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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-801

Filed: 19 September 2017

New Hanover County, Nos. 15 CRS 054379, 15 CRS 006891

STATE OF NORTH CAROLINA,

v.

TERRENCE DOMINICK MCINTYRE, Defendant.

Appeal by defendant from judgments entered on or about 2 March 2016 by Judge Phyllis M. Gorham in Superior Court, New Hanover County. Heard in the Court of Appeals 6 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Robert K. Smith, for the State.

Guy J. Loranger for defendant-appellant.

STROUD, Judge.

Defendant Terrence Dominick McIntyre (“defendant”) appeals from the trial court’s judgments of conviction finding him guilty of common law robbery and possession of a firearm by a felon. On appeal, defendant argues that the trial court committed prejudicial error by allowing the State to admit as evidence and play for the jury a recording of defendant’s interrogation because it contained testimonial

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statements by a non-testifying police officer. Defendant, however, failed to preserve this issue for appeal and has not requested this Court review for plain error. Furthermore, even if defendant had properly preserved this issue, he cannot demonstrate prejudice from the jury hearing the statements. We find no error with the trial court's admission of the video into evidence.

Facts

It all began with a trip to WalMart that went seriously astray in several ways. In May 2015, Ms. Fleming was staying at her cousin's house in Kure Beach. On 26 May 2015, Ms. Fleming's son, Zeke, and his girlfriend Amy¹ were also visiting Kure Beach. Zeke, Amy, and their two children went to Walmart, where Zeke fled the scene and was later arrested for stealing. Amy got lost after leaving Walmart and ended up in Wilmington -- about 17 miles north of her intended destination in Kure Beach. She pulled into a gas station to ask for directions back to the Carolina Beach or Kure Beach area, but the clerk working that day did not know how to direct her. No one else was in the parking lot, so Amy went back to her car and kept driving; she then saw a man on the side of the road walking a dog, so she stopped to ask if she could use his cell phone. The man identified himself as "Terry;" we now refer to him as defendant in this case.

¹ Pseudonyms are used for ease of reading.

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Defendant went inside to get his phone and then let Amy use it to call Ms. Fleming. Afterwards, Amy mentioned that her boyfriend was probably going to jail and that the only thing she had was a gun she could possibly sell. Amy asked defendant if he knew anyone who would like to buy an assault rifle. Defendant said he could probably find someone and gave Amy his phone number to call him the next day.

The next morning, 27 May 2015, defendant called Amy to see if she was still “trying to get rid of the gun.” She told him yes, and he said he had somebody who really wanted it and gave her an address off Confederate Drive. Ms. Fleming and the children rode along with Amy to meet with defendant. Amy followed the directions of her GPS to the Confederate Drive location, and as she approached she saw defendant standing at a stop sign. She stopped and rolled down the window, and eventually defendant got in the car. The GPS said “you’re at your destination,” but defendant saw a police car sitting in the parking lot of the apartment complex and told Amy to keep going because “it would not look good with two white women with a black guy and a firearm[.]”

Defendant had Amy pull off the road to park by the pool of the apartment complex, and Ms. Fleming got out of the car to go sell the gun with defendant while Amy stayed in the car with the children. Defendant and Ms. Fleming walked for a while -- supposedly heading towards his friend’s house to sell the gun. They went

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over at least two fences; all the while Ms. Fleming carried the gun, which she and Amy had taken apart, in a mesh bag on her shoulder. As Ms. Fleming straddled the second fence, defendant attacked her, beating her on her face and causing her to drop the gun to the ground and fall off the fence. Defendant grabbed the gun, jumped the fence, and ran off down a trail. Ms. Fleming tried to climb back over the fence, but she could not do it on her own, so she walked another way back around to the apartment complex. Ms. Fleming had blood all over her face when she encountered law enforcement officers.

Later that same day, Ms. Fleming and Amy both separately identified defendant in a photo lineup. A warrant was issued for defendant's arrest on or about 28 May 2015; defendant was arrested in June and agreed to be interrogated on 24 June 2015. Defendant was indicted on or about 28 September 2015 on the charges of common law robbery, larceny of a firearm, assault inflicting serious injury, and possession of a firearm by a felon.²

Defendant's jury trial began with jury selection on 29 February 2016 and then went from 1 March 2016 to 2 March 2016. At trial, the State sought to introduce portions of the video of the June 2015 police interrogation of defendant. Outside the presence of the jury, defendant's counsel raised an objection to the video, arguing it

² On 29 February 2016, the State noted that it had chosen not to pursue the larceny of a firearm or assault inflicting serious injury charges, so only the remaining charges of common law robbery and possession of a firearm by a felon were considered by the jury at trial.

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presented a Confrontation Clause issue because one officer on the tape -- Detective Eubanks -- was not present to testify at trial. Defendant's counsel argued specifically:

A lot of the interrogation is conducted by Detective Eubanks so there's a lot of conversation, a lot of statements, a lot of questions proposed and propounded by Detective Eubanks and so certainly [defendant]'s responses can all come in and, when taken in context, I don't think there's a hearsay issue or a confrontation issue.

But Detective Eubanks does make a lot of off-the-cuff remarks about the investigation and the procedure of investigation, what he has conducted, things that he has done that I don't think is necessarily proof of hearsay and essentially is offered for the truth but we are not able to have any meaningful cross-examination of Detective Eubanks. He's not been subpoenaed to be here.

The trial court asked what kind of statements Detective Eubanks made, and defendant's counsel replied:

So for instance there will be times when he is propounding questions on to [defendant] about his whereabouts, things like that, but in other instances he says things like that we've already talked to these witnesses and I know this and I know this and I've got enough evidence right now I don't need you to tell me what happened. Things like that that I think, at the very least, create a conundrum when I can't cross-examine him. And Crawford requires the ability to, the capability, the opportunity to cross-examine witnesses and he's clearly a witness, he's talking throughout the entire video.

The State explained that "any statements by Detective Eubanks are not being offered for the truth of the matter asserted and they explain the defendant's answers and the sequence of the conversation[.]" Defendant's counsel once again clarified that

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his argument was not based on hearsay but on a *Crawford* confrontation issue, noting that the issue then becomes whether the statements were testimonial in nature.

Defendant's counsel noted:

But Detective Eubanks from the ATF makes a lot of statements about the progress that the federal government has made in the investigation, that they've got everything they need to prosecute him, you know. He can make this easier on himself if he tells them where the gun is and things like that, that go to the federal investigation that I think is prejudicial. And it's kind of compounded by the fact that I'm not able to cross-examine him.

....

The issue is many of the statements that Detective Eubanks makes meet the definition of testimonial statements and, because of that, the defendant is required to have an opportunity to cross-examine that witness.

The State replied:

Your Honor, we just say they are not testimonial and the probative value of having these statements in completely outweighs any prejudice to the defendant. Any statements made by Eddie Eubanks only explain and further explain defendant's statement which is a denial that there was any gun. We think you should allow it in as we had stated.

The trial court denied the motion and allowed the video to be admitted into evidence, noting that "you can always say that this sounds like statements that an investigator might use such as a tactic in investigating and interrogating a witness or a suspect."

When the State moved to admit the video into evidence, defendant's counsel asked

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the court: “And if you would just note my objection for the reasons stated previously and in addition the Fourteenth Amendment.”

On 2 March 2016, a jury found defendant guilty of the two remaining counts of common law robbery and possession of a firearm by a felon. Defendant was sentenced and gave timely notice of appeal for his convictions to this Court.

Discussion

On appeal, defendant contends that “the trial court committed prejudicial error by allowing the State to admit as evidence and play for the jury a recording of [defendant]’s interrogation where the recording contained testimonial statements by a non-testifying officer, [Detective] Eubanks.” (Original in all caps). At trial, the State admitted into evidence the video of the interrogation of defendant by Detective Michael Tenney and Detective Eubanks. Detective Tenney testified at trial, but Detective Eubanks did not. Defendant argues that his right to confrontation, as guaranteed by the Confrontation Clause, was violated because Detective Eubanks did not testify at defendant’s trial, so he could not question Detective Eubanks about his statements -- which defendant labels as “testimonial.”

The Sixth Amendment to the United States Constitution provides in part that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him. . . . [*Crawford v. Washington*, 541 U.S. 36, 53-54, 158 L.Ed.2d 177, 194, 124 S. Ct. 1354, 1365 (2004)] holds the Confrontation Clause forbids admission of testimonial statements of a witness who did not appear at trial unless he was

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unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”

State v. Lewis, 361 N.C. 541, 545, 648 S.E.2d 824, 827 (2007) (citations, quotation marks, brackets, and ellipses omitted). “The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

The State argues that defendant did not adequately preserve this issue for appeal because at trial, defendant only identified “one specific statement of [Detective] Eubanks to the [trial court] judge[,]” while on appeal defendant offers three examples of statements Detective Eubanks made in the portion of the video as played to the jury. In fact, the scope of defendant’s objection is difficult to discern. Prior to trial, the State and defendant’s counsel had agreed to redact or mute certain portions of the interview for various reasons. Defendant did not raise his Confrontation Clause objection until the State offered the DVD of the interview into evidence. The objection, as stated, was to the “video in its entirety.” The grounds for the objection were:

So for instance there will be times when he is propounding questions on to [defendant] about his whereabouts, things like that, but in other instances he says things like that we’ve already talked to these witnesses and I know this and I know this and I’ve got enough evidence right now I don’t need you to tell me what happened. Things like that that I think, at the very least, create a conundrum when I can’t cross-examine him. And Crawford requires the ability to, the capability, the opportunity to cross-examine witnesses

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and he's clearly a witness, he's talking throughout the entire video. And, you know, I've just never had a particular situation like this where both detectives that are conducting an interrogation aren't present in court.

I mean, he's not here, he's not under subpoena, he's not on the witness list and I think you can watch a brief amount of it and you would get the same glimpse that I have about what I'm talking about. And, you know, I would submit that muting all of his statements or at least some of them would be merely impossible. So introducing the video in its entirety would be an abrogation of [defendant's] right to confrontation under Crawford and its progeny.

On appeal, defendant's initial brief does not explicitly challenge the video "in its entirety" but instead challenges three statements. Although he argues that the interrogation video "was 'riddled' " with testimonial statements, he makes specific arguments about only three: "(1) [Detective Eubanks'] interview with [Ms.] Fleming in which she identified [defendant] as her assailant; (2) His purported collection of a document establishing that a gun belonging to [Amy] existed; and (3) His intent to take [defendant] into federal custody in the near future." (Internal reference citations omitted).

In response to the State's argument that defendant failed to preserve this issue for review because his objection at trial was non-specific, defendant replies that his objection was not "broadside" but that he had stated

the specific factual and legal basis for his objection. He asserted that the DVD recording contained numerous remarks by a non-testifying officer, Agent Eubanks, "about the progress that the federal government has made in the

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investigation, that they've got everything they need to prosecute him[.]” [Defendant] asserted that those specific statements were testimonial and violated his right of confrontation under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). Because the DVD recording was “riddled with statements like that,” [defendant] objected to admission of the exhibit in its entirety.

(Internal citation references omitted). In other words, defendant’s objection at trial *was* “to admission of the exhibit in its entirety,” without specific arguments regarding any particular statement by Detective Eubanks, other than the one noted: that the federal government had everything it needed to prosecute him.

Yet defendant’s identification of this statement leads to another problem: this statement was never heard by the jury. Defendant noted in a footnote of his initial appellate brief:

In the DVD recording, Agent Eubanks’ verbatim statement was, “We don’t need to talk to you. There’s more than enough evidence at this point from everybody who’s identified you to get you into court and get you convicted.” The State and [defendant’s] counsel agreed to redact the first 7:12 of the DVD recording. Thus, *this statement was not played for the jury.*³

³ Although defendant did offer the Court the opportunity to request a copy of the DVD from the New Hanover County Clerk of Court, we determined that based on the generality of defendant’s argument, he did not consider it useful for the Court to review the entire video or he would have provided it. However, we also assumed that defendant’s characterizations of the testimony in question are accurate, since the State has not suggested otherwise.

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(Emphasis added) (internal citation references omitted). As the first seven minutes of the video were not played for the jury, the jury did not hear it and any argument regarding this statement is irrelevant.

On appeal, defendant now attempts to raise issue with a statement during a later segment of the video -- from 40:30 to 40:40 -- that apparently dealt with the same topic of Detective Eubank's intention to take defendant into federal custody soon. But defendant made no specific objection at trial to this later statement or the other two statements that defendant has now raised in his brief on appeal. Under Rule 10(a)(1), "[i]n 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." Since defendant has acknowledged that the only statement which he specifically objected to before the trial court was not presented to the jury, this leaves us with only the three statements he now raises on appeal, to which he did not specifically object and only made generalized objections. Thus, defendant did not properly preserve this argument for appeal and, at most, we could only review these statements for plain error. But Defendant has made no request for plain error review on appeal. *See, e.g., State v. Harris*, __ N.C. App. __, __, 800 S.E.2d 676, 680 (2017) ("The specific grounds for objection raised before the trial court must be the theory argued on appeal because the law does not permit parties to swap horses

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between courts in order to get a better mount in the appellate court. Furthermore, when counsel objects to the admission of evidence on only one ground, he or she fails to preserve the additional grounds for appeal, unless plain error is specifically and distinctly argued on appeal. For this issue, Defendant has not argued plain error. Therefore, we only address the grounds under which the contested admission of evidence was objected, as any other grounds have been waived.” (Citations, quotation marks, and brackets omitted), *disc. review denied*, __ N.C. __, __ S.E.2d __ (No.174P17) (August 17, 2017).

Moreover, even if we were to generously assume defendant did request we review for plain error, defendant’s argument would still fail, as he cannot show prejudice from the video’s admission. As to the first statement regarding Detective Eubanks’ interview with Ms. Fleming where she identified defendant as her assailant, Ms. Fleming also testified at trial and once again positively identified defendant. Her earlier photo lineup identification was also introduced as evidence. As for the second statement about the existence of a gun owned by Amy, Amy testified to detailed information about the gun. Finally, the third statement was about Detective Eubanks’ intention to take defendant into federal custody in the future. This did not ultimately occur, but we do not see how the trial court allowing this statement in could reach the level of prejudice necessary to warrant a new trial. During his interrogation, defendant had already been arrested and was already in

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state custody. The jury heard substantial evidence outside of the video to support a conviction, including both Ms. Fleming and Amy's testimonies regarding the events that occurred. Defendant therefore could not meet the difficult burden of establishing prejudice from the jury hearing the statements on the video he now raises issue with on appeal.

Conclusion

We conclude that defendant has not properly preserved this issue for appeal, and even if he had, no prejudicial error resulted from the admission of the video into evidence. We hold that the trial court did not err when it admitted the video of defendant's interrogation into evidence.

NO ERROR.

Chief Judge McGEE and Judge TYSON concur.

Report per Rule 30(e).