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NO. COA13-267
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

STATE OF NORTH CAROLINA

v. Wake County
No. 10 CRS 38

ANTHONY WAIRS MUIR

Appeal by Defendant from judgments entered 12 October 2011 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 11 September 2013.

Attorney General Roy Cooper, by Assistant Attorney General Justin M. Hampton, for the State.

Assistant Public Defender Brendan O'Donnell for Defendant.

STEPHENS, Judge.

Procedural History and Evidence at Trial

On 3 September 2009 James Wise was working as an informant with the Raleigh Police Department ("RPD"). Wearing a wire, Wise went to the home of Defendant Anthony Wairs Muir and attempted to purchase marijuana. Defendant did not have marijuana, so Wise asked him for some "hard white," also known as crack cocaine. Wise waited on the porch while Defendant went to retrieve the

drugs. After observing the interaction between Wise and Defendant, one officer testified that saw what he believed to be a drug transaction, but noted that he was unable to distinguish money or narcotics. Defendant was later arrested and indicted for possession with the intent to sell or deliver cocaine, sale of cocaine, and delivery of cocaine.

At trial, Wise was called to testify about his transaction with Defendant. In anticipation of that testimony, the trial judge conferred with counsel for both parties, outside the presence of the jury, regarding the extent to which counsel for Defendant could cross-examine Wise about two pending criminal charges. After discussion from both sides, the trial court determined that the existence of Wise's pending charges could be elicited on cross-examination, but counsel for Defendant could not "pry into the circumstances surrounding those charges." As a result, the following colloquy occurred between Wise (here, "A") and counsel for Defendant (here, "Q") on cross-examination:

> Q. Ms. Jacobs delved into your criminal record just cursory [sic]. I want to talk to you just a little more. What[,] if anything[,] in the last ten years have you been convicted of, meaning[,] what charges have you gone to court and either been found guilty of or pled guilty to?
>
> A. I haven't pled. I've pled guilty to none of them. I was found guilty of one

> misdemeanor charge.
>
> Q. What misdemeanor charge?
>
> . . .
>
> A. What I was charged with was yelling and hollering at a lady in Moore Square.
>
> Q. Weren't you convicted of public disturbance in 19 — weren't you convicted of resisting a public officer [in] 2004?
>
> A. I think. I'm not for sure. I don't remember that.
>
> . . .
>
> Q. Do you not have a pending charge of assault with a deadly weapon inflicting serious injury, common law robbery, pending now?
>
> A. Yes, sir.
>
> Q. Okay. And is it your testimony that you have not done work for [the RPD] in exchange for dismissals?
>
> A. . . . I did work for them for money.
>
> Q. It's your testimony that that's all you've done, just for money?
>
> A. I did it for money and only one traffic ticket.

A jury convicted Defendant of possession with intent to sell or deliver cocaine, sale of cocaine, and delivery of cocaine. He was sentenced to 18 to 22 months in prison for the sale of cocaine and 11 to 14 months in prison for possession

with intent to sell and deliver cocaine. The second sentence was suspended, and Defendant was placed on supervised probation for 24 months to begin at the expiration of his active sentence. The trial court arrested judgment on Defendant's conviction for delivery of cocaine. Defendant appeals.

Discussion

On appeal, Defendant argues that (1) the trial court erred in refusing to allow him to more fully cross-examine Wise, in violation of Defendant's constitutional rights; (2) the trial court plainly erred by failing to properly instruct the jury to review Wise's testimony with caution; and (3) Defendant's trial counsel committed a series of errors cumulatively prejudicing Defendant's case and violating his rights to effective assistance of counsel and a fair trial. We find no error in part and dismiss in part.

I. The Confrontation Clause

Defendant first argues that the trial court erred by failing to allow him to cross-examine Wise about the circumstances surrounding Wise's employment with the RPD and the criminal charges pending against him. Specifically, Defendant contends that the trial court violated his federal and state constitutional rights to confront Wise. Before reviewing this

argument on its merits, we address the State's contention that Defendant did not properly preserve his argument for appellate review.

A. Preservation of Constitutional Objection

As a preliminary matter, Defendant argues that he preserved his Confrontation Clause argument by objection during the State's attempt to introduce Wise's testimony. For support, Defendant relies on the following pre-testimony exchange:

> [THE STATE]: There are two matters. My next witness is going to be [Wise], who is the confidential informant in this case. One of the things that I'm going to go over, of course, is his criminal record. He has one prior felony conviction. He also has common law robberies and assault with a deadly weapon inflicting serious injury. It's an '08 case here in Wake County. It has not been disposed of. It is a pending charge. . . .
>
> THE COURT: It's a pending charge? . . .
>
> [THE STATE]: That would be my position. That would be my position as to not bring up anything with regard to that and that [counsel for Defendant] be barred from asking any other questions with regard to [the pending charge].
>
> THE COURT: It's not a conviction.
>
> [THE STATE]: Yes, sir, I'm aware of that.
>
> THE COURT: If it were, it would be fair game.

> [COUNSEL FOR DEFENDANT]: Judge, I have cases I would like to cite to you, and I would — I certainly understand that it's not a conviction. . . . State v. Alston . . . indicates it would be irreversible [sic] error by not allowing the defendant to question the [S]tate's witness about this pending charge in which he faced a maximum 30-year sentence.
>
> THE COURT: I think in this case I'm going to allow you to ask him about [the pending charges]. . . .
>
> [COUNSEL FOR DEFENDANT]: Thank you, Your Honor.
>
> THE COURT: We're not going to go into the details; [these charges have] nothing to do whatsoever with drugs.
>
> [COUNSEL FOR DEFENDANT]: Your Honor, I believe the extent —
>
> THE COURT: Limited instruction which only applies to the conviction [sic].
>
> [COUNSEL FOR DEFENDANT]: I believe the extent of my questions about that would be: Do you have these things pending?
>
> . . .
>
> THE COURT: All [counsel for Defendant] is entitled to do is ask [Wise] if he's got charges pending, not to discuss the nature, not to pry into the circumstances surrounding those charges.

Paraphrasing the *Alston* Court's holding that "it was error to prevent the defendant from probing the credibility of a state's witness by asking him whether he expected leniency from his

potential sentence on his own pending criminal charges," Defendant contends that his reference to *State v. Alston*, 17 N.C. App. 712, 195 S.E.2d 314 (1973), was sufficient to preserve the confrontation issue for appellate review. Therefore, he asserts, "[i]t is apparent from [the context] that [defense counsel in this case] was objecting to a limitation on his ability to confront [Wise] about his potential sentence — including any expectation of leniency — in violation of [D]efendant's right guaranteed by the Confrontation Clause." We disagree.

Generally speaking, "[t]his Court will not consider arguments based upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if [the] defendant does not raise them in the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (citations and internal quotation marks omitted), *cert. denied*, 540 U.S. 988, 157 L. Ed. 2d 382 (2003). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the *specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P.

10(a)(1) (emphasis added).

A review of the pre-testimony exchange in this case indicates that Defendant's trial counsel did not object to the limitation imposed by the trial court. Though defense counsel arguably objected to the State's request that he be prohibited from questioning Wise about Wise's pending criminal charges, he *explicitly agreed* with the trial court's instruction that he refrain from getting into "the particulars" of those pending charges, stating: "I believe the extent of my questions about [the pending charges] would be: Do you have these things pending?" Accordingly, we conclude that Defendant did not preserve his Confrontation Clause argument for appellate review.

B. Abuse of Discretion

Defendant also contends that, if his constitutional argument was not properly preserved, the trial court's decision to limit his ability to cross-examine Wise should be reviewed for abuse of discretion. Specifically, Defendant asserts that the trial court lacked the discretion to "exclude altogether questions and answers [that] directly challenge the disinterestedness or credibility of the witness'[s] testimony." We disagree.

As noted *supra*, counsel for Defendant failed to object to

the trial court's instruction limiting the extent to which he could "pry into the circumstances surrounding [Wise's pending] charges." His only objection was directed against the State's motion to prevent him from asking Wise about the *existence* of those charges, not the surrounding circumstances. Accordingly, we hold that review of this issue under the abuse of discretion standard was not properly preserved for appellate review. *See, e.g.*, *State v. Campbell*, 359 N.C. 644, 670, 617 S.E.2d 1, 17 (2005) ("Defendant did not object to this exchange at trial and, thus, has failed to preserve this issue for appeal.").

We note, however, that in criminal cases a defendant may nonetheless argue an unpreserved issue on appeal when that defendant specifically and distinctly contends that the trial court's mistake amounted to plain error. N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Plain error arises when the trial court's mistake is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). "Under the plain error rule, [the] defendant must convince [the appellate court] not only that there was error, but that absent the error, the

jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

In the section of his brief entitled "Prejudice," Defendant cites to N.C. Gen. Stat. § 15A-1443(a) and contends that "[a]bsent constitutional error, it is Defendant's burden to show that there is a reasonable possibility that[,] but for the abridgment of his right to cross-examine [Wise], a different result would have been reached at trial." From there, Defendant goes on to argue that Wise was a crucial witness to the State's case and that the trial court's limitation of his ability to cross-examine Wise likely had an impact on the jury's verdict. Though prejudicial error must be present to successfully argue plain error on appeal, an unpreserved argument of prejudice does not amount to a specific and distinct contention that the trial court's alleged mistake in an evidentiary or instructional ruling amounted to "plain error."

Section 15A-1443(a) states that "[a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at [trial]." N.C. Gen Stat. § 15A-1443(a) (2011). However, in *State v. Lawrence*, 365

N.C. 506, 512, 723 S.E.2d 326, 330 (2012), our Supreme Court made it clear that section 1443 only applies to "[p]reserved legal error," as distinct from unpreserved plain error. *Id.* Because Defendant made no specific and distinct argument that the trial court committed *plain error* in limiting his ability to cross-examine Wise, review of that issue is waived. *See, e.g.*, *State v. Hamilton*, 338 N.C. 193, 208, 449 S.E.2d 402, 411 (1994) ("Because [the] defendant has failed to specifically and distinctly allege that the trial court's instruction amounted to plain error, [he] has waived any appellate review."). Accordingly, Defendant's first argument is overruled.

II. Jury Instructions

In criminal cases, an unpreserved argument that the trial court erred in its jury instructions may be reviewed for plain error when such error is specifically and distinctly alleged on appeal. *Odom*, 307 N.C. at 660–61, 300 S.E.2d at 378–79; N.C.R. App. P. 10(a)(4). As noted above, plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (citation and internal quotation marks omitted). "Under the plain error rule, [the] defendant must convince this Court not only that there was error, but that

absent the error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

In his second argument on appeal, Defendant specifically and distinctly contends that the trial court plainly erred by failing to instruct the jury that it should examine Wise's testimony with caution. Defendant points out that section 104.30 of the North Carolina Pattern Jury Instructions provides a template for such an instruction and notes that our trial courts are required to "declare and explain the law arising on the evidence relating to each substantial feature of the case." For support, Defendant cites *State v. Black*, 34 N.C. App. 606, 239 S.E.2d 276 (1977), where we held that the trial court erred by failing to instruct the jury to examine an undercover detective's testimony with care and caution. *Id.* at 609, 239 S.E.2d at 278. We are unpersuaded.

In *Black*, the defendant was indicted for possession of marijuana with intent to sell and sale of marijuana. *Id.* at 607, 239 S.E.2d at 277. At trial, the State offered the testimony of (1) an undercover deputy sheriff who purchased marijuana from Defendant and (2) a prostitute who helped facilitate the transaction. *Id.* At the close of the evidence, the defendant's trial counsel requested that the court specially instruct the

jury that it should consider the testimony of the deputy and the prostitute with care and caution. *Id.* at 608, 239 S.E.2d at 277. The trial court agreed to do so as to the prostitute, but not as to the deputy. *Id.* at 609, 239 S.E.2d at 278. Citing a rule that the jury should be directed to scrutinize the evidence of a paid detective and make appropriate allowances for bias upon proper request, we held that the trial court erred in instructing the jury as to the prostitute, but not the deputy sheriff, and awarded a new trial. *Id.* In so holding, we pointed out that the trial court's error was not necessarily harmless because the prostitute's testimony was less persuasive than the deputy's testimony, and, by instructing the jury to consider only the prostitute's testimony with caution, the trial court potentially "bolstered [the deputy's unequivocal] testimony in the minds of the jurors." *Id.*

In this case, the trial court similarly failed to instruct the jury that it should consider the paid informant's testimony with caution. Unlike *Black*, however, counsel for Defendant never requested such a jury instruction at trial and there was no second, potentially interested witness whose testimony might have bolstered Wise's testimony by comparison. In addition, the

jury had already received the following instruction regarding the testimony of an interested witness:

> In determining whether to believe any witness, you should apply the same tests of truthfulness that you reply [sic] in your everyday affairs. As applied to this trial, the tests may include the opportunity of the witness to see, hear, know[,] or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; *any interest, bias, or prejudice the witness may have*; the apparent understanding and fairness of the witness; whether the testimony of the witness is reasonable; whether the testimony is consistent with other believable evidence in the case.

(Emphasis added). Indeed, our Supreme Court has long held that:

> Instruction[s] to scrutinize the testimony of a witness on the ground of interest or bias [are] a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to prejudice, partiality, or inclination of a witness will not generally be held for reversible error, *unless there be a request for such instruction*.

State v. Stevens, 244 N.C. 40, 44, 92 S.E.2d 409, 412 (1956) (citations and internal quotation marks omitted; emphasis added). Because Defendant made no such request in this case, we hold that the trial court did not err by omitting a specific cautionary instruction regarding Wise's testimony. Accordingly, Defendant's second argument is overruled.

III. Ineffective Assistance of Counsel ("IAC")

Lastly, Defendant argues that he was denied his right to effective assistance of counsel under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, sections 19 and 23 of the North Carolina Constitution. Specifically, Defendant alleges that his trial counsel failed to: (1) impeach Wise on a prior felony conviction, (2) impeach Wise on his previous conviction for maintaining a dwelling, (3) object to an officer's testimony that Wise was truthful to the police, (4) request an instruction directing the jury to examine Wise's testimony with caution, and (5) seek permission from the trial court to cross-examine Wise regarding possible expectations of leniency on pending charges in exchange for his testimony. Defendant further contends that these errors, taken together, constitute an additional prejudice.

As a general rule, an allegation of IAC should only be reviewed on appeal 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). "[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 ("MAR")] proceeding." *Id.* at 167, 557 S.E.2d at 525.

In alleging IAC, a defendant must show that his counsel's performance was (1) deficient, with "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defense, showing that counsel's "errors were so serious as to deprive the defendant of a fair trial . . . ." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). When determining whether an attorney provided ineffective trial assistance, a court

> must indulge 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.

Id. at 689, 80 L. Ed. 2d at 694–95 (citation omitted).

After a thorough review of the record, we conclude that the evidence available is insufficient to establish whether trial counsel's actions were ineffective or merely the result of trial strategy. Because the record does not address this issue, we

dismiss Defendant’s argument without prejudice to his right 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).