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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-931

No. COA22-492

Filed 29 December 2022

Rockingham County, Nos. 20 CRS 51143, 20 CRS 539

STATE OF NORTH CAROLINA, Plaintiff,

v.

DWIGHT JEROME BROWN, Defendant.

Appeal by Defendant from judgment entered 16 September 2021 by Judge Edwin G. Wilson, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 15 November 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa L. Townsend, for the State.

Jarvis John Edgerton, IV, for Defendant-Appellant.

CARPENTER, Judge.

¶ 1

Defendant appeals from judgment after a jury convicted him of possession of a firearm by a felon, in violation of N.C. Gen. Stat. § 14-425.1. Following his conviction, Defendant entered a plea of guilty to attaining habitual felon status, in violation of N.C. Gen. Stat. § 14-7.1. On appeal, Defendant argues his Fourteenth Amendment due process rights were violated due to witness intimidation by law enforcement and

witness tampering by the prosecution. After careful review, we dismiss the appeal.

I. Factual and Procedural Background

¶ 2

This incident arose out of a domestic dispute on 7 May 2020 in Rockingham County. Dwight J. Brown (“Defendant”) began dating Brooke Hudson (“Hudson”) in February 2020. Hudson paid the rent for a trailer at 214 Talley Road where her son, Wesley Chilton (“Chilton”), resided with Joshua Hill (“Hill”), Hill’s girlfriend, and their daughter. Hudson resided elsewhere with her mother.

¶ 3

The evidence at trial tends to show the following: when Hudson arrived at the trailer to drop off a rent payment on 7 May 2020, she received an angry phone call from Defendant, stating he was coming and to stay put. Immediately before and when Defendant arrived, several individuals were at the trailer, including Hudson, Chilton, Hill, Hill’s daughter and girlfriend, and Chilton’s friend, Brian Worley (“Worley”). After receiving the angry call, Hudson was fearful and asked Worley whether he had his gun on him because she did not know what to expect.

¶ 4

Defendant arrived and engaged in various aggressive behaviors, including demanding to see Hudson’s phone, blocking her car with his car, putting his hands on Hudson, and ultimately shoving Worley and brandishing a black handgun at the group when Worley attempted to intervene. Shortly thereafter, as darkness approached, Defendant returned to his vehicle and drove away with Hudson.

¶ 5

Worley testified he called the police to report the abduction. While Worley spoke with the police, Chilton testified he called his mother to check on her safety, overhearing Defendant threaten her in the background. After a right turn, Hudson opened the passenger door and fled, attempting to escape, but Defendant chased her down on foot. To prevent her from escaping again, Defendant grabbed Hudson's hair, "pull[ing] a lot of [her] hair out[,]" and reclined her passenger seat all the way so she could not get her bearings. When police lights appeared in the rearview, Defendant placed the gun in the glovebox and instructed Hudson to hide his drugs in her shoe.

¶ 6

Police recovered beer from the passenger compartment and a Taurus semi-automatic pistol, including eleven bullets, from the glovebox. Hudson was observed by officers as fearful and "visibly upset" during the stop. Based upon Detective Smaldone's experience interviewing victims of domestic violence, he did not believe Hudson when she initially claimed responsibility for the gun and alcohol, since it appeared to be a domestic violence situation, and Defendant was the only one with the odor of alcohol on his breath. Hudson testified she initially claimed responsibility for the contraband because Defendant was likely to be out the next day, and she was afraid of what he might do.

¶ 7

After officers took Defendant into custody and advised Hudson that she and her son were at risk of being charged with crimes—such as obstruction, possession of a concealed firearm, and filing a false report—if they lied to law enforcement, Hudson

recanted and admitted the gun was Defendant's. Hudson's testimony at trial was consistent with her statements made on the evening of the 7 May 2020 incident at an interview conducted by Detective Smaldone, and three months after the incident at an interview on an unrelated matter conducted by Detective Wright. Detective Wright supplemented Detective Smaldone's initial report after the second interview. Hudson also testified that the prosecution showed her videos of Defendant saying "derogatory" things about her to other women.

¶ 8

On 8 September 2020, the Rockingham County Grand Jury issued a Bill of Indictment for Defendant for possession of a firearm by a felon on 7 May 2020. On 2 November 2020, the Rockingham County Grand Jury issued a Bill of Indictment for Defendant having attained the status of habitual felon, for having been convicted of felonious possession of cocaine on 24 May 2000, felonious possession with the intent to sell or distribute cocaine on 1 May 2002, and felonious selling/delivering of cocaine on 30 January 2012.

¶ 9

This trial began on 13 September 2021 before the Honorable Edwin G. Wilson, Jr., Judge Presiding. After the jury reached a verdict of guilty on 16 September 2021 for possession of a firearm by a felon, Defendant made a motion to set aside the jury's verdict and asked the trial court to enter a verdict of not guilty, which was denied. Defendant then moved for a mistrial without specifying a basis, which the trial court also denied. Defendant entered oral Notice of Appeal. Thereafter, Defendant pled

guilty to the habitual felon charge. The trial court sentenced Defendant as a Class C felon, representing the habitual felon enhancement, and found Defendant to be a record Level VI for structured sentencing purposes. The Defendant received a sentence in the presumptive range of 146 months minimum and a corresponding maximum sentence of 188 months in the North Carolina Department of Adult Corrections.

II. Jurisdiction

¶ 10 This Court has jurisdiction over an appeal from a final judgment of the Superior Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) (2021) and 15A-1444(a) (2021).

III. Issue

¶ 11 The sole issue on appeal is whether pretrial interview tactics employed by law enforcement and the prosecution rose to the level of witness coercion in violation of Defendant's right to due process under the Fourteenth Amendment.

IV. Analysis

¶ 12 On appeal, Defendant asserts that pretrial actions by law enforcement and the prosecution individually and cumulatively amounted to an unconstitutional and successful effort to persuade Hudson to testify contrary to her initial statements to law enforcement made during the traffic stop. The State asserts that Defendant received a fair trial, free from prejudicial or plain error.

¶ 13 While Defendant’s brief does not explicitly implicate the Sixth Amendment, we construe his argument as such based upon his reference to the Fourteenth Amendment and the precedent he relies upon. “A defendant’s sixth amendment right to present his own witnesses to establish a defense is a fundamental element of due process of law, and is therefore applicable to the states through the due process clause of the fourteenth amendment.” *State v. Melvin*, 326 N.C. 173, 184, 388 S.E.2d 72, 77 (1990) (citing *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967)).

A. Preservation

¶ 14 Despite the absence of any objection based on witness tampering or coercion, Defendant argues his issue on appeal is “preserved by law for appellate review, without objection in the trial court, under the facts of this case.” The State asserts that Defendant’s sole authority for his argument, *State v. Mackey*, is distinguishable on several bases and therefore inapplicable. 58 N.C. App. 385, 293 S.E.2d 617, *appeal dismissed and disc. rev. denied* 306 N.C. 748, 295 S.E.2d 761 (1982). We agree with the State.

¶ 15 “In order 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). Specific objections are

indispensable at trial to put the presiding judge on notice of possible error so they may take corrective action in the first instance, if necessary. *See State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019). “[A] defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.” *Mackey*, 58 N.C. App. at 389, 293 S.E.2d at 619 (citation and internal quotations omitted).

¶ 16 In *Mackey*, a witness for the defendant testified in the defendant’s favor. *Id.* at 387, 293 S.E.2d at 618. After stepping down, the witness was approached by a detective in the hallway. *Id.* at 387, 293 S.E.2d at 618. The detective stated he knew the witness’s testimony had been false, read him his rights, and threatened to prosecute him for perjury. *Id.* at 387, 293 S.E.2d at 618. The witness spoke to the district attorney and was assured he would not be prosecuted if he took the stand again, this time as a State’s rebuttal witness, and told the truth. *Id.* at 387, 293 S.E.2d at 618. The witness agreed to take the stand again and testified his former testimony had been false. *Id.* at 387, 293 S.E.2d at 618. The defendant was subsequently convicted of armed robbery. *Id.* at 386, 293 S.E.2d at 618.

¶ 17 A unanimous panel from this Court remanded for a new trial, concluding that law enforcement’s “intimidation of [the witness] violated defendant’s constitutional right to present his own witnesses to establish his defense.” *Id.* at 390, 293 S.E.2d at 620. Despite no objections to preserve the due process issue in the trial court, we held

“[u]nder the particular circumstances presented by this case . . . defendant did not waive his due process rights.” *Id.* at 389, 293 S.E.2d at 619. Those particular circumstances were law enforcement’s intimidation of a *defense* witness to change his *prior testimony*, where the defense had *no notice* of the witness’s repudiation or intent to testify for the State. *See id.* at 390, 293 S.E.2d at 620 (emphasis added). Furthermore, an objection and motion to strike would have been ineffective to wipe out the prejudicial effect of the intimidation at this late stage because the jury had already heard the repudiation. *See id.* at 389, 293 S.E.2d at 619. Therefore, an objection would have been ineffective to prevent intimidation that had already occurred just outside the courtroom. *Id.* at 389, 293 S.E.2d at 619.

¶ 18 The instant case is distinguishable, implicating none of the concerns noted in *Mackey*. Whereas in *Mackey*, a defense witness was intimidated by law enforcement to repudiate his prior testimony by testifying on redirect for the State, this case deals with a prosecution witness’s pretrial statements to law enforcement during the investigation phase. *See id.* at 390, 293 S.E.2d at 620. Here, the defense did not subpoena or identify Hudson as a defense witness. Prior notice to the defense is another distinguishing factor between these two cases. While in *Mackey* the defense had no notice of the witness’s repudiation or intent to testify for the State, here, Defendant had notice Hudson was a prosecution witness and had received discovery regarding her conflicting statements to law enforcement, which were vigorously

explored on cross examination. *See id.* at 390, 293 S.E.2d at 620.

¶ 19 The “particular circumstances” present in *Mackey* are absent here. *See id.* at 389, 293 S.E.2d at 619. Accordingly, we conclude *Mackey* is distinguishable, and Defendant’s Fourteenth Amendment due process issue was not properly preserved. *See State v. Stroud*, 259 N.C. App. 411, 419, 815 S.E.2d 705, 712 (2018). Having concluded Defendant’s constitutional argument was not properly preserved, we consider whether the law permits us to reach the merits of his appeal.

B. Unpreserved Constitutional Error

¶ 20 “Like federal plain error review, the North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error.” *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). “An appellate court will apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases.” *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018); *see also State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39–40 (2002) (“[T]his Court has held that plain error analysis applies only to jury instructions and evidentiary matters . . .”).

¶ 21 “Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal . . . not even for plain error.” *State v. Gopal*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007), *aff’d*, 362 N.C. 342, 661 S.E.2d

732 (2008) (citing *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) and *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000)).

¶ 22 Although Defendant clearly and sufficiently invokes plain error as an alternative standard of review in his brief, he fails to include any authority explaining how plain error review is applicable in this case. He does not argue that this case presents an unpreserved evidentiary or instructional error; rather, he repeatedly contends his constitutional rights were violated. Furthermore, we note that Defendant failed to file a Petition for Writ of *Certiorari* (“PWC”) or request that we invoke Rule 2.

¶ 23 Accordingly, we conclude that plain error review does not permit us to reach Defendant’s unpreserved constitutional argument. *See Mackey*, 58 N.C. App. at 389, 293 S.E.2d at 619; *see also Matter of J.N.*, 381 N.C. 131, 133, 2022-NCSC-52, ¶ 7 (“[T]he existence of a constitutional protection does not obviate the requirement that arguments rooted in the Constitution be preserved for appellate review.”). We therefore dismiss Defendant’s appeal.

V. Conclusion

¶ 24 In sum, we reject Defendant’s contention that his Fourteenth Amendment issue on appeal was preserved by law despite raising no objection in the trial court. Furthermore, the constraints of plain error caselaw do not allow us to reach Defendant’s unpreserved constitutional argument under plain error review. In the

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absence of a PWC or alternative basis to reach the merits, we dismiss the appeal.

DISMISSED.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).