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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-564

Filed: 18 February 2020

Cumberland County, No. 18 CRS 52674

STATE OF NORTH CAROLINA

v.

NASEER AAKEER NEWSUAN

Appeal by Defendant from Judgments entered 16 January 2019 by Judge Thomas H. Lock in Cumberland County Superior Court. Heard in the Court of Appeals 4 December 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Paul M. Cox, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Naseer Aakeer Newsuan (Defendant) appeals from Judgments entered on 16 January 2019 upon his convictions for Robbery with a Dangerous Weapon and Assault with a Dangerous Weapon Inflicting Serious Injury. The Record before us, including evidence presented at trial, tends to show the following:

On the night of 10 February 2018, Ryan Hoving (Hoving) and his girlfriend Asma Thompson (Thompson) were sleeping in an apartment located in Spring Lake, Cumberland County. At trial, Thompson testified around 4 a.m. someone knocked on the door. Hoving answered the door and was met by Defendant, who Thompson knew as “Seer,” and Maurice Woodson (Woodson), who Thompson knew as “Scoot.” From the room where she had been sleeping, Thompson stated she saw two men enter the apartment and begin fighting Hoving. Thompson testified Defendant entered the room where she was, and they looked at each other. Defendant pointed a gun at Thompson and told her to look down while he looked around the room. Thompson testified Defendant grabbed Hoving’s money off the floor and exited the room. He then gave the gun to Woodson and told him to “burn him.” Woodson then shot Hoving in the stomach before Defendant and Woodson fled the apartment. Thompson called 911 to report the robbery and assault.

Detective Yancy McDowell (Detective McDowell) of the Spring Lake Police Department was called to investigate. Detective McDowell interviewed Hoving and Thompson at Cape Fear Valley Hospital the next day. Detective McDowell stated that Thompson was “pretty shaken up.” Several days later, on 20 February 2018, Thompson contacted the Spring Lake Police Department to disclose that she possibly knew the identity of one of the suspects. Detective McDowell and another member of the Spring Lake Police Department, Officer Penny, met with Thompson. Officer

Penny presented Thompson with a photo lineup, but Thompson did not identify anyone. Thompson then pulled out her cellphone and showed Detective McDowell what was purportedly a screenshot from Instagram showing the two individuals she identified as the suspects. Thompson identified the individuals in the screenshot as “Seer” and “Scoot.”

On 2 March 2018, Defendant was arrested and charged with Conspiracy to commit Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Bodily Injury, and First-Degree Kidnapping. Defendant’s trial came on for hearing on 14 January 2019. At trial, the State sought to admit several photos of Defendant and Woodson, obtained from Defendant’s Facebook page, into evidence to support its argument of a conspiracy between the two men. Defendant objected. During a voir dire examination, Detective McDowell testified that photos of Woodson and Defendant he obtained from Defendant’s Facebook showed Defendant making “gang signs.” Detective McDowell indicated he had limited experience with gangs “but [could] recognize some gang signs.” He had also received an “eight-hour class in gang awareness.”

The trial court admitted several of the State’s proffered photographs as exhibits twenty-four through twenty-seven. Detective McDowell then testified in front of the jury—without objection—that in three photographs Defendant and Woodson were making “gang sign gestures.” Specifically, discussing exhibit twenty-

four, Detective McDowell stated “[Defendant] is simply making a gesture holding a gun If my memory serves me, this sign here is west side.” Again, in exhibit twenty-six, Detective McDowell testified Defendant and Woodson were “[m]aking gestures, gang sign gestures.” And lastly, Detective McDowell testified regarding exhibit twenty-seven that Defendant “[a]ppears to be making a gang sign also.”

At the close of trial, Defendant moved the trial court to dismiss each of the three charges against Defendant. The trial court granted Defendant’s Motion on the charge of First-Degree Kidnapping. On 16 January 2019, the jury returned a verdict finding Defendant guilty of Robbery with a Firearm and Assault with a Deadly Weapon Inflicting Serious Injury. The trial court entered Judgments and sentenced Defendant in the presumptive range. Defendant gave oral notice of appeal.

Issue

The sole issue on appeal is whether the trial court committed plain error when it permitted the State’s witness to offer lay-witness testimony concerning Defendant’s use of “gang signs” in photographs.

Analysis

On appeal, Defendant contends it was error for the trial court to permit Detective McDowell to testify that hand signs shown in the photographs of Defendant and Woodson were “gang signs” because it “requires particular expertise and is beyond the limit of lay testimony.” Defendant did not object to Detective McDowell’s

testimony at trial. Thus, on appeal, Defendant requests we review this issue for plain error. *See State v. Moore*, 366 N.C. 100, 105-06, 726 S.E.2d 168, 173 (2012) (“When, as in this case, a defendant fails to object to the admission of the testimony at trial, we review only for plain error.”); *see also* N.C.R. App. P. 10(a)(4). “For error 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) (citations and quotation marks omitted).

Defendant first contends that Detective McDowell’s testimony was improper opinion testimony by a lay witness. The State, in opposition, contends instead that Detective McDowell’s testimony was proper under Rule 701 of the North Carolina Rules of Evidence.

Rule 701 limits a nonexpert witness to testify to “those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701 (2019). Detective McDowell admitted his experience with gangs is “limited,” but he testified that he participated in an eight-hour class on gang awareness. His trial testimony that the hand signs exhibited in the three photographs of Defendant and Woodson were “gang signs” was “rationally based on

[his] perception.” *See id.* Further, his testimony was helpful to the jury’s determination of a conspiracy between Defendant and Woodson. Defendant cites no North Carolina caselaw in support of his argument that Detective McDowell’s testimony was “beyond the acceptable limit of lay testimony.” Accordingly, we decline to hold, as Defendant argues, that Detective McDowell’s testimony regarding Defendant’s hand signs was “beyond the acceptable limit of lay testimony” therefore requiring testimony from an expert witness.

Even assuming *arguendo* Detective McDowell’s testimony was improper, lay-witness testimony, we do not conclude Defendant was so prejudiced by the testimony it rises to the level of plain error. Indeed, this Court has held the admission of “gang-related” testimony does not amount to plain error “where other sufficient evidence tends to implicate the defendant in the crime.” *State v. Hinton*, 226 N.C. App. 108, 114, 738 S.E.2d 241, 247 (2013) (citing *State v. Dean*, 196 N.C. App. 180, 195, 674 S.E.2d 453, 463 (2009); *State v. Hightower*, 168 N.C. App. 661, 667, 609 S.E.2d 235, 239 (2005)). The State does not dispute, as a general matter, that gang-related testimony *may* be prejudicial. However, the State contends in the case *sub judice* that the testimony, amounting to three statements by Detective McDowell that the hand signs Defendant exhibited in three photographs were gang signs, did not amount to plain error. We agree.

The testimony Defendant was making gang signs in three photographs with Woodson was offered to show the close relationship and conspiracy between Defendant and Woodson. The trial court held a bench conference and voir dire examination with Detective McDowell about the admissibility of the photographs depicting Defendant and Woodson making hand signs. At that time, Defense Counsel objected to the admission of the photographs as unfairly prejudicial. The trial court “applied the balancing test required by Rule 403 and d[id] not find that the probative value of the photographs [was] substantially outweighed by the danger of unfair prejudice”

In *Hinton*, this Court held “the admission of extensive gang-related testimony had a probable impact on the jury’s finding that defendant was guilty and thus constitutes plain error.” *Id.* at 115-16, 738 S.E.2d at 248 (citations and quotation marks omitted). However, the testimony in question “spanned twenty-nine pages of trial transcript, fifteen of which referenced gangs or gang-related activity [and t]he words ‘gang,’ ‘gangster,’ ‘Bloods,’ and ‘Crypts [sic]’ were used a combined total of ninety-one times.” *Id.* at 113-14, 738 S.E.2d at 246. The *Hinton* Court continued that the eyewitness testimony linking the defendant to the crime was “halting, awkward, and incomprehensible at times[.]” *Id.* at 114, 738 S.E.2d at 247.

In contrast, the gang-related testimony in the case *sub judice* was far from “extensive.” *See id.* at 115-16, 738 S.E.2d at 248. Detective McDowell’s testimony in

front of the jury spanned fifty-seven pages, which included only *three* references to gang signs. Detective McDowell did not testify Defendant was a gang member. He testified the hand signs Defendant and Woodson exhibited in three photographs—which were properly authenticated and admitted as evidence before the jury—appeared to him to be gang signs. The testimony was offered to show conspiracy between Defendant and Woodson. That Detective McDowell testified the specific hand signs in the photographs were gang signs did not have a “probable impact on the jury’s finding that defendant was guilty[]” because the jury was able to view and examine the three photographs depicting Defendant and Woodson making identical hand signs. *Id.* at 115-16, 738 S.E.2d at 248 (citations and quotation marks omitted).

Further, unlike the eyewitness testimony in *Hinton*, Thompson testified to her recollection of the events on the night of 10 February 2018 and about her identification of the suspects. Thompson testified she knew of Defendant from high school. She was able get a good look at Defendant’s face when he entered her room in part because he was not wearing anything to cover his face. Her testimony was comprehensible and developed—it spanned sixty-nine pages of the trial transcript, of which twenty pages were cross examination. Thus, we conclude Detective McDowell’s testimony related to Defendant’s use of gang signs was not prejudicial to Defendant in light of “other sufficient evidence [that] tend[ed] to implicate the defendant in the crime.” *Id.* at 114, 738 S.E.2d at 247 (citation omitted).

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no plain error in Defendant's trial.

NO PLAIN ERROR.

Judges BRYANT and COLLINS concur.

Report per Rule 30(e).