IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-886

Filed: 5 July 2016

Guilford County, Nos. 11 CRS 24788, 87042

STATE OF NORTH CAROLINA

v.

PAMELA MARIE HAIZLIP

Appeal by defendant from judgment entered 29 January 2013 by Judge Richard W. Stone in Guilford County Superior Court. Heard in the Court of Appeals 27 January 2016.

Roy Cooper, Attorney General, by J. Aldean Webster, III, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Jillian C. Katz and Benjamin Dowling-Sendor, Assistant Appellate Defenders, for defendant-appellant.

DAVIS, Judge.

Pamela Marie Haizlip ("Defendant") appeals from her convictions for felony fleeing to elude arrest with a motor vehicle and attaining the status of an habitual felon. On appeal, she contends that (1) the trial court committed plain error by allowing officers to impermissibly testify regarding a legal conclusion and as to Defendant's character; and (2) she received ineffective assistance of counsel. After

careful review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 8 September 2011, Defendant and her nephew, Dwayne Haizlip ("Dwayne"), drove to the home of LaShonda Richardson ("Richardson") located at 414 Boyd Street in Greensboro, North Carolina. Defendant was driving her Suburban SUV ("the Suburban"), and Dwayne was riding in the front passenger seat.

After arriving at 414 Boyd Street, Defendant went inside and visited with Richardson for approximately 15-20 minutes. Afterwards, she went back out to her vehicle and honked the horn until Dwayne came outside and got into the front passenger seat.

During this time, Detective Richard Alston ("Detective Alston") with the Greensboro Police Department was conducting surveillance of 414 Boyd Street for suspected drug activity from a parked undercover patrol vehicle. Detective Dwayne James ("Detective James") was parked on an adjacent street to provide backup for Detective Alston. Approximately 15 other officers were also nearby to assist in the operation.

Based upon information Detective Alston had received, he was specifically looking for a silver Volvo and a Chevrolet SUV which were allegedly involved in

illegal drug trafficking. When he observed the Suburban (which fit this description) at 414 Boyd Street, he radioed Detective James and the other officers with a description of the vehicle.

Shortly thereafter, Defendant left Richardson's house with Dwayne riding in the front passenger seat. Detective James radioed Detective Alston and informed him that the Suburban had just driven by his vehicle at a "high rate of speed," run through a stop sign, and turned right onto Lindsay Street.

Detective Alston established an open radio channel with the other officers in the area in order to facilitate pursuit of the Suburban. Detective Abraham Mendez ("Detective Mendez") spotted the Suburban as it was merging onto U.S. Highway 29 ("U.S. 29"). He performed a computer check of the vehicle's license plate and stated over the radio that the vehicle was registered to Defendant. When Detective James heard Detective Mendez convey this information, he responded by saying over the radio that "[i]f it is -- if Pam or Dwayne is in that vehicle, they're going to run." Detective James explained that he made this statement based on prior interactions he had had with Defendant and Dwayne.

Detective Mendez observed the Suburban run through a yield sign onto U.S. 29 traveling southbound, cutting off another vehicle that was forced to brake in order to avoid rear-ending the Suburban. Detective Mendez accelerated onto U.S. 29 and began "pacing" Defendant's vehicle, which he defined as getting directly behind that

vehicle and "find[ing] a fixed object on the roadway, you wait till that vehicle's bumper passes that fixed object, and then you begin counting, for instance, 1,001, 1,002, 1,003. And then when you pass that fixed object, let's say if it stops at 1,004, then you pick another fixed object and you do the same thing. If you're still at 1,004, then you match that vehicle speed."

Once he had successfully paced the vehicle, Detective Mendez looked at his speedometer and determined that Defendant's vehicle was traveling at approximately 64-65 miles per hour. The posted speed limit for the stretch of U.S. 29 upon which Defendant was traveling was 55 miles per hour.

Detective Mendez further observed that Defendant's vehicle "was unable to maintain its lane of travel . . . it straddled the center, the dotted white line in between lane one and two, the left and right lane. It straddled that line several times and then came back to its lane and then went back to the center and then back to its lane again." At this point, Detective Alston ordered Detective Mendez to initiate a traffic stop of Defendant's vehicle.

Detective Mendez activated his blue lights. In response, Defendant immediately accelerated and Detective Mendez noted that "probably about that time we were doing about 70 [miles per hour]."

Both Defendant and Detective Mendez were traveling in the right lane of U.S. 29. Shortly after Detective Mendez activated his blue lights, two other officers,

(Corporal Altizer and Officer Randazzo), who were in Corporal Altizer's patrol vehicle and traveling in the left-hand lane, followed the Suburban with their siren and blue lights activated. Officer Randazzo estimated that the Suburban was travelling in excess of 70 miles per hour. He further observed that at one point during the chase the speedometer on Corporal Altizer's patrol vehicle had indicated they were driving at 75 miles per hour yet were not gaining any ground on Defendant's vehicle.

Defendant continued to travel at a high rate of speed for over a mile, weaving in and out of traffic and repeatedly changing lanes. As a result, other vehicles on the road were forced to take evasive action in order to avoid colliding with the Suburban. Detective James, who had managed to get ahead of the Suburban, called for a mobile road block and slowed his vehicle so that he was blocking the Suburban from the front. Defendant merged onto an exit ramp leading to South Elm-Eugene Road. Detective Mendez accelerated and positioned his vehicle on U.S. 29 in the far right lane in order to block the Suburban from re-entering the highway.

Defendant veered back towards U.S. 29 in an attempt to get back onto the highway at which point she collided with the passenger side of Detective Mendez' vehicle. The Suburban then left the road and came to a stop when it crashed into an exit ramp sign.

Dwayne exited the vehicle and began fleeing on foot. He was quickly apprehended by officers, and a bag containing cocaine was discovered shortly

thereafter along the path on which he had fled. Defendant, who had remained in the driver's seat of the Suburban, was placed under arrest.

On 7 November 2011, Defendant was indicted on charges of trafficking in cocaine by transportation, conspiracy to traffic in cocaine by possession, felony fleeing to elude arrest with a motor vehicle, and attaining the status of an habitual felon. On 6 February 2012, superseding indictments were filed as to these charges.

Beginning on 23 January 2013, a jury trial was held before the Honorable Richard W. Stone in Guilford County Superior Court. The jury found Defendant guilty of felony fleeing to elude arrest with a motor vehicle and acquitted her of the drug charges. Defendant subsequently pled guilty to attaining habitual felon status. The trial court sentenced Defendant to 60-81 months imprisonment.

Defendant filed a petition for *certiorari* with this Court on 17 November 2014 alleging that her attorney had failed to enter notice of appeal on her behalf or explain to Defendant her right to appeal the trial court's judgment. On 4 December 2014, we granted Defendant's petition.

Analysis

I. Opinion Testimony

Defendant first argues on appeal that the trial court committed plain error by allowing Detective James to testify that Defendant's driving was "reckless."

Specifically, she contends that this testimony constituted impermissible opinion testimony as to a legal conclusion. We disagree.

Defendant acknowledges that her trial counsel failed to object at trial to the testimony she now challenges on appeal. Consequently, we review Defendant's argument on this issue solely for plain error. *See* N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

At trial, Detective James testified as follows on direct examination concerning his pursuit of Defendant's vehicle:

> Q. Detective James, you indicated you were trying to maintain your distance?

A. Yes.

Q. And so you actually picked up your speed, that correct?

A. Yes, yes.

Q. Tell me what happened next.

A. Okay. As I said, I observed this vehicle was closing distance on me. As it got closer, I continued -- I continued to -- to increase my speed.

I observed, like I said, I observed that the Suburban was weaving in and out of traffic maneuvering around cars as well as I was.

We eventually came to the merge of Highway 29 onto I-40. And shortly after that, because of the -- the *reckless* driving, we -- I -- in my -- in my mind -- there's a technique that we use. It's called a mobile road block.

Q. Mobile road block?

A. Yes.

Q. Tell me about that.

A. That's a maneuver where you use, at a minimum, you use three police vehicles. You position one vehicle in front of the suspect vehicle, another vehicle in the rear of the suspect vehicle, and then a vehicle to -- in this situation we would have positioned the vehicle to the left of the suspect vehicle.

And what you do is -- it's not a maneuver like a pit maneuver, which is where you intentionally make contact with the vehicle.

A mobile road block is where we gradually bring our police vehicles to a -- to a slow stop in order to -- and -- and get the suspect vehicle to slow down and come to a slow stop. No intention of any type of contact between the vehicles. It's just a maneuver that's used to box in a car and gradually bring it to a stop.

(Emphasis added).

Defendant asserts that Detective James' characterization of Defendant's driving as "reckless" in the above-quoted testimony constituted improper expert witness opinion testimony, or, in the alternative, improper lay opinion testimony. She contends that the word "reckless" is a "term of art with a specific legal definition, not just an adjective."

Rule 704 of the North Carolina Rules of Evidence states that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C.R. Evid. 704. We have explained that

> Rule 704 does allow admission of lay opinion evidence on ultimate issues, but to qualify for admission the opinion must be helpful to the jury. . . . Furthermore, while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness.

State v. Elkins, 210 N.C. App. 110, 124, 707 S.E.2d 744, 754 (2011) (internal citations and quotation marks omitted); *see also State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 283 ("[Under Rule 704] [t]he witness may offer testimony in the form of an opinion or inference even though it may embrace the ultimate issue to be decided by the jury. However, the expert may not testify that such a particular legal

conclusion or standard has or has not been met." (internal citations, quotation marks, and ellipses omitted)), *disc. review denied*, 327 N.C. 639, 399 S.E.2d 127 (1990).

N.C. Gen. Stat. § 20-141.5 states, in pertinent part, as follows:

> (a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.
>
> (b) If two or more of the following aggravating factors are present at the time the violation occurs, violation of this section shall be a Class H felony.
>
> > (1) Speeding in excess of 15 miles per hour over the legal speed limit.
> >
> > . . . .
> >
> > (3) Reckless driving as proscribed by G.S. 20-140.
> >
> > . . . .
> >
> > (5) Driving when the person's drivers license is revoked.[1]

N.C. Gen. Stat. § 20-141.5(a)-(b) (2015). N.C. Gen. Stat. § 20-140, in turn, defines "reckless driving" as follows:

> (a) Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving.

[1] Defendant conceded at trial that she was driving while her driver's license was revoked.

> (b) Any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving.

N.C. Gen. Stat. § 20-140(a)-(b) (2015).

We find instructive our decision in *State v. Rollins*, 220 N.C. App. 443, 725 S.E.2d 456, *appeal dismissed and disc. review denied*, 366 N.C. 242, 731 S.E.2d 415 (2012). In *Rollins*, the defendant was charged with second-degree murder in connection with a traffic accident that occurred during a high-speed police chase. Officers who were in pursuit of the defendant (who had just committed larceny and was attempting to flee) pulled up behind the defendant's vehicle and activated their blue lights. The defendant accelerated to approximately 80 miles per hour in a 45 miles per hour zone. *Id.* at 444-46, 725 S.E.2d at 459-60.

Shortly thereafter, the defendant drove off the right side of the road, veered back across the double yellow line into oncoming traffic, and collided head-on with an oncoming car, killing the driver of that vehicle. *Id.* at 446-47, 725 S.E.2d at 460. At the defendant's trial, the pursuing officers testified as to the manner in which the defendant had been driving.

> During the State's examination of Officer Patterson, he testified that the officers were not allowed to engage in a car pursuit or continue a pursuit unless they observed conduct that they believed to be a felony. According to Officer Patterson, he believed that the requirements for felony speeding to elude arrest had been met because

> defendant had, while fleeing the police, engaged in the crime of careless and reckless driving and the crime of speeding over 15 miles per hour above the speed limit. Officer Anderson similarly testified that "the manner in which he was driving became a felony insofar as felony speed to elude. His driving became very fast and it was reckless." He also testified that defendant was going 25 miles per hour over the speed limit.

Id. at 452, 725 S.E.2d at 463.

On appeal, the defendant argued that the trial court committed plain error by allowing the officers to testify to legal conclusions regarding whether the defendant had committed the criminal offenses of felony speeding to elude an officer, careless and reckless driving, and speeding over 15 miles an hour above the posted speed limit. *Id.* We disagreed, noting that "[o]ur Supreme Court has previously recognized that some testimony of officers regarding violations of the law may constitute a shorthand statement of fact rather than a legal term of art or an opinion as to the legal standard the jury should apply, rendering the testimony admissible." *Id.* (citation, quotation marks, and ellipses omitted).

We further stated that "here, the officers were not interpreting the law for the jury, but rather were testifying regarding their observations in order to explain why they pursued defendant in a high-speed chase. We hold that this testimony was admissible[.]" *Id.* at 452-53, 725 S.E.2d at 463. We also observed that "we cannot conclude that even if the officers' testimony regarding the potential crimes had been excluded, the jury would probably have reached a different verdict. . . . Given the

officers' entire testimony, we cannot conclude that the jury probably would have reached a different verdict in the absence of the challenged testimony." *Id.* at 453, 725 S.E.2d at 463-64.

We believe the testimony of Detective James concerning Defendant's reckless driving in the present case is materially indistinguishable from the testimony at issue in *Rollins*. Indeed, if anything, Detective James' testimony was more innocuous than the officers' testimony at issue in that case. Moreover, upon examination of the context surrounding Detective James' shorthand statement that Defendant's driving was "reckless," we are satisfied that he was merely offering an explanation of his subsequent actions in calling for a moving road block rather than, as Defendant argues, deliberately stating a legal conclusion so as to improperly influence the jury.

Finally, even assuming *arguendo* that Detective James' testimony amounted to an impermissible legal conclusion, Defendant has failed to show this testimony had a probable impact on the jury's verdict. The other evidence of Defendant's reckless driving was overwhelming and tended to establish that Defendant (1) ran a stop sign at a high rate of speed; (2) accelerated through a yield sign forcing another driver to apply his brakes to avoid colliding with Defendant; (3) was unable to maintain her lane of travel, repeatedly straddling the line separating the lanes; and (4) weaved through traffic at a high rate of speed, forcing other drivers to take evasive action to avoid crashing into her vehicle. *See State v. Bronson*, 333 N.C. 67, 77-78, 423 S.E.2d

772, 778-79 (1992) (holding that even assuming witness impermissibly testified as to legal conclusion, no plain error occurred in light of overwhelming evidence of guilt).

Therefore, we conclude that the admission of the challenged portion of Detective James' testimony was clearly not plain error. Defendant's argument on this issue is overruled.[2]

II. Character Evidence

Defendant next argues that the trial court committed plain error by allowing Detective James and Detective Mendez to improperly testify about a character trait of Defendant's — namely, that if she was in the Suburban she was likely to flee. We disagree.

Defendant specifically challenges the following portion of Detective James' testimony:

> Q. And you say you were in their immediate vicinity, then you had caught up to their location?
>
> A. Yes, I caught up.

[2] We note that Defendant also makes a cursory argument in her brief that because the jury did not indicate whether it was relying upon reckless driving or speeding in excess of 15 miles per hour over the speed limit in connection with her conviction for felony fleeing to elude arrest with a motor vehicle, the conviction should be vacated. However, since ample evidence exists establishing both reckless driving *and* speeding in excess of 15 miles per hour over the speed limit, there was no error in the jury's failure to indicate which factor it actually relied upon in reaching its verdict that she had violated N.C. Gen. Stat. § 20-141.5. *See State v. Walters*, __ N.C. __, 782 S.E.2d 505, 507-08 (2016) ("[I]f the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense,* the requirement of unanimity is satisfied." (citation and quotation marks omitted)); *State v. Funchess*, 141 N.C. App. 302, 309, 540 S.E.2d 435, 439 (2000) (defendant's right to unanimous verdict on charge of felonious speeding to elude arrest not violated by trial court's failure to instruct jury to agree unanimously on same two aggravating factors; aggravating factors were merely alternate ways of enhancing punishment for speeding to elude arrest from a misdemeanor to a Class H felony).

> Q. Tell me then what happened from there.
>
> A. Okay. After the information came out about the registered owner of the vehicle, I got on the radio and I said, If [sic] it is -- *if Pam or Dwayne is in that vehicle, they're going to run*.

(Emphasis added).

Defendant similarly challenges Detective Mendez' testimony essentially reiterating Detective James' statement:

> Q. As a result of this information coupled with the speed violation and the other unsafe movement you made mention of, what did you do?
>
> A. I relayed the information that Officer Pacific gave to me over the radio and advised who the vehicle belonged to and that her license was suspended.
>
> At that time Corporal Alston stated, you know, go ahead and stop the vehicle whenever you're ready. And then at that -- also Detective James stated, If [sic] it's -- if it's Pamela Haizlip and Dwayne, they're probably going to run.

Rule 404(a) of the North Carolina Rules of Evidence states, in pertinent part, that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C.R. Evid. 404(a). However, even assuming — without deciding — that the officers' references to Defendant's propensity to "run" constituted error, such evidence clearly did not amount to plain error in light of the overwhelming independent evidence of Defendant's guilt.

III. Ineffective Assistance of Counsel

Defendant's final argument on appeal is that she received ineffective assistance of counsel at trial due to her counsel's failure to object to Detective James' and Detective Mendez' testimony that Defendant was likely to "run." We disagree.

"In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Edgar*, __ N.C. App. __, __, 777 S.E.2d 766, 770-71 (2015) (internal citations and quotation marks omitted).

> In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendants to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Turner, __ N.C. App. __, __, 765 S.E.2d 77, 83 (2014) (internal citations, quotation marks, and brackets omitted), *disc. review denied*, __ N.C. __, 768 S.E.2d 563 (2015). However, "[i]n considering ineffective assistance of counsel claims, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at __, 765 S.E.2d at 84 (citation and brackets omitted).

Here, because — as discussed above — overwhelming evidence was presented of Defendant's guilt, even assuming she could show her trial counsel's performance was deficient, she cannot satisfy the second element of the test by showing prejudice. Therefore, we are able to conclude that Defendant's ineffective assistance of counsel claim lacks merit. *See State v. Allen*, 233 N.C. App. 507, 507, 756 S.E.2d 852, 855 (2014) ("A claim of ineffective assistance of counsel will be denied where defendant cannot show how his counsel's error prejudiced him.").

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).