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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-424

Filed: 18 December 2018

Mecklenburg County, Nos. 17 CRS 205845–47, 15715

STATE OF NORTH CAROLINA

v.

ERIC CHRISTOPHER ORR

Appeal by defendant from judgment entered 23 October 2017 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 October 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Thomas H. Moore, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.*

ELMORE, Judge.

Defendant Eric Christopher Orr appeals from judgment entered upon jury verdicts finding him guilty of common law robbery, speeding to elude arrest, and attaining habitual felon status. On appeal, defendant contends the trial court abused its discretion by admitting into evidence a recording that included unfairly prejudicial

commentary from the victims, by failing to sentence defendant in the mitigated range for his convictions, and by directly questioning defendant in a manner that suggested the trial judge was not impartial. Defendant further contends the trial court erred during the sentencing hearing when it admitted evidence irrelevant to the three felonies enumerated in the habitual felon indictment.

Upon review, we conclude defendant received a fair trial, free from prejudicial error.

### **Background**

Defendant was charged with two counts of common law robbery and one count of fleeing to elude arrest on 13 February 2017, and a grand jury indicted defendant on those counts on 20 February 2017. The grand jury returned an additional indictment on 5 June 2017 for defendant attaining habitual felon status. The evidence presented at trial tended to show the following.

On the night of 13 February 2017, Kellie Ward and Jonathan Goulding were robbed in the parking lot of their apartment complex. The perpetrator threatened Ward and Goulding with a gun, ordered them to hand over their car keys, and told Ward to start the car. Ward and Goulding then went upstairs to Goulding's apartment, called the police, and watched from the balcony as the perpetrator drove in circles, apparently trying to exit the parking lot.

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When the perpetrator finally managed to drive away, a police chase lasting approximately ten minutes ensued. During the pursuit, the stolen car reached high speeds, travelled on the wrong side of the road, and collided with several other vehicles, all of which was recorded on a video camera in the lead officer's patrol car. The pursuit ended when the stolen car crashed into a Rite Aid store sign, and defendant was found trapped in the driver's seat.

Firefighters were summoned to the scene to cut the vehicle apart so defendant could be removed and transported to the hospital for medical treatment. Prior to being removed, defendant made several statements to the three officers that had been involved in the pursuit. Noting that the gun in the car was only a BB gun, defendant said, "y'all got me" and "I should have stayed my black ass at home. I don't know what the f\*\*\* I was thinking." Defendant's statements were recorded by a body camera worn by one of the officers.

Following the police chase, another officer drove Ward and Goulding to the crash site to do a "show-up" identification, which was recorded by that officer's body camera. When they arrived at the scene, defendant had already been taken to the hospital, but Ward did identify the stolen car as hers. Officers recovered Ward and Goulding's keys as well as a BB gun during a search of the car.

At trial, defendant chose to testify on his own behalf as the sole witness for the defense. According to defendant, a man named Ron stole Ward's car, picked

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defendant up afterward, and drove for the majority of the police chase before jumping out of the car, at which point defendant moved into the driver's seat. During direct examination, the trial judge interrupted defense counsel's questioning as follows:

[DEFENSE COUNSEL]: What happened to Ron?

[DEFENDANT]: . . . When he accelerate the car it was being messed up [sic]. The car was swerving to the side, like the front part, the front tire. But he, like, "I fitting to jump out." And when we got up there—

THE COURT: He told you that he was going to jump out of a moving car?

[DEFENDANT]: Exactly.

Following the brief interruption, direct examination continued in the usual manner.

The jury returned verdicts finding defendant guilty of common law robbery, speeding to elude arrest, and attaining habitual felon status. The trial court thereafter sentenced defendant—as a habitual felon—to two consecutive active prison terms, both in the presumptive range for his convictions.

Additional facts will be set forth as necessary to discuss the specific issues presented by defendant on appeal.

**Discussion**

On appeal, defendant contends the trial court abused its discretion by (I) admitting into evidence the recording that included commentary from the victims as they were being transported by police to the crash site, (II) failing to sentence

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defendant in the mitigated range for his convictions, and (III) directly questioning defendant “in a manner suggesting that it found his testimony to be not credible.” Defendant further contends the trial court erred when it (IV) admitted evidence that defendant had “committed a felony other than one of the three enumerated in the habitual felon indictment and had been referred for [a] mental health evaluation by another judge.”

Each assignment of error is addressed in turn.

I. The trial court did not abuse its discretion in admitting the recording.

In his first argument on appeal, defendant contends the trial court abused its discretion by allowing the State to introduce into evidence the body camera recording of Ward and Goulding being transported to and arriving at the crash site. Defendant contends the recording was “unfairly emotional and inflammatory” based on Ward’s sobbing and on both Ward and Goulding expressing their disdain for defendant. We disagree.

Recordings such as the one at issue here, if relevant and properly authenticated, may be admitted into evidence for both illustrative and substantive purposes. *State v. Gaither*, 161 N.C. App. 96, 102, 587 S.E.2d 505, 509 (2003). However, pursuant to North Carolina Evidence Rule 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2017). “Unfair prejudice has been

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defined as an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (citation omitted). Whether or not to exclude evidence under Rule 403 is a matter within the sound discretion of the trial judge, “and his ruling may be reversed for an abuse of discretion only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *Id.*

In the instant case, the recording was offered during Ward’s testimony for the purpose of illustrating the events she described immediately following the robbery and police chase, including her identification of the stolen car. Defendant objected pursuant to Rule 403, asserting that the recording had “little probative value and a lot of prejudicial effect . . . [i]t serves no purpose.” In response, the State argued that the recording was “extremely probative” as the “best evidence of the state of mind of both of these victims right after they were robbed. They are taken to the scene where they identify the victim’s car as being the same car that was just stolen from them.” Acknowledging that the recording was “clearly prejudicial simply because [Ward’s] in an emotional sort of response,” the trial court nevertheless overruled the objection on the basis that the recording was relevant to the State’s case as “part of the *res gestae*” or atmosphere following the robbery.

Where the trial court considered defendant’s Rule 403 objection, acknowledged that the recording was prejudicial based on the victim’s emotional state, but

concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, we find no abuse of discretion. This argument is overruled.

II. The trial court did not abuse its discretion in failing to sentence defendant in the mitigated range for his convictions.

Defendant next argues that the trial court abused its discretion by sentencing him in the presumptive rather than the mitigated range for his convictions. Defendant specifically contends the trial court was required to find two mitigating factors—that defendant suffered from a mental disorder and had a strong support network in the community—and to sentence him accordingly. We disagree.

When sentencing a criminal offender, the trial court “shall *consider* evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the *decision* to depart from the presumptive range is in the discretion of the court.” N.C. Gen. Stat. § 15A-1340.16(a) (2017) (emphasis added). “This Court has held the trial court is required to take ‘into account factors in aggravation and mitigation *only* when deviating from the presumptive range in sentencing.’ ” *State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000) (quoting *State v. Caldwell*, 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997)).

Here, defendant was sentenced in the presumptive range for his convictions. Defendant has failed on appeal to demonstrate how the trial court abused its

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discretion in deciding not to depart from the presumptive range and to instead sentence him in the mitigated range. Accordingly, this argument is overruled.

III. The trial court did not abuse its discretion in briefly interrupting direct examination to ask defendant a clarifying question.

In his third argument on appeal, defendant contends the trial court abused its discretion by asking a single question during defendant's testimony "in a manner suggesting that it found his testimony to be not credible." We disagree.

"The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2017). However, pursuant to North Carolina Evidence Rule 614(b), the trial court may direct questions to a witness for the purpose of developing a relevant fact or clarifying the witness's testimony. N.C. Gen. Stat. § 8C-1, Rule 614(b) (2017); *see also State v. Pearce*, 296 N.C. 281, 285, 250 S.E.2d 640, 644 (1979) ("[I]n the exercise of his duty to supervise and control the course of a trial, the trial judge may interrogate a witness for the purpose of developing a relevant fact or clarifying a witness's testimony in order to ensure justice and aid the jury in their search for a verdict that speaks the truth.").

Here, defendant testified that prior to jumping out of the stolen car, a man named Ron told defendant, "I fitting to jump out." The trial court then asked defendant directly, "He told you that he was going to jump out of a moving car?" to which defendant answered, "Exactly." There is no indication that, in this single



clarifying question, the trial court expressed an opinion regarding defendant's credibility, his guilt or innocence, or a factual controversy to be resolved by the jury.

This argument is overruled.

IV. The trial court did not commit prejudicial error during the habitual felon phase of sentencing.

In his final argument on appeal, defendant contends the trial court committed reversible error by allowing the jury to review irrelevant, prejudicial evidence during the habitual felon phase of his sentencing hearing. We disagree.

“Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon” and may be subjected to enhanced punishment based on his attaining habitual felon status. N.C. Gen. Stat. § 14-7.1(a) (2017); *see also State v. Allen*, 292 N.C. 431, 434, 233 S.E.2d 585, 587 (1977). In the habitual felon phase of sentencing, the only question for the jury is whether the defendant was previously convicted of or pled guilty to three non-overlapping felonies. N.C. Gen. Stat. § 14-7.1(c) (2017).

Here, defendant contends that the State's Exhibits 20 and 24 were irrelevant and prejudicial to the jury's determination of his attaining habitual felon status; Exhibit 20 was a copy of defendant's 13 February 2006 judgment and conviction for the felony offense of carrying a concealed weapon, while Exhibit 24 was a copy of his 6 December 2016 judgment and conviction for the felony offense of fleeing to elude

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arrest. Defendant specifically contends that Exhibit 20 contained irrelevant, prejudicial information about his referral for a mental health evaluation. He further contends that Exhibit 24 should not have included any information about his conviction for the misdemeanor offense of assault on a government official.

To the extent that irrelevant evidence was admitted during the habitual felon stage of defendant's trial, its admission was cured by the trial court's jury instructions on the State's burden of proof. *State v. Lotharp*, 148 N.C. App. 435, 444–45, 559 S.E.2d 807, 812 (2002). Specifically, the trial court instructed the jury that the State had the burden to establish that defendant had been previously convicted of three felonies on 13 February 2006, 27 June 2007, and 6 December 2016. Defendant has thus failed to show that the admission of any irrelevant evidence unfairly prejudiced the outcome of the habitual felon stage of his trial, and this argument is overruled.

**Conclusion**

For the reasons stated herein, the trial court did not abuse its discretion by admitting into evidence the recording that included prejudicial commentary from the victims, by failing to sentence defendant in the mitigated range for his convictions, or by asking defendant a single clarifying question during his testimony. Additionally, the trial court did not commit reversible error by allowing the jury to review irrelevant evidence during the habitual felon phase of defendant's sentencing hearing. We conclude that defendant received a fair trial, free from prejudicial error.

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NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge ARROWOOD concur.

Report per Rule 30(e).