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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-479

No. COA22-22

Filed 5 July 2022

Guilford County, Nos. 20 CRS 71189, 20 CRS 79918

STATE OF NORTH CAROLINA

v.

CHRISHAUN SHYMERE MINGO, Defendant.

Appeal by defendant from the judgment entered 15 June 2021 by Judge William A. Wood II in Guilford County Superior Court. Heard in the Court of Appeals 25 May 2022.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General James Bernier, Jr., for State-appellee.*

*Leslie Rawls for defendant-appellant.*

GORE, Judge.

¶ 1

Defendant Chrishaun Shymere Mingo appeals from the judgment entered on 16 June 2021 upon the jury verdict finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury (“AWDWIKISI”) and sentencing him to 73-100 months imprisonment. On appeal, defendant argues that the trial court committed plain error by allowing testimony regarding defendant’s post-arrest

silence. After careful consideration of defendant's argument, we discern no plain error.

### **I. Background**

¶ 2 On 26 March 2020, Andrew Potter wished to purchase one pound of marijuana. Mr. Potter contacted the individual he routinely purchased marijuana from, however, this individual was out of town, so he arranged for an associate to meet Mr. Potter at his house and sell him the marijuana.

¶ 3 Around 2:30 p.m. that same day, a car arrived at Mr. Potter's house. As Mr. Potter approached the car, he saw Justice Crosby in the driver's seat and defendant in the passenger seat. The two men in the car rolled down a car window and asked Mr. Potter if he had the money, to which Mr. Potter responded in the affirmative. Defendant then pulled out a handgun and pointed it through the open passenger side window of the car and at Mr. Potter. Defendant told Mr. Potter to give him the money. Mr. Potter initially nervously laughed in response to defendant's request. When Mr. Potter realized defendant was serious, he tried to get to the rear of the car. As Mr. Potter tried to get away, defendant shot at him through the closed rear passenger window. Defendant shot Mr. Potter five times, in the knee, arm, thigh, chest, and buttocks.

¶ 4 After the shooting ended, Mr. Crosby and defendant drove away. Mr. Potter's girlfriend came outside from inside the house and found Mr. Potter lying on the

ground. Mr. Potter's girlfriend called 911. During the 911 call, she described the vehicle Mr. Crosby and defendant were driving in and what direction they drove in.

¶ 5

At the time, Deputy D. T. Cooke with the Guilford County Sheriff's Department was working as a patrol sergeant. On 26 March 2020, Deputy Cooke was on duty when he heard dispatch give the call with the description and approximate location of the vehicle involved in the shooting of Mr. Potter. Deputy Cooke believed he knew the direction the vehicle was likely heading and drove in that direction. While traveling on Hicone Road, Deputy Cooke saw a vehicle matching the description of the vehicle involved in the shooting of Mr. Potter. Deputy Cooke conducted a traffic stop on the vehicle. Justice Crosby and defendant were both in the car when Deputy Cooke conducted the traffic stop. When Deputy Crosby inspected the vehicle, he noticed the rear passenger window was busted out, found shell casings in the car, and smelled marijuana in the car.

¶ 6

A grand jury returned a true bill of indictment against defendant for AWDWIKISI on 22 June 2020. On 30 November 2020, the grand jury returned another true bill of indictment against defendant for felony attempted robbery with a dangerous weapon.

¶ 7

The matter came on for trial on 1 June 2021. The evidence presented at trial included an identification of defendant as the man who shot Mr. Potter; testimony from Deputy Cooke about the traffic stop where defendant was found in a car

matching the description given in the 911 call, where he found shell casings in the car, and that glass found on the road was consistent with the missing rear passenger side window of the car he stopped and consistent with a tinted car window which had been shot out. Defendant did not testify at trial. The jury returned a verdict of guilty of AWDWIKISI and not guilty of attempted robbery with a dangerous weapon. Defendant was sentenced to 73-100 months in prison. Following sentencing, defendant entered oral notice of appeal in open court.

## II. Discussion

¶ 8 On appeal, defendant argues that the trial court committed plain error by allowing testimony regarding his post-arrest silence. Defendant asserts this testimony was used in a manner that implied his guilt and violated his Fifth Amendment right to remain silent. Defendant did not object to the introduction of this testimony at trial, however, he specifically asserts plain error on appeal.

¶ 9 In a criminal case, if an issue is not preserved for appeal by objection at trial or is not otherwise preserved by rule or law then the unpreserved error is reviewed only for plain error. *See* N.C.R. App. P. 10(a)(4). “To obtain plain error review, a ‘defendant must specifically and distinctly contend that the alleged error constitutes plain error. Furthermore, plain error review in North Carolina is normally limited to instructional and evidentiary error.’” *State v. Chavez*, 378 N.C. 265, 269, 2021-NCSC-86, The comments on defendant’s exercise of his right to remain silent were likely

error. *See State v. Lane*, 301 N.C. 382, 384, 271 S.E.2d 273, 275 (1980) (stating that any comment upon the exercise of the right to remain silent, nothing else appearing, is impermissible). However, we decline to analyze whether the challenged testimony was erroneously permitted. Assuming *arguendo* error occurred, defendant has not satisfied his burden of demonstrating plain error occurred.

¶ 10 “Consideration of the way in which the evidence was presented or the prosecutor’s use of the evidence is relevant to whether admission of the testimony at issue constituted plain error, but not to the threshold question of whether admission of the testimony was error,” when the testimony relates to the fact that the defendant exercised his right to remain silent. *State v. Richardson*, 226 N.C. App. 292, 301, 741 S.E.2d 434, 441 (2013) (quoting *State v. Moore*, 366 N.C. 100, 105, 726 S.E.2d 168, 173 (2012)). In *Moore*, a witness made brief, unsolicited comments concerning the defendant’s decision to exercise his right to remain silent. In concluding that the challenged comments did not constitute plain error, our Supreme Court stated that:

In this case the admission of Officer Murphy’s statements regarding defendant’s post-*Miranda* exercise of his right to remain silent was not plain error. First, the prosecutor did not emphasize, capitalize on, or directly elicit Officer Murphy’s prohibited responses. . . . [T]he prosecutor did not emphasize or highlight defendant’s exercise of his rights. Moreover, the prosecutor did not mention defendant’s exercise of his rights when he cross-examined defendant or in his closing argument. That the prosecutor did not emphasize, capitalize on, or directly elicit Officer Murphy’s prohibited responses militates against a finding of plain

error. . . . [G]iven the brief, passing nature of the evidence in the context of the entire trial, the evidence is not likely to have “tilted the scales” in the jury’s determination of defendant’s guilt or innocence.

*Moore*, 366 N.C. at 107-06, 726 S.E.2d at 173-74. Additionally, our Supreme Court indicated that “[s]ubstantial evidence of a defendant’s guilt is a factor to be considered in determining whether the error was a fundamental error rising to plain error.” *Id.* at 109, 726 S.E.2d at 174-75.

¶ 11 Based on the analysis employed in *Moore*, this Court identified four factors, none of which are determinative, to be considered when analyzing whether a prosecutorial comment concerning a defendant’s post-arrest silence constitutes plain error. *Richardson*, 226 N.C. App. at 302, 741 S.E.2d at 441-42. These four factors are:

(1) whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; (2) whether the record contained substantial evidence of the defendant’s guilt; (3) whether the defendant’s credibility was successfully attacked in other ways in addition to the impermissible comment upon his or her decision to exercise his or her constitutional right to remain silent; and (4) the extent to which the prosecutor emphasized or capitalized on the improper testimony by, for example, engaging in extensive cross-examination concerning the defendant’s post-arrest silence or attacking the defendant’s credibility in closing argument base on his decision to refrain from making a statement to investigating officers.

*Id.* at 302, 741 S.E.2d at 442.

¶ 12 Here, the challenged testimony included the following testimony from Detective Jonathan Robertson of the Guilford County Sheriff's Office:

Q: And when you responded to the detention center in Greensboro, were you – who were the two individuals that were in custody awaiting your arrival?

A: Detective Wiley and I were presented Justice Life Crosby and Chrishaun Shymere Mingo.

Q: Were they together or in separate areas?

A: They were in separate areas.

Q: And after you went to see those two individuals, did they talk to you?

A: No, sir. Both declined to provide a statement.

Defendant also challenges the following testimony from Deputy T.D. Cooke of the Guilford County Sheriff's Office:

Q: Now, once the two individuals were separated, as you said, and placed into other patrol cars, what did you do next?

A: The vehicle was still in the middle of the roadway and we were at a busy intersection. I went to the car after – after we detained those, I cleared the car, make sure nobody else was in the vehicle, make sure no other suspects. And really wanted to make sure that I had the right vehicle, had the right suspects. I felt it was odd that I was not asked why they were stopped.

¶ 13 In the challenged testimony from Detective Robertson, the prosecutor did elicit the testimony. However, the prosecutor did not emphasize or highlight the fact that

defendant did not answer questions. The prosecutor instead immediately moved on with his line of questioning. In contrast, the challenged testimony from Deputy Cooke was in no way elicited by the prosecutor's questioning. Additionally, the prosecutor did not mention either instance of defendant exercising his right to remain silent in his closing arguments. There was also ample evidence of defendant's guilt presented. This evidence includes identification of defendant by Mr. Potter as the man who shot him; and testimony from Deputy Cooke that mere minutes after the shooting occurred, he pulled over a vehicle matching the description of the vehicle used in the shooting, defendant was the passenger in the car Deputy Cooke pulled over, the back passenger side window of the car was shot out, and Deputy Cooke found shell casings from a pistol in the car.

¶ 14           Following the reasoning employed by our Supreme Court in *Moore*, due to the lack of emphasis placed on the potentially impermissible testimony by the prosecutor and the presence of additional overwhelming evidence of defendant's guilt, we discern no plain error.

### III. Conclusion

¶ 15           "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case." *State v. Cummings*, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000). Defendant waived review by failing to object to the testimony challenged on appeal. Before this Court, defendant has failed to show prejudice. Under the plain error



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*Opinion of the Court*

standard, we find no error.

NO ERROR.

Judges DIETZ and WOOD concur.

Report per Rule 30(e).