IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1319

Filed: 18 December 2018

Mecklenburg County, Nos. 15CRS012708-09

STATE OF NORTH CAROLINA

v.

KEVIN RIVERA-MARQUEZ, Defendant.

Appeal by defendant from judgment entered 10 May 2017 by Judge Charles M. Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2018.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Christina S. Hayes, for the State.*

*Attorney Richard J. Costanza, for defendant-appellant.*

BERGER, Judge.

On May 10, 2017, a Mecklenburg County jury found Kevin Rivera-Marquez ("Defendant") guilty of one count of breaking or entering a motor vehicle. Defendant received a probationary sentence, and appeals alleging that (1) he received ineffective

assistance of counsel, and (2) the trial court erred when it refused to provide a special instruction to the jury on voluntary intoxication. After review, we find no error.

Factual and Procedural Background

On November 27, 2014, Defendant broke into a motor vehicle owned by Yasmin Jackson ("Jackson"). Jackson left her apartment to find Defendant sitting in the driver's seat of her vehicle holding money she had left in the center console. Jackson testified that Defendant wore a jacket and a baseball hat during the encounter. Jackson instructed Defendant to return her money and exit the vehicle. Defendant complied, exited the vehicle, and ran down a sidewalk. As he went into a stairwell, Defendant abandoned his hat and jacket. Subsequently, Defendant returned to the area and walked past Jackson and a group of neighbors that had gathered. Defendant entered one of the units at the apartment complex, and Jackson directed officers to his location when they arrived.

Jackson testified that she smelled a moderate to strong odor of alcohol on Defendant's person, but when asked if Defendant acted like he was impaired, Jackson replied, "[i]f I didn't smell the alcohol, I don't think that I would have thought he was impaired."

Another resident of the apartment complex, Juan Carlos Perez-Soliz ("Perez") testified that it appeared someone had entered his vehicle because the glove compartment was opened and a banana peel was left in the driver's seat.

Officer Josh Knowles ("Officer Knowles") with the Charlotte-Mecklenburg Police Department responded to the scene. He found a shirt and hat in the breezeway, and located Defendant still in the apartment Jackson described. However, when Officer Knowles asked questions concerning his identity, Defendant provided him with a false ID, false date of birth, and different birthdates. Defendant's mother came out, identified Defendant as her son, and provided Officer Knowles with his birth certificate, which reflected his date of birth was July 22, 1997.

Officer Knowles testified that he did not smell an odor of alcohol about Defendant's person, and he could not tell if Defendant was slurring his words because of a language barrier. However, Officer Knowles testified that Defendant did appear to be tired. Sergeant Jason Dority also testified to a language barrier with Defendant. However, another officer attempted to interview Defendant between 2:00 a.m. and 4:30 a.m., and according to him, Defendant "appeared to have used some alcohol," had slurred his speech, and fell asleep.

Defendant testified that on November 27, 2014, he had consumed ten beers from 5:00 p.m. until midnight. Upon returning to the apartment complex, Defendant testified his "step[-]father left the left side car door open for me," that he retrieved a key from a cupholder in the car, and went into his apartment and went to sleep. Defendant was also able to recall where the car was parked and that he locked the car door after he obtained the key. When asked by his attorney if he tried to break

into anyone's vehicle, Defendant responded, "I don't remember." Defendant not only did not remember taking off his hat and jacket when he fled the scene, he testified that the hat and jacket did not belong to him.

Defendant requested the trial court provide an instruction on voluntary intoxication, but the trial court declined. Defendant was subsequently convicted of breaking or entering Jackson's motor vehicle, and he received a probationary sentence. Defendant timely appeals that conviction. Defendant was found not guilty of breaking or entering Perez's vehicle.

I. Ineffective Assistance of Counsel

Defendant contends he was denied effective assistance of counsel when his trial counsel allegedly made an unauthorized concession during opening statements and closing arguments. Specifically, Defendant argues that a *Harbison* violation occurred when, without obtaining Defendant's consent on the record, counsel conceded guilt to the lesser-included offense of first-degree trespassing. We disagree.

"[A]dmission of the defendant's guilt . . . to the jury [without the defendant's consent] is per se prejudicial error." *State v. Harbison*, 315 N.C. 175, 177, 337 S.E.2d 504, 505 (1985). "*Harbison* requires that the decision to concede guilt to a lesser included crime be made exclusively by the defendant." *State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004) (citation and quotation marks omitted). However, "counsel may reasonably reveal facts during opening arguments which will

come out later at trial in an effort to lessen their impact when they are revealed." *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004). Moreover, our appellate courts "engage[ ] in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *Id. (*citation omitted).

Rather than conceding that Defendant was guilty of a crime, defense counsel provided an opening statement with an accurate forecast of the evidence. There was a reasonable likelihood that Jackson's testimony and evidence of entry into Perez's vehicle would be admitted. This forecast of the evidence that Defendant had gone into both vehicles could reasonably "lessen the sting" in this case, and the disclosure during opening statements does not amount to a *Harbison* violation. *Id.* We also note that this preview of the evidence aligns with what plainly appears to be Defendant's strategy at trial to emphasize his intoxication in an effort to lessen his culpability.

Further, defense counsel's argument to the jury that they should consider the lesser included offense of first-degree trespassing, even when viewed in combination with the challenged statement in opening, does not amount to a *Harbison* violation. Defense counsel was simply arguing to the jury that they should fulfill their duty to consider the evidence and charges against Defendant. This statement was not an admission of guilt to any crime. Defense counsel did not concede guilt, or otherwise argue to the jury that Defendant was guilty of first-degree trespassing. Although the

better practice would be for defense counsel to bring even questionable concessions to the attention of the trial court, we cannot conclude that defense counsel's statement here amount to a *Harbison* violation.

II. Jury Instruction

Defendant next argues that the trial court erred when it declined to instruct the jury on voluntary intoxication for the offense of breaking or entering a motor vehicle. We disagree.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.*

> Voluntary intoxication is not a legal excuse for a criminal act; however, it may be sufficient in degree to prevent and therefore disprove the existence of a specific intent . . . To make the defense of voluntary intoxication

> available to defendant, the evidence must show that at the time of the [criminal act] the defendant's mind and reason were so completely intoxicated and overthrown that he could not form a specific intent to [commit the criminal act].

*State v. Gerald*, 304 N.C. 511, 521, 284 S.E.2d 312, 318-19 (1981) (citations omitted).

> It is well established that an instruction on voluntary intoxication is not required in every case in which a defendant claims that he [committed a criminal act] after consuming intoxicating beverages or controlled substances. Evidence of mere intoxication is not enough to meet defendant's burden of production. Before the trial court will be required to instruct on voluntary intoxication, defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a [specific intent]. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

*State v. Cheek*, 351 N.C. 48, 74-75, 520 S.E.2d 545, 560-61 (1999) (citations and quotation marks omitted).

In the case *sub judice*, even when viewed in the light most favorable to Defendant, there was not substantial evidence to conclude that Defendant was utterly incapable of planning and functioning as a result of his alcohol consumption *at the time he committed the crime*. While there was evidence Defendant was intoxicated, the totality of the evidence does not establish that he was so intoxicated that he could not form the requisite intent.

Defendant consumed ten beers over a seven hour period. He was able to remember significant details of his actions before and after breaking into Jackson's

vehicle. Upon returning to the apartment complex, Defendant testified the left side car door was left open by his step-father, and that the key was left in a cupholder. Defendant remembered where the vehicle was parked, that he locked the car door after he obtained the key, and that he entered his apartment and went to sleep.

That Defendant could conduct himself and had the capacity to recall the very specific details of his activities contradicts his contention, and there is no evidence that "*at the time of the crime* . . . defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a [specific intent]." *Cheek*, 351 N.C. at 74, 520 S.E.2d at 560-61 (emphasis added). Defendant's subsequent actions during his interview with officers are irrelevant to this inquiry.

Because there was insufficient evidence to justify an instruction on voluntary intoxication, the trial court did not err.

Conclusion

Defendant received a fair trial, free from error. Defendant's trial counsel was not ineffective, and the trial court did not err when it declined to instruct the jury on voluntary intoxication.

NO ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).