHNSON]. Yes, I did.
>
> [PROSECUTOR]. And did you have an opportunity to interview D'Nazya Downing?
>
> [JOHNSON]. Yes, I did.
>
> [PROSECUTOR]. And did you have an opportunity to interview Montise Mitchell?
>
> [JOHNSON]. Montise Mitchell gave no – would not speak or communicate with me.

Mitchell contends that this line of questioning violated his Fifth Amendment rights. But even assuming the trial court erred by admitting this testimony, Mitchell has not shown plain error, because he has not established that "absent the error, the jury probably would have returned a different verdict." *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335. To be sure, Mitchell argues that "the State's case rested on the credibility of two witnesses" and that Mitchell established during trial that those witnesses had "substantial interests in the outcome of the trial, interests that would be furthered by convictions of the Defendant."

But Mitchell never explains why Detective Johnson's single, isolated reference to his decision to remain silent had anything to do with the credibility of those other witnesses, or in any way impacted the jury's decision to credit those witnesses' testimony in reaching their verdict. At best, Mitchell suggests that the exclusion of the challenged testimony *might* have had some marginal impact on the jury's deliberations; he has not come close to showing that, but for the challenged testimony, the jury *probably would have* acquitted him. *Id.* We therefore find no plain error.

Mitchell next asserts that, if this Court finds no plain error, it should hold that Mitchell received ineffective assistance of counsel because his trial counsel failed to object to the challenged testimony. This argument is not suited for review on direct appeal.

The merits of an ineffective assistance of counsel claim will be decided on direct appeal only "when the cold record reveals that no further investigation is required." *State v. Thompson*, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004). Here, even assuming the challenged testimony was objectionable, there are sound strategic reasons why Mitchell's counsel might have chosen not to object to it—for example, counsel may have concluded that objecting to a single, isolated remark that, in context, likely was not aimed at Mitchell's Fifth Amendment rights might unintentionally highlight the State's broader points from the redirect examination, which concerned the thoroughness of Detective Johnson's investigation.

As our Supreme Court recently emphasized, whether counsel "made a particular strategic decision remains a question of fact, and is not something which can be hypothesized" by an appellate court on direct appeal. *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017). Whenever there are potential fact questions concerning an ineffective assistance of counsel claim, like those that arise here, the Supreme Court has instructed us to dismiss the claim without prejudice to pursue it through a motion for appropriate relief in the trial court. *Id.* We follow the Supreme Court's instructions from *Todd* and dismiss this claim without prejudice.

II. Conviction on two separate counts of conspiracy

Mitchell next argues that the trial court erred in denying his motion to dismiss one of the two conspiracy charges. Mitchell contends that the State's evidence was

sufficient only to show the existence of a single agreement to commit multiple offenses, not two separate agreements.

The State concedes this error on appeal, admitting that "there was not sufficient evidence to support a second count of conspiracy." The State agrees with Mitchell that "one of the conspiracy convictions should be vacated."

We have reviewed the record and agree with the parties that we must vacate one of the conspiracy convictions. "[A] criminal conspiracy is an agreement by two or more persons to perform either an unlawful act or a lawful act in an unlawful manner." *State v. Wilson*, 106 N.C. App. 342, 345, 416 S.E.2d 603, 605 (1992). "When the evidence shows a series of agreements or acts constituting a *single* conspiracy, a defendant cannot be prosecuted on multiple conspiracy indictments consistent with the constitutional prohibition against double jeopardy." *State v. Medlin*, 86 N.C. App. 114, 121, 357 S.E.2d 174, 178 (1987).

Here, the evidence at trial only was sufficient to show a single agreement. That evidence showed that Mitchell conspired with D'Nazya Downing, Shanika Mitchell, and the second shooter to ambush and shoot Darrell and Antwan Council in their car. Although there were two victims (and two separate crimes against them), there was no evidence of two separate agreements to commit these crimes.

Accordingly, we vacate the conspiracy conviction in Case No. 16CRS000035 and, because that conviction was consolidated for sentencing with the attempted first

degree murder conviction, remand this matter for resentencing for attempted first degree murder. *Medlin*, 86 N.C. App. at 122, 357 S.E.2d at 179.

Conclusion

For the reasons discussed above, we find no plain error in the trial court's judgments for first degree murder, attempted first degree murder, and one count of conspiracy. We dismiss the corresponding ineffective assistance of counsel claim without prejudice to assert it in a motion for appropriate relief. We vacate the second conspiracy conviction and, because it was consolidated for sentencing with the attempted first degree murder conviction, remand for resentencing.

NO PLAIN ERROR IN PART; DISMISSED IN PART; VACATED AND REMANDED IN PART.

Judges BRYANT and INMAN concur.

Report per Rule 30(e).