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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-451

Filed: 7 January 2020

Davidson County, Nos. 17CRS2618, 17CRS56168

STATE OF NORTH CAROLINA

v.

BRIAN LORENZO CURLEE, Defendant.

Appeal by defendant from judgment entered 14 November 2018 by Judge Mark Klass in Davidson County Superior Court. Heard in the Court of Appeals 29 October 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Nolan Graves, for the State.*

*James R. Parish for defendant-appellant.*

BERGER, Judge.

On November 14, 2018, a Davidson County jury found Brian Lorenzo Curlee (“Defendant”) guilty of malicious conduct by a prisoner. Defendant pleaded guilty to having attained habitual felon status, and he was sentenced to 80 to 108 months in prison. On appeal, Defendant argues the trial court (1) erred when it admitted evidence for illustrative purposes that was not properly authenticated; and (2)

committed plain error when it failed to instruct the jury on the defense of intoxication. Defendant also contends that he received ineffective assistance of counsel. We disagree.

Factual and Procedural Background

On September 20, 2017, Defendant was arrested by the Lexington Police Department for public intoxication and brought to the Davidson County Jail. Detention Officers Nifong (“Officer Nifong”), Crotts (“Officer Crotts”), and Robbins (“Officer Robbins”) attended to Defendant during processing. According to Officer Nifong, Defendant was agitated and argumentative. Defendant put his fists up and entered a fighting stance whenever the officers approached him.

As part of processing, Officer Nifong ordered Defendant to move from a temporary holding cell to a dress-out room to change out of his street clothes and into a jumpsuit provided by the jail. Defendant refused to cooperate with the officer’s order. Officer Crotts attempted to escort Defendant from the holding cell but Defendant resisted. Working together, Officers Nifong, Crotts, and Robbins placed handcuffs on Defendant and physically removed him from the holding cell to the dress-out room. As a result, Defendant grew even more agitated.

Once in the dress-out room, Defendant began threatening the officers and their families. Defendant was ordered to remove his clothing but refused. The officers physically removed Defendant’s clothing and made several attempts to put Defendant

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in a padded-restraint suit. However, the officers were unable to get Defendant into the restraint suit. The officers then began to escort Defendant from the dress-out room to his cell when Defendant spat directly in Officer Nifong's face.

On November 14, 2018, the Davidson County Grand Jury indicted Defendant for malicious conduct by a prisoner, communicating threats, and attaining habitual felon status. At trial, Officers Nifong and Crotts testified regarding the threats made to the officers while processing Defendant and that Defendant spat in Officer Nifong's face. As part of the State's case, and over Defendant's objection, the trial court allowed the State to present a video of the incident. The video was admitted for illustrative purposes, and Officer Nifong was permitted to narrate the incident depicted by the video.

Defendant testified that he was highly intoxicated on the night of the incident. According to Defendant, he vaguely remembers being picked up by police, but had no memory of any of the events that occurred following his arrest.

At the conclusion of all the evidence, the trial court dismissed the charge of communicating threats. On November 14, 2018, the jury found Defendant guilty of malicious conduct by a prisoner. Defendant pleaded guilty to having attained habitual felon status and was sentenced to 80 to 108 months in prison. Defendant timely appeals.

On appeal, Defendant argues the trial court (1) erred when it admitted evidence for illustrative purposes that was not properly authenticated; and (2) committed plain error when it failed to instruct the jury on the defense of intoxication. Defendant also contends he received ineffective assistance of counsel. We disagree.

Analysis

I. Admission of Illustrative Video Evidence

Defendant first argues that the trial court erred when it admitted video evidence of the incident for illustrative purposes over Defendant's objection. According to Defendant, the video should not have been admitted into evidence because it was not properly authenticated.

A trial court's determination as to whether evidence has been sufficiently authenticated is reviewed de novo. *State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011). "Videotapes are admissible under North Carolina law for both illustrative and substantive purposes." *State v. Gaither*, 161 N.C. App. 96, 102, 587 S.E.2d 505, 509 (2003). To introduce a video as substantive evidence, the proponent of the evidence must first lay a proper foundation by showing that the recording process used to create the video was reliable and that the video introduced at trial is the same as that produced by the recording process. *State v. Snead*, 368 N.C. 811, 814, 783 S.E.2d 733, 736 (2016).

Illustrative evidence, on the other hand, is not used substantively, but “to illustrate the testimony of a witness so as to make it more intelligible to the court and to the jury.” *State v. See*, 301 N.C. 388, 391, 271 S.E.2d 282, 284 (1980). To lay a proper foundation for illustrative video evidence, the proponent of the evidence must provide testimony “that the motion picture or videotape fairly and accurately illustrates the events filmed.” *State v. Ayscue*, 169 N.C. App. 548, 551, 610 S.E.2d 389, 392 (2005) (citation and quotation marks omitted).

Here, Defendant objected to the introduction of the video on the grounds that the State failed to lay a proper foundation for the evidence. On appeal, Defendant acknowledges that the video was introduced for illustrative purposes but argues that it was inadmissible because the State failed to authenticate the video under the standard used for videos introduced as substantive evidence. This argument misstates the foundation required for illustrative video evidence.

Officer Nifong testified that he watched the entire video, that he initialed the disc and marked the date that he watched the video, and that the video fairly and accurately depicted the events to which he was testifying. After the State laid this foundation, the trial court admitted the video for illustrative purposes. Subsequently, while charging the jury, the trial court instructed that the video was not substantive or direct evidence and that it could only be considered “for the purpose of illustrating and explaining the testimony of the witness.”

Accordingly, because Officer Nifong testified that the video fairly and accurately illustrated the events to which he was testifying, and the video was admitted solely to illustrate his testimony, the trial court did not err when it admitted the video recording.

## II. Jury Instruction on Voluntary Intoxication

Defendant next argues that the trial court committed plain error when it failed to instruct the jury on the defense of voluntary intoxication. At trial, Defendant did not request a jury instruction on voluntary intoxication as a defense to malicious conduct by a prisoner. Where a Defendant does not request a jury instruction on an affirmative defense at trial, the trial court's failure to give such an instruction is reviewed for plain error. *State v. Andrews*, 170 N.C. App. 68, 75, 612 S.E.2d 178, 183 (2005). To constitute plain error, "a defendant must demonstrate that a fundamental error occurred at trial. 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." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and quotation marks omitted).

"Voluntary intoxication is an affirmative defense that can be used to negate the *mens rea* required in certain criminal offenses." *State v. Yang*, 174 N.C. App. 755, 760, 622 S.E.2d 632, 636 (2005). However, voluntary intoxication only provides a

defense to crimes that require a showing of specific intent. *State v. Jones*, 300 N.C. 363, 365, 266 S.E.2d 586, 587 (1980). Thus, “voluntary intoxication is no defense to a general intent crime.” *State v. Harris*, 171 N.C. App. 127, 131, 613 S.E.2d 701, 704 (2005). In *State v. Robertson*, this Court determined that malicious conduct by a prisoner is a general intent crime. 161 N.C. App. 288, 293, 587 S.E.2d 902, 905 (2003).

Therefore, because voluntary intoxication provides no defense to crimes of general intent, the trial court did err, much less commit a fundamental error, when it did not instruct the jury on voluntary intoxication as a defense to malicious conduct by a prisoner.

### III. Ineffective Assistance of Counsel

Lastly, Defendant argues that his trial counsel provided ineffective assistance of counsel by failing to request an instruction on voluntary intoxication as a defense to malicious conduct by a prisoner. “On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo.” *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014).

To succeed on a claim for ineffective assistance of counsel, a defendant must satisfy a two-prong test. *State v. Blakeney*, 352 N.C. 287, 307, 531 S.E.2d 799, 814 (2000). “First, he must show that counsel’s performance fell below an objective standard of reasonableness. Second, once [the] defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability

exists that the trial result would have been different absent the error.” *Id.* at 307-08, 531 S.E.2d at 814-15 (citation omitted). Where a trial court’s failure to provide a jury instruction cannot amount to plain error, trial counsel’s failure to request the instruction cannot sustain a claim for ineffective assistance of counsel. *Andrews*, 170 N.C. App. at 76-77, 612 S.E.2d at 183-84.

Thus, because the trial court committed no error by failing to instruct the jury on voluntary intoxication as an affirmative defense to malicious conduct by a prisoner, Defendant’s trial counsel did not provide ineffective assistance by failing to request such an instruction.

#### Conclusion

For the reasons stated herein, the trial court did not err when it admitted the video recording used by the State as illustrative evidence. In addition, the trial court did not commit plain error when it did not provide an instruction on voluntary intoxication as a defense to malicious conduct by a prisoner. Lastly, defense counsel did not render ineffective assistance of counsel by failing to request an instruction on voluntary intoxication as a defense to malicious conduct by a prisoner.

NO ERROR.

Judges INMAN and HAMPSON concur.

Report per Rule 30(e).