IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-156

Filed: 6 November 2018

Wake County, No. 15CRS219816

STATE OF NORTH CAROLINA

v.

WALTER BRITT GARRISON, Defendant.

Appeal by Defendant from judgment entered 23 May 2017 by Judge James E. Hardin, Jr. in Wake County Superior Court. Heard in the Court of Appeals 6 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Alvin W. Keller, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant.

BERGER, Judge.

On May 23, 2017, a Wake County jury convicted Walter Britt Garrison ("Defendant") of first-degree murder. Defendant appeals, arguing that the trial court erred by (1) omitting an instruction that would limit the jury's reliance on accomplice testimony, and (2) admitting certain physical evidence that was purportedly not

relevant to the crime charged. Defendant also asserts that he received ineffective assistance of counsel. We conclude the trial court did not err and dismiss the ineffective assistance of counsel claim.

Factual and Procedural Background

Around 6:30 p.m. on August 28, 2015, Defendant drank alcohol and "snorted a little cocaine" with his brother, Patrick Garrison ("Defendant's brother"). About an hour later, Defendant drove himself, his brother, and two other men to the house of Devon "Trim" Watkins ("Watkins") to get more cocaine. More than ten people were present at Watkins' house when they arrived. While there, Defendant's brother witnessed an argument that escalated to a fist fight between Defendant and Watkins. Defendant's brother and Watkins' brother, Casey "Big Boy" Watkins, joined the fight. After more men joined the scuffle, Defendant's brother pulled Defendant away. As Defendant and his brother were leaving, Defendant told his brother "you better get your guns."

At 9:46 p.m., a Wake Forest police officer responded to a 911 call reporting shots fired at North Allen Road in Wake Forest. When the officer arrived, a woman was standing in the road screaming that someone had been shot on the back porch of the house at 424 North Allen Road. The officer went to the back porch and found that the victim, later identified as Glenn Lee ("Lee"), was not breathing. Lee was later pronounced dead at the hospital.

At trial, Defendant's brother testified that around 10:00 p.m. on August 28, 2015, Defendant confided in him that he had "shot somebody and he thought that he hit him in the chest, but all he saw was their body fall."

Defendant's girlfriend, Tarsha Daniels ("Daniels"), testified that around 8:00 p.m. on August 28, 2015, Defendant called Daniels and sounded "upset." Defendant told her that "something had went down and he needed [her] to meet him at his grandmother's house." When Daniels arrived, she met Defendant, Defendant's brother, and two other individuals that she did not recognize. The five traveled in separate vehicles to the area of Pine Street in Wake Forest. Defendant and the two other individuals got out of their car and began walking. Daniels testified that she heard a gunshot five to fifteen minutes later. Daniels fled the neighborhood and called Defendant, who told her to go ahead and drive away and that he would get a ride.

Later that night, Defendant called Daniels to ask her to pick him up at his friend's house. After picking him up, Daniels then drove Defendant back to her house in Durham, where Defendant's brother later joined them. The three of them stayed up drinking until about 1:00 a.m. At some point that night, Defendant told Daniels that he had fought with Watkins earlier that day and that he "wasn't happy about it." Defendant said that he had returned to Watkins' house later that night and it looked like "they were bragging about the fight." Defendant then confided in Daniels

that he had shot someone that night in the woods behind the house while he was "[s]tanding behind a tree." Defendant also told Daniels that he thought he had shot a "[g]uy named Big Boy," but he was upset because he intended to shoot someone else.

Wakia Gallatin ("Gallatin") testified that she met Defendant in early August 2015. On August 28, 2015, Defendant had called her and said that "he had just got in an argument with somebody," and asked her for a ride. Gallatin told Defendant that she could not pick him up because she was not in town. Around 9:40 p.m. that same night, Defendant called Gallatin again and told her that "he had just shot somebody and needed a ride." Gallatin again declined and hung up the phone. Gallatin testified that during this second phone call Defendant's voice sounded "hyped and kind of panicked." Phone records established that multiple calls had been made between Defendant and Gallatin on the night of August 28, 2015.

Wake Forest Police Sergeant Steven Cashwell ("Sergeant Cashwell") investigated the homicide and had received a tip about additional evidence at the crime scene. He returned to 424 North Allen Road on September 8, 2015. Sergeant Cashwell testified that he searched the lot "adjacent to the residence where the incident occurred" for an "empty shell casing from the bullet that had been fired," which he eventually found "on the ground near a tree."

On May 23, 2017, Defendant was convicted of first-degree murder and was sentenced to life in prison without parole. Defendant appeals, alleging the trial court

erred by not instructing the jury on the proper use of accomplice testimony and by admitting the shell casing found by Sergeant Cashwell. Defendant also asserts he received ineffective assistance of counsel.

Analysis

I. Jury Instruction

Defendant first argues that the trial court erred by not instructing the jury on the proper use of accomplice testimony; specifically, with regard to the testimony of Defendant's brother and Daniels as they were "potential accomplices." Defendant concedes that he neither requested this instruction be given at trial, nor objected when the trial court did not charge the jury with this instruction. Instead, Defendant asks this Court to review the trial court's omission of the jury instruction on accomplice testimony for plain error. We find no error.

Rule 10 of the North Carolina Rules of Appellate Procedure states that

> [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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1) (2017).

"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." N.C. R. App. P. 10(a)(4) (2017). "[U]npreserved issues [are reviewed] for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and quotation marks omitted).

> 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 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) (citations, quotation marks, and brackets omitted).

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). This level of review "requires the defendant to bear the heavier

burden of showing that the error rises to the level of plain error." *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

"[I]t is the duty of the trial court to instruct the jury on all of the substantive features of a case." *State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1998) (citations omitted). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citations omitted). The trial court's duty to instruct the jury "arises notwithstanding the absence of a request by one of the parties for a particular instruction." *Loftin*, 322 N.C. at 381, 368 S.E.2d at 617 (citations omitted).

However, instructions cautioning the jury to closely examine accomplice testimony is not a "substantive feature of the trial," and thus, the omission of such an instruction—absent a request by the defendant—will generally not be deemed reversible error. *State v. Reddick*, 222 N.C. 520, 523, 23 S.E.2d 909, 910 (1943).

More specifically, in *Reddick*, our Supreme Court noted that it has

> held in various decisions that a conviction may be had upon the unsupported testimony of an accomplice. It has also been often held with us that a reversal will not be granted for failure of the court to instruct upon a subordinate feature in absence of a special request therefor. . . . Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to the prejudice, partiality, or inclination of a witness will not generally be held for reversible error unless there be a request for such instruction.

Reddick, 222 N.C. at 523, 23 S.E.2d at 910-11 (citations and quotation marks omitted).

This Court and our Supreme Court have repeatedly applied this rule to other factually analogous matters. For example, in *State v. Roux*, defendant's argument that the trial court "should have charged the jury that it was their duty to receive the testimony of accomplices with caution" failed because the defendant did not request such an instruction. *State v. Roux*, 266 N.C. 555, 563, 146 S.E.2d 654, 660 (1966).

Additionally, in *State v. Bagby*, we recognized "the long-established rule requiring a special request by defendant to have the court charge the jury to scrutinize the testimony of an accomplice." *State v. Bagby*, 48 N.C. App. 222, 223, 268 S.E.2d 233, 234 (1980) (citation omitted). Finally, in *State v. King*, absent "a special request, the failure of the court to charge the jury to scrutinize the testimony of an accomplice [was not error], the matter being a subordinate and not a substantive feature of the case." *State v. King*, 21 N.C. App. 549, 550, 204 S.E.2d 927, 927 (1974) (citation omitted). We are bound by precedent to hold that the trial court was not required to give a jury instruction on accomplice testimony absent a request for this instruction. Because the trial court did not err, Defendant cannot show plain error.

II. Relevance of Physical Evidence

Defendant next challenges the trial court's admission into evidence of the shell casing found ten days after the shooting occurred. Defendant asserts that the shell

casing was unfairly prejudicial and irrelevant as "[n]othing connected the shell casing to the bullet found in the victim." Defendant contends that this issue was properly preserved, but in the alternative, requests for this Court to review for plain error. We find no error.

> Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial. . . . As such, in order to preserve for appellate review a trial court's decision to admit testimony, objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence. . . .

State v. Ray, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citations and quotation marks omitted); *see also* N.C. R. App. P. 10(a)(1) (2017).

Here, Defendant asserts that this issue was properly preserved because Defendant objected when the shell casing was first mentioned on the fourth day of trial. However, the shell casing was first introduced on the second day of trial, through the testimony of Agent Hope Bruehl of the Raleigh City Wake County Bureau of Identification ("Agent Bruehl"). Agent Bruehl testified that when she returned to the crime scene on September 8, 2015, she "met with detectives on the scene who stated they found a cartridge casing in the vacant lot next door." Agent Bruehl further stated that she collected the shell casing, took photos and measurements, and sketched the scene that day. As Defendant failed to timely object

to this testimony regarding the disputed shell casing, this issue was not properly preserved. Accordingly, we are limited to reviewing the relevancy and admissibility of the shell casing for plain error.

As previously stated, "unpreserved issues [may be reviewed] for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *Gregory*, 342 N.C. at 584, 467 S.E.2d at 31. "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697 (citation omitted).

"Evidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (2017). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2017). Any weakness as to the relevant connection between the disputed evidence and the commission of the crime goes "to the weight of the evidence and not its admissibility." *State v. Grier*, 307 N.C. 628, 633, 300 S.E.2d 351, 354 (1983) (citation omitted).

Here, Sergeant Cashwell found the subject shell casing around 1:30 p.m. on September 8, 2015, ten days after the August 28, 2015 shooting. Sergeant Cashwell testified that the shell casing was not wet, dirty, or rusty. Further, on direct and re-

direct examination, the following notable exchanges took place between counsel for the State and Sergeant Cashwell:

> [Sergeant Cashwell:] When I got [to the crime scene], I looked and there was a lot to the left, which would be to the north side of the residence where the incident occurred. I looked—I was looking through that lot for a shell casing, an empty shell casing from the bullet that had been fired. . . . [I located] a single shell casing on the ground near a tree in that lot that was adjacent to the residence where the incident occurred.
>
> [The State:] Can you say approximately how far the shell casing was from the tree that you described?
>
> [Sergeant Cashwell:] I'd say within 10 feet.
>
> . . .
>
> [The State:] The shell casing that you located . . . that was near the tree, did you look from the location that the shell casing was to the back porch of the house?
>
> [Sergeant Cashwell:] I did.
>
> [The State:] And in your opinion, was there a clear line of sight from that shell casing to the back porch?
>
> [Sergeant Cashwell:] Yes.
>
> . . .
>
> [The State:] Prior to going to the scene on September 8th, were you aware of how many times the victim in this case, Glenn Lee, had been shot? . . .
>
> [The State:] How many times, to your knowledge had he been shot?

> [Sergeant Cashwell:] Once.
>
> [The State:] How many shell casings were found near that tree in the adjacent lot?
>
> [Sergeant Cashwell:] One.

Because there were several smaller trees in the area, Sergeant Cashwell stated that he also searched around those trees and the entire property of 424 North Allen Road, but he only found one shell casing. Moreover, Sergeant Cashwell testified that to his knowledge, between the shooting on August 28, 2015 and the recovery of the casing on September 8, 2015, Sergeant Cashwell could not recall that there were "any reported shootings on 424 North Allen Road or [in] that immediate area." As a supervisor of the Criminal Investigation Department, Sergeant Cashwell stated that he would typically have been notified if there was a shooting in that area during that time.

Sergeant Cashwell's testimony was corroborated by Daniels' testimony. Daniels testified that Defendant confided in her that he had shot someone while standing behind a tree in the woods in the back of the house.

The record reflects ample evidence connecting the shell casing to the shooting on August 28, 2015. Defendant's argument goes to the weight of the evidence, not its admissibility. Because the trial court did not err, Defendant cannot show plain error.

III. Ineffective Assistance of Counsel

Finally, Defendant asserts that he received ineffective assistance of counsel because his counsel failed to file a pre-trial motion *in limine* to prevent any evidence of the shell casing from being admitted at trial. We decline to address this claim on direct appeal.

If "the record before this [c]ourt is not thoroughly developed regarding . . . counsel's reasonableness, or lack thereof, . . . [then] the record before us is insufficient to determine whether defendant received ineffective assistance of counsel." *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017). Here, the record before us is insufficient to determine whether trial counsel was ineffective or whether there were reasonable, strategic reasons for counsel's actions. Accordingly, we dismiss Defendant's ineffective assistance of counsel claim without prejudice to his right to assert his claim in a motion for appropriate relief.

Conclusion

The trial court did not err by omitting an instruction limiting the jury's reliance on accomplice testimony absent a request for such instruction and by admitting the shell casing. We also dismiss Defendant's ineffective assistance of counsel claim without prejudice.

NO ERROR IN PART; DISMISSED IN PART.

Judges TYSON and INMAN concur.

Report per Rule 30(e).