IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-989

Filed: 2 May 2017

Mecklenburg County, Nos. 13 CRS 43492, 222265–68

STATE OF NORTH CAROLINA

v.

JOHN ARTHUR STROUD

Appeal by defendant from judgments entered 16 April 2015 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 March 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ann W. Matthews, for the State.

Anne Bleyman for defendant.

DIETZ, Judge.

Defendant John Arthur Stroud appeals his convictions for felonious breaking and entering and larceny. Stroud argues that he cannot present a meaningful defense on appeal because of deficiencies in the trial transcript. We acknowledge that the quality of the transcript is remarkably poor—it contains, for example, more than a thousand "inaudible" notations where the court reporters who prepared it were

unable to document what was said. But surrounding context permits this Court to reconstruct most of what occurred during trial and, even where we cannot, Stroud has failed to show prejudice from the missing portions of the transcript.

Stroud also contends that the trial court erred by instructing the jury on flight. Even if we concluded that the flight instruction was erroneous, Stroud fails to argue any prejudice from this erroneous instruction, instead relying on the bare assertion that it was prejudicial. This sort of conclusory assertion of prejudice is insufficient; to overcome harmless error, a defendant must explain *why* there is a reasonable possibility that the alleged error affected the outcome of the trial. Stroud did not do so here and we therefore find no prejudicial error in the trial court's judgments.

Facts and Procedural History

On 31 May 2013, Joanna Petrie was returning to her family's home in Charlotte when she saw an unfamiliar man exit her garage, get into a white Ford Escape, and drive away. Joanna took note of the car's license plate number and told her mother, Julia Petrie, what she had seen. Joanna and Julia quickly discovered that two sets of golf clubs and two golf bags were missing from the garage. The Petries contacted the police.

The police determined that the vehicle Joanna had seen was registered to Kyana Renee Stele. When the police contacted Stele, she informed them that her mother and her mother's boyfriend, Defendant John Arthur Stroud, were the primary

users of the car. Stele further informed the police that Stroud would be picking her mother up from a doctor's appointment later that afternoon.

The police were waiting for Stroud at the doctor's office when he arrived to pick up Stele's mother. Stroud arrived in Stele's white Ford Escape with the license plate matching the one Petrie observed in her driveway. There were golf clubs and bags in the back seat. The police arrested Stroud at the scene.

Later that day, Julia Petrie's husband, Christopher Petrie, identified one set of golf clubs and one golf bag recovered from Stroud as ones stolen from the Petrie's garage. But half of Christopher's clubs were still missing, and he informed the police that the other golf equipment recovered from the car—a green golf bag and another set of clubs—were not his.

The police soon identified a recently opened case where another homeowner had reported that golf clubs and a green golf bag had been stolen from his open garage. The police contacted that victim, who identified the other bag and clubs as those taken from his garage.

Stroud, however, maintained that the golf equipment found in the car belonged to him. He claimed that the owner of a pawn shop where he was formerly employed gave him the equipment as a gift. He also claimed that he was at home, doing floor repairs, when Joanna Petrie witnessed someone leaving her family's garage and that, during the time of the theft, Stroud had loaned Stele's white Ford Escape to a friend.

On 4 November 2013, the State indicted Stroud on two counts of felonious possession of stolen goods and one count each of felonious breaking and entering, larceny after breaking and entering, and attaining the status of a habitual felon. The State tried Stroud on 13 April 2015.

At the charge conference, the State requested an instruction on flight. Stroud objected. The trial court overruled the objection and instructed the jury on flight.

On 16 April 2015, the jury returned verdicts finding Stroud guilty of felonious breaking or entering, larceny after breaking or entering, felonious possession of stolen goods, and non-felonious possession of stolen goods. Stroud pleaded guilty to attaining the status of a habitual felon. The trial court arrested judgment on the felonious possession of stolen goods charge, consolidated the other felony convictions, and sentenced Stroud as a habitual felon to a term of 115 to 120 months in prison. The court sentenced Stroud to a consecutive term of 120 days on the non-felonious possession of stolen goods charge. Stroud appealed.

Stroud's appellate counsel received a copy of Stroud's trial transcript on 14 March 2016. The court reporter who was present during the trial left the position during the preparation of the transcript, and other court reporters were brought in to complete the work. David E. Jester, Court Reporting Manager for the North Carolina Administrative Office of the Courts, sent a note to Stroud's counsel referencing the quality of the transcript:

> [T]he transcript is going to end at the conclusion of the jury charge. You're also going to see quite a number of notations of the recording malfunctioning with clear "holes" in the transcript each time. In short, this is probably the worst transcript I've ever had a hand in producing, and I'm very upset I can't do any more to make it better.

Mr. Jester also sent a second note to both the attorney handling the appeal for the State and to Stroud's appellate counsel, which read as follows:

> You'll note the records left by [the transcriptionist] were less than hoped and left many things missing from the transcript. As I told [Stroud's appellate counsel] earlier, it is upsetting to me that I and the other reporters that have worked on this case were not left in a position to produce a transcript any better than this.

Analysis

I. Deficiencies in the Trial Transcript

Stroud first argues that the State has deprived him of his right to meaningful appellate review because the trial transcript contains more than a thousand "inaudible" notations, meaning the court reporters who prepared the transcript were unable to document what was said. As explained below, despite the problems with the transcript, under controlling precedent from this Court and our Supreme Court we find no prejudicial error in this case.

The U.S. Supreme Court has held that an appellate counsel's duty cannot be adequately discharged unless he or she has access to a transcript of the testimony and other evidence presented as well as the court's instructions to the jury. *Hardy v.*

United States, 375 U.S. 277, 282 (1964). Likewise, this Court has acknowledged that "the most basic and fundamental tool of [an appellate advocate's] profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law." *State v. Hobbs*, 190 N.C. App. 183, 185, 660 S.E.2d 168, 170 (2008) (quoting *Hardy*, 375 U.S. at 288 (Goldberg, J., concurring)).[1]

Nevertheless, our State's appellate courts repeatedly have held that an incomplete or deficient transcript alone is not enough to require a new trial. *Id.* at 186, 660 S.E.2d 170; *State v. Hammonds*, 141 N.C. App. 152, 167, 541 S.E.2d 166, 177 (2000), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001). Instead, the defendant must show prejudice as a result of the deficient transcript. *Hobbs*, 190 N.C. App. at 186, 660 S.E.2d at 170. Importantly, a defendant cannot rely on mere speculation or categorical assertions to satisfy the prejudice requirement: "the use of general allegations of prejudice is insufficient to show reversible error resulting from the loss of specific portions of testimony caused by gaps in recording." *State v. Owens*,

[1] In North Carolina, appellate litigants have an alternative means of documenting a court proceeding other than a verbatim transcript prepared by a court reporter. That alternative, known as the narrative option, permits the litigants to reconstruct the proceedings from accounts of those present at trial (with assistance from the trial court, if necessary). *See* N.C. R. App. P. 9(c)(1). When used, the narrative option "would fulfill the same functions as a transcript and provide the defendant with a meaningful appeal." *Hobbs*, 190 N.C. App. at 186, 660 S.E.2d at 170. But, as the State concedes, Stroud diligently attempted to use the narrative option to fill in the missing portions of the transcript but could not do so because neither the prosecutor nor Stroud's trial counsel had any memory of the missing portions of the transcript.

160 N.C. App. 494, 499, 586 S.E.2d 519, 523 (2003). In other words, the defendant must specify *how* he has been prejudiced by the portions of the transcript that are missing or labeled "inaudible." *State v. Boggess*, 358 N.C. 676, 685, 600 S.E.2d 453, 459 (2004); *Hammonds*, 141 N.C. App. at 167, 541 S.E.2d at 177.

Here, Stroud does not identify any specific legal arguments that he is unable to advance on appeal because of the deficiencies in his trial transcript. Instead, he describes a series of "unknowns" that result from the transcript:

> It is unknown what evidentiary rulings were made by the trial court. It is unknown whether the evidence was sufficient to support the convictions. It is unknown what the parties requested and how the trial court ruled during the charge conference. It is unknown whether lesser-included instructions that were not given might have been supported by the evidence. It is unknown what rulings were sought and made on the questions submitted by the jury. It is unknown if the jury was polled, and what transpired at that point. It is unknown whether the acceptance of Mr. Stroud's plea to attaining the status of habitual felon was proper. It is unknown whether Mr. Stroud submitted mitigating factors at sentencing that the trial court should have considered. It is unknown whether the sentence was supported by the evidence at the sentencing hearing.

We reject these arguments because, as our Supreme Court found to be the case in *Hammonds*, here, "in most instances it is possible to reconstruct the substance of what was said, even if the precise words are lost." *Hammonds*, 141 N.C. App. at 167, 541 S.E.2d at 177.

To be clear, we do not downplay the inadequacies of the trial transcript. Virtually every exchange that occurs throughout the proceeding includes at least one "inaudible" notation. But, as in *Hammonds*, those inaudible portions of the transcript have "surrounding material that give context to the missing parts." *Id.* at 166, 541 S.E.2d at 177. Having carefully reviewed the transcript, we are satisfied that the trial court properly ruled on Stroud's evidentiary objections, that there was sufficient evidence to support the convictions, and that the trial court's instructions to the jury accurately stated the law. This disposes of most of the "unknowns" Stroud identifies on appeal.

With respect to the remaining "unknowns"—such as whether the trial court properly accepted Stroud's plea to being a habitual felon and whether the court properly considered any mitigating factors at sentencing—Stroud has not satisfied his burden to show prejudice because he fails to point to anything specific in the record (not the transcript) to support his argument that he was prejudiced. *Owens,* 160 N.C. App. at 499, 586 S.E.2d at 523.

For example, with respect to the habitual felon issue, Stroud cannot show prejudice unless he identifies some reason why he was not actually a habitual felon (which, of course, does not require a copy of the trial transcript).[2] Similarly, Stroud

[2] The record contains a signed, sworn statement by Stroud describing his rights and demonstrating that he knowingly and voluntarily pleaded guilty to attaining the status of a habitual felon.

cannot argue that the court improperly ignored mitigating factors at sentencing without identifying for this Court what mitigating factors he could have presented that would be relevant to his sentence (which, again, is something that can be done whether a transcript of the proceeding exists or not). Without doing so, this Court is left with nothing more than speculation about the possibility of prejudice, which we repeatedly have held "is insufficient to show reversible error resulting from the loss of specific portions of testimony caused by gaps in recording." *Id.* Accordingly, we find no prejudicial error in the deficiencies in the trial transcript.

II. Flight Instruction

Stroud next argues that the trial court committed prejudicial error by instructing the jury on flight over his objection. As explained below, Stroud has not shown that this alleged error prejudiced him.

We review a defendant's challenge to a trial court's decisions regarding jury instructions *de novo*. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "An error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. It is the defendant's burden to establish the existence of such prejudice on appeal." *State v. Tatum-Wade*, 229 N.C. App. 83, 94, 747 S.E.2d 382, 390 (2013) (brackets and citation omitted).

As this Court explained in *Tatum-Wade*, a defendant cannot show prejudice by simply asserting it; the defendant must explain precisely how that error impacted the jury's verdict. *Id.* at 94–95, 747 S.E.2d at 390. Put another way, the defendant's "bare assertion of prejudice is not self-sustaining." *State v. Bailey*, 280 N.C. 264, 269, 185 S.E.2d 683, 687 (1972). Thus, "without any particularized argument showing how she was prejudiced by the challenged instructions" a defendant fails "to demonstrate that she is entitled to a new trial." *Tatum-Wade*, 229 N.C. App. at 94–95, 747 S.E.2d at 390.

Here, like the defendant in *Tatum-Wade*, Stroud simply asserts that the instruction was prejudicial without making any specific argument of how or why. Stroud's entire prejudice argument consists of the following: "The instruction on flight was prejudicial error. . . . The error in instructing on flight when it was not supported by the evidence had a probable impact on the jury's finding that Mr. Stroud was guilty of felonious breaking and entering, and larceny after breaking and entering." This argument is insufficient to overcome the harmless error standard. Moreover, even with the numerous "inaudible" notations discussed above, the transcript readily demonstrates that the jury heard overwhelming evidence of Stroud's guilt—including testimony that one of the victims wrote down the license plate number of the car leaving the scene of the theft and that law enforcement traced the car to Stroud and recovered the stolen goods. There is no reasonable possibility that, absent the flight

instruction, the jury would not have convicted Stroud of these charges. Accordingly, we find no prejudicial error in the trial court's instruction on flight.

Conclusion

For the reasons stated above, we find no prejudicial error in the trial court's judgments.

NO PREJUDICIAL ERROR.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).