IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-732

Filed: 4 June 2019

Person County, No. 15 CRS 52053

STATE OF NORTH CAROLINA

v.

BLAINE MARKEITH BENSON

Appeal by defendant from judgment entered 2 November 2017 by Judge David T. Lambeth, Jr. in Superior Court, Person County. Heard in the Court of Appeals 28 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott T. Slusser, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

STROUD, Judge.

Even if the State has failed to first establish a legitimate purpose for admission of a co-defendant's testimony of his guilty plea to the same crime for which defendant is charged, where the co-defendant testifies at the defendant's trial and clearly discloses his own participation in the crime for which defendant was charged, this

defendant cannot demonstrate any prejudice from admission of the testimony or the State's reference to this evidence in its closing argument. Accordingly, we find no plain error by the trial court.

I. Background

After getting a DWI, defendant was required to perform community service. As part of defendant's community service, he cleaned sewage at the Person County Group Home ("PCGH") with another community service worker, Edwin Terry. Defendant "was tasked with transporting the raw sewage that was in the wet vac to a manhole to pour it out." Afterwards, defendant wrote a letter to PCGH and alleged that he had been involved in a "possibly illegal raw sewage clean-up operation," and that he had gathered evidence of the "illegal activity." Defendant also alluded to negative health changes as a result of cleaning the raw sewage at PCGH. After receiving the letter, the Director of PCGH had a phone conversation with defendant. After this conversation, defendant sent a second letter and requested $400,000.00 each for himself and Terry, but then reduced the price to $250,000.00 each, as "compensation for our families." The Director called the police who then recorded a phone call with defendant and Terry.

Defendant was indicted for extortion and arrested. After a jury trial, defendant was found guilty of extortion and sentenced within the aggravated range because he

was on unsupervised probation while committing the offense. Defendant appealed, but his notice of appeal did not indicate that it had been served on the State.

II. Petition for Writ of Certiorari

Defendant acknowledges that his written "notice of appeal lacked a certificate indicating that it was served on the State." "When a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear that appeal." *State v. Rowe*, 231 N.C. App. 462, 465, 752 S.E.2d 223, 225 (2013) (brackets omitted). Defendant requests this Court grant his petition for writ of certiorari. The State does not contend that it did not receive the notice of appeal or allege any prejudice. "The writ of certiorari may be issued "in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). In our discretion, we grant Defendant's petition and review this case on its merits.

III. Challenged Testimony

Defendant argues "[t]he trial court erred by allowing Mr. Terry to testify that he pled guilty to the same charge Mr. Benson faced. The State did not establish a legitimate purpose for the evidence before Mr. Terry testified." Defendant contends that "[t]he trial court's admission of the evidence that Mr. Terry pled guilty to extortion constituted plain error."

Defendant did not object to the challenged testimony and our review is limited to plain error. "In criminal cases, an issue that was not preserved by objection noted at trial and which 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." N.C. R. App. P. 10(a)(4). "The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation, brackets, ellipsis, quotation marks, and emphasis omitted).

Our Supreme Court has stated that "evidence of a co-defendant's guilty plea is not competent as evidence of the guilt of the defendant standing trial. Thus, if such evidence is introduced for that illegitimate purpose—solely as evidence of the guilt of the defendant on trial—it is not admissible." *State v. Rothwell*, 308 N.C. 782, 786, 303 S.E.2d 798, 801 (1983). "Our case law indicates, however, that if evidence of a testifying co-defendant's guilty plea is introduced for a legitimate purpose, it is proper to admit it." *Id.* (emphasis omitted). Our Supreme Court has held that where the testimony of the guilty plea "was elicited after the witness' credibility had been attacked by the defendant," there was a legitimate purpose for the State to present

evidence of the witness's guilty plea. *Id.* at 787, 303 S.E.2d at 802. But even if the State had not established a "legitimate purpose" of the evidence when admitted, defendant must also demonstrate prejudice from any erroneously admitted testimony of a co-defendant's guilty plea. *See id.* at 790, 303 S.E.2d at 803.

As in *Rothwell*, here the State elicited evidence of Terry's guilty plea in his direct examination and before a legitimate purpose had "been established for its introduction at trial." *Id.* at 787, 303 S.E.2d at 802. But even if the initial admission of the evidence was erroneous, "as the events at trial unfolded" the "erroneous admission into evidence was not prejudicial to defendant" because Terry then testified about his own involvement in the crime. *See id.* After being sworn in, the State asked Terry about his connection to the extortion scheme at PCGH:

> Q (MS. MARTIN:) Mr. Terry, will you tell the jury your name?
>
> A Edwin Terry.
>
> Q And Mr. Terry, you are now in the North Carolina Department of Adult Corrections serving a sentence for a probation violation and for extortion as a result of your participating in a scheme to get money from Person County Group Homes. Is that right?
>
> A Yes, ma'am.
>
> Q And tell the jury what it was that you were on probation for and doing community service for?
>
> A Involuntary manslaughter.

Q Okay. Involuntary manslaughter. And then were you doing okay on your probation until this crime was committed. Is that correct?

A Yes, ma'am. Yes, ma'am.

Q So did this conviction for extortion violate that probation and is that why you're in prison today?

A Yes, ma'am.

Q And you're serving how long?

A Nineteen to 23 months.

Q All right. Umm, so you came in and pled guilty to trying to unlawfully get money from Person County Group Homes?

A Yes, ma'am.

Q All right. Tell the jury, umm, was that idea to demand and try to get half a million dollars from Person County Group Homes or threatening to expose them and, umm, cause some harm to them, was that your idea?

A No, ma'am.

Q Whose idea was it?

A It was our idea.

Q Okay. By that, who do you mean our idea?

A Blaine Benson.

Q And is that the defendant who's on trial here today?

A Yes, ma'am.

The initial testimony about Terry's conviction for the extortion, "standing alone, was erroneously admitted into evidence because a legitimate purpose had not yet been established for its introduction at trial." *Id.* at 787, 303 S.E.2d at 801-02. However, as in *Rothwell*, "it is clear that this erroneous admission into evidence was not prejudicial to defendant." *Id.* at 787, 303 S.E.2d at 802. Terry went on to testify about "facts which clearly disclosed his own participation in the crimes for which defendant was being tried." *Id.* at 788, 303 S.E.2d at 802. Further, defendant's counsel extensively cross-examined Terry about his involvement and his plea deal, and we cannot find any prejudice to defendant from Terry's testimony. *See State v. Cameron*, 284 N.C. 165, 170, 200 S.E.2d 186, 190 (1973) ("[I]n view of the witness' sworn testimony, which amounted to a detailed and unequivocal admission of his guilt, we are unable to perceive how a statement of his intention to confirm this sworn, public confession by a subsequent plea of guilty could be prejudicial error.").

IV. Closing Argument

Defendant also argues that the State's statements in its closing argument regarding this same evidence amounts to plain error, as defendant did not object during the closing argument:

> So when you go into the jury room, remember, you can have a little doubt, because you hear two different stories from two different sides. But you have to ask yourself, what makes common sense? What's, what do I feel, what do I know? And what you know from the evidence presented is that this defendant *just like his co-defendant admitted* is

> guilty of extortion, and I ask to you return a verdict of guilty. Thank you.

(Emphasis added.)

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Waring, 364 N.C. 443, 499-500, 701 S.E.2d 615, 650 (2010) (citations, quotation marks, and brackets omitted).

We have already determined that defendant has failed to show any prejudice from the evidence of Terry's guilty plea; likewise, defendant cannot demonstrate that the State's reference to the guilty plea "so infected the trial with unfairness that [it] rendered the conviction fundamentally unfair." *Id.* at 500, 701 S.E.2d at 650. Defendant cites *State v. Kerley*, 246 N.C. 157, 97 S.E.2d 876 (1957), to support this argument, but defendant's reliance on *Kerley* is misplaced. In *Kerley*, the State used evidence of a co-defendant's guilty plea to implicate the defendant, but the co-defendant did not testify and the defendant did not have the opportunity to cross-

examine him. *See Id.* at 160, 97 S.E.2d at 879. Accordingly, we find no prejudice from the State's closing argument.

V. Conclusion

Defendant received a fair trial, free of prejudicial error.

NO ERROR.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).