NO. COA12-447
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

STATE OF NORTH CAROLINA

v. Carteret County
No. 10-CRS-55178

THOMAS RAY BLEVINS

On writ of *certiorari* by Defendant to review the judgment and commitment entered 14 September 2011 by Judge Richard Doughton in Carteret County Superior Court. Heard in the Court of Appeals 26 September 2012.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender John F. Carella, for Defendant-Appellant.

STEPHENS, Judge.

Procedural History and Evidence

This appeal arises from indictments charging Defendant Thomas Ray Blevins ("Blevins") with intimidating a witness in a separate, misdemeanor larceny case and for attaining the status of habitual felon.

On 6 December 2010, Magistrate A. B. Pond issued a warrant against Blevins for intimidating a witness in violation of N.C. Gen. Stat. § 14-226. Blevins was served with that warrant on 7 December 2010. On 4 April 2011, indictments charging Blevins with intimidating a witness and attaining the status of habitual felon were handed down.

The case was tried on 14 September 2011, during the 12 September 2011 Regular Criminal Session of Carteret County Superior Court, the Honorable Richard Doughton presiding. During the trial, the first and only witness, Billy Jo Jenson ("Jenson"), testified that she had previously been approached by Blevins in anticipation of a separate court appearance. Jenson was to be a witness against Blevins in that case, and she testified that Blevins had informed her he would "break [her] down to where [she] would not be able to move or walk," if she testified against him.

As Jenson began to testify further, mentioning a thirteen-year-old "shooting," the prosecutor stopped her, explaining that they were "getting into something [the trial court] wanted to do on a voir dire." At that time, trial counsel for Blevins ("Thomas") affirmed that "[this] would be [his] objection," as well. The jurors were excused, and Thomas clarified his objection that Jenson was verging on giving improper hearsay evidence. The trial court disagreed, stating that "[Jenson]'s

not to testify to anything somebody else told her. But she can testify to what [Blevins] said." In response, the following exchange occurred:

> THE COURT: That's what the basis of the charge is. I thought you said that would be okay?
>
> []THOMAS: That is acceptable.
>
> [PROSECUTOR]: Okay. That was my mistake then. I thought he was preserving —

The discussion ended there, and the trial court brought the jurors back to the courtroom. In accordance with the trial court's ruling, Jenson continued her testimony and alleged that Blevins had also informed her how "he had shot and killed two people and that . . . . he [had] been in the Crips gang[.]"

At the conclusion of the trial, the jury found Blevins guilty of intimidating a witness. Blevins then admitted to attaining the status of habitual felon. Soon after, the following exchange occurred between Blevins and Judge Doughton:

> THE COURT: And you understand that you also have a right during a sentencing hearing to prove to the Court the existence of any mitigating factors that may apply to your case?
>
> THE DEFENDANT: As far as mitigating? Your Honor, I went — I have some mental health issues and —
>
> THE COURT: Well, you can present any mitigating factor your lawyer wants to present at the sentencing hearing.

(Defense conferring)

THE DEFENDANT: Okay.

THE COURT: You understand that?

THE DEFENDANT: Yes, sir.

During the sentencing hearing, Thomas requested deference and "some sympathy" from the court, stating his preference that the sentence for Blevins be within the presumptive range. When the court inquired whether Blevins had any new evidence to present or any mitigating factors to allege, Thomas responded with the statements: "no evidence" and "[n]o mitigating factors."

The trial court then sentenced Blevins to 88 to 115 months in prison. Afterward, Blevins alleged that he had bipolar disorder and post-traumatic stress disorder. Addressing those statements, the court included a recommendation in its judgment that Blevins be evaluated for those "medical issues."

At no point during the trial did Thomas give oral notice of appeal. Two days later, on 16 September 2011, Blevins mailed written notice of appeal to Judge Doughton from Central Prison in Raleigh. That document listed the name of this case, the case number, the date when it was written, and asserted his intent to appeal "on grounds of inaffective [sic] assistance of counsel."

On 21 September 2011, Judge Doughton found that Blevins had given notice of appeal and determined that he was indigent. On

26 October 2011, the Appellate Defender assigned appellate counsel to Blevins. Three and a half months later, on 14 February 2012, Blevins filed his first petition for writ of *certiorari*, praying that this Court permit review of the 14 September 2011 judgment. This Court dismissed that petition without prejudice to the right of the defendant to re-file after the record on appeal had been filed with the Court or after the appeal was dismissed by the trial court. The record on appeal was filed on 16 April 2012. Blevins filed his second and current petition for writ of *certiorari* on 9 May 2012, praying that this Court permit review of the 14 September 2011 judgment "without regard to the limitation in his *pro se* notice of appeal."

Discussion

I. The 9 May 2012 Petition for Writ of Certiorari

Rule 4(a) of the North Carolina Rules of Appellate Procedure provides that, in criminal cases, notice of appeal may be given (1) orally at trial or (2) by filing written notice with the clerk of superior court and serving copies on all adverse parties within fourteen days of entry of final judgment. N.C.R. App. P. 4(a)(1)-(2). Written notice of appeal must (1) "specify the party or parties taking the appeal," (2) include "the judgment or order from which appeal is taken," (3) include "the court to which appeal is taken," and (4) be signed by counsel or the *pro se* appellant. N.C.R. App. P. 4(b).

The written notice of appeal that was mailed to Judge Doughton does not meet all of these requirements. It was not filed with the clerk of superior court and a copy was not served on the State. It does not specify the court to which appeal is being made. Further, while the notice lists the name of the case and the case number, its text does not specifically refer to the judgment from which appeal is taken.[1]

Given these failures, we grant the petition for writ of *certiorari* pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. Rule 21 provides that the writ of *certiorari* may be issued by either appellate court when the right to prosecute an appeal has been lost by failure to take timely action. N.C.R. App. P. 21(a). Relying on that rule, we have previously held that "failure to issue a writ of certiorari would be manifestly unjust," where a defendant has lost his right to appeal through no fault of his own, but rather as a result of the actions of counsel. *State v. Hammonds*, ___ N.C. App. ___, ___, 720 S.E.2d 820, 823 (2012). In this case, Blevins's failure to meet the requirements of Rule 4 was the result of his lack of information about the appellate process.

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[1] Though appellate counsel stated in his petition for writ of *certiorari* that Blevins "did not intend to limit the issues for appeal by citing his counsel's ineffective assistance in the notice," we note there is nothing in the Rules of Appellate Procedure that limits a party's ability to raise issues not mentioned in the notice of appeal as long as that notice meets the requirements of Rule 4.

Accordingly, we exercise our discretion and allow his petition for writ of *certiorari*.

II. Evidence of Mitigating Factors

Blevins first argues that the trial court erred by not allowing him to personally present evidence of mitigating factors during sentencing. We are not persuaded.

Unless a sentencing hearing is waived by a criminal defendant, our trial courts are required to provide for such a hearing before pronouncing sentence. N.C. Gen. Stat. § 15A-1334(a) (2011). At the hearing, a defendant "may make a statement in his own behalf." N.C. Gen. Stat. § 15A-1334(b). That statement is meant to provide the defendant with "an opportunity to state any further information which the trial court might consider when determining the sentence to be imposed." *State v. Rankins*, 133 N.C. App. 607, 613, 515 S.E.2d 748, 752 (1999).

Our Supreme Court has determined that — in contrast to Rule 32 of the Federal Rules of Criminal Procedure, which requires a "[federal] district court affirmatively to afford a defendant an opportunity to speak before sentencing" — our section 1334(b) "provides simply that a defendant '*may* make a statement on his own behalf.'" *State v. Poole*, 305 N.C. 308, 325, 289 S.E.2d 335, 346 (1982) (emphasis added). In *Poole*, the Court noted that our legislature would have "plainly said so," had it "intended for

[section 1334(b)] to impose the same requirement as the federal statute[.]" *Id.* As a result, the Court ruled that "our statute does not command this practice" of requiring the trial judge to ask a defendant if she or he wishes to make a statement before the sentencing hearing concludes. *Id.* While criminal defendants have the right to speak for themselves during the sentencing hearing, it is not the obligation of the trial judge to enforce that right in the courts of this State.

In *Poole*, just before sentencing, the trial court asked counsel if there was "[a]nything before I pass sentence[.]" *Id.* at 325, 289 S.E.2d at 345. According to the record, the defendant made "no attempt" to make an additional statement. *Id.* As a result, the Supreme Court rejected the defendant's contention that the trial court had impermissibly failed to ask him, personally, if he had anything to say in that case, commenting "we are not dealing here with a situation in which defendant was affirmatively denied an opportunity to speak during the sentencing hearing." *Id.* at 326, 289 S.E.2d at 346.

In this case, Blevins was informed that he would have an opportunity during sentencing to "present any mitigating factor [his] lawyer want[ed] to present at the sentencing hearing." During sentencing, the trial court asked Thomas if there were any mitigating factors to present, and he responded with "[n]o mitigating factors." Here, as in *Poole*, the record does not

reflect any attempt by Blevins to make an additional statement during that process. The trial court did not affirmatively deny Blevins the opportunity to speak. Therefore, this argument is overruled.

III. Plain Error

Blevins also argues that the trial court erred by allowing Jenson to testify about the statements Blevins made to her during his attempt at intimidation — specifically, that he was a member of the Crips gang and that he had previously murdered two individuals. Blevins contends that the court's failure to exclude Jenson's testimony constituted plain error because it resulted in the improper admission of: (1) prior crimes testimony under Rule 404(b), (2) irrelevant evidence under Rules 401 and 402, and (3) overly prejudicial evidence under Rule 403. The admission of that testimony, Blevins argues, "was highly prejudicial and . . . almost certainly impacted the jury's verdict," constituting plain error on the part of Judge Doughton and "open[ing] the door to the subsequent testimony, which repeatedly characterized Mr. Blevins as a killer." We disagree.

"[W]here a criminal defendant has not objected to the admission of evidence at trial, the proper standard of review is a plain error analysis[.]"[2] *State v. Gary*, 348 N.C. 510, 518, 501

[2] Though Thomas did, in fact, note an objection to Jenson's testimony, that objection was based solely on his contention

S.E.2d 57, 63 (1998). Plain error is found "only in exceptional cases 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." *State v. Hammett*, 361 N.C. 92, 98, 637 S.E.2d 518, 522 (2006) (internal quotation marks and citations omitted).

First, Blevins contends that Jenson's testimony should have been excluded as improper prior crimes testimony under Rule 404(b). Rule 404(b) states that evidence of other crimes "is not admissible to prove the character of a person" for the purpose of showing that such person acted in conformity with that character trait, but such evidence may be admissible for other purposes. N.C. Gen. Stat. 8C-1, Rule 404(b) (2011). Our Supreme Court has clarified that "[u]nder Rule 404(b), evidence of prior acts is admissible so long as it is relevant to any fact or issue other than the character of the accused." *State v. Moseley*, 338 N.C. 1, 42, 449 S.E.2d 412, 437 (1994). In this case, Blevins was not charged with murder or violation of the North Carolina Street Gang Suppression Act. The only crime at

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that the testimony was impermissible hearsay evidence. Thomas did not object on any of the grounds that Blevins now advances in his brief. Thus, a plain error analysis remains the proper standard of review. *See State v. Locklear*, 363 N.C. 438, 449, 681 S.E.2d 293, 303 (2009) ("To the extent defendant . . . objected on grounds other than those now argued on appeal, he has waived his right to appellate review other than for plain error.").

issue was whether Blevins had intimidated a witness against him, Jenson. Pursuant to our Supreme Court's ruling in *Moseley*, in order to have been admissible Jenson's testimony only needed to be relevant to "any fact or issue" having to do with intimidating a witness.

The crime of intimidating a witness exists when

> any person . . . threat[ens], menaces or in any other manner intimidate[s] or attempt[s] to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent[s] or deter[s], or attempt[s] to prevent or deter any person . . . acting as such witness from attendance upon such court[.]

N.C. Gen. Stat. § 14-226 (2011). This crime is proven by showing that (1) the person alleged to have been intimidated was acting as a witness in a court of this State, (2) the defendant intentionally intimidated that witness in order to influence her testimony, and (3) the defendant did so by threats. N.C.P.I. Crim. 230.61 (2012).

We find nothing in the record to suggest that the statements made by Blevins to Jenson were admitted to prove his character. Rather, those statements served as evidence of the threats made by Blevins during his attempt to intimidate Jenson. Accordingly, the trial court did not err in failing to exclude Jenson's testimony under Rule 404(b).

Second, Blevins contends that Jenson's testimony was

irrelevant to the crime of intimidating a witness and, thus, should not have been admitted. We are not persuaded.

As the State rightly notes in its brief, the statements made by Blevins are "part and parcel of the crime committed" and, as such, necessarily relevant to the crime. For the defendant to be convicted of intimidating a witness, the State must show that he threatened a witness. Blevins's statements constituted threats against Jenson. Thus, they are relevant. *See State v. Galloway*, 188 N.C. 416, 417, 124 S.E. 745, 746 (1924) ("The circumscribed admission of the defendants should not be invoked as a means of excluding evidence material to the State's proof of the essential elements of the offense charged in the indictment."); *cf. State v. Jackson*, 161 N.C. App. 118, 588 S.E.2d 11 (2003) (holding that the victim's testimony concerning how she felt when the gun used by the robbery perpetrators was placed to her head was relevant, in a prosecution for robbery with a dangerous weapon, to show the element of the offense that the victim felt her life had been threatened and endangered by the use of a gun). Accordingly, we find no error, much less plain error, for the trial court's failure to exclude these statements as irrelevant.

Third, Blevins contends that the admission of the statements made to Jenson was unfairly prejudicial under Rule 403 and, thus, should have been excluded. Rule 403 provides that

evidence, even where relevant, may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403. In applying this rule, the North Carolina Supreme Court has stated that it is for the trial court to determine whether the probative value of the testimony of a defendant's attempts to intimidate a witness was substantially outweighed by the danger of unfair prejudice. *State v. Mason*, 337 N.C. 165, 171, 446 S.E.2d 58, 61 (1994). Though Jenson's testimony may have resulted in some prejudice against Blevins,[3] we find nothing in the record to suggest that the significant probative value of this aspect of Jenson's testimony was substantially outweighed by the danger of unfair prejudice. Accordingly, we find no evidence that the trial court abused its discretion or committed plain error.

As the State pointed out in its brief, "[t]here can be no plain error[] when there is no error." Blevins may not use the Rules of Evidence as a shield to protect himself from his own attempts to intimidate a witness against him. We conclude that Judge Doughton neither erred nor plainly erred by failing to exclude this portion of Jenson's testimony.

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[3] "Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree. The relevant evidence is properly admissible . . . *unless* the judge determines that it must be excluded, for instance, because of the risk of '*unfair* prejudice.'" *State v. Mercer*, 317 N.C. 87, 93–94, 343 S.E.2d 885, 889 (1986).

IV. Ineffective Assistance of Counsel

Finally, Blevins argues that he was denied his right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 23 of the North Carolina Constitution. Blevins alleges that Thomas improperly broke his promise to the jury that Blevins would testify, failed to properly object to certain testimony, wrongly moved to dismiss the case in the presence of the jury, and failed to present mitigating evidence during the sentencing hearing. Blevins also contends that each of the four preceding errors, taken together, constitute an additional prejudice.

Ineffective assistance of counsel ("IAC") claims brought on direct review are "decided on the merits when the cold record reveals that no further investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). "This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated." *Id.* at 166, 557 S.E.2d at 524-25 (internal quotation marks omitted). "[S]hould the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without

prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding." *Id.* at 167, 557 S.E.2d at 525 ("[B]ecause of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal."); *see generally State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) ("In general, claims of [IAC] should be considered through motions for appropriate relief and not on direct appeal."). A motion for appropriate relief, which would result in an evidentiary hearing at the trial level, is preferable to a direct appeal because the direct appeal forces the State, in defending such an allegation, to rely on "[unknown] information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor." *Stroud*, 147 N.C. App. at 554, 557 S.E.2d at 547 ("Only when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance.") (internal quotation marks, brackets, and citations omitted).

When a defendant alleges IAC, he must show that his attorney's conduct fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688-89, 80 L. Ed. 2d 674, 693 (1984); *State v. Strickland*, 346 N.C. 443, 454, 488 S.E.2d 194, 200 (1997). In addition, a claim alleging IAC "must establish . . . that the trial would have had a

different outcome in the absence of such assistance." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525 (citing *Strickland*, 466 U.S. at 687–88, 80 L. Ed. 2d at 693). In determining whether counsel's actions are objectively reasonable, the United States Supreme Court has specified that:

> [A] court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 688–89, 80 L. Ed. 2d at 694–95 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.") (internal citation omitted).

In *State v. Stroud*, we addressed a similar case in which the defendant alleged IAC on the grounds that the defendant's trial attorney had "failed to move to sever his case from [his co-defendant's] case for trial, failed to object to irrelevant evidence and inadmissible hearsay, and failed to request limiting instructions for evidence admissible against [the co-

defendant], but not against [the defendant]." *Stroud*, 147 N.C. App. at 553, 557 S.E.2d at 547. There, we determined that it was unclear on the face of the record whether the actions of defendant's counsel were the result of ineffective and unreasonable behavior or simply the result of tactical decisions and trial strategy. *Id.* at 556, 557 S.E.2d at 548. Thus, we concluded that the defendant's "arguments concern potential questions of trial strategy and counsel's impressions," that the defendant had "prematurely asserted his ineffective assistance of counsel claim," and that "an evidentiary hearing available through a motion for appropriate relief" was necessary to sort out the nature of counsel's actions. *Id.* (internal quotation marks omitted). As in *Stroud*, after a thorough review of the transcript and record in this case, we are unable to determine whether Thomas's actions were ineffective or merely the result of trial strategy.

Accordingly, we dismiss this issue without prejudice to Blevins to file a motion for appropriate relief in the trial court.

NO ERROR in part; DISMISSED in part.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).