IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-18

No. COA21-290

Filed 4 January 2022

Onslow County, No. 15 CRS 54665, 15 CRS 54673

STATE OF NORTH CAROLINA

v.

JAMES A. COX

Appeal by Defendant from Judgments entered 16 January 2018 by Judge William W. Bland in Onslow County Superior Court. Heard in the Court of Appeals 6 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Glenn Gerding for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 James A. Cox (Defendant) appeals from his convictions for Conspiracy to Commit Armed Robbery with a Dangerous Weapon and Felonious Breaking or Entering. The evidence presented at trial tends to show the following:

¶ 2 Sometime prior to the night of 8 August 2015, Defendant gave Richard Linn (Linn) $20.00 to purchase Percocet tablets or other drugs. Linn testified he regularly

used Angela Leisure (Leisure) as a go-between to purchase drugs. On this occasion, Linn added his own money to Defendant's and gave Leisure approximately $50.00 or $60.00. Leisure admitted she never purchased the drugs and never returned the money to Linn.

¶ 3 Linn further testified on the evening of 8 August 2015, Defendant and his girlfriend, Ashley Jackson (Jackson), arrived at Linn's house and demanded he come outside. Defendant was standing outside with a gun in his hand and told Linn to "get in the car." Linn stated Defendant and Jackson wanted to go to Leisure's house "to talk to her about their money." After getting in the car, Linn directed Defendant to Leisure's house.

¶ 4 Leisure's boyfriend, Daniel McMinn (McMinn), testified he was standing outside of Leisure's home when Defendant, Jackson, and Linn arrived. Jackson asked McMinn where Leisure was. Jackson and Defendant entered the house and McMinn followed. After entering the home, Jackson attacked Leisure by pulling her hair, punching her, and forcing her to the ground. Leisure recalled Jackson saying, "give me my money" or "give me the money." McMinn testified he reached for his cell phone to call the police, but he stopped when he saw Defendant display a handgun "in a threatening way."

¶ 5 After several minutes of fighting, Linn called Jackson off, saying: "I think she's had enough. Come on, let's go." Defendant, Jackson, and Linn left the house. Linn

testified once outside, Defendant turned and kicked a hole in the door. Defendant also fired a shot into Leisure's home, which struck a mirrored door. Defendant, Jackson, and Linn left Leisure's home without obtaining any money or personal property.

¶ 6 Based on these events, Defendant was arrested and charged with First-Degree Burglary, Conspiracy to Commit Robbery with a Dangerous Weapon, and Discharging a Weapon into an Occupied Property. Following the State's presentation of evidence, Defendant moved to dismiss all charges. This Motion was denied.

¶ 7 Subsequently, Defendant presented evidence, including his own testimony. Defendant's evidence tended to show he went to Linn's house on 8 August 2015 to give Linn $20.00 to purchase pain relievers for Jackson. Later in the evening, Linn requested Defendant pick him up because Leisure had taken the money and would not answer his phone calls. Linn said he would talk to Leisure in person and get Defendant's money back. Defendant claimed no one, including himself, had a weapon on 8 August 2015 and that Jackson kicked in the door, not Defendant. At the close of all the evidence, Defendant renewed his Motion to Dismiss all charges, which the trial court denied.

¶ 8 After instructing the jury, the trial court provided the jury with written copies of its jury instructions. After deliberating for approximately two hours, the jury

returned a note with two questions related to the Conspiracy charge. The first question stated, "Can we get clarification of 'While the defendant knows that the defendant is not entitled to take the property,' " which was part of the definition in the jury instructions on Conspiracy to Commit Robbery with a Dangerous Weapon. The jury's second question asked, "Is it still Robbery to take [b]ack [one's own] property?" After conferring with counsel, and without any objection by Defendant's trial counsel, the trial court declined to answer the jury's two questions directly. Instead, the trial court referred the jury back to its written copy of the jury instructions.

¶ 9 On 16 January 2018, the jury returned a verdict finding Defendant guilty of Felonious Breaking or Entering, Conspiracy to Commit Robbery with a Dangerous Weapon, and Discharging a Weapon into an Occupied Property. The trial court entered a consolidated judgment on the Conspiracy to Commit Robbery with a Dangerous Weapon and Discharging a Weapon into an Occupied Property charges, sentencing Defendant to a minimum of 60 months and a maximum of 84 months in the custody of the North Carolina Department of Adult Correction. On the Felonious Breaking or Entering charge, Defendant received a suspended sentence of 6 to 17 months and was placed on supervised probation for a term of 24 months. Defendant gave oral Notice of Appeal at trial.

¶ 10 On appeal to this Court, Defendant raised four issues: (I) whether the trial judge committed plain error by failing to respond to the jury's two questions; (II) whether defense counsel was ineffective for failure to request further instructions in response to the jury's questions related to the intent element of robbery; (III) whether the trial judge erred in denying the defendant's Motion to Dismiss the charge of conspiracy to commit armed robbery; and (IV) whether the trial judge erred in denying defendant's Motion to Dismiss the charge of felonious breaking and entering. This Court issued a unanimous decision holding the trial court erred by denying Defendant's Motion to Dismiss because Defendant had a claim of right to the property that negated the element of felonious intent. This Court did not address the plain error and ineffective assistance of counsel claims.

¶ 11 On 14 August 2020, the Supreme Court of North Carolina issued an Opinion reversing this Court. The Court held existing law did not permit a party to legally engage in "self-help" under a claim of right if the property was subject to an illegal transaction. Consequently, the Supreme Court ordered Defendant's convictions reinstated.

¶ 12 Thereafter, Defendant filed a Petition for Writ of Certiorari in this Court to decide the remaining unaddressed plain error and ineffective assistance of counsel issues—arguments we did not reach in the original decision. On 11 January 2021, this Court allowed the Petition. Having granted Certiorari, this Court has

jurisdiction to hear Defendant's appeal pursuant to N.C. Gen. Stat. § 7A-32 and N.C.R. App. P. 21.

Issues

¶ 13 The issues on appeal are whether: (I) the *ex post facto* clauses of the federal and state constitutions bar retroactive application of *State v. Cox*, 375 N.C. 165, 846 S.E.2d 482 (2020), to Defendant's plain error and ineffective assistance of counsel claims;[1] (II) the trial court committed plain error by failing to respond to the jury's two questions; and (III) defense counsel was ineffective for failure to request further instructions in response to the jury's questions related to the intent element of robbery.

Analysis

I. *Ex Post Facto* Application of the Supreme Court's Opinion

¶ 14 Recognizing that application of the Supreme Court's earlier decision in this case may well have foreclosed his remaining arguments, Defendant nevertheless contends that applying the North Carolina Supreme Court's decision here to the

[1] The plain error and ineffective assistance of counsel arguments may well be deemed abandoned by Defendant's attempt to incorporate the arguments by reference from his "initial appellant brief" instead of setting out the argument in his brief. *See Wiley v. L3 Communs. Vertex Aero., LLC*, 251 N.C. App. 354, 365, 795 S.E.2d 580, 588 (2016) (citing *Fortner v. J.K. Holding Co.*, 319 N.C. 640, 641-42, 357 S.E.2d 167, 167-68 (1987)) ("This Court and our Supreme Court repeatedly have rejected attempts by litigants to 'incorporate by reference' arguments found elsewhere in the trial record.").

remaining issues from Defendant's first appeal would violate the constitutional prohibition against *ex post facto* laws. Both Article I, § 10 of the United States Constitution, and Article I § 16 of the North Carolina Constitution prohibit the enactment of *ex post facto* laws. U.S. Const. art. I § 10; N.C. Const. art. I § 16. An *ex post facto* law is a law that "(1) makes an action criminal which was done before the passing of the law and which was innocent when done, (2) aggravates a crime or makes it greater than when it was committed, (3) allows imposition of a different or greater punishment than was permitted when the crime was committed, or (4) alters the legal rules of evidence to permit different or less testimony to convict the offender than was required at the time the offense was committed." *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991). "In other words, in order for a criminal law to be an *ex post facto* violation, it must be both retrospective by applying to events which occurred before its enactment, and it must disadvantage the offender affected by it." *State v. Krider,* 138 N.C. App. 37, 46, 530 S.E.2d 569, 574 (2000). "Although the *ex post facto* clauses are directed specifically at legislative action, the Supreme Court of the United States has held that the Fifth and Fourteenth Amendments to the U.S. Constitution also 'forbid retroactive application of an unforeseeable judicial modification of criminal law, to the disadvantage of the defendant.' " *Vance,* 328 N.C. at 620, 403 S.E.2d at 500. (quoting *Weaver v. Graham*, 450 U.S. 24, 29, 67 L. Ed. 2d 17, 23 (1981)).

¶ 15 In this case, it is evident that in the view of our Supreme Court, its decision in Defendant's case did not constitute an "unforeseeable judicial modification of criminal law." To the contrary, the Court noted "[no] other case in this state has heretofore authorized a party to legally engage in 'self-help' by virtue of the exercise of a bona fide claim of right or title to property which is the subject of an illegal transaction"; and pointedly noted that in the Supreme Court's view this Court's decision "erroneously extended beyond existing legal bounds the right of a party to engage in 'self-help.' " *Cox*, 375 N.C. at 172, 846 S.E.2d at 487. Therefore, we must likewise conclude the Supreme Court's decision did not modify or create new law, but merely restated and reaffirmed existing law. Thus, retractive application of our Supreme Court's prior Opinion in this case to Defendant's plain error and ineffective assistance of counsel claims does not implicate or violate the federal and state constitutions' prohibitions on *ex post facto* laws. Consequently, we remain bound in our analysis by our Supreme Court's earlier decision in this case and conclude *ex post facto* clauses do not forbid application of *State v. Cox*, 375 N.C. 165, 846 S.E.2d 482 (2020), to Defendant's plain error and ineffective assistance of counsel claims. *See State v. DeJesus*, 265 N.C. App. 279, 291, 827 S.E.2d 744, 753 (2019) ("This Court is bound by the precedent of our Supreme Court. . . .").

II. Response to Jury Questions

¶ 16 Defendant next contends the trial court erred by failing to respond to the jury's

two questions. Assuming Defendant did not abandon this argument by his failure to set it out in his brief, in accordance with the Supreme Court's earlier Opinion in this case, we are constrained to conclude the trial court did not err by refusing to respond to the jury's two questions.

¶ 17 "After the jury retires for deliberation, the judge may give appropriate additional instructions to . . . [r]espond to an inquiry of the jury made in open court." N.C. Gen. Stat. § 15A-1234 (a)(1) (2019). "When the trial court gives such additional instructions, it may also give or repeat other instructions to avoid giving undue prominence to the additional instructions." *State v. Weddington,* 329 N.C. 202, 210, 404 S.E.2d 671, 674 (1991). Furthermore, "the trial court is in the best position to determine whether further additional instructions will aid or confuse the jury in its deliberations . . . " *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986). Therefore, whether or not to give additional instructions in response to a question "rests within the sound discretion of the trial court and will not be overturned absent abuse of that discretion." *State v. Bartlett*, 153 N.C. App. 680, 685, 571 S.E.2d 28, 31 (2002).

¶ 18 Here, the jury asked for clarification on the part of the instruction that stated "[w]hile the defendant knows that the defendant is not entitled to take the property," and followed up this request with a question plainly asking, "[i]s it still robbery to take back [one's own] property?" The trial court, in its discretion, chose to respond to

the question by referring the jury back to the initial robbery instruction instead of providing an additional instruction on felonious intent. The trial court reasoned it would not be appropriate to provide additional instruction because:

> it's the duty of the jury to determine the facts from the evidence presented and apply the facts to the law, and the law, as applicable in this case, has been set out in these jury instructions that you have a copy of and were read to you.

This reasoning indicates the trial court chose not to issue an additional instruction on felonious intent in response to the jury's questions in order to avoid infusing its own application of the law to the facts. Thus, the trial court properly exercised its discretion in repeating the robbery instruction, which explained that, in order to be convicted, defendant must have known he was not entitled to take the property. *See State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (An abuse of discretion will only be found "upon a showing that [the trial court's] ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision."). Therefore, we conclude the trial court did not err in directing the jury back to the robbery instruction instead of answering the jury questions with additional instructions on felonious intent.

III. Ineffective Assistance of Counsel

¶ 19 Defendant also contends defense counsel was ineffective for failure to request further instructions in response to the jury's questions. Assuming arguendo this

argument was not abandoned by his failure to set it out in his brief, defense counsel was not ineffective for failure to request an instruction contrary to law. To prove his counselor rendered ineffective assistance, a defendant must show: (1) "counsel's representation fell below an objective standard of reasonableness[,]" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (quoting *Wiggins v. Smith*, 539 U.S. 510, 521, 534, 156 L. Ed. 2d 471, 484, 493 (2003)). A counselor's failure to request an inapplicable instruction does not fall below an objective standard of reasonableness because, even if the counselor requests such an instruction, the trial court should not grant his request. *See State v. Holshouser*, 267 N.C. App. 349, 354, 833 S.E.2d 193, 198 (2019).

¶ 20 In this case, in the view of our Supreme Court, a bona fide claim of right does not defeat the element of felonious intent to armed robbery when the defendant forcibly attempts to take property that's the subject of an illegal transaction from the actual possession of the victim. Therefore, even if defense counsel had requested a "claim of right" instruction, the trial court, following existing law, should not have given the instruction to the jury. Thus, defense counsel did not render ineffective assistance because his failure to request an inapplicable instruction did not fall below an objective standard of reasonableness. *Id.*

Conclusion

¶ 21 Accordingly, we conclude there was no error at trial and affirm the Judgments for Conspiracy to Commit Robbery with a Dangerous Weapon and Felonious Breaking or Entering.

NO ERROR.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).