IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-887

Filed 16 April 2024

Mecklenburg County, No. 20 CRS 232324

STATE OF NORTH CAROLINA

v.

VALENTINO JOHNSON-BRYANT

Appeal by defendant from judgment entered 30 November 2022 by Judge J. Thomas Davis in Superior Court, Mecklenburg County. Heard in the Court of Appeals 3 April 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan R. Marx, for the State.

Mecklenburg County Public Defender Kevin P. Tully, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

ARROWOOD, Judge.

Valentino Johnson-Bryant ("defendant") appeals from the trial court's judgment entered 30 November 2022. For the following reasons, we find that defendant received a fair trial free from prejudicial error.

I. Background

Defendant was indicted for robbery with a dangerous weapon and possession of a stolen firearm on 5 October 2020. Defendant's case came on for trial at the 28 November 2022 Criminal Session of Superior Court, Mecklenburg County. Before jury selection, the State dismissed the charge for possession of a stolen firearm.

The State's evidence tended to show that shortly after 10:00 p.m. on 21 September 2020, Thomas Galindo Diaz ("Mr. Galindo")[1] arrived home from work and walked toward his apartment in Charlotte, North Carolina. While walking and speaking to his wife on his cellphone, he heard someone trying to get his attention from behind him on the sidewalk. Mr. Galindo turned around and saw a tall, black man later identified as defendant.[2]

Mr. Galindo testified that defendant started speaking to him in English; however, defendant said one word in Spanish that Mr. Galindo understood: "Dinero." After telling defendant he did not have any money, Mr. Galindo testified that defendant responded by asking for his cellphone via the Spanish word for telephone. Mr. Galindo also testified that because defendant pulled out a gun and pointed toward him around the time he said the word "dinero," he gave defendant his cellphone.

According to Mr. Galindo, Officer Dustin Wells ("Officer Wells") "came by and

[1] Mr. Galindo neither speaks nor understands English and testified at trial via an interpreter.

[2] Although dark outside, Mr. Galindo testified that there was a lot of light on the sidewalk.

[ ] noticed what was going on" around the same time.[3] When Officer Wells approached them in his patrol car, Mr. Galindo testified that defendant "started to walk away down the street." As Officer Wells pursued defendant, Mr. Galindo testified that he also followed defendant and ultimately saw Officer Wells apprehend defendant.

When Mr. Galindo was asked by the State about his cellphone, the following exchange occurred:

> **The State**: And did you get your cell phone back?
>
> **Mr. Galindo**: Yes. Because before the officer had captured him, . . . he'd thrown the cellphone down on the ground.
>
> **The State**: Who threw the cellphone on the ground?
>
> **Mr. Galindo**: [Defendant].

When later asked by defense counsel about his cellphone, the following exchange occurred:

> **Defense counsel**: Did [defendant] ever take [the cellphone] and go away anywhere with it?
>
> **Mr. Galindo**: Yes.
>
> **Defense Counsel**: Where did he go with it?

[3] When asked on cross-examination if Mr. Galindo had said anything in his statement to police about defendant "producing a gun" at the same time he "said the word 'dinero,' " Mr. Galindo responded, "No, I didn't say that. The officer, though, he – he knows because he saw the whole thing."

Mr. Galindo: He was walking down the street when the officer was already following him.

Defense Counsel: Okay. But where was the cellphone?

Mr. Galindo: He had it in his hand.

Defense counsel: So from your recollection, [defendant] still had the cellphone when [Officer Wells] was walking after the person?

Mr. Galindo: Yes.

Defense Counsel: But you got the phone back that night, correct?

Mr. Galindo: Yes, certainly.

Defense Counsel: Who did you get your phone from?

Mr. Galindo: From the officer.

Defense Counsel: So your testimony is that an officer picked up your cellphone and gave your cellphone to you.

Mr. Galindo: Yes.

Defense Counsel: Did you testify earlier that [defendant] dropped the phone?

Mr. Galindo: No. I don't know at what point anything happened. But that [defendant] threw it down or laid it down, he did because I saw it; it was on the ground.

Defense Counsel: Well, if you saw it on the ground, you saw how it got on the ground, right?

Mr. Galindo: No, no.

Defense Counsel: So you don't know how it got on the ground?

Mr. Galindo: Yes, I don't know.

Defense Counsel: And if you don't know that, then you don't know that this person threw the gun on the ground, then, right?

Mr. Galindo: No, no, I don't know about that.

Defense Counsel: And you didn't tell any officer in your statement that you saw the person drop the cellphone, throw the cellphone, or do anything like that, did you?

Mr. Galindo: No, no, no.

Defense Counsel: So if someone says that you told them that you saw this person throw the gun, that would not be the truth from what you experienced, correct?

Mr. Galindo: No, that – that wouldn't be the truth, no.

On redirect, Mr. Galindo testified that he never saw the cellphone on the ground and that the officer had given it back to him.

Officer Wells testified that—while patrolling near Mr. Galindo's apartment—he heard "[l]oud voices" and "observed a[n] extremely tall black male . . . with a black firearm pointed at [Mr. Galindo]."[4] After immediately making a U-turn, Officer Wells

[4] Officer Wells corroborated Mr. Galindo's testimony that the area was "well lit" by "outside lighting."

saw defendant take "off running" away from Mr. Galindo. Mr. Galindo approached Officer Wells in his patrol car and stated that "he had just been robbed while pointing" at defendant "running in the opposite direction." Officer Wells pursued defendant in his patrol car and apprehended him a few blocks away. While Officer Wells searched defendant, defendant stated he had a gun in his jacket pocket and Officer Wells retrieved it.

On cross-examination of Officer Wells, multiple exchanges occurred concerning Mr. Galindo's cellphone:

> **Defense counsel**: When you [observed defendant with the gun], you didn't see a cellphone, did you?
>
> **Officer Wells**: No, sir.
>
> **Defense counsel**: You didn't see any exchanging of a cellphone or anything else between the two individuals, did you?
>
> **Officer Wells**: An exchange of what?
>
> **Defense counsel**: Of anything. Did you see any exchange?
>
> **Officer Wells**: No, sir.
>
> . . . .
>
> **Defense counsel**: You didn't put anything in your report about you seeing a cellphone, did you?
>
> **Officer Wells**: I never seen a cellphone.
>
> . . . .

Defense counsel: Did you see Mr. Galindo follow [defendant]?

Officer Wells: Follow? No.

Defense counsel: Did you see Mr. Galindo go after this suspect?

Officer Wells: No.

Defense counsel: Did you see Mr. Galindo bend over and pick up anything as the suspect was walking or running, doesn't matter which, going away?

Officer Wells: No.

Defense counsel: Did you see a phone being thrown?

Officer Wells: No.

Defense counsel: Did you ever see a phone on the defendant's person?

Officer Wells: No.

. . . .

Defense counsel: Where's the phone [at the point of arrest]?

Officer Wells: The phone was recovered by [Mr. Galindo].

Defense counsel: Did you see [Mr. Galindo] recover it?

Officer Wells: No.

Defense counsel: Did you ever see it out of [Mr. Galindo's] hands?

Officer Wells: I did not.

Defense counsel: Where did [Mr. Galindo] recover it?

Officer Wells: I have no idea, sir.[5]

During direct examination of Officer Wells, the State published to the jury a video recording from Officer Wells's body camera, which showed his confrontation with defendant and defendant's apprehension.[6] At one point during the recording, the police dispatcher can be heard stating, "The firearm comes back stolen[.]" After the recording was played, the trial court released the jury for lunch, and the following exchange occurred between the State, defense counsel, and the trial court:

> **The State**: Briefly, Your Honor. I will just bring – put on the record that the Court might have caught it or [defense counsel] caught it, but I attempted to mute the portion of the audio that mentioned the stolen gun. Unfortunately, I wasn't – I muted it on my computer, but for some reason, I guess it's on a different audio track, so it did play that little blurb. My contention is it was so short, I don't know if it's worth bringing more attention to. But I will admit that I did try to do that, but unfortunately my ignorance of the audio tracks in this courtroom, I wasn't able to do that.

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[5] Officer Christopher Garcia ("Officer Garcia"), who responded to the incident and transcribed Mr. Galindo's statement, testified that he could not "remember specifics on the phone." Officer Garcia also testified that he neither took possession of the cellphone nor asked for the cellphone to be swabbed for DNA.

[6] Officer Wells's body camera was not activated at the time he came into contact with Mr. Galindo.

Trial Court: Well, in my observation in hearing it, I didn't pick up on it at all. I thought you never did anything. I mean I never heard that statement, but in any event, what is your position? Do you want me to instruct the jury to disregard that or you want –

Defense Counsel: No, no, Sir. The only thing that was brought to mention was the quick movements of the prosecutor. I didn't even hear it.

Trial Court: I didn't hear it either.

Defense Counsel: I didn't. I did not hear it.

Trial Court: But at the same time, I'll be happy to instruct the jury to disregard the statement. But it may call attention to jurors that didn't hear anything as I didn't and as you didn't.

The State: I think it actually may draw more attention to it than it's worth.

Trial Court: Well, it's kind up to the defense.

Defense Counsel: It is. Out of abundance of caution, I'd ask that you give an instruction. Although, I would tell the Court I didn't hear anything, and they wouldn't have even known what to listen for.

Following the lunch recess and further examination of Officer Wells[7] by defendant and the State, the trial court instructed the jury as follows:

[7] In particular, on cross examination, defense counsel asked Officer Wells, "The gentlemen was charged with a felony, correct?" Officer Wells responded, "He was charged with two."

> Members of the jury, you did see a video that introduced into evidence as State's Exhibit B. In that video were statements made by a dispatcher. That's the person responding back to any radio calls. I instruct you to disregard any of those statements made by that dispatcher during that video, other than that, you can consider the video as evidence. And I'll give you more instructions at the jury instructions.

During the charge conference, the State requested jury instructions for both completed armed robbery and attempted robbery "given the back and forth about the taking of the phone and disposal of the phone[.]" The trial court ultimately agreed stating, "I think there's enough evidence here about the phone and all what happened that it would – could be interpreted to be an attempt." The trial court then instructed the jury on both robbery and attempted robbery with a firearm.

Defendant was found guilty of attempted robbery with a dangerous weapon and sentenced to prison for a minimum of fifty-one months and a maximum of seventy-four months. Defendant filed a written notice of appeal on 9 December 2022; however, in violation of N.C. R. App. P. 4(b), the notice failed to designate the court to which appeal was taken. On 30 November 2023, defendant filed a petition for writ of certiorari ("PWC") in the event this Court determined that defendant had waived his right to appeal.

II. Discussion

Defendant contends that the trial court erred in instructing the jury on the lesser included offense of attempted robbery because the instruction was not

supported by the evidence. Defendant also contends that the trial court erred in failing to declare a mistrial *ex mero motu* after improper evidence could be heard from a recording and a witness response to questioning. Lastly, defendant contends that defendant was denied effective assistance of counsel because his attorney failed to move for a mistrial after the improper evidence was introduced. We address defendant's notice of appeal before taking each argument in turn.

A. Notice of Appeal

Although defendant failed to properly designate this Court in its notice, such failure is not fatal "where this Court is the only court possessing jurisdiction to hear the matter and the State has not suggested that it was misled by the defendant's flawed notice of appeal." *State v. Sitosky*, 238 N.C. App. 558, 560 (2014) (citing *State v. Ragland*, 226 N.C. App. 547, 552–53 (2013)). Here, defendant's intent to appeal can be readily inferred from its notice and the fact that this Court is the only court with jurisdiction to hear the appeal. Further, the State asserted in its brief that it did not contest appellate jurisdiction and stipulated that it was not misled. Accordingly, defendant's failure to name this Court in his notice does not warrant dismissal, and we dismiss his PWC.

B. Lesser-Included Offense Instruction

Defendant contends that the trial court erred in instructing the jury on attempted robbery because evidence produced at trial was not conflicting on any element of robbery with a dangerous weapon and that such instruction was

prejudicial. We disagree.

The elements for armed robbery with a dangerous weapon include: "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." N.C.G.S. § 14-87(a) (2023); *State v. Small*, 328 N.C. 175, 181 (1991). "Attempted armed robbery, although defined in N.C.G.S. § 14-87 along with armed robbery, is clearly a separate offense." *State v. White*, 322 N.C. 506, 515 (1988). Further, attempted robbery with a dangerous weapon constitutes a lesser included offense of robbery with a dangerous weapon. N.C.G.S. § 14-87(a1). The essential difference between the two offenses relates to the "taking" element and whether the taking of property was completed or attempted. *See State v. Torbit*, 77 N.C. App. 816, 817–18 (1985) (citation omitted). Notably, the "taking" element for armed robbery is met even if defendant's control or possession of the property lasts for only a brief moment. *State v. Patterson*, 182 N.C. App. 102, 107 (2007).

"[A] defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts." *State v. Palmer*, 293 N.C. 633, 643–644 (1977) (citations omitted). In fact, a trial court *must instruct* "on a lesser included offense if: (1) the evidence is equivocal on an element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the

lesser included offense would be justified." *State v. Whitaker*, 307 N.C. 115, 118 (1982) (citing *State v. Riera*, 276 N.C. 361, 368 (1970)) (emphasis added). Instructing on the lesser included offense in these situations "reduce[s] the risk of an unwarranted conviction" because if an element "of the offense charged remain[s] in doubt but the defendant is clearly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction rather than to acquit the defendant altogether." *State v. Conaway*, 339 N.C. 487, 514 (1995) (citing *Beck v. Alabama*, 447 U.S. 625, 634–35 (1980)).

"However, 'due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction.' " *State v. Leazer*, 353 N.C. 234, 237 (2000) (quoting *Hopper v. Evans*, 456 U.S. 605, 611 (1982)). When a lesser included offense instruction is not supported by the evidence, the "instruction detracts from, rather than enhances, the rationality of the process." *Id.* (cleaned up); *see also State v. Lampkins*, 286 N.C. 497, 504 (1975) (explaining that in cases where the evidence would not permit the jury to rationally find a defendant guilty of the lesser offense, instructing the jury on the lesser offense "invite[s] a compromise verdict whereby the defendant would be found guilty of an offense, which he did not commit, for the sole reason that some of the jurors believe him guilty of the greater offense."). Moreover, "the mere possibility that the jury might believe part but not all of the testimony of the prosecuting witness is not sufficient to require the Court to submit to the jury the instruction for a lesser offense than that which the

prosecuting witness testified was committed." *Lampkins*, 286 N.C. at 504 (cleaned up).

Therefore, the test in cases involving the propriety of a lesser included offense instruction is "whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of those elements." *State v. Leroux*, 326 N.C. 368, 378–79 (1990) (citations omitted). "For evidence to be 'in conflict,' there must be evidence that tends to negate the State's positive evidence as to the elements of the crime." *State v. Wilson*, 385 N.C. 538, 543 (2023) (citation omitted). "Such conflicts may arise from evidence introduced by the State, or the defendant. They may also arise when only the State has introduced evidence." *Id.* (cleaned up).

Here, sufficient conflicting evidence exists concerning the "taking" element of armed robbery to warrant the trial court's attempted robbery instruction. Specifically, there is contradictory evidence as to whether defendant took actual control of Mr. Galindo's cellphone or merely attempted the act. Officer Wells testified that he never saw a cellphone, let alone one exchanging hands, when observing defendant pointing the gun at Mr. Galindo. Officer Wells also never saw defendant with a cellphone while defendant was running away from him, nor did he see defendant drop a cellphone while fleeing or Mr. Galindo recover one. Although there is a question about how much of the confrontation Officer Wells observed, we consider it instructive that Mr. Galindo believed Officer Wells "saw the whole thing."

Further, Mr. Galindo testified on direct examination and again on redirect that "the officer" had picked up his cellphone and returned it to him. However, neither Officer Wells nor Officer Garcia testified to doing that, and no other officers testified at trial. In fact, Officer Wells testified that Mr. Galindo was the one who had recovered the cellphone.[8] And Officer Garcia testified that he never possessed the cellphone, nor could he "remember specifics" about it. Accordingly, the evidence in this case goes beyond "[t]he mere possibility that the jury might believe part but not all of the testimony" of Mr. Galindo, and is sufficient to warrant the attempted robbery instruction. *See Lampkins*, 286 N.C. at 504.

C. Mistrial *ex mero motu*

Defendant contends that the trial court erred by failing to declare a mistrial (1) after the State played a recording where a police dispatcher could be heard stating that the gun defendant possessed was stolen and (2) after Officer Wells stated defendant was charged with two felonies on cross-examination. We disagree.

A judge may declare a mistrial on their own motion if "[i]t is impossible for the trial to proceed in conformity with law[.]" N.C.G.S. § 15A-1063 (2023). Such declaration is reviewed under an abuse of discretion standard and appropriate "only when there are such serious improprieties as to make it impossible to attain a fair

[8] Officer Wells testified to this but never witnessed it happen.

and impartial verdict under the law." *State v. Bowman*, 349 N.C. 459, 472 (1998) (cleaned up).

Trial courts may use curative instructions to remove potential prejudice from erroneous material submitted to a jury, and we presume jurors follow such instructions and disregard that material. *State v. Moore*, 276 N.C. 142, 149 (1970) (citation omitted). However, our Supreme Court has recognized that curative instructions may not always remove the prejudice of erroneous evidence. *State v. Aycoth*, 270 N.C. 270, 272–73 (1967). Whether an instruction can cure the prejudicial effect of erroneous evidence "depend[s] in large measure upon the nature of the evidence and the particular circumstances of the individual case." *State v. Hunt*, 287 N.C. 360, 375 (1975) (citation omitted) (holding that the prejudice associated with the prosecutor's questions could not be removed by an instruction given the following day but limiting the holding to the specific circumstances of the capital case under review).

Here, the dispatcher's statement about the gun was briefly mentioned in just one sentence during an approximately nine-minute video, and no one in the recording responded or remarked about it. It is also unclear whether the jury even heard the statement as both defense counsel and the trial court admitted to not hearing it when the recording played. And as defense counsel maintained, the jury "wouldn't have even known what to listen for." However, even assuming *arguendo* that the jury heard the statement, we presume they followed the trial court's instruction to

disregard it under *Moore*. Although the trial court did not instruct the jury immediately after the recording was played, unlike in *Hunt*, it provided the instruction on the same afternoon following the lunch recess and some additional testimony, and it expressly referred to the dispatcher's statements.

Defendant's reliance on *Aycoth* is also unpersuasive. In that case, a deputy sheriff testified as a State witness during the defendant's trial for armed robbery. 270 N.C. at 271. In responding to a question about the ownership of a car, the deputy sheriff's answer included the statement that the defendant had been indicted previously for murder. *Id.* at 272. Defense counsel objected to the statement, and the trial court subsequently instructed the jury to disregard the statement. *Id.* Our Supreme Court held that "the court's instruction did not remove from the minds of the jurors the prejudicial effect of the knowledge they had acquired from" the deputy sheriff's statement regarding the murder indictment. *Id.* at 273.

However, in the case *sub judice* and unlike in *Aycoth*, the dispatcher's statement concerned the status of the gun rather than a charge or indictment against defendant. And even if the statement implied that a charge or indictment was forthcoming, it would not be for an offense "far more heinous" than the one defendant was on trial for, as in the case with *Aycoth*. *See State v. Poteat*, No. COA15-603, 2016 WL 3584452, at *3 (N.C. Ct. App. July 5, 2016). Further, Officer Wells's statement that defendant had been charged with two felonies was an invited error because it was in direct response to defense counsel's question of whether defendant had been

charged with a felony. *See State v. Daughtridge*, 248, N.C. App. 707, 719 (2016); *State v. Global*, 186 N.C. App. 308, 319 (2007) ("Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." (citations omitted)).

Accordingly, the trial court did not abuse its discretion in not declaring a mistrial because the instruction cured the prejudicial effect of the dispatcher's statement, if any, and Officer Wells's statement about the two felonies was an invited error. Defendant's ineffective assistance of counsel contention is also without merit because, as discussed above, defendant failed to show that either statement was prejudicial. *See State v. Poindexter*, 359 N.C. 287, 290–91 (2005) (explaining that even if a defendant can show their counsel's performance was deficient, they must also establish that the deficiency prejudiced their defense) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

III. Conclusion

For the foregoing reasons, we find defendant had a fair trial free from prejudicial error.

NO ERROR.

Judges WOOD and FLOOD concur.

Report per Rule 30(e).