NO. COA12-360
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 10 CVS 28980, 58982

RAYMOND ROBERTS

Appeal by defendant from judgment entered 4 November 2011 by Judge Eric L. Levinson in Forsyth County Superior Court. Heard in the Court of Appeals 13 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Richard A. Graham, for the State.

Kevin P. Bradley, for Defendant-appellant.

ERVIN, Judge.

Defendant Raymond Roberts appeals from a judgment entered based upon his convictions for felonious larceny and having attained the status of an habitual felon. On appeal, Defendant contends that the trial court erred by allowing the admission "as excited utterances [of] statements [made by] unidentified, non-testifying persons absent [a showing that] the declarants spoke under the stress of excitement caused by the event

related." In addition, Defendant asserts that he received ineffective assistance from his trial counsel as the result of his trial counsel's failure to object to certain statements made by the prosecutor and to the admission of irrelevant documents during the habitual felon proceeding. After careful consideration of Defendant's challenges to the trial court's judgment in light of the record and the pertinent law, we conclude that Defendant is not entitled to any relief from the trial court's judgments on appeal.

I. Factual Background

A. Substantive Facts

On the evening of 2 September 2010, Crystal Pearson drove to the Winston-Salem residence of Marilyn Robinson's mother, which was located on Slater Street, for the purpose of dropping off her two year old niece for a visit with Ms. Robinson's daughter. At that time, the car was occupied by Ms. Pearson, her niece, and another girl whose mother was a friend of Ms. Pearson's and whom Ms. Pearson was taking home. When she arrived at the Slater Avenue residence, Ms. Pearson took her niece out of the car while leaving the other girl in the vehicle with the door open.

As she escorted her niece to the Slater Avenue residence, Ms. Pearson noticed a man on the street where she was parked and caught a "glimpse" of "someone with a white shirt, light skin,

almost Hispanic" who might have had "an Afro or high hair." This man, who was about 100 feet from Ms. Pearson, was the only person she observed on the street at that time. As Ms. Pearson left her niece with Ms. Robinson and began returning to her car, the "car door slam[med] and [the vehicle] t[oo]k off down the street." At that point, Ms. Pearson started screaming, observed the car speed down Addison Street and turn onto New Walkertown Road without stopping at the stop sign, and called 911 to report the incident.

A few minutes later, the 911 dispatcher called back and told Ms. Pearson that her car had been found. A Winston-Salem police officer drove Ms. Pearson to a location where investigating officers had a suspect in custody, and showed Ms. Pearson a shirtless man in handcuffs. Ms. Pearson was unable to identify this individual as the person who had taken her car. Subsequently, Ms. Pearson went to the location at which a collision had occurred and identified her car, which was "wrecked, beyond repair." Although the child who had remained in Ms. Pearson's car was shaken up and had a bruise on her neck, she was otherwise unharmed.

At about 6:00 p.m. on 2 September 2010, Corporal Mark Bollinger of the Winston-Salem Police Department saw a vehicle turn from Addison Avenue onto New Walkertown without stopping as required by a stop sign. Corporal Bollinger determined that the

driver was male and appeared to be either African-American or Hispanic. The driver did not respond when Corporal Bollinger signaled for him to stop. After Corporal Bollinger activated his blue light, the car sped up and drove out of Corporal Bollinger's sight. About fifteen to twenty seconds after the car ran the stop sign, Corporal Bollinger heard a broadcast concerning a kidnaping which included the description of a vehicle similar to the one that he had attempted to stop. As a result, Corporal Bollinger radioed in to report that he had just seen the car described in the broadcast.

Sergeant Kevan Sawyer of the Winston-Salem Police Department heard both Corporal Bollinger's radio report concerning a car driving "in a careless and reckless manner" and the broadcast about a kidnaping involving a vehicle with a similar description. After driving around the area for a few minutes, Sergeant Sawyer found a crashed vehicle matching the description set out in the radio report. At the time of his arrival, bystanders were yelling that a baby was in the car. As Sergeant Sawyer was assisting the child, various bystanders shouted that "a black male wearing a blue or black tee shirt, blue shorts" with "a tattoo on his upper chest, left chest" had just fled the scene. Sergeant Sawyer relayed this information to other law enforcement officers.

At around 6:00 p.m. on 2 September 2010, Sylvester Page stopped to rest on a low wall near a church on Dunleith Street. As he rested, Mr. Page heard squealing tires, saw a flash of blue or grey, and watched a car hit the wall on which he was sitting. A man got out of the car, said, "You ain't seen me," and ran off down a driveway adjacent to the church. When investigating officers arrived, Mr. Page told them what had happened. A short while later, the officers took Mr. Page to see Defendant, whom he identified as the man who had crashed into the wall and run away. At trial, Mr. Page testified that he was "absolutely certain" that he had correctly identified the person involved in the wreck and subsequent flight.

At around 6:00 p.m. on 2 September 2010, John Siemers was driving down Fourth Street. As he prepared to turn onto Dunleith, he "heard a commotion" and saw a "light-skinned male" running from between two nearby houses. As the man ran, he removed his shirt, exposing a tattoo on his chest. About thirty seconds later, a law enforcement officer arrived. After hearing bystanders describe Defendant to the officer, Mr. Siemers told the law enforcement officer that he had seen a man running. Shortly thereafter, Mr. Siemers participated in a "show up" in which he identified Defendant as the man he had seen running away.

Brian Hall, a crime scene technician with the Winston-Salem Police Department, obtained swabs from the car's gearshift and sent them to the State Bureau of Investigation crime laboratory for further examination and testing. SBI Special Agent Cortney Cowan, a forensic DNA analyst, compared DNA removed from the swabs prepared by Mr. Hall with known DNA samples obtained from Ms. Pearson and Defendant, and concluded that Defendant could not be excluded as a source of the genetic material found on the car's gearshift. However, because the DNA found on the gearshift contained a mixture of material originating from both Defendant and Ms. Pearson, Special Agent Cowan could not definitely determine that Defendant's DNA was on the gearshift.

B. Procedural History

On 2 September 2010, a magistrate's order was issued charging Defendant with felonious larceny, first degree kidnaping, and failing to render assistance following an accident. On 7 March 2011, the Forsyth County grand jury returned indictments charging Defendant with first degree kidnaping, felonious larceny, and having attained the status of an habitual felon and alleging as an aggravating factor that the victim of the kidnaping was very young. On 2 May 2011, the Forsyth County grand jury returned a superseding indictment charging Defendant with felonious larceny of a motor vehicle and

first degree kidnaping and alleging as an aggravating factor that the victim of the kidnaping was very young.

The charges against Defendant came on for trial before the trial court and a jury at the 31 October 2011 criminal session of the Forsyth County Superior Court. At the conclusion of the trial, the jury returned verdicts convicting Defendant of felonious larceny and acquitting Defendant of first degree kidnaping and any lesser included offense. Although the jury found that the victim of the alleged kidnaping was very young, the trial court set aside this determination given the jury's decision with respect to the kidnaping charge. After the required separate hearing, the jury also found that Defendant had attained habitual felon status. Based upon the jury's verdicts, the trial court entered a judgment sentencing Defendant to 134-170 months imprisonment. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Admissibility of Bystander Statements

In his initial challenge to the trial court's judgment, Defendant contends that the trial court erred by admitting statements by certain "unidentified, non-testifying persons [as excited utterances] absent [a showing that] the declarants spoke under the stress of excitement caused by the event related."

Defendant has failed to adequately preserve this issue for appellate review.

> Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. To be timely, an objection to the admission of evidence must be made "at the time it is actually introduced at trial." It is insufficient to object only to the presenting party's forecast of the evidence. As such, in order to preserve for appellate review a trial court's decision to admit testimony, "objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence" and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony.

State v. Ray, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (quoting *State v. Thibodeaux*, 352 N.C. 570, 581-82, 532 S.E.2d 797, 806 (2000), *cert. denied*, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001)), *superseded by statute as stated in State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515 (2005). In *Ray*, this Court unanimously granted the defendant a new trial based upon what we believed to have been the erroneous admission of evidence. After granting discretionary review, the Supreme Court reversed our decision on the grounds that the defendant had failed to object to admission of the challenged evidence in a timely manner:

> . . . [D]efendant objected to the admission of [the challenged] evidence . . . only during a hearing out of the jury's presence.

> In other words, defendant objected to the State's forecast of the evidence, but did not then subsequently object when the evidence was "actually introduced at trial." Thus, defendant failed to preserve for appellate review the trial court's decision to admit [the] evidence. . . . Moreover, defendant lost his remaining opportunity for appellate review when he failed to argue in the Court of Appeals that the trial court's admission of this testimony amounted to plain error. Accordingly, the Court of Appeals erred by reaching the merits of defendant's arguments on this issue.

Ray, 364 N.C. at 277-78, 697 S.E.2d at 322 (quoting *Thibodeaux*, 352 N.C. at 581, 532 S.E.2d at 806 (citing N.C.R. App. P. 10(c)(4)). As a result of the fact that "[t]he Court of Appeals 'has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court,'" *Haugh v. County of Durham*, __ N.C. App __, __, 702 S.E.2d 814, 823 (2010) (quoting *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (internal citation and internal quotation marks omitted)), *disc. review denied*, 365 N.C. 328, 717 S.E.2d 397 (2011), we are obligated to follow the principle enunciated in *Ray*.

Sergeant Sawyer testified that the first thing he did after arriving at the scene of the accident involving Ms. Pearson's vehicle was to assist a small child sitting in the back seat. As a result of the fact that Defendant objected when Sergeant Sawyer began to describe comments made by bystanders while he

was attending to the child, the trial court excused the jury and conducted a *voir dire* examination. In the course of the *voir dire* proceeding, Defendant's trial counsel argued that Sergeant Sawyer's testimony was inadmissible to the extent that it recited statements made by unidentified persons at the scene of the crash, on the grounds that these statements were not admissible as excited utterances. At the conclusion of the *voir dire* examination, the trial court overruled Defendant's objection and brought the jury back into the courtroom. After the jury returned, Sergeant Sawyer testified without objection that:

> A. . . . As I was [assisting the child], I was being yelled at. People was yelling things. The person who was driving the car ran, he ran around the church, and he was a black male wearing a blue or black tee shirt, blue shorts, and he had a tattoo on his upper chest, left chest.
>
> Q. Now, Sergeant Sawyer, were you getting this information from just the people at the scene?
>
> A. It was being yelled at me, and I was picking up on it as I was reaching into the car. Black male just ran, ran around the church, took his shirt off. He had a tattoo, these type things.

As a result, given that Defendant failed to object in the presence of the jury to the admission of Sergeant Sawyer's testimony concerning the statements that were made by various bystanders while he attempted to assist the child and the fact

that Defendant has not attempted to argue that the admission of the statements in question constituted plain error, N.C.R. App. P. 10(a)(4) (stating that, "[i]n 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"); *see also State v. Lawrence*, __ N.C. __, __, 723 S.E.2d 326, 333 (2012) (stating that, "[t]o have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error") (citations omitted), we conclude that Defendant has failed to properly preserve this issue for appellate review.

B. Ineffective Assistance of Counsel

Secondly, Defendant argues that his trial counsel "failed to function as the 'counsel for defense' guaranteed by the Sixth Amendment to the Constitution of the United States and by Article I, Section 23, of the Constitution of North Carolina" on the grounds that he failed "to object to the prosecutor speaking to the jury as an unsworn witness publishing records of prior alleged crimes and convictions" or "to object to receipt of multiple documents irrelevant to habitual felon status and prejudicial to fair consideration of the Defendant's denial of

one of the indicted prior convictions." We conclude that Defendant is not entitled to relief from the trial court's judgment on the basis of these arguments.

"'In order to obtain' relief on the basis of an ineffective assistance of counsel claim, Defendant is required to demonstrate that his trial counsel's performance was deficient and that this deficient performance 'prejudiced the defense.'" *State v. Best*, __ N.C. App __, __, 713 S.E.2d 556, 562 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)), *disc. review denied*, 365 N.C. 361, 718 S.E.2d 397 (2011). The United States Supreme Court has articulated a two-part test for use in determining if a defendant is entitled to relief on ineffective assistance of counsel grounds:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 80 L.E.2d at 693, 104 S. Ct. at 2064. In *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985), the Supreme Court adopted the *Strickland* test for

use in evaluating similar claims asserted under the North Carolina Constitution.

> The first element [of an ineffective assistance of counsel claims] requires a showing that counsel made serious errors; and the latter requires a showing that, even if counsel made an unreasonable error, "there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings."

State v. Banks, __ N.C. App. __, __, 706 S.E.2d 807, 821 (2011) (quoting *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248) (other citation omitted). "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell* at 563, 324 S.E.2d at 249.

At the hearing held for the purpose of determining whether Defendant had attained habitual felon status, the State introduced, without objection, an exhibit consisting of various documents pertaining to Defendant's prior convictions. In attempting to persuade us of the merits of his ineffective assistance of counsel claim, Defendant focuses on the contents of this exhibit, correctly notes that the "prosecutor is not a sworn witness subject to cross-examination," *State v. Sanderson*, 336 N.C. 1, 14, 442 S.E.2d 33, 41 (1994), and suggests that his

trial counsel's performance was deficient on the grounds that "counsel failed to object when the prosecutor was allowed to speak to the jury in the presentation of evidence in the State's habitual felon case" by "giv[ing] her explanations of the State's Exhibit HF-1 . . . including [describing a particular document as] 'signed by the Defendant.'" We do not find this argument persuasive.

After carefully reviewing the record, it is clear to us that the challenged prosecutorial statements, which were nothing more than a description of items that had been admitted into evidence, did not constitute the equivalent of sworn testimony. For example, the record reflects that the prosecutor made the following statement at the habitual felon proceeding:

> THE COURT: Ladies and Gentlemen, the State has rested, but I know that [the prosecutor] wants to publish these for you. . . . There should be 13 copies for you. And I believe [the prosecutor] will address you with these items at this time, once you have these in hand. . . .
>
> [Prosecutor]: Thank you. Your Honor, and members of the jury, as you examine Habitual Felon document one, turning to page two, file number 92 CRS 11907, State versus Raymond Roberts, black male. And listed as the age being 23.
>
> That would be the sheet of judgment and commitment. The date of the signature of the commitment, the date of conviction, August 25th of 1992. Attached to that, on the third page, 92 CRS 11907, State versus

> Raymond Roberts, that's the transcript of plea.
>
> Passing two pages, moving on to the indictment, 92 CRS 11907, State versus Raymond Roberts. Date of offense, May 11th of 1992. There's a warrant for arrest for the same case number.
>
> And moving on to the second judgment and commitment document, 96 CRS 21556, State versus Raymond Roberts, black male. Date of birth, October 5th of 1968.

The prosecutor reviewed the documents relating to the other two convictions upon which the State relied in support of its habitual felon allegation in a similar manner. At no point did the prosecutor make any editorial comments concerning the documents in question or discuss the factual basis underlying the charges reflected in the documents. At one point the prosecutor did state, as noted in Defendant's brief, that:

> And the information, the charging document for 07 CRS 51245, State of North Carolina, Durham County, versus Raymond Levi Roberts. Date of offense, August 2nd of 2007. And that is signed by the Defendant and his attorney at the bottom. Following that, a warrant.

Although the Prosecutor did mention the presence of the signatures of Defendant and his counsel on the information, she did not debate the authenticity of the signatures or assert that any particular significance should be attached to them. The signatures that the prosecutor described do, in fact, appear on the relevant document. In addition, Defendant did expressly

concede at the habitual felon proceeding that he had been convicted of the offense to which the signed document related, a fact which renders any complaint about the prosecutor's reference to the presence of Defendant's signature on the document in question beside the point. As a result, for all of these reasons, we conclude that the challenged prosecutorial comments were not improper and that any objection which Defendant's trial counsel might have advanced in opposition to these comments would not and should not have been sustained. *State v. Mewborn*, 200 N.C. App. 731, 738, 684 S.E.2d 535, 540 (2009) (citing *State v. Lee*, 348 N.C. 474, 492, 501 S.E.2d 334, 345 (1998)) (stating that "the failure to object to admissible evidence does not constitute an error which would satisfy the first prong of the *Strickland* test)". Thus, the failure of Defendant's trial counsel to object to these remarks does not constitute the sort of deficient performance needed to show the existence of a valid ineffective assistance of counsel claim.

In addition, Defendant contends that he received deficient representation from his trial counsel on the grounds that his "counsel failed to object to the inclusion of multiple documents in Exhibit HF-1 which are irrelevant to the issue of habitual felon status but prejudicial to fair evaluation of [Defendant's] denial of one of the indicted predicate felonies," including "warrants for arrest, a magistrate's order, a restitution

worksheet, a prior habitual felon indictment and order for arrest, and transcripts of pleas." Assuming, without in any way deciding, that the failure of Defendant's trial counsel to object to the admission of these additional documents constituted deficient representation, we conclude that Defendant has failed to show the prejudice necessary to support a valid ineffective assistance of counsel claim.

At the hearing convened for the purpose of determining whether Defendant should be sentenced as an habitual felon, Defendant attempted to dispute one of the convictions upon which the State relied in attempting to persuade the jury that Defendant's sentence should be enhanced pursuant to N.C. Gen. Stat. § 14-7.1. Although Defendant admitted that he had been convicted of the felonies specified in two of the three cases enumerated in the habitual felon indictment, he claimed to have been in custody on the date that the offense for which he was allegedly convicted in File No. 96 CRS 21556 had been committed. More specifically, Defendant testified that he recalled being in custody on 7 July 1996, the offense date alleged in File No. 96 CRS 21556:

> Q. Do you remember when you were in the custody of Nash County?
>
> A. Well, due to the kind of medication I take for seizures, I can't remember the exact date, but I do remember,

> recall that it was approximately somewhere around February or March.
>
> Q. Of what year?
>
> A. Of '96, 1996.
>
> Q. And how long were you in custody in Nash County?
>
> A. Approximately about two years.
>
> Q. So you were in custody in Nash County from 1996 to 1998; is that correct?
>
> A. Yes, ma'am. I was in custody at Nash Correctional until '97. From '96, if I can remember, I was in jail for about two years under new charges in Nash County, that was dismissed. That's not shown on my record at all.

However, we note that Defendant admitted that he had previously been found to be an habitual felon in File No. 97 CRS 13257 and that the conviction in File No. 96 CRS 21556 was one of the predicate felonies used to support that conviction. Moreover, Defendant did not introduce any documentary support for his claim to have been incarcerated on the date when the offense charged in File No. 96 CRS 21556 was committed.

"[T]he only issue in [an] habitual felon proceeding is whether the defendant has been convicted of or pled guilty to three felony offenses[.]" *State v. Oakes*, __ N.C. App __, __, 724 S.E.2d 132, 137 (2012) (citing *State v. Ross*, 207 N.C. App. 379, 399, 700 S.E.2d 412, 425 (2010), *disc. review denied*, 365 N.C. 346, 717 S.E.2d 377 (2011)). At the habitual felon

proceeding, the State offered ample evidence that Defendant was subject to the enhanced sentence authorized by N.C. Gen. Stat. § 14-7.1. As we have already noted, Defendant conceded that he had been convicted of two of the three felonies enumerated in the indictment charging him with having attained habitual felon status. In challenging the validity of the State's attempt to establish the existence of the third conviction specified in the indictment, Defendant offered nothing more than his unsupported recollection, which he admitted was impaired by the ingestion of prescription medication, that he was incarcerated as the result of other charges on the date that the third felony was allegedly committed. However, he admitted that he had previously been sentenced as an habitual felon based, at least in part, on the felony conviction which he now denies having received. The documentary evidence upon which the State relied certainly tended to show that Defendant was convicted of all three predicate felonies alleged in the habitual felon indictment. Although Defendant asserts in a conclusory fashion that he was denied a fair trial and that the "magnitude of the errors in the habitual felon proceeding" should result in a finding of "structural error," he has not, for the reasons set forth above, satisfied us that there is a reasonable probability that he would have been acquitted of the habitual felon allegation in the event that the challenged evidence had not been admitted, a

determination which is fatal to this aspect of his ineffective assistance of counsel claim. As a result, Defendant is not entitled to relief from the trial court's judgment on ineffective assistance grounds.

III. Conclusion

Thus, for the reasons discussed above, neither of Defendant's challenges to the trial court's judgment have merit. As a result, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Judges ROBERT N. HUNTER, JR., and McCULLOUGH concur.

Report per Rule 30(e).