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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1062

Filed: 3 November 2020

Iredell County, Nos. 18 CRS 051629, 18 CRS 002215

STATE OF NORTH CAROLINA

v.

DAVID LOUIS MATHIS, Defendant.

Appeal by Defendant from judgment entered 25 April 2019 by Judge Mark Klass in Iredell County Superior Court. Heard in the Court of Appeals 7 October 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State.

Mannette Law Firm, by Kellie Mannette, for Defendant.

BROOK, Judge.

David Louis Mathis (“Defendant”) appeals from judgment entered upon jury verdict for possession of a firearm by a felon and judgment entered upon plea of no contest to the status of habitual felon. On appeal, Defendant argues the trial court erred by impermissibly expressing an opinion to the jury regarding video evidence. Defendant further argues he received ineffective assistance of counsel because his

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trial counsel failed to move to suppress (1) all evidence related to what he contends was an illegal seizure and (2) his admission to being a convicted felon.

For the reasons stated below, we hold that the trial court did not express an improper opinion, but we dismiss without prejudice to Defendant's right to file a motion for appropriate relief regarding his ineffective assistance of counsel claims.

I. Factual Background and Procedural History

A. Factual Background

On 27 March 2018, then-Officer Souther ("Deputy Souther") received a dispatch call that there was a Black man, later identified as Defendant, walking with a shotgun down Salisbury Road in Statesville, North Carolina. While Deputy Souther was on his way to Salisbury Road, he received a second dispatch call that the man placed his shotgun on a propane tank. When Deputy Souther arrived, he saw Defendant walking on the side of the road with chips, a drink, and a long gun concealed in part by a black jacket. Deputy Souther handcuffed Defendant almost immediately, testifying that he did so for his safety, and told Defendant that he should have been carrying the shotgun in a case.¹

After handcuffing Defendant, Deputy Souther had dispatch confirm whether Defendant had been convicted of a felony, and, upon confirmation, placed Defendant under arrest for possession of a firearm by a felon. Deputy Souther testified that

¹ At trial, Deputy Souther testified that North Carolina is an open-carry state and that "as a general rule" it is "not unlawful to walk around openly with a weapon."

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Defendant told him at the scene that he had previously been convicted of a felony. After arresting Defendant, Deputy Souther examined the shotgun and discovered it was unloaded and that Defendant had no ammunition for the gun.

At the police station, Deputy Souther questioned Defendant about the shotgun after reading his *Miranda* rights. Defendant told Deputy Souther again that he was a convicted felon. Deputy Souther testified at trial that Defendant's prior felony conviction was from October 1984; however, Deputy Souther did not learn the date until they were at the police station for processing. Defendant also told Deputy Souther that he knew he could not have a handgun but thought he could be in possession of a single-barrel shotgun. He explained to Deputy Souther that he was taking it to a pawn shop.

B. Procedural History

Defendant was charged with possession of a firearm by a felon. The charging document alleged a prior felony conviction dated 10 October 1984. Defendant was also indicted for having attained habitual felon status on 9 July 2018. Defendant was tried before a jury on both charges on 24 April 2019.

During trial, defense counsel elicited testimony that on the 1984 judgment form that the State submitted to prove Defendant had been convicted of a felony in 1984, the defendant's name appeared as "David Lewis a.k.a. David Lewis Mathis" (instead of David Louis Mathis), that the age of the defendant was listed as 23, and

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that no birthdate was on the judgment form. Deputy Souther testified that Defendant's birthdate is 2 February 1959.²

The jury also viewed Deputy Souther's body-worn camera ("BWC") footage, which showed Deputy Souther's interactions with Defendant at the scene. In the video, after Deputy Souther received information from dispatch that Defendant had been convicted of a felony, he asked Defendant, while handcuffed, if he was a convicted felon. Defendant replied that he was, but no mention was made as to what year he had been convicted of a felony.

After closing arguments, the trial court instructed the jury on how to use the BWC that they were shown. The court instructed:

A video was received into evidence in this case for the purpose of illustrating and explaining the testimony of a witness. This video is not substantive or direct evidence[,] that is[,] it has not been received into evidence to prove any fact in this case. You may consider this video only for the purpose of illustrating and explaining the testimony of the witness. To the extent if any that you find that it does so illustrate and explain the testimony of the witness. You may not consider it for any other purpose in connection with the trial of this case.

During deliberations, the jury submitted a question to the court, asking, "can we use the video as evidence or not?" The court instructed the jury that "as to the

² This would mean Defendant was 24 years old in 1984, not 23 as the judgment form lists.

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video, you can use that as corroboration of what the officer testified to. That's what that's for.”

The jury returned a verdict of guilty of possession of a firearm by a felon. Defendant entered a plea of no contest to obtaining the status of habitual felon. The trial court sentenced Defendant to an active sentence of 87 to 117 months of imprisonment.

Defendant timely noticed appeal.

II. Analysis

On appeal, Defendant makes three arguments. First, he argues the trial court erred by impermissibly expressing an opinion to the jury that the video evidence corroborated Deputy Souther's testimony. Next, Defendant argues he received ineffective assistance of counsel because his trial counsel failed to move to suppress the fruits of the stop, arguing police detained him solely because he was openly carrying a shotgun. Finally, Defendant argues he received ineffective assistance of counsel because his trial counsel failed to move to suppress his admission to being a convicted felon, which he contends was obtained through custodial questioning before police advised him of his *Miranda* rights. We consider each argument in turn.

A. Standard of Review

The prohibition of an expression of an opinion by the trial court is a statutory mandate. N.C. Gen. Stat. §§ 15A-1222, 1232 (2019). We review whether a trial court

violated this statutory mandate de novo. *State v. Perkinson*, ___ N.C. App. ___, ___, 844 S.E.2d 336, 337 (2020). We also review a claim of ineffective assistance of counsel de novo. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). Under a de novo review, “this Court considers the matter anew and freely substitutes its own judgment for that of the lower court.” *Perkinson*, ___ N.C. App. at ___, 844 S.E.2d at 337 (citation and internal marks omitted).

B. Improper Expression of Opinion

Defendant first argues that the trial court improperly expressed an opinion to the jury in violation of N.C. Gen. Stat. §§ 15A-1222 and 1232. For the following reasons, we disagree.

While giving any instructions to the jury, “the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence.” *Id.* § 15A-1232. Further, “[t]he 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.” *Id.* § 15A-1222.

To determine if the trial court improperly expressed an opinion, this Court looks at the alleged improper remark’s “probable meaning to the jury, not the judge’s motive.” *State v. McEachern*, 283 N.C. 57, 60, 194 S.E.2d 787, 789 (1973). In evaluating whether the statement was improper, “a totality of the circumstances test

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is utilized.” *State v. Anthony*, 354 N.C. 372, 402, 555 S.E.2d 557, 578 (2001) (citation omitted).

The defendant also “has the burden of showing prejudice” occurred from any improper statement. *Id.* (citation omitted). To meet this burden, the defendant must show that “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” N.C. Gen. Stat. § 15A-1443(a) (2019). When the statement by the trial court goes to the “heart of the trial, assuming defendant’s guilt[,]” it “requires a new trial.” *State v. Guffey*, 39 N.C. App. 359, 361, 250 S.E.2d 96, 97-98 (1979).

Our case law illustrates how these rules operate in practice.

In *State v. Springs*, the defendant’s theory at trial was that someone else had possession of the drugs found in his apartment. 200 N.C. App. 288, 290, 683 S.E.2d 432, 434 (2009). While the defendant was testifying, the trial court stated “[l]et’s move on to another area. He has no involvement with these charges[,]” referring to the person the defendant claimed had possession of the drugs. *Id.* at 291, 683 S.E.2d at 434. On appeal, the defendant claimed that the comment by the court “discredit[ed] the defense’s theory to the jury by demonstrating that the trial judge did not believe that” someone else had possession of the drugs. *Id.* We held that the trial court’s statement was an impermissible opinion requiring a new trial because whether someone else had possession of the drugs was a factual question “for the jury

to decide” and the “statement suggested that [the trial court] had already assessed the credibility of defendant’s evidence and found it lacking.” *Id.* at 293, 683 S.E.2d at 436.

In *State v. Young*, our Supreme Court concluded that the trial court did not impermissibly express an opinion when it instructed the jury that

[t]here is evidence in this case which tends to show that the defendant confessed that he committed the crime charged in this case [first-degree murder]. Now, if you find that the defendant made that confession, then you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight which you will give to it.

324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989). While the defendant argued that the trial court’s instruction that the evidence “tends to show” a confession amounted to an expression of opinion on the evidence, the Court held otherwise because the jury was still left to determine whether the defendant had confessed, whether the confession was truthful, and how much weight to give the confession. *Id.* at 495, 380 S.E.2d at 97-98.

Here, the trial court first instructed the jury that they could use Deputy Souther’s BWC video “only for the purpose of illustrating and explaining the testimony of the witness.” The court further instructed that the “video is not substantive or direct evidence[,]” and it is not in “evidence to prove any fact in this case.” During deliberations, the jury submitted a question to the court asking, “can

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we use the video as evidence or not?” The court told the jury that they “can use [the video] as corroboration of what the officer testified to. That’s what that’s for.”

Defendant argues that the trial court, in its response to the jury’s question, expressed an opinion that the “video corroborated Officer Souther’s testimony and telling [the jury] to use the video for that purpose provided the jury with the ‘right’ answer: conviction.” Defendant further argues that without the trial court’s statement, there is a “reasonable possibility” that the jury would not have convicted, because asking the court about the video evidence was really to help solve the question of “whether the State had sufficiently proven” Defendant’s alleged 1984 conviction. We disagree for the following reasons.

First, though Defendant argues that the trial court told the jury that the BWC video corroborated Deputy Souther’s testimony, the trial court’s verbatim instruction to the jury was that they “can use [the video] as corroboration”—not that it *did* corroborate Deputy Souther’s testimony. This instruction did not, as Defendant characterizes it, provide the jury with the “right answer: conviction”; the court merely instructed that the video might or might not corroborate Deputy Souther’s testimony. While the trial court arguably could have been more precise in responding to the jury’s inquiry, whether or not the video did corroborate Deputy Souther’s testimony was still a question for the jury to decide. *See Young*, 324 N.C. at 494, 380 S.E.2d at 97.

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Even assuming the remark here was improper, it was not prejudicial. Unlike in *Springs*, the allegedly improper comment did not go to the heart of the defense. The trial court in *Springs* “assessed the credibility of defendant’s evidence and found it lacking.” 200 N.C. App. at 293, 683 S.E.2d at 436. Here, in answering the jury’s question, the trial court did not weigh in on the central issue: whether Defendant was or was not convicted of an offense in 1984. *See Guffey*, 39 N.C. App. at 361, 250 S.E.2d at 97-98. Instead, on three occasions during trial, Deputy Souther reiterated that Defendant told him he was a convicted felon. The trial court’s remark that the jury “can use [the video] as corroboration” does not change the fact that the jury heard Deputy Souther testify that Defendant was a convicted felon multiple times at trial. Moreover, nowhere in the video does Defendant state he was convicted of an offense in 1984, which was at issue in this case. Further, the video did not mention anything about the main theories that defense counsel argued proved Defendant did not have a 1984 conviction: that Defendant’s name was spelled differently, his birthdate was missing on the judgment form, and an incorrect age was written on the form. This makes it difficult to discern how a different result would have been reached, even if the jury took the trial judge’s comment as an instruction that the video did corroborate the deputy’s testimony.

For the reasons stated above, we find that the trial court did not improperly express an opinion to the jury in violation of N.C. Gen. Stat. §§ 15A-1222 and 1232.

C. Ineffective Assistance of Counsel

Defendant next argues that he was denied effective assistance of counsel because his attorney failed to move to suppress evidence obtained as a result of his detention and inculpatory statements he made to Deputy Souther. Because the record lacks the necessary material for us to conduct appellate review of this issue, we dismiss without prejudice as to Defendant's right to file a motion for appropriate relief.

When an ineffective assistance of counsel claim is brought on direct appeal, it "will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as . . . an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). If a claim is "brought prematurely, we dismiss [that] claim without prejudice, allowing defendant to bring [it] pursuant to a subsequent motion for appropriate relief in the trial court." *State v. Thompson*, 359 N.C. 77, 123, 604 S.E.2d 850, 881 (2004).

Our Court recently noted that it "will rarely be appropriate" to directly review ineffective assistance of counsel claims based on trial counsel's failure to file a motion to suppress because "we would have to hold, at least implicitly, that there was no legitimate possibility that additional relevant evidence would have been elicited had a suppression hearing been conducted[.]" *State v. Rivera*, 264 N.C. App. 525, 536, 826

S.E.2d 511, 519 (2019). This is a near impossibility since “[t]his Court can only surmise who might have testified at the suppression hearing and what evidence that testimony would have elicited.” *Id.* at 539, 826 S.E.2d at 521. In short, “[w]e cannot know what evidence might have been produced in a hearing that never occurred[,]” and so “direct review in cases like the present case is not appropriate unless it is clear that an MAR proceeding would not result in additional evidence that could influence our decision on appellate review.” *Id.* at 536-541, 826 S.E.2d at 519-522.

Here, Defendant argues that his ineffective assistance of counsel claim is apparent from the cold record and therefore can be considered on direct appeal. Specifically, Defendant argues that Deputy Souther had no legitimate basis for stopping Defendant because carrying a gun, without some other fact giving rise to reasonable suspicion, does not allow for a *Terry* stop because North Carolina is an open-carry state. Defendant also argues that Defendant was “clearly” in custody, and Deputy Souther obtained inculpatory statements in violation of *Miranda*.

However, as in *Rivera*, Defendant’s trial counsel failed to file any pretrial motion to suppress in accordance with Article 53 of the General Statutes and failed to move to suppress during trial. *Id.* at 537, 826 S.E.2d at 520. Because Deputy Souther did not testify at a suppression hearing in this case, “he never gave testimony for the purpose of establishing that, among other things, he had reasonable suspicion to extend the stop.” *State v. Miller*, 371 N.C. 266, 271, 814 S.E.2d 81, 84 (2018). And

though Deputy Souther's BWC is part of the record on appeal, if we were to review that footage, we would be using it "to *substitute* for a suppression hearing and an evidentiary record, [] making determinations about witness credibility in the process[.]" *Id.* at 271-73, 814 S.E.2d at 84-85 ("[The officer] may have observed something during the traffic stop that was not captured in his body camera footage and that he did not testify about during the guilt/innocence phase of the trial."). Relatedly, the State did not introduce evidence as to whether Defendant was *Mirandized* before making incriminating statements to Deputy Souther. *See State v. Richardson*, 265 N.C. App. 383, 827 S.E.2d 337, 2019 N.C. App. LEXIS 411, at *12-13 (2019) (unpublished) ("Because defense counsel did not timely seek to suppress [d]efendant's statements, the State was never invited to introduce evidence pertaining to whether [d]efendant was advised of his *Miranda* rights.").

"Therefore, we hold that the current record is insufficient for direct review of Defendant's IAC claim, and we dismiss the claim without prejudice to [D]efendant's right to file a motion for appropriate relief in the superior court based upon an allegation of ineffective assistance of counsel." *Rivera*, 264 N.C. App. at 541, 826 S.E.2d at 522 (citation and internal marks omitted).

III. Conclusion

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For the above stated reasons, we hold that the trial court did not express an improper opinion but dismiss Defendant's IAC claim without prejudice to his right to file a motion for appropriate relief.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judge ZACHARY concurs.

Judge BERGER concurs in the result.

Report per Rule 30(e).