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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-558

Filed 16 May 2023

Onslow County, Nos. 20 CRS 54637-38

STATE OF NORTH CAROLINA,

v.

RICHARD HUMPHREY, Defendant.

Appeal by defendant from judgment entered 1 December 2021 by Judge Imelda J. Pate in Onslow County Superior Court. Heard in the Court of Appeals 8 February 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alan D. McInnes, for the State.

Sharon L. Smith, for defendant-appellant.

STADING, Judge.

Defendant Richard Humphrey appeals from a judgment after a jury found him guilty of felony possession of cocaine, possession of drug paraphernalia, resisting a public officer, driving while license revoked (impaired revocation), and possession of marijuana up to one-half ounce. There are two issues on appeal: (1) whether the trial court committed plain error by allowing the State to introduce evidence of prior

crimes and acts without a proper purpose under Rule 404(b), and (2) whether defendant was denied his right to effective assistance of counsel at trial in violation of his rights guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19 and 23 of the North Carolina Constitution. For the reasons set forth below, we hold no plain error in the admission of evidence by the trial court and dismiss the claim of ineffective assistance of counsel without prejudice.

I. Background

A. Events of 18 September 2020

On the evening of 18 September 2020, while on patrol, Officer Carolyn Handy (hereinafter “Officer Handy”) of the Jacksonville Police Department observed a black Cadillac with unlawfully tinted windows parked across the street from an apartment complex in a “high crime area.” Officer Handy initiated a traffic stop of defendant in response to observing “the window tint violation.” On two prior occasions, Officer Handy had personally witnessed defendant operating this specific vehicle and knew his driver’s license was suspended. When stopped on this occasion, defendant exited the vehicle immediately with a washcloth in his hand. Officer Handy instructed defendant to get back inside of the vehicle. However, once Officer Handy was “within reaching distance,” defendant ran into a wood line near the apartment complex. Officer Handy eventually apprehended defendant after he tripped and fell. Defendant told Officer Handy that he “just had some weed,” and she observed a folded dollar bill on the ground “right next to” defendant which had fallen from his sock.

Based on her training and experience, Officer Handy discovered what she believed to be marijuana inside of the dollar bill on the ground.

Shortly thereafter, Lieutenant Joshua Porter (hereinafter “Lieutenant Porter”), Officer Eloi Gelinas (hereinafter “Officer Gelinas”), and Detective David Peck III (hereinafter “Detective Peck”) arrived at the scene. Detective Peck took defendant into custody. While in the patrol car, defendant again stated he had “just a little bit of weed” on him. After Officer Handy notified Officer Gelinas of defendant’s admission to having illegal drugs in his possession, Officer Gelinas searched the vehicle and discovered another folded dollar bill “partially out of the cigarette lighter in the center console.” This dollar bill inside of the vehicle contained a white powdery substance later confirmed to be cocaine. Officer Handy testified the vehicle containing the cocaine was owned by Dequavious Humphrey, who was not with defendant when he was operating the vehicle that evening or on prior encounters.

B. Past Encounters with Law Enforcement

At trial, Officers Handy, Gelinas, and Detective Peck testified about the night in question, as well as their prior encounters with defendant. Officer Handy testified that she stopped defendant driving the Cadillac twice before and, on both occasions, defendant was the only operator and occupant of the vehicle. Likewise, Officer Gelinas testified that he stopped defendant driving the Cadillac on 23 April 2020 and 9 July 2020. On 23 April 2020, Officer Gelinas stopped defendant for a window tint violation. Officer Gelinas testified that defendant was the sole occupant of the

vehicle, there was a strong odor of marijuana coming from the car, defendant coughed up marijuana he had eaten, and admitted to having a “little bit” of marijuana. As a result of the stop, Officer Gelinas issued defendant a citation for driving with a revoked license and a window tint violation. Detective Peck was also present at the scene of this particular traffic stop to assist Officer Gelinas.

On 9 July 2020, Officer Gelinas again saw the exact same vehicle from the prior traffic stop. Officer Gelinas initiated a stop of the Cadillac only after witnessing defendant in operation of the vehicle and having knowledge of defendant’s suspended driver’s license. Officer Gelinas testified there was a strong odor of marijuana coming from the car and that defendant produced a small bag of marijuana from his pocket after stating “I was gonna [sic] throw it out the window, but I didn’t.” Officer Gelinas cited defendant for driving with a revoked license, possession of marijuana up to one-half ounce, and possession of marijuana paraphernalia.

Detective Peck testified about two prior encounters with defendant. He recounted the 23 April 2020 traffic stop in which he assisted Officer Gelinas. And on the very next day, 24 April 2020, Detective Peck again encountered defendant driving the same Cadillac without tag lights. When Detective Peck initiated a U-turn in an effort to stop the vehicle, defendant “sped up and made a turn.” Defendant stopped at some point and exited the vehicle. Detective Peck recognized defendant from the stop with Officer Gelinas on the previous day. Leaving his wallet and identification card in the vehicle, defendant fled from the area on foot and jumped over a fence.

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Detective Peck called for a canine to assist tracking defendant which led to a residence and owner thereof who gave consent to search her house. Defendant was located upstairs in the residence “profusely sweating.”

The supervisor of all officers involved in this matter, Lieutenant Porter, was also present for the events of 18 September 2020. Lieutenant Porter stated that he was familiar with defendant and had seen the same Cadillac in previous investigations. Additionally, he testified that he had “never seen anyone driving that Cadillac except Mr. Richard Humphrey.” On cross-examination, defendant’s trial counsel asked Lieutenant Porter if Dequavious Humphrey was the registered owner of the vehicle and if he had previously been charged with cocaine-related offenses. Lieutenant Porter acknowledged a previous investigation of Dequavious Humphrey who is the registered owner of the Cadillac, but defendant “solely occupied” the Cadillac in all their investigations involving the vehicle.

At the charge conference, defendant’s trial counsel requested an instruction to the jury with respect to “evidence of similar acts or crimes that the State admitted.” Alternatively, he requested that the trial court strike testimony of prior encounters with defendant, arguing that the testimony did not go to the substance of the crime charged. In response, the State argued that the evidence was relevant, and the testimony demonstrated defendant’s intent, knowledge, and opportunity. After allowing defendant’s trial counsel an opportunity to respond, the trial court decided to instruct the jury that:

This evidence was received solely for the purpose of showing that the defendant had the intent which is a necessary element of the crimes charged in this case, that the defendant had the knowledge which is a necessary element of the crimes charged in this case, and that the defendant had the opportunity to commit these crimes.

In his closing argument, defendant's trial counsel argued "this vehicle was not owned by Richard Humphrey. It was owned by Dequavious Humphrey and . . . Officer Porter [told] you . . . [t]hat he had previous encounters with Dequavious Humphrey, and those encounters . . . involved cocaine." After deliberation, the jury found defendant guilty on all five counts, and defendant subsequently pled guilty to attaining habitual felon status. On 1 December 2021, defendant gave oral notice of appeal.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Analysis

A. Introduction of Evidence of Prior Encounters

Defendant first argues that the trial court's admission of evidence of prior crimes and acts involving the same vehicle was without a proper purpose and violated Rule 404(b). Defendant did not give a timely objection at trial to the admission of the disputed evidence, therefore, we review the trial court's decision for plain error on appeal. To prevail under such standard, "a defendant must demonstrate that a

fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). “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.” *Id.* “[B]ecause plain error is to be ‘applied cautiously and only in the exceptional case,’ the error [must] be one that ‘seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings.’” *Id.*

Defendant maintains the trial court erred in admitting the officers’ testimony of their prior interactions with defendant because the State used the testimony for an improper purpose. Under Rule 404(b) of the North Carolina Rules of Evidence:

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 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) (2023).

Rule 404(b) is a rule of “*inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1989) (emphasis original). Thus, while 404(b) contains a list of proper purposes in which the court may admit evidence of a defendant’s prior

acts, this list is not exclusive or exhaustive. *State v. Washington*, 277 N.C. App. 576, 581, 859 S.E.2d 246, 251 (2021). A court may admit such evidence “so long as it is relevant to any fact of issue other than the defendant’s propensity to commit a crime.” *Id.* (citation omitted).

Defendant was charged with several drug offenses—possession of cocaine, possession of marijuana, and possession of drug paraphernalia. Under the law and in accordance with the instructions provided to the jurors at trial, a finding of guilt requires proof by the State beyond a reasonable doubt that the accused “knowingly possessed” the illegal contraband. The jury instructions explained that possession of a controlled substance or drug paraphernalia necessitates that the accused is “aware of its presence, and has both the power and intent to control the disposition or use.” In charging the jury with respect to the cocaine charge, the trial court instructed:

If you find beyond a reasonable doubt that a substance was found in a certain place (such as in a vehicle) and that the defendant exercised control over that place whether or not the defendant owned it, this would be a circumstance from which you may infer that the defendant was aware of the presence of the substance and had the power and intent to control its disposition or use.

In their testimony, the officers described prior encounters in which defendant was the sole occupant and operator of the Cadillac where the cocaine was found on this particular occasion. However, as defendant was not the owner of the vehicle, there was a factual issue for the jury’s consideration as to whether he was the individual who had control over the Cadillac and the substance found inside. The

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officers' testimony assisted the jury in determining these facts by showing that defendant regularly operated the Cadillac and could have been the person controlling the items contained in the vehicle. *See Washington*, 277 N.C. App. at 581, 859 S.E.2d at 581 ("Evidence of other crimes, wrongs, or acts committed by a defendant may be admissible under Rule 404(b) if it establishes the chain of circumstances or context of the charged crime."). Moreover, the jury was instructed to only consider the evidence for the limited purpose of showing defendant had the necessary intent, knowledge, and opportunity to commit the crime.

At trial, defendant's attorney drew upon the contested testimony during cross-examination and closing argument in an effort to establish reasonable doubt about the possession of the contraband by calling attention to the ownership of the vehicle. First, defendant's trial counsel questioned Lieutenant Porter about a previous investigation of Dequavious Humphrey possessing crack cocaine. Then, he proceeded to elicit testimony that Dequavious Humphrey was the owner of the Cadillac at issue in this matter. Accordingly, in his closing argument, defendant's trial counsel called into question his client's possession of the cocaine: "[s]o we have the owner of the vehicle who has been charged previously with possession of cocaine, not Richard Humphrey."

The record clearly shows the admission of the evidence is probative of the issue of defendant's exercise of control over the vehicle, whether or not he owned it. The evidence of other encounters is ultimately probative of whether defendant had the

power and intent to control the disposition or use of the items located therein. For the foregoing reasons, we hold that the trial court committed no error because the State did not use the contested evidence to show defendant had the propensity to commit the crimes charged. The officers' testimony of the prior encounters provided probative value and was not admitted to show defendant's propensity to commit the crimes for which he was tried. Thus, the trial court committed no fundamental error that could have had a probable impact on the jury's findings.

B. Ineffective Assistance of Counsel

Defendant next argues that he is entitled to a new trial because he received ineffective assistance of counsel in violation of his Sixth Amendment rights. A claim of ineffective assistance of counsel is reviewed *de novo* on appeal. *State v. Thorne*, 173 N.C. App. 393, 396, 618 S.E.2d 790 (2005). When a defendant seeks to have his conviction overturned due to ineffective assistance of counsel, he bears the burden of showing his counsel's performance was so objectively deficient at trial that it prejudiced him. *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citation omitted). Counsel is deficient if he makes an error so severe that he is not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* In order to prevail, the defendant must show that counsel's error was so profound that it deprived him of a fair trial with a reliable result. *Id.*

This Court recognizes the long-standing principle that strategic and tactical decisions are matters within the discretion of the attorney. *State v. Rhue*, 150 N.C.

App. 280, 290, 563 S.E.2d 72, 79 (2002), *appeal dismissed and disc. review denied*, 356 N.C. 689, 578 S.E.2d 589 (2003). Trial counsel is given wide latitude in their decisions to develop or submit a defense, and “[s]uch decisions are generally not second-guessed by our courts.” *State v. Lesnane*, 137 N.C. App. 234, 246, 528 S.E.2d 37, 45, *appeal dismissed and disc. review denied*, 352 N.C. 154, 544 S.E.2d 236 (2000). Ineffective assistance of counsel claims brought on direct review are decided on the merits when the cold record reveals that no further investigation is required. *State v. Thompson*, 359 N.C. 77, 81, 604 S.E.2d 850, 857 (2004). Our appellate courts have consistently held that “whether defense counsel made a particular strategic decision remains a question of fact and is not something which can be hypothesized by an appellate court on direct appeal.” *State v. Spinks*, 256 N.C. App. 596, 597, 808 S.E.2d 350, 352 (2017) (cleaned up)

In this matter, at this stage in the proceedings, defendant’s ineffective assistance of counsel claim cannot be determined by the cold record alone. We therefore dismiss defendant’s ineffective assistance of counsel claim without prejudice.

IV. Conclusion

In conclusion, we hold that the trial court did not commit plain error by admitting the officers’ testimony of prior encounters because the State introduced the evidence for a proper purpose under rule 404(b). Additionally, we dismiss defendant’s ineffective assistance of counsel claim without prejudice.

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NO PLAIN ERROR; INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM
DISMISSED WITHOUT PREJUDICE.

Judges MURPHY and HAMPSON concur.

Report per Rule 30(e).