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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-221

Filed: 7 January 2020

Wake County, Nos. 16 CRS 200507, 200824-25

STATE OF NORTH CAROLINA

v.

TYREE DEVON HERRING

Appeal by defendant from judgments entered 26 July 2018 by Judge W. Osmond Smith III in Wake County Superior Court. Heard in the Court of Appeals 5 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Anna M. Davis, for the State.

Daniel M. Blau for defendant-appellant.

TYSON, Judge.

Tyree Devon Herring (“Defendant”) appeals from judgments entered after a jury found him guilty of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, assault inflicting serious injury in the presence of a minor, and breaking and entering with intent to terrorize or injure. We

find no prejudicial error. We deny Defendant's motion for appropriate relief without prejudice.

I. Background

Iesha Duffy ("Duffy") and Defendant were acquainted since they were high school students. Duffy and Defendant never married, but engaged in an "on-and-off" again relationship for a number of years and their relationship produced three children. In late 2015, Defendant and Duffy were both charged with assaulting each other. Their romantic relationship ended. Duffy and the children moved into a house located on Bodie Island Lane in Raleigh.

In late December 2015, Duffy heard tapping coming from her living room and bedroom windows at her house. Duffy called 911 and the Raleigh Police Department responded. When police arrived, they found Defendant present outside her house. Officers ordered Defendant to leave.

A. Night of 7 January 2016

On the evening of 7 January 2016, Duffy was home on Bodie Island Lane with her children. While the children were getting ready for bed, Duffy was in her kitchen speaking with Brandon Satterfield ("Satterfield"), on the phone. While Duffy was talking on the phone, she felt a painful "poking" in her back. She felt the painful "poking" again, screamed, and fell to the floor. Once on the floor, Duffy looked up and saw Defendant's face above her.

While this was happening, Satterfield's phone was still connected with Duffy. As Duffy went silent, Satterfield heard her children screaming: "No, stop, stop. Mommy, Mommy." Satterfield hung up and called 911. He told the 911 dispatcher "that they needed to get someone over to [Duffy's] house to check on her."

While Duffy was on the kitchen floor regaining consciousness, she heard her oldest child cry "Mommy, mommy, don't die." Duffy sent her oldest child to get help. The child ran to the home of Ashley Humphries ("Humphries") and Gerren Orr ("Orr") who lived next door. Both Humphries and Orr heard the child banging on their door, screaming, and crying for help.

Humphries ran next door to Duffy's house. She found Duffy lying on the kitchen floor in a pool of blood, drifting in-and-out of consciousness. Humphries screamed for Orr to call 911. Orr called 911 and remained on the phone with the dispatcher until help arrived. The 911 dispatcher instructed Orr to apply pressure to Duffy's wounds. Duffy's oldest son returned and remained at his mother's side.

The first officer to arrive on the scene was Raleigh Police Officer B.A. DiCello ("Officer DiCello"). Officer DiCello found Duffy laying on the kitchen floor covered in blood. As soon as Officer DiCello arrived in the kitchen he could not tell if Duffy "was alive or dead." As he began to assess Duffy's condition, she recovered consciousness. Officer DiCello testified "[Duffy] had a difficult time kind of talking. It was almost – her voice was almost raspy." Officer DiCello asked Duffy "Can you feel pain[?]" Duffy

responded “Yes, yes, I’m in pain.” Officer DiCello asked “If this is the last breath you take, you tell me who did this.” Duffy then responded, “His dad.”

B. Duffy’s Injuries

Duffy was taken to WakeMed Hospital and treated by Danielle Willis, PA-C for the life-threatening stab wounds. She testified Duffy “had multiple stab wounds to her face, her back, her abdomen, and her right arm.” Duffy suffered six stab wounds to her back, which caused internal bleeding in her chest cavity and punctured her lung. Duffy also suffered a liver laceration.

Duffy underwent a procedure to remove the fluid from the chest cavity and allow her lung to re-expand. Duffy also underwent surgery to repair her liver laceration. Duffy was hospitalized in the Intensive Care Unit and discharged nine days later.

C. Defendant’s Trial

On 21 March 2016, Defendant was indicted for: (1) assault with a deadly weapon with intent to kill inflicting serious injury; (2) assault inflicting serious injury with a minor present; (3) attempted first-degree murder; (4) assault by strangulation; and, (5) felony breaking and entering with intent to terrorize or injure.

The State called Raleigh Police Detective Gory Mendez (“Detective Mendez”) to testify at trial. Detective Mendez was part of a team of officers, who extract and analyze cell phone data. Another detective had asked him to “analyze cell phone

records in a case involving [Defendant].” Detective Mendez never identified the phone number, to whom it was assigned, or how the phone number was associated with the case. Defendant’s counsel objected to the introduction of the phone records from carrier T-Mobile U.S., Inc. on the grounds they were not properly authenticated as business records under N.C. Gen. Stat. § 8C-1, Rule 803(6) (2017). The trial court sustained the objection and excluded the phone records.

The State also called Raleigh Police Detective Brad Winston, who had also assisted with extracting and analyzing cell-phone data. Detective Winston testified he was provided two cell phones: an Alcatel phone and an LG phone, by Raleigh Police Detective Tripp (“Detective Tripp”).

Detective Wilson extracted data from both the Alcatel and LG phones and included the relevant data in his report. Detective Wilson testified about the data taken from the LG phone. Detective Wilson testified that two days prior to the incident, someone had performed Google searches on the LG phone for the following queries: “Can you Pry a Window with a crowbar;” “Can You Open a Window with a Crowbar;” and “Mini Crowbar.”

Detective Wilson further testified someone had visited the website pages seeking information about how to open a stuck window, how to open a window with a crowbar, and common burglary tools. The day after the 7 January 2016 assault,

someone had used the phone and accessed an online news article about these assaults on Duffy from the LG phone.

Defendant was convicted of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, assault inflicting serious injury with a minor present, and breaking and entering with the intent to terrorize or injure. The jury's verdict found Defendant not guilty of assault by strangulation.

The trial court sentenced Defendant, as a Class B2, Level III offender, to an active term of 240 months to 300 months in prison for the attempted first-degree murder. Defendant was sentenced as a Class C, Level III offender to an active term of 96 months to 128 months in prison for the assault with a deadly weapon with intent to kill inflicting serious injury and the assault inflicting serious injury with a minor present to run concurrently with the sentence for attempted first degree murder. The trial court also sentenced Defendant as a Class H, Level III offender to 10 months to 21 months for breaking and entering with the intent to terrorize or injure to begin consecutively to the sentences for the attempted murder and assaults. Defendant gave oral notice of appeal in court.

II. Jurisdiction

This Court possesses jurisdiction over the final judgment of the trial court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court committed plain error by: (1) allowing the State to introduce unauthorized and prejudicial evidence found on a cell phone; (2) allowing the State to introduce inadmissible and prejudicial evidence of Defendant's prior acts; (3) allowing a State's witness to speculate about Defendant's mental state; and, (4) failing to dismiss the breaking and entering with intent to terrorize or injure charge due to a fatal variance between the indictment and proof at trial.

IV. Defendant's Plain Error Arguments

A. Standard of Review

In criminal cases, an issue that was not preserved by objection noted at trial and that 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 Supreme Court of North Carolina "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted).

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) (citations omitted). "Under the plain error rule, 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). We review Defendant's first three issues and arguments under this standard of review.

B. Authentication of Cell Phone

Defendant argues the trial court erred by admitting unauthenticated evidence taken from a cell phone. Defendant failed to object to this testimony, and we review for plain error. N.C. R. App. P. 10(a)(4).

Rule 901(a) provides "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2017).

"Based upon our review of the record, it appears that if defendant had made a timely objection, the State could have supplied the necessary foundation," through the testimony of Detective Tripp, another Raleigh police officer, or an official from the cell phone company. *State v. Howard*, 215 N.C. App. 318, 327, 715 S.E.2d 573, 579 (2011) (citations omitted). In *Howard*, this Court reviewed arguments under Rule 901, among others, for plain error concerning surveillance video, receipts, photos, and a copy of the victim's social security card. *Id.* Here, like *Howard*, Defendant "has made no showing that the foundational prerequisites, upon objection, could not have been supplied and has pointed to nothing suggesting that the evidence in question is

inaccurate or otherwise flawed, we decline to conclude the omissions . . . amount to plain error.” *Id.* at 327, 715 S.E.2d at 579-80 (citations and alterations omitted).

Under plain error review, any error in the introduction of the cell phone “into evidence without adequate foundation is not the type of exceptional case where we can say that the claimed error is so fundamental that justice could not have been done.” *State v. Jones*, 176 N.C. App. 678, 684, 627 S.E.2d 265, 269 (2006). Defendant’s argument is overruled.

C. Prior Acts of Defendant

Defendant argues the trial court erred by allowing the State to introduce inadmissible and prejudicial evidence of his prior arrests, in violation of North Carolina Rules of Evidence 609 and 404(b). While Duffy was recovering in the hospital, Detective Tripp and another unnamed officer interviewed her. A recording of that interview was played for the jury. In that interview, the following exchange took place:

Officer #1: We are currently actively looking for [Defendant].

Duffy: Somebody needs to get him. Somebody need [sic] to get him. And when he goes this time, he needs to go for good.

Officer #2: The last incident, both of you were arrested. But prior to that, there was one where he was arrested, and he was put in under a pretty large bond. Do you remember that one?

Duffy: Yeah, I don't know how he's got out. I have no idea.

Officer #2: The beginning of this year.

Duffy: I don't know how he got out. I have no idea how he got out. I have no idea how he gets out any time. His bonds are always set high and he always finds a way out. I don't understand it.

Rule 404(b) provides: “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.” N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017).

Defendant argues the outcome of this case is controlled by *State v. Cashwell*. In *Cashwell*, our Supreme Court awarded a new trial where a State's witness testified the defendant “was in jail for an assault with a deadly weapon with intent to kill against his girl friend.” *State v. Cashwell*, 322 N.C. 574, 576, 369 S.E.2d 566, 567 (1988). This testimony did not tend to show any material fact that the defendant had killed the two victims in that case, neither of whom was the “girl friend.”

Prior to trial, Defendant had conceded “he committed assault against the victim, Ms. Duffy; that there was a deadly weapon involved; and that the injuries here were, in fact, serious injuries.” What was at issue before the jury was Defendant's requisite intent. The instances in the recorded interview referred to

Defendant's prior assaults on Duffy. The two officers were investigating incidents where Duffy was the victim. Duffy would also testify about these incidents at trial. This unobjected-to prior history goes to Defendant's motive and intent. Both are material facts indicative of elements of Defendant's guilt and are admissible under Rule 404(b). Defendant's argument for plain error is overruled.

D. Satterfield's Testimony

Defendant argues the trial court erred by allowing Satterfield to testify about Defendant's mental state in violation of North Carolina Rules of Evidence 602 and 805. Defendant failed to object to this testimony and our review is for plain error.

Satterfield testified he believed Defendant was "a little upset about me dealing with" Ms. Duffy. Satterfield testified that he had two interactions with Defendant. The first one had occurred when he was inside an automobile in front of Eugene McGill's ("McGill") house with McGill. Defendant approached the vehicle and asked Satterfield if he was talking with Duffy. Satterfield testified he told Defendant "that [Satterfield] had talked to [Duffy] but [she] was not interested in talking to me at the time so - - and I also told him that if he had issues, I was not the person to confront and if he confronted me again, there was going to be an issue between us."

The second interaction occurred between Satterfield and Defendant two days after the assault on Duffy. Defendant called Satterfield at work and "threaten[ed] he was going to do something to me and he wanted to meet up somewhere, and I agreed

to meet but he never gave me a location.” Satterfield also testified Defendant stated he was “going to get me touched.” Satterfield stated he understood “touched” to mean “shot” or “beat up.” After the assaults on Duffy, Satterfield was asked by the Raleigh Police Department to stay away from his residence and at a hotel until Defendant was located.

North Carolina Rule of Evidence 602 provides: “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge, may, but need not, consist of the testimony of the witness himself.” N.C. Gen. Stat. § 8C-1, Rule 602 (2017).

Defendant cites *State v. Duke*, which is inapposite, to support his argument. In *Duke*, the trial court denied admission of testimony concerning the defendant’s state of mind in the sentencing phase of a capital trial. *State v. Duke*, 360 N.C. 110, 126, 623 S.E.2d 11, 22 (2005). A proper foundation must be laid for the witness’s basis of knowledge. *Id.* Our Supreme Court held denying the evidence was error, but not plain error. *Id.* Here, Satterfield had personal knowledge of Defendant’s *animus* towards him, as evidenced by the tense conversations between them, both before and after the assaults on Duffy had occurred, and while authorities were looking for Defendant.

Defendant further argues the admission of this evidence violated North Carolina Rule of Evidence 805, which provides: “hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule.” N.C. Gen. Stat. § 8C-1, Rule 805 (2017).

Defendant’s argument relies upon an assumption Defendant had heard this information from other people. Satterfield had direct interactions with Defendant on which his testimony was based. Nothing tends to show Satterfield heard these statements from anyone other than Defendant.

The challenged statements were out-of-court admissions made by Defendant. These statements are admissible under the admission by a party-opponent exception to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 801(d) (2017). Defendant fails to show any error in the unobjected-to admission of this testimony. Defendant’s argument is overruled.

V. Indictment

Defendant argues the indictment for breaking and entering with the intent to terrorize or injure was fatally defective. He asserts the address on the indictment was incorrect and listed an incorrect statute number. Defendant concedes he did not specifically argue a fatal variance existed in the indictment in his motion to dismiss at the close of the State’s evidence and asks this Court to review this issue pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure.

A “[d]efendant must preserve the right to appeal a fatal variance.” *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012). This Court can invoke Rule 2 “only in exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake.” *State v. Pender*, 243 N.C. App. 142, 149, 776 S.E.2d 352, 358 (2015) (citations omitted).

Rule 2 authorizes this Court to “suspend or vary the requirements or provisions of any of the [Rules of Appellate Procedure].” N.C. R. App. P. 2. Our Supreme Court has stated that this power to vary the default provisions of the appellate rules should be invoked rarely and in “exceptional circumstances.” *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007).

Our Court invoked Rule 2 to review a fatal variance argument that had not been adequately preserved for appellate review for three reasons in *State v. Martinez*:

(1) Supreme Court precedent indicated that fatal variances of the type present here are sufficiently serious to justify the exercise of our authority under [Rule] 2; (2) a variance-based challenge is, essentially, a contention that the evidence is insufficient to support a conviction, and this Court and our Supreme Court have regularly invoked [Rule] 2 in order to address challenges to the sufficiency of the evidence to support a conviction; and (3) it is difficult to contemplate a more manifest injustice to a convicted defendant than that which would result from sustaining a conviction that lacked adequate evidentiary support.

State v. Martinez, 230 N.C. App. 361, 364, 749 S.E.2d 512, 514 (2013) (citations, alterations, and internal quotations omitted).

Due to these errors, we invoke Rule 2 and review this issue. “A defendant must be convicted, if at all, of the particular offense charged in the indictment” and “[t]he State’s proof must conform to the specific allegations contained in the indictment.” *State v. Pulliam*, 78 N.C. App. 129, 132, 336 S.E.2d 649, 651 (1985). This rule “insure[s] that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident.” *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002). Not all purported errors or variances in an indictment are fatal. “In order for a variance to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged.” *Id* (citations and parenthetical omitted).

The indictment for breaking and entering with intent to terrorize contains, *inter alia*: “the defendant named above unlawfully, willfully and felonious broke into the residence of Iesha Duffy, making unlawful entry at 1117 Bodie Island Lane, Raleigh, with the intent to terrorize or injur[e] the occupant, Iesha Duffy. This act was done in violation of N.C.G.S. 15-54(a1).”

Defendant’s indictment lists the applicable statute as “N.C.G.S. 15-54(a1),” while the correct statute is N.C. Gen. Stat. § 14-54(a1). According to N.C. Gen. Stat. § 15A-924(a)(6): “[e]rror in the citation or its omission is not grounds for dismissal of the charges or reversal of a conviction.” N.C. Gen. Stat. § 15A-924 (2017). This

incorrect statute designation does not cause a material variance and creates a fatally defective indictment to necessitate reversal. *Id.*

The indictment also listed the incorrect Duffy home address as 1117 Bodie Island Lane, instead of 1113 Bodie Island Lane as the evidence introduced at trial showed. The evidence showed that the house belonged to Duffy and the indictment alleged the location of the alleged crime was “the residence of Iesha Duffy.” “[T]his inconsequential error in the street address appearing in the indictment does not render the indictment fatally defective.” *State v. Davis*, 282 N.C. 107, 114, 191 S.E.2d 664, 669 (1972).

Applying our Supreme Court’s holding in *Davis*, this incorrect house number identification is not a fatal variance to create a fatally defective indictment to warrant reversal of Defendant’s conviction. Defendant has failed to show any potential prejudice or that either error in the indictment mislead or prevented him from receiving a fair trial. Defendant’s argument is overruled.

VI. Conclusion

Defendant has shown no prejudice or plain error in the absence of any objection to: (1) admitting the cell phone evidence; (2) allowing a State’s witness to speculate about Defendant’s mental state; and, (3) allowing recorded testimony about Defendant’s prior arrests. The trial court did not err in failing to dismiss the breaking and entering with intent to terrorize or injure charge.

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Opinion of the Court

Defendant received a fair trial, free from prejudicial errors he preserved and argued. Defendant's arguments under plain error review do not merit a new trial. We find no error in the jury's verdict or in the judgment entered thereon. We deny Defendant's motion for appropriate relief without prejudice. *It is so ordered.*

NO ERROR.

Judges MURPHY and YOUNG Concur.

Report per Rule 30(e).