IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1291

Filed: 17 October 2017

Forsyth County, No. 13 CRS 58606

STATE OF NORTH CAROLINA

v.

JASON ERIC TAYLOR

Appeal by defendant from judgment entered 26 May 2016 by Judge Michael D. Duncan in Forsyth County Superior Court. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General James Bernier, Jr., for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.

CALABRIA, Judge.

Where the fact that defendant was threatened and felt threatened was introduced into evidence, the exclusion of the specific language of the threat was not prejudicial error. Where there was insufficient evidence in the record that the trial court's instructions to the jury were coercive, the trial court did not commit plain

error in encouraging the jury to reach a verdict. Where the trial court was permitted to enter its findings orally, and did so, it did not err in declining to enter written findings on defendant's motion to suppress.

I. Factual and Procedural Background

In the early morning of 31 August 2013, Jason Eric Taylor ("defendant") had been at a club in downtown Winston-Salem. At approximately 2 a.m., defendant was approached by four or five men looking for a ride, who told defendant to drive them. When defendant refused, the men threatened him.

Defendant drove past a Winston-Salem Police Department ("WSPD") car driven by Officer Edwina Stewart ("Officer Stewart"). Officer Stewart observed that defendant's headlights were not on, and initiated a traffic stop. After Officer Stewart stopped him, defendant admitted that he had three beers before driving. During the stop, defendant repeatedly asserted that his passengers had forced him to drive. Officer Stewart administered multiple field sobriety tests, and ultimately arrested defendant. At the WSPD station, defendant's blood measured an alcohol content of .09.

Defendant was charged via magistrate's order with driving while impaired. The matter came before Forsyth County District Court, and defendant moved to dismiss the charge for lack of probable cause. According to defendant's motion, the arresting officer lacked reasonable suspicion to stop defendant's vehicle. According

to defense counsel, that motion was never heard. The district court judge sentenced defendant to an active term of 30 days in the custody of the Forsyth County Sheriff's Department, then suspended that sentence and placed defendant on supervised probation for a period of 24 months.

Defendant appealed to Forsyth County Superior Court. Before trial, defendant moved to suppress the stop, on the same basis as his previously filed motion to dismiss. The trial court declined to rule on the motion before trial, but allowed it to be reconsidered during trial.

At trial, although defendant was permitted to testify that he had been threatened, the trial court sustained the State's objections to defendant introducing the specific threats the men made. Defendant testified that, based on what happened, he felt "forced to get in that car and drive[.]"

Officer Stewart testified that defendant's headlights were not on, and she followed defendant for a period to see whether he would turn them on. She testified that he did not turn them on as she followed him. Video footage from Officer Stewart's dashboard camera was introduced into evidence, which raised a question of whether defendant's headlights were on. The video showed a group of men leaving defendant's vehicle after it was stopped. After Officer Stewart testified, defendant renewed the motion to suppress, which the trial court denied.

After the State and defense rested, the trial court instructed the jury, which proceeded to deliberation. After several hours of deliberating, the jury indicated that it was split. Court adjourned for the evening, and the next morning, the trial court encouraged the jury to continue deliberating. The jury ultimately returned a verdict finding defendant guilty of driving while impaired. The trial court sentenced defendant to two years in the custody of the Misdemeanant Confinement Program, then suspended that sentence and placed defendant on suspended probation for a period of 24 months. As a special condition of probation, defendant was to serve 45 days in the custody of the Forsyth County Sheriff's Department.

Defendant appeals.

II. Exclusion of Evidence

In his first argument, defendant contends that the trial court erred in excluding testimony as hearsay. We disagree.

A. Standard of Review

"The trial court's determination as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal." *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293, *appeal dismissed and disc. review denied*, 365 N.C. 354, 718 S.E.2d 148 (2011).

B. Analysis

At trial, defendant asserted as a defense the fact that he had been coerced into driving. He offered to introduce the exact language of the threats against him to explain his subsequent conduct, but this was rejected as hearsay. On appeal, defendant contends that the exclusion of this evidence was error.

"Rule 801 of the Rules of Evidence defines '[h]earsay' as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' " *Castaneda*, 215 N.C. App. at 147, 715 S.E.2d at 293 (quoting N.C.R. Evid. 801(c)). That said, we have held that:

> "[o]ut-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Call,* 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). In particular, statements of one person to another to explain subsequent actions taken by the person to whom the statements were made are admissible as non-hearsay evidence. *State v. Coffey,* 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990). "The reason such statements are admissible is not that they fall under an exception to the [hearsay] rule, but that they simply are not hearsay—they do not come within the . . . legal definition of the term." *Long v. Paving Co.,* 47 N.C. App. 564, 569, 268 S.E.2d 1, 5 (1980).

Id. In the instant case, defendant contends that the statement in question, the alleged threat made against him, was being introduced to explain his subsequent conduct, namely the fact that he was coerced.

We have long held, however, that "exclusion of evidence cannot be prejudicial when the witness later testifies to the same facts or the evidence is merely cumulative

of other testimony." *State v. Anderson*, 26 N.C. App. 422, 425, 216 S.E.2d 166, 168 (1975). In the instant case, although the language of the threat itself was not introduced into evidence, defendant testified extensively regarding the fact that he was threatened, and that his subsequent conduct was a result of the threat. For example, defendant testified, "I stated to the party that approached me, I didn't want to drive. They threatened me." The State moved to strike this statement, but the trial court overruled the objection. Defendant was then asked what specifically made him feel threatened; he responded that "[t]hey were scary individuals[,]" and that they were "[t]attooed down, shaved heads, gang colors." He added that he actually felt scared by them. He further testified that he felt "[o]ne hundred percent" that they would hurt him if he did not comply.

It is therefore clear from the record that defendant introduced evidence that (1) he was threatened, (2) he actually felt threatened, and (3) that feeling influenced his subsequent actions. Even assuming *arguendo* that it was error for the trial court to exclude the specific language of the threat made against defendant, the fact that defendant was threatened was ultimately introduced into evidence, as was evidence that the threat coerced his actions. It was therefore cumulative. As such, even if the exclusion of the words constituted error, it could not be prejudicial. We hold therefore that the trial court did not commit prejudicial error in excluding the specific language of the threat.

III. Plain Error

In his second argument, defendant contends that the trial court committed plain error in encouraging the jury to reach a verdict after deadlock. We disagree.

A. Standard of Review

The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

> [T]he plain error rule . . . is always to be applied cautiously and only in 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, so lacking in its elements 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, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted).

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Analysis

After roughly three hours of deliberation, the jury submitted a note to the trial court, stating that "after multiple votes the jury is split on guilty versus non guilty." The trial court considered the jury's split, and resolved to "just send [the jury] home for the night, separate them from one another a little bit, come back tomorrow and see if they can start afresh." The trial court then called the jury into the courtroom, and asked whether further deliberations would enable the jury to reach a unanimous verdict. The foreperson of the jury responded, "not without, you know, additional evidence with regards to the coercion piece of the testimony." The trial court then recessed for the evening, instructing the jury to return for deliberations in the morning, and emphasizing that "[i]t has to be a unanimous verdict."

The proceedings resumed the following morning. The trial court then instructed the jury as follows:

> Ladies and gentlemen of the jury, jurors have the duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. Each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with his or her fellow jurors. In the course of deliberations a juror should not hesitate to re-examine his or her own views and change his or her opinion if convinced it was erroneous. Finally, no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a verdict.

The jury then deliberated for roughly one hour and fifteen minutes, at which time it reached its verdict.

Defendant contends that the trial court's conduct constituted plain error, in that the trial court coerced the jury to continue deliberations after the jury informed the court that it was deadlocked.

"It is well settled that Article I, Section 24 of the Constitution of North Carolina prohibits a trial court from coercing a jury to return a verdict." *State v. Patterson*, 332 N.C. 409, 415, 420 S.E.2d 98, 101 (1992). "In determining whether a trial court's actions are coercive under this section of our Constitution, we must analyze the trial court's actions in light of the totality of the circumstances facing the trial court at the time it acted." *Id.* at 415-16, 420 S.E.2d at 101. We note that although a constitutional issue may not usually be raised pursuant to plain error review, one involving jury instructions may be raised. *See State v. May*, 368 N.C. 112, 118, 772 S.E.2d 458, 462 (2015) (holding that "because the alleged constitutional error occurred during the trial court's instructions to the jury, we may review for plain error").

Our General Statutes provide that, with respect to unanimous decisions and deadlocked juries:

> (a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C. Gen. Stat. § 15A-1235 (2015). "We have held that even when jury instructions do not precisely follow the guidelines set forth in N.C.G.S. § 15A-1235, no error arises when the essence of the instructions was merely to ask the jury to continue to

deliberate without being coercive." *May*, 368 N.C. at 120, 772 S.E.2d at 464 (citation and quotation marks omitted).

In *May*, the jury deliberated for several hours before announcing that it was deadlocked. The trial court instructed the jury to continue deliberations, but emphasized that no juror should abandon his own conviction for the sake of a unanimous verdict. After another half hour of deliberations, the jury remained deadlocked. The trial court encouraged the jury to continue deliberations for one more half hour. At the end of that time, the jury returned a verdict finding the defendant guilty on one charge, but remained deadlocked on the remaining two charges. The trial court declared a mistrial with respect to the remaining two charges. On appeal, this Court held that the trial court's instructions were coercive and unconstitutional. *State v. May*, 230 N.C. App. 366, 381-82, 749 S.E.2d 483, 493 (2013).

On discretionary review, our Supreme Court reversed, noting that "through the course of three separate instructions, the trial court repeatedly emphasized to the jurors the importance of their individual convictions, while giving instructions that substantially tracked the language of N.C.G.S. § 15A-1235(b)." *May*, 368 N.C. at 121 772 S.E.2d at 464 (citation and quotation marks omitted). The Court therefore held that defendant had failed to establish that the trial court committed plain error.

In the instant case, upon reconvening the next morning, the trial court recited the contents of N.C. Gen. Stat. § 15A-1235(b) virtually verbatim. It is clear that these instructions "emphasized to the jurors the importance of their individual convictions, while giving instructions that substantially tracked the language of N.C.G.S. § 15A-1235(b)." We therefore hold, as our Supreme Court did in *May*, that the trial court's instruction to the jury was not coercive, and that defendant has failed to demonstrate that the trial court committed plain error in its jury instruction.

IV. Motion to Suppress

In his third argument, defendant contends that the trial court erred in failing to make specific written findings of fact when ruling on defendant's motion to suppress. We disagree.

A. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

B. Analysis

In a pretrial motion before the trial court, defendant moved to suppress the evidence of the stop. After some discussion, the trial court decided to hold the matter open, to be addressed if the stop were to be introduced during trial. After the testimony of Officer Stewart, defendant renewed the motion to suppress the evidence of the stop. The trial court permitted defendant to conduct a voir dire of Officer Stewart. The trial court then ruled on defendant's motion to suppress, and made the following oral findings:

> The Court makes the following findings: first, that the officer testified that what first drew her attention to the vehicle was the fact that when it passed by her it had no headlights on. The Court finds that when she -- the officer got in behind the vehicle it made its first right-hand turn, pursuant to the video, that it appears at that point in time the headlights were on, based upon the video which shows the car turning and the lights shining in a distance in a dark area.
>
> The Court has no knowledge of whether or not the headlights were turned on by the defendant from the time that the officer first saw him until the time that he made the first right-hand turn. I can't necessarily speculate as to whether or not -- or what happened during that period of time, and based upon the officer's testimony that the lights were not on I'm going to deny the motion to suppress.
>
> The video is not definitive as to when the officer first saw the defendant whether the headlights were on or not. It clearly shows that when he made his first right-hand turn, which has been identified onto Liberty Street, that at that point in time the headlights were on. It is difficult to determine from the video whether the tail lights, not the brake lights, but whether the tail lights were in fact on or not. It appears to the Court after the very first turn onto

> Liberty Street, just from my reviewing of the video it doesn't appear that the tail lights were on. But I can't, again, determine from the video exactly whether they were or were not.
>
> Both counsel have made very good arguments on behalf of their clients but based upon all the evidence that has been presented the Court is going to deny the motion to suppress.

Defendant now contends that the trial court erred in failing to make findings of fact on defendant's motion to suppress.

Our General Statutes provide that, where a motion to suppress may not be summarily denied for statutory reasons, "the judge must make the determination after a hearing and finding of facts." N.C. Gen. Stat. § 15A-977(d) (2015). Defendant cites our decision in *State v. Morgan*, in which we interpreted this statute " 'as mandating a written order unless (1) the trial court provides its rationale from the bench, and (2) there are no material conflicts in the evidence at the suppression hearing.' " *State v. Morgan*, 225 N.C. App. 784, 786, 741 S.E.2d 422, 424 (2013) (quoting *State v. Williams,* 195 N.C. App. 554, 555, 673 S.E.2d 394, 395 (2009)).

Subsequent to our decision in *Morgan*, however, our Supreme Court held that "[a] written determination setting forth the findings and conclusions is not necessary, but it is the better practice." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015). The Court further held that "our cases require findings of fact only when there is a material conflict in the evidence *and allow the trial court to make these*

findings either orally or in writing." *Id.* (emphasis added) (abrogating *State v. Williams* and those cases relying upon it).

Even assuming *arguendo* that a material conflict existed in the evidence requiring the entry of findings of fact, it is undisputed that the trial court made its findings of fact orally. We hold that this satisfied our Supreme Court's holding in *Bartlett*, and therefore that the trial court did not err in entering oral findings of fact on defendant's motion to suppress.

NO PREJUDICIAL ERROR IN PART, NO PLAIN ERROR IN PART, NO ERROR IN PART.

Judge ZACHARY concurs.

Judge MURPHY concurs in a separate opinion.

Report per Rule 30(e).

No. COA16-1291 – *State v. Taylor*

MURPHY, Judge, concurring in separate opinion.

While I concur in the Majority's result upholding Defendant's conviction and I concur fully with Parts III and IV, I write separately because I cannot join the majority's analysis in Part II. The trial court did err by sustaining the objection to Defendant's attempt to testify as to what was actually said in the alleged threat made to him, and the evidence was not cumulative of other evidence before the jury. This evidence would not have been hearsay, as the statement was not offered for the truth of the matter asserted and was relevant to the jury's consideration of the effect on the listener, here Defendant, and whether the statement constituted a reasonable basis for Defendant's duress defense. Knowing that Defendant was "threatened" is not evidence of what the threat actually was or whether the Defendant was under such duress as to excuse his failure to abide by our laws of general application. I join in the result because Defendant failed to make an offer of proof before the trial court and, therefore, has not preserved appellate review of the prejudicial effect of the trial court's error.

Further, I would dismiss Defendant's 5 April 2017 motion for appropriate relief due to ineffective assistance of counsel without prejudice to a motion being filed at the trial level, as we cannot make a proper determination upon the cold record. The trial court is in the best position to conduct an evidentiary hearing to determine: why

an offer of proof was not made; what the offer of proof would have been; and whether trial counsel's performance in not making an offer of proof was so deficient and prejudicial as to have denied Defendant his constitutional rights to counsel.