NO. COA14-664
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Onslow County
No. 12 CRS 50988

RODNEY R. MILTON

Appeal by Defendant from judgment entered 24 January 2014 by Judge Paul L. Jones in Onslow County Superior Court. Heard in the Court of Appeals 20 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Derek L. Hunter, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jillian C. Katz, for Defendant.

STEPHENS, Judge.

Evidence and Procedural Background

Defendant Rodney R. Milton appeals from the judgment entered upon his conviction of robbery with a dangerous weapon in connection with the robbery of a credit union. The evidence at trial tended to show the following: In early 2012, Defendant began working as an assistant to Yvonne Fye-Morris in the

residential and commercial cleaning business Fye-Morris owned and operated in Jacksonville.[1] Fye-Morris hired Defendant to help her clean a Barnes & Noble Bookstore located in Jacksonville Mall on Monday and Wednesday mornings. On the morning of 8 February 2012, Fye-Morris picked up Defendant for work and noticed he was wearing a different outfit from the one he had previously worn on the job. Defendant wore blue pants, a blue shirt, athletic shoes, a heavy beige jacket, and a black baseball cap. The pair arrived at Barnes & Noble at 7:00 a.m., cleaned the store, and left between 8:45 and 9:00 a.m.

Defendant asked Fye-Morris to drive him to the local bus station so he could price a ticket from Jacksonville to Philadelphia. After that stop, Fye-Morris drove to a nearby K-Mart. While Fye-Morris was inside, Defendant visited an Exxon gas station located in the same shopping center. The two later met back at Fye-Morris's car and, as they drove past the Triangle branch of the Marine Federal Credit Union ("MFCU"), Defendant stated that it would be easy to rob a bank in North Carolina. Fye-Morris found Defendant's remark "strange and odd," but made no comment. At Defendant's request, Fye-Morris

[1] Fye-Morris knew Defendant as Rodney "Fisher."

dropped him off at a different Exxon station before she returned home.

About lunchtime that day, a man entered the Triangle branch of MFCU and approached Marlana Gaffke, a teller. The man, who was dressed in a dark cap and beige jacket, handed Gaffke a note written on the back of a Barnes & Noble flyer. The note read: "Give me the money. I have a gun." Gaffke gave the man all of the money in her drawer — a total of $9,497.00 — including the specially marked "bait" money that can be identified in the event of a robbery. The man took the money and left the bank in a taxi owned by Tarheel Taxi Company.

Just afterwards, Fye-Morris was watching television at home when she saw a "breaking news" report about a robbery at the Triangle branch of MFCU. The news broadcast included a still image of the suspect from the MFCU surveillance camera. Fye-Morris immediately identified the man in the image as Defendant because he was wearing the same clothing he had worn to work that morning. Fye-Morris reported this information to her daughter, who worked at another branch of MFCU. Once the Jacksonville Police Department ("JPD") learned of Fye-Morris's report, an officer with the JPD interviewed her. Fye-Morris identified a photograph of the robbery suspect as Defendant.

Detective Barbara Evanson of the JPD testified that she retrieved surveillance video from the Barnes & Noble store and the Exxon station near K-Mart. She confirmed that Defendant, dressed in blue pants, a blue shirt, beige jacket, black cap, and athletic shoes, had cleaned the Barnes & Noble store that morning and that a man wearing the same clothing had visited the Exxon. She also opined that Defendant was wearing the "exact clothing" in the Barnes & Noble video as the suspect in the MFCU video.

Milton Hunter, Jr., the driver of the cab the suspect had taken to and from the MFCU branch, testified that he had picked a man up from the bus station, driven him to the credit union, waited for about 20 minutes while the man was inside, and then drove the man back toward the bus station. However, the man asked to be let out near a bus stop in downtown Jacksonville, and Hunter complied. JPD officers recovered a jacket from the backseat of Hunter's taxi. Officers who searched the area near the bus stop recovered a black cap from a nearby yard, and they used the hat and jacket to conduct a canine search.

The canine search led officers to the home of Glenda Williams, who told the officers that Defendant had stopped by her home at 11:00 a.m. that day for about thirty minutes. At

about 11:30 p.m. the same day, Williams contacted the JPD to report that Defendant had just returned to her home, said he needed to retrieve his gun, got something wrapped in a towel from her bathroom, and then departed in a taxi owned by Tarheel Taxi Company. Officers recovered a blue shirt from a bin outside Williams's house.

In the early morning hours of 9 February 2012, Defendant was arrested near the Coastal Motel. At the time of his arrest, Defendant had $505.00 in cash, a glass pipe, and several lighters in his possession. On 14 February 2012, officers found $6,922.00 in a field about 75 yards from the Coastal Motel. The recovered money, which was still banded together, included the MFCU bait money. In addition, Shawnta Combs,[2] Defendant's sister-in-law, identified Defendant as the man in the surveillance video. Combs's identification was based on the suspect's clothing, particularly his Nike shoes which Combs stated she had given to Defendant.

On 20 February 2012, unaware that officers had already discovered the stolen money, Defendant gave a map of its location to Gerald Potter, an employee at the Onslow County jail. Defendant promised to split the money with Potter in

[2] At the time of trial, Combs used the last name "Herdy."

exchange for his help in retrieving it. Detective Evanson testified that the stolen money had in fact been discovered exactly where the map indicated it would be. Additional testimony included a report from another jail employee that Defendant had confessed to robbing a bank, and expert testimony that Defendant's DNA matched DNA found on the jacket from Hunter's taxi, the black cap discovered near the bus stop, and the blue shirt retrieved from the bin outside Williams's home.

Defendant was tried upon indictments for robbery with a dangerous weapon and felonious possession of stolen goods. On 24 January 2014, the jury returned guilty verdicts on both charges. The trial court sentenced Defendant to 73-100 months in prison on the robbery conviction and a consecutive term of 8-19 months on the stolen goods conviction. Defendant gave notice of appeal in open court. On 11 February 2014, the State tendered a motion to arrest judgment on the stolen goods charge, which the trial court granted.

Discussion

On appeal, Defendant argues that the trial court erred in (1) permitting certain lay opinion testimony by Detective Evanson, (2) allowing the State to ask Defendant if he had used drugs on the day of his arrest, and (3) failing to reinstruct

the jury on common law robbery. We find no prejudicial error in part and dismiss in part.

I. Lay opinion testimony

Defendant first argues that the trial court erred in allowing Detective Evanson, as a lay witness, to identify the person in the surveillance video as Defendant and to state her opinion that Defendant was wearing the "exact clothing" in the Barnes & Noble surveillance video as the suspect in the MFCU surveillance video. We disagree.

> In general, we apply the abuse of discretion standard to reviews of the admissibility of lay opinion testimony. However, 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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Therefore, where a party does not object at trial, plain error is the proper standard of review. Plain error is so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached. Plain error exists 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. Collins, 216 N.C. App. 249, 254-55, 716 S.E.2d 255, 259-60 (2011) (citations, internal quotation marks, and brackets omitted; emphasis in original).

> Admissible lay opinion testimony is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. Ordinarily, opinion evidence of a non-expert witness is inadmissible because it tends to invade the province of the jury.

Id. at 255, 716 S.E.2d at 260 (citations and internal quotation marks omitted). Defendant cites *State v. Belk*, 201 N.C. App. 412, 689 S.E.2d 439 (2009), *disc. review denied*, 364 N.C. 129, 695 S.E.2d 761 (2010), as controlling authority in his appeal on this issue. In that case, this Court held that a trial court erred in allowing a police officer to testify that the defendant was the individual depicted in a surveillance tape because the video was clear enough that the officer was "in no better position than the jury to identify [the d]efendant as the person in the surveillance video[.]" *Id.* at 414, 689 S.E.2d at 441. However, the decision to grant a new trial to the defendant in that case was based upon the reasoning that "the State's case rested exclusively on the surveillance video and [the officer's] identification testimony. The State offered no fingerprint

evidence, DNA evidence, or other identification testimony." *Id.* at 418, 689 S.E.2d at 443. In each of these respects, Defendant's case is entirely distinguishable from *Belk*.

Here, during the direct examination of Detective Evanson, Defendant did not object to her testimony that Defendant was wearing the "exact clothing" as the robbery suspect in the MFCU surveillance video:

> Q Okay. And did you observe anything of significance in the video footage of the Barnes & Noble?
>
> A The significance in the video footage from Barnes & Noble was when [Defendant] entered the hallway, which I believe is Camera Number 8 at Barnes & Noble. The clothing that he was wearing in that hallway is, in my opinion, the exact clothing that was worn by the armed robbery suspect at the Marine Federal Credit Union.

Having failed to object to its admission at trial, Defendant, unlike the defendant in *Belk*, is entitled only to plain error review of this testimony. *See Collins*, 216 N.C. App. at 254-55, 716 S.E.2d at 259-60.

We further observe that, unlike the officer who testified in *Belk*, Evanson did not identify the person in the video of the crime as Defendant, but rather, in describing the importance of a video showing Defendant lawfully going about his job, opined that Defendant was wearing the exact clothing as the suspect

depicted in the MFCU video showing the robbery. In light of the overwhelming evidence of Defendant's guilt, including, *inter alia*, (1) unchallenged testimony from Fye-Morris and Combs identifying Defendant as the man in the MFCU video, as well as (2) DNA evidence linking Defendant to items of clothing recovered after the robbery which matched the clothing depicted in the video evidence, (3) testimony about the map indicating the location of the stolen money, and (4) Defendant's reported confession to a jail employee, we simply cannot conclude that, in the absence of Detective Evanson's opinion that the robbery suspect wore the "exact clothing" as Defendant did in the Barnes & Noble video, the jury would have reached a different verdict. Thus, Defendant cannot establish plain error in the admission of the challenged testimony.

As for the trial court's overruling of Defendant's objection to Detective Evanson's references to the man depicted on surveillance videos as Defendant, a careful review of the transcript reveals that Evanson only used Defendant's name when describing the man depicted in the time-stamped Barnes & Noble video from the morning of 8 February 2012. This was the only testimony to which Defendant objected. Since Defendant himself testified that he worked with Fye-Morris cleaning the Barnes &

Noble store that morning, it is undisputed that Defendant is the man depicted in the video from Barnes & Noble. On the other hand, when describing the surveillance videos from the Exxon station and the MFCU branch, Detective Evanson referred to the person depicted therein only as "a gentleman" or "the subject." We find no error in the admission of this portion of Detective Evanson's testimony. Accordingly, Defendant's first argument is overruled.

II. Questions about Defendant's drug use

Defendant next argues that the trial court committed plain error in allowing the State to ask him whether he had used drugs on the day of his arrest. We disagree.

Defendant notes that the trial court granted his pretrial motion *in limine* to exclude any testimony regarding Defendant's possession of cocaine at the time of his arrest or his use of cocaine on the day of his arrest. However, during his direct testimony, Defendant explained that he had returned to Williams's house on the evening of 8 February 2012 in order "to get some E pills, ecstasy pills." On cross-examination, the State twice asked Defendant if he had used drugs on the day of his arrest, and each time Defendant responded, "Yeah."

"A motion *in limine* does not preserve a question for appellate review in the absence of the renewal of the objection at trial." *State v. Crandell*, 208 N.C. App. 227, 235, 702 S.E.2d 352, 358 (2010) (citations omitted), *disc. review denied*, 365 N.C. 194, 710 S.E.2d 34 (2011). Accordingly, Defendant has argued that the State's questions about his drug use constituted plain error, that is, error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *See Collins*, 216 N.C. App. at 255, 716 S.E.2d at 260.

In light of the trial court's ruling on Defendant's pretrial motion, it was improper for the State to ask Defendant about his drug use before his arrest. However, given the overwhelming evidence that Defendant committed the robbery of the MFCU branch and of Defendant's mention on direct examination that he had gone to Williams's house to obtain illegal drugs, we do not believe his admission to using drugs probably resulted in the jury reaching a different verdict than it otherwise would have reached. *Id.* Accordingly, this argument is overruled.

III. Failure to reinstruct the jury on common law robbery

Lastly, Defendant argues that the trial court erred in failing to reinstruct the jury on common law robbery. Again, we disagree.

After several hours of deliberations, the jury submitted a note to the trial court, asking, "Can we have the statute on the differences of count one?"[3] and "Is there [sic] one or more items of the statute that must be met, or all seven?" The trial court recalled the jury to the courtroom, and the following exchange took place:

> THE COURT: Mr. Foreperson, I have a note that says — the record should reflect that all jurors are back in the presence of the court - "can we have the statute on the difference of count one?" When you say, "the statute", what are you referring to?
>
> JUROR NUMBER TEN: The difference between the — if I may read from here — the guilty of robbery with a dangerous weapon and guilty of common law robbery. May we have the statute — the difference?
>
> THE COURT: Okay. I'll give you a real simple explanation. The first one, if a firearm was proven; the second one, if there's not a sufficient proof of a firearm.
>
> JUROR NUMBER TEN: Your Honor, there was a number of sticking points on that. Is there any way we can get it in writing?

[3] Count one is a reference to the charge of robbery with a dangerous weapon and the lesser-included offense of common law robbery.

THE COURT: No, sir.

JUROR NUMBER TEN: No? Okay. Thank you, sir.

THE COURT: What do you mean, sticking points?

JUROR NUMBER TEN: Just discussion points on having a weapon or not, or the perception of one, sir. The perception, in general. Number six on the first one, if we could have that read to us.

THE COURT: Okay.

JUROR NUMBER TEN: On the one for the armed robbery and, if at all possible, Your Honor, could you read the — the conditions for guilty of common law robbery; and, also, we needed to know if — if we need to meet one or more, or all seven.

THE COURT: Sir, all. For the first one, you have to meet seven; for the second one, it's six.

JUROR NUMBER TEN: Thank you, sir.

THE COURT: There's no part, it's all.

JUROR NUMBER TEN: Is it possible to hear the statutes again, sir?

THE COURT: Okay.

JUROR NUMBER TEN: Thank you, Your Honor.

THE COURT: Any objection to me re-reading the jury instruction on robbery with a firearm?

[THE STATE]: No, sir.

[DEFENSE COUNSEL]: No, Your Honor.

THE COURT: Okay. Keep in mind all the other instructions I've given you, but I'm going to read the whole thing again.

The defendant has been charged with robbery with a firearm, which is the taking and carrying away the personal property of another, from his person or in his presence, without his consent, by endangering or threatening a person's life with a firearm, the taker knowing that he is not entitled to take the property and intending to deprive another of its use permanently.

For you to find the defendant guilty of this offense, the state must prove seven things, beyond a reasonable doubt.

First, that the defendant took property from the person, presence or place of business of Marlana Gaffke, an employee of Marine Federal Credit Union.

Second, that the defendant carried away the property.

Third, that the person did not voluntarily consent to the taking and carrying away of the property.

Fourth, that the defendant knew he was not entitled to take the property.

Fifth, that at the time of the taking, the defendant intended to deprive a person of its use permanently.

Sixth, that the defendant had a firearm in his possession at the time he obtained the property, or that it reasonably appeared to

> the victim that a firearm was being used, in which case you may infer that said instrument is what the defendant's conduct represented it to be.
>
> And seventh, that the defendant obtained the property by threatening the life of Marlana Gaffke, an employee of Marine Federal Credit Union, with a firearm or purported firearm.
>
> If you find from the evidence, beyond a reasonable doubt, that on or about the alleged date, the defendant had in his possession a firearm and took and carried away property from the person, presence or place of business of Marlana Gaffke, an employee of Marine Federal Credit Union, without her voluntary consent, by threatening her life with the use of a firearm, the defendant knowing he was not entitled to take the property, and intending to deprive that person of its use permanently, it would be your duty to return a verdict of guilty. If you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.
>
> Any questions so far?
>
> JUROR NUMBER TEN: No, Your Honor.
>
> THE COURT: Okay. Do you want me to read the other part of it?
>
> JUROR NUMBER TEN: No, Your Honor.
>
> THE COURT: Thank you. You may return to deliberate.

As this excerpt from the transcript reveals, Defendant made no objection to the trial court's response to the jury's questions

and did not request any additional instructions be given. On appeal, Defendant argues that the trial court's decision to repeat the charge on robbery with a dangerous weapon, but not to repeat the charge for common law robbery, constituted plain error.

Defendant cites our General Statutes for the proposition that, "[a]t any time the judge gives additional instructions, he *may* also give or repeat other instructions to avoid giving undue prominence to the additional instructions." N.C. Gen. Stat. § 15A-1234(b) (2013) (emphasis added). This Court has held that a defendant need not make an objection at trial to preserve for appellate review his argument under section 15A-1234. *State v. Tucker*, 91 N.C. App. 511, 516, 372 S.E.2d 328, 331 (1988).

However, where a trial court merely "repeat[s] or clarif[ies] instructions previously given in response to the jury's question, we do not believe these to be 'additional instructions'" as contemplated by this statute. *State v. Farrington*, 40 N.C. App. 341, 346-47, 253 S.E.2d 24, 27 (1979). A trial "court is not required to repeat instructions which were previously given to the jury in the absence of some error in the charge but may do so in its discretion. The trial court's decision whether to repeat previously given instructions to the

jury is reviewed for abuse of discretion." *State v. Smith*, 194 N.C. App. 120, 126, 669 S.E.2d 8, 13 (2008) (citations and internal quotation marks omitted), *disc. review denied*, 363 N.C. 661, 687 S.E.2d 293 (2009). In challenging a trial court's decision whether to *repeat* previously given instructions, a defendant who fails to object is "limited to arguing plain error on appeal. Our Supreme Court has held, however, that discretionary decisions by the trial court are not subject to plain error review." *Id.* at 126-27, 669 S.E.2d at 13 (citation omitted).

Here, the trial court did not give any *additional* instructions; rather, it merely repeated and clarified the instructions previously given on robbery with a dangerous weapon and common law robbery. The decision of whether and how to repeat instructions and attempt to clarify the differences between robbery with a dangerous weapon and common law robbery was within the trial court's discretion and its decision is not subject to plain error review. *See id.*[4] Accordingly, we dismiss this argument.

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[4] Even if Defendant had preserved his right to challenge the trial court's partial repetition of the robbery instructions, Defendant would not prevail. Although, as Defendant notes, the jury foreperson did, at one point, ask the trial court to "read

NO PREJUDICIAL ERROR in part; DISMISSED in part.

Chief Judge MCGEE and Judge DIETZ concur.

Report per Rule 30(e).

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the — the conditions for guilty of common law robbery[,]" this request was in the context of clarifying two apparent points of confusion: (1) whether all or only some of the elements of each offense were required to return a guilty verdict and (2) how the two robbery offenses differed. The trial court addressed both points, and, after re-reading the instruction on robbery with a dangerous weapon, even inquired whether the foreperson wanted to hear the instruction on common law robbery repeated as well. The foreperson stated that the jury did not need to hear that instruction again. Thus, even had Defendant objected and preserved his right to appeal this decision, he could not demonstrate that the trial court abused its discretion given the court's extensive discussion with the foreperson and its careful inquiry to ensure that the jury's confusion was assuaged.