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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-494

Filed: 17 March 2020

Mecklenburg County, Nos. 18 CRS 202735, 18 CRS 27340

STATE OF NORTH CAROLINA

v.

ORLANDO RAY FINLEY, Defendant.

Appeal by defendant from judgments entered 27 November 2018 by Judge Casey M. Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin, for the State.*

*Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.*

BERGER, Judge.

On October 25, 2018, Orlando Ray Finley (“Defendant”) was convicted of one count of robbery with a dangerous weapon, and he was sentenced to 69 to 95 months in prison. Defendant also pleaded guilty to felony failure to appear, for which he received a suspended sentence. Defendant appeals his conviction for robbery with a dangerous weapon, arguing the trial court (1) erred when it overruled his objections

to questions concerning a vehicle linking Defendant to the Taco Bell robbery, (2) erred when it admitted jail phone calls made by Defendant, and (3) committed plain error when it allowed officers to identify Defendant in a surveillance video without providing a limiting instruction. We disagree.

Factual and Procedural Background

On January 5, 2018, a Subway restaurant in Charlotte was robbed by an individual who threatened the life of an employee with a handgun. Store security video captured the incident and showed the perpetrator wearing a fur-lined hooded jacket. The lower half of the perpetrator's face was concealed. In addition, the perpetrator had a distinctive tattoo on his hand that was visible on the video.

On January 8, 2018, two individuals robbed a Taco Bell restaurant on South Boulevard in Charlotte. One of the perpetrators threatened the life of an employee with a handgun. Store security video showed the perpetrator wearing a fur-lined hooded jacket, with a portion of the perpetrator's face concealed. The employee observed the perpetrator and his accomplice flee in a blue vehicle.

Detective Jaime Smith ("Det. Smith") investigated the robberies. Detective Smith asked other officers to assist in identifying the suspects. Detective Cynthia Banner, a former School Resource Officer at Bishops Spaugh Community Academy, identified Defendant as the suspect captured on video in the Subway robbery based on her prior experience with him.

Defendant was indicted on two counts of robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon. Defendant failed to appear in court on these charges, and he was subsequently indicted for felony failure to appear. Defendant pleaded guilty to felony failure to appear. At trial on the robbery charges, the jury found Defendant guilty of robbery with a dangerous weapon for the Taco Bell robbery, and not guilty on the remaining charges.

Defendant appeals, arguing the trial court (1) erred when it overruled his objections to questions concerning a vehicle linking Defendant to the Taco Bell robbery, (2) erred when it admitted jail phone calls made by Defendant, and (3) committed plain error when officers identified Defendant in video captured at a crime scene without providing a limiting instruction. We disagree.

### Analysis

Defendant contends that the trial court erred when it admitted testimony concerning the vehicle used in the Taco Bell robbery and jail phone calls made by Defendant. We disagree.

“On appeal, the standard of review of a trial court’s decision to exclude or admit evidence is that of an abuse of discretion. An abuse of discretion will be found only when the trial court’s decision was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Sloan*, 180 N.C. App. 527, 532, 638 S.E.2d 36, 40 (2006) (citation and quotation marks omitted). “Evidentiary errors are harmless

unless a defendant proves that absent the error a different result would have been reached at trial.” *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001).

Defendant contends the following exchange between the prosecutor and Det. Smith was impermissible because “the trial court permitted Det. Smith to speculate that [the] officers’ investigation uncovered a vehicle associated with [Defendant] and the Taco Bell robbery”:

[Prosecutor]. Did you make any attempts to locate Mr. Finley?

[Detective Smith]. Prior to finding out his residence, that was done on the -- I think the 11th of January is when I went to his mother’s house.

[Prosecutor]. Okay, don’t –

[Detective Smith]. That was based off information that we found in the car.

[Defense Counsel]: Objection, Your Honor, to this line of questioning. There’s no basis, no information. All we have is the statement of Detective Banner.

THE COURT: Sustained.

...

[Prosecutor]. A little bit about the car. Were you able to develop a suspect vehicle based on what information you got from Taco Bell?

[Detective Smith]. Yes, sir.

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[Prosecutor]. Based on that suspect vehicle did you arrive at a possible location for the defendant?

[Detective Smith]. Yes, sir.

[Defense Counsel]: Objection. There's no basis, there's no information about what happened at Taco Bell and how they came up with this vehicle or anything like that.

THE COURT: Overruled.

[Prosecutor]. You can answer the question.

[Detective Smith]. The -- will you repeat the question?

[Prosecutor]. Yeah. Based on your investigation, in part including the information you got about a vehicle, did you develop an address potentially where you would find the defendant?

[Detective Smith]. Yes. The information that we got was the car had been purchased by --

[Defense Counsel]: Objection.

THE COURT: Sustained.

[Prosecutor]. Keeping the car kind of to the side, the particulars about the vehicle, did you go to an address to try to find the defendant?

[Detective Smith]. Yes.

[Prosecutor]. Do you know what that address was?

[Detective Smith]. 712 Wilderness Trail.

[Prosecutor]. Did you in fact find the defendant at 712 Wilderness Trail?

[Detective Smith]. I did not.

[Prosecutor]. Did you speak with anyone there?

[Detective Smith]. I spoke with his mother.

[Defense Counsel]: Your Honor, I would object to the characterization that it was his mother. There's no indication how he would know who his mother was other than, again, somebody told him.

THE COURT: Overruled.

Assuming, without deciding, that the trial court erred when it allowed Det. Smith's testimony, the State later entered into evidence a CMPD video of Det. Smith questioning Defendant, and thus, any purported error was harmless. State's Exhibit 9 was a video of Defendant's interrogation by Det. Smith. This exhibit was entered without objection from Defendant. The video showed Det. Smith placing a photograph in front of Defendant and asking, "Do you recognize that? Is that the car?" Det. Smith then showed Defendant another set of photos, and stated, "that's a picture of you right there. That's inside of the Subway." Defendant then asked Det. Smith what another image on the page was, and Det. Smith responds, "That's the Taco Bell. That's where we got this picture right here of your car from."

In the jail phone call, Defendant can be heard talking about the interview captured in State's Exhibit 9. Defendant said, "[Det. Smith] showed me the pictures. He was like, is this your car? I was like, [expletive deleted], you found me. I was just

staring at the pictures and [expletive deleted], I ain't gone lie. The pictures had me like shook. Like, aw [expletive deleted], you found me."

Through State's Exhibit 9 and Defendant's comments made during the jail phone call, Defendant linked himself to the suspect vehicle in the Taco Bell robbery. Defendant admitted in the phone call that the photograph shown to him by Det. Smith depicted his vehicle. Further, Defendant admitted that he had a negative reaction to the photograph of the vehicle because he knew he had been caught.

Thus, even if the trial court erred in admitting Det. Smith's testimony, the error was harmless based on the other evidence presented in this case.

Defendant further contends that the State failed to produce sufficient evidence that he was the individual who made the jail phone call. However, Sergeant Shields testified that each inmate possessed a "personal identification number unique to each inmate" which allowed him to recognize who placed calls. Sergeant Shields testified that the call at issue was placed by Defendant's identification number. He testified that the conversation concerned, in addition to the specifics of the interview referenced above, bond amounts, which were the same bond amounts that Defendant was under at the time. He also testified that the conversation involved two charges of robbery and one of conspiracy, the same charges Defendant faced. Aside from objecting to the recording itself, Defendant did not object to Sergeant Shields' testimony, and did not cross-examine him.

“[P]ersonal knowledge is all that is required to authenticate a tape recording.” *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991). “A caller’s identity may be established by testimony connecting the voice on the recording with defendant or by some circumstantial evidence.” *State v. Mobley*, 206 N.C. App. 285, 289, 696 S.E.2d 862, 865 (2010) (citation omitted). In *Mobley*, for example, the State identified the defendant as the speaker on a jail call based on the use of the defendant’s identification number, the use of a nickname similar to the defendant’s first name, and the contents of the call concerning circumstances similar to those of the defendant’s arrest. This Court held that the trial court did not abuse its discretion in admitting the call into evidence, and further held that even had the admission been error, the defendant failed to demonstrate prejudice. *Id.* at 289-90, 696 S.E.2d at 865-66.

Here, the State presented evidence that Defendant’s identification number was used to make the call, and the contents of the call bore substantial similarity to the facts and procedural posture of Defendant’s case. Therefore, the trial court did not abuse its discretion when it admitted the phone call into evidence.

Defendant next argues that the trial court committed plain error when it failed to provide a relevant limiting instruction, and also when it admitted testimony from officers identifying Defendant as the perpetrator. We disagree.



“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); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). Our courts “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. Bice*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 821 S.E.2d 259, 264 (2018) (quoting *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996)), *rev. denied*, \_\_\_ N.C. \_\_\_, 831 S.E.2d 70 (2019).

Plain error is reserved for those instances in which an alleged 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) (citation and quotation marks 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) (citation omitted).

We first note that a defendant who fails “to specifically request or tender a limiting instruction at the time the evidence was admitted[ ] is not entitled to have the trial court’s failure to give limiting instructions reviewed on appeal.” *Stager*, 329

N.C. at 310, 406 S.E.2d at 894 (citation omitted). *See also State v. Smith*, No. COA17-153, 2018 WL 256731, at \*6 (N.C. Ct. App. Jan. 2, 2018) (unpublished), *rev. denied*, 371 N.C. 114, 813 S.E.2d 237 (2018) (a “trial court is not required to provide a limiting instruction unless requested by the party objecting to the use of the evidence as substantive evidence.” (citations omitted)). Thus, in the absence of a request by Defendant, the trial court did not err when it did not give a limiting instruction, and Defendant cannot show plain error.

In addition, Defendant here has only argued that error occurred and that this Court should conduct plain error review. Defendant has failed to allege that, absent the purported error, the jury would have probably reached a different result. “It is not the duty of this Court to supplement an appellant’s brief with legal authority or arguments not contained therein.” *State v. Sellers*, 245 N.C. App. 556, 558, 782 S.E.2d 86, 88 (2016). Because Defendant has failed to demonstrate that this is a “truly exceptional case[]” in which the purported errors “tilted the scales,” *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citation and quotation marks omitted), Defendant cannot overcome his burden in this matter.

Finally, Defendant argues that the cumulative effect of the purported errors entitle him to a new trial. Defendant essentially argues that because he was found not guilty of the Subway robbery, he should have been found not guilty of the Taco Bell robbery.

“Cumulative errors lead to reversal when taken as a whole they deprived [a] defendant of his due process right to a fair trial free from prejudicial error.” *State v. Wilkerson*, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009) (citation and quotation marks omitted). After reviewing the evidence as a whole, which includes Defendant’s admissions in the properly admitted jail phone call, the purported errors “did not deprive [D]efendant of his due process right to a fair trial.” *Id.* at 426, 683 S.E.2d at 201.

Conclusion

Defendant was not prejudiced by the admission of evidence that linked him to the suspect vehicle in the Taco Bell robbery. In addition, the trial court did not abuse its discretion when it admitted the jail phone call made by Defendant. The trial court did not commit plain error when officers identified Defendant in video captured at a crime scene without providing a limiting instruction. Finally, Defendant was not deprived of his right to a fair trial by the purported cumulative errors.

NO PREJUDICIAL ERROR.

Judges ZACHARY and YOUNG concur.

Report per Rule 30(e).