IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-346

Filed: 15 December 2015

New Hanover County, No. 14 CRS 50566

STATE OF NORTH CAROLINA

v.

JAMES FREDERICK BURRISS

Appeal by Defendant from judgment entered 2 October 2014 by Judge W. Douglas Parsons in Superior Court, New Hanover County. Heard in the Court of Appeals 3 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Christopher R. McLennan, for the State.

Sharon L. Smith for Defendant-Appellant.

McGEE, Chief Judge.

James Frederick Burriss ("Defendant") appeals from judgment entered on his convictions of felonious entering and injury to real property. Defendant argues the trial court committed plain error in admitting the opinion testimony of two officers who identified Defendant as the suspect in a surveillance video, and that his trial counsel was ineffective because he failed to object to the admission of the officers' opinion testimony.

Defendant was indicted on 12 May 2014 on charges of breaking and entering, felony larceny, felony conspiracy, injury to real property, and attaining habitual felon status. Defendant's case came on for trial on 1 October 2014 in New Hanover County Superior Court. Due to a fatal defect in the indictment, the State dismissed the felony larceny and conspiracy charges. Before trial began, Defendant made an oral motion *in limine* requesting that the trial court prohibit testimony about the officers' prior personal knowledge of Defendant that allowed the officers to identify Defendant as the man in the video. The State agreed and the trial court granted Defendant's motion, stating that "[t]he underlying reason for the identification will not be mentioned[.]"

At trial, the State's evidence tended to show the following facts. Defendant, along with another male, entered the clubhouse building ("the building") of the Campus Edge Apartments around 9:00 p.m. on 25 November 2013. The building contained the leasing office, laundry room, and workout room. Before leaving the building, both Defendant and the other male appeared to be interested in a SmartCard dispenser machine ("the machine") located in the workout room.

Around 10:45 p.m. on that same evening, the two men returned to the building, turned off the lights, and started to shake the machine. The two men removed the machine and left the building. The next morning, the manager arrived at the building and found the side door damaged and noticed that the SmartCard machine was

missing. The manager provided law enforcement with a copy of the surveillance video.

Detective Vincent Vacarro ("Detective Vacarro") with the Wilmington Police Department testified at trial. He testified that, as part of his investigation, he sent a department-wide email asking for assistance in identifying the suspect from the surveillance video and attached a still photo of the suspect. Lieutenant David Oyler ("Lieutenant Oyler") responded to Detective Vacarro's email, giving Defendant's name. Detective Vacarro followed up with Lieutenant Oyler, asking how certain he was on his identification. Lieutenant Oyler stated that he was "100 percent certain" it was Defendant. After comparing the surveillance photo to a photo of Defendant, Detective Vacarro also determined they were the same person. He testified that he was "100 percent" certain Defendant was the suspect in the surveillance video.

Lieutenant Oyler also testified at trial. He stated he was "100 percent" positive Defendant was the man from the surveillance video and that his opinion had not changed since the day he replied to the email in December 2013.

A jury found Defendant guilty of felonious entry and misdemeanor injury to real property on 2 October 2014. Defendant pleaded guilty to attaining habitual felon status. The trial court sentenced Defendant in the presumptive range of 95 months' to 126 months' imprisonment. Defendant appeals.

I.

Defendant first contends the trial court committed plain error in admitting the testimony of two officers identifying Defendant as one of the men in the surveillance video. Defendant argues the testimony of the officers constituted inadmissible lay opinions because the officers were in no better position than the jurors to draw a conclusion on identity. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2013).

Generally, we review the admissibility of lay opinion testimony under the abuse of discretion standard. *State v. Collins*, 216 N.C. App. 249, 254, 716 S.E.2d 255, 259 (2011). However, Defendant did not object to the testimony of Detective Vacarro or Lieutenant Oyler at trial and, thus, failed to preserve this issue for appeal. We review unpreserved issues pertaining to the admissibility of evidence for plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Plain error arises when the error 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 and quotation marks omitted). "Under the plain error rule, 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." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

Admissible lay witness 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." N.C. Gen. Stat. § 8C-1, Rule 701. When analyzing the admissibility of lay opinion testimony identifying a defendant as the person in a video, this Court has identified the following factors to consider:

> (1) the witness's general level of familiarity with the defendant's appearance; (2) the witness's familiarity with the defendant's appearance at the time the surveillance photograph was taken or when the defendant was dressed in a manner similar to the individual depicted in the photograph; (3) whether the defendant had disguised his appearance at the time of the offense; and (4) whether the defendant had altered his appearance prior to trial.

State v. Belk, 201 N.C. App. 412, 415, 689 S.E.2d 439, 441 (2009) (citations and quotation marks omitted). This Court also considers the clarity of a video and whether any portion of the suspect in the video is obscured. *Id.* at 416, 689 S.E.2d at 442. Defendant argues the officers' testimony constituted inadmissible lay opinion because the officers lacked the requisite personal knowledge on which to base their opinion.

We first address Lieutenant Oyler's testimony. At trial, Lieutenant Oyler testified that he responded to Detective Vacarro's email with Defendant's name, identifying Defendant as the man in the picture. This Court previously has held that, when an officer has sufficient familiarity with a defendant's appearance due to prior interactions, the officer's testimony identifying the defendant in a surveillance video is properly admitted. *Collins*, 216 N.C. App. at 257, 716 S.E.2d at 260. We held in *Collins* that, due to the testifying officer's prior "dealings" with the defendant, he had

sufficient familiarity with the defendant's appearance for his testimony to be helpful to the jury in identifying the defendant as the man in the surveillance video. *Id.* at __, 716 S.E.2d at 260-61.

Here, given Lieutenant Oyler's apparent familiarity with Defendant, his testimony would likely be proper under *Collins*. However, Defendant precluded any testimony regarding the basis for Lieutenant Oyler's familiarity with his pretrial oral motion *in limine*. Because Defendant excluded such testimony, he cannot now claim this as a basis for error on appeal. *See State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (1991) ("The defendant may not change his position from that taken at trial to obtain a 'steadier mount' on appeal.") (citation omitted).

We next address Detective Vacarro's testimony at trial. Assuming *arguendo* Detective Vacarro's testimony was inadmissible under Rule 701, the error would not rise to the level of plain error. Detective Vacarro's testimony presented the same information as the testimony of Lieutenant Oyler, who was, it seems, in a better position than the jury to recognize Defendant from the video, given Lieutenant Oyler's apparent prior familiarity with Defendant. In addition, the jury could make its own determination concerning whether Defendant was recognizable as the person depicted on the video.

Defendant further argues the trial court erred in allowing the testimony because any evidence of the officers' personal knowledge of him could have been

presented outside the presence of the jury to prevent any undue prejudice. However, Defendant did not object to the opinion testimony during trial, which would have given the State the opportunity to correct any potential issue with the officers' testimony by laying the proper personal knowledge foundation for the officers' opinions, whether in the presence of the jury or otherwise.

In any event, we cannot fully review Defendant's arguments because Defendant failed to provide a copy of the surveillance video with his record on appeal. *See State v. Hall*, 187 N.C. App. 308, 324, 653 S.E.2d 200, 212 (2007) ("This omission prevents this Court from determining whether the trial court erred[.]"). During deliberations, the jury asked to review the surveillance video again while in the presence of Defendant. Without a copy of the video, we are not able to conduct a full plain error review. "It is the duty of the appellant to see that the record is properly [prepared] and transmitted. The appellant also has the duty to ensure that the record is complete and contains the materials asserted to contain error." *Id.* at 324, 653 S.E.2d at 211 (citations and quotation marks omitted). "Rule 9 of the North Carolina Rules of Appellate Procedure requires that 'exhibit[s] offered in evidence and *required for understanding of errors assigned* shall be filed in the appellate court.' N.C.R. App. P. 9(d)(2) (2008)" *Id.* at 324, 653 S.E.2d at 211-12. Defendant fails in his burden of proving plain error.

II.

Defendant next contends that his counsel's failure to object to the opinion testimony, and thus preserve the issue for appeal, constitutes ineffective assistance of counsel. In order to be successful on an ineffective assistance of counsel claim, "a defendant must show that (1) defense counsel's 'performance was deficient,' and (2) 'the deficient performance prejudiced the defense.'" *State v. Waring*, 364 N.C. 443, 502, 701 S.E.2d 615, 652 (2010) (quoting *Strickland v. Washington,* 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). "Counsel's performance is deficient when it falls below an objective standard of reasonableness." *Id.* (citation and quotation marks omitted). The defendant is prejudiced by counsel's deficient performance "when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (citation and quotation marks omitted).

Defense counsel's failure to object appears to be a strategic decision in order to prevent the jury from hearing Defendant's extensive criminal history, including multiple prior convictions for breaking and entering and breaking and entering coin/currency machines. In general, "reviewing courts do not second-guess the strategic or tactical decisions made by a defendant's counsel." *State v. Pemberton*, ___ N.C. App. ___, ___, 743 S.E.2d 719, 724 (2013). "[T]actical decisions—such as which witnesses to call, which motions to make, and how to conduct cross-examination—normally lie within the attorney's province." *State v. Brown*, 339 N.C.

426, 434, 451 S.E.2d 181, 187 (1994). When evaluating an ineffective assistance of counsel claim "stemming from [a] challenge[ ] to strategic and tactical decisions made prior to and during trial, a defendant's trial counsel 'is given wide latitude . . . and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear.'" *Pemberton*, ___ N.C. App. at ___, 743 S.E.2d at 724 (citation omitted).

However, without a copy of the video, we are unable to review whether counsel's failure to object was, indeed, a strategic decision and whether there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Waring*, 364 N.C. at 502, 701 S.E.2d at 652 (citation and quotation marks omitted); *Hall*, 187 N.C. App. at 324, 653 S.E.2d at 212. Therefore, we dismiss Defendant's ineffective assistance of counsel claim. *Id.*

Further:

> In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing defendant's appeal because issues could not be determined from the record on appeal and stating that to "properly advance these arguments defendant must move for appropriate relief pursuant to G.S. 15A–1415."). A motion for appropriate relief is preferable to direct appeal because in order to

> defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. "[O]nly when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance." Thus, superior courts should assess the allegations in light of all the circumstances known to counsel at the time of representation.
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> *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citations omitted).

State v. Stroud, 147 N.C. App. 549, 553-54, 557 S.E.2d 544, 547 (2001). Accordingly, we dismiss any claims for ineffective assistance of counsel without prejudice to Defendant's right to file a motion for appropriate relief in the superior court.

NO PLAIN ERROR IN PART; DISMISSED IN PART.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).