IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 18-1292

Filed: 17 September 2019

Durham County, No. 15 CRS 60540-42, 44, 16 CRS 84

STATE OF NORTH CAROLINA

v.

STEVENSON GILBERTO TRICE, Defendant.

Appeal by defendant from judgment entered 27 September 2017 by Judge James K. Roberson in Durham County Superior Court. Heard in the Court of Appeals 21 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Torrey D. Dixon, for the State.

Law Office of Lisa Miles, by Lisa Miles, for defendant-appellant.

YOUNG, Judge.

The trial court did not commit reversible error in overruling Defendant's objections to testimony by Officer Broadwell, denying Defendant's motions to dismiss, declining to instruct the jury on the lesser included offense of false imprisonment, or charging Defendant with habitual felon status. We therefore find no error in the trial court's decision.

I. Factual and Procedural History

On 6 December 2015, Marco Mundy ("Marco"), Marlon Mundy ("Marlon"), and Warren Blue ("Blue") went to Laquinta Inn ("Inn") to meet Stevenson Trice (Defendant) to purchase drugs for a friend, Tara. Marlon was driving his car with Blue in the front passenger seat and Marco seated behind Blue. At the meetup, Defendant got into the backseat with Marco and gave the men the drugs. The men delivered the drugs to Tara then returned to the Inn to pay Defendant for the drugs.

The following day, Defendant called and texted Blue to say he had left his gun in the backseat of the car. Blue told him they did not have the gun and did not know anything about a gun having been in the car. Defendant went to Marco and Marlon's house with a large shotgun. Defendant threatened, "Yeah, we're gonna have a problem if you don't have no guns or whatever so, you need to look." Defendant repeatedly asked Marco to "give the gun back," but Marco said he did not have the gun. The gun was never found in the house. Defendant said, "Everybody get in the car," and suggested that they go to Tara's house to see if the gun was there. A second car followed their vehicle to Tara's house, but they did not find a gun at her home.

Defendant directed the three men to drive down Carr Road–a dead end street—near his grandmother's house. Defendant guided them turn-by-turn while continuing to hold the shotgun, and at one point shouted, "You're going to have to give – you're going to have to either replace my gun and or y'all out." After directing

them down Carr Road, Defendant demanded that Marlon turn the car back around, back up to some trees and stop. Blue offered Defendant $200 to cover the price of the gun that Defendant had claimed he had left in Marlon's car but Defendant wanted more money. Defendant then gave an ultimatum, demanding either $250 (to buy another gun that he found) or the return of the alleged gun and again threatened that no one was leaving until he got either the money or the gun.

Defendant directed others at the scene to go get duct tape. Defendant told Marlon to restrain his brother Marco's hands and mouth with duct tape. At first, Marlon resisted and told Defendant that he was not going to restrain his brother, but after Defendant pointed the shotgun at Marlon, he followed Defendant's commands and restrained his brother's hands and mouth.

Defendant eventually stopped asking for a gun but continued to demand money, and told Marlon to ask his father for the money. Marlon called his father, George Mitchiner ("Mitchiner"), and told him that he and his brother were being held and that Defendant, "want[ed] $250 or he's going to kill us." Defendant made clear to Mitchiner while he was on the telephone, "I already got two already, so killing your two sons mean nothing to me. So you better hurry up and get this money together." Defendant further told him, "I'm going to lay both of them down if you don't get me $250 in 30 minutes." Mitchiner called back and told Defendant one of his friends

would meet them at the bank and give them the money, and called 911 to report the incident so that his son's cell phone could be traced.

Marco and Marlon's brother Mario had been at their home when Defendant showed up earlier in the day with the shotgun, and heard Defendant say, "Somebody needs to get me my gun or my money or something." Mario did not call the police because when he saw them all leave together he assumed it had been resolved.

While Defendant, Marco, Marlon, and Blue were headed to the bank, they were blocked by police on Carr Road. Officer J.R. Broadwell ("Officer Broadwell") got out of his car, approached the vehicle and commanded them to stop the vehicle and put up their hands. Marlon and Blue, the two front-seat passengers, complied and raised their hands in the air. The back two passengers, Defendant and Marco, did not comply at first. Defendant, on the right backseat passenger's side, raised his hands to his waist area and then started to make motions towards the floorboard as Officer Broadwell approached. After Officer Broadwell kicked out the back door window, a gun was exposed on the floorboard near Defendant's feet. Officer Broadwell locked eyes with Defendant, and exclaimed, "Show me your F'ing hands, or I will F'ing shoot you!" Defendant finally complied and raised his hands in the air. Marco's hands were still duct taped and he was yelling, "I'm duct taped!" As Officer Broadwell was pulling Marco out of the car, he said, "I'm a victim." Soon after, Officer Troy Fitting ("Officer Fitting") arrived on scene responding where an alleged kidnap victim's phone was

"pinging." At trial, Marlon testified that he never saw a gun in the car that night and that he had "still never seen a gun."

II. Testimonial Evidence

In his first argument on appeal, Defendant contends that the trial court improperly admitted 404(b) evidence in the form of Officer Broadwell's testimony. We disagree. He further contends that it was ineffective assistance of counsel (IAC) for trial counsel to fail to object to Officer Broadwell's testimony. We disagree.

A. Standard of Review

> Though this Court has not used the term de novo to describe its own review of 404(b) evidence, we have consistently engaged in a fact-based inquiry under Rule 404(b) while applying an abuse of discretion standard to the subsequent balancing of probative value and unfair prejudice under Rule 403. For the purpose of clarity, we now explicitly hold that when analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012).

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell

> below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

B. 404(b) Evidence

Defendant contends that improper 404(b) evidence, in the form of Officer Broadwell's testimony, was admitted. However, Defendant mischaracterizes this testimony. Officer Broadwell's statements about believing Defendant "was going to be the most dangerous person in that vehicle" or describing how Defendant appeared in those moments was not admitted to prove Defendant's character nor was it used to prove Defendant acted in accordance with any particular character trait. The testimony instead was Officer Broadwell's observations and thought processes directly related to his training and experience as a law enforcement officer. Officer Broadwell's testimony was not 404(b) evidence. Defendant objected to this testimony, but the objection was overruled.

Even assuming arguendo that the testimony was 404(b) evidence and that the admission of this testimony was error, Defendant must show that the admitted evidence prejudiced his case. *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373

(1988) ("Even if the complaining party can show that the trial court erred in its ruling, relief ordinarily will not be granted absent a showing of prejudice"). There was overwhelming evidence outside of Officer Broadwell's statements that Defendant committed the charged crimes. Numerous witnesses testified that Defendant, while carrying a shotgun, took the three men from place to place directing them turn by turn while threatening that he would kill at least two of them if they did not give him either the gun or the amount of money he demanded. Police officers traced the victim's cell phone to find Defendant in the car with the three men, backed in the woods on a dead end street, with one victim already restrained with duct tape and sitting next to the Defendant, while Defendant was reaching toward his shotgun at his feet. Even if Officer Broadwell's testimony had not been admitted, the jury would likely have still reached the same result. Since Defendant cannot prove that the admission of this evidence prejudiced him, any error from the trial court's admission of Officer Broadwell's testimony was harmless.

C. Ineffective Assistance of Counsel

Defendant contends that it was IAC for trial counsel to fail to object to Officer Broadwell's testimony.

As mentioned above, there is a reasonable probability that, even without any trial counsel errors, the result of the proceeding would have been the same due to the overwhelming amount of evidence pointing to Defendant's guilt. An IAC claim

requires proof of prejudice. *Id*. Here, Defendant failed to present any evidence to prove prejudice, and cannot succeed on a IAC claim. Therefore, there is no prejudicial error and we uphold the decision of the trial court.

D. Lay Opinion Testimony

Furthermore, Defendant contends that even the parts of Officer Broadwell's testimony that were objected to and overruled should not have been admitted under Rule 401 which addresses relevancy, and Rule 701 which addresses lay opinion testimony. However, again, to succeed on this argument Defendant must show that the admitted evidence prejudiced him in some way. *Id*. Since Defendant is unable to do so, he cannot show prejudicial error, and the trial court did not commit reversible error in admitting Officer Broadwell's testimony.

III. Motions to Dismiss

In his third argument, Defendant contends the State failed to prove all essential elements of attempted armed robbery and his motions to dismiss should have been allowed. We disagree.

A. Standard of Review

This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser

> offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Fritsch, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

B. Analysis

Defendant contends that the State failed to prove the essential element of felonious intent for attempted armed robbery, and therefore, Defendant's motions to dismiss the charges of attempted armed robbery should have been granted. Defendant argues that the State provided insufficient evidence that Defendant attempted to take property he knew he was not entitled to. Defendant claims that he was trying to gain possession of his own gun, or the money to cover the cost of that gun. With that argument Defendant believes the State was not able to prove he had the felonious intent to take the property of another person. However, "[t]he evidence is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference that might be drawn therefrom." *State v. Jackson*, 75 N.C. App. 294, 297, 330 S.E.2d 668, 669 (1985). There was no evidence that the gun at issue even existed as none of the victims saw it in the car on the night they first met,

the gun was not mentioned until the next day, and the gun was not found at any of the locations Defendant or the officers searched. Without the existence of such gun, Defendant can prove no right to it.

Even if the gun existed, Defendant repeatedly asked the victims for money. Defendant made it clear he was trying to get money because he eventually stopped asking for the gun and asked only for money. The Defendant's statements to the three men could be interpreted to mean that Defendant intended to rob them of money to which he did not have a bona fide claim. There was sufficient evidence for a jury to reasonably determine that Defendant intended to rob them of money to which he was not entitled, and therefore, because this necessary element of attempted robbery with a dangerous weapon was met by the State's evidence. Therefore, the trial court did not err in denying the motions to dismiss.

IV. Lesser-Included Offense

In his fourth argument, Defendant contends that the trial court committed plain error by declining to instruct the jury on the lesser-included offense of false imprisonment. We disagree.

A. Standard of Review

Plain error arises when the error is " '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). "Under the plain error rule, the 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." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

Defendant contends that the trial court erred by not instructing the jury on the lesser-included offense of false imprisonment, in regard to the two charges of the first-degree kidnappings of Marlon and Blue, because there was some conflicting evidence from which the jury could have found Defendant guilty of the lesser-included offense.

Because Defendant did not request that the court instruct the jury on a lesser-included offense the issue must be reviewed only for plain error. The evidence showed that Defendant restrained and moved all three victims for the purpose of holding each for ransom, for terrorizing, and for facilitating the commission of a felony, robbery with a dangerous weapon. Defendant warned all three that there would be problems if they did not have "guns or whatever," and said, "everybody get in the car." Defendant took the victims from place to place and told them someone would give him $250 or no one was leaving, and Defendant eventually threatened to kill at least two of the victims. Lastly, Defendant was in possession of a shotgun. Even if it were erroneous for the trial court to fail to instruct the jury on the lesser-included offense, Defendant has not shown that this omission prejudiced him. Therefore, the trial

court did not commit plain error in failing to instruct the jury on the lesser-included offense.

V. Habitual Felon Status

In his fifth argument, Defendant contends that he was improperly charged with habitual felon status as the underlying felony indictments failed to comply with N.C. Gen. Stat. § 14-7.3. We disagree.

A. Standard of Review

> Properly construed this act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being a habitual felon. It is likewise clear that the proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the "principal," or substantive, felony.

State v. Allen, 292 N.C. 432, 433-34, 233 S.E.2d 585, 587 (1977); s*ee also State v. Keyes*, 56 N.C. App. 75, 286 S.E.2d 861 (1982); N.C. Gen. Stat. § 14-7.3 (2018).

B. Analysis

Defendant argues that he was improperly charged with habitual felon status as the underlying felony indictments failed to comply with N.C. Gen. Stat. § 14-7.3.

> An indictment which charges a person who is an habitual felon … with the commission of any felony… must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony.

N.C. Gen. Stat. §14-7.3. The habitual felon indictment was separate from the indictment charging Defendant with the principal felonies, but Defendant argues that the indictments charging the underlying felonies do not comply with the statute because they do not "also charge that said person is an habitual felon." N.C. Gen. Stat. § 14-7.3.

In *State v. Todd*, the defendant was tried on charges of felonious breaking or entering and larceny, and being an habitual offender. The defendant argued that the habitual felon indictment did not comply with N.C. Gen. Stat. § 14-7.3 in that the indictment for breaking or entering and larceny failed to refer to his alleged status as a habitual offender at the time of the commission of the crime. The North Carolina Supreme Court held that § 14-7.3 does not render an indictment for habitual felon status invalid when the indictment for the underlying charge fails to refer to the defendant's habitual felon status at the time of the alleged commission of the underlying felony, so long as the defendant's habitual felon status is indeed charged in a separate indictment. *State v. Todd*, 313 N.C. 110, 120, 326 S.E.2d 249, 255 (1985). In the instant case, as in *Todd*, Defendant was tried on charges of being a habitual felon and argued the indictment did not comply with N.C. Gen. Stat. § 14-7.3 because the underlying charges did not "also charge that said person is an habitual felon." N.C. Gen. Stat. § 14-7.3. Accordingly, Defendant's argument fails, and the trial court did not err in charging Defendant with habitual felon status.

NO ERROR.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).