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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-899

Filed 5 November 2024

Johnston County, Nos. 19 CRS 1702, 1767, 56239

STATE OF NORTH CAROLINA

v.

KENNETH DEKEYSER, JR.

Appeal by defendant from judgment entered 16 December 2022 by Judge G. Bryan Collins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 27 August 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Cheryl Kaminski, for the State.

MK Mann Law, by Mikayla Mann, for defendant-appellant.

ZACHARY, Judge.

Defendant Kenneth Dekeyser, Jr., appeals from the trial court's judgment entered upon the jury's verdicts finding him guilty of two counts of felony habitual larceny and upon his plea of guilty to having attained habitual-felon status. After careful review, we conclude that Defendant received a fair trial, free from error.

I. BACKGROUND

Clarks Outlet Store and Wilsons Leather Outlet are retail stores located within an outlet mall in Smithfield. On the evening of 10 October 2019, Tyisha Melvin was working at Clarks. She saw an older black man wearing a distinctive jacket with the writing “Muhammad Ali” on the front lingering in one area of the store, but when she approached him, he left. Melvin then noticed that “shoes were taken” and called 9-1-1. Melvin stood at a store window, while on the phone with the 9-1-1 dispatcher, and “ke[pt] [her] eye on [the perpetrator] as he left Clarks going [toward] Nike[.]” which she reported to the 9-1-1 dispatcher.

Around the same time, Steven Driver was working at Wilsons Leather, which is located near the Nike store in the outlet mall. According to Driver, a black man wearing a black jumpsuit entered Wilsons Leather, “circle[d] around a couple different racks[.]” “stayed in one area, and then all of a sudden took off running out of the store” carrying jackets, headed toward “the Nike area and into the parking lot[.]” Driver then “went over to [the] rack and saw that there were [security] sensors on the floor that had been cut from the jackets.”

Smithfield Police Department Officer Sean Cook heard the Clarks larceny dispatch. Officer Cook “drove around the area” of the Nike store and saw Defendant, who matched the visual description relayed by the dispatcher. Defendant was standing in the front of his friend’s vehicle in the Nike parking lot.

Defendant began to run when Officer Cook approached him. Officer Cook apprehended Defendant and placed him in handcuffs near the friend's vehicle. Officer Cook also detained the vehicle's owner.

When Officer Cook frisked Defendant, he "[r]etrieved several cutting instruments[,]" including "either some ten cutter, side snips, or razor blade, something of the sort to cut those heavy metal pins and those tags." In Officer Cook's experience, a shoplifter will use a cutting tool to remove antitheft devices or sensors from merchandise to avoid tripping an alarm. He then assisted in a search of the vehicle and removed "two leather jackets" and "two pairs of Clarks brand shoes."

The Wilsons Leather theft had not yet been reported. However, the discovery of the leather jackets led Officer Cook to suspect that a theft had occurred there, so he walked to Wilsons Leather. He learned from Driver that a theft had just happened. Driver explained that he "couldn't tell [Officer Cook] exactly what items were missing because [they] came off of a rack," but Driver did tell Officer Cook that he "had the [security] sensors that were left after the situation happened."

Officer Cook retrieved the jackets and presented them to Driver, who pointed out that "exactly where the antitheft device would have been[,]" there "was a hole in the material itself where the device was removed improperly with some kind of cutting device[.]" Driver showed Officer Cook the "jacket rack" from which the items were removed; the merchandise "match[ed] the jackets that c[a]me from the racks, and the [security] sensors would have been from those jackets as well." Officer Cook

then returned the two pairs of shoes to Clarks after confirming with Melvin that the shoes had been stolen.

Smithfield Police Department Officer William Faircloth also received the Clarks larceny dispatch. When Officer Faircloth arrived, Defendant was in handcuffs in the Nike parking lot. In Officer Faircloth's dashcam footage, Defendant can be seen wearing a black jumpsuit, including a black jacket with the name "Ali" visible.

On 2 December 2019, a Johnston County grand jury returned true bills of indictment charging Defendant with three counts of felony habitual larceny pursuant to N.C. Gen. Stat. § 14-72(b)(6). On 16 December 2019, the grand jury indicted Defendant for attaining habitual felon status, pursuant to N.C. Gen. Stat. § 14-7.1. Before Defendant's case came on for trial, the State voluntarily dismissed one count of felony habitual larceny.

Defendant's case came on for jury trial beginning on 14 December 2022. That same day, the jury returned verdicts finding Defendant guilty of two counts of felony larceny, and Defendant pleaded guilty to attaining habitual felon status. On 16 December 2022, the trial court entered judgment sentencing Defendant to a term of 128 to 166 months in the custody of the North Carolina Division of Adult Correction. Defendant gave oral notice of appeal.

II. DISCUSSION

Defendant raises three arguments on appeal. He first contends that the trial court erred when it denied his motion to dismiss the charges of felony habitual

larceny because the State failed to present substantial evidence that either larceny occurred, or that Defendant committed a larceny at Wilsons Leather.

In addition, Defendant challenges the admission into evidence of dashcam footage of statements that he made to Officer Faircloth. Defendant first argues that he received ineffective assistance of counsel because of his trial counsel's failure to move to suppress the statements that Defendant made regarding his drug usage and "an explicit admission of guilt"; Defendant maintains that these statements were made while he was "in custody without being advised of his *Miranda* rights[.]" Defendant further contends that the trial court committed plain error in admitting the dashcam footage containing his statements about his drug usage because the statements were inadmissible under Rules 401, 402, 403, and 404(b) of the North Carolina Rules of Evidence.

A. Motion to Dismiss

Defendant argues that the State presented "insufficient evidence [that] a larceny occurred at Clarks" because there was not substantial evidence "that the shoes found in the car were stolen from Clarks." Defendant bases this on the facts that, although Melvin "stated that there was an empty space near where a man in a 'Muhammad Ali' jacket was standing," she "did not see the man leave with anything in his hands" and she did not otherwise "provide evidence that the shoes the officer brought to the store were actually stolen."

Next, Defendant contends that the State failed to present substantial “evidence that a larceny occurred at [Wilson’s] Leather” because “[t]here was no report of missing property or a larceny from” Wilson’s Leather. Defendant notes that Driver “testified that he could not tell exactly what was missing because the items the officer brought to the store looked like items that were on a rack”; therefore, Defendant alleges that the State failed to present substantial “evidence that the jackets were actually stolen[.]” In addition, Defendant argues that the State failed to present substantial evidence that Defendant committed the Wilson’s Leather larceny.

We are not persuaded that the trial court erred in denying the motions to dismiss.

1. Standard of Review

This Court reviews de novo a trial court’s denial of a motion to dismiss. *State v. Hobson*, 261 N.C. App. 60, 70, 819 S.E.2d 397, 404, *disc. review denied*, 371 N.C. 793, 821 S.E.2d 173 (2018).

“When ruling on a defendant’s motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense.” *Id.* (citation omitted). “Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion.” *State v. Osborne*, 372 N.C. 619, 626, 831 S.E.2d 328, 333 (2019) (cleaned up).

“[T]he evidence must be considered in the light most favorable to the State [and] the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom.” *Id.* (cleaned up). “[I]f the record developed before the trial court contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.” *Id.* (cleaned up). “Moreover, both competent and incompetent evidence that is favorable to the State must be considered by the trial court in ruling on a defendant’s motion to dismiss.” *Id.* (citation omitted).

“Once the [trial] court decides that a reasonable inference of the defendant’s guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.” *State v. Parker*, 274 N.C. App. 464, 468, 852 S.E.2d 638, 644 (2020) (cleaned up). In considering such motions, the trial court is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971).

“In borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury” *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (cleaned up), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

2. Discussion

“[I]n North Carolina, larceny remains a common law crime.” *State v. Hsiung*, 291 N.C. App. 104, 115, 895 S.E.2d 411, 417 (2023) (cleaned up), *disc. review denied*, 386 N.C. 283, 900 S.E.2d 670 (2024). The essential elements of larceny “are that the defendant (a) took the property of another; (b) carried it away; (c) without the owner’s consent; and (d) with the intent to deprive the owner of his property permanently.” *Id.* at 115, 895 S.E.2d at 417–18 (cleaned up); *accord State v. Sisk*, 285 N.C. App. 637, 641, 878 S.E.2d 183, 186 (2022).

In the instant case, the State charged Defendant with felony habitual larceny pursuant to N.C. Gen. Stat. § 14-72(b)(6). N.C. Gen. Stat. § 14-72(b)(6) “elevat[es] misdemeanor larceny to felony larceny” but it “does not change the nature of the crime; [the] elements of proof remain the same.” *Hsiung*, 291 N.C. App. at 115, 895 S.E.2d at 417.

N.C. Gen. Stat. § 14-72(b)(6) renders “[t]he crime of larceny” a felony “without regard to the value of the property in question” where the larceny is, *inter alia*, “[c]ommitted after the defendant has been convicted . . . for any offense of larceny . . . or any offense deemed or punishable as larceny . . . , regardless of whether the prior convictions were misdemeanors, felonies, or a combination thereof, at least four times.” N.C. Gen. Stat. § 14-72(b)(6) (2023). Here, Defendant stipulated to having at least four prior qualifying larceny convictions.

a. Substantial Evidence of the Clarks Larceny

STATE V. DEKEYSER

Opinion of the Court

We first address Defendant's argument that the State failed to present substantial evidence "that the shoes found in the car were stolen from Clarks."

As Defendant acknowledges, he made "an explicit admission of guilt" to Officer Faircloth while being transported to the police station. This confession was recorded by Officer Faircloth's dashcam, and the recording of these statements was admitted into evidence as State's Exhibit 3 and played for the jury.¹

In addition to Defendant's admission, there was substantial other evidence that there was a larceny at Clarks. On cross-examination, Defendant's counsel asked Officer Cook: "Do you recall if you asked [Melvin] about the shoes that you were returning, are these shoes from this store?" Officer Cook testified that "I would have absolutely asked that. It would have been basic investigative questions." The exchange continued:

[Defendant's counsel:] Do you recall if she knew the answer?

¹ Defendant maintains that the trial court committed plain error by admitting these statements concerning his drug usage. Regardless, our Supreme Court has explained that for purposes of a defendant's motion to dismiss, "when evaluating the sufficiency of the evidence, all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction in question":

[A] reviewing court errs to the extent that it determines whether the evidence suffices to support a defendant's criminal conviction by ascertaining whether the evidence relevant to the issue of the defendant's guilt should or should not have been admitted and then evaluating whether the admissible evidence, examined without reference to the allegedly inadmissible evidence that the trial court allowed the jury to hear, sufficed to support the defendant's conviction.

Osborne, 372 N.C. at 630, 831 S.E.2d at 335–36. Accordingly, these statements are properly considered with regard to the trial court's denial of Defendant's motion to dismiss.

[Officer Cook:] I would assume yes. I wouldn't return property to a business that the property is not their property.

Q. They were Clarks brand; weren't they?

A. Yes, sir.

Moreover, Melvin testified that when she approached the man wearing the "Muhammad Ali" jacket, "the customer left the store." Melvin then "noticed that some shoes were taken" and called 9-1-1. Officer Cook found two pairs of Clarks brand shoes in the vehicle owned by Defendant's friend, which was parked in the same area that Melvin described to the 9-1-1 dispatcher as the area to which the perpetrator was heading, and next to which Defendant was standing.

"Thus, the record, when considered in its entirety and without regard to whether specific items of evidence found in the record were or were not admissible, contains ample evidence tending to show" that the two pairs of Clarks brand shoes were stolen from Clarks. *Osborne*, 372 N.C. at 631, 831 S.E.2d at 337. Defendant's arguments are overruled.

b. Substantial Evidence of the Wilsons Leather Larceny

We next address Defendant's argument that the State failed to present substantial evidence "that the jackets were actually stolen" from Wilsons Leather.

The State presented ample evidence of a larceny at Wilsons Leather. On 10 October 2019, Driver was working at Wilsons Leather, which is located near Nike.

Driver saw a black man wearing a black jumpsuit enter the store, “circle around a couple different racks[,] . . . and then all of a sudden [take] off running out of the store” carrying jackets, and head toward “the Nike area and into the parking lot[.]” Driver “went over to [the] rack and saw that there were [security] sensors on the floor that had been cut from the jackets.”

Before Driver had the chance to call 9-1-1, Officer Cook had searched Defendant’s friend’s vehicle and removed “two leather jackets.” Officer Cook went to Wilsons Leather, where Driver confirmed that there had been a theft. Driver explained that while he “couldn’t tell [Officer Cook] exactly what items were missing because [they] came off of a rack,” he did have “the [security] sensors that were left” on the floor as the perpetrator fled the store.

Officer Cook retrieved the leather jackets from the vehicle and presented them to Driver. Driver pointed out to Officer Cook that “exactly where the antitheft device would have been[,]” there “was a hole in the material itself where the device was removed improperly with some kind of cutting device[.]” Driver was also able to tell from which “jacket rack” the man took the jackets, because they “match[ed] the jackets that c[a]me from the racks[.]” He added that “the [security] sensors would have been from those jackets as well.”

We conclude that the State presented substantial evidence of a larceny at Wilsons Leather such that the trial court did not err in submitting the charge to the jury. *See id.* Defendant’s arguments are overruled.

c. Substantial Evidence that Defendant was the Perpetrator

Finally, Defendant argues that “[t]he State failed to produce sufficient evidence that [Defendant] was the person who [Driver] saw inside” Wilsons Leather on 10 October 2019, in that “[t]here was no mention of Muhammad Ali in the brief description given by [Driver].”

The State’s evidence tended to show that shortly after Officer Cook received the Clarks larceny dispatch, he radioed to Officer Faircloth that he “ha[d] a suspect in his sight.” Officer Cook spotted Defendant by the vehicle in the Nike parking lot, the location to which Driver saw the individual running from Wilsons Leather. Officer Cook recovered cutting tools—of the type that shoplifters are known to use to remove antitheft sensors—from Defendant’s pockets. He also recovered stolen Wilsons Leather jackets from inside the vehicle belonging to Defendant’s friend, next to which Defendant was standing when apprehended. In addition, Defendant matched the visual descriptions of the perpetrator given by Melvin and Driver.

The State presented substantial evidence from which a jury could reasonably infer Defendant’s identity as the perpetrator of the larceny at Wilsons Leather. *See id.* Thus, Defendant’s arguments are overruled.

B. Statements in State’s Exhibit 3

Defendant next raises two arguments concerning statements that he made to Officer Faircloth that were recorded by Officer Faircloth’s dashcam and included in a

portion of the dashcam footage that the trial court admitted into evidence as State's Exhibit 3. This footage included the following exchange:

[Officer Faircloth:] You should probably think about retiring.

[Defendant:] I have, man. These g***** handcuffs killing my wrists, man.

[Officer:] Say what?

[Defendant:] These handcuffs killing my wrists.

[Officer:] We'll—we'll be out soon. How long have you been cutting hair?

[Defendant:] About thirty-five years.

[Officer:] And you don't make enough d*** money to pay for [unintelligible]?

[Defendant:] Yeah, man. Because I be getting high, man.

[Officer:] Say what?

[Defendant:] I be getting high, man.

[Officer:] You be getting high?

[Defendant:] Yeah, I ain't gone lie.

[Officer:] You smoke weed?

[Defendant:] Smoke weed.

[Officer:] Is that the only thing you do?

[Defendant:] Sniff a little powder every now and then.

[Officer:] Well, if you're going to have to have habits, you

got to be able to pay for it. Can't be stealing s***.

Defendant neglected to file a proper motion to suppress the statements that he contends on appeal were the product of a custodial interrogation without his *Miranda* rights having been read.² Because Defendant failed to file a motion to suppress the statements, Defendant waived any “objection that [the evidence was] obtained in violation of . . . the United States or North Carolina Constitutions.” *State v. Satterfield*, 300 N.C. 621, 624, 268 S.E.2d 510, 513 (1980). Instead, regarding this issue, Defendant argues (1) that he received ineffective assistance of counsel, and (2) that the trial court plainly erred by admitting this evidence.

1. Ineffective Assistance of Counsel

Defendant argues that his “[c]ounsel was deficient for failing to make an obvious and meritorious suppression motion.” According to Defendant, “[i]f trial counsel was acting as a reasonable attorney, he should have made a motion to suppress [Defendant]’s admission made without proper *Miranda* warnings because the statement was highly prejudicial.” (Italics added).

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that his counsel’s performance was deficient, and the deficient performance prejudiced his defense. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271,

² In *Miranda v. Arizona*, the United States Supreme Court held that the State “may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] defendant unless [the State] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966).

286, *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). “Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (cleaned up).

“[T]he two prongs of an ineffective assistance claim (attorney error and prejudice) need not be considered in any particular order. In fact, the [United States Supreme] Court [has] intimated that disposing of an ineffective assistance claim on the ground of lack of sufficient prejudice, if possible, is preferable.” *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985).

Accordingly, we begin by determining whether there is a reasonable probability that, but for Defendant’s counsel’s failure to file a motion to suppress Defendant’s statements in State’s Exhibit 3, the result of the proceeding would have been different.

Initially, we note that State’s Exhibit 3 contains only visual footage of the lengthy encounter between Defendant and law enforcement officers in the parking lot, and there is no audio until Officer Faircloth and Defendant approach and enter Officer Faircloth’s patrol vehicle. Further, State’s Exhibit 3 does not begin until after Officer Cook was frisking Defendant. Thus, it is not evident from the cold record that the officers failed to read Defendant his *Miranda* rights prior to Defendant making the statements contained in State’s Exhibit 3.

Nonetheless, in light of the overwhelming evidence of Defendant's guilt at trial, the prejudice prong of Defendant's claim of ineffective assistance of counsel "may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Hernandez*, ___ N.C. App. ___, ___, 899 S.E.2d 899, 913 (2024) (citation omitted).

Although Defendant asserts that "[w]ithout the statements on the [dashcam footage], the evidence against [him] was largely circumstantial" and thus the admission of the statements was manifestly prejudicial to his defense, we are not persuaded.

As explained above, the State presented substantial evidence of Defendant's guilt of both larcenies. Defendant matched Melvin's description of the perpetrator, and he was discovered in the same area to which both Melvin and Driver testified that they saw Defendant heading after leaving their stores with merchandise. Officer Cook searched Defendant's pockets and recovered cutting tools used for removing antitheft devices. Officers found stolen merchandise from both Clarks and Wilsons Leather inside Defendant's friend's vehicle, in front of which Defendant was standing when Officer Cook detained him.

Additionally, both Melvin and Driver testified at trial and gave descriptive accounts of the larcenies, including visual descriptions of the perpetrator. Defendant appears at the beginning of State's Exhibit 3, and it is clear that he is a black male wearing a black jumpsuit bearing the name and image of "Ali[.]" consistent with the

descriptions of the perpetrator. Officer Faircloth also testified that the back of Defendant's jacket had "a picture of Muhammad Ali in one of his fights where he has his glove up."

Considering the overwhelming evidence of Defendant's guilt of the larcenies, we conclude that Defendant cannot show that there is a reasonable probability that the jury would have returned a different verdict had the statements in State's Exhibit 3 been excluded from evidence. *See Allen*, 360 N.C. at 316, 626 S.E.2d at 286. Because Defendant cannot establish prejudice, his claim of ineffective assistance of counsel fails. *See Dockery*, 78 N.C. App. at 192, 336 S.E.2d at 721.

2. Plain Error

Lastly, Defendant argues that the trial court committed plain error in admitting the dashcam footage in which Defendant makes statements about his drug usage because these statements were inadmissible under Rules 401, 402, 403, and 404(b) of the North Carolina Rules of Evidence.

"[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012); *see also State v. Hammett*, 361 N.C. 92, 97–98, 637 S.E.2d 518, 522 (2006). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. To show that an error was fundamental, the 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.* (cleaned up).

Plain error “is always to be applied cautiously and only in the exceptional case[.]” *State v. Koke*, 264 N.C. App. 101, 107, 824 S.E.2d 887, 891 (2019) (citation omitted). The error must be “so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]” *Id.* (citation omitted). Plain error is often found where the error “seriously affects the fairness, integrity or public reputation of judicial proceedings[.]” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (cleaned up).

For the reasons stated above, Defendant has failed to show that the admission of dashcam footage containing Defendant’s statements about his drug usage had a probable impact on the jury’s finding that he was guilty of the larceny charges. *See id.* Defendant therefore cannot establish prejudice, and Defendant’s argument that the trial court committed plain error in admitting the dashcam footage of Defendant’s statements is overruled.

III. CONCLUSION

For the reasons stated herein, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges MURPHY and GORE concur.

Report per Rule 30(e).