IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1034

Filed 7 May 2024

McDowell County, Nos. 19CRS51908, 20CRS26, 20CRS28–29

STATE OF NORTH CAROLINA

v.

JOSEPH TIMOTHY O'BUCKLEY, Defendant.

Appeal by defendant from judgment entered 12 January 2023 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 2 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jocelyn C. Wright, for the State-appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for defendant-appellant.

GORE, Judge.

Joseph Timothy O'Buckley ("defendant") argues the trial court erred by denying his motion for a mistrial where a phone call played by the State included defendant and the victim discussing defendant's past and current habitual felon status. Defendant argues this evidence was inadmissible under N.C.G.S. § 14-7.5,

highly prejudicial under § 15A-1061, and warrants a new trial. Upon review, we discern no error.

Defendant was charged with attempted murder, assault inflicting serious bodily injury, assault on a female, assault inflicting physical injury by strangulation, intimidating a witness, violating a domestic violence protective order, and attaining habitual felon status.

At trial, the victim testified that defendant began calling her from jail about ten days after the incident that led to defendant's arrest. The victim stated defendant was urging her to talk to his lawyer and decline to testify against him:

> [THE VICTIM]: [H]e kept saying because he was already a repeat offender, that he would be in jail for, like twenty —
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: You need to disregard the statement about being a repeat offender. Sustain the objection.
>
> [THE VICTIM]: Oh, I'm sorry. He was insisting that I would be putting a nail in his coffin if I testified against him.
>
> [PROSECUTOR]: How often would the defendant tell you those things about, "You shouldn't testify. You should talk to my attorney. You shouldn't talk to the DA," those kinds of things?
>
> [THE VICTIM]: Every phone call; every phone call, every single one, but only after he cried and said that he loved me and wanted to have a child with me.

Later, recordings of phone conversations between defendant and the victim were admitted into evidence and played for the jury. The State first played a call

from 25 November 2019, then one from 29 November 2019. During the 29 November 2019 phone call, the following exchange occurred:

> [DEFENDANT]: Baby, if they come back and f__king hit me with the habitual felon I could do up to the next f__king seven years in this motherf__ker over this sh_t, man.
>
> [THE VICTIM]: What!?
>
> [DEFENDANT]: Oh yeah. That one charge is 118 months.
>
> [THE VICTIM]: Which one?
>
> [DEFENDANT]: The kidnapping.
>
> [THE VICTIM]: Yeah. The strangulation is more than that I think. God d__n. Why'd you do that? God!
>
> (*Crying*)
>
> (*Unintelligible*)
>
> I said we'll be missing you for a long time if that happens. I thought — I thought habitual meant you did the same kind of crime over and over and over.
>
> [DEFENDANT]: All they have to have is one of those felonies on me baby. And they can come back. I've already got habitual felon. That's what I did them seven years for, habitual felon. All they gotta do is have one felony on me and they can come back and give it to me again.
>
> [THE VICTIM]: One? Why? God! This is what I don't like to think about.

When the call concluded, defense counsel told the court he wanted to be heard. The court responded, "Just stop that just here. Okay, members of the jury. You need to disregard the portion about him being a habitual felon. Other than that, you may consider the contents as evidence. Is that sufficient?" Defense counsel told the court

he would have a motion at the appropriate time.

Outside the presence of the jury, defense counsel made a motion for mistrial based on the portion of the call, "from my client's own mouth that he's a habitual felon." Defense counsel noted that there had been a mention of habitual felon prior to this, but he did not object at that time because he did not want to draw attention to it. He felt that the 29 November 2019 call, however, substantially prejudiced defendant because the jury would not be able to "un-hear" or disregard it despite the court's instruction.

Defense counsel also argued defendant's criminal record was inadmissible, and the parties had stipulated as much, prior to the recording being played. The prosecutor said she tried to skip that part, but a window popped up and she could not exit it quickly enough. She had no argument in opposition to the mistrial motion. The trial court denied the motion for mistrial and reiterated to the jury when they re-entered the courtroom that, "you need to disregard a portion of the statement that was made by the defendant."

Defendant was found guilty of all charges and was subsequently found to have attained habitual felon status. Defendant gave oral notice of appeal in open court and appeals pursuant to N.C.G.S. §§ 7A-27(b) and 15A-1444(a) from a final judgment in Superior Court, McDowell County.

North Carolina General Statutes § 15A-1061 provides, in part, that the trial court "must declare a mistrial upon the defendant's motion if there occurs during the

trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (2023). "Whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge, and a mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *State v. Calloway*, 305 N.C. 747, 754 (1982) (citations omitted).

Section 14-7.5 provides, in relevant part, "[t]he *indictment* that the person is an habitual felon shall not be revealed to the jury unless the jury shall find that the defendant is guilty of the principal felony or other felony with which he is charged." N.C.G.S. § 14-7.5 (2023). This Court has previously determined that § 14-7.5 "bars revelation to the jury of the *pending indictment* that the defendant is an habitual felon." *State v. Rogers*, 236 N.C. App. 201, 205 (2014) (citation omitted). Section 14-7.5 does not, however, apply to the erroneous admission of oral evidence on cross-examination or to revelation to the jury of a *previous* habitual felon conviction. *See State v. Owens*, 160 N.C. App. 494, 502 (2003) (discerning no error where "the State's questions did not refer to the pending habitual felon indictment against [the] defendant but simply served to elicit information on [the] defendant's criminal record, including a *previous* habitual felon conviction."); *State v. Thompson*, 141 N.C. App. 698, 704 (2001) (concluding that the defendant had not shown a violation of § 14-7.5 where "the State asked [the] defendant only whether he had been told that he

qualified as an 'habitual offender.'"); *State v. Aldridge*, 67 N.C. App. 655, 659 (1984) (holding that cross-examination of a defendant that disclosed prior felonies, but did not disclose a pending indictment as an habitual felon, did not violate § 14-7.5).

Here, defendant discussed the *possibility* of a habitual felon indictment during the 29 November 2019 phone call. Defendant referred to "information on [his] criminal record, including a *previous* habitual felon conviction[,]" *Owens*, 160 N.C. App. at 502, and hypothesized that he could be indicted for habitual felon in the future in an apparent effort to dissuade the victim from cooperating with the State or testifying in his prosecution. We note that defendant was not indicted for attaining habitual felon status until 13 January 2020, so at the time of the phone conversation with the victim, defendant could not have been referring to a "*pending indictment*" for which he was standing trial. *Rogers*, 236 N.C. App. at 205. Accordingly, we conclude that defendant has not shown a clear violation of § 14-7.5 in this case.

Moreover, even if we presume, *arguendo*, and without deciding that portions of the 29 November 2019 phone call were inadmissible, we conclude that defendant fails to demonstrate substantial or irreparable prejudice.

Defendant cites to our Supreme Court's decision in *State v. Hunt*, a capital case in which the prosecutor questioned a witness about whether the witness knew that the defendant had a criminal record, had served time in prison, and was currently on probation. 287 N.C. 360, 372–74 (1975). The following morning, the trial court gave a lengthy curative instruction to the jury that it should disregard the questions and

answers allowed over counsel's objection the previous day. *Id.* at 376. Our Supreme Court ordered a new trial, noting:

> that the instructions then given were not specific as to the content of the challenged questions, and by this time the evidence must have found secure lodgment in the minds of the jurors. The questions posed by the prosecutor were loaded with prejudice, and we are of the opinion that under the circumstances of this capital case, the harmful effect of the evidence could not have been removed by the [c]ourt's instruction.

Id. at 376–77.

Defendant argues the same result is compelled here. Defendant asserts the jury was left with the impression that he had a significant criminal record, had been a habitual felon before, and would be facing habitual felon impacts and consequences again. Defendant contends the State's failure to redact part of the phone call about his past and probable future indictment for habitual felon status was such a serious impropriety that casts doubt on the jury's ability to reach a fair and impartial verdict. We disagree.

Here, unlike *Hunt*, the State did not present or elicit evidence of specific crimes unrelated to the instant case, and the jury was not aware of defendant's substantial prior record. The trial court immediately instructed the jury to disregard, stating, "[j]ust stop that just here. Okay, members of the jury. You need to disregard the portion about [defendant] being a habitual felon. Other than that, you may consider the contents as evidence."

> Ordinarily, when a trial court instructs the jury not to consider prejudicial evidence, the prejudice is cured. North Carolina courts have long recognized the presumption jurors will understand and comply with those instructions. Further, this Court has recognized instructions as curative when counsel immediately objects, and the trial court sustains the objection and issues a curative instruction.

State v. McDougald, 279 N.C. App. 25, 30 (2021) (internal citations omitted). Here, unlike *Hunt*, we determine that any potential prejudicial effect to defendant was cured by the trial court's prompt and appropriate action after the presentation of the 29 November 2019 phone call.

For the foregoing reasons, we determine that the trial court did not abuse its discretion when it denied defendant's motion for a mistrial. We discern no clear violation of § 14-7.5, and no substantial or irreparable prejudice to defendant's case.

NO ERROR.

Judges STROUD and TYSON concur.

Report per Rule 30(e).