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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-596

Filed 06 June 2023

Catawba County, Nos. 16 CRS 3883-84, 17 CRS 79, 18 CRS 4221

STATE OF NORTH CAROLINA

v.

ARSENIO DWAYNE CURTIS, Defendant.

Appeal by defendant from judgment entered 29 October 2021 by Judge W. Todd Pomeroy in Catawba County Superior Court. Heard in the Court of Appeals 22 March 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Nicholas R. Sanders, for the State.

William D. Spence, for the Defendant.

DILLON, Judge.

This case arises out of a drug-related shooting resulting in the death of a couple in their home.

I. Background

Defendant Arsenio Dwayne Curtis was found guilty by a jury of two counts of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit

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robbery with a dangerous weapon in connection with the death of Mark Wilson and Deidra Ramseur. The evidence at trial tended to show:

On 12 March 2016, Mark and Diedra were discovered dead in Mark's home. A State's expert testified that Mark and Diedra died from gunshot wounds.

Officers arrested Defendant, Reand Rivera and three other suspects in connection with the shooting. During his interview, Reand revealed the following:

On the day of Mark and Diedra's death, Reand, Defendant, and the other suspects discussed a plan to commit robbery and murder. Later that night, Reand, Defendant, and two of the other suspects arrived at Mark's home. The fifth suspect did not travel to Mark's home but had provided the others with guns. Once they arrived at Mark's home, Defendant kicked in the door. They robbed Mark and Diedra of drugs and money. Reand then shot Mark, and one of the other suspects shot Diedra. The four men left, and all five men split the 30 grams of marijuana and the \$1,200.00 that were stolen.

At the close of the State's evidence, Defendant's motion to dismiss was denied by the trial court. Defendant was found guilty of two counts of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. He was sentenced to two consecutive terms of life in prison without parole on the first-degree murder convictions and a further sentence of 111-146 months upon the consolidated convictions for first-degree burglary, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon.

Defendant appeals.

II. Analysis

Defendant makes three arguments on appeal, which we address in turn.

A. Conflict of Interest

Defendant first argues the trial court erred by allowing his trial attorney to continue despite the conflict of interest created when the attorney allowed Defendant to use the attorney's cell phone in jail, in violation of the law. We disagree.

Section 14-258.1(d) of our General Statutes proscribes providing a mobile phone to an inmate:

(d) Any person who knowingly gives or sells a mobile telephone or other wireless communications device, or a component of one of those devices, to an inmate in the custody of the Division of Prisons of the Department of Adult Correction, to a delinquent juvenile in the custody of the Juvenile Justice Section of the Division of Prisons of the Department of Adult Correction, or to an inmate in the custody of a local confinement facility, or any person who knowingly gives or sells any such device or component to a person who is not an inmate or delinquent juvenile for delivery to an inmate or delinquent juvenile, is guilty of a Class H felony.

N.C. Gen. Stat. § 14-258.1(d) (2016).

Surveillance cameras in the jail revealed that Defendant's attorney handed his cell phone to Defendant while visiting him in jail. In response to the actions of Defendant's attorney, an assistant district attorney (the "ADA") sought advice from

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the State Bar as to his obligations and filed in the trial court a “Motion to Determine Potential Conflict.” Defendant filed a response to the State’s motion, moving “pursuant to N.C.G.S. § 8C-501, the 6th Amendment of the United States Constitution, the 14th Amendment to the Constitution as applied to the States, and the Constitution of the State of North Carolina . . . to allow defense counsel to remain as the Defendant’s attorney in the above-captioned matter.” Defendant referred to the State’s motion as “an abuse of power and prosecutorial misconduct” and argued that Catawba County and the district attorney violated his Sixth Amendment rights and intruded into the attorney-client privileged relationship between Defendant and his attorney by video-recording the meeting. In his prayer for relief, Defendant specifically asked the Court to “allow[] defense counsel to continue representing Defendant.”

The trial court provided Defendant with an independent attorney to advise him on any potential conflict. The trial court also afforded Defendant’s attorney the opportunity to speak to another attorney considering the allegations that were being made. After a hearing on the matter, the trial court held that there could be a *potential* conflict present but that the attorney was not going to be removed from the case. Defendant now challenges this ruling.

A criminal defendant’s Sixth Amendment right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The “right to effective assistance of counsel includes the ‘right to representation that

is free from conflicts of interest.” *State v. Burton*, 344 N.C. 381, 391, 474 S.E.2d 336, 343 (1996) (quoting *Wood v. Georgia*, 450 U.S. 261, 271 (1981)). A defendant can generally waive a conflict of interest and any claim that they received ineffective assistance of counsel due to that conflict. *See State v. Choudhry*, 365 N.C. 215, 223, 717 S.E.2d 348, 354 (2011); *see also State v. Nations*, 319 N.C. 318, 326, 354 S.E.2d 510, 515 (1987). When a conflict is identified, “[t]he standard for the validity of a sixth amendment waiver by a defendant is that it be voluntarily, knowingly, and intelligently made.” *Id.*

In the instant case, the trial court’s written order stated that “[o]n August 4, 2021, in open court, the Defendant knowingly, intelligently, and voluntarily waived the potential conflict and chose to keep [the attorney] as his counsel of choice.” Before making its ruling, the trial court examined Defendant at length about his choice to waive the conflict of interest by: (1) giving Defendant an opportunity to discuss the issue with his independent counsel, (2) inquiring about whether Defendant continued to believe his attorney was effective in his representation, (3) asking whether Defendant had any issues with the potential conflict of interest after listening to the evidence and arguments at the hearing, (4) ensuring that Defendant understood that waiving the potential conflict of interest was Defendant’s decision alone without any coercion, and (5) ensuring that Defendant had no remaining questions about the waiver. As a result, the trial court found that Defendant waived the potential conflict of interest. We conclude that the trial court did not err and, as such, that Defendant

has also waived his current argument that his counsel was ineffective due to this conflict of interest.

B. Plain Error– Accomplice Statement

Defendant argues the trial court plainly erred by allowing Reand to testify that he had given a pre-trial recorded statement that was “basically, exactly, what he had told the jury today.” We disagree.

In order to preserve an issue for appellate review, a party must make an objection and obtain a ruling on that objection. N.C. R. App. P. 10(a) (2021).

In the case at bar, Defendant did not object to the testimony he now alleges constitutes error. Therefore, he did not preserve the issue for appellate review, and he must establish that the alleged error rose to the level of *plain error*.

In other words, Defendant needed to show that the error constituted a “*fundamental error*, something so basic, so prejudicial, so lacking in its elements that justice could not have been done.” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis added). And a trial error only requires reversal if “there is a reasonable possibility that *had the error in question not been committed a different result would have been reached at the trial.*” N.C. Gen. Stat. § 15A-1443(a) (2021) (emphasis added).

Here, admission of Reand’s testimony was not erroneous because Reand did not testify as to his opinion on whether another person’s prior statement and in-court testimony were consistent. Rather, after a cross-examination attacking his

credibility, Reand testified that his own in-court testimony was similar to what he told officers after entering his plea agreement.

Our Supreme Court has held that this type of evidence is competent, as it ruled in *Maultsby* that “[i]t was competent to corroborate the witness, whose credibility had been attacked by the course of the cross-examination, to show by his own testimony that soon after the occurrence and before this proceeding began he had made similar statements to his testimony on the stand.” *State v. Maultsby*, 130 N.C. 664, 665, 41 S.E. 97, 98 (1902). And also, “[t]here is a distinction” where the witness is not “attempting to corroborate somebody else as to what the other person has said.” *State v. Lentz*, 270 N.C. 122, 125, 153 S.E.2d 864, 867 (1967).

Even assuming the statement made by Reand was objectionable, we conclude that Defendant has failed to show that any error by the trial court rose to the level of plain error.

C. Plain Error— Vouching

Lastly, Defendant argues the trial court committed plain error by failing to intervene *ex mero motu* when the ADA vouched for his witness’s truthfulness and the truthfulness and strength of his case in his closing argument. We disagree.

“The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were *so grossly improper* that the trial court committed reversible error by failing to intervene *ex mero motu*.” *State v. Taylor*, 362 N.C. 514, 545, 669 S.E.2d 239, 265

(2008) (emphasis added). This Court is tasked with determining “whether the argument in question *strayed far enough from the parameters of propriety* that the trial court . . . should have intervened.” *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (emphasis added).

In the case at bar, the ADA stated in his closing that his main witness originally lied but ended up coming clean. However, these statements are similar to the statements our Supreme Court allowed in *State v. Wiley*, 355 N.C. 592, 622, 565 S.E.2d 22, 43 (2002). In *Wiley*, after mentioning prior statements made by a witness, the prosecutor stated, “then she came forward and began to tell the truth and has pretty much told the truth.” *State v. Wiley*, 355 N.C. 592, 621, 565 S.E.2d 22, 43 (2002). In this instance, the Supreme Court held that “[t]he prosecutor was merely giving the jury reasons to believe the state’s witnesses who had given prior inconsistent statements and were previously unwilling to cooperate with investigators.” *Id.*

Like the prosecutor in *Wiley*, in this case the ADA was merely giving the jury reasons to believe his main witness by explaining why his witness originally lied but ended up coming clean. Because the argument was not improper according to our Supreme Court in *Wiley*, the trial court had no basis for intervention *ex mero motu*. See *State v. Phillips*, 365 N.C. 103, 138, 711 S.E.2d 122, 147 (2011).

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Accordingly, we hold that the trial court did not commit plain error by failing to intervene *ex mero motu* when the ADA vouched for his witness's truthfulness and the truthfulness and strength of his case in his closing argument.

NO ERROR.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).