IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-330

Filed: 3 December 2019

Mecklenburg County, Nos. 16 CRS 215686, 16 CRS 215688, 18 CRS 2802

STATE OF NORTH CAROLINA

v.

DEJAUN EVANS, Defendant.

Appeal by Defendant from judgements entered 21 August 2018 by Judge Athena F. Brooks in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Derek L. Hunter, for the State.

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for Defendant-Appellant.

INMAN, Judge.

Dejaun Evans ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon. On appeal, Defendant contends that the trial court erred by: (1) failing to extend the session of court in which his trial began, resulting in entry of judgment out of session and without jurisdiction; and (2) responding to a question from the jury with a written request for clarification read to the jury by the bailiff, in violation of criminal

procedure statutes. After careful review, we hold that Defendant has failed to demonstrate reversible error.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant was arrested on 29 April 2016 by the Charlotte-Mecklenburg Police Department in connection with a robbery after being identified in a photo lineup by the victim. Defendant was indicted for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon on 9 May 2016. He was initially tried on these charges in September of 2017; that trial ended in a mistrial after the jury was unable to reach a unanimous verdict.

Defendant's second trial began on 15 August 2018 in Mecklenburg County, and included an additional charge for possession of a firearm by a felon. Special Superior Court Judge Athena Brooks presided over the trial pursuant to a commission "begin[ning] August 15, 2018 and continu[ing] Three Days or until business is completed." Judge Brooks was also assigned by separate commission to hold court in Mecklenburg County for the following week beginning 20 August 2018.[1]

On 17 Friday 2018, at the conclusion of the third day of trial, Judge Brooks called a weekend recess. Following the jury's departure from the courtroom, the

[1] We take judicial notice of these commissions, which were included in an appendix to Defendant's brief and are relied upon by both parties in their arguments before this Court. *See Baker v. Varser*, 239 N.C. 180, 186, 79 S.E.2d 757, 762-63 (1954) (taking judicial notice of a superior court judge's commission).

prosecutor asked if "it would be appropriate at this time to make findings why we're holding this session to next week[.]" Judge Brooks replied, "I have the commission next week is—I have on the road commission." The prosecutor concluded the exchange by responding "Understood. I didn't know if that had to be on the record." The trial resumed the following Monday, 20 August 2018, in a different courtroom without any further comment on the weekend recess by the court or counsel.

The State and Defendant rested their cases later that day and court recessed for the evening. The next morning, Judge Brooks instructed the jury on the pertinent law, which included the following instruction on photographic lineup evidence consistent with the Eyewitness Identification Reform Act, N.C. Gen. Stat. §§ 15A-284.50 *et seq.* (2019):

> THE COURT: . . . A photo lineup conducted by a local law enforcement agency is required to meet all of the following requirements:
>
> . . . .
>
> The photograph of the suspect shall be contemporaneous and, to the extent practicable, shall resemble the suspect's appearance at the time of the offense.

Once Judge Brooks completed the instructions, the jury left the courtroom to begin its deliberations in a jury room.

Later the same day, the jury sent a written note to the trial court requesting: (1) an opportunity to review a tape recording that had been entered into evidence; (2)

instruction on whether the jury was required to find Defendant guilty of all charges, or if it could find Defendant not guilty as to some; (3) instruction on "[h]ow . . . 'contemporary photo' [is] defined by the court[;]" and (4) a copy of the jury instructions. The trial court read each request aloud, and engaged in the following discussion with the parties:

> THE COURT: All right. Number 3, I don't understand. It says how is contemporary photo defined by the Court. I don't know if that's my accent that came out as contemporary or if the words got confused by the jury. I simply will need more information to answer that. Any position for the state?
>
> [THE PROSECUTOR]: The state would agree.
>
> THE COURT: Anything for the defendant?
>
> [DEFENDANT'S COUNSEL]: In the Eyewitness Identification Reform Act, it says contemporary photo.
>
> . . . .
>
> THE COURT: I just want to make sure it's not my accent or my using the jury instruction. I just don't know.
>
> . . . .
>
> [THE PROSECUTOR]: . . . I would say that based on the question, it could be what [Defendant's counsel] is saying, it could be some other things, I would simply tell the jury that we're unclear what their question is, if they could define it further and we could readdress it.
>
> THE COURT: Just to make sure that that's what they're talking about.

> [DEFENDANT'S COUNSEL]: Doesn't the jury instruction say a contemporaneous photo album?
>
> . . . .
>
> THE COURT: Okay. It says contemporary.
>
> . . . .
>
> How is contemporary photo defined, I'm going to ask for a little more clarification as to that. I guess basically just ask them is it contemporary photo in regard to the lineup or something else just so I'll know where the words come from. I mean, I don't know how to get to that point other than flat out asking.
>
> [DEFENDANT'S COUNSEL]: Yeah. I think that's the only—the word contemporary, I think, in this trial has only been used at any point one time, and that was during jury instruction. No one has said contemporary other than jury instruction, and that word only appears in the eyewitness identification.
>
> THE COURT: And if it comes back to that's what it is, I'm going to tell them to use their normal understanding of the word.
>
> [DEFENDANT'S COUNSEL]: And could you ask them to rely on the evidence that was given at the trial?
>
> THE COURT: Yes, sir. I always do that.

The trial court also engaged in the following discussion concerning the request for a copy of the jury instructions:

> THE COURT: . . . As opposed to giving them all of these [instructions], because there's a lot of notes and stuff, I would ask them to say which one specifically are you requesting so that we can sanitize it out of the law that's

> always in the footnotes and stuff before we give it to them. I don't have a problem giving it to them, but . . . I'd rather give them one which conforms to the several that they're specifically asking about.
>
> . . . .
>
> [DEFENDANT'S COUNSEL]: I would ask what—if they do want specific ones, and then ask—or do they want all of them, because they may want all of them.
>
> THE COURT: If they want all of them, I'm giving it.
>
> . . . .
>
> I'm going to ask them specifically which instruction or all.

Having resolved to ask the jury to clarify these two questions, counsel and the court turned their discussion to how to convey the request for clarification to the jurors. Judge Brooks asked the bailiff to deliver the request by reading the jury a written note, at which time the prosecutor asked for a bench conference. That conference was held off the record. The recorded proceedings resumed as follows:

> THE COURT: I'm going to send this [written note[2]] back. And this will be part of the file. And you could ask these two questions in regard to three and four. Don't engage in a colloquy back and forth. Just say the judge has these questions, I need an answer to these questions.
>
> THE DEPUTY: Got you.
>
> THE COURT: And read them only as they're asked so we have them in the record what we're reading.

[2] Judge Brooks's note is included in the record, and reads: "(3) Contemporary photo as to line up request or other. (4) Which instruction or all?"

. . . .

THE DEPUTY: Right.

. . . .

[DEFENDANT'S COUNSEL]: Your Honor should the question be presented to them in court on the record as opposed to –

THE COURT: The problem is, is if I ask them the question in court, then they may have to communicate, and we can't be a part of their understanding. That's why I was going to go ahead in the jury room, because they may have to have some conversation about which instruction, et cetera, and I don't want to be a part of that.

[DEFENDANT'S COUNSEL]: Can a deputy?

THE COURT: He is sworn since he's with the jury. If they start having colloquy, he knows to step out.

[DEFENDANT'S COUNSEL]: Well, that's my understanding.

THE COURT: And I don't want him to be standing there staring at them while they're talking. If they have a conversation, he'll step out. It may be the answer is very quick, it may be they need to communicate. If you'll just radio and remind them –

THE DEPUTY: Your Honor, the procedure is if you send a note back, we'll advise the judge wants you to answer these questions, they'll answer them and come back.

. . . .

We would never ever listen to deliberations. Once this starts, we're out. I tell them we want to get out.

The jury returned written answers to the court's inquiry, apparently on the same note they originally sent to the court, informing Judge Brooks that the jury was requesting: (1) a definition of "contemporary photo . . . [a]s to line up requirements[;]" and (2) "[i]nstructions for how a line up should be complied [sic] and the seven elements of 'Robbery with a firearm.' " With the clarifications in hand, and outside the presence of the jury, Judge Brooks suggested proposed responses to each request—neither counsel for the State nor Defendant objected. Judge Brooks called the jury back into the courtroom and provided the additional instructions.

The jury ultimately found Defendant guilty on all charges. The trial court consolidated Defendant's convictions for conspiracy and armed robbery and sentenced him to 70 to 96 months imprisonment. The trial court imposed a second, consecutive sentence of 12 to 24 months imprisonment for possession of a firearm by a felon. In addition, the trial court assessed court costs and restitution in the total amount of $1,738.99. Defendant entered written notice of appeal.

II. ANALYSIS

A. Standard of Review

Defendant's assertion that the trial court failed to properly extend the session in which the trial began implicates the trial court's jurisdiction, a question we review *de novo*. *State v. Lewis*, 243 N.C. App. 757, 761, 779 S.E.2d 147, 149 (2015). We apply that same standard to Defendant's argument that the trial court committed statutory

error in seeking clarification from the jury through a written note delivered by the bailiff. *See State v. Mackey*, 209 NC App 116, 120, 708 S.E.2d 719, 721 (2011) ("Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." (citations omitted)).[3]

B. Session of Court

Defendant first contends that the trial court failed to extend the session of court in which his trial began, violating the rule against judgments entered out of session. *See State v. Boone*, 310 N.C. 284, 288, 311 S.E.2d 552, 555 (1984) (holding an order entered out of session was "null and void and of no legal effect" (citation omitted)), *superseded on other grounds as recognized by State v. Oates*, 366 N.C. 264, 267, 732 S.E.2d 571, 574 (2012). We disagree.

N.C. Gen. Stat. § 15-167 (2019) allows a trial judge to extend a session if a felony trial is in progress on the last Friday of that session. Such an extension is validly accomplished when the trial court announces a weekend recess in open court without objection from the parties. *State v. Locklear*, 174 N.C. App. 547, 551, 621 S.E.2d 254, 257 (2005).

[3] Defendant assigns error only to the method by which the trial court's clarifying request was delivered to the jury; he does not contend that the contents of the request or the decision to seek clarification were erroneous. Those issues would potentially be subject to different standards of review, depending on the nature of the arguments presented. *See, e.g., State v. Edwards*, 239 N.C. App. 391, 392-93, 768 S.E.2d 619, 620-21 (2015) (recognizing that some jury instruction challenges are subject to the abuse of discretion standard while others are reviewed *de novo*).

Judge Brooks announced the weekend recess without objection by the parties and, consistent with *Locklear*, validly extended the session pursuant to N.C. Gen. Stat. § 15-167. Although she was asked and declined to make explicit findings on the record in support of that extension, her decision not to make those findings because she would already be present in Mecklenburg County under a subsequent commission does not constitute an "express[] refus[al] . . . to extend the session," as argued by Defendant. A decision not to make findings in support of a ruling is distinct from a decision on the ruling itself. "Unless the contrary appears, it is presumed that judicial acts and duties have been duly and regularly performed[,]" *Hamlin v. Hamlin*, 302 N.C. 478, 486, 276 S.E.2d 381, 387 (1981) (citations omitted), and we will not read the trial judge's reference to her subsequent commission in declining to make findings to support an extension of the session as an explicit refusal to extend the session.

C. Note to the Jury

Defendant next contends that the trial court, in seeking clarification on a jury request through a message delivered by the bailiff, violated: (1) N.C. Gen. Stat. § 15A-1234(a) (2019), which permits a judge to "[r]espond to an inquiry of the jury made in open court" with further instruction; (2) N.C. Gen. Stat. § 15A-1234(d) (2019), which requires that "[a]ll additional instructions . . . be given in open court[;]" and (3) N.C. Gen. Stat. § 15A-1236(c) (2019), which provides that "[i]f the jurors are committed to

the charge of an officer, he must . . . not . . . permit any person to speak or otherwise communicate with them on any subject connected with the trial nor . . . do so himself[.]" Mere violation of these statutes is not enough for Defendant to prevail on appeal, however, as he must also demonstrate prejudice. *See, e.g., State v. Thibodeaux*, 341 N.C. 53, 62, 459 S.E.2d 501, 507 (1995) (requiring a defendant to show prejudice to prevail on appeal for violation of N.C. Gen. Stat. § 15A-1236); *State v. Robinson*, 160 N.C. App. 564, 568-69, 586 S.E.2d 534, 537 (2003) (applying the prejudicial error standard to a violation of N.C. Gen. Stat. § 15A-1234).

Assuming, *arguendo*, that Judge Brooks committed statutory error, Defendant has failed to show prejudice. Defendant seeks to analogize his appeal to cases in which the trial judge communicated to the jury only through the jury foreperson; in those instances, our appellate courts have identified prejudice in the risk that the foreperson would inaccurately recount the communication with the judge to the rest of the jury. *State v. Ashe*, 314 N.C. 28, 37-38, 331 S.E.2d 652, 657-58 (1985); *Robinson*, 160 N.C. App. at 569, 586 S.E.2d at 537. Under our caselaw, however, no prejudice results from messages relayed from the court to the jury by a bailiff where: (1) "the record 'affirmatively reveals exactly what the trial court intended to say to the . . . jurors' [through the bailiff] and there was 'no indication that anything to the contrary occurred[;]' " (2) there was "no objection from defendant[;]" and (3) "the communications '[did] not relate to defendant's guilt or innocence[,] . . . nor would

defendant's presence have been useful to his defense[,]' " and thus were not " 'an instruction as to the law' outside the presence of a . . . defendant." *State v. Badgett*, 361 N.C. 234, 254, 644 S.E.2d 206, 218 (2007) (quoting *State v. Gay*, 334 N.C. 467, 482, 434 S.E.2d 840, 848 (1993)). Although *Badgett* and *Gay* did not expressly analyze messages to jurors from bailiffs under the statutes at issue in this appeal, we have relied on them to determine whether reversible error arose in alleged violations of N.C. Gen. Stat. §§ 15A-1234 and -1236. *See State v. Corum*, 176 N.C. App. 150, 157-58, 625 S.E.2d 889, 894 (2006) (holding, based on *Gay*, that the defendant failed to show reversible error for violations of N.C. Gen. Stat. §§ 15A-1234 and -1236 when the trial court communicated an instruction to the jury through a bailiff); *State v. Lewis*, 214 N.C. App. 195, 714 S.E.2d 530, 2011 WL 3298882, *8-*9 (2011) (unpublished) (relying on *Gay*, *Badgett*, and *Corum* to hold that a defendant failed to demonstrate prejudicial error for violation of N.C. Gen. Stat. § 15A-1234(d) when the trial judge conveyed an instruction to the jury via a bailiff).

Here, the trial judge's instructions to the bailiff were clear and unambiguous. The bailiff confirmed that he understood the judge's directions on the record multiple times, and explained that he would only step into the jury room, convey the message, and then immediately leave prior to any colloquy. Defendant's counsel did ask whether the judge needed to call the jurors in and whether a deputy could deliver the court's request, but did not object to the procedure:

> [DEFENDANT'S COUNSEL]: Can a deputy?
>
> [THE COURT]: He is sworn since he's with the jury. If they start having a colloquy, he knows to step out.
>
> [DEFENDANT'S COUNSEL]: Well, that's my understanding.

Indeed, this exchange could be fairly read as confirming Defendant's counsel's "understanding" that the deputy could deliver the message but must avoid being present during any colloquy.

It further appears that the judge's message was neither related to Defendant's guilt or innocence nor did it amount to an instruction on the law such that prejudice arose, as it simply sought to clarify the questions asked by the jury. *Cf. Corum*, 176 N.C. App. at 158, 625 S.E.2d at 894 (holding trial court did not commit reversible error in having a bailiff deliver a written instruction to the jury that they "must rely on [their] own recollection as to what the evidence showed."). Defendant assigns prejudice to "a risk that the jury believed the information they were requesting was 'unimportant or not worthy of further consideration[,]' " quoting *Ashe*, 314 N.C. at 38-39, 331 S.E.2d at 659, and argues that "we [cannot] know how [the questions were] communicated to the jury and how the jury might have interpreted the judge's request." However, absent evidence to the contrary, we presume that both the bailiff and the jury understood and followed the judge's straightforward instructions. *See Gay*, 334 N.C. at 482, 434 S.E.2d at 848 (presuming the bailiff accurately delivered

the judge's message to the jurors where there was no evidence to the contrary); *Ryals v. Hall-Lane Moving and Storage Co.,* 122 N.C. App. 134, 140, 468 S.E.2d 69, 73 (1996) ("The jury . . . is presumed to understand and comply with the instructions of the court." (citation omitted)). It appears from the record that the bailiff and the jury did exactly that; the judge received the jury's clarified requests and subsequently provided instructions, to which neither party objected, in response thereto. The jury reached its verdict without asking additional questions of the court. In short, to the extent that the trial court erred by this procedure, we hold that Defendant has failed to demonstrate prejudice warranting reversal.

III. CONCLUSION

For the foregoing reasons, we hold that Defendant has failed to demonstrate reversible error.

NO ERROR.

Judges DIETZ and YOUNG concur.