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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-330

No. COA20-907

Filed 3 May 2022

New Hanover County, No. 16 CRS 56562

STATE OF NORTH CAROLINA,

v.

TEVIN DEMETRIUS VANN, Defendant.

Appeal by defendant from judgment entered 16 December 2019 by Judge Henry Stevens in New Hanover County Superior Court. Heard in the Court of Appeals 30 November 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State-appellee.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

GORE, Judge.

¶ 1

Defendant Tevin Demetrius Vann appeals from the trial court's judgment entered on the jury's verdicts finding him guilty of felony first-degree murder, felony murder of an unborn child, and robbery with a dangerous weapon. After careful review, we conclude that the trial court prejudicially erred.

I. Background

¶ 2 On 16 August 2016, defendant was arrested for the murder of Ashley McLean. Defendant was subsequently indicted for the offenses of first-degree murder, murder of an unborn child, and robbery with a dangerous weapon on 9 January 2017.

¶ 3 During their investigation, detectives with the Wilmington Police Department interrogated defendant on 16 August 2016 regarding the death of Ashley McLean. Despite initially repeatedly denying killing Ashley McLean, defendant ultimately admitted to striking Ashley McLean and fleeing her hotel room with her cell phone. On 8 November 2019, defendant moved to suppress his confession as involuntary. This motion was denied.

¶ 4 The case came on for trial on 2 December 2019 and concluded on 16 December 2019. Evidence introduced at trial included photograph and video evidence, a transcript of the interrogation of defendant, and testimonial evidence. Following trial, defendant requested the jury be instructed on and submitted requested jury instructions for false confession; second-degree murder, including voluntary manslaughter; and murder of an unborn child. The trial court instructed the jury on robbery with a dangerous weapon, common law robbery, first-degree felony murder, second-degree murder, voluntary manslaughter, and murder of an unborn child.

¶ 5 On several occasions during deliberations the jury asked to review evidence from the trial. On one such occasion, the jury asked to review the testimony given at trial from a Wilmington Police Department Detective, defendant, the medical

examiner, and to review the medical examiner's report. The trial court provided the jury with copies of the medical examiner's report, but with regards to the requested testimony responded "it's your duty to recall their testimony. So you will have to remember that. We're not – we can't provide a transcript as to that."

¶ 6 The jury returned guilty verdicts on the charges of felony first-degree murder, felony murder of an unborn child, and robbery with a dangerous weapon. Defendant entered written notice of appeal on 17 December 2019.

II. Jury's Request

¶ 7 Defendant argues that the trial court failed to exercise its discretion in denying the jury's request to review the transcripts of testimony from defendant, the detective, and the medical examiner, and is thus entitled to a new trial. Though defendant did not object to the trial court's denial of the jury's request, his argument is nonetheless preserved for appellate review. *See State v. Long*, 196 N.C. App. 22, 25, 674 S.E.2d 696, 698 (2009) (citing *State v. Ashe*, 314 N.C. 28, 40, 331 S.E.2d 652, 659 (1985)); *see also State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 124 (1980). For the following reasons we order defendant be given a new trial.

¶ 8 North Carolina General Statutes § 15A-1233 provides:

If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury

and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2020). This is a codification of the well settled rule in North Carolina “that the decision whether to grant or refuse a request by the jury, after beginning its deliberations, for a restatement of the evidence lies within the discretion of the trial court.” *Lang*, 301 N.C. at 510, 272 S.E.2d at 124 (citing *State v. Hough*, 299 N.C. 245, 262 S.E.2d 268 (1980); *State v. Ford*, 297 N.C. 28, 252 S.E.2d 717 (1979); *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978)). “[T]here is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented. Where the error is prejudicial, the defendant is entitled to have his motion reconsidered and passed upon as a discretionary matter.” *Long*, 196 N.C. App. at 27, 674 S.E.2d at 699 (quoting *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999)). “Thus, in summary, we must consider if the trial court failed to exercise its discretion. If the trial court did indeed fail to exercise its discretion, this would constitute error, and we must then consider whether this error was prejudicial.” *Long*, 196 N.C. App. at 28, 674 S.E.2d at 700 (citations omitted).

In *Lang*, the jury requested the transcript of the testimony of a witness that established the defendant’s alibi. In that case the trial court responded,

No sir, the transcript is not available to the jury. The lady who takes it down, of course, is just another individual like you 12 people. And what she hears may or may not be what you hear, and 12 of you people are expected, through your ability to hear and understand and recall evidence, to establish what the testimony was. No, I hope you understand. She takes it down and the record, after she submits it to the various individuals, if it needs to be submitted is gone over and then they themselves can object to what she had in the record as not being what the witness says, and so on and so forth. For that reason I do not allow records to even be read back to the jury, because she may not have heard it exactly as the witness said it, and you people might have heard it differently; so for that reason you are required to recall the witness' testimony as you've heard it.

Lang, 301 N.C. 510-11, 272 S.E.2d at 125. Our Supreme Court in *Lang* held that the trial court's comments that the transcript was *not available* to them was an indication that the trial court did not exercise its discretion in deciding whether the transcript should have been available under the facts of that case. *Id.* at 511, 272 S.E.2d at 125. Further, our Supreme Court found the trial court's error was prejudicial because the requested evidence was testimony, which if believed, would have established the defendant's alibi. *Id.* Thus, the jury's understanding of this evidence was material to the determination of the defendant's guilt or innocence.

¶ 10 The North Carolina Supreme Court considered a similar issue in *State v. Ford*. In *Ford*, when asked by the jury during deliberations to review evidence the trial court responded, "Members of the jury, I'm sorry but we're not allowed to go back in

and review the evidence once the case is completed. It is your duty, of course, as best you can to recall all of the evidence that was presented, and I'm sorry, but we really can't help you with that particular matter." *Ford*, 297 N.C. at 30, 252 S.E.2d at 718. Our Supreme Court in *Ford* held, similarly to its holding in *Lang*, that the trial court did not exercise its discretion in denying the jury's request. However, the *Ford* Court held that error was not prejudicial because "[t]he requested evidence was, for the most part, conflicting, inconclusive, or not in the record." *Id.* at 31, 252 S.E.2d at 719.

¶ 11 In the case *sub judice*, the jury requested to review specific testimony from the Wilmington Police Department Detective, defendant's testimony, and the testimony of the medical examiner. The trial court's response to the jury's request to review testimony was "it's your duty to recall that testimony. So you have to remember that. We're not – we can't provide a transcript as to that." The trial court's specific statement "we can't provide a transcript as to that" is similar language to that used by the trial courts in *Lang*, "the transcript is not available . . ." and in *Ford*, "we're not allowed to go back in and review the evidence once the case is completed." Language from the trial court that a transcript can't be provided, is not available, or is not allowed to be reviewed requires a finding by this court that the trial court did not exercise the required discretion in considering whether to grant the jury's request. Therefore, we must hold that the trial court erred in not exercising its discretion when denying the jury's request to review testimony.

¶ 12 However, we cannot award defendant a new trial based on an error alone; that error must also be prejudicial. *See Ford*, 297 N.C. at 30, 252 S.E.2d at 718.

A review of the pertinent caselaw reveals that a trial court's error in failing to exercise its discretion in denying a jury's request to review testimony constitutes prejudicial error when the requested testimony (1) "is material to the determination of defendant's guilt or innocence;" and (2) "involves issues of some confusion or contradiction" such that the jury would want to review this evidence to fully understand it.

State v. Chapman, 244 N.C. App. 699, 708, 781 S.E.2d 320, 327 (2016) (citing *State v. Johnson*, 346 N.C. 119, 126, 484 S.E.2d 372, 377 (1997)).

¶ 13 Here, defendant's testimony at trial included testimony regarding his interrogation, statements that he only confessed because he believed if he did so he would not be charged with murder, and assertions that he did not attack the victim in anyway and that she was alive when he left her hotel room. In *Lang*, this Court noted that the fact that the defendant had previously confessed to the charges and then recanted his confession at trial would increase the likelihood that the jury would want to review his contradictory confession. 196 N.C. App. at 41, 674 S.E.2d at 707. We conclude that whether the jury believed defendant's testimony was determinative of defendant's guilt or innocence. Defendant's confession was the only evidence directly linking him to the killing; the remainder of the evidence was circumstantial and placed defendant in the victim's hotel room but did not link him to the actual

killing. Thus, whether the jury believed defendant's recant of his confession is determinative to the jury's verdict. Further, as noted above, the fact that defendant initially confessed and then recanted that confession on the stand makes his testimony an issue "of some confusion or contradiction such that the jury would want to review [the] evidence to fully understand it." *Chapman*, 244 N.C. App. at 708, 781 S.E.2d at 327. Thus, we hold the trial court's error was prejudicial.

III. Conclusion

¶ 14 For the foregoing reasons we conclude that the trial court erred in not exercising its discretion when considering the jury's request to review testimony and that that error was prejudicial. Thus, defendant is entitled to a new trial.

NEW TRIAL.

Chief Judge STROUD and Judge HAMPSON concur.

Report per Rule 30(e).