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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-360

Filed: 7 January 2020

Wake County, No. 17CRS219732

STATE OF NORTH CAROLINA

v.

MICHAEL A. GARCIA, Defendant.

Appeal by Defendant from judgment entered 31 October 2018 by Judge W. Osmond Smith, III, in Wake County Superior Court. Heard in the Court of Appeals 13 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Candace A. Hoffman, for the State.

Warren D. Hynson for Defendant.

BROOK, Judge.

Michael A. Garcia (“Defendant”) appeals from judgment entered upon a jury verdict for felonious operation of a motor vehicle to elude arrest. Defendant argues trial counsel’s failure to request a limiting instruction pursuant to Rule 404(b) constituted ineffective assistance of counsel warranting a new trial. We disagree.

I. Background

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A. Factual Background

On 10 October 2017, Deputy O’Byrne of the Wake County Sheriff’s Department was parked in a church lot facing Leesville Road around 11:00 p.m. while on patrol. He noticed a black Dodge Charger with tinted windows and a loud muffler headed northbound on Leesville Road. Believing the window tint to be in violation of window tinting requirements, Deputy O’Byrne pulled behind the car and ran its license plate. The search showed that the car’s registered owner was Donna Garcia.

Deputy O’Byrne testified at trial that he then attempted to initiate a traffic stop. He turned on his blue lights and was able to see the driver’s “very distinct, frizzy, shoulder-length hair.” Deputy O’Byrne then determined the car’s driver to be Defendant, Ms. Garcia’s son, with whom he had spoken at Ms. Garcia’s residence on prior occasions. Once Deputy O’Byrne activated his lights and emergency equipment, Deputy O’Byrne testified the vehicle made a sharp left and took off at a high rate of speed, approximately 100 miles per hour. Deputy O’Byrne pursued the vehicle but eventually lost sight of it. He went to Ms. Garcia’s residence over the course of the next week and finally found Defendant and the vehicle there on 17 October 2017.

Defendant was charged with felonious operation of a motor vehicle to elude arrest and proceeded to trial on that charge on 29 October 2018.

B. Procedural History

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Prior to trial, defense counsel filed and argued a motion in limine to exclude Rule 404(b) prior crimes, wrongs, or acts evidence related to three of Deputy O'Byrne's prior interactions with Defendant. First, on 9 September 2017, Deputy O'Byrne had reported seeing Defendant driving a Ford Mustang at a high rate of speed near Leesville Road and attempted to stop the vehicle. Defendant sped away but was ultimately charged with reckless driving and failure to heed blue lights and sirens. Second, two weeks before 10 October 2017, Deputy O'Byrne had seen Defendant fueling a black Dodge Charger at a gas station near Leesville Road. Finally, Deputy O'Byrne had seen Defendant driving a black Dodge Charger the night before the 10 October 2017 encounter. The trial court denied defense counsel's motion as to the two latter interactions but reserved ruling on the 9 September 2017 incident until trial.

During trial, Deputy O'Byrne testified that he knew the car's driver to be Defendant on 10 October 2017 based on multiple prior interactions with Defendant. These included the two occasions he had seen Defendant operating a black Dodge Charger and also instances where Deputy O'Byrne had spoken with Defendant at his mother's house.

Deputy O'Byrne then testified that he had a previous encounter with Defendant where Defendant fled in a different vehicle, alluding to the 9 September 2017 incident. Defense counsel objected and moved to strike Deputy O'Byrne's

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testimony regarding the 9 September 2017 encounter. The trial court granted defense counsel's motion and struck the testimony. However, defense counsel did not request a limiting jury instruction regarding Deputy O'Byrne's past interactions with Defendant.

The jury ultimately returned a verdict of guilty and the trial court sentenced Defendant to 6 to 17 months' imprisonment, suspended upon 18 months of supervised probation. Defendant timely appealed.

II. Analysis

Defendant claims trial counsel's failure to request an instruction limiting the jury's consideration of Deputy O'Byrne's testimony about his prior familiarity and interactions with Defendant constituted deficient performance of counsel resulting in prejudice to Defendant. Defendant contends the following testimony should have been accompanied by a limiting instruction: Deputy O'Byrne's recognition of Ms. Garcia's name, his familiarity with Ms. Garcia and Defendant's address, his having spoken with Ms. Garcia in the past, his having met with Defendant at that address previously, and his having "several other encounters" with Defendant. Specifically, Defendant argues the lack of a limiting instruction likely resulted in the jury considering these prior interactions as improper propensity evidence as opposed to evidence of identity.

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For the following reasons, we hold Defendant has failed to demonstrate ineffective assistance of counsel.

A. Standard of Review

“On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo.” *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citation omitted). “Under a *de novo* review, th[is] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and marks omitted).

B. Ineffective Assistance of Counsel

In order to establish ineffective assistance of counsel, the defendant must first “show that counsel’s performance was deficient” and then that counsel’s deficient performance prejudiced his defense. *See State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citation omitted). However, “if a reviewing court can determine at the outset” that there was no prejudice, “then the court need not determine whether counsel’s performance was actually deficient.” *Id.* at 563, 324 S.E.2d at 248. In reviewing for prejudice, “[t]he question becomes whether a reasonable probability exists that, absent counsel’s deficient performance, the result of the proceeding would have been different.” *State v. Moorman*, 320 N.C. 387, 399, 358 S.E.2d 502, 510 (1987). Proving prejudice requires showing “that there is a

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reasonable probability that, but for counsel's ineffective assistance, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* We therefore assess whether it is reasonably probable that the outcome of Defendant's proceeding would have been different had defense counsel requested the limiting instruction for the challenged testimony.

To review: Defendant argues a limiting instruction was necessary to ensure Deputy O'Byrne's past interactions with Defendant were not considered for improper purposes. Under N.C. Gen. Stat. § 8C-1, Rule 404, evidence of a defendant's character may not be used to show that the defendant acted in conformity with the alleged offense. N.C. Gen. Stat. § 8C-1, Rule 404 (2017). Evidence of prior bad acts similarly cannot be used to prove character, N.C. Gen. Stat. § 8C-1, Rule 404(b), if "the only probative value of such evidence is to show that the defendant has the propensity to commit an offense," 1 *Brandis and Broun on North Carolina Evidence* § 94 at 297 (8th ed. 2018). Here, Defendant asserts that Deputy O'Byrne's testimony about interactions with Defendant planted an "improper seed in the jurors' minds: that Defendant was known to and had prior direct interactions with law enforcement[.]"

At the same time, Defendant acknowledges that the evidence in question was admissible for identification purposes pursuant to Rule 404(b), and it is well-established that when a defendant does not request a limiting instruction and the

evidence is “admissible for a proper purpose, any error in instructing the jury [is] not so fundamental as to have a probable impact on the jury.” *State v. Sneed*, 108 N.C. App. 506, 511, 424 S.E.2d 449, 452 (1993) (citations omitted).

Considering the above, we must reject Defendant’s prejudice argument. First, Deputy O’Byrne’s past interactions with Defendant were admissible for identification purposes. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017). The jury also heard Deputy O’Byrne testify that he could identify Defendant as the driver of the car on the night in question on account of his “very distinct, frizzy, shoulder-length hair.” The fact that Defendant’s argument centers on the failure to provide an instruction limiting the use of admissible evidence imperils his case for prejudice as it establishes no probable jury impact. The further evidence—untouched by the argued-for limiting instruction—dooms his prejudice argument as it runs contrary to any reasonable probability of a different jury verdict.

III. Conclusion

Defendant has failed to establish he was prejudiced by his counsel’s failure to request a limiting instruction and thus has failed to demonstrate ineffective assistance of counsel.¹

NO ERROR.

Judges STROUD and COLLINS concur.

¹ Given that the record establishes Defendant did not receive ineffective assistance of counsel, we deny Defendant’s motion for appropriate relief.

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Report per Rule 30(e).