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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-663

Filed: 16 April 2019

Moore County, No. 17 CRS 51448

STATE OF NORTH CAROLINA

v.

MARK TYLER MATTHEWS

Appeal by defendant from judgments entered 11 January 2018 by Judge Tanya T. Wallace in Moore County Superior Court. Heard in the Court of Appeals 30 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Terence Steed, for the State.

Mark Montgomery for defendant.

DIETZ, Judge.

Defendant Mark Tyler Matthews appeals his convictions for first degree burglary and common law robbery. As explained below, the trial court properly admitted an audio recording of Matthews's statements to law enforcement with certain objectionable portions muted, accompanied by a limiting instruction to disregard those muted portions. The trial court also properly admitted a statement

by a law enforcement officer that Matthews's story during his police interview matched the accounts of two other witnesses. Accordingly, we find no error in the trial court's judgments.

Facts and Procedural History

In May 2017, Bobby Gray Culler, an elderly man in his eighties, was robbed at his home. A week later, law enforcement arrested Taylor Tannehill, Kristopher Thomas, and Mark Tyler Matthews in connection with the crime. The State indicted Matthews for first degree burglary and common law robbery.

At trial, Culler testified that he was home alone on the night of the robbery. That evening, a young woman later identified as Tannehill came to his door asking for gas money. Culler gave her five dollars, but the woman returned a few minutes later, asking to come in while she waited for her boyfriend to pick her up. Culler let her into his house. Then, the woman asked Culler if he wanted her "to do something" before her boyfriend arrived. Culler admitted to paying the woman forty dollars in exchange for sex.

As the woman ushered him into his bedroom, a black man and a white man entered his home through the front door. The black man kicked Culler in the face, held him down and yelled "[w]here is your money?" while the white man "was just standing there." Culler could not identify the men because their faces were covered.

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Culler saw the men steal his checkbooks and an envelope with \$400.00 in it. After they left the house, Culler called the police.

Taylor Tannehill also testified at trial. Tannehill explained that, at the time of the crimes, she was dating Thomas and knew Matthews as an acquaintance. On the morning of the robbery, the three were sitting in Tannehill's car in a parking lot when Matthews "said that he knows where we can hit a lick." Although Tannehill did not want to participate, she drove Thomas and Matthews to Culler's house that night because she was afraid of Thomas, who physically abused her.

Tannehill admitted to knocking on Culler's door to ask for gas money and explained that, when she returned to the car, Matthews and Thomas told her to go back, offer Culler sex in exchange for money, and unlock the front door on her way in. Tannehill again explained that she did not want to do this, but Thomas threatened to hurt her if she did not.

Tannehill recalled watching Matthews and Thomas enter the bedroom with their faces covered, kick Culler in the face, and demand money. As she ran out of the house, Tannehill saw Thomas take the money while Matthews remained in the bedroom. When they returned to the car, Tannehill saw Thomas give the money and the checkbooks to Matthews so they could count it "and get some pills."

Detective Patrick Holder, an investigating officer, also testified for the State. He interviewed Culler on the night of the crime. Later that week, he interviewed

Tannehill about unrelated crimes and Tannehill confessed to her involvement in robbing Culler. Detective Holder testified that Tannehill's description of the events of that night matched Culler's.

Detective Holder later arrested Matthews and interviewed him. At trial, the State played a partially muted audio recording of the interrogation in which Matthews admitted he was outside Culler's house on the night of the crime and recounted other events of that night. After the jury heard the recording, Detective Holder testified that Matthews "admitted to being there the same night that Taylor Tannehill was there with Kris Thomas, that they went to the residence and the story was the same as what Ms. Tannehill had stated and what Mr. Culler had stated as well had occurred."

The jury found Matthews guilty on all charges and the trial court sentenced him to 84 to 113 months in prison for burglary and 15 to 17 months for robbery, with the sentences running consecutively. Matthews appealed.

Analysis

I. Audio recording of police interrogation

Matthews first challenges the admission of an audio recording of his interview with Detective Holder, with certain portions muted so the jury could not hear what was said. He contends that the audio recording was inadmissible under Rules 401 and 403 of the Rules of Evidence.

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We begin with a brief description of the sequence of events that led the trial court to admit this audio recording. During a bench conference at trial, Matthews objected to the entire recording of that interview and presented a list of statements from the recording that he considered too prejudicial to play for the jury. Some of these statements implied that Detective Holder and Matthews knew each other, such as when Detective Holder said “[w]e sat in a room like this too many times” and “[w]hy you keep getting in these situations.” Other statements revealed that Matthews had “[j]ust got out of prison” for another crime.

The State did not oppose Matthews’s objection to these statements. Instead, the State proposed muting the objectionable portions and playing only the audio, not the video, of the recording. The trial court approved the State’s recommendations and overruled Matthews’s objections, but also decided to provide a limiting instruction that would inform the jury to disregard the muted portions as “matters that are not proper for your consideration.”

Matthews first argues that the audio recording was irrelevant under Rule 401 because “[o]ther than Mr. Matthews’ vague admission of being at the Culler house at some time, and the detective’s repeated insistence that Mr. Matthews is guilty, there is nothing on the tape tending to show Mr. Matthews’ guilt.” We reject this argument for two reasons. First, at trial, Matthews did not object on relevancy grounds, and on appeal Matthews does not assert plain error. Thus, this argument is procedurally

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barred on appeal. N.C. R. App. P. 10(a)(1). Second, the audio recording included Matthews's admission that he was present near the scene of the crime, both incriminating him directly and corroborating accounts of other witnesses. This unquestionably makes the recording relevant under Rule 401. Accordingly, Matthews's relevancy argument is meritless.

Matthews next argues that the audio recording was so prejudicial that it was inadmissible under Rule 403. Matthews timely objected on this basis and we therefore review the trial court's ruling for abuse of discretion. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158 (2012).

Under Rule 403, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. N.C. R. Evid. 403. Matthews argues that, by muting portions of the recording instead of editing them out, "[t]he tape created the improper impression that Mr. Matthews was hiding something" or that "Mr. Matthews incriminated himself during those silenced portions." Either way, Matthews contends that the silence during the muted portions of the audio was so prejudicial that the trial court should have excluded it.

We reject this argument. The trial transcript indicates that the trial court considered the probative value of the audio recording and its potential prejudicial effect and then addressed Matthews's concerns about prejudice by limiting the recording only to the audio portion and crafting a limiting instruction (with

Matthews's input) to ensure that the jury did not consider the muted portions of the recording during deliberations. The trial court determined that this approach avoided the danger of unfair prejudice while permitting use of the appropriate portions of the recording. That decision was well within the trial court's discretion and certainly not "so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Accordingly, under the applicable standard of review, we find no abuse of discretion in the trial court's ruling.

II. Detective Holder's testimony

Matthews next argues that the trial court erred by admitting testimony from Detective Holder that Matthews's "story was the same as what Ms. Tannehill had stated and what Mr. Culler had stated as well had occurred." Matthews contends that the officer's testimony that Matthews's story matched the accounts of those other witnesses was improper opinion testimony because "the jury was perfectly capable of comparing Mr. Matthews' statement with those of Mr. Culler and Ms. Tannehill." Matthews concedes that he did not object to this testimony and we therefore review it for plain error. N.C. R. App. P. 10(a).

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

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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.

We are not persuaded that Detective Holder's statement was impermissible opinion testimony. Detective Holder was tasked with investigating the alleged crime and his testimony established that, during the investigation, Matthews gave an account that matched accounts given by other witnesses. Our Supreme Court has held that similar statements by law enforcement officers are permissible "lay opinions based upon their own personal perceptions." *State v. Rhinehart*, 322 N.C. 53, 57, 366 S.E.2d 429, 431 (1988).

In any event, this testimony cannot rise to the level of plain error because Matthews cannot show that this testimony had a probable impact on the jury's verdict. The jury heard Culler testify that a white man and a black man robbed his home with the help of a young woman. Tannehill testified that Matthews, a white man, participated in the robbery. The jury heard the recording of Matthews's interview with law enforcement in which he admitted that he was present with Tannehill the night of the robbery. This evidence strongly suggests that Matthews was the white man who participated in the crime. In light of this evidence, Matthews has not shown that, but for Detective Holder's statement that Matthews's account

matched those of other witnesses, the jury “probably would have returned a different verdict.” *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335. Thus, we find no plain error.

III. Ineffective assistance of counsel

Finally, Matthews argues that he received ineffective assistance of counsel because his counsel failed to object to Detective Holder’s testimony described above. Because we determined that the trial court properly admitted the challenged testimony, this alternative claim fails as well.

Moreover, even if we believed that Detective Holder’s testimony may have been inadmissible, there are potential strategic reasons why Matthews’s counsel may not have objected, including, as the State observes, that counsel chose “not to draw more of the jury’s attention to [a] . . . consistent sequence of events from three different sources by raising an objection.” Accordingly, even if we believed the challenged statement was objectionable—and we do not—we would be required to dismiss this ineffective assistance of counsel claim as unsuited for review on direct appeal. *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017).

Conclusion

We find no error in the trial court’s judgments.

NO ERROR.

Judges STROUD and BERGER concur.

Report per Rule 30(e).