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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-662

Filed 6 February 2024

Wake County, No. 17 CRS 219916

STATE OF NORTH CAROLINA

v.

TYRON DALETAY COOPER

Appeal by Defendant from Judgment entered 17 September 2021 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 23 August 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden William Hayes, for the State.

Kimberly P. Hoppin for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Tyron Daletay Cooper (Defendant) appeals from a Judgment entered 17 September 2021 upon his conviction of First-Degree Murder. The Record before us, including evidence presented at trial, tends to show the following:

On the evening of 8 November 2016, officers with the Raleigh Police

Department (RPD) responded to a call reporting gunshots at the Universal Cab Company on 432 Hill Street, Raleigh, North Carolina. At the scene, Deputies found Nwabu Cyril Efobi deceased from multiple gunshot wounds. Several nine-millimeter shell casings were collected at the scene. Surveillance footage from cameras operated by another business in the same strip mall showed Efobi struggling with a person off-screen who fled the area following the altercation. RPD identified this person as the suspect. The suspect appeared to be a black male with facial hair wearing dark-rimmed glasses, a dark hooded sweatshirt, and a ballcap under the sweatshirt. RPD also examined surveillance footage from the same cameras the previous day, 7 November 2016, which appeared to show the same suspect wearing the same clothing, walking around the vicinity of the Universal Cab Company, and using a cellphone.

On 2 December 2016, RPD Detective Mark Quagliarello applied for a court order for a “tower dump” for 7 and 8 November 2016 (the Tower Dump Order). The Tower Dump Order required cellular phone companies to produce a list of every phone number that connected to a specific cell tower in a given time frame. Tower dumps do not provide subscriber information associated with those phone numbers. On 19 April 2017, Detective Quagliarello applied for a “geofence” order for 7 and 8 November 2016 (the Geofence Order). The Geofence Order required Google to provide similar information for phone numbers that connected to Google services such as Google, Google Maps, and Gmail during a given time frame and geographic area.

Both applications were granted; however, the information produced did not generate any leads.

In September 2017, counsel for Stacy Dooley, an inmate in a federal penitentiary, contacted RPD and notified Detective Quagliarello that Dooley had information about the murder at the Universal Cab Company. In a subsequent conversation, Dooley told Detective Quagliarello he had become friends with Defendant when they were incarcerated at the same federal prison, and they had remained friends after Defendant was transferred and later released. Dooley reported Defendant had confessed to Dooley over the phone he had been involved in a robbery and murder of a cab driver in Raleigh. Dooley stated Defendant said he had used a nine-millimeter handgun—information which had not been made public. Dooley then provided RPD with Defendant’s cellphone number.

Based on this information, Detective Quagliarello searched the RPD law enforcement database and determined Defendant had been living at a halfway house in Raleigh in November 2016. When RPD Deputies visited the halfway house, an employee showed them records indicating Defendant had signed out of the house reportedly to go to work during the relevant times on both 7 and 8 November 2016. Detective Quagliarello subsequently contacted Defendant’s then-employer, Axxcess Staffing. Axxcess Staffing verified Defendant had been an employee in November 2016; however, their records indicated Defendant did not work for them on 7 or 8 November 2016. The Axxcess Staffing manager provided RPD with Defendant’s

cellphone number, which matched the number Dooley had given Detective Quagliarello.

Detective Quagliarello began to investigate the phone number, first by searching the number on Facebook. The search returned a public Facebook page connected to the username “Tyron dot Cooper one.” Detective Quagliarello also found a second Facebook page for “Tyron dot Cooper dot 712.” Photographs posted on these Facebook pages in 2016 showed Defendant, a black man with facial hair, wearing a hooded sweatshirt appearing to match the one the suspect wore in the surveillance video.

Deputies then searched the data they had obtained pursuant to the December 2016 Tower Dump Order and confirmed Defendant’s cellphone number connected to the cell tower for the Universal Cab Company during the relevant time frames on 7 and 8 November 2016. Detective Quagliarello applied for a court order for historical call detail records, historical location information, and subscriber information (CSLI) for Defendant’s phone number (the CSLI Order). Mapping the phone number using this data revealed on the morning of 7 November 2016, the phone number connected to a cell site section and cell tower providing coverage for the halfway house where Defendant was living. The same phone number connected to a cell site sector and cell tower providing coverage for the Universal Cab Company the same evening at 5:58 p.m., 6:53 p.m., and 7:01 p.m.

Mapping the phone number for 8 November 2016 showed it connected to a cell

site sector and tower providing coverage for the halfway house at 6:06 a.m. It also showed the same phone number used a cell site sector and tower providing coverage for the Universal Cab Company multiple times throughout the morning and again in the evening at 5:37 p.m., 5:39 p.m., 6:15 p.m., and 6:16 p.m.

Based on this information and Dooley's statements, Detective Quagliarello obtained an arrest warrant for Defendant. Defendant was arrested leaving his apartment in Durham, North Carolina early in the morning of 13 October 2017. When Defendant was arrested, Detective Quagliarello searched Defendant's bedroom pursuant to a search warrant. Evidence collected included a shirt that appeared similar to one worn in one of the Facebook photos and a black zip-up hooded sweatshirt with white draw strings resembling the one worn in the Facebook photos and the suspect's sweatshirt from the surveillance video. Additionally, in a suitcase in Defendant's bedroom, Deputies discovered a piece of paper with the name "Cyril Efobi"—the victim's name—written on it.

Prior to trial, Defendant filed a Motion to Suppress "fruits of cell tower dumps of location information & [an] invalid geofence 'warrant.'" Defendant argued law enforcement needed warrants for both the Tower Dump and the CSLI, and the Tower Dump and CSLI Orders RPD had obtained were insufficient. After a suppression hearing on 20 August 2021, the trial court denied Defendant's Motion, determining the Orders were the functional equivalent of warrants and were supported by probable cause.

Defendant's trial began 24 August 2021. At trial, Dooley testified for the State consistent with the initial statements he gave Detective Quagliarello. The State played recordings of phone calls between Dooley and Defendant for the jury. Additionally, the State asked Dooley, "[d]o you know what [Defendant was incarcerated] for?" Dooley answered before Defendant was able to object and stated, "I think he told me a handgun." Defendant then objected and the trial court sustained the objection. However, Defendant did not move to strike Dooley's response. Further, Dooley testified Defendant expressed his belief he had gained status as a result of committing the murder. Finally, Dooley stated appearing as a witness for the State was dangerous for him due to Defendant's alleged gang involvement.

Additionally, the halfway house supervisor, Dori Jones, also testified for the State. The State asked her to explain what a halfway house is, and Defendant objected. The jury left the courtroom so the trial court could hear arguments on this issue. Defendant contended the testimony explaining a halfway house would be prejudicial because it implies Defendant had been in prison, which was merely tangential to the State's case. The trial court overruled Defendant's objection but determined to give a limiting instruction to the jury. When the jury returned, the State resumed questioning and Jones explained a halfway house is "a community-based program where we contract with the government to house individuals coming from federal prison." The trial court then gave a limiting instruction, telling the jury it could only consider this testimony "for the purpose of determining opportunity

and/or a plan.”

Defendant presented no evidence. On 30 August 2021, the jury returned its verdict finding Defendant was guilty of first-degree murder. Defendant was sentenced to a term of life in prison without the possibility of parole. Defendant timely filed written Notice of Appeal on 13 September 2021.

Issues Presented

The issues are whether the trial court erred by: (I) denying Defendant’s Motion to Suppress; and (II) admitting testimony reflecting Defendant’s prior criminal conviction and alleged gang affiliation.

Analysis

I. Motion to Suppress

On appeal to this Court, Defendant first contends the trial court erred in denying his Motion to Suppress evidence related to the Tower Dump Order and CSLI Order. “Our review of a trial court’s denial of a motion to suppress is strictly limited to a determination of whether [the trial court’s] findings are supported by competent evidence, and in turn, whether the findings support the trial court’s ultimate conclusion.” *State v. Reynolds*, 161 N.C. App. 144, 146-47, 587 S.E.2d 456, 458 (2003) (citation and quotation marks omitted). The trial court’s conclusions of law, however, are “subject to full review, and will be sustained if they are correct in light of its findings of fact.” *State v. Foy*, 208 N.C. App. 562, 564, 703 S.E.2d 741, 742 (2010) (citing *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993), *cert. denied*,

512 U.S. 1254, 114 S.Ct. 2784, 129 L.Ed.2d 895 (1994)).

A. Findings of Fact

Defendant challenges the trial court's Finding of Fact 2 and part of Finding of Fact 3. The Findings read:

2. Shell casings collected at the crime scene indicated that the shooting had taken place in front of the Universal Cab Company and that a nine-millimeter weapon had been used.

3. . . . Shots are fired and the suspect is seen fleeing the scene with what appears to be a handgun in his right hand.

Defendant asserts these Findings were based on information that did not appear in the applications for either Order and therefore should not have been used to assess whether the issuing judges properly found probable cause. Defendant is correct—this information does not appear in either application. Consequently, it should not have been considered in evaluating whether the issuing judges properly found probable cause. *State v. Brown*, 248 N.C. App. 72, 75-76, 787 S.E.2d 81, 85 (2016) (Noting outside of one exception, “it is error for a reviewing court to rely [] upon facts elicited at the [suppression] hearing that [go] beyond the four corners of [the] warrant.” (alterations in original) (citation and quotation marks omitted)). However, based on the remaining unchallenged Findings, we conclude the trial court did not err in concluding probable cause existed to support the CSLI Order.

B. Conclusion of Law

Defendant further challenges the trial court's Conclusion evidence obtained

based on the Tower Dump Order and the CSLI Order was admissible, and both Orders were supported by probable cause. Because we conclude the CSLI Order was supported by probable cause independent of any information derived from the Tower Dump Order, and the same data obtained by the Tower Dump Order was captured by the CSLI Order, we consider only the CSLI Order.

The Fourth Amendment of the U.S. Constitution and Article 1, Section 20, of the Constitution of North Carolina protect against unreasonable searches and seizures by requiring the issuance of a warrant only on a showing of probable cause. *See State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302-03 (2016). A court determines whether probable cause exists with a totality-of-the-circumstances test. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 230-31, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527, 543-44 (1983)); *see also State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260-61 (1984). “[T]he probable cause analysis under the federal and state constitutions is identical.” *Id.* To obtain a warrant, a magistrate must find there is probable cause that “evidence of a crime will be found in a particular place.” *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (citation omitted).

In *Carpenter v. United States*, the U.S. Supreme Court held “an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.” 585 U.S. ___, ___, 138 S.Ct. 2206, 2217, 201 L.Ed.2d 507, 521 (2018). Further, the government’s acquisition of a defendant’s CSLI constitutes a search. *Id.* at 2220, 201 L.E.2d at 525. Accordingly, a warrant is generally required

for the government to obtain an individual's CSLI. *Id.* at 2221, 201 L.Ed.2d. at 525.

This Court in *State v. Gore* considered a search granted under an order pursuant to N.C. Gen. Stat. §§ 15A-262 and 263. 272 N.C. App. 98, 846 S.E.2d 295 (2020). The *Gore* Court held a warrantless search of historical CSLI violates a defendant's rights under the North Carolina Constitution. *Id.* at 104, 846 S.E.2d at 299. However, the Court found no error in the trial court's denial of the defendant's motion to suppress "because the application to obtain defendant's CSLI contains all the information necessary from which the trial court could have issued a warrant supported by probable cause." *Id.*

Here, as in *Gore*, the issuing magistrate found probable cause: "Mr. Quagliarello. . . has offered specific and articulable facts showing that there is probable cause to believe that the [historical CSLI] [is] relevant and material to an ongoing criminal investigation[.]" *Compare, Gore*, 272 N.C. App. at 107, 846 S.E.2d at 301 (affirming the government's application for historical CSLI where the issuing magistrate found " 'the applicant has shown Probable Cause that the information sought is relevant and material to an ongoing criminal investigation.' "). The information in the CSLI Order application shows the trial court had a substantial basis for reaching that Conclusion, even without any information derived from the Tower Dump Order.

In his application for the CSLI Order, Detective Quagliarello alleged the following: He had received information from an FBI agent that a person incarcerated

in a federal prison identified Defendant as the suspect in this case. This person stated Defendant had told him about the incident and “gave details concerning the case that were not released to the public.” Detective Quagliarello determined Defendant resided at a federal halfway house at the time of the incident, and the halfway house’s records showed Defendant had signed himself out of the facility on the day of the murder and the day prior ostensibly to work at Axxcess Staffing. However, Axxcess Staffing’s records indicated Defendant did not work for them on either day in question. A photograph of Defendant provided by the halfway house showed he matched the description of the suspect from the surveillance video. The person incarcerated provided Defendant’s phone number to Detective Quagliarello, and this number corresponded to an account under Defendant’s name on Facebook.

None of the information above stems from the Tower Dump Order or the evidence it produced. Still, the CSLI Order application clearly supplied information supporting “*a probability or substantial chance of criminal activity*,” *State v. McKinney*, 368 N.C. 161, 165, 775 S.E.2d 821, 825 (2015) (emphasis in original) (citation omitted), “or the identity of a person participating in an offense,” N.C. Gen. Stat. § 15A-242(4) (2021), required to establish probable cause. Thus, the trial court properly concluded the CSLI Order was “supported by probable cause.” Therefore, the trial court did not err in denying Defendant’s Motion to Suppress.

II. Testimony Admitted at Trial

Defendant challenges the admission of testimony at trial, most of which was

admitted over Defendant's objection. Some, however, was admitted without objection. We consider each in turn.

A. Testimony Admitted Over Objection

Defendant contends the trial court improperly admitted certain testimony over his objections under North Carolina Rules of Evidence 403, 404(a), and 404(b). The testimony at issue concerns Defendant's prior incarceration. Defendant specifically challenges the admission of Dooley's testimony regarding their time together in federal prison, Dooley's testimony about the prior offense for which Defendant was incarcerated, and the halfway house supervisor's testimony explaining the purpose of a halfway house.

i. Rules 404(a) and (b)

When the State asked Dooley whether he knew what offense Defendant had previously been incarcerated for, Dooley answered before Defendant was able to object. The trial court sustained Defendant's objection; however, Defendant did not then move to strike Dooley's answer from the record. "Where a defendant does not move to strike an inadmissible answer, his objection is waived." *State v. Anthony*, 271 N.C. App. 749, 752, 845 S.E.2d 452, 455 (2020) (citing *State v. Battle*, 267 N.C. 513, 520, 148 S.E.2d 599, 604 (1966)); see also *State v. Curry*, 203 N.C. App. 375, 387, 692 S.E.2d 129, 138 (2010) ("We first note that defendant's counsel objected *after* the witness had answered the question, and he failed to make a motion to strike; thus, defendant waived this objection." (emphasis in original)). Thus, even if admission of

the handgun testimony was error, Defendant has waived appellate review.

Rules 404(a) and (b) both consider the admissibility of character evidence. Under 404(a), evidence of a person's character is generally not admissible to prove "that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a) (2021). Rule 404(b) provides "[e]vidence 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." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2021). Thus, evidence does not run afoul of Rule 404 so long as it is submitted for a proper purpose, not to assert a defendant has the propensity to commit a particular offense. *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987) (evidence of prior bad acts "is admissible under Rule 404(b) so long as it also is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried." (citation and quotation marks omitted) (emphasis in original)). Under Rule 404(b), evidence of prior acts may be admitted for such purposes 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) (2021).

Testimony admitted under both Rule 404(a) and (b) is reviewed de novo. *State v. Dixon*, 261 N.C. App. 676, 687, 821 S.E.2d 232, 241 (2018); *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)

(citation and quotation marks omitted).

In this case, Dooley testified he became friends with Defendant while they were incarcerated in the same prison. This Court has stated a determination whether evidence was properly admitted under Rule 404(b) requires us to consider “[f]irst, is the evidence relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried? Second, is that purpose relevant to an issue material to the pending case?” *State v. Golden*, 224 N.C. App. 136, 141, 735 S.E.2d 425, 429 (2012) (citing *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990) and *State v. Anderson*, 350 N.C. 152, 175, 513 S.E.2d 296, 310 (1999)). Evidence of other crimes or wrongs by a defendant is admissible under Rule 404(b) “so long as it is relevant to any fact or issue other than the character of the accused.” *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986) (citation omitted).

Here, Dooley’s testimony went to the issue of identity by establishing his relationship to Defendant. “Identity is a proper purpose within the meaning of Rule 404(b).” *State v. Haskins*, 104 N.C. App. 675, 681, 411 S.E.2d 376, 381 (1991). Further, our Supreme Court has held “knowledge of the relationship between [the witness] and defendant was necessary in order for the jury to assess [the witness]’ credibility and determine what weight to give his testimony concerning defendant’s confession to this crime.” *State v. White*, 340 N.C. 264, 285-86, 457 S.E.2d 841, 853 (1995); *see also State v. Carvalho*, 243 N.C. App. 394, 405, 777 S.E.2d 78, 86 (2015).

Similarly, Dooley's testimony regarding how he met and developed a relationship with Defendant goes precisely to this issue and was therefore necessary for the jury to assess Dooley's credibility and "determine what weight to give his testimony concerning defendant's confession[.]" *White*, 340 N.C. at 285-86, 457 S.E.2d at 853. Thus, although Defendant's prior incarceration implicates his character, Dooley's testimony did not run afoul of Rule 404(b) because it is relevant to material issues other than Defendant's character.

Additionally, the trial court gave a limiting instruction precisely on this issue.

The trial court instructed the jury:

[T]he fact that the Defendant may have been incarcerated and the reasons for his incarceration in federal prison are not evidence of his guilt in this case. . . You may consider it for purposes of understanding the relationship between [Dooley] and [Defendant]. . . You cannot consider it for evidence of guilt.

A jury is presumed to follow limiting instructions. *Carvalho*, 243 N.C. App. at 405, 777 S.E.2d at 86. The trial court asked whether any member of the jury felt they could not follow the instruction, and no juror indicated they could not. There is thus no evidence in the Record the jury considered this testimony for an improper purpose.

Defendant also challenges the admission of Jones' testimony regarding the purpose of a halfway house. The State asked Jones to explain what a halfway house is for the jury and, before she could answer, Defendant objected and asked to be heard on the issue. Upon Defendant's objection to Jones' testimony, the trial court conducted a lengthy voir dire outside of the jury's presence. The State argued Jones'

testimony went to a plan, specifically the State's theory Defendant lied about going to work to have an alibi for the time of the murder. "Evidence of other offenses is admissible if it tends to show the existence of a plan or design to commit the offense charged, or to accomplish a goal of which the offense charged is a part[.]" *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 892 (1991) (citation and quotation marks omitted). Further, the trial court issued a limiting instruction after Jones' testimony which correctly identified the permissible purposes for which the jury could use this testimony, stating:

the circumstances that brought [Defendant] to that house or the fact that he may have been incarcerated at some point in time is not relevant to whether he is guilty of the charge—the charges before you. You may consider this for the purpose of determining opportunity and/or a plan. But you may not consider it as evidence because he may have done something in the past means he did something now.

The trial court asked whether any juror could not follow the instruction, and none so indicated. Thus, the trial court expressly stated this testimony could only be considered with respect to plan and opportunity, and there is no evidence in the Record indicating the jury did not follow the instruction. Therefore, the trial court did not err by admitting Jones' testimony because it was presented for a permissible purpose and was relevant to the material issue of Defendant's plan. *See Golden*, 224 N.C. App. at 141, 735 S.E.2d at 429 (citations omitted). The trial court also issued a limiting instruction properly constraining the jury's consideration of Jones' testimony. Consequently, the trial court did not err by admitting Jones' and Dooley's

testimony.

ii. Rule 403 Balancing

Defendant also argues the trial court abused its discretion in admitting the above testimony because alluding to Defendant's prior incarceration had an unfairly prejudicial effect of showing Defendant to have bad character.

After determining evidence is offered for a proper purpose and is relevant, the trial court must balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. *State v. Bynum*, 111 N.C. App. 845, 848-49, 433 S.E.2d 778, 780 (1993) (citation omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2021). "Unfair prejudice, as used in Rule 403, means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (citation and quotation marks omitted). "Whether to exclude evidence pursuant to Rule 403 is a matter left to the sound discretion of the trial court." *State v. Jones*, 347 N.C. 193, 213, 491 S.E.2d 641,653 (1997) (citation omitted). A trial court's ruling will be reversed for abuse of discretion "only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted).

"[M]ere prejudice is not the determining factor in the Rule 403 balancing test[;]" the burden is on the defendant to prove unfair prejudice, and the trial court

must determine whether the unfair prejudice substantially outweighs the probative value of challenged evidence. *State v. Walters*, 209 N.C. App. 158, 163, 703 S.E.2d 493, 497 (2011). “[A]ll evidence offered by the State will have a prejudicial effect on a defendant; however, the prejudicial effect will vary in degree.” *State v. Golphin*, 352 N.C. 364, 434, 533 S.E.2d 168, 215 (2000) (citations omitted).

Here, the trial court heard Defendant’s objections to Jones’ testimony in depth. Defendant objected to Dooley’s testimony on multiple occasions, and after these recurring objections the trial court stated:

[Trial Court]: What’s the basis? Same basis?

[Defense Counsel]: [Rule] 403, yeah.

[Trial Court]: Overruled. As I –I think it’s the—given that the jury has said they can follow my instructions, the probative value of [Dooley’s] testimony as to the nature of their relationship is not substantially outweighed by any prejudicial value, given the fact that the jury has indicated they can follow my instructions; therefore, in my discretion, I’ll allow the testimony and overrule the objection.

Additionally, as discussed above, the trial court gave several limiting instructions on these issues. First, after Jones’ testimony defining a halfway house, the trial court told the jury “the circumstances that brought [Defendant] to that house or the fact that he may have been incarcerated at some point in time is not relevant to whether he is guilty of the charge[.]” Further, the trial court explicitly stated the purposes for which the jury could and could not consider the evidence: “You may consider this for the purpose of determining opportunity and/or a plan. But you may

not consider it as evidence because he may have done something in the past means he did something now.” Second, after Dooley’s statement he and Defendant had been incarcerated together, the trial court instructed the jury it could not consider Defendant’s prior incarceration or the reasons for his incarceration as evidence of guilt.

A trial court “can guard[] against the possibility of prejudice by instructing the jury to consider [the witness’s] testimony only for the limited [permissible] purposes[.]” *State v. Hargrave*, 198 N.C. App. 579, 586, 680 S.E.2d 254, 259 (2009) (citation and quotation marks omitted) (alterations in original). A jury is presumed to follow limiting instructions. *Carvalho*, 243 N.C. App. at 405, 777 S.E.2d at 86; *see also State v. Montgomery*, 291 N.C. 235, 244, 229 S.E.2d 904, 909 (1976) (“We assume, as our system for administration of justice requires, that the jurors in this case were possessed of sufficient character and intelligence to understand and comply with th[e] limiting] instruction by the court.” (citation omitted)). In both instances, the trial court asked whether any member of the jury felt they could not follow the instruction, and no juror indicated they could not. There is thus no evidence in the Record suggesting the jury did not follow instructions.

The Record before us reflects the trial court engaged in a balancing test weighing the probative value and any unfair prejudicial impact of this evidence under Rule 403. As such, the trial court complied with the requirements of Rule 403 and did not abuse its discretion in admitting Dooley’s and Jones’ testimony.

B. Testimony Admitted Without Objection

Defendant objected to some of the testimony regarding his alleged gang affiliation; however, because he failed to object to other testimony on the same issue, his objections are not preserved. *State v. Trull*, 349 N.C. 428, 446, 509 S.E.2d 178, 191 (1998) (“[W]here evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.” (citation and quotation marks omitted)); N.C.R. App. P. 10(a)(1) (2023). Our review is therefore limited to plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (Our Supreme Court “has elected to review unpreserved issues for plain error when they involve. . . rulings on the admissibility of evidence.” (citations omitted)). “In criminal cases, an issue that was not preserved by objection noted at trial. . . 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).

“For error to constitute plain error, 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). Further, “[t]o 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.* (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982))). Thus, plain

error is reserved for “the exceptional case where, after reviewing the entire record, it can be said the claimed error is a ‘*fundamental*’ error, something so basic, so prejudicial. . . that justice cannot have been done,’ or ‘where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *McCaskill*, 676 F.2d at 1002).

Defendant challenges the admission of Dooley’s testimony concerning: Defendant’s gang affiliation; Defendant being put in charge of lower-status gang members after the murder; Defendant’s alleged gang name; and the potential danger for Dooley based on his testimony at trial. At trial, the State played recorded phone calls between Dooley and Defendant in which Dooley referred to Defendant as “Bloody Ty,” which he explained was Defendant’s “gang name.” Additionally in the phone calls, Dooley referred to the “Bloods,” a well-known gang, and said Defendant “[ran] shit.” Dooley testified this referred to Defendant being put in charge of other gang members after committing the murder. Lastly, Dooley explained it was dangerous for him to appear as a witness at trial because “[Defendant’s] a gang member. They’re everywhere, the Bloods.” Even assuming admission of this testimony was error, Defendant has not satisfied the prejudice requirement for plain error.

Although the State did not have significant physical evidence or eyewitness testimony to identify Defendant as the perpetrator, the State had significant circumstantial evidence. At trial, the State presented Dooley’s testimony, including

recordings of some of his conversations with Defendant. In his statements to RPD prior to Defendant's indictment, Dooley reported information about the murder that had not been released to the public. The State also presented significant cell site data placing Defendant in the area of the murder at the relevant times corresponding to the surveillance video of the suspect walking the perimeter of the Universal Cab Company on 7 November 2016 and struggling with Efobi before fleeing the scene on 8 November 2016. The State presented photos Defendant posted on Facebook in which he resembled and appeared in similar clothes to the suspect in the surveillance video. Finally, the State presented the paper seized from Defendant's apartment following his arrest with the victim's name on it.

Given this substantial evidence, it is unlikely the jury would have reached a different verdict absent the testimony about Defendant's alleged gang affiliation. Although, as the State acknowledges, this testimony was used in part to bolster Dooley's credibility, the State supported Dooley's credibility in other ways, such as by showing the repeated calls between Dooley and Defendant, as well as by demonstrating Dooley knew details about the crime that were not public. Thus, we cannot say this is an "exceptional case" in which the alleged error rises to the level of plain error. *See McCaskill*, 676 F.2d at 1002. Therefore, we conclude the trial court did not err by admitting Dooley's testimony regarding Defendant's alleged gang affiliation.

Conclusion

STATE V. COOPER

Opinion of the Court

Accordingly, for the foregoing reasons, we conclude there was no error at trial, and we affirm the Judgment entered against Defendant.

NO ERROR.

Judges MURPHY and GRIFFIN concur.

Report per Rule 30(e).