IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-984

Filed: 6 June 2017

Durham County, No. 14 CRS 57222

STATE OF NORTH CAROLINA

v.

KERRY CARRELL

Appeal by defendant from judgment entered 20 April 2016 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 8 May 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Katy Dickinson-Schultz, for the State.

Jeffrey William Gillette for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from a judgment entered upon his conviction of robbery with a dangerous weapon. On appeal, defendant argues that the trial court's admission of the recording of a phone call to emergency services ("911") and of text messages sent by a witness constituted plain error. After considering defendant's

argument in light of the record and the applicable law, we conclude that defendant is not entitled to relief on appeal.

I. Factual and Procedural Background

On 3 November 2014, defendant was indicted for the offense of robbery with a dangerous weapon (armed robbery). Defendant was tried before a jury beginning on 18 April 2016, the Honorable Robert H. Hobgood presiding. Defendant did not testify or present evidence at trial. The State's evidence, as relevant to the issue raised on appeal, is summarized as follows.

William Ordonez testified that on 28 June 2014, he and his wife were vacuuming their cars at a car wash in Durham, North Carolina, when Mr. Ordonez felt something like a gun touch his back. When he turned around, he saw defendant who was armed and demanded Mr. Ordonez's money before grabbing Mr. Ordonez's wallet. Mr. Ordonez asked for his money back, but defendant brandished the gun before getting into a van and driving off. Mr. Ordonez asked his wife to call 911 and then got in his car and followed defendant for several minutes, during which time Mr. Ordonez photographed the van and its license plate. While Mr. Ordonez was following the van, defendant threw Mr. Ordonez's wallet out of the van. Mr. Ordonez retrieved the wallet, which was missing $800 that it had previously contained. Mr. Ordonez returned to the car wash, where he gave a statement to law enforcement officers and showed them the photographs of the van and its license plate.

Viridiana Santos, Mr. Ordonez's wife, testified that while she was at the car wash, her husband screamed, told her to call 911, and drove off following a van. Officer Troy Robert Fitting of the Durham Police Department was dispatched to the car wash in response to Ms. Santos' 911 call. Ms. Santos told him that a man had robbed her husband at gunpoint before driving away. When Mr. Ordonez returned to the car wash, he gave the officer a statement that corroborated his trial testimony. Officer Fitting learned that the van was registered to Minnie Lee Childs, who told the officer that defendant, who was her son, was using the van.

The jury was also shown footage recorded by video surveillance cameras at the car wash at the time of the robbery. The video depicted two vehicles parked at the vacuums. A van drove into the area behind the car wash and a man approached the area of the vacuums. The same man walked back to the van and drove away, chased by a second man, who then got into a vehicle and followed the van.

Christopher Mason testified that on 28 June 2014, defendant gave him a ride in his van. Defendant stopped near the car wash and Mr. Mason went into a store located at the same corner. When he came out of the store, defendant's van was not where it had been parked. Shortly thereafter, Mr. Mason heard a scream and saw defendant's van drive rapidly away, followed by another vehicle. Defendant did not return for Mr. Mason, despite Mr. Mason's repeated calls and text messages. Several hours later, Mr. Mason called 911 to report that he had seen a robbery. The court allowed the audio recording of the 911 call to be played to the jury, and allowed the text messages to be published to the

jury. On 20 April 2016, the jury returned a verdict finding defendant guilty of armed robbery. The trial court sentenced defendant to a term of 85 to 114 months' imprisonment. Defendant gave notice of appeal in open court.

II. Admission of Mr. Mason's 911 Telephone Call and Text Messages

Mr. Mason testified that after defendant drove away, he sent defendant several text messages and that he later called 911 to report an armed robbery. The 911 call and the text messages were admitted without objection. On appeal, defendant argues that admission of this evidence constituted plain error. We disagree.

Because defendant did not object to the admission of the evidence, our review is limited to determining whether plain error was committed. *State v. Walker,* 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). To establish plain error, the defendant must show that there was a fundamental error, defined as an error that "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence,* 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation omitted).

Defendant argues that the telephone call and text messages were inadmissible hearsay and that if the jury had not heard the 911 recording and seen Mr. Mason's text messages, "there was a substantial likelihood that the jurors would not have believed that [defendant] had a gun and would have found him not guilty of armed robbery." Thus, defendant does not dispute that he would have been convicted of a theft offense in the absence of the challenged evidence, and limits his argument to a contention that, without the admission of Mr. Mason's 911 call and text messages, he would not have been

convicted of robbery with a dangerous weapon. Assuming, without deciding, that the 911 call and the text messages were inadmissible, we hold that their admission did not rise to the level of plain error.

We first consider the probable impact of Mr. Mason's text messages on the jury's verdict. After defendant left Mr. Mason at the corner where the car wash was located, Mr. Mason sent defendant several text messages. In his text messages, Mr. Mason expresses anger at having been left at the car wash without a ride. To the extent that we can discern their meaning, Mr. Mason's text messages also appear to scold defendant for committing an unspecified crime, to urge defendant not to use drugs, and to warn defendant that Mr. Mason will report him to the police. However, most of the words in the texts are abbreviated or misspelled, and we agree with the State that the "substantive content of the texts are, more often than not, quite confusing and incomprehensible." In addition, Mr. Mason's text messages do not appear to contain any specific reference to defendant's possession of a firearm or to the armed robbery of Mr. Ordonez. We conclude that there is no reasonable likelihood that the text messages had a significant effect upon the jury.

When defendant did not respond to these text messages, Mr. Mason called 911 and falsely reported that he had observed an armed robbery at the car wash. At trial, Mr. Mason admitted that he had not witnessed the robbery and had made the 911 call because he was angry at defendant for abandoning him without a ride. However, the State presented ample evidence of defendant's commission of armed robbery. Mr.

Ordonez testified that defendant placed a gun to his back and demanded money and also pointed a gun at Mr. Ordonez when he asked for his money to be returned. Officer Fitting testified that Mr. Ordonez told him that the perpetrator had a gun, and Mr. Ordonez's testimony was also supported by the video footage. No evidence was introduced to contradict Mr. Ordonez's testimony that defendant had robbed him with the use of a firearm. Moreover, at trial, Mr. Mason admitted that he had not seen the robbery and had made the 911 call because he was angry at defendant.

Given that Mr. Ordonez's testimony was uncontradicted and was corroborated by other evidence, and that Mr. Mason's text messages were largely irrelevant to the issue of defendant's possession of a firearm, we conclude that "defendant cannot show that, absent the error, the jury probably would have returned a different verdict." *Lawrence,* 365 N.C. at 519, 723 S.E.2d at 335.

Defendant has not raised any other challenges to his conviction. We conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges BRYANT and DAVIS concur.

Report per Rule 30(e).