An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-726

No. COA22-53

Filed 1 November 2022

Guilford County, Nos. 17 CRS 74394-95, 74472-73, 74737, 74753, 75293

STATE OF NORTH CAROLINA

v.

TEVIN DAMATO FRIDAY

Appeal by defendant from judgments entered 23 July 2021 by Judge Timothy G. Gould in Guilford County Superior Court. Heard in the Court of Appeals 21 September 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin T. Spangler, for the State.

Daniel M. Blau Attorney at Law, P.C., by Daniel M. Blau, for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Tevin Damato Friday ("defendant") appeals from judgments entered adjudging him guilty of: two counts of obtaining property by false pretenses, two counts of robbery with a dangerous weapon, one count of attempt to obtain property by false pretenses, one count of assault on a government official or employee, and one count of extortion. The trial court entered judgment on the charge of robbery with a

dangerous weapon and sentenced defendant to a mitigated-range active term of 48 to 70 months in prison. The trial court consolidated the remaining six charges and sentenced defendant to a consecutive, mitigated-range active term of 48 to70 months, for a total sentence of 96 to140 months. Defendant alleges the trial court erred by: (1) allowing the State to introduce improper hearsay evidence through defendant's interrogation video, (2) defendant receiving ineffective assistance of counsel, (3) failing to instruct the jury on the lesser-included offense of common law robbery for the robbery of Mr. Bruner ("Bruner), (4) instructing the jury that it could find defendant guilty on a theory of acting in concert, and (5) by allowing witnesses to make irrelevant and improper remarks about the area of Greensboro where defendant lived. As detailed below in our discussion of each issue, we find no error.

I. Background

¶ 2 On 26 June 2017, a Guilford County Grand Jury indicted defendant with two counts of obtaining property by false pretenses, two counts of robbery with a dangerous weapon, one count of possession of a stolen firearm, one count of attempt to obtain property by false pretense, one count of assault on a government official or employee, and one count of extortion. Defendant's cases came on for trial in July 2021 in Guilford County Superior Court, Judge Gould presiding. The State presented evidence tending to show the following:

¶ 3 In April 2017, Mr. Hall ("Hall") observed a Craigslist advertisement entitled "Casual Encounters" when he began conversing with a "young black lady" via text message. The advertisement was targeted at men older than 50 and requested a "donation" in exchange "for a certain amount of hours of . . . time with this person" or "oral sex." The evening of 3 April 2017, after exchanging a series of text messages, Hall drove to "apartment X" located at 111 Marshall Street in Greensboro to meet the woman from the advertisement. Hall was told to come to the "top floor" about "three stories up."

¶ 4 After knocking on the apartment door, someone opened the door slightly and asked Hall if "[he] had a donation." Hall handed over $200.00, waited for approximately two or three minutes, then began to receive threatening text messages. The message claimed "[t]his was an underaged girl," and unless Hall agreed to give them additional money, they would alert the police. Hall agreed to deposit $400.00 into a Bank of America account the following day. Hall was given the account number and was directed to deposit the money into an account under the name "Tevin Friday." Hall deposited the money as instructed. Shortly after this encounter, Hall "confess[ed]" to his wife what had occurred and alerted the police.

¶ 5 The next individual who fell victim to the deceptive Craigslist advertisement was Bruner. Bruner testified that, on 13 April 2017, he was "[l]ooking to get hooked up" with a "female" when he came across the Craigslist advertisement. After having

a conversation with someone he believed to be the woman from the advertisement, he was given an address and drove to Greensboro. When Bruner arrived, he waited about five or ten minutes and was told to "come up" to the apartment. As he was making his way up to the third floor, an individual with a gun came from the backside of the stairwell and told Bruner "[g]ive me your money." Bruner started pulling money out when he was directed to also hand over his wallet. Bruner did not contact the police. However, the Greensboro Police Department contacted Bruner at a later date "about [him] being robbed and [his] personal belongings being in [defendant's] apartment." Bruner also participated in a photo lineup of potential suspects, where he was unable to identify defendant.

¶ 6 A few weeks later, Mr. Hogan ("Hogan") had a similar interaction. Hogan's testimony tended to show that on 2 May 2017, he drove to Greensboro after searching through Craigslist advertisements for "company or [an] escort." After arriving at the apartment complex on Marshall Street, Hogan was told to "[c]ome up to the third floor." Hogan was almost at the top of the stairwell when he saw a tall, "skinny" black male that "[h]ad on a hoodie [and] [h]ad white dreads . . . coming out from the edges of the hoodie." Hogan also stated that the man had a black handgun and was "pointing it at [his] head," while commanding him to "[e]mpty [his] pockets." Hogan threw his cellphone, wallet, $150.00 in cash, and his credit and identification cards on the ground. After returning home to Burlington, Hogan contacted the police.

Hogan returned with his iPad and used his location services to show the officers where he was robbed and where his cellphone was last located.

¶ 7 Later that night and into the early morning hours of 3 May 2017, Ms. Brown ("Brown") began receiving text messages from whom she believed to be her friend, Hogan. The messages alleged that Hogan was in trouble and "owed some people money." Brown also received a phone call from Hogan's phone, affirming that she would help and travel to Greensboro to drop the money off. Brown collected a total of $500.00 and followed the instructions provided by the individual messaging her. Brown proceeded to the same apartment complex, to a cluster of mailboxes "behind the apartment building" and put the money into a mailbox. She then received a series of text messages asking her to remove the money from the inside of the mailbox and to place it on top. She responded that she was unable to remove the money. When Hogan never came outside, she decided to drive home.

¶ 8 Later that morning, Brown received additional text messages asking for more money. These messages were no longer coming from Hogan's phone, but instead from a different number claiming that Hogan's "phone had died[,] and he was using someone else's[.]" Brown went to the bank, but this time she was directed to put the money on top of the mailbox. When Brown arrived this time, the mailbox had clearly been damaged. Once again Brown proceeded to wait for Hogan.

¶ 9 When he didn't arrive, she texted asking him where he was and she received a message stating, "they won't let me go unless I give them more money." Brown waited a few more minutes and "observed a tall, black male with dreads run around behind the fence and then go around behind the building[.]" Brown continued to receive threatening messages. At one point, she received a message that stated, "[i]f I don't pay these monies, these people, they're [going to] kill me."

¶ 10 After the third request for additional money, Brown contacted the Greensboro Police Department. She explained to an officer what happened and how she believed her friend Hogan was in danger. She was told that Hogan had been home since the night before but had contacted them about a robbery. With the help of Brown, Greensboro police coordinated a third money drop, this time with the intention of apprehending the suspect once he grabbed the money from the mailbox.

¶ 11 After Brown placed the "money" on the mailbox, the surveillance team watched defendant retrieve the package. As officers approached, Officer Patrena Caviness identified herself and was tackled to the ground as defendant attempted to flee. Defendant was subsequently apprehended.

¶ 12 Officers then obtained a search warrant for defendant's apartment. Inside defendant's apartment, officers discovered IDs belonging to both Bruner and Hogan, money, Hogan's phone, and a black handgun belonging to defendant's cousin under the bed. Officers also obtained a search warrant for the contents of defendant's

cellphone and found "several messages . . . from a [Craigslist] account [to] . . . Hogan." Officers also found a "Text Now application[,]" on defendant's device, which allowed him to generate a different cellphone number. Defendant used this different number to text Brown.

¶ 13 At trial, multiple officers testified to their investigative tactics and the evidence discovered. Specifically, officers discovered: the Craigslist account used to contact the victims was connected to defendant's school email account, the cellphone number used to message Hall belonged to defendant, a picture of Aaleyiah Bess ("Bess"), defendant's girlfriend, was the photo used on the Craigslist account, and officers obtained the financial records illustrating that the bank account Hall deposited $400.00 into belonged to defendant.

¶ 14 Defendant, in his defense, testified that he was not involved in any of the robberies, did not setup the Craigslist account, and was only in possession of the stolen items because they were "brought [to him]" by someone named "Boss" and his partner "Dollars."

¶ 15 Defendant was found guilty of two counts of obtaining property by false pretenses, two counts of robbery with a dangerous weapon, one count of attempt to obtain property by false pretenses, one count of assault on a government official or employee, and one count of extortion. Defendant timely appealed.

II. Discussion

A. Standard of Review

¶ 16 Defendant failed to object to the introduction of his interrogation video and the remarks of testifying witnesses he deemed prejudicial. Nor did defendant request a jury instruction on common law robbery. Therefore, he did not preserve any such error, and this Court's review is limited to whether the trial court committed plain error. *State v. Canady*, 271 N.C. App. 766, 767, S.E.2d 353, 355 (2020). Our Supreme Court stated:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice–that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alterations in original, citations, and internal quotation marks omitted).

B. Hearsay

¶ 17 As for his first error, defendant contends the introduction of his interrogation video included hearsay, and thus, was inadmissible. Specifically, defendant argues the detectives' statements within the video largely consisted of double-hearsay, did not corroborate the evidence at trial, and did not add "weight or credibility to [the

witnesses' trial testimony]," and was erroneously admitted. We disagree.

¶ 18 Defendant argues the inclusion of the following eight statements constituted hearsay and were prejudicial to his defense:

> 1) Detective Tyndall told defendant that Bess had "already told me enough, ok? Why do you think she ain't sitting down here?"
>
> 2) When defendant said he was not the person texting Brown, Detective Tyndall responded, "your girlfriend said you and her were the only ones who used that phone."
>
> 3) Detective Tyndall reiterated to defendant, "you know I've been talking to your girl, right?"
>
> 4) Detective Tyndall told defendant he would tell the prosecutor defendant denied his involvement in the robberies, "even though we talked to your girlfriend and she told us about it."
>
> 5) When defendant told Detective Tyndall that Boss was watching while defendant went to retrieve Brown's envelope, Detective Ferrell responded that "[ ] Bess said she was the only one there. Is she a lying person?"
>
> 6) Detective Tyndall told defendant Brown had made copies of the money she put on the mailbox, and that the serial numbers of her bills matched the ones found in defendant's apartment.
>
> 7) Regarding Brown, Detective Tyndall told defendant, "[w]hen she gets the money–you don't even know how long we've been talking to this woman–and she makes copies of it, why would you have all the same money, with the same serial numbers, that she gave you if you've been splitting it with these guys?"

> 8) When defendant said he just met Boss and Dollars a few weeks earlier, Detective Tyndall replied, "not true, because it's been going on since January, and I can prove it."

Defendant's contention is without merit.

¶ 19 Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2021). "[O]ut-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). Specifically, questions by detectives during an interview, containing purported statements by third-parties, offered to show "the effect they had on defendant and his response[,]" are not hearsay as they are not being offered "to prove the truth of the matters asserted therein . . . ." *State v. Miller*, 197 N.C. App. 78, 88-89, 676 S.E.2d 546, 553 (2009).

¶ 20 Defendant relies on several distinguishable cases to support his argument that pretrial statements that do not corroborate a witness's trial testimony are inadmissible. Each case cited by defendant involved pretrial statements admitted for the substantive purpose of corroborating trial testimony. *State v. Jones*, 329 N.C. 254, 257, 404 S.E.2d 835, 836 (1991) ("A prior statement of a witness may not be admitted if it is not consistent with the witness's testimony.") (citation omitted); *State*

v. Burton, 322 N.C. 447, 451, 368 S.E.2d 630, 632-33 (1988) ("[Witness's] prior recorded statement . . . directly contradicted . . . sworn testimony. Therefore, it was not admissible under the guise of corroborative evidence.") (citation omitted); *State v. Stills*, 310 N.C. 410, 416, 312 S.E.2d 443, 447 (1984) ("[T]he trial court committed prejudicial error in admitting the challenged 'corroborative' testimony. Much of it did not corroborate the other witnesses, and in part it contradicted the substantive testimony.") (citation omitted); *State v. McCree*, 160 N.C. App. 200, 207, 584 S.E.2d 861, 866 (2003) ("It is well established that a witness's prior statements may be admitted to corroborate the witness's sworn trial testimony but they may not be used as substantive evidence.") (citation omitted). Furthermore, in each of the above cases, the defendants objected to the admissibility of the prior statements at trial, thus they were not subject to plain error review. Finally, the statements above were admitted for their truth and to add credibility to testifying witnesses, unlike the eight statements subject to review here. None of the statements cited by defendant fall within the framework of these cases.

¶ 21 Even, assuming arguendo, the statements listed by defendant were erroneously admitted, the trial court gave the following limiting instruction:

> Evidence has been received tending to show that at an earlier time a witness made a statement which may conflict or be consistent with the testimony of the witness at this trial. You must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you

> believe the earlier statement was made and that it conflicts or is consistent with the testimony of a witness at this trial, you may consider this, and all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve the witness's testimony.

"When the trial court instructs the jury not to consider incompetent evidence, any prejudice is ordinarily cured." *State v. Adams*, 347 N.C. 48, 68, 490 S.E.2d 220, 230 (1997), *cert. denied*, 522 U.S. 1096, 139 L. E. 2d 878 (1998) (citation omitted). We find defendant's arguments are without merit.

C. Ineffective Assistance of Counsel

¶ 22 Defendant next asserts he received ineffective assistance of counsel during his direct examination. Specifically, defendant contends his credibility was questioned when defense counsel asked, "[s]o you expect the jury to believe that you had–you stopped studying biochemistry when you had an exam the next morning?" Due to the fact that the State and defendant offered two competing versions of events, defendant argues his credibility was weakened, and thus his defense was prejudiced, when he was consistently questioned by defense counsel. We disagree.

¶ 23 To successfully assert an ineffective assistance of counsel claim, defendant must satisfy the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674 (1984): (1) "he must show that counsel's performance fell below an objective standard of reasonableness" and (2) "once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable

probability exists that the trial result would have been different." *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488 (2002) (citing *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). In evaluating whether defendant received effective assistance of counsel, we presume counsel "acted in the exercise of reasonable professional judgment" and we must "avoid the temptation to second-guess the actions of trial counsel[.]" *Gainey*, 355 N.C. at 112-13, 558 S.E.2d at 488 (citations omitted).

¶ 24 Defendant relies on *State v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987), to support his ineffective assistance of counsel claim. In *Moorman*, our Supreme Court found counsel's advocacy was constitutionally deficient for a variety of reasons, including:

> 1. With regard to trial preparation . . . [counsel] did not visit the crime scene and did not conduct any independent investigation of the matter. His discussions with potential witnesses were brief and failed to explore their knowledge of the incident. He failed to advise witnesses what they would be asked, what to expect, or whether or not they would even testify. This lack of preparation even extended to defendant. Although [counsel] spent a considerable amount of time with [defendant], most of their conversations centered on football and other matters not related to the trial. The Court finds that [counsel] spent no more than an hour discussing with [defendant] the specifics of his version of [the] incident and only briefly discussed his potential testimony on two occasions . . . [t]his limited amount of trial preparation and the investigation was well below the standard of

> practice routinely engaged in by attorneys who defend serious criminal cases . . . .
>
> 2. The Court further finds that [counsel's] conduct during trial was equally deficient. . . . In his opening remarks to the jury, he advised that the prosecution witness's account of the incident was preposterous, that a conspiracy against the defendant existed and that [defendant] was physically and psychologically incapable of rape. He further stated that the defense would offer evidence regarding the victim's prior similar encounter with another black athlete. He made reference to . . . evidence which would show that it was physically impossible for [defendant] to engage in the acts which the victim would describe. . . . The impact of such a deficient opening statement was further aggravated by the prosecutor's closing argument which addressed the failure of the defendant to show any of the above . . . .

320 N.C. at 394-96, 358 S.E.2d at 507-508 (internal quotation marks omitted). In addition to the above, it was shown that counsel "used and abused drugs during the trial . . . [including] Percocet, Dalmane, Fiorinal, Vicodin, Demerol, Vistaril and Phenergan." *Id.* at 396, 358 S.E.2d at 508. Throughout the ten-day trial, "counsel was lethargic, inattentive, and drowsy. During the defendant's testimony, counsel dozed off briefly on at least one occasion." *Id.*

¶ 25 In the case *sub judice*, defendant argues counsel's actions were similarly deficient. However, defendant was not subjected to inefficient trial preparation, drug abuse, nor evidentiary inconsistencies between what counsel proffered to prove and what was actually evidenced at trial. Defendant's sole contention is that his

credibility was weakened, and his direct examination was more indicative of a cross-examination. After careful review of defendant's testimony, we do not agree that counsel's representation was so deficient that "a reasonable probability exists that the trial result would have been different." *Gainey*, 355 N.C. at 112, 558 S.E.2d at 488. These questions could have been posed as part of trial strategy to provide defendant an opportunity to bolster his credibility with the jury. Accordingly, we find no error.

D. Common Law Robbery

¶ 26 Defendant also contends the trial court erred by not instructing the jury on the lesser-included offense of common law robbery for the robbery of Bruner. Because defendant did not request this jury instruction during trial, we review this assignment of error for plain error. "Plain error with respect to jury instructions requires the error be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Banks*, 191 N.C. App. 743, 749, 664 S.E.2d 355, 359 (2008) (citation omitted).

¶ 27 "Common law robbery is a lesser[-]included offense of armed robbery or robbery with a firearm or other dangerous weapon[.]" *State v. Tarrant*, 70 N.C. App. 449, 451, 320 S.E.2d 291, 293-94 (1984) (citation omitted). When there is evidence a defendant is guilty of the lesser crime, he is entitled to an instruction on the lesser-included

offense. *Id.* 70 N.C. App. at 451, 320 S.E.2d at 293. "The test is whether there is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (citation and quotation marks omitted). "[W]hen an implement used appears to be a firearm, the law presumes . . . that the implement is, in fact, a firearm, whereupon no instruction for common law robbery need be given." *State v. Wise*, 269 N.C. App. 105, 107, 837 S.E.2d 193, 195 (2019) (citing *State v. Joyner*, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985)).

¶ 28 Defendant relies on this Court's prior decision in *State v. Rucker*, No. COA09-1686, 2010 N.C. App. LEXIS 1135 (2010) (unpublished) to support his argument. In *Rucker*, two victims testified that the defendant robbed them with a gun. *Id.* at *2-3. The defendant gave a statement to police admitting to the robberies, but stated he used a cellphone instead. *Id.* at *3. This Court found that the defendant's statement was sufficient evidence to instruct the jury on common law robbery. *Id.* at *12.

¶ 29 Here, defendant's trial testimony and his statements during interrogation are contradictory. During his interrogation, defendant admitted to police that he robbed Bruner, but denied using or possessing a gun. However, at trial, defendant denied ever seeing Bruner in person. Additionally, when defendant was questioned about how Bruner's wallet ended up in his apartment, he stated it was brought to him one night around 4:00 a.m., by two unidentified individuals. Defendant emphatically

denied possessing a gun or committing any robbery. Defendant's testimony denying his participation in the robbery negates any obligation the court could have possibly had with respect to considering an instruction on common law robbery. *State v. Redmond*, 266 N.C. App. 580, 584, 831 S.E.2d 650, 654 (2019) (necessity for a jury instruction on common law robbery does not arise where "the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged." (quoting *State v. Hicks*, 241 N.C. 156, 159-60, 84 S.E.2d 545, 547 (1954) (emphasis in original and citation omitted))). Thus, the court did not err, much less commit plain error in failing to instruct on common law robbery.

E. Acting in Concert Jury Instruction

¶ 30 Defendant also contends the trial court erred by instructing the jury on the theory of acting in concert with respect to the armed robbery charges because that theory of guilt was not supported by the evidence. This Court reviews errors challenging the trial court's jury instructions *de novo*. *State v. Gabriel*, 207 N.C. App. 440, 443, 700 S.E.2d 127, 129 (2010) (citation omitted).

¶ 31 To support a jury instruction on acting in concert: the evidence must be sufficient to show that the defendant was present at the scene of the crime and that the defendant was "acting together with another who d[id] the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979).

¶ 32 The State requested the acting in concert jury instruction because at trial defendant stated he had nothing to do with the robberies, although, "[t]hrough [defendant's] interview and statements to the police, he indicated that he had, in fact, set up this website, which would have been the basis of luring these men over to be robbed[.]" Over defense counsel's objection, the trial court gave the following jury instruction:

> For a defendant to be found guilty of a crime, it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit robbery with a firearm, each of them, if actually or constructively present, is guilty of the crime.

Defendant argues the evidence tended to show that he "either committed all of the elements of the robberies, or none of them." Despite defendant's contention, the evidence at trial was substantial and indicated that defendant either worked alone, with Bess, or with the still unidentified "Boss" and "Dollars."

¶ 33 The evidence showed: Bruner and Hogan were robbed by someone matching defendant's description, at defendant's apartment complex, based on a Craigslist advertisement defendant setup. Although defendant asserts the robberies were committed without him, by "Boss and Dollars," the stolen items were found in defendant's apartment. Also, during his interrogation, defendant admitted to robbing Bruner, but claimed he was not present during Hogan's robbery. However, defendant

was the individual apprehended after coordinating a third money drop with Brown, whose number he only could have received from Hogan's stolen cellphone. There is also evidence that defendant was acting in concert with a female accomplice to lure at least two of the victims to the location where the robberies occurred.

¶ 34 Defendant's arguments are overruled.

F. Witness Remarks

¶ 35 Finally, defendant contends the trial court erred in allowing certain comments by witnesses. Because his counsel did not object to the statements during trial, we review for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted). Defendant argues it was prejudicial for the trial court to allow certain "irrelevant" statements pertaining to the area of Greensboro where defendant lived. Specifically, defendant contends it was prejudicial for Hall to testify that defendant lived near "a predominantly black college[,]" and for Hogan to state he traveled to the "iffy [sic] part of town." Given the overwhelming evidence, both testimonial and electronic of defendant's guilt, even assuming, *arguendo*, the trial court should have stricken the statements on its own volition, defendant cannot meet the test required to show plain error. Defendant's final argument is overruled.

III. Conclusion

¶ 36 Accordingly, we conclude defendant received a fair trial free from error.

NO ERROR.

Judges GORE and HAMPSON concur.

Report per Rule 30(e).