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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-725

No. COA22-120

Filed 1 November 2022

Wake County, Nos. 18CRS214945-47

STATE OF NORTH CAROLINA

v.

MARZELLE MELIK BURGESS, Defendant.

Appeal by defendant from judgment entered 4 June 2021 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 4 October 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly Potter, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for the defendant-appellant.

TYSON, Judge.

¶ 1 Marzelle Melik Burgess ("Defendant") appeals from the judgment entered upon a jury's verdict for his three felony convictions, including Felonious Fleeing to Elude Arrest with a Motor Vehicle, Simple Possession of Marijuana, and Possession of Marijuana Paraphernalia. Defendant argues the trial court committed plain error by allowing Deputy Justin Hastings ("Deputy Hastings") to improperly vouch for the

credibility of Brian Ashley ("Ashley), Defendant's cousin and a key character witness. We find no error.

I. Background

¶ 2 On 11 August 2018, Deputy Hastings was assigned to patrol a "high crime" area in Wake County where "a couple of shootings had occurred within the last week" and officers had received "some recent reports of drug activity." Deputy Hastings observed a vehicle with dark window tint, which he suspected was illegal, and attempted to conduct a traffic stop. He activated the emergency lights and siren on his marked patrol vehicle.

¶ 3 Defendant, the driver of the illegally tinted vehicle, "failed to stop for [Deputy Hastings'] lights and siren and began to accelerate," before turning onto a residential street. After a short pursuit through a residential area, with Defendant reaching speeds of between 60 and 65 miles per hour in a 25 miles per hour zone, Defendant lost control of his vehicle and it collided with several parked cars before coming to a stop in a nearby front yard.

¶ 4 Defendant jumped from the vehicle and fled on foot. He briefly turned around and "made eye contact" with Deputy Hastings when he verbally commanded Defendant to stop. Another officer, Deputy Steven O'Byrne, pursued Defendant on foot, while Deputy Hastings detained the passenger, Brian Ashley, and searched the

vehicle. Deputy Hastings found illegal drugs of ecstasy and marijuana in the front section of the vehicle and several large digital scales in the trunk.

¶ 5 During the questioning of Ashley, Deputy Hastings found him to be "cooperative," and he used information provided by Ashley to deduce the identity of Defendant. Ashley initially identified Defendant as "Malik Adams," whom Deputy Hastings had difficulty locating in the police database. After running the vehicle's registration through the database, Deputy Hastings learned the vehicle was registered to a man with the last name of Burgess, who Ashley explained was Defendant's father. Ashley initially provided Deputy Hastings with Defendant's mother's current last name, as she had remarried. Deputy Hastings used the Defendant's father's address to ascertain Defendant's full name, Marzelle Melik Burgess and his current address.

¶ 6 Deputy Hastings took Ashley home. Ashley was currently residing at his aunt's house with Defendant. He proceeded to ask Ashley's aunt (i.e., Defendant's mother) whether Defendant was at home. She identified herself as Defendant's mother and gave Deputy Hastings permission to look and determine whether Defendant was at home. Ashley, who was free to leave, left the premises. While looking for Defendant, Deputy Hastings smelled marijuana emanating from Defendant's room and observed "vacuum seal bags used to contain marijuana [and]

marijuana residue in plain view." When Defendant could not be located, Deputy Hastings seized the house and obtained a search warrant.

¶ 7 Defendant was indicted for Felony Flee to Elude Arrest, Possession with Intent to Sell or Deliver a Schedule I Controlled Substance, Possession with Intent to Sell or Deliver Marijuana, Maintaining a Dwelling for Controlled Substance, and Possession of Marijuana Paraphernalia on 27 November 2018.

¶ 8 At trial, Deputy Hastings identified Defendant as the driver of the vehicle. Deputy Hastings explained his investigatory decision-making on direct examination.

> [THE STATE]: [W]hat did you do next?
>
> [DEPUTY HASTINGS]: I continued to speak with Mr. Ashley and determined whether he was involved with the crime that had been committed at the time or not.
>
> [THE STATE]: And did you make a determination about his involvement?
>
> [DEPUTY HASTINGS]: Yes, sir, that he was just a [sic] innocent party. He was –
>
> [THE STATE]: So you decided not to charge Mr. Ashley with anything?
>
> [DEPUTY HASTINGS]: Yes, sir.

¶ 9 On cross-examination, Deputy Hastings responded to a line of questioning about Ashley.

> [Defense Counsel]: I see. Let me go back and stop and talk

> to you about Mr. Ashley real quick. Mr. Ashley told you that he did – that the drugs were not his –
>
> [Deputy Hastings]: Yes.
>
> [Defense Counsel]: – correct? Do you usually take people's word for it when they tell you the drugs aren't theirs?
>
> [Deputy Hastings]: It depends on the situation.
>
> [Defense Counsel]: Okay.
>
> [Deputy Hastings]: Mr. Ashley was not nervous. He appeared to be honest. He gave me a rational explanation to what was going on. He didn't give me any reason to indicate that he was lying to me.

¶ 10 The State also introduced into evidence Deputy Hastings' dashcam and bodycam video footage, which detailed the pursuit of Defendant and the vehicle and the questioning of Ashley. The State later called Ashley as a witness, who testified that he did not remember making any of those statements to Officer Hastings, but he did not deny making them.

¶ 11 The jury found Defendant guilty of Felony Flee to Elude Arrest; the lesser-included charge of Possession of Less than One-Half Ounce of Marijuana; and Possession of Marijuana Paraphernalia on 4 June 2021. Defendant was found not guilty of Possession with Intent to Sell or Deliver a Schedule I Controlled Substance. The charge of Maintaining a Dwelling for Controlled Substance was dismissed by the

trial court at the close of the State's evidence. Defendant was sentenced as a level IV offender to an active term of 9 to 20 months. Defendant appealed.

II. Jurisdiction

¶ 12 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(4), 15A-1444 (2021).

III. Improper Vouching

¶ 13 Defendant argues the trial court committed plain error by allowing Deputy Hastings to improperly vouch for the credibility of Ashley. He asserts Ashley's credibility was essential to support the jury's verdicts. Defendant asserts Ashley's testimony was the only basis for Deputy Hastings to identify Defendant as the driver of the vehicle. He argues the trial court committed plain error by allowing Hastings to testify Ashley was an innocent party; was honest; and no reason indicated he had lied.

A. Standard of Review

¶ 14 Defendant failed to object to Deputy Hastings' statements regarding whether he believed Ashley on cross-examination. In a criminal case, "an issue . . . not preserved by objection [ ] at trial . . . [nor] preserved by rule or law . . . nevertheless may be [ ] the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4); *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012)

("Unpreserved error in criminal cases, on the other hand, is reviewed only for plain error."). "[P]lain error review in North Carolina is normally limited to instructional and evidentiary error." *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (citation omitted).

¶ 15 "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (affirming how to apply the plain error standard of review, as set forth in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)). In deciding whether an unpreserved evidentiary error rises to plain error, this Court "must examine the entire record and determine if the [ ] error had a probable impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 379 (citation omitted); *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted) (explaining a defendant must convince this Court on appeal "not only that there was error, but that absent the error, the jury probably would have reached a different result").

B. Analysis

¶ 16 "It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury," or the finder of fact at a bench trial. *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citations omitted).

¶ 17 Rule 701 of the North Carolina Rules of Evidence provides a lay witness may testify "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 (2021).

¶ 18 "[O]ur Supreme Court has determined that when one witness 'vouch[es] for the veracity of another witness,' such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded by Rule 701." *State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007), *aff'd,* 362 N.C. 342, 661 S.E.2d 732 (2008) (citation omitted). When a jury is able to "see for itself the manner and appearance" of the witness whose credibility was vouched for, however, "the opinion as to [the witness's] credibility [i]s not helpful to the jury's determination of a fact in issue." *Id.* at 319, 651 S.E.2d at 286.

¶ 19 In *State v. Taylor*, the prosecutor had asked the detective during direct examination why she decided to move forward with the investigation. 238 N.C. App. 159, 168, 767 S.E.2d 585, 591-92 (2014) (Bryant J., dissenting) (*rev'd* by *State v. Taylor*, 368 N.C. 300, 776 S.E.2d 680 (2015) (*per curiam*), for the reasons stated in the dissenting opinion). The detective responded that the victim-witness "seemed to be telling [her] the truth." *Id.* at 168, 767 S.E.2d at 591. The detective's testimony did not establish or vouch for the veracity of the victim-witness, because it was merely a response to a proper question, and she explained her rationale for continuing the investigation. *Id.* at 168-69, 767 S.E.2d at 592. Such testimony, when elicited in response to a proper question, does not constitute improper vouching when the

witness testifies at trial. The jury's role is to make the credibility determination of the witness for themselves. *Id.* at 168, 767 S.E.2d at 591.

¶ 20 Here, like in *Taylor*, Deputy Hastings responded to a proper question on direct examination inquiring about the sequence of his investigative process. Deputy Hastings clarified he had continued to speak with Ashley to determine whether Ashley had any involvement with the illegal drugs he had found inside the vehicle.

¶ 21 Deputy Hastings similarly responded to a question by the Defendant about whether Deputy Hastings generally believed witnesses about their involvement with drugs. Any purported error in Deputy Hastings' response to Defendant's line of questioning was invited error. *Gobal*, 186 N.C. App. at 319, 651 S.E.2d at 287 (citation omitted) ("Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law.").

¶ 22 The jury was further able to see, hear, and ascertain Ashley's credibility for themselves. Ashley testified at trial. Although Ashley changed his story, the jury was in the best position to determine whether Ashley was truthful to Deputy Hastings after the crash or during trial when he knew Defendant, his cousin, could go to prison if convicted. The jury was also able to view Ashley's statements on the day of the accident. The State entered video and sound footage into evidence from the day of the incident.

¶ 23 As explained in *Gobal* and *Taylor*, Defendant has failed to show error, much less plain error, in allowing Deputy Hastings' testimony. Ashley testified himself at trial and other testimony and recorded evidence was entered from the day of the accident to allow the jury to assess Ashley's credibility for themselves.

IV. Conclusion

¶ 24 Defendant has failed to show the trial court committed error, much less plain error, by allowing Deputy Hastings' testimony. Deputy Hastings responded to proper questions about the sequence of his investigation on direct examination. Defendant invited any error on cross-examination about Ashley's credibility by asking Deputy Hastings how he determined whether a person was lying about involvement with drugs.

¶ 25 The jury was further able to assess the credibility of Ashley because he testified at trial. Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges INMAN and COLLINS CONCUR.

Report per Rule 30(e).