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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-335

No. COA20-118

Filed 6 July 2021

Cumberland County, No. 15CRS53535

STATE OF NORTH CAROLINA

v.

JAMMAL RASHAD MILES

Appeal by defendant from order entered 14 May 2019 by Judge Thomas H. Lock in Cumberland County Superior Court. Heard in the Court of Appeals 26 May 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Derek L. Hunter, for the State-Appellee.

Dylan J.C. Buffman Attorney at Law, PLLC, by Dylan J.C. Buffman, for Defendant-Appellant.

CARPENTER, Judge.

I. Factual and Procedural Background

¶ 1 Mr. Jammal Miles ("Defendant") was charged with two counts of malicious

conduct by a prisoner and one count of felony possession of cocaine. He was also indicted as a habitual felon.

¶ 2 The relevant facts leading to Defendant's charges are as follows: On 23 April 2017, Deputy Price of the Cumberland County Sheriff's Department saw Defendant asleep in the passenger seat of a parked car at a gas station. Deputy Price attempted to wake Defendant through the car's open window, but Defendant was initially unresponsive. Deputy Price testified he saw a plastic bag in Defendant's hand. Deputy Price concluded Defendant was suffering from an overdose and called for an ambulance. Defendant awoke, and Deputy Price canceled the call for the ambulance. Following direction from Deputy Price, Defendant got out of the car and took his hands from his pockets. Deputy Price testified that he saw Defendant drop the plastic bag and step on it. Deputy Price testified he noticed the bag had white powder in it. Defendant denied the bag on the ground belonged to him.

¶ 3 Deputy Price testified that Defendant verbally opposed being searched, and that a civilian notified other nearby officers to come assist Deputy Price. Officer Ariel Aponte and his partner were inside the gas station and came out to assist Deputy Price. Officer Aponte recorded body camera footage of the incident. Officer Aponte and Deputy Price escorted Defendant to the patrol car. Defendant asked why he was being arrested and requested a supervisor come to the scene. Sergeant Britton arrived and told Defendant he was being arrested for possession of narcotics.

Sergeant Britton forced Defendant into the patrol car. Sergeant Britton testified that officers at the scene later observed what they believed to be saliva on Sergeant Britton's shirt. While Defendant was handcuffed and locked in the patrol car, Deputy Price stood behind the tailgate and conducted a field test for narcotics. Deputy Price had the tailgate open while conducting the field test. Deputy Price testified that Defendant was spitting inside the vehicle, and Deputy Price instructed him to stop. Deputy Price testified that Defendant spit through the partition and out the open rear of the vehicle, landing on Deputy Price's forearm.

¶ 4 Defendant was charged with two counts of malicious conduct by a prisoner (one against Deputy Price, and one against Sergeant Britton), as well as one count of felony possession of cocaine. The charges came on for a trial during the 18 February 2019 criminal session of the Superior Court for Cumberland County, the Honorable James F. Ammons, Jr. presiding (the "first trial"). At the first trial, the State played body camera footage recorded by Officer Ariel Aponte, and Sergeant Britton was called as a witness to identify the points in the video at which Defendant spit. The jury returned a guilty verdict on one count of malicious conduct against Deputy Price, and acquitted Defendant on the second count of malicious conduct against Sergeant Britton. The jury could not reach a verdict on the charge of possession of cocaine. The trial court declared a mistrial on the third count. The jury found Defendant had attained habitual felon status. Defendant stipulated to twelve prior record level

points. He was sentenced at prior record level four in the presumptive range to an active term of 88 to 118 months. Defendant gave oral notice of appeal at trial.

¶ 5 Pursuant to a plea agreement, Defendant agreed to plead guilty to the cocaine charge and admit his status as a habitual felon. The charges were to be consolidated into one judgment, and Defendant would be sentenced to 88 to 118 months in prison. During the plea colloquy, the trial court incorrectly advised Defendant that, in agreeing to plead guilty, Defendant waived his right to appeal both the conviction of malicious conduct by a prisoner of which the jury had convicted him, as well as the conviction for felony possession of cocaine to which Defendant was pleading guilty. Defendant's counsel informed the court that he did not believe Defendant waived his right to appeal by agreeing to the plea deal, to which the trial court responded that if Defendant wished to appeal his convictions, the trial court would not accept the plea. Defendant indicated he wished to exercise his right to appeal, and the trial court rejected the plea agreement.

¶ 6 The cocaine charge came on for a second trial during the 13 May 2019 criminal session of the Superior Court of Cumberland County, the Honorable Thomas H. Lock presiding (the "second trial"). At the second trial, the jury found Defendant guilty of possession of cocaine. The prior record level worksheet that was submitted to the trial court after the second trial included the conviction for malicious conduct by a prisoner, obtained in this case at the first trial. This additional conviction increased

the number of prior record level points from twelve to sixteen, elevating Defendant's prior record level from four to five. Defendant was sentenced in the mitigated range to an active term of 26 to 44 months, consecutive to the sentence imposed after the first trial.

¶ 7 On 1 October 2019, this Court granted Defendant's petition for *certiorari*, reinstating his right to appeal the judgment from the second trial. On 12 March 2020, this Court allowed Defendant's motion to consolidate the appeal of both judgments.

II. Jurisdiction

¶ 8 Jurisdiction lies in this Court as a matter of right over a final judgment of a superior court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat § 15A-1444(a) (2019), and pursuant to N.C. R. App. P. 21 (2019) and the Order of this Court allowing Defendant's petition for *certiorari*.

III. Issues

¶ 9 The issues on appeal are (1) whether Defendant was denied the right to effective assistance of counsel when his attorney failed to object to the trial court's misstatements of law; (2) whether the trial court committed plain error when it allowed the State to introduce lay-opinion testimony from Sergeant Britton describing events on the video he did not witness personally; (3) whether the trial court abused its discretion by denying Defendant's motion to sequester the State's witnesses; and (4) whether the trial court erred in including Defendant's conviction

from the first trial when calculating Defendant's prior record level for sentencing after the second trial.

IV. Analysis

A. Ineffective Assistance of Counsel

¶ 10 Defendant contends he was denied the right to effective assistance of counsel when his attorney failed to object to the trial court's misstatements of law, specifically the trial court's incorrect representation to Defendant that, in agreeing to plead guilty, Defendant waived his right to appeal both the convictions of malicious conduct by a prisoner and felony possession of cocaine.

1. Standard of Review

¶ 11 "To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286, *cert. denied*, 549 U.S. 867 (2006), (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). "Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness." *Id.* at 316, 626 S.E.2d at 286. "Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 216, 626 S.E.2d at 286. "A reasonable probability is a probability sufficient to

undermine confidence in the outcome." *Id.* at 216, 626 S.E.2d at 286. In the context of a plea, a defendant "must . . . demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it[.]" *Missouri v. Frye*, 566 U.S. 134, 147, 132 S. Ct. 1399, 1409 (2012).

2. Discussion

¶ 12 The trial court misrepresented to Defendant he would not be able to appeal his convictions if he agreed to plead guilty to the cocaine charge. Defendant's counsel objected to the trial court's misrepresentations, and ultimately Defendant expressed his desire to preserve his right to appeal. In response, the trial court stated, "Then I will reject this plea." Defendant contends his counsel's performance was deficient because counsel failed to further object to the trial court's requirement that Defendant waive his right to appeal.

¶ 13 However, "claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citing *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985)). A motion for appropriate relief is the preferable mechanism to raise such a claim because "[t]o defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor." *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citation omitted). "[S]hould

the reviewing court determine that [the ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (citing *State v. Kinch*, 314 N.C. 99, 106, 331 S.E.2d 665, 669 (1985)).

¶ 14 In this case, we cannot properly assess the ineffective assistance of counsel issue on direct appeal because an evidentiary hearing on this issue has not been held, and the "cold record" is not dispositive. *Kinch*, 314 N.C. at 106, 331 S.E.2d at 669 (concluding same); *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citations omitted) (Ineffective assistance of counsel "claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing."); *State v. House*, 340 N.C. 187, 196, 456 S.E.2d 292, 297 (1995) (declining to adjudicate ineffective assistance of counsel claim where record was silent as to whether defendant consented to his counsel's argument regarding his guilt and determining that said issue was appropriately deferred for consideration in a motion for appropriate relief). Therefore, we dismiss Defendant's claim for ineffective assistance of counsel without prejudice to his right to file a motion for appropriate relief in the trial court.

¶ 15 Should this issue be raised below in a motion for appropriate relief, the trial

court "should take evidence, make findings of fact and conclusions of law, and order review of all files and oral thought patterns of trial counsel and client that are determined to be relevant to defendant's allegations of ineffective assistance of counsel." *Buckner*, 351 N.C. at 412, 527 S.E.2d at 314.

B. Introduction of Lay-Opinion Testimony

¶ 16 During the first trial, the State played for the jury the body camera video of the events that occurred resulting in Defendant's charges, as recorded by Officer Ariel Aponte. Defendant does not contend the introduction of the video was improper. Rather, Defendant contends the introduction of Sergeant Britton's testimony regarding the events depicted in the body camera footage amounted to improper lay witness testimony.

1. Standard of Review

¶ 17 Defendant failed to object to Sergeant Britton's testimony at trial. "[W]here a party does not object at trial, plain error is the proper standard of review." *State v. Collins*, 216 N.C. App. 249, 254, 716 S.E.2d 255, 259 (2011).

¶ 18 "Plain error is 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *Id.* at 255, 716 S.E.2d at 260, *quoting State v. Bagley,* 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987). "Plain error exists 'only in exceptional cases where, after reviewing the entire record, it can be said the claimed error is a fundamental

error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.'" *Id.* at 255, 716 S.E.2d at 260, *quoting State v. Hammett,* 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006) (internal quotation marks and citations omitted).

2. Discussion

¶ 19 Pursuant to the North Carolina Rules of Evidence, admissible lay opinion testimony in the form of opinions or inferences "is limited 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.

¶ 20 Sergeant Britton testified regarding the segments in the video when Defendant spit on Deputy Price and when the saliva appeared on Sergeant Britton's shirt—instances which resulted in Defendant's two separate charges of malicious conduct. Sergeant Britton's testimony likely helped the jury understand what they were seeing, since Sergeant Britton was present as the footage was being recorded. *See* N.C. Gen. Stat. § 8C-1, Rule 701.

¶ 21 However, even assuming, without finding, the introduction of Sergeant Britton's testimony was in error, it did not amount to plain error, as it did not serve to prejudice Defendant. Because both Officer Aponte and Deputy Price also testified to Defendant's actions resulting in the charge of malicious conduct against Deputy Price, the State's case for this charge did not exclusively rest on the testimony of

Sergeant Britton. Therefore, Defendant cannot show Sergeant Britton's testimony as to Defendant's malicious conduct against Deputy Price prejudiced him such that the jury would have reached a different verdict absent Sergeant Britton's testimony.

¶ 22 The jury did not convict Defendant of the charge of malicious conduct against Sergeant Britton. Therefore, Sergeant Britton's testimony was not prejudicial to Defendant regarding that charge. Defendant is unable to show that Sergeant Britton's testimony "probably resulted in the jury reaching a different verdict than it otherwise would have reached." *See Collins*, 216 N.C. App. at 255, 716 S.E.2d at 260. Accordingly, the trial court did not commit plain error in admitting Sergeant Britton's testimony.

C. Defendant's Motion to Sequester the State's Witnesses

¶ 23 At trial, Defendant argued the State's witnesses, namely, Officer Aponte, Sergeant Britton, and Deputy Price, should be sequestered to "insur[e] they are not intentionally talking off each other's statement during the [S]tate's case in chief." The trial court denied Defendant's motion. Defendant contends the trial court's denial of Defendant's motion amounted to an abuse of the trial court's discretion, because, Defendant argues, the denial was based on "the trial court's assumption that police officers are immune from tailoring their testimony on the stand."

1. Standard of Review

¶ 24 "A ruling on a motion to sequester witnesses rests within the sound discretion

of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing that the [action] was so arbitrary that it could not have been the result of a reasoned decision." *State v. Roache,* 358 N.C. 243, 276–77, 595 S.E.2d 381, 404 (2004) (internal quotations omitted) (quoting *State v. Hyde*, 352 N.C. 37, 43, 530 S.E.2d 281, 286 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). We review rulings on motions to sequester witnesses for abuse of discretion. *See State v. Fullwood*, 323 N.C. 371, 380, 373 S.E.2d 518, 524 (1998), *vacated and remanded on other grounds*, 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990).

2. Discussion

¶ 25 Defendant first argues the trial court abused its discretion in denying its motion to sequester witnesses because the trial court's decision was based on the "assumption that police officers are immune from tailoring their testimony on the stand." Defendant's portrayal of the trial court's reasoning is not proven by the contents of the record. Still, this Court held, and our Supreme Court's precedent supports, that "in situations . . . where the officers were in uniform in the performance of their routine duties . . . it is improper to single them out as a class of witnesses that may be less credible due to their potential interest in the outcome of the case." *State v. McQueen*, 181 N.C. App. 417, 420, 639 S.E.2d 131, 133 (2007) (*citing State v. Hunt*, 345 N.C. 720, 726, 483 S.E.2d 417, 421 (1997)); *see also State v. Williams*, 333 N.C. 719, 733, 430 S.E.2d 888, 895 (1993). At most, the record reflects the trial court

refused to accept Defendant's argument that the witnesses should have been sequestered based on their status as police officers, in keeping with the law as it stands.

¶ 26 Defendant further argues because Officer Price and Sergeant Britton were the victims of Defendant's charges of malicious conduct, they were "interested witnesses," and should have been sequestered. In short, Defendant's arguments amount to mere speculation and conjecture.

¶ 27 "The aim of sequestration is two-fold: First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses, and second, it aids in detecting testimony that is less than candid." *State v. Harrell*, 67 N.C. App. 57, 64, 312 S.E.2d 230, 236 (1984). However, "due process does not automatically require separation of witnesses who are to testify to the same set of facts." *Id*. at 64, 312 S.E.2d at 236.

¶ 28 We have previously upheld a trial court's denial of a motion to sequester when the State's entire case rested on the testimony of three police officers who were to testify about the same set of facts. *See State v. Holmes*, 109 N.C. App. 615, 623, 428 S.E.2d 277, 281 (1993). We have also previously held a trial court did not abuse its discretion in denying a motion to sequester witnesses who were both victims in the same set of facts when the defendant on appeal had not shown the witnesses tailored their testimony to fit that of the other. *See State v. Jones*, 241 N.C. App. 132, 144, 772 S.E.2d 470, 479 (2015). In the case at bar, while two of the officers who testified

were alleged to have been victims of Defendant's malicious conduct, the record does not reflect either of those officers tailored their testimony to that of the other. *See Jones*, 241 N.C. App. at 144, 772 S.E.2d at 479.

¶ 29 The trial court did not abuse its discretion by denying Defendant's motion to sequester the witnesses.

D. Motion for Appropriate Relief Regarding Sentencing Calculation

1. Standard of Review

¶ 30 The determination of a defendant's prior record level for sentencing purposes is subject to *de novo* review. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009). "Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Bohler*, 198 N.C. App. at 633, 681 S.E.2d at 804 (*quoting State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)).

2. Discussion

¶ 31 Under N.C. Gen. Stat. § 15A-1340.14(d), where two or more offenses are joined for trial, but a conviction for one is obtained in a different calendar week than another, the prior conviction may not be used to determine the prior record level for sentencing on the subsequent conviction. N.C. Gen. Stat. § 15A-1340.14(d); *see also State v. Watlington*, 234 N.C. App. 601, 759 S.E.2d 392 (2014) and *State v. West*, 180 N.C. App. 664, 638 S.E.2d 508 (2006).

¶ 32 The State concedes that after the second trial on 14 May 2019, the trial court erred in determining Defendant's prior record level for sentencing by including in its calculation Defendant's conviction for malicious conduct by a prisoner from the first trial on 22 February 2019. A defendant who is tried on consolidated charges, but is not convicted on one or more of the charges, cannot have a conviction from that trial treated as a prior conviction for purposes of calculating the prior record level if he is subsequently convicted of any of those same charges. "It would be unjust to punish a defendant more harshly simply because, in his first trial, the jury could not reach a unanimous verdict on some charges, but in a subsequent trial, a different jury convicted that defendant on some of those same charges." *See Watlington*, 234 N.C. App. at 609, 759 S.E.2d at 397. In the instant case, the trial court's inclusion of Defendant's prior conviction for malicious conduct by a prisoner resulted in Defendant being assigned four additional points, which, in turn, resulted in the court sentencing Defendant as a prior record level five instead of a prior record level four.

¶ 33 The trial court erred in including Defendant's conviction for malicious conduct by a prisoner from the first trial when calculating Defendant's prior record level for sentencing after the second trial. Accordingly, Defendant's convictions for felony possession of cocaine and for attaining status as a habitual felon should be remanded to the trial court for resentencing.

VI. Conclusion

¶ 34 This Court dismisses Defendant's claim for ineffective assistance of counsel without prejudice to his right to file a motion for appropriate relief in the trial court. We hold the trial court did not commit plain error in allowing the introduction of Sergeant Britton's testimony, and did not abuse its discretion by denying Defendant's motion to sequester the State's witnesses. However, we hold the trial court erred in including Defendant's conviction from the first trial when calculating Defendant's prior record level for sentencing after the second trial. Therefore, we dismiss without prejudice in part, affirm in part, and remand in part for re-sentencing consistent with this opinion.

DISMISS WITHOUT PREJUDICE IN PART, AFFIRM IN PART, REMAND IN PART.

Judges DILLON and GORE concur.

Report per Rule 30(e).