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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-4

Filed 3 December 2024

Cleveland County, Nos. 22CRS30, 22CRS50154

STATE OF NORTH CAROLINA

v.

DONAVON DERON ESKRIDGE, Defendant.

Appeal by defendant from judgment entered 28 March 2023 by Judge Karen Eady-Williams in Cleveland County Superior Court. Heard in the Court of Appeals 11 September 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Jodi P. Carpenter, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woome-Deters, for defendant-appellant.

FLOOD, Judge.

Defendant Donavon Deron Eskridge appeals from the trial court's judgment finding him guilty of possession of a firearm by a felon and attaining habitual felon status. On appeal, Defendant argues (A) the trial court abused its discretion or plainly erred in allowing testimonies and statements made by law enforcement

officers concerning Defendant's possession of the gun to be admitted. Defendant alternatively argues (B) he received ineffective assistance of counsel ("IAC") where counsel failed to object to or failed to move to strike law enforcement officers' testimonies. Upon careful review, we conclude the trial court neither abused its discretion, nor committed plain error, in allowing testimonies and statements made by law enforcement officers concerning Defendant's possession of the gun to be admitted. We further conclude Defendant failed to demonstrate he was prejudiced, and therefore dismiss his IAC argument.

I. Facts and Procedural Background

On 14 January 2022, Sergeant Daniel Bernat of the Shelby Police Department was working as a patrol officer when he received a report of gunshots fired at the 400 block of Airline Avenue in Shelby, North Carolina. Although Sergeant Bernat did not see anything or find anyone where the gunshots were reported, he continued to patrol the area. Sergeant Bernat drove by 504 Airline Avenue, at which time he saw Defendant, along with several other individuals, standing outside a house. Upon conducting a warrant check, Sergeant Bernat discovered that Defendant had an active warrant for misdemeanor larceny. Sergeant Bernat noticed that everyone outside the house was calm, and he saw Defendant standing near two vehicles parked in the front yard, smoking a cigarette. Defendant then turned and walked towards the house. Sergeant Bernat walked towards Defendant, informed him he had a warrant for Defendant's arrest, and saw Defendant had his left hand in his front left

pocket, where Sergeant Bernat also noticed “a blunt object” inside that pocket. Sergeant Bernat grabbed Defendant’s left arm, while Defendant tightly grabbed the object and tried to pull away. Sergeant Bernat told Defendant not to pull away from him, and placed him on the ground.

Sergeant Bernat called for backup, and three minutes later, Officer Steven Hawkins, who was also on patrol, arrived. Officer Hawkins gave Defendant commands to place both hands behind his back, at which point Defendant grasped at his own waistband area. Defendant then released his hands, and the officers were able to handcuff Defendant. The officers searched Defendant on one side of his body, and then lifted him to his feet. When Defendant stood up, Officer Hawkins noticed a bulge of what appeared to be a handgun on the right inner side of the calf of Defendant’s right leg. Sergeant Bernat searched Defendant’s leg, and retrieved a black Taurus semiautomatic 9 millimeter handgun.

Defendant was arrested that same day and charged with possession of a firearm by a felon. On 14 February 2022, a grand jury indicted Defendant for possession of a firearm by a felon and attaining habitual felon status. On 27 March 2023, the matter came on for trial. On the first day of trial, Defendant stipulated he was a convicted felon.

At trial, Officer Hawkins testified that as he was walking Defendant to the patrol car, he “observed [Defendant’s] leg kind of dragging the ground and kind of . . . in a[n] effort to disguise something moving in his pants leg.” He further testified he

noticed “a bulge in . . . the bottom part of [Defendant’s] sweatpants near his ankle[, that] was the outline of a firearm.” Defense counsel did not object to this testimony.

Footage from Officer Hawkins’ body cam was thereafter admitted into evidence, which showed a conversation between Officer Hawkins and Sergeant Bernat after Defendant was placed in a patrol vehicle. Defense counsel objected to introduction of footage from the point after which Defendant was placed in the patrol vehicle, but the trial court overruled defense counsel’s objection. In the body cam footage, Officer Hawkins stated that “[Defendant] was trying to get that gun out of his pants when we was walking up this way.” In the footage, Sergeant Barnat responded: “And what happened was, when I put him on the ground, you seen me lock his arms.” Officer Hawkins then responded: “He was probably trying to push that gun out.”

Sergeant Bernat testified that, during the officers’ attempt to arrest Defendant, Defendant was “given loud verbal commands to place his hand behind his back, at which time he basically grasp[ed] at his waistband area, where he ha[d] both hands clenched towards that area of his waistband.” Sergeant Bernat further testified that, based on his training and experience of thirteen years in law enforcement, Defendant’s actions were “basically an attempt to get rid of a weapon that is dominantly carried there because it’s easily accessible, it’s easy to get rid of. That is dominantly where an individual who’s not lawfully allowed to carry a firearm would carry one.” Defense counsel objected to Sergeant Bernat’s testimony, but the

trial court overruled this objection. Defense counsel did not move to strike the testimony.

Footage from Sergeant Bernat's body cam was played and admitted into evidence, which showed a statement Defendant made after he was transported to the jail facility for fingerprinting as part of the booking procedure. The footage showed that, while Sergeant Bernat was entering Defendant's information into a database, Defendant made the following statement: "A person was showing me the gun. When you pulled up, the gun was on me."

Defendant also testified, providing that, the day of his arrest, he was talking to an acquaintance when a man known as "Jade" approached him from behind. According to Defendant, two days prior to this, Defendant had sold Jade weed, and Jade accused Defendant of shorting him in the deal, which Defendant denied. When Jade approached Defendant from behind, Defendant turned around and found Jade pointing a gun in his face. Jade demanded money, and Defendant believed he was being robbed and feared for his life. Defendant grabbed the gun, and Jade pulled the trigger, resulting in a blast that "went past [Defendant's] head." Defendant overpowered Jade, wrestled him to the ground, and grabbed the gun from him, after which Jade ran away. Defendant testified he did not feel safe after Jade ran away and wanted to protect himself, so Defendant put the gun in the waistband of his pants.

Defendant's account was corroborated in part by Paris Marion, whose aunt

owned the house where the incident occurred. Marion testified as to the argument between Defendant and Jade—whom Marion did not know—that Jade pulled the gun on Defendant when “it went off[,]” and that they were fighting each other. Marion further testified he went into the house to check on his aunt and did not leave the residence again until the officers arrived at the scene. Marion did not inform the officers about the altercation, and neither of the officers asked him questions, although Marion and Sergeant Bernat exchanged greetings, where Sergeant Bernat asked Marion if he was doing alright, to which Marion responded: “Everything is all right[.]”

The trial court thereafter instructed the jury, and as part of its instructions, included the defense of justification. On 28 March 2023, the jury convicted Defendant of possession of a firearm by a felon and attaining habitual felon status, and the trial court imposed a sentence of 101 to 134 months’ imprisonment. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to review an appeal from a final judgment of a superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Analysis

On appeal, Defendant argues (A) the trial court abused its discretion or plainly erred in allowing testimonies and statements by law enforcement officers concerning Defendant’s possession of the gun to be admitted. Specifically, Defendant contends

that three statements made by the law enforcement officers were improperly admitted as lay or expert witness testimony: (1) Officer Hawkins telling Sergeant Bernat, on Officer Hawkins' body cam footage, that that he thought Defendant was attempting to get rid of the gun; (2) Officer Hawkins' testimony that Defendant was trying to conceal the gun; and (3) Sergeant Bernat's testimony that people who carry guns unlawfully are likely to carry them in their waistbands. Defendant alternatively argues (B) he received IAC where defense counsel failed to object to or failed to move to strike law enforcement officers' testimonies. We address each argument, in turn.

As a preliminary matter, we address the issue of whether the officers' statements and testimonies were properly preserved for appellate review.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). "Failure to move to strike [an inadmissible] part of an answer, *even though the answer is objected to*, results in a waiver of the objection." *State v. Chatman*, 308 N.C. 169, 178, 301 S.E.2d 71, 77 (1983) (emphasis in original); *see also State v. Anthony*, 271 N.C. App. 749, 752, 845 S.E.2d 452, 455 (2020).

Here, defense counsel timely objected to Officer Hawkins' statement that he thought Defendant was attempting to get rid of the gun, thus preserving the

statement for appellate review. *See Chatman*, 308 N.C. at 178, 301 S.E.2d at 77. Defense counsel, however, did not object to Officer Hawkins' testimony that Defendant was trying to conceal the gun, and although defense counsel objected to Sergeant Bernat's testimony that people who carry guns unlawfully are likely to carry them in their waistbands, defense counsel did not make a motion to strike. *See id.* at 178, 301 S.E.2d at 77; *Anthony*, 271 N.C. App. at 752, 845 S.E.2d at 455. Accordingly, only Officer Hawkins' statement to Sergeant Bernat that he thought Defendant was attempting to get rid of the gun, was properly preserved for appellate review.

A. Preserved Evidence

Defendant first argues Officer Hawkins' statement, as shown in his body cam footage, that "[Defendant] was trying to get that gun out of his pants when we was walking up this way[]" and "was probably trying to push that gun out[,] was inadmissible opinion testimony and was prejudicial to Defendant. We disagree.

Admissibility of expert or lay opinion testimony is reviewed for an abuse of discretion. *See State v. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010); *see also State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Ward*, 364 N.C. at 139–40, 694 S.E.2d at 742 (citation and internal quotation marks omitted).

A witness who is not testifying as an expert may give testimony in the form of

an opinion, as long as the opinion is “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C.R. Evid. 701. A witness may testify to shorthand statements of facts, which include “instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.” *State v. Williams*, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987) (citation omitted); *see also* N.C.R. Evid. 701. Shorthand statements of fact are admissible “even though the witness must also state a conclusion or opinion in rendering them.” *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981); *see also* N.C.R. Evid. 704 (“Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”). If the trial court commits error in admitting testimony, such 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 at the trial out of which the appeal arises.” *State v. Belk*, 201 N.C. App. 412, 418, 689 S.E.2d 439, 443 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2023)).

In *State v. McVay*, at the trial from which the appeal arose, the trial court admitted lay opinion testimonies by “various law enforcement officers that [the] defendant ‘tried to kill’ [a law enforcement officer].” 174 N.C. App. 335, 339, 620 S.E.2d 883, 885 (2005). On appeal, this Court held there was no error in admitting the law enforcement officers’ testimonies, finding that the testimonies by law

enforcement officers “amounted to nothing more than shorthand statements of fact based on their knowledge and observations.” *Id.* at 339, 620 S.E.2d at 886. Further, this Court found that “[t]he statements made by the police officers do not implicate the guilt or mental state or intent of the defendant, but rather explain their perceptions and the impact of those perceptions on their actions.” *Id.* at 339, 620 S.E.2d at 886.

Just like the law enforcement officers’ testimonies in *McVay* that the defendant “tried to kill” a law enforcement officer was nothing more than a “shorthand statement of fact based on [the law enforcement officers’] knowledge and observations[,]” so here was Officer Hawkins’ statement that Defendant was trying to get rid of the gun also no more than a shorthand statement of fact based on Officer Hawkins’ knowledge and observations. *Id.* at 339, 620 S.E.2d at 886. Further, Officer Hawkins’ statement only “explained [his] perceptions and the impact of those perceptions on [his] actions[,]” namely, that he observed Defendant was trying to get rid of the gun, and as a result, “relayed that information to Sergeant Bernat[, a]nd Sergeant Bernat actually retrieved said gun.” *Id.* at 339, 620 S.E.2d at 886.

Officer Hawkins’ statement likewise did not “implicate the guilt or mental state or intent of [Defendant].” *Id.* at 339, 620 S.E.2d at 886. In *State v. Turnage*, this Court held that a law enforcement officer’s testimony that the defendant was searched and found with “a screwdriver and a metal rod in his pockets indicating that he was just probably in the process of breaking into a residence[,]” and that “[t]hose

types of tools [are] used [] to break into residences[,]” was improper lay witness testimony that drew inferences as to the defendant’s guilt. 190 N.C. App. 123, 129, 660 S.E.2d 129, 133 (2008). Similarly, in *State v. Carrillo*, this Court found that it was error to allow law enforcement officers “to offer their opinions of whether [the] defendant was guilty.” 164 N.C. App. 204, 210, 595 S.E.2d 219, 223 (2004).

Here, on the other hand, Officer Hawkins’ statement did not impermissibly state or draw inferences for the jury that Defendant was guilty because Officer Hawkins did not suggest Defendant was attempting to commit a crime or was guilty of a crime. *See Turnage*, 190 N.C. App. at 129, 660 S.E.2d at 133; *Carrillo*, 164 N.C. App. at 210, 595 S.E.2d at 223. Rather, Officer Hawkins’ statement simply described what Defendant was doing—trying to get rid of the gun—without making any suggestion as to Defendant’s guilt. Officer Hawkins’ statement was therefore, as stated above, simply a shorthand statement of fact based on his knowledge and observations, which permitted the jury itself to decide on Defendant’s guilt. *See McVay*, 174 N.C. App. at 339, 620 S.E.2d at 886; *Turnage*, 190 N.C. App. at 129, 660 S.E.2d at 133.

Accordingly, just as this Court held the admission of the law enforcement officers’ statements in *McVay* were not in error, so here was the trial court’s admission of Officer Hawkins’ statement not in error. *See* 174 N.C. App. at 339, 620 S.E.2d at 886. Since the trial court did not err in admitting the statement, it certainly did not prejudicially err, and thus the trial court did not abuse its discretion in

admitting Officer Hawkins' statement as proper lay witness opinion testimony. *See id.* at 339, 620 S.E.2d at 886; *Belk*, 201 N.C. App. at 418, 689 S.E.2d at 443.

B. Unpreserved Evidence

Defendant next argues the trial court plainly erred in admitting Officer Hawkins' testimony that he "observed [Defendant's] leg kind of dragging the ground and kind of . . . in a[n] effort to disguise something moving in his pants leg[]," and that he noticed "a bulge in . . . the bottom part of [Defendant's] sweatpants near his ankle[, that] was the outline of a firearm[,]" as well as Sergeant Bernat's testimony that "[the waistband] is dominantly where an individual who's not lawfully allowed to carry a firearm would carry one." Upon review, we find these statements do not amount to plain error, because the State presented substantial additional evidence of Defendant's guilt.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action 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); *see also State v. Hunt*, 250 N.C. App. 238, 246, 792 S.E.2d 552, 559 (2016). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. . . . [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." *State v. Lawrence*, 365

N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation marks omitted).

Testimony was presented at trial that, upon arriving at the scene, Sergeant Bernat noticed everyone was calm, and that he spoke with an individual who was approaching the house but who did not say anything about an attempted robbery. Further testimony was presented that Defendant walked away from Sergeant Bernat rather than approach him to discuss the attempted robbery, nor did Defendant ever inform Sergeant Bernat he was the victim of an attempted robbery. Defendant also tried to avoid being arrested by Sergeant Bernat. During the booking procedure, Defendant stated to Sergeant Bernat, “[a] person was showing me the gun. When you pulled up, the gun was on me.” Marion, who corroborated Defendant’s testimony, did not see Defendant take possession of the gun after Marion went inside the house, nor did he tell law enforcement officers about the attempted robbery.

Given the substantial evidence from which a jury could reasonably find Defendant guilty, Defendant has failed to demonstrate that, but for the admission of these statements, any error in admitting them “had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* at 518, 723 S.E.2d at 334. Accordingly, Defendant was not prejudiced by the trial court’s admission of these statements, and the trial court did not commit plain error. *See id.* at 518, 723 S.E.2d at 334.

C. Ineffective Assistance of Counsel

Defendant alternatively argues that defense counsel’s failure to timely object

to or move to strike the unpreserved statements by Officer Hawkins and Sergeant Bernat amounts to IAC, or that the cumulative impact of the challenged evidence amounts to prejudice. We disagree.

“On appeal, this Court reviews whether a defendant was denied effective assistance of counsel *de novo*.” *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). “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 omitted and cleaned up).

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense. 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.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations omitted and cleaned up); *see also Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064–65, 80 L.Ed. 2d 674, 693–95 (1984). “Because [IAC] claims focus on the reasonableness of counsel’s performance, courts can consider the cumulative effect of alleged errors by counsel.” *State v. Allen*, 378 N.C. 286, 304, 861 S.E.2d 273, 286 (2021) (citation omitted).

As discussed previously, Defendant has failed to demonstrate that admission

of any of the law enforcement officers' statements amounted to plain error; thus, Defendant has failed to demonstrate that he was prejudiced by defense counsel's failure to timely object or move to strike the relevant testimony. *See Allen*, 360 N.C. at 316, 626 S.E.2d at 286. Accordingly, because Defendant was not prejudiced, Defendant cannot prevail on an IAC claim; thus, we dismiss Defendant's IAC claim. *See id.* at 316, 626 S.E.2d at 286. Further, because Defendant has failed to establish an IAC claim, he cannot demonstrate that the cumulative effect of counsel's deficient performance warrants a new trial. *See Allen*, 378 N.C. at 304, 861 S.E.2d at 286; *see also State v. Campbell*, 359 N.C. 644, 705, 617 S.E.2d 1, 38 (2005) (holding that where the "defendant has shown no basis for reversal . . . for [IAC]," the defendant cannot show that "the cumulative effect of his counsel's constitutionally deficient performance requires reversal of his conviction[]").

IV. Conclusion

Upon review, we conclude the trial court did not abuse its discretion in admitting Officer Hawkins' statement that Defendant was trying to get rid of the gun, because the testimony was properly admitted as lay opinion testimony and was not prejudicial. We further conclude the trial court did not commit plain error in admitting the other statements by Officer Hawkins and Sergeant Bernat because there was substantial uncontested evidence that a jury could reasonably consider in determining Defendant's guilt. Finally, because Defendant cannot show he was prejudiced, his IAC and cumulative error claims fail. We therefore find the trial court

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committed no error and no plain error, and we dismiss Defendant's IAC claim.

NO ERROR In Part, NO PLAIN ERROR In Part, and DISMISSED In Part.

Judges CARPENTER and STADING concur.

Report per Rule 30(e).