IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1251

Filed: 18 February 2020

Mecklenburg County, No. 16 CRS 225460

STATE OF NORTH CAROLINA

v.

DAVID JEDEDIAH NYEPLU

Appeal by defendant from judgment entered 25 May 2018 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Ellen A. Newby, for the State.

Daniel M. Blau Attorney at Law, P.C., by Daniel M. Blau, for defendant-appellant.

BRYANT, Judge.

Where there was no abuse of discretion in the trial court's handling of jury voir dire, defendant's arguments surrounding that theme must fail. And defendant's arguments not properly preserved are dismissed.

On 3 October 2016, defendant David Jedediah Nyeplu was indicted in Mecklenburg County Superior Court on charges of second-degree rape and attempted second-degree sexual offense. Later, the State elected not to proceed on the charge of attempted second-degree sexual offense. On 21 May 2018, defendant's trial commenced in Mecklenburg County Superior Court, the Honorable Forrest D. Bridges, Judge presiding.

The evidence presented at trial tended to show that E.U. (hereinafter "the victim") was a student at UNC-Charlotte University. In her senior year, the victim rented an off-campus apartment, but as she approached her last semester (fall semester 2015), she did not want to sign a new one-year apartment lease. Her classmate, a young woman named Francis, offered to allow the victim to live with her for the fall semester 2015. Francis lived in an apartment she shared with her twenty-four-year-old uncle, defendant David Jedediah Nyeplu. With defendant's help, the victim moved her belongings into Francis's apartment in July 2015. However, within weeks of moving in, Francis informed the victim that Francis's aunt would move into the apartment and that the victim would need to move out. The victim applied for on-campus housing at UNC Charlotte University and on 23 August 2015, went to Francis's apartment to move her belongings. During the move, the victim misplaced her father's bank card; the associated bank account contained funds for the victim's tuition. That evening the victim searched her belongings and called Francis to inform

her that the bank card was missing. Francis searched her apartment but did not find the card. Nevertheless, the victim called an uber and returned to Francis's apartment complex that night.

Upon her arrival, the victim saw defendant outside of the apartment building. She explained to defendant that she had misplaced her father's bank card. While the victim looked for the card in the parking lot, defendant entered the apartment. Not finding the card outside, the victim also entered the apartment. Defendant was seated at a dinner table, eating, and Francis was not in the apartment. While he ate, defendant engaged the victim in conversation: he asked why he never saw her at parties and asked about her sexual experience. At some point, defendant got up and approached the victim from behind, kissed her neck, and shoved his hand down the back of her pants. The victim repeatedly told defendant to stop and that she wanted to go home. The victim began crying. Defendant did not stop. He held her, pushed her into his room, pushed her down onto the floor, and lay on top of her. The victim testified that she continually struggled, tried to keep her legs closed, and tried to push defendant off of her. Defendant, however, removed the victim's pants and forced his penis inside of her vagina. Afterwards, defendant left the apartment. The victim gathered her things. When she left the apartment, defendant was standing outside and offered her a ride home. The victim declined the offer, called an Uber driver, and called a relative who told her to go to a hospital.

That night, at the Carolinas Healthcare System Hospital, the victim agreed to have a rape kit performed anonymously. Three days after the rape, defendant sent the victim a text message: "I've been calling you but all I get is voicemail. I'm sorry. You can come to the house so we can talk about it, please. Again, I'm sorry." On 2 September 2015, the victim reported the incident to the UNC Charlotte police department and withdrew from UNC Charlotte University. Detective Mike Melendez with the Charlotte-Mecklenburg Police Department, Sexual Assault Unit, Violent Crimes Division, met with the victim on 11 September 2015. Detective Melendez attempted to contact defendant by use of the phone number associated with the text messages sent to the victim's cell phone; however, an attorney later informed Detective Melendez that defendant would not meet with him. A DNA analyst with the Charlotte-Mecklenburg Police Department crime laboratory testified as an expert in DNA analysis that "[t]he DNA profile obtained from the sperm cell fraction of the vaginal swabs [taken during the victim's rape kit procedure] matched the DNA profile obtained from [defendant]."

Defendant offered no evidence.

Defendant was found guilty of second-degree rape. The trial court entered judgment in accordance with the jury verdict and sentenced defendant to 72 to 147 months imprisonment. Defendant appeals.

On appeal, defendant argues that the trial court erred by (I) restricting defendant's jury voir dire and (II) failing to declare a mistrial for defendant's inability to continue with juror selection. Defendant argues (III) that he received ineffective assistance of counsel when his attorney failed to appear in court; (IV) that the trial court erred by admitting evidence of defendant's silence during the investigation by law enforcement officers; and (V) the trial court committed plain error by allowing a witness to testify that the victim was vulnerable to being sexually assaulted.

I

Defendant first argues that the trial court abused its discretion by restricting defendant's jury voir dire. More specifically, defendant contends that the trial court's order that each party's voir dire pass of the panel of prospective jurors be conducted by no more than one attorney per pass amounted to a violation of General Statutes, section 15A-1214 ("Selection of jurors; procedure"), as well as the right to an impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, where the defense counsel who began questioning prospective jurors was unable to complete defendant's first pass compelling defendant to pass the panel of prospective jurors back to the State for the next pass. Defendant contends that he is entitled to a new trial. We disagree.

Constitutional Argument

We first note that defendant did not raise an objection to the trial court's order during the jury voir dire. Defendant acknowledges that his constitutional argument was not preserved but asks this Court to invoke Rule 2 in order to reach the merits of his argument. *See* N.C.R. App. P. 2 (2019) ("To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions."). We do not invoke Rule 2 in this instance, and therefore, defendant's constitutional argument on this issue is dismissed. *See State v. Hart*, 361 N.C. 309, 315, 644 S.E.2d 201, 205 (2007) ("Rule 2 must be applied cautiously."). *See also State v. Fullwood*, 343 N.C. 725, 733, 472 S.E.2d 883, 887 (1996) (dismissing the defendant's constitutional argument challenging a trial court ruling that only one attorney for each party could question prospective jurors where it was raised for the first time on appeal); *State v. Frye*, 341 N.C. 470, 493, 461 S.E.2d 664, 675 (1995) (same).

Statutory Argument

Defendant argues that the trial court's ruling to limit the number of attorneys who could question the jurors during each pass of the jury voir dire, violated General Statutes, section 15A-1214. Defendant acknowledges that he did not raise this

objection before the trial court but contends that his challenge is preserved, citing *State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994) ("When a trial court acts contrary to a statutory mandate, the right to appeal the court's action is preserved, notwithstanding the failure of the appealing party to object at trial." (citations omitted)). *See also State v. Gurkin*, 234 N.C. App. 207, 213, 758 S.E.2d 450, 455 (2014) (holding the defendant's challenge to the trial court's ruling on jury selection—as an improper deviation from section 15A-1214—was preserved for appellate review despite the lack of an objection before the trial court). We address this argument.

At the beginning of the jury voir dire, the court informed the parties that only one attorney would be allowed to question prospective jurors with each pass of the prospective panel between the State and the defense: "[So,] only one attorney [will be] examining jurors during any particular setting."

Assistant District Attorney Kristen Northrup clarified the court's ruling regarding voir dire.

> MS. NORTHRUP: . . . I suppose just a housekeeping issue for us as well, we will be rotating jury selection with [Assistant District Attorney Jane Honeycutt] doing the first pass and I will do the second pass.
>
> THE COURT: You're talking about when the panel begins with the State, then you pass to the Defendant, then any replacement jurors will come back –
>
> MS. NORTHRUP: Yes, sir.
>
> THE COURT: All right. That's fine, so long as only one

attorney is examining jurors during any particular setting.

Also, the following exchange occurred between the trial court and defense counsel regarding jury voir dire.

> [Defense counsel Burton]: . . . One housekeeping matter that I'd like to raise for the Court. If this is okay with the Court, I intend to be here for today to assist [defense counsel] Jetton in jury selection. . . . [S]o if it's okay with the Court, we would like to at least express that to the jury in voir dire just to explain that I'm going to be gone later in the week, if that's okay with Your Honor.
>
> . . . .
>
> THE COURT: Who will actually do the jury selection?
>
> [Defense counsel Burton]: That will be [defense counsel] Jetton likely. But unless the Court, you know, has a preference, we intended to have one of us actually do the questioning of the jury. . . .
>
> . . . .
>
> . . . [U]nless the Court would prefer for us to do it a different way, then one of us will be asking questions to the jury and not both.
>
> THE COURT: Yes. Okay.

The State completed one pass of the jury voir dire and that afternoon defense counsel Burton began a pass of the jury but did not question all potential jurors before court adjourned for the day. The following exchange took place.

> THE COURT: All right. Now, [defense counsel] Burton, are you going to come back and finish up this process tomorrow morning?

> [Defense counsel Burton]: Unfortunately, Your Honor, I'll have to turn it over to [defense counsel] Jetton.
>
> THE COURT: You started it. You got to finish this round.
>
> MR. BURTON: Then yes, Your Honor, I will be –
>
> . . . .
>
> THE COURT: Okay. I'll see you tomorrow morning at 9:30. It's fine with me if he does the next round, but like I said, I don't mind having the lawyers take turns with different passes. But if one passes the jury on, only let one lawyer talk to the jury during each pass. Otherwise we get into too much duplication.
>
> [Defense counsel Burton]: Your Honor, in all candor, I will have to try and see if I can move a site inspection in Dunn, North Carolina tomorrow morning with a number of other lawyers and parties that are involved. But if the Court wants me to be here, I will most certainly be here.
>
> THE COURT: It's not a question of what I want. It's a question of what we got to have. Now, unless y'all want to pass the rest of these folks back to the State, which of course, that's up to you.
>
> [Defense counsel Jetton]: Then -- the ten – we've got ten; right?
>
> THE COURT: Yes. So in any event –
>
> [Defense counsel Jetton]: We understand what we got to do, Your Honor.

The next morning, the following exchange took place:

> THE COURT: . . . What are we doing as to the jury?

> [Defense counsel Jetton]: Your Honor, we have no -- sorry. We're going to have to pass the jury. We have to pass the jury, Your Honor.
>
> THE COURT: You're ready to pass the remaining ten?
>
> [Defense counsel Jetton]: Yes.
>
> THE COURT: Okay. All right.

"Our trial courts have traditionally been afforded broad discretion to rule upon the manner and extent of jury voir dire, and this Court will not disturb such a ruling on appeal absent an abuse of that discretion." *State v. Murrell*, 362 N.C. 375, 388–89, 665 S.E.2d 61, 71 (2008) (citation omitted). "[T]o obtain relief relating to jury *voir dire*, a defendant must show not only an abuse of discretion, but also prejudice." *State v. Garcell*, 363 N.C. 10, 27, 678 S.E.2d 618, 630 (2009) (citation omitted). "Our Supreme Court has 'consistently required that defendants claiming error in jury selection procedures show prejudice in addition to a statutory violation before they can receive a new trial.' " *Gurkin*, 234 N.C. App. at 214, 758 S.E.2d at 455 (quoting *State v. Garcia*, 358 N.C. 382, 406, 597 S.E.2d 724, 743 (2004)).

"The primary goal of the jury selection process is to ensure selection of a jury comprised only of persons who will render a fair and impartial verdict." *State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992) (citation omitted). Pursuant to section 15A-1214,

> [t]he prosecutor and the defense counsel, or the defendant if not represented by counsel, may personally question

> prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge.

N.C. Gen. Stat. § 15A-1214(c) (2019).

Defendant contends that the trial court abused its discretion (1) where its ruling "effectively negated [defendant]'s right to counsel;" (2) where its ruling "precluded [defendant] from finishing his *voir dire*;" (3) where it "incorrectly believed it had no choice but to prohibit [defense counsel] Jetton from taking over the *voir dire*;" and (4) where the court failed to "give the defense adequate notice of the rule it intended to enforce." Defendant's contentions are without merit and are not supported by the record.

Defendant does not provide any authority which precludes a trial court from limiting the number of attorneys that may question potential jurors during a pass of the jury voir dire. *Cf. Frye*, 341 N.C. at 492–93, 461 S.E.2d at 675. Moreover, the record does not provide a specific basis for why defense counsel Jetton passed the jury back to the State for voir dire: defendant did not request to continue questioning the prospective ten jurors; and the trial court did not deny defendant's request. *See State v. Conaway*, 339 N.C. 487, 507, 453 S.E.2d 824, 837 (1995) (holding no error where the defendant exercised peremptory challenges to some prospective jurors and then acted in accordance with the trial court's instruction to pass the jury back to the State but failed to clarify or otherwise inform the court that the defendant wished to

continue questioning the remaining jury panel before passing them back to the prosecution). Moreover, the record does not specifically state whether defense counsel Burton was available to continue questioning the jury on the second day of the jury voir dire or if he was unavailable, the reason for his unavailability.

Where defendant did not bring to the court's attention his desire to continue questioning prospective jurors before passing the prospective jury panel back to the prosecution, *see id.*, we hold the trial court did not abuse its discretion by ruling, at defendant's acquiescence, to pass the panel of prospective jurors from defendant to the prosecution for questioning. *See Murrell*, 362 N.C. at 388–89, 665 S.E.2d at 71. Accordingly, defendant's argument is overruled.

II

Next, defendant argues that the trial court abused its discretion by failing to declare a mistrial *sua sponte* after it became impossible for defendant to continue with jury selection. As he argued in Issue I, defendant contends that the trial court's order allowing only one attorney to question potential jurors during each pass by either party irreparably prejudiced defendant where the defense counsel who began questioning jurors was unable to question each member of the prospective jury panel and did not return to court the next day which compelled defendant to pass the remaining jurors back to the State without completing his voir dire. We dismiss this argument.

Pursuant to General Statutes, section 15A-1063, "[u]pon motion of a party or upon his own motion, a judge may declare a mistrial if: (1) It is impossible for the trial to proceed in conformity with law . . . ." N.C. Gen. Stat. § 15A-1063(1) (2019).

> It is well established that the decision as to whether substantial and irreparable prejudice has occurred lies within the sound discretion of the trial judge and that his decision will not be disturbed on appeal absent a showing of abuse of discretion. A mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict.

State v. Cummings, 352 N.C. 600, 630, 536 S.E.2d 36, 57 (2000) (citations omitted).

In *Garcia*, our Supreme Court considered whether the defendant was entitled to a new trial based on the trial court's multiple violations of General Statutes, section 15A-1214 during jury voir dire. 358 N.C. 382, 597 S.E.2d 724. Addressing the defendant's argument that improper jury selection amounted to structural error, the Court characterized the defendant's argument as "asserting that the alleged structural error violated his constitutional right to a fair and impartial jury." *Id.* at 408, 597 S.E.2d at 744. The Court reasoned as follows:

> Structural error, no less than other constitutional error, should be preserved at trial. *See State v. Roache*, 358 N.C. 243, 595 S.E.2d 381 (2004) (determining that the defendant's assignment of error which alleged that "improper jury selection procedure violated his constitutional right to a fair and impartial jury" was not raised at trial and, consequently, had not been preserved for appellate review); *cf.* [*Johnson v. United States*, 520 U.S. 461, 466, 137 L.Ed.2d 718, 726 (1997)] (determining that structural error must be preserved for review on direct

> appeal from judgment of conviction in the federal courts).

Id. at 410–11, 597 S.E.2d at 745.

Taking guidance from the Court's reasoning in *Garcia*, we hold that defendant's argument was not preserved before the trial court and thus, is not properly before this Court. Accordingly, we dismiss this argument.

III

Next, defendant argues that he received ineffective assistance of counsel where his attorney failed to appear in court for the second day of trial, and as a result, he is entitled to a new trial. We disagree.

> A defendant's right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 25 L.Ed.2d 763, 773 (1970). When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. [668], [688], [104 S.Ct. 2052, 2064,] 80 L.Ed.2d 674, 693 (1984).

State v. Braswell, 312 N.C. 553, 561–62, 324 S.E.2d 241, 247–48 (1985).

> In *Strickland* the United States Supreme Court set forth a two-pronged test for determining whether a defendant has received ineffective assistance of counsel. 466 U.S. at 687, 104 S.Ct. at 2064. *Strickland* requires that a defendant first establish that counsel's performance was deficient. *Id.* at 687, 104 S.Ct. at 2064. This first prong requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. at 2064. Second, a defendant must demonstrate that the deficient performance prejudiced the defense, which

> requires a showing that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064. Thus, both deficient performance and prejudice are required for a successful ineffective assistance of counsel claim.

State v. Todd, 369 N.C. 707, 710–11, 799 S.E.2d 834, 837 (2017).

Focusing on the second prong of the *Strickland* test, "a defendant must demonstrate that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 710–11, 799 S.E.2d at 837 (citation omitted). Other than stating there is a reasonable probability that the result of defendant's trial would have been different had a different jury been constituted, defendant does not establish how the constituted jury deprived defendant of a fair trial. "Mere speculation is an insufficient basis upon which to grant relief." *Frye*, 341 N.C. at 494, 461 S.E.2d at 675. Accordingly, defendant's argument is overruled.

IV

Next, defendant argues that the trial court committed plain error by allowing the State to introduce evidence of defendant's silence, in violation of his rights under the Fifth and Fourteenth Amendments of the United States Constitution, as well as Article I, sections 19 and 23 of the North Carolina Constitution. On appeal, defendant acknowledges that defense counsel did not object at trial.

"Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001), not even for plain error, *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000)." *State v. Gobal*, 186 N.C. App. 308, 320, 651 S.E.2d 279, 287 (2007), *aff'd*, 362 N.C. 342, 661 S.E.2d 732 (2008).

Accordingly, defendant's argument is dismissed.

V

Lastly, defendant argues that the trial court committed plain error by allowing Detective Melendez to testify that the victim was vulnerable to being sexually assaulted. We disagree.

> 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 the 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 affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (citations omitted).

Defendant challenges the following testimony given by Detective Melendez on direct examination by the State:

> Q. You've heard some things about [the victim's] prior

> claim of sexual assault in Oklahoma.
>
> A. Yes. I'm actually not surprised that she's a victim of prior sexual assault. She's unfortunately very vulnerable in that from my experience dealing with sexual assault victims, that doesn't surprise me.

The testimony came during the State's examination of Detective Melendez regarding the practice of interviewing sexual assault victims while at the Charlotte-Mecklenburg Police Department, Law Enforcement Center; what the victim disclosed during her interviews; and what steps Detective Melendez took in the investigation following the victim's interview.

The challenged testimony does not directly relate to any element of the charged offense—second-degree rape (N.C.G.S. § 14-27.3 recodified as § 14-27.22 by 2015 N.C. Sess. Laws ch. 181, § 4(a) (effective December 1, 2015)). Even if we assume that the trial court erred by admitting the challenged testimony of Detective Melendez, upon review of the entire record, we cannot say that the admission had a probable impact on the jury's finding that defendant was guilty of second-degree rape. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, defendant's argument is overruled.

NO ERROR IN PART; DISMISSED IN PART.

Judges COLLINS and YOUNG concur.

Report per Rule 30(e).