IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-403

Filed: 18 December 2018

Mecklenburg County, Nos. 15 CRS 245327, 245331–32, 245334

STATE OF NORTH CAROLINA

v.

DONTAE RASHAWN ANTHONY and DEANGELO DUMARCUS JOHNSON

Appeal by defendants from judgments entered 18 August 2017 by Judge Todd Pomeroy in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John A. Payne and Assistant Attorney General LaShawn S. Piquant, for the State.

Dylan J.C. Buffum Attorney at Law, PLLC, by Dylan J.C. Buffum, for defendant Anthony.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant Johnson.

DIETZ, Judge.

Defendants Dontae Rashawn Anthony and DeAngelo Dumarcus Johnson appeal their convictions for possession of a stolen vehicle and robbery with a dangerous weapon. As explained below, we are constrained by Supreme Court

precedent to vacate Defendants' convictions. Our Supreme Court has held that, when the jury requests a transcript of trial testimony during deliberations, the trial court must exercise its discretion to decide whether or not to accommodate the jury's request. Here, the trial court's statements are virtually identical to similar statements that the Supreme Court has held are insufficient to show the trial court exercised its discretion. We therefore vacate the challenged judgments and remand for further proceedings.

Facts and Procedural History

In January 2016, the State indicted Defendants Dontae Rashawn Anthony and DeAngelo Dumarcus Johnson on charges of possession of a stolen vehicle and robbery with a dangerous weapon. The case went to trial in August 2017.

At trial, Officer Joshua Skipper, who responded to the robbery, testified for the State. Relevant to this appeal, Officer Skipper described how law enforcement apprehended three men—including Defendants—fleeing police in the victim's stolen car. Officer Skipper then described a "show-up" identification process in which officers brought the apprehended suspects to be viewed by the victim for identification. During Officer Skipper's testimony, the State introduced video footage of the show-up identification recorded through a body camera. Officer Skipper narrated the sequence of events on that video, including the victim's identification of

Defendants as the perpetrators. A court reporter was present at trial to transcribe Officer Skipper's testimony.

During jury deliberations, the jury submitted a note to the court stating that "[t]he jury would like to hear the 911 call, read transcript of Skipper's testimony, and, finally, review Skipper's body-worn camera in addition of the show-up." In response to the jury's request, outside the jury's presence, the trial court told the parties that "we can accommodate the 911 call. There is no – as you all know, there is no transcript, so my instruction on that will be your duty to recall the evidence as you heard it, and you will not be provided any transcript." The trial court then informed the jury that "[w]ith regards to transcripts, those are not available, all right. So in that situation you just have to remember the evidence as you remember it, the testimony as you remember it, and use your recollection to recall those events, okay?"

The jury convicted Defendants of possession of a stolen vehicle and robbery with a dangerous weapon. The trial court arrested judgment on the possession of a stolen vehicle charges and sentenced Defendants to 62 to 87 months in prison for the robbery charges. Defendants timely appealed.

Analysis

We begin our analysis with Defendants' argument concerning the jury's request to review a transcript of trial testimony. As explained below, our case law requires us to vacate and remand for a new trial on this issue.

Trial courts have broad discretionary authority to permit the jury, during deliberations, to "reexamine material received in evidence and to review portions of the testimony." *State v. McVay*, 174 N.C. App. 335, 339–40, 620 S.E.2d 883, 886 (2005); N.C. Gen. Stat. § 15A-1233(a). This discretionary authority includes the authority to order the court reporter to prepare a transcript of trial testimony so that the jury can review it. *State v. Ballard*, 193 N.C. App. 551, 557, 668 S.E.2d 78, 82 (2008).

Of course, for practical reasons, trial courts rarely exercise this discretion and order a transcript to be prepared. *Id.* But our Supreme Court repeatedly has emphasized that trial courts have discretion to do so and, if the jury asks for a transcript of testimony, "the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury." *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985).

Importantly, the Supreme Court also repeatedly has held that "[a] trial court's statement that it is *unable* to provide the transcript to the jury demonstrates the court's apparent belief that it lacks the discretion to comply with the request." *State v. Starr*, 365 N.C. 314, 318, 718 S.E.2d 362, 365 (2011). For example, in *State v. Lang*, after the jury requested a transcript of testimony, the trial court responded that "the transcript is not available to the jury." 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980). The Supreme Court held that the trial judge's "comment to the jury that the

transcript was not available to them was an indication that he did not exercise his discretion to decide whether the transcript should have been available under the facts of this case. The denial of the jury's request as a matter of law was error." *Id.* at 511, 272 S.E.2d at 125.

Similarly, in *State v. Ashe*, the jury asked the trial court for a transcript of certain trial testimony. The court responded by stating "[t]here is no transcript at this point. You and the other jurors will have to take your recollection of the evidence." 314 N.C. at 35, 331 S.E.2d at 656–57. The Supreme Court again held that the trial court erred by failing to exercise its discretion because the trial judge's remark that "there is no transcript at this point" indicated that "the trial judge apparently felt that he could not grant the request." *Id.* As the Supreme Court later summarized, "[t]hese cases demonstrate the well-settled rule that a trial court does not exercise its discretion when, as evidenced by its response, it believes it cannot comply with the jury's transcript request." *Starr*, 365 N.C. at 318, 718 S.E.2d at 365–66.

This case is controlled by *Lang*, *Ashe*, and their progeny. Here, when the jury requested a transcript of certain trial testimony during deliberations, the trial court first stated to the parties (outside the jury's presence) that "[t]here is no – as you all know, there is no transcript, so my instruction on that will be your duty is to recall the evidence as you heard it, and you will not be provided any transcript." The trial

court then called the jury into the courtroom and instructed them that "[w]ith regards to transcripts, those are not available, all right. So in that situation you just have to remember the evidence as you remember it, the testimony as you remember it, and use your recollection to recall those events, okay?"

We agree with Defendants that the trial court's statements in this case are indistinguishable from those in *Ashe*, *Lang*, and other controlling Supreme Court cases addressing this question. We are therefore constrained to conclude that the trial court erred by failing to indicate that it understood it had discretion to order a transcript to be prepared for the jury's examination, and nevertheless chose not to do so in an exercise of that discretion. *Starr*, 365 N.C. at 319, 718 S.E.2d at 366.

We thus turn to whether this error prejudiced Defendants. "[A] trial court's error in failing to exercise its discretion in denying a jury's request to review testimony constitutes prejudicial error when the requested testimony (1) is material to the determination of defendant's guilt or innocence; and (2) involves issues of some confusion or contradiction such that the jury would want to review this evidence to fully understand it." *State v. Chapman*, 244 N.C. App. 699, 708, 781 S.E.2d 320, 327 (2016).

Here, the requested testimony was unquestionably material—it concerned the victim's identification of Defendants as the perpetrators of the crime in a "show-up" identification with law enforcement. Moreover, the victim did not identify Defendants

at trial. Thus, Officer Skipper's testimony about the show-up identification—for which the jury sought the transcript—was a critical piece of the State's case.

The requested testimony also involved issues of potential confusion or contradiction. The victim told law enforcement that two men robbed him and stole his car. When law enforcement spotted the vehicle and apprehended the occupants, there were three men. The victim's statements to the officers about those three men were somewhat contradictory. For example, the victim stated that the armed perpetrator told the victim not to look at him, and that the victim complied. Nevertheless, when officers brought Anthony to be viewed by the victim, the victim stated he was "eighty percent" certain that Anthony was the armed perpetrator who forced him from his car. But the victim immediately qualified that statement by asserting that "it's hard to tell because he had his hoodie pulled tight."

Then, when officers brought Johnson out to be viewed by the victim, the victim said he was now "75 percent" certain that Johnson, not Anthony, was the armed perpetrator. But when identifying Johnson with seventy-five percent certainty, the victim also explained that "okay, I'm bad about this, but he very well could have been the first guy [the armed perpetrator]. . . Damn, I was trying my best to, like, not look at him and piss him off."

These statements, and several other arguable inconsistencies in the victim's identification—such as the victim's "iffy" reaction to whether the third man

apprehended by law enforcement was one of the perpetrators—are sufficient to demonstrate that there was "some confusion or contradiction" in the testimony warranting further review by the jury. *See Chapman*, 244 N.C. App. at 708, 781 S.E.2d at 327. Thus, Defendants have met their burden under *Chapman* to show prejudice. *Id.* We therefore vacate the trial court's judgments and remand this case for further proceedings.

Because we vacate and remand on this issue, we need not reach Defendants' other arguments on appeal, which similarly sought a new trial as a remedy, and which will not necessarily arise again at a new trial.[1]

Conclusion

For the reasons discussed above, we vacate the trial court's judgments and remand for further proceedings.

VACATED AND REMANDED.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).

[1] Defendants also assert that the trial court should have granted their motion to dismiss based on insufficiency of the evidence because the doctrine of recent possession, on which the trial court instructed the jury, did not apply. But, as explained above, even setting aside the court's instruction on recent possession, there was substantial evidence from which a reasonable jury could have convicted Defendants based on the victim's identification of Defendants as the perpetrators. Thus, as Defendants acknowledge in their argument, this issue is better framed as a challenge to the court's jury instruction on the doctrine of recent possession, the remedy for which would be a new trial.