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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-192

Filed: 15 December 2020

Johnston County, No. 16 CRS 57241

STATE OF NORTH CAROLINA

v.

VICTOR VIDAL GONZALEZ

Appeal by defendant from judgment entered 25 May 2018 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 4 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General J. Aldean Webster III, for the State.

Kimberly P. Hoppin, for defendant-appellant.

STROUD, Judge.

Defendant argues that he received an unfair trial due to references to other criminal behavior, and the trial court erred by denying his motions for mistrial for the same reasons. Because there was overwhelming evidence of Defendant trafficking cocaine by transportation, he was not prejudiced by any evidentiary errors

in this case, and the trial court properly denied his motions for mistrial. We conclude Defendant received a fair trial free from prejudicial error.

I. Background

At trial, the State's evidence tended to show that on 15 November 2016, a state highway patrol trooper stopped Defendant and found two packages of cocaine under the hood of the vehicle. The North Carolina State Bureau of Investigation learned about the transportation of cocaine through a wiretap investigation, but Defendant was not the target of this investigation. The State began surveilling Defendant after he received phone calls from the primary target of the wiretap investigation, Jose Cruz. Based on information learned during their investigation, officers were anticipating a delivery of cocaine on 15 November 2016.

On 15 November 2016, Defendant drove Jorge Martinez, who was also under surveillance by the SBI due to his connections to Jose Cruz, from Charlotte to Durham. Defendant stopped in an Advance Auto Parts parking lot and exchanged some items with an occupant of a white van. Defendant put the items under the hood of the vehicle and then drove to Johnston County. State Highway Patrol Trooper Matthew Strawbridge stopped defendant's vehicle, and after getting permission to search the vehicle, he discovered cocaine under the hood of the vehicle.

Defendant was charged with trafficking cocaine by transportation and maintaining a vehicle for the purposes of keeping and selling a controlled substance.

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The State later chose not to proceed on the maintaining a vehicle charge. Defendant filed a motion to suppress the evidence seized upon the search of his vehicle, and after a hearing on the motion, the trial court denied the motion to suppress. Defendant was tried by jury before the 21 May 2018 session of Johnson County, Superior Court. The jury returned a verdict of guilty to trafficking in cocaine by transportation. Defendant was sentenced accordingly and gave notice of appeal in open court.

II. Analysis

Defendant argues, “the State put before the jury repeated references, inferences, allegations and suspicions of [Defendant’s] affiliation with greater criminal behavior than that with which he was charged, [Defendant] was unfairly prejudiced and his trial on the single trafficking cocaine charge was unjust.” Because Defendant was discovered with the cocaine as part of a larger investigation focused on other people, some of the evidence included references to that investigation. Although Defendant did not object to all of this evidence, he did object to some portions of the evidence. The trial court attempted to balance references to the larger investigation which resulted in Defendant’s charges while limiting references to other unrelated criminal activity. Outside the presence of the jury, the trial court told both parties, “It is already before this jury that this arrest was part of a larger wiretapping investigation. It is already before this jury that a subject named Cruz was the target of the investigation and that he was believed to reside in St. Paul.” However, the

trial court acknowledged that the State “made references to a lot of things that really are not before the Court. This defendant is not charged with conspiracy.”

A. Opening Statement

Defendant argues the “trial court reversibly erred” by “failing to intervene” in the State’s opening remarks.

Where Defendant did not object to the opening statement, our “review is limited to an examination of whether the argument was so grossly improper that the trial judge abused his discretion in failing to intervene *ex mero motu*.” *State v. Gladden*, 315 N.C. 398, 417, 340 S.E.2d 673, 685 (1986) (citing *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740 (1983)).

Defendant alleges the following portions of the State’s opening statement were “highly prejudicial, grossly improper, and unsupported”:

The evidence is going to show, you’re going to see, that this defendant told Trooper Strawbridge that he was working drywall, that that’s why he was going to St. Paul [sic] in Robeson County. The evidence is going to show that he was working, but he was working for the Mexican cartel and that he was part of an organization, a cog, that was trafficking kilograms after kilogram of cocaine from Mexico, distributing it in North Carolina, specifically going down to a man by the name of Jose Cruz who lived in St. Paul.

(Alteration in original.) Defendant also challenges references to “delivering large amounts of cocaine from Mexico to be distributed in North Carolina,” and, “[n]ot doing drywall, but working for the cartel.”

Each party in a criminal jury trial has the opportunity to make a brief opening statement. “The purpose of an opening statement is to set forth a ‘general forecast’ of the evidence.”

“Counsel for the parties may not, however, ‘(1) refer to inadmissible evidence, (2) ‘exaggerate or overstate’ the evidence, or (3) discuss evidence [they] expect[] the other party to introduce.’” The parties are generally given “wide latitude” in the scope of an opening statement. Such scope is within the sound discretion of the trial court.

State v. Ackerman, 144 N.C. App. 452, 462-63, 551 S.E.2d 139, 146 (2001) (alterations in original) (citations omitted).

Here, Defendant was charged with trafficking cocaine by transportation, and there were no charges related to association with any cartels. However, Defendant was implicated through a larger wiretap investigation into Jose Cruz. The State’s opening statement forecasted that Defendant was knowingly transporting cocaine, which is one of the elements of trafficking cocaine by transportation. *See* N.C. Gen. Stat. § 90-95(h)(3) (2017). Accordingly, the trial court did not abuse its discretion by not intervening *ex mero motu*.

B. Closing Statement

The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from

the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord

Thus, when defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial.

State v. Huey, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (alteration in original) (citation omitted) (quoting *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002)). “On appeal, [t]he standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection.” *State v. Brown*, 182 N.C. App. 277, 283, 641 S.E.2d 850, 854 (2007) (alteration in original) (quoting *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002)). “Under an abuse of discretion standard of review, [a] prosecutor's improper remark during closing arguments does not justify a new trial unless it is so grave that it prejudiced the result of the trial.” *Id.* at 283-84, 641 S.E.2d at 854 (quoting *State v. Rashidi*, 172 N.C. App. 628, 642, 617 S.E.2d 68, 77-78, *aff'd*, 360 N.C. 166, 622 S.E.2d 493 (2005)).

Defendant objected to the following portions of the State's closing argument:

MR. JACKSON: He was working, but he was working for a large organization that's funneling cocaine into our country and into North Carolina.

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. . . .

This is – it’s about work. It is about work. It’s about the type of work that the defendant was engaged in, going back and forth from Mexico and delivering and trafficking in cocaine.

. . . .

MR. JACKSON: -- to the conversations of Jose Delores Cruz, and they’re hearing what he’s saying. They’re hearing the talk. They’re hearing what’s going on. That’s what a wiretap is. And then when you hear -- then, when they hear what they hear, bam. There’s this guy calling. Remember the testimony? For a while he was Unidentified Male 64. That’s Unidentified Male 64.

As noted above, Defendant was implicated through a larger wiretap investigation into Jose Cruz, and the State was arguing this information was relevant to his knowing transportation of cocaine. We find no abuse of discretion by the trial court in overruling Defendant’s objections.

Defendant did not object to the following part of the State’s closing argument, but alleges, “[t]he State improperly argued that all of the officers told the truth:”

It’s about the responsibility to each one of these law enforcement officers who were here, who testified, their responsibility to do everything they can to keep us safe, to keep drugs off the street. And then they come in here and they’re accused of being untruthful.

You heard their testimony. You heard -- saw the manner in which they testified. They’re thinking hard about it. They’re thinking hard about it. They’re not going to say something they don’t remember. They’re going to tell you the truth. And to think that a sworn -- when an officer gets on the stand and swears to tell the truth, that

that's nothing but the truth, and to say, oh, well, if it's not in the report, then what he's saying is this -- a fabrication? That's not reality. That's not reality. That's an insult.

The officers could have gotten on the stand and said, "Oh, yes. We heard all of this," and they could have made up a bunch of stuff. But they didn't.

While an attorney may not "express his personal belief as to the truth or falsity of the evidence" "[d]uring a closing argument," N.C. Gen. Stat. § 15A-1230 (2017), where Defendant's closing argument called the credibility of the State's witnesses into question, "If you look at all the totality of the evidence, not just what you hear, but what they back it up, with no police reports," we conclude the trial court did not commit an abuse of discretion by declining to intervene *ex mero motu*. These arguments are overruled.

C. Relevant Evidence

Defendant challenges multiple pieces of evidence and testimony as not relevant and argues:

There is a reasonable possibility that, but for the State's introduction of unsupported and unfairly prejudicial evidence and grossly improper arguments that [Defendant] was a member of a Mexican drug cartel repeatedly bringing kilograms after kilograms into our country for distribution in North Carolina, the jury would have assessed the testimony differently and found that the State failed to prove beyond a reasonable doubt that [Defendant] knowingly trafficked 2000 grams of cocaine on the particular date in question.

Examples of testimony that Defendant identifies as not relevant and prejudicial are: Trooper Strawbridge’s testimony about searching Defendant due to “it could be linked to a cartel” and allowing Defendant to use his phone while in his vehicle to potentially “call their cartel-connected sources[;]” reference to additional bricks of cocaine by the State’s Expert Witness related to a larger umbrella case but not connected to Defendant’s trafficking charge;¹ testimony by Agent Bradley Williams, a special agent with the North Carolina State Bureau of Investigation, that wiretap investigations “tend to be very large complex investigations” “targeting large trafficking organizations” “that are supplying significant amounts of narcotics to us in a particular area; in this case, North Carolina[.]”² and that a criminal phone call was made between the target of the wiretap investigation and Defendant.³

Rule 403 provides that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” “The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court [.]” Accordingly, we will not overturn the trial judge’s decision absent a showing that the decision was “manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision.”

¹ The trial court gave a limiting instruction as to the relevance of this evidence.

² Defendant objected, and the trial court agreed to allow Agent Williams to testify that this investigation was part of a larger criminal investigation involving a wiretap, including any observation Agent Williams personally made.

³ Defendant “objected to the implication that the phone conversations themselves between [Defendant] and the phone number subject to the wiretap was criminal and therefore justified a location data order.”

State v. Curmon, 171 N.C. App. 697, 706, 615 S.E.2d 417, 424 (2005) (alterations in original) (citations omitted).

“In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent.” “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.” Plain error arises when the error is “so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]” “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. Pless, 263 N.C. App. 341, 349, 822 S.E.2d 725, 730 (2018), *cert. denied*, 373 N.C. 175, 833 S.E.2d 804 (2019) (citations omitted).

Here, except where otherwise noted, Defendant did not object to the evidence he now challenges on appeal. Even assuming the trial court did err as Defendant argues, we conclude that Defendant has not established “that absent the error, the jury probably would have reached a different result.” *Id.* As to the errors where Defendant objected, we conclude the trial court sustaining Defendant’s objections and giving a curative instruction informing the jury the six additional bricks of cocaine were not relevant and to be disregarded was sufficient; the trial court did not abuse its discretion in allowing Agent Williams to testify that this investigation was part of

a larger criminal investigation or allowing Agent Songalewski to testify that contact with a phone number subject to a criminal wiretap investigation could result in further investigation. This argument is overruled.

D. Information Obtained from Phone Records

Defendant argues “the trial court improperly allowed into evidence, over objection, information obtained from unauthenticated phone records.” (Original in all caps.) “If alleged error is properly preserved at trial, we review evidentiary rulings for an abuse of discretion.” *State v. Petrick*, 186 N.C. App. 597, 601, 652 S.E.2d 688, 691 (2007) (citing *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004)).

Defendant objected to testimony regarding Defendant’s phone number. The first instance was when Agent Bradley Williams, a special agent with the North Carolina State Bureau of Investigation, was discussing surveillance of Defendant:

Q. Okay. And so where -- you were made aware that that [sic] phone was -- phone that was obtained from the Cruz wiretap was at a particular location. Where was that location?

A. The -- the intel we were -- we had indicated it was at the apartment complex -- Country Club Apartment complex --

MR. KNOTT: Objection to what intel he had unless he has direct knowledge of it.

THE COURT: Overruled.

“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. Here, Agent Williams testified about the investigation and how he conducted surveillance. As part of that process, he testified that he was assisting Agent Paul Songalewski with the North Carolina State Bureau of Investigation with the wiretap, that they were investigating Jose Cruz, and based on that investigation it led to the discovery of the phone number:

Q. And were you given -- and were you aware of a target number, the -- the telephone number that you were surveilling?

A. Yes, sir.

Q. Okay. Now, what was that number?

A. I can't remember the number off the top of my head, but it was a 704 number, which is a Charlotte area code.

Q. Okay. And were y'all able to -- through the investigation, to ping the location of that particular telephone?

A. Yes. We were able to -- to obtain the location of where that cell phone physically was.

Q. And this is -- you're able to obtain that telephone number from the wiretap on Cruz's phone; is that right?

A. That's correct.

Q. Okay. So once you get this new number, you're able to determine its location; is that correct?

A. We can track the location of the phone, that's correct.

Agent Williams had personal knowledge of the phone number based upon his work in the wiretap investigation. This argument is overruled.

Defendant also objected to identification of Defendant's phone number by Agent Songalewski who was responsible for the wiretap investigation into Jose Cruz:

Q. And at some point in time, did you obtain such an order on [the phone number]?

A. Yes. The -- one of the investigators did. I don't recall who.

MR. KNOTT: Objection.

THE COURT: Overruled.

Q. Was that -- was that a part of this investigation?

A. Yes.

Q. Okay. And that is the defendant's phone number?

MR. KNOTT: Objection. He's already -- I apologize. Objection.

THE COURT: Overruled.

Q. Talk about -- so were y'all able --

A. I'm sorry, sir. That was part of the Jose Cruz investigation. This investigation became a part of that.

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Q. Yes.

A. If that answers your question, sir.

MR. KNOTT: Objection.

THE COURT: Overruled.

Defendant made numerous similar objections throughout Agent Songalewski's testimony. Defendant argues:

This evidence linking this particular telephone number to [Defendant], and then to calls made to Jose Cruz, bolstered the State's improper allegations and allowed the jury to infer that Mr. Gonzalez was part of a large Mexican cartel, well beyond the its task of determining whether [Defendant] knowingly transported 2000 grams of cocaine on November 15, 2016.

We disagree. Agent Songalewski's testimony addressed his knowledge of Defendant's phone number based upon the investigation into Jose Cruz. Defendant's argument regarding his phone number simply highlights the relevance of the investigation of Mr. Cruz which led to his own arrest. The trial court did not err in denying Defendant's repeated objections.

E. Ineffective Assistance of Counsel

Defendant alleges:

To the extent that [Defendant] has been prejudiced by his attorney's failure to preserve issues for review by failing to object to improper and inadmissible evidence and arguments, and subjecting him to less favorable standards of review by this Court, then he contends that he received ineffective assistance of counsel.

To show ineffective assistance of counsel,

the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result was reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process which renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *see also State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). "The merits of an ineffective assistance of counsel claim will be decided on direct appeal only 'when the cold record reveals that no further investigation is required.'" *State v. Friend*, 257 N.C. App. 516, 521, 809 S.E.2d 902, 906 (2018) (quoting *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004)).

In this case, Defendant has failed to show that his trial "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. In addition, Defendant cannot establish how he was prejudiced by his counsel's performance in failing to preserve some evidentiary issues when he has not shown that even if the suggested errors were preserved how this Court would have reached a different result. This argument is overruled.

III. Motion for Mistrial

Defendant argues the trial court erred by denying his repeated motions for mistrial. Defendant moved for mistrial after an agent testified that officers knew about the cocaine under the hood of vehicle before a traffic stop, after the State's forensic chemist expert testified about the "cartel's drugs," and after the jury returned its verdict.

A. Standard of Review

It is well established that

a "[m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." The trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." However, "[n]ot every disruptive event which occurs during trial automatically requires the court to declare a mistrial." "Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion."

State v. Dye, 207 N.C. App. 473, 481-82, 700 S.E.2d 135, 140 (2010) (alterations in original) (citations omitted).

B. Analysis

Defendant has not established an abuse of discretion by the trial court or irreparable prejudice to his case. Where there was overwhelming evidence of Defendant's guilt of trafficking cocaine by transportation, we conclude the trial court

did not err by denying Defendants motions for a mistrial. *See State v. Carr*, 61 N.C. App. 402, 411, 301 S.E.2d 430, 436-37 (1983) (“Where the error claimed could not have made the difference between a guilty verdict and an acquittal, no prejudice results to the defendant.” (citing *State v. Smith*, 301 N.C. 695, 697, 272 S.E.2d 852, 855 (1981))).

C. Cumulative Error

Defendant argues, “[t]o the extent any single error identified by [Defendant] is alone insufficient to warrant reversal, the cumulative effect of all the errors require that his convictions be vacated.” Defendant describes the effect of the cumulative errors as:

Given the case presented by the State, the jury here was not deciding whether [Defendant] had knowingly transported 2000 grams of cocaine on November 15, 2016. Rather, the jury here was given the task of deciding whether this alleged member of a large Mexican drug cartel had been caught with 2000 grams of cocaine on one of numerous trips funneling “kilograms after kilogram” from Mexico for distribution into North Carolina.

We have already addressed the errors Defendant raised on appeal and determined that none of them were reversible error. We conclude there is no cumulative error, and the trial court did not commit an abuse of discretion by denying Defendant’s motions for a mistrial.

IV. Conclusion

The trial court gave limiting instructions and sought to limit references to the larger investigation and criminal activity beyond Defendant's charges. Defendant also has not demonstrated any prejudice from the State's references to other criminal activity and cartels due to the overwhelming evidence of his guilt. "[L]itigants are not entitled to receive 'perfect' trials; instead, they are entitled to receive 'a fair trial, free of prejudicial error.'" *State v. Malachi*, 371 N.C. 719, 733, 821 S.E.2d 407, 418 (2018) (quoting *State v. Ligon*, 332 N.C. 224, 243, 420 S.E.2d 136, 147 (1992)). We conclude Defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges ARROWOOD and BROOK concur.

Report per Rule 30(e).