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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-645

Filed 21 February 2023

Cumberland County, No. 20 CRS 55737

STATE OF NORTH CAROLINA

v.

GREGORY ALAN DAVIS, JR.

Appeal by defendant from judgment entered 17 March 2022 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 25 January 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Phillip K. Woods, for the State.

The Sweet Law Firm, PLLC, by Kaelyn N. Sweet, for defendant-appellant.

ARROWOOD, Judge.

Gregory Alan Davis, Jr. (“defendant”), appeals from judgment entered upon his conviction for obtaining property by false pretenses, conspiracy to obtain property by false pretenses, and attaining habitual felon status. Defendant contends the trial court plainly erred by admitting improper character evidence of defendant’s prior criminal conduct. Alternatively, defendant argues he received ineffective assistance

of counsel when his trial counsel failed to object to the admission of this testimony. For the following reasons, we find no error.

I. Background

In 2020, Sergeant Daniel Frankart (“Sergeant Frankart”), then a Detective with the financial crimes unit of the Cumberland County Sheriff’s Office, began investigating “an identity theft ring” operating “across multiple counties.” As part of his investigation, Sergeant Frankart investigated an incident that occurred on 7 May 2020 at HGR’s Trucks and Trailers (“HGR’s”) where someone used fraudulent credit and identification cards to purchase a trailer. The name on the identification used was Michael Melhem and the name on the credit card used was Roger Smeal.

On 23 June 2020, the owner of HGR’s, Mr. Howard Randolph (“Mr. Randolph”), contacted Sergeant Frankart and told him that there was someone in the business attempting to make a fraudulent purchase. Mr. Randolph told Sergeant Frankart that one suspect was inside the store, and another person believed to be involved was in the parking lot in a black Toyota Tundra truck. When Sergeant Frankart arrived, he walked up to the Toyota Tundra, and instructed the occupant to keep the vehicle parked. However, the driver put the car in reverse and “sped out of the parking lot.” Although Detective Frankart attempted to pursue the vehicle, he was instructed to terminate the pursuit by his watch commander.

Sergeant Frankart returned to the business and made contact with the suspect who had been inside the business. This suspect, later identified as Mr. Quincy Little

STATE V. DAVIS

Opinion of the Court

(“Mr. Little”), was attempting to leave the business on foot when he was apprehended. A North Carolina identification card for Michael Tolentino with Mr. Little’s photograph on it was located a short distance from where Mr. Little was apprehended, and a North Carolina thirty-day registration card receipt for a 2020 Toyota Tundra was found on his person.

Mr. Little was arrested and charged with attempting to obtain property by false pretenses and identity theft. Defendant was also charged with attempting to obtain property by false pretenses, felony conspiracy to obtain property by false pretenses, and with attaining the status of habitual felon related to this incident after Detective Frankart identified him as the person driving the Toyota Tundra. Defendant was indicted for the same offense related to the events that occurred on 7 May 2020. Both sets of charges were joined.

The matter came on for trial on 15 March 2022 in Cumberland County Superior Court, Judge Hill presiding. At trial, defendant’s alleged co-defendant from the 7 May 2020 incident, Mr. Ellis Cogdell (“Mr. Cogdell”) testified for the State as part of a plea deal.

Mr. Cogdell testified that although he had known defendant for years, he had been “doing business” with him about a year and saw defendant a couple times a week. Mr. Cogdell testified, without objection, that his “business” with defendant included “roll[ing] with him to pick up drugs” and doing “credit card stuff” with him. Specifically, Mr. Cogdell testified that defendant would provide him credit cards and

STATE V. DAVIS

Opinion of the Court

identification cards and take him places to use them. Although the cards would sometimes have Mr. Cogdell's name on them, he testified that sometimes they had other names on them. One such time the card had the name "Michael Melhem" on it. Furthermore, Mr. Cogdell testified, over defense's objection, that he had seen defendant making fake identification cards before using a machine. Although defense counsel objected to this specific question, they did not object as Mr. Cogdell continued to testify about the machine and process for making the fraudulent cards.

Mr. Cogdell testified that on 7 May 2020, defendant picked him up and said they "were going to work[.]" which he knew meant they were "going to get some cards." Mr. Cogdell stated that on that day, defendant drove him to a business that sold trailers, handed him cards, and had him go inside and make a purchase. Although defendant initially waited inside the car, Mr. Cogdell testified defendant came inside after he got "confused" about how to make the purchase. Mr. Cogdell testified that when defendant came inside, he spoke with the salesperson and explained to them his "pops' card" was not working. Ultimately, they were able to make the purchase and left with the trailer.

Mr. Randolph also testified for the State. Mr. Randolph stated that on 7 May 2020 he was at the business and interacted with the suspects. Although he testified defendant looked "similar" to one of the men who fraudulently purchased the trailer that day, he could not "identify him [100%][.]" Furthermore, Detective Frankart testified about the events that occurred on 23 June and stated defendant

STATE V. DAVIS

Opinion of the Court

was the person driving the Toyota Tundra that fled that day. Lastly, Mr. Michael Melhem testified for the State that his identity was used without his knowledge, and he did not give anyone permission to make purchases using his identity.

At the close of the State's evidence, defense counsel moved to dismiss the charges from 23 June 2020, arguing there was "insufficient evidence to establish the fact that . . . [defendant] was involved directly with . . . any attempted obtaining property by false pretenses against [Mr.] Tolentino." Defense counsel also argued that the charges from the 7 June 2020 incident should be dismissed because there was "no evidence offered with regards to Roger Smeal." The State countered that "language [in the indictment] referring to Mr. Roger Smeal" was not a "specific element of the charged offense[.]" but mere "surplusage" which the State was not required to prove. Defendant's motions to dismiss were denied.

Mr. Little testified for the defense regarding the events on 23 June 2020. Mr. Little admitted that he went with an "associate" to HGR's that day to "attempt to obtain property from" them, but testified this associate was not in the courtroom. When pushed, Mr. Little provided contradicting testimony, first claiming he was "not obligated to" divulge the name of his associate, then stating he did not know the name of his associate, before eventually admitting his associate went by the nickname, "Black." Mr. Little also provided contradicting testimony about how he came to possess identification with the name Michael Tolentino on it with his picture. At first, Mr. Little stated he was "not obligated" to say where he got the identification,

but then stated he did not know the “actual name” of the person he received it from. On cross-examination, Mr. Little stated he “found” the identification, and when pressed as to how he found an identification card with his photograph on it, he claimed it was “given” to him.

Furthermore, Mr. Little initially denied agreeing to a “factual recitation” which stated he had “conspired to obtain property by false pretenses using an identification card and a financial card that [was] provided to [him] by [defendant]” when he accepted a plea deal for the charges that stemmed from the 23 June 2020 event. When confronted with the transcript, he acknowledged that defendant’s name was mentioned several times in the factual recitation but testified that he “didn’t understand” the “full plea agreement.” Mr. Little further testified that although he was a paralegal specialist while serving in the military, there must have been a misunderstanding regarding the plea agreement he accepted, and he was likely just ready to put the incident behind him.

The State re-called Sergeant Frankart to the stand for rebuttal. Sergeant Frankart reiterated that Mr. Little was with defendant on 23 June 2020 and that he confirmed defendant’s identity “by known tattoos.” At the close of all evidence, defense counsel made another motion to dismiss both sets of charges arguing the State failed to present “sufficient evidence[.]” These motions were likewise denied.

On 17 March 2022, defendant was found guilty of the one count of obtaining property by false pretense and one count of conspiracy to obtain property by false

STATE V. DAVIS

Opinion of the Court

pretense, stemming from the 7 May 2020 incident. Defendant was found not guilty of the charges that stemmed from the 23 June 2020 incident. Thereafter, defendant pleaded guilty to attaining the status of habitual felon and was sentenced to 100 to 132 months active sentence. Defendant gave oral notice of appeal in open court.

II. Discussion

On appeal, defendant contends the trial court plainly erred by allowing a witness to testify about defendant's prior criminal conduct, thereby improperly admitting character evidence. Alternatively, defendant argues he received ineffective assistance of counsel when his trial counsel "failed to object to the admission of his prior crimes, wrongs, or acts."

A. Character Evidence

Defendant first argues the trial court plainly erred by allowing the State to elicit character evidence of criminal conduct from its witness, Mr. Cogdell, including testimony that defendant "manufactured fraudulent credit cards and identification cards on multiple occasions[.]" Defendant further alleges this testimony was unfairly prejudicial and entitles him to a new trial. Because defendant did not preserve any errors related to the testimony in question, this Court's review is limited to whether the trial court's actions constituted plain error.¹

¹ Although defendant's trial counsel did object to one specific question, they did not object to Mr. Cogdell's continued testimony and therefore the benefit of their prior objection was lost. *State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985). We note this although defendant does not

“In criminal cases, an issue that was not preserved by objection . . . nevertheless may be made 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) (2023). Our Supreme Court has 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) (alteration in original) (citations and quotation marks omitted). “Plain error includes error that is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done; or grave error that amounts to a denial of a fundamental right of the accused; or error that has resulted in a miscarriage of justice or in the denial to appellant of a fair trial.” *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996) (citation omitted).

Rule 404(b) of the North Carolina Rules of Evidence provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be

dispute that plain error is the correct standard of review and defendant recognizes that trial counsel’s objection “was waived when he failed to object to the continued line of questioning.”

STATE V. DAVIS

Opinion of the Court

admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2022). Significantly, the list of purposes for which prior acts may be admitted under Rule 404(b) is “not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant’s propensity to commit the crime.” *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53 (citations omitted), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403 (2022).

This Court has, on multiple occasions, held that testimony about how a witness was able to identify a defendant is admissible under Rule 404(b). For example, in *State v. Reid*, this Court held that the witnesses’ testimony that they knew defendant because they “hustled together” and “sold drugs together” was not inadmissible character evidence, but properly admitted testimony to establish how the witness could identify the defendant. *State v. Reid*, 175 N.C. App. 613, 624, 625 S.E.2d 575, 584 (2006). Furthermore, evidence of prior history between conspirators or co-defendants is relevant to the witnesses “certainty in identification . . . and to establish a course of dealing between the two to enhance [the witnesses’] testimony that on the occasion in question he dealt with the defendant” *State v. Weaver*, 318 N.C. 400,

404, 348 S.E.2d 791, 794 (1986).

Here, Mr. Cogdell testified that he knew defendant and they did “business” together, including “credit card stuff” where defendant would provide him with fraudulent credit cards and identification and take him places to use them. When asked about how he obtained these fraudulent cards, Mr. Cogdell testified that he had seen defendant making fake identification cards using a machine and described the process and the machine. This testimony is relevant not only to Mr. Cogdell’s identification of defendant, but also the certainty in that identification. *See id.*; *Reid*, 175 N.C. App. at 624, 625 S.E.2d at 584. Accordingly, the evidence was admissible for a purpose other than propensity and did not amount to plain error.

B. Ineffective Assistance of Counsel

In the alternative, defendant contends that he received ineffective assistance of counsel when his trial counsel failed to object to Mr. Cogdell’s testimony. A defendant’s right to counsel, as guaranteed by the Sixth Amendment to the United States Constitution, includes the right to effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985) (citation omitted). When appealing a conviction based on this theory, a defendant must demonstrate their trial counsel’s conduct “fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 693 (1984). To successfully assert an ineffective assistance of counsel claim, defendant must demonstrate: (1) “that counsel’s performance was deficient” and (2) “but for counsel’s errors, there would

have been a different result in the proceedings.” *Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248-49 (quoting *Strickland*, 466 U.S. at 687, 694, 80 L. Ed. 2d at 693, 698). “Thus, both deficient performance and prejudice are required for a successful ineffective assistance of counsel claim.” *State v. Todd*, 369 N.C. 707, 711, 799 S.E.2d 834, 837 (2017).

In evaluating defendant’s ineffective assistance of counsel claim, we “must be highly deferential” since “it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694 (citation omitted); *State v. Gainey*, 355 N.C. 73, 112-13, 558 S.E.2d 463, 488, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Accordingly, we presume “trial counsel’s representation is within the boundaries of acceptable professional conduct.” *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (citation omitted); *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694 (“[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance[.]”).

Here, as discussed above, Mr. Cogdell’s testimony was admissible for purposes other than character evidence. Therefore, defendant cannot prove his trial counsel’s conduct was deficient, nor prejudicial. Accordingly, defendant’s argument that he received ineffective assistance of counsel is without merit.

III. Conclusion

STATE V. DAVIS

Opinion of the Court

For the foregoing reasons, we hold defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges COLLINS and WOOD concur.

Report per Rule 30(e).