IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1262

Filed: 4 October 2016

Catawba County, No. 14 CRS 2824

STATE OF NORTH CAROLINA

v.

FREDDIE SOOTS, Defendant.

Appeal by defendant from judgment entered on or about 30 July 2015 by Judge Daniel A. Kuehnert in Superior Court, Catawba County. Heard in the Court of Appeals 26 April 2016.

Attorney General Roy A. Cooper III, by Assistant Attorney General Barry Bloch, for the State.

Appellant Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

STROUD, Judge.

Defendant Freddie Soots appeals following a jury verdict convicting him of robbery with a dangerous weapon, for which he received a sentence of 65 to 87 months imprisonment. On appeal, defendant contends the following: (1) the trial court erred in denying his motion to dismiss because his due process rights were violated by the State, which waited until almost three years after the robbery to indict him; (2) the trial court erred in admitting hearsay statements under the residual hearsay

exception, N.C. Gen. Stat. § 8C-804(b)(5); and (3) the trial court violated his U.S. Const. amend. VI right to confront witnesses by admitting testimony that contained an "inescapable inference" based upon statements by a non-testifying witness. We disagree and hold that the trial court did not commit error.

I. Facts and Procedural History

On 23 July 2011, Mrs. Brenda Morris worked as a clerk at Smokes Unlimited, a discount tobacco store in Conover, North Carolina. At 4:30 p.m., her husband, Mr. Morris, stopped by the store to speak with her. At 4:45 p.m., defendant entered Smokes Unlimited, wearing a baseball cap pulled over his face and carrying a small book bag. A customer, Mr. Schroeder, was also in the store purchasing lottery tickets. Defendant walked to the back of the store and looked at merchandise. Mr. Schroeder left the store to scratch off his lottery ticket on a bench in front of the store. Defendant then approached the cash register. Defendant took a sawed-off shotgun out of his book bag, pointed it at Mr. Morris, ordered Mr. Morris to walk to the front of the store, and told Mr. Morris to not "do anything stupid." Mr. Morris walked to the front of the store. Defendant pointed the shotgun at Mrs. Morris and ordered her to open the register, grab the money, and place it on the counter. Mrs. Morris placed $923.95 in cash and a check for $27.53 on the counter. Defendant told Mrs. Morris to back up against a cigarette rack and keep her hands in the air. Defendant grabbed the money from the counter, placed it and the shotgun in his book bag, and stated, "[D]esperate

times call for desperate measures. I'm sorry you folks . . . had to go through this." Defendant left the store and drove away. Mr. Schroder was able to see the license plate number of defendant's getaway vehicle. Mrs. Morris immediately locked the front door of the store and called 911.

Patrol Sergeant Queen ("Sgt. Queen"), Officer Miller, and Officer Baker, of the Conover City Police Department, arrived at the store approximately two minutes later. Sgt. Queen obtained a written statement from Mr. and Mrs. Morris. Mr. and Mrs. Morris told the police officers that defendant looked like he was in his thirties, tall and skinny, and had a tattoo that appeared to be a "cross of some sort." Although Mr. and Mrs. Morris remembered defendant's body type and clothing, they could not identify defendant in a photo lineup. They also told the officers about three video cameras that survey the back and front of the store and the cash register area.

Mr. Schroeder told Sgt. Queen the license plate number of the getaway vehicle, and Sgt. Queen ran the number through the Department of Criminal Information database ("DCI"). The DCI records indicated the vehicle was a 1999 Dodge Caravan owned by Christine and Donald Soots at an address in Whiteville, North Carolina. Sgt. Queen searched the Department of Motor Vehicles database and found defendant also lived at the same address. Sgt. Queen relayed this information to Investigator Towery of the Catawba County Sherriff's office, who took a report from Sgt. Queen and interviewed Mrs. Morris. Investigator Towery then called Master Sergeant Ward

("MSgt. Ward") and asked him to go to the property at the retrieved address to locate the getaway vehicle. Deputy Sherriff Fowler also traveled to the property with MSgt. Ward. At the home, the officers spoke with Mr. and Mrs. Soots, and based upon that conversation, "filed a stolen vehicle report." Officers returned to the Soots's residence and searched the van on 26 July 2011. Defendant voluntarily turned himself in for the Smokes Unlimited robbery that same day.

Defendant was on post-release supervision for a 2009 conviction in Maryland and was being monitored in North Carolina when the robbery occurred. Defendant was in violation of the terms of his Maryland post-release supervision, so he was re-arrested and taken to Maryland for a probation violation hearing. He was then incarcerated in Maryland until August 2012. The Conover Police Department was not immediately informed of defendant's release from custody in Maryland and did not seek to extradite him at that time. In early 2014, Investigator Towery learned defendant had been released from custody in Maryland and gave the State her prosecution package in April 2014.

Prior to defendant's indictment, defendant's father passed away on 30 December 2012. Defendant's mother's health deteriorated and she developed the early stages of dementia. Defendant's parents were therefore both unavailable as witnesses by April 2014.

On 28 April 2014, a Catawba County grand jury indicted defendant for felony robbery with a dangerous weapon, in violation of N.C. Gen. Stat. § 14-87. Defendant pled not guilty and requested a jury trial in October 2014. Prior to trial, defendant moved to dismiss the case pursuant to N.C. Gen. Stat. § 15A-954(a)(3), and contended the State denied him due process by waiting to indict him for two years and nine months after the offense, and argued it prejudiced him because his parents became unavailable as witnesses in the interim. The trial court denied defendant's motion to dismiss. The case was called for trial 27 July 2015.

At trial, the State offered the testimony of six witnesses: (1) Mrs. Brenda Morris; (2) retired Sheriff's MSgt. Keith Ward; (3) Deputy Sheriff Dustin Fowler; (4) Mr. James Morris; (5) Patrol Sgt. Robert Queen; and (6) Investigator Kristy Towery. The State admitted thirteen exhibits into evidence: (Ex. 1) a surveillance video of the robbery; (Ex. 2-4) digital screenshots from the surveillance videos; (Ex. 5-11) photographs of defendant and his tattoos taken while he was in custody; (Ex. 12) Mrs. Morris' witness statement; and (Ex. 13) Mr. Morris' witness statement.

Sgt. Queen testified he received the getaway car's license plate number from Mr. Schroeder, who was not present during trial; defense counsel did not object. Defense counsel did object to Investigator Towery's testimony about Sgt. Queen's conversation with Mr. Schroeder and the trial court sustained this objection. MSgt. Ward also testified he filed a police report "pursuant to" a conversation with

defendant's parents, to which defense counsel objected. After *voir dire*, the trial court admitted statements defendant's parents made in conversations with law enforcement under the residual hearsay exception, and stated the following:

> [T]o the extent that any of this evidence comes in that might be arguable hearsay, the Court would, among other things any other reasons this may come in, I think there's a hearsay exception when the declarant's unavailable under 804(b)(5) when it's material, it's more probative than any other reasonable available evidence and it's in the interest of justice. . . . [T]he Court will also note, this information was made available to the defendant in advance previously[.]

After the State called all of its witnesses, it moved for an "in-court identification of [defendant]" and specifically asked for "the jury to be allowed to see" defendant's right wrist, right bicep, left forearm, and a cross tattoo on his left hand. Defense counsel argued pictures of defendant's tattoos, which were taken when he was arrested, had already come into evidence through Investigator Towery's testimony and "[t]here is simply no need for what [the State] is requesting and it should have come in the form of a motion to be heard outside the presence of the jury." The trial court stated, "the Court doesn't know whether it's going to hurt or help [defendant's] case, but I think that the State's got a right to ask for your client to roll up his sleeves and show them what tattoos he can." Defense counsel agreed stating, "Well, I would ask that he take his shirt off . . . ." and asked to recall Investigator Towery as a witness. The trial court allowed defendant to change into a short-sleeve

t-shirt to display his tattoos in order to "identify or eliminate from identification the defendant as a possible suspect in this crime."

The State rested and defendant moved to dismiss the case because "Not one person has identified [defendant] as the perpetrator of this crime[.]" The trial court noted for the record a videotape and photographs admitted into evidence showed the perpetrator had "identifying marks or tattoos" that are similar to defendant's. Further, the video and photos showed the perpetrator and defendant had a similar "[b]ody type and height[.]" The trial court also noted the automobile description, license plate, and registered address could all "lead the jury to identify beyond a reasonable doubt that the defendant was the perpetrator of the crime . . . ." Defendant did not present any evidence. Thereafter, the trial court charged the jury and sent them out to deliberate.

During deliberation, the jury asked to see the surveillance video "from a closer vantage point." The trial court set up a computer in the courtroom to allow the jury to watch the video while standing close to the screen. The jury deliberated further and returned a unanimous verdict finding defendant guilty of robbery with a dangerous weapon. The trial court imposed a sentence of 65 to 87 months imprisonment. Defendant timely gave his notice of appeal.

II. Analysis

A. Pre-indictment Delay

Defendant contends the trial court erred by denying his motion to dismiss because it took the State nearly three years to indict him after the robbery. Defendant argues that this caused him substantial prejudice because his parents became unavailable witnesses in the two year interim. We disagree.

A challenge to a pre-indictment delay is predicated on an alleged violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *State v. Davis*, 46 N.C. App. 778, 781, 266 S.E.2d 20, 22 (1980); *see also United States v. Lovasco*, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1971). "To prevail [on such a claim], a defendant must show both actual and substantial prejudice from the pre-indictment delay *and* that the delay was intentional on the part of the state in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant." *State v. Graham*, 200 N.C. App. 204, 215, 683 S.E.2d 437, 444 (2009) (citation and quotation marks omitted). Prejudice occurs when there is significant evidence or testimony lost due to the delay that would have been helpful to the defense. *State v. Jones*, 98 N.C. App. 342, 344, 391 S.E.2d 52, 54-55 (1990); *see also State v. Dietz*, 289 N.C. 488, 493, 223 S.E.2d 357, 360 (1976) ("[D]efendant must show that lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost as the result of the pre-indictment delay."). "The standard of

review for alleged violations of constitutional rights is *de novo*." *Graham*, 200 N.C. App. at 214, 683 S.E.2d at 444.

Here, defendant fails to show actual or substantial prejudice from the pre-indictment delay. Defendant speculates that his parents' testimony would provide him an alibi and diminish his connection to the getaway vehicle. Yet there is record evidence from the pretrial hearing that defendant's father told officers defendant was driving the getaway vehicle. Defendant's father also told officers that defendant stole his vehicle, although he later denied that it was stolen in order to drop the larceny charge against his son. The jury, however, never heard this evidence. Nevertheless, even if the jury believed defendant used his parents' vehicle with their permission, this would not prove defendant's innocence for the armed robbery charge. Whether he was driving the vehicle with his parents' consent or without, it still belonged to his parents and he was driving it.

Defendant also fails to show "that the delay was intentional on the part of the state in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant." *Id.* at 215, 683 S.E.2d at 444. At the hearing on defendant's motion to dismiss based upon the delay, the State explained that Investigator Towery had mistakenly believed that it was necessary to wait until defendant was released by Maryland before proceeding with a grand jury indictment. She was not notified when defendant was released from incarceration in Maryland

but when she did learn that defendant was back in North Carolina, in 2014, she then proceeded with the case. Although Investigator Towery could have legally brought the charges against defendant sooner, nothing in the record suggests the "delay was intentional on the part of the state in order to impair defendant's ability to defend himself[.]" *Id.* Nothing in the record suggests the State knew defendant's parents were in poor health, and Investigator Towery gave the State the requisite information in 2014 when she learned of defendant's release from prison in Maryland. Therefore, the State's delay in indicting was not intentional and defendant did not suffer actual or substantial prejudice from the pre-indictment delay.

B. Residual Hearsay Exception

Defendant contends the trial court erred by admitting evidence of conversations between witnesses and his parents under the residual hearsay exception in N.C. R. Evid. 804(b)(5), when his parents were unavailable to testify at trial. We disagree.

The residual hearsay exception, Rule 804(b)(5), provides the following:

> **Other Exceptions**--A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted

> under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. R. Evid. 804(b)(5).

Once a trial court establishes that a declarant is unavailable pursuant to N.C. R. Evid. 804(a), there is a six-part inquiry to determine whether the hearsay evidence is admissible under N.C. R. Evid. 804(b)(5). *State v. Fowler*, 353 N.C. 599, 608-09, 548 S.E.2d 684, 696 (2002). The trial court must determine: (1) whether proper notice was given to the opposing party; (2) whether the hearsay is not specifically covered elsewhere; (3) whether the statement is trustworthy; (4) whether the statement is material; (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts; and (6) whether the interests of justice will be served by admission. *State v. King*, 353 N.C. 457, 479, 546 S.E.2d 575, 592 (2001).

When determining the trustworthiness of the statement, the trial court must consider: (1) whether the declarant had personal knowledge of the underlying events; (2) whether the declarant is motivated to speak the truth or otherwise; (3) whether the declarant has ever recanted the statement; and (4) whether the declarant is available at trial for meaningful cross-examination. *Id.* (citation omitted). The trial court is required to make findings of fact and conclusions of law when determining

the trustworthiness of a hearsay statement. *State v. Swindler*, 339 N.C. 469, 474, 450 S.E.2d 907, 910-11 (1994). "[A]dmissibility of hearsay statements pursuant to the 803(24) residual exception is within the sound discretion of the trial court . . . ." *State v. Smith*, 315 N.C. 76, 97, 337 S.E.2d 833, 847 (1985).

Upon defendant's objections to use of the statements at trial, the trial court allowed *voir dire* of Deputy Sheriff Fowler, who took the statements from Mr. and Mrs. Soots. The trial court ultimately ruled that the evidence would be allowed under "a hearsay exception when the declarant's unavailable under 804(b)(5) when it's material, it's more probative than any other reasonable available evidence and it's in the interest of justice." Like the trial court here, the trial court in *Swindler* also failed to make particularized findings of fact and conclusions of law regarding whether the hearsay statement possessed " 'equivalent circumstantial guarantees of trustworthiness,' " but our Supreme Court conducted its own analysis on the trustworthiness of the statement using the four considerations listed above. *Swindler*, 339 N.C. at 474, 450 S.E.2d at 911.

Here, the hearsay statements were made by defendant's parents to Deputy Sheriff Fowler and MSgt. Ward on 23 July 2011. First, the parents had personal knowledge of the events described in the statements: that defendant lived with them and drove their vehicle. Second, the parents had no reason to lie to the officers about their son's residence and his use of their vehicle. Third, defendant's father recanted

his allegation that defendant stole the vehicle, but he did not recant his statement that defendant drove his vehicle on the day of the robbery. Fourth, defendant's father was deceased at the time of trial, and defendant's mother became mentally ill before trial, rendering them unavailable. Therefore, the record evidence establishes the statements possessed "equivalent circumstantial guarantees of trustworthiness." N.C. R. Evid. 804(b)(5).

The trial court concluded, without objection, that defendant had timely notice of the State's intent to introduce the parents' hearsay statements. This information was "material" to the case because it provided information about the getaway vehicle and defendant's access to the car, whether with or without his parents' permission to use the car. North Carolina's Rules of Evidence "shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." N.C. Gen. Stat. § 8C-1, Rule 102(a). By admitting the officers' statements into evidence, the trial court served the "interests of justice" by providing jurors with the necessary tools to ascertain the truth. This argument is without merit.

C. Hearsay

Defendant contends that the "trial court erred by admitting prejudicial testimony of law enforcement officers about matters outside their personal

knowledge, based on hearsay information from non-testifying witnesses." Defendant's argument addresses two instances of testimony:

1. Sgt. Queen's testimony that he had talked to Mr. Schoeder -- who was not present at trial to testify -- immediately after the robbery and learned the license tag number for the getaway car. Defendant did not object to this testimony.
2. Deputy Sheriff Fowler's testimony that he had "determined" that defendant lived at an address in Whiteville, North Carolina with his parents. Defendant did object to this testimony, although the same information was admitted as part of the statements from defendant's parents, discussed above.

Since we have already assessed the admission of Mr. and Mrs. Soots's statement above and the information that defendant lived at the same address with his parents was included in that report, we need not address this evidence again. Thus, we will address only Sgt. Queen's testimony about getting a license tag number from Mr. Schroder.

Defendant did not object to this testimony; thus, it may be subject only to plain error review. In order to preserve an issue for plain error review, however, a defendant must distinctly argue for plain error review on appeal. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("To have an alleged error reviewed

under the plain error standard, the defendant must specifically and distinctly contend that the alleged error constitutes plain error." (Citation and quotation marks omitted)). Just mentioning "plain error," without more, is not sufficient. *See, e.g.*, *State v. Mobley*, 200 N.C. App. 570, 572-73, 684 S.E.2d 508, 510 (2009) ("While defendant mentions plain error in passing in his brief, he has not adequately argued plain error. Case law requires that, in order for an appellate court to review for plain error, defendant must bear the burden of showing either (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." (Citation and quotation marks omitted)).

In this case, defendant mentioned the term "plain error" in his brief, but the only statement which could be construed as an argument of plain error as to this evidence is: "Although he did not object to the testimony about Mr. Schroeder providing the license number of the van, that evidence was so prejudicial it amounted to plain error because it was the only evidence linking the Soots's van to the robbery, and therefore it probably caused the jury to convict Mr. Soots. Under any standard, the prejudice from this evidence requires a new trial." Even if we assume, generously, that this is an adequate plain error argument, the testimony challenged here was not hearsay and was properly admitted.

Our Supreme Court has held that "[o]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (citations omitted). Therefore, this Court has upheld the admission of a law enforcement officer's testimony concerning witness statements used to explain his actions during an investigation. *See State v. Rollins,* 226 N.C. App. 129, 140, 738 S.E.2d 440, 448 (2013) ("Since Agent Brown's testimony regarding his conversations with [a witness] was admitted for the proper purpose of explaining his decision to conduct a search near Andrews Terrace, the testimony was not hearsay."), *disc. review denied*, 367 N.C. 324, 755 S.E.2d 610 (2014), *cert. denied*, __ U.S. __, 190 L. Ed. 2d. 96, 135 S. Ct. 125 (2014); *State v. Alexander*, 177 N.C. App. 281, 284, 628 S.E.2d 434, 436 (2006) ("Officer Dozier's testimony regarding his interaction with the detective and Plaud was nonhearsay and proper to explain his subsequent actions. It was not admitted to prove that the information Plaud offered was 'important' or that someone named 'Vaughntray' committed the crime. Rather, the testimony explained how Officer Dozier had received information leading him to form a reasonable suspicion that defendant was involved in the robbery, which in turn justified his inclusion of defendant's photograph in the lineup."); *State v. Wiggins,* 185 N.C. App. 376, 384, 648 S.E.2d 865,

871 (2007) ("[T]he challenged testimony was not offered for its truth and was therefore not inadmissible hearsay."); *State v. Batchelor,* 202 N.C. App. 733, 736, 690 S.E.2d 53, 55 (2010) ("[S]tatements were not hearsay and did not violate the Confrontation Clause because they were not offered for their truth; that defendant was a drug dealer.").

Here, Sgt. Queen and Investigator Towery testified they researched the license plate of the getaway vehicle, after Sgt. Queen talked to Mr. Schroeder. The testimony was given to explain the State's actions during its investigation and why officers developed the Soots's residence in Whiteville as a location of interest. Mr. Schroeder's eyewitness statement led Investigator Towery to conduct independent research into the registration of the getaway vehicle and the Soots's residence. Mr. Schroeder's statements were not offered to prove the truth of the matter asserted; in fact, he did not say what number Mr. Schroeder told him. Rather, the statement explains the subsequent actions of the officers, which led them ultimately to the Soots's home.

III. Conclusion

For the foregoing reasons, the trial court did not commit any reversible error in defendant's trial.

NO ERROR.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).