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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1125

Filed 2 July 2024

Mecklenburg County, No. 19CRS239213

STATE OF NORTH CAROLINA

v.

ELIJAH RAHIM MINGO

Appeal by defendant from judgment entered 24 March 2023 by Judge Matt Osman in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2024.

*Attorney General Joshua H. Stein, by Deputy General Counsel by South A. Moore, and General Counsel Fellow Marc D. Brunton, for the State.*

*Law Office of John W. King, Jr. PLLC, by John W. Moss, for the defendant-appellant.*

TYSON, Judge.

Elijah Rahim Mingo (“Defendant”) appeals from a judgment entered upon a jury’s verdict finding him guilty of conspiracy to commit robbery with a dangerous weapon. He argues the trial court erred and committed plain error in its instructions to the jury and abused its discretion in response to the jury’s request to review

evidence during deliberations. We discern no plain error or abuse of discretion and hold no reversible error is shown.

### **I. Background**

Michael Foster made plans to meet with Chaun Robinson in Charlotte on 9 October 2019. When Robinson arrived to pick up Foster, Defendant was driving the car. Over the course of an hour, they smoked marijuana, visited an ABC store, and dropped Foster off at his home. Later that evening, Robinson invited Foster and his cousin, Gerald, to meet again at Robinson's apartment complex. When the two arrived, they picked up Robinson, who directed them to park in a secluded area to smoke marijuana.

After parking, Robinson told them he would be right back and briefly left. When Robinson returned, two masked men came out of the bushes, pointed handguns at Foster, and demanded his possessions. As Foster reached for his wallet, one of the men shot him in the upper right arm. The two masked men took Foster's wallet and phone from his pockets, and they ran off with Robinson.

Foster's cousin drove him to the hospital. While recovering, Foster looked through Robinson's social media postings in hopes of finding his assailants. He identified Defendant as the shooter based on his face tattoos, and immediately reported Defendant as his assailant to the police.

Around 10:30 p.m. the same night, police responded to the apartment complex. They identified a car matching the description Foster had been in with Robinson and

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Defendant that afternoon. The officers observed Robinson and his brother, Nigel Hitchcock, sitting in the car. Six or seven minutes later, Defendant approached the car and appeared to remove items from it. Officers identified Defendant by his face tattoos, noticed a live pistol round near where he was standing, and placed him under arrest.

Defendant, Robinson, and Hitchcock were wearing electronic monitoring devices at the time of the robbery. During trial, the State entered a PowerPoint presentation showing a timelapse schedule of the location pings of Defendant's, Robinson's, and Hitchcock's cell phones over the course of the evening into evidence as Exhibit 31. The State also entered still images of all Defendant's pings taken from the timelapse as Exhibits 32 through 38. While all of Defendant's location pings from 9 October 2019 were contained in Exhibits 32 through 38, some of Robinson's and Hitchcock's location pings were omitted from those exhibits. Exhibits 32 through 38 depicted still images of the apartments with location pings, whereas Exhibit 31 aggregated all of Defendant's, Robinson's, and Hitchcock's location pings into one timelapse.

Before deliberations, the trial court had instructed the jury to "remember the evidence, whether called to your attention or not. You should consider all the evidence, the arguments, contentions, and positions urged by the attorneys and any other contention that arises from the evidence."

During deliberations, the jury asked to review "pictures of A-P-T-S with pings."

The trial court took this to mean “pictures of apartments, with pings,” and provided Exhibits 32 through 38 for review in the courtroom. Defendant was convicted of conspiracy to commit robbery with a dangerous weapon on 24 March 2023. Defendant was sentenced as a prior record level IV offender to an active term of a minimum of 35 months to a maximum of 54 months imprisonment. Defendant gave oral notice of appeal in open court.

## **II. Jurisdiction**

Jurisdiction lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

## **III. Issues**

Defendant argues the trial court erred by: (1) failing to exercise its discretion over the jury’s request to review Exhibit 31 during deliberations; and, (2) not repeating its instruction to remember and consider all the evidence after the jury had reviewed Exhibits 32 through 38.

## **IV. Reviewing Exhibits During Jury Deliberation**

Defendant argues the trial court abused its discretion when it allowed the jury to reexamine Exhibits 32 through 38 during deliberations without also including Exhibit 31. He contends the court failed to exercise its discretion over Exhibit 31 in response to the jury’s request, and that it prejudicially erred by not providing Exhibit 31 to the jury, giving undue prominence to Exhibits 32 through 38.

### **A. Standard of Review**

This Court reviews a trial court’s ruling on a jury’s request to review evidence

during deliberations for an abuse of discretion. *State v. Long*, 196 N.C. App. 22, 27, 674 S.E.2d 696, 699 (2009). A trial court abuses its discretion when its decision is “so arbitrary that it could not have been the result of a reasoned decision.” *State v. Perez*, 135 N.C. App. 543, 555, 522 S.E.2d 102, 110 (1999) (citation omitted).

When the jury requests to review evidence during deliberations, the trial court must exercise its discretion over the request. *State v. Hayes*, 239 N.C. App. 539, 557, 768 S.E.2d 636, 648 (2015). When the trial court assigns no reason for its decision, it is presumed on appeal that the trial court exercised its discretion. *State v. Maness*, 363 N.C. 261, 278, 677 S.E.2d 796, 807 (2009).

A trial court’s failure to exercise its discretion is reviewable for error and preserved for appeal, even when the defendant fails to object. *State v. Hinton*, 226 N.C. App. 108, 116, 738 S.E.2d 241, 248 (2013). The defendant then has the burden of showing that the error was prejudicial. *Id.* at 117, 738 S.E.2d at 248. An error is prejudicial when “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached.” N.C. Gen. Stat. § 15A-1443(a).

## **B. Analysis**

Defendant argues Exhibit 31 should have been included in the jury’s request to review the “pictures of A-P-T-S with pings.” The trial judge reasoned, “I presume [the jury’s request] means apartments, with pings.” Defendant argues the trial court failed to exercise its discretion by failing to include Exhibit 31 in the documents the

jury reviewed. We disagree.

After beginning deliberations, if a jury asks to reexamine testimony or evidence, the trial court “in [its] discretion . . . may permit the jury to reexamine in open court the requested materials admitted into evidence.” N.C. Gen. Stat. § 15A-1233(a) (2023). “If the trial court fails to exercise its discretion, the defendant has the burden to show ‘that he has been prejudiced by the trial court’s error[.]’ ” *Hinton*, 226 N.C. App at 117, 738 S.E.2d at 248.

“[W]hen a trial court assigns no reason for a ruling which is to be made as a matter of discretion, the reviewing court on appeal presumes that the trial court exercised its discretion.” *Maness*, 363 N.C. at 278, 677 S.E.2d at 807 (2009) (citation omitted). A trial court does not exercise its discretion when it affirmatively states it lacks discretion over a request. *State v. Lyons*, 250 N.C. App. 698, 706, 793 S.E.2d 755, 761 (2016) (“For example, a trial court fails to exercise its discretion to deny a jury’s request to review witness testimony by responding that a transcript is ‘not available’ or that the court lacks ‘the ability’ to present the transcript to the jury[.]” (citations omitted)).

When the trial court does not state or indicate it cannot make evidence available to the jury, it is presumed to have considered the request and denied it in its discretion. *State v. Guevara*, 349 N.C. 243, 253, 506 S.E.2d 711, 718 (1998). If the trial court grants a jury’s request to review evidence, it “may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence

to the evidence requested.” N.C. Gen. Stat. § 15A-1233(a).

Here, no failure to exercise discretion over Exhibit 31 is shown, because the jury never requested to review it. The jury asked to review the “pictures of A-P-T-S [apartments] with pings.” The jury did not ask to review the PowerPoint presentation with the timelapse of Defendant’s, Robinson’s, and Hitchcock’s location pings. Exhibits 32 through 38 contained the still images of the apartments with Defendant’s location pings. In the exercise of its discretion and consistent with the jury’s request, the trial court allowed the jury to review Exhibits 32 through 38.

After the trial court granted the jury’s request, neither the jury nor Defendant asked for Exhibit 31 to be included. The trial court cannot fail to exercise its discretion over a request that is never made. Additionally, the trial court never gave any indication it lacked the authority to present Exhibit 31 for review. It is presumed to have exercised its discretion over the request to review “pictures of A-P-T-S with pings.” *Guevara*, 349 N.C. at 253, 506 S.E.2d at 718.

Alternatively, Defendant argues the trial court was required to include Exhibit 31 because it contained additional relevant information not found in Exhibits 32 through 38, and the trial court gave undue prominence to Exhibits 32 through 38. The decision to include additional evidence in response to a jury request also rests within the trial court’s discretion.

According to N.C. Gen Stat. § 15A-1233(a), after granting a jury’s request to review evidence, “[i]n *his discretion* the judge *may* also have the jury review other

evidence relating to the same factual issue . . . .” N.C. Gen Stat. § 15A-1233(a) (emphasis supplied). Exhibit 31 was already admitted and presented to the jury at trial. Exhibits 32 through 38 are derived directly from Exhibit 31, as those exhibits demonstrate all of Defendant’s location pings. The trial court properly exercised its discretion to not distribute Exhibit 31 in the absence of a request.

## **V. Jury Instructions**

Defendant also argues the trial court erred by failing to instruct the jury to consider and remember all of the evidence after reviewing Exhibits 32 through 38, which he asserts is a requirement established in *State v. Weddington*. 329 N.C. 202, 208, 404 S.E.2d 671, 675 (1991).

### **A. Standard of Review**

When a party fails to preserve an issue for appeal through objection, this Court may review it “for plain error when [it] involve[s] . . . errors in the judge’s instructions to the jury[.]” *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). To demonstrate plain error, the defendant must show that had it not been for the error, the jury probably would have reached a different result. *Hayes*, 239 N.C. App. at 549, 768 S.E.2d at 644.

### **B. Analysis**

Defendant argues *State v. Weddington* imposes a requirement upon the trial court to “instruct the jury that it must remember and consider the rest of the evidence” after each time the jury reviews evidence during deliberations. 329 N.C. at



208, 404 S.E.2d at 675. Defendant argues the trial court failed to do so after providing Exhibits 32 through 38 to the jury at their request, and this failure was prejudicial. We disagree.

Defendant failed to request the instruction or to object to the instruction as given. Presuming, without deciding, this constituted error, Defendant has not shown the error was prejudicial under plain error review. Exhibit 31 is largely irrelevant to Defendant's conviction of conspiracy to commit robbery with a deadly weapon. A criminal conspiracy has two elements: (1) an agreement between two or more persons (2) to do an unlawful act or a lawful act in an unlawful way or by unlawful means. *State v. Lyons*, 268 N.C. App 603, 607-08, 836 S.E.2d 917, 921 (2019).

Location is not an element of the offense, and where Defendant was at the time of the robbery has no bearing on whether he had agreed to participate in the conspiracy. Further, at the beginning of deliberations, the trial court instructed the jury to "remember the evidence" and "consider all the evidence[.]" Defendant has not shown the trial court's failure to repeat the instruction after the jury reviewed Exhibits 32 through 38 would have probably resulted in a different outcome. Defendant fails to demonstrate plain error in the trial court's failure to repeat the instruction. *Id.*

## **VI. Conclusion**

The trial court properly exercised its discretion over the jury's request to review evidence during deliberations and did not commit plain error in instructing

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the jury. Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. Defendant demonstrates no reversible or prejudicial error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).