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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-154

No. COA21-217

Filed 1 March 2022

Johnston County, Nos. 19 CRS 52528-29, 19 CRS 1768

STATE OF NORTH CAROLINA

v.

TRAVIS RAY OVERCASH, Defendant.

Appeal by defendant from judgments entered 19 November 2020 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 17 November 2021.

Attorney General Joshua H. Stein, by Associate Attorney General Brian M. Miller and Deputy Solicitor General Sarah G. Boyce, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Travis Ray Overcash ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of uttering an instrument containing a forged endorsement and obtaining property by false pretenses. Defendant argues the trial court violated the "rule of completeness" because the trial court admitted a still photograph from a surveillance video which was unavailable at trial; an enlarged,

zoomed-in version of that same photograph; testimony about the photograph; and testimony about what a witness saw on the surveillance video. We hold that Defendant waived his argument regarding the trial court's error in admitting witness testimony about what was seen in the surveillance video. Defendant is therefore unable to demonstrate prejudicial error warranting a new trial. As a result, we do not need to address Defendant's argument that the rule of completeness required the exclusion of the still photograph or testimony about the photograph.

I. Background

¶ 2 The State's evidence tended to show that Carmen Gonzales worked at the Golden Corral in Smithfield. Dana Soriano, the manager at the Golden Corral, testified that every other week, she receives employees' paychecks by mail and stores them in an unlocked, clear tub in a cabinet under the register. When an employee picks up a check, either Ms. Soriano or a crew leader retrieves the check from the tub and hands it to the employee. Ms. Gonzales attempted to pick up her check in April of 2019; however, the crew leader was unable to find Ms. Gonzales's check. Ms. Gonzales reported the missing check to Ms. Soriano, who immediately contacted United Community Bank. After confirming that the $719.27 check made out to Ms. Gonzales had been "cashed and debited from the Golden Corral account," the bank sent Ms. Soriano a copy of the cleared check. The timestamp on the check revealed that it had been cashed on 13 April 2019 at 3:11 p.m. at Dunn's Gas and Grocery in

Four Oaks. The check was endorsed with a signature of "Carmen Gonzales." A copy of the check was entered into evidence as State's Exhibit 1. At trial, Ms. Gonzales testified that the signature on the back of the check was not her signature.

¶ 3 On 18 April 2019, Ms. Soriano called the manager of Dunn's Gas and Grocery, Teresa Heath, in search of video surveillance from the inside of the store on 13 April 2019 at approximately 3:11 p.m. On 19 April 2019, Ms. Soriano had a conversation with Defendant about Ms. Gonzales's missing check. Defendant "was upset" thinking that "someone had accused him of taking a check or whatever." Ms. Soriano assured Defendant that she "had no clue who had done anything with the check . . . , and if he hadn't done anything, then there was no problem." After informing Defendant she was planning to get the police involved to figure out who actually cashed the check, Defendant "disappeared." Defendant never returned to work at the Golden Corral.

¶ 4 Ms. Soriano drove to Dunn's Gas and Grocery, which is approximately fifteen minutes away from the Golden Corral and met with Ms. Heath. Ms. Heath showed Ms. Soriano the video surveillance from 13 April 2019. Ms. Soriano testified that she watched the video for approximately one minute and took a picture of the video with her iPhone when the timestamp on the video read "4/13/2019 at 3:07." The photograph was entered into evidence as State's Exhibit 2. Defendant objected to the admission of the photograph. The trial court overruled Defendant's objection. Ms. Soriano testified that she recognized the person in the video surveillance as

Defendant, an employee who had worked at Golden Corral for approximately two months. In the photo, Ms. Soriano testified that Defendant was wearing a Golden Corral chef's coat.

¶ 5 Ms. Heath testified that the photograph shows the inside of Dunn's Gas and Grocery and explained that the clerk who processed the check no longer worked at Dunn's Gas and Grocery. Ms. Heath testified regarding her store's policy for cashing checks: when the cashier was presented with a check, the cashier "would stick it through our time clock to stamp a date on it and put her initials on it" before providing the individual with cash. Ms. Heath testified that the copy of the $719.27 check from Golden Corral, in conformity with the policy of Dunn's Gas and Grocery, was "stamped with our time clock with the time and date it was cashed. The cashier has her initials on it. And the back of the check is stamped with our deposit account information."

¶ 6 Ms. Heath described what she saw in the surveillance video: "I saw this person here walk up to my counter" and, although she could not specifically identify what the person was holding, she saw "a piece of paper that he laid on my counter and hand[ed] to the clerk." Ms. Heath explained that she watched the clerk "pick [the piece of paper] up and look at it. She put it into my time clock and checked it – the time on it, put her initial on it. Proceeded to put it in the little drawer that's beside of the cash register and took out money and hand[ed] it to him." Ms. Heath testified

that after the individual presented the paper and received the cash, she saw him on the video "take [the money], put it in his hand, and he walked out the door." According to Ms. Heath, the entire interaction lasted approximately one minute. Ms. Heath testified that she had known Defendant, Travis Overcash, for "[y]ears," as he had done business at the store before and his sister had previously been employed at the store. Ms. Heath testified that the individual who she observed on the surveillance video cashing the check was Defendant. Ms. Heath explained that she no longer had the surveillance video because "I don't think our surveillance cameras holds it that long."

¶ 7 Ms. Soriano also testified as to what she saw on the video: she watched Defendant go "up to the counter" and engage in a "monetary transaction" with the cashier. She didn't seem any items for purchase, such as chips or sodas, in Defendant's hands. Ms. Soriano also testified regarding State's Exhibit 4 – a labor distribution report for employees' punch in and punch out times. Ms. Soriano explained that the report indicates that on 13 April 2019, Defendant clocked in to work at 5:56 a.m. and clocked out at 2:13 p.m.

¶ 8 Officer Rex Byron Eure, Jr. testified that on 19 April 2019, he worked for the Four Oaks Police Department and responded to a complaint at Dunn's Grocery and Gas regarding "a fraud involving checks case." When Officer Eure arrived at the store, Ms. Heath and Ms. Soriano had already viewed the surveillance video. At the

time, the power was out at Dunn's Gas and Grocery so Officer Eure did not have the opportunity to view the surveillance video. Ms. Soriano showed Officer Eure a check that was cashed and was signed by "Carmen Gonzales" and the photograph that she had taken of the surveillance video. Officer Eure recognized the individual in the photograph as Defendant. Ms. Soriano sent Officer Eure the photograph in a text message, and Officer Eure printed the picture and placed it in the case file. Officer Eure testified that he also "zoomed in [on the photograph] to enlarge showing the individual and the timestamp itself." The zoomed-in, enlarged photograph was admitted into evidence as State's Exhibit 3.

¶ 9 The State rested its case and dismissed one count of obtaining property by false pretenses and one count of uttering an instrument containing a forged endorsement. Defendant moved to dismiss the remaining charges. Defendant argued that "we do have evidence that [Defendant] was in a store[;]" however, "there's no one that has testified that he actually signed Ms. Gonzales' name[.]" The trial court denied Defendant's motion to dismiss. The jury returned verdicts finding Defendant guilty of one count of obtaining property by false pretenses and one count of uttering an instrument containing a forged endorsement. Defendant pleaded guilty to habitual felon status. Defendant was sentenced to 108 to 142 months imprisonment for obtaining property by false pretenses and 36 to 56 months imprisonment for uttering an instrument containing a forged endorsement. Defendant orally noticed appeal.

II. Analysis

¶ 10 Defendant argues that "[t]he trial court violated the rule of completeness by admitting a screenshot of a recorded-over surveillance video, a blow-up of the screenshot, and testimony concerning the photographs and the unavailable video."

¶ 11 "A trial court's decision in determining whether an excluded portion ought to be admitted under Rule 106 will not be reversed on appeal in the absence of a showing of an abuse of discretion." *State v. Hall*, 194 N.C. App. 42, 50, 669 S.E.2d 30, 36 (2008) (citation omitted).

¶ 12 The "rule of completeness" is codified in Rule 106: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." N.C. Gen. Stat. § 8C-1, Rule 106 (2019). "The purpose of the 'completeness' rule codified in Rule 106 is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot, because of 'the inadequacy of repair work when delayed to a point later in the trial.'" *State v. Thompson*, 332 N.C. 204, 220, 420 S.E.2d 395, 403–04 (1992) (quoting *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986)).

¶ 13 We first address whether the witnesses' testimony about what they saw on the surveillance video should have been excluded under the rule of completeness.

A. Testimony regarding video surveillance

¶ 14 Defendant argues the trial court should have excluded Ms. Heath's and Ms. Soriano's testimony regarding what they saw on the surveillance video under the rule of completeness. Before addressing whether the rule of completeness even applies to testimony, we must first determine whether this issue was preserved for appellate review.

¶ 15 At trial, during Ms. Heath's testimony, the State sought to introduce the snapshot of the surveillance video, and Defendant objected to the exhibit based on the rule of completeness. Outside the presence of the jury, Defendant argued that the rule of completeness required that "the video itself should be admitted and not any portion thereof unless we have the video to be able to scrutinize everything in the store that day, not just one frame of the video that may be able to be misinterpreted[.]" Defendant did not make any argument concerning Ms. Heath's and Ms. Soriano's testimony about what they had seen in the surveillance video. The State, however, mentioned the testimony of Ms. Heath and Ms. Soriano, stating "Defense counsel certainly has the opportunity to cross-examine Ms. Heath and Ms. Soriano about what they saw," as that "goes to the weight of the evidence." The trial court overruled Defendant's objection to the photograph from the video based on the rule of completeness and clarified that "[t]he State, of course, will still be required to authenticate the exhibit before it may be admitted." When the trial court asked if

Defendant was ready, Defendant inquired "my question as to that in regard to the photograph and the witness is testifying about what the video contained?" The trial court, appearing to understand the question, responded: "She may testify about what she saw on the video, yes." The jury returned, and Ms. Heath resumed her testimony.

¶ 16 The State contends that Defendant never objected to Ms. Heath's or Ms. Soriano's testimony about their observations of the surveillance video and, therefore, pursuant to Appellate Rule 10(a)(1), "this Court should not consider the issue now." Defendant argues that "[c]ounsel's 'question' to the trial court about whether its ruling applied to both the photographs and the testimony, or just the photographs, constitutes an objection to the admission of the testimony." Alternatively, in his reply brief, Defendant asserts that "in the event this Court concludes defense counsel didn't preserve the argument that the witnesses' testimony should've been excluded, this Court should review the admission of the testimony for plain error."

¶ 17 Generally, "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). "[T]o preserve for appellate review a trial court's decision to admit testimony, objections to that testimony must be contemporaneous with the time such testimony is offered into evidence and not made only during a hearing out of the jury's presence prior to the actual introduction

of the testimony." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citations, quotations marks, and brackets omitted); *see also State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985) ("Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence." (citation omitted)). "We have said that a defendant is not entitled to relief where there was no objection made *at the time the evidence was offered*." *State v. Gladden*, 315 N.C. 398, 415, 340 S.E.2d 673, 684 (1986) (emphasis in original) (citation omitted).

¶ 18 Defendant objected to the admission of the photograph and although the wording of Defendant's question lacks clarity, it appears that the trial court understood that Defendant was inquiring whether the court's ruling would also apply to the witnesses' testimony about what was seen on the surveillance video. However, Defendant failed to object during either Ms. Heath's or Ms. Soriano's testimony regarding what they saw on the surveillance video. Therefore, Defendant has waived his right to appeal the admissibility of testimony regarding what Ms. Soriano and Ms. Heath saw on the surveillance video. *See Ray*, 364 N.C. at 277, 697 S.E.2d at 322.

¶ 19 Defendant argued plain error in his reply brief, not his primary brief. Appellate Rule 10(a)(4) states that plain error review is only available "when the

judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4). This Court has established that it is insufficient for a defendant to assert plain error review for the first time in his reply brief. *See State v. Dinan*, 233 N.C. App. 694, 698–99, 757 S.E.2d 481, 485 (2014) ("In his brief, defendant does not ask this Court to review the issue under the plain error standard. When the State noted defendant's failure to argue plain error in the State's brief, Defendant attempted to cure this deficiency by mentioning plain error in Defendant's reply brief. However, a reply brief is not an avenue to correct the deficiencies contained in the original brief." (citations omitted)). Thus, Defendant is not entitled to plain error review of this issue. *See id.*

¶ 20 Assuming *arguendo* Defendant did not waive his objection, his argument that the trial court erred in admitting testimony about what the witnesses saw on the surveillance video still fails. The rule of completeness, codified in Rule 106, specifically refers to "a writing or recorded statement." N.C. Gen. Stat. § 8C-1, Rule 106. "The commentary to Rule 106 explains that, 'for practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.'" *State v. Edwards*, 261 N.C. App. 459, 468, 820 S.E.2d 862, 869 (2018) (quoting Advisory Committee Notes to Rule 106) (brackets omitted). In addition, the photograph from the surveillance video was not a "writing or recorded statement." Although a video which includes audio could perhaps be considered as a "recorded

statement" if the statements by a person in the video are at issue, in this case, there is no indication this video included any sound and none of the testimony addressed anything any person said during the video. It appears that the video in question did not include any audio recording, and the only evidence in question as to the exhibits is purely photographic evidence.

¶ 21 Defendant quotes the Supreme Court in *State v. Thompson*, 332 N.C. 204, 420 S.E.2d 395 (1992) that "Rule 106 codifies the standard common law rule that when a writing or recorded statement or a part thereof is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness it too should be admitted." *Id.* at 219–20, 420 S.E.2d at 403. Defendant argues that Ms. Heath's and Ms. Soriano's testimony should be excluded under the rule of completeness because it is "closely related" to the screenshot of the video surveillance. However, in *Thompson*, the defendant sought to introduce a transcript of a police interview with the defendant contemporaneously with the introduction of tapes and transcripts of phone calls. *See id.*, 332 N.C. at 219, 420 S.E.2d at 403. A transcript of an interview—a writing—is explicitly included within the language of Rule 106. N.C. Gen. Stat. § 8C-1, Rule 106. Moreover, Defendant has not cited, and our research has not revealed *any* case in which this Court or the Supreme Court has held that the rule of completeness encompasses testimony, certainly not in-court testimony about what a witness observed.

B. Admission of photograph and testimony about photograph

¶ 22 Defendant also argues that the rule of completeness also requires the exclusion of the photograph and testimony regarding the photograph. Since we determine that the witnesses' testimony as to what they saw was admissible, we need not address the admissibility of the photograph and testimony about the photograph. However, even if the rule of completeness did require the exclusion of the photograph, Defendant suffered no prejudice by its admission because there was ample evidence presented of Defendant's guilt.

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

N.C. Gen. Stat. § 15A-1443(a) (2019).

¶ 23 Defendant was found guilty of uttering an instrument containing a forged endorsement pursuant to North Carolina General Statute § 14-120 and obtaining property by false pretenses pursuant to North Carolina General Statute § 14-100. The essential elements of uttering an instrument containing a forged endorsement are "'(1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another.'" *State v. McSwain*, 2021-NCCOA-216, ¶ 22 (quoting *State v. Hill*, 31 N.C. App. 248, 249, 229 S.E.2d 810, 810

(1976)); *see also* N.C. Gen. Stat. § 14-120 (2019).

> Our Supreme Court has defined the elements of the crime of obtaining property by false pretenses in N.C. Gen. Stat. § 14-100 as follows: "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another."

State v. Bradsher, ___ N.C. App. ___, ___, 852 S.E.2d 716, 729 (2020) (quoting *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980)); *see also* N.C. Gen. Stat. § 14-100(a). Thus, the act of stealing, signing, cashing, and receiving money from another's paycheck would be a violation of both North Carolina General Statutes §§ 14-100 and 14-120. *See* N.C. Gen. Stat. § 14-100(a); N.C. Gen. Stat. § 14-120.

¶ 24 The evidence presented at trial showed that Defendant and Ms. Gonzales were coworkers at Golden Corral, where Ms. Gonzales's paycheck went missing. Defendant clocked out of work on 13 April 2019 at 2:13 p.m. A copy of the paycheck—entered into evidence—was signed by "Carmen Gonzales" and contained a timestamp indicating that it had been cashed on 13 April 2019 at 3:11 p.m. at Dunn's Gas and Grocery. Ms. Soriano testified that on 19 April 2019, after having a conversation with Defendant about Ms. Gonzales's missing check, Defendant clocked out of work and never returned.

¶ 25 Defendant conceded that he was in Dunn's Gas and Grocery on 13 April 2019. As discussed above, Ms. Heath and Ms. Soriano viewed the surveillance video of

Defendant's interaction with the clerk at Dunn's Gas and Grocery on 13 April 2019. Both witnesses knew Defendant personally and identified Defendant on the surveillance video. Ms. Soriano testified that she observed Defendant walk "up the counter" and engage in a "monetary transaction" with the cashier. Ms. Heath testified that she observed Defendant hand the clerk "a piece of paper," which the clerk "stamped . . . with the timestamp machine" and placed "in the little drawer that's beside of the cash register" before taking out money and handing it to Defendant. Thus, even without the admission of the photograph into evidence, there was ample evidence that Defendant stole Ms. Gonzales's check, which he then signed and cashed at Dunn's Gas and Grocery, in violation of North Carolina General Statutes §§ 14-100(a) and 14-120. As a result, we do not hold that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C. Gen. Stat. § 15A-1443(a).

III. Conclusion

¶ 26 We hold that Defendant did not properly preserve his argument that the trial court erred in admitting the testimony of two witnesses regarding what they saw on a surveillance video. Therefore, given the evidence presented to the jury at trial, including the testimony about what the witnesses saw on the surveillance video, Defendant has failed to demonstrate that the exclusion of the photograph constituted prejudicial error.

NO PREJDUCIAL ERROR.

Judges INMAN and JACKSON concur.

Report per Rule 30(e).