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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-609

Filed: 17 March 2020

Orange County, Nos. 16CRS050771, 18CRS000151, 18CRS000182

STATE OF NORTH CAROLINA,

v.

ANDRE LAMAR DIXON, Defendant.

Appeal by Defendant from judgment entered 6 November 2018 by Judge Michael J. O'Foghludha in Orange County Superior Court. Heard in the Court of Appeals 4 February 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Meghan Adelle Jones for Defendant-Appellant.

COLLINS, Judge.

Defendant Andre Lamar Dixon appeals from the trial court's judgment entered upon his convictions for: (1) first-degree murder, in violation of N.C. Gen. Stat. § 14-17; (2) possession of a firearm by a felon, in violation of N.C. Gen. Stat. § 14-415.1; and (3) conspiracy to commit first-degree murder, in violation of N.C. Gen. Stat. § 14-17. Defendant contends that the trial court erred by: (1) admitting certain

evidence over Defendant's objections; and (2) failing to properly investigate allegations of juror misconduct and denying Defendant's motion for a mistrial made pursuant to those allegations. We discern no error.

I. Background

The evidence presented at Defendant's trial tended to show the following: on 18 January 2016, Defendant drove a gray Nissan Altima together with two other vehicles, a black Chevrolet Malibu and a white Nissan Altima, from Durham to Efland. After the vehicles arrived in Efland, Tevin Kendrick, the owner of the white Altima, was shot to death. Multiple handguns were used in Kendrick's killing, including a .380 caliber pistol. The other passengers left the scene in the gray Altima and the black Malibu, and law-enforcement officers found Kendrick's body behind the white Altima later that day.

On 1 February 2016, officers from the Town of Cary Police Department responded to a call about an alleged home invasion. The family who resided in the home told the officers that multiple individuals invaded the home, demanded money, stole $4,000 in cash and a cellphone from them, and drove off in two sedans, one of which they identified as possibly silver and the other as possibly black. One of the victims told the officers that she was tracking the stolen cellphone, which was stationary at a hotel in Durham. The officers informed dispatch and requested that officers from the City of Durham Police Department investigate, which they did.

Upon arriving at the hotel, the investigating officers noticed a gray Nissan Altima and a black Chevrolet Malibu parked outside, with certain individuals in and around the two vehicles. One of the officers called the number of the stolen cellphone, which rang in the front passenger seat of the gray Altima. The officers then arrested the individuals in and around the vehicles, and found a loaded .380 caliber pistol on the front passenger seat of the gray Altima next to the stolen cellphone. The two vehicles, the cellphone, and the .380 caliber pistol were then seized.

Law-enforcement officers subsequently discovered Defendant's palmprint inside the Cary home from which the cellphone was stolen. Law enforcement officers also discovered evidence that the gray Altima seized following the Cary home invasion had been rented by Defendant's mother, as well as video evidence showing the gray Altima and the black Malibu seized along with it (1) traveling towards the scene of Kendrick's killing on 18 January 2016 with a white Nissan Altima and (2) traveling away from the scene without the white Altima later the same day. Laboratory analysis from the North Carolina State Crime Laboratory showed that .380 caliber shell casings found at the scene of Kendrick's killing had been fired from the .380 caliber pistol found within the gray Altima following the Cary home invasion.

On 31 March 2016, Defendant was arrested for Kendrick's killing. On 18 April 2016, Defendant was indicted for first-degree murder in violation of N.C. Gen. Stat.

§ 14-17. On 24 July 2018, Defendant was also indicted for possession of a firearm by a felon, in violation of N.C. Gen. Stat. § 14-415.1, and conspiracy to commit first-degree murder, in violation of N.C. Gen. Stat. §§ 14-17/14-2.4.[1]

On 17 October 2018, Defendant filed a motion to exclude evidence that Defendant was involved in the Cary home invasion. In his motion to exclude, which he made pursuant to North Carolina Rules of Evidence 401, 403, and 404, Defendant argued that the evidence of the home invasion was irrelevant to the issues in the instant case and highly prejudicial to his defense, and that any probative value of the home invasion was outweighed by the danger of undue prejudice.

The State filed a motion in limine on 22 October 2018 seeking an order "declaring evidence related to and stemming from" the Cary home invasion to be admissible in the instant case, stating that (1) evidence showed that a vehicle rented by Defendant's mother and another specific vehicle were used to facilitate both

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[1] Defendant's indictment for conspiracy lists that the "Offense in Violation of G.S." which Defendant was alleged to have violated was "14-2.4[,]" and describes the offense as conspiring "to commit the felony of first degree murder (N.C.G.S. 14-17)" against Kendrick. N.C. Gen. Stat. § 14-2.4, entitled "Punishment for conspiracy to commit a felony[,]" does not criminalize any conduct itself, but rather describes how penalties are applied for convictions of conspiring to commit criminal conduct criminalized elsewhere, such as the offense of murder criminalized by N.C. Gen. Stat. § 14-17. For that reason, the trial court entered judgment upon Defendant's conviction for conspiracy to commit first-degree murder under "G.S. No. 14-17[.]"

Because the conspiracy indictment mentions the murder statute, N.C. Gen. Stat. § 14-17, and Defendant does not argue that the indictment was deficient, we construe the offense for which Defendant was indicted to be N.C. Gen. Stat. § 14-17, the punishment for which is prescribed by N.C. Gen. Stat. § 14-2.4. *See State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984) ("An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense.").

Kendrick's killing and the home invasion, (2) one of the weapons used in Kendrick's killing was found within that vehicle during the investigation of the home invasion, and (3) evidence placed Defendant both at the scene of the home invasion and the hotel where the vehicle containing the weapon used in Kendrick's killing was located. The State accordingly argued that the evidence of Defendant's involvement in the home invasion was relevant and admissible to establish Defendant's identity as one of Kendrick's killers, and that its probative value was not outweighed by the danger of undue prejudice.

The matter came on for trial on 22 October 2018. Before the jury was selected, the parties argued their competing motions regarding the admissibility of the evidence of Defendant's involvement in the Cary home invasion. Defendant argued that "the specifics of what happened in the home and what [investigators] recovered in the home . . . are irrelevant and should be excluded specifically[,]" and that such evidence was unfairly prejudicial to Defendant. The State reiterated its argument that the overlap between the vehicles and the weapon made the evidence that Defendant was involved in the home invasion relevant, admissible, and more probative than prejudicial, specifically stating that "anything that ties [Defendant] to that car ties him to that murder weapon and ties him to this murder."

After considering the parties' arguments, the trial court ruled that evidence regarding the Cary home invasion was relevant within the meaning of North Carolina

Rule of Evidence 401 and not unfairly prejudicial within the meaning of Rule 403. The trial court told the prosecutor that he would not permit evidence of any other robberies to be introduced, but that "[a]s long as you keep it confined to just how the evidence was developed from that break-in during the night of these people that you just referenced I think is fine."[2]

At trial, the State called Dexter Grant, an individual who claimed he knew Defendant from when they were first in prison together in 2015. Grant testified that while he and Defendant were in Wake County jail together in 2017, Defendant told him he was involved in Kendrick's killing. Grant testified that Defendant told him that he had shot and killed Kendrick along with five others, and that the killing had been because Kendrick had "tried to set [the six] up with the police or to get robbed." Grant also testified that Defendant told him that he had used a vehicle rented by his mother to travel to and from the scene of the killing.

Over Defendant's repeated objections, the trial court also allowed the State to question Grant about what Defendant had told him about his involvement in the Cary home invasion. Grant testified that Defendant told him that he and his associates had been targeting Asian business owners for robberies "[b]ecause they don't believe in putting money in the bank." Defendant also told Grant that the same vehicle used to travel to the scene of Kendrick's killing was used to travel to and from the home

[2] The record does not reflect that the trial court made any specific reference to North Carolina Rule of Evidence 404 in its ruling, or anywhere else.

invasion, and that he had stolen a cellphone from the home, which had allowed law-enforcement officers to track the vehicles to the Durham hotel. Grant also testified that Defendant said he was at the hotel when the officers arrived, but escaped, and that one of the guns used in Kendrick's killing was taken from a vehicle outside the hotel.

Following the close of evidence, the trial court charged the jury with a limiting instruction on the Cary home invasion, stating:

> Evidence has been received tending to show that a home invasion occurred in Cary, North Carolina on or about February the 1st of 2016. This evidence was received solely for the purpose of showing the identity of the person who committed the crime or crimes charged in this case, if such were committed, or a chain or group of events explaining the context or the story of the crime or crimes charged in this case, if such were committed. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose.

While jury deliberations were underway, Defendant's trial counsel told the trial court that he had witnessed a "brief conversation" between a juror and one of the State's witnesses, Investigator Timothy Jones of the Orange County Sheriff's Office. The trial court asked Jones for his version of events, and Jones told the trial court the following:

> I was standing out front, sir, with [courtroom sheriff] Captain Collins just minding my business and some people had walked up, was asking Captain Collins where jury -- juvenile and jury is at. So, I mean, just -- so I seen some

> jurors coming up, so I opened the door because I had the key card. And the jury member that he's speaking of stopped in the doorway and was like, Hey, do you remember me? I said, like, I can't talk to you. I don't want to talk to you about the case. But do you remember me? I said, No, sir. I'm sorry. I don't remember you. Well, do you remember me in jury selection I said something about a home break-in next to mine. I think you are the one that came out and investigated it. I said, sir, honestly, I don't -- I apologize, I don't remember you. I said, It could have been Investigator Jeff Ray. And that was – he's like, Oh, okay. I said, I'm sorry. I said, I get a lot of cases like that. I said, you know, I apologize for not remembering you if I was the one investigating it. Okay. Have a good day. Went about his way.

Jones also told the trial court that after that interaction, he also let one more juror into the jury room. The trial court later asked Collins whether Jones' recollection comported with his own, and Collins confirmed that it did. Neither Jones nor Collins were sworn in at the time of their colloquies with the trial court regarding Jones' interactions with the jurors.

Defendant expressed concern about the effect of the interactions upon the jury's deliberations and moved for a mistrial, arguing that when a witness "act[s] in the capacity of letting jurors in and out of locked doors, [he] essentially put[s] [him]self in the position of being a bailiff." The State opposed Defendant's motion. After considering the parties' arguments, the trial court denied Defendant's motion, and stated that it had "made to its own satisfaction a full inquiry into this matter

and, in the court's discretion, the court finds that no substantial and irreparable prejudice has been made to the defendant's case."

On 6 November 2018, Defendant was convicted on all counts. The trial court consolidated the convictions and entered judgment thereupon the same day, and sentenced Defendant to life imprisonment without the possibility of parole. Defendant gave oral notice of appeal in open court.

II. Discussion

Defendant contends that the trial court erred by: (1) admitting evidence regarding the Cary home invasion over Defendant's objections; and (2) denying his motion for a mistrial without properly investigating Jones' interactions with the jurors. We address each argument in turn.

A. Admission of evidence of Cary home invasion

The first question for our consideration is whether the evidence of the Cary home invasion is admissible under Rule 404(b) and relevant within the meaning of Rule 401 to the determination of Defendant's guilt in this case.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith[,]" but may be admissible to prove, inter alia, "opportunity, intent, preparation, plan, knowledge, [or] identity" in connection with the crime at issue. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2018). Our Supreme Court has said that "Rule 404(b) is a clear

general rule of *inclusion*[,]" and that evidence of other crimes, wrongs, or acts "is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012) (internal quotation marks and citations omitted). We review a trial court's admission of evidence that falls within Rule 404(b)'s scope de novo. *Id.*

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2018). Our appellate courts review de novo relevancy determinations by a trial court. *State v. Triplett*, 368 N.C. 172, 175, 775 S.E.2d 805, 807 (2015).

In his brief on appeal, Defendant argues that the trial court erred because "[e]vidence of the alleged home invasion in Cary and of a plan to follow Asian business owners to their homes and rob them was not relevant to prove any fact at issue in this prosecution[,]" but rather "tended to inflame the jury's prejudice and to encourage a verdict based only on [Defendant's] alleged propensity for crime."

We disagree. Our Supreme Court has said that evidence of other crimes, wrongs, or acts is admissible if the evidence "forms part of the history of the event or serves to enhance the natural development of the facts[,]" or is "linked in time and circumstances with the charged crime, . . . forms an integral and natural part of an

account of the crime, or is necessary to complete the story of the crime for the jury." *State v. Agee*, 326 N.C. 542, 547-48, 391 S.E.2d 171, 174 (1990). In *Agee*, the Court held that, because the evidence regarding the other crime whose admissibility was challenged under Rule 404(b) "served the purpose of establishing the chain of circumstances leading up to [the defendant's] arrest for [the crime for which the defendant was charged], Rule 404(b) did not require its exclusion as evidence probative *only* of defendant's propensity to" commit the crime charged, and deemed the evidence regarding the other crime admissible. *Id.* at 550, 391 S.E.2d at 175-76.

Here, Defendant's palmprint within the Cary home places Defendant at the site of the Cary home invasion. During that home invasion, a victim's cellphone was stolen, and the perpetrators fled in two sedans identified as possibly silver and black. The stolen cellphone was discovered by law enforcement shortly following the home invasion within a gray Altima that had been rented by Defendant's mother and which was parked beside a black Malibu. Video evidence tends to show that those same two vehicles were driven alongside Kendrick's white Altima in the direction of the scene of Kendrick's killing on the day of the alleged murder for which Defendant is charged, and drove away later that same day together, but without Kendrick's Altima. Moreover, the cellphone stolen during the home invasion was located soon after the home invasion on the front passenger seat of the gray Altima beside a .380 caliber pistol from which forensic experts determined shell casings found at the scene of the

killing had been fired. Following the discovery of the aforementioned evidence, Defendant was arrested and charged with, inter alia, murdering Kendrick.

Such evidentiary overlap between the Cary home invasion and the alleged murder provides clear "link[s] in time and circumstances with the charged crime" that "served the purpose of establishing the chain of circumstances leading up to [Defendant's] arrest" for murder, and we accordingly conclude that "Rule 404(b) did not require [the evidence regarding the home invasion's] exclusion as evidence probative *only* of defendant's propensity to" commit murder. *Id.* at 548, 550, 391 S.E.2d at 174-76. Instead, the evidence "tend[s] to make the existence of [a] fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence[,]" N.C. Gen. Stat. § 8C-1, Rule 401: specifically, Defendant's "identity" as one of Kendrick's killers within the meaning of Rule 404(b).

We accordingly conclude that the evidence regarding Defendant's involvement in the Cary home invasion is relevant within the meaning of Rule 401 and admissible

under Rule 404(b), and that the trial court did not err by admitting the evidence of the Cary home invasion.[3]

B. Denial of motion for mistrial/juror misconduct

Defendant also argues that the trial court erred by "failing to investigate" the alleged interactions between State's witness Jones and two jurors, and by denying Defendant's motion for a mistrial.

N.C. Gen. Stat. § 15A-1061 sets forth, in relevant part:

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

N.C. Gen. Stat. § 15A-1061 (2018). We review both (1) allegations that the trial court failed to properly investigate alleged juror misconduct and (2) a trial court's denial of a motion for a mistrial based upon alleged juror misconduct for abuse of discretion. *State v. Harris*, 145 N.C. App. 570, 576-78, 551 S.E.2d 499, 503-04 (2001). We will

[3] Defendant does not argue in his brief on appeal that the trial court abused its discretion by admitting the evidence under Rule 403. Accordingly, this argument has been abandoned. N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *Comstock v. Comstock*, 244 N.C. App. 20, 25 n.2, 780 S.E.2d 183, 186-87 n.2 (2015) (holding "cursory reference" insufficient to satisfy Appellate Rule 28(b)(6) where party "offers no actual substantive argument with regard to [an] issue"); *see also First Charter Bank v. Am. Children's Home*, 203 N.C. App. 574, 580, 692 S.E.2d 457, 463 (2010) ("It is not the role of the appellate courts to create an appeal for an appellant, nor is it the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein." (internal quotation marks, ellipsis, and citations omitted)).

reverse for abuse of discretion "only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

Regarding the alleged failure to investigate, Defendant argues that the trial court improperly ruled without first taking sworn testimony from Jones, the juror with whom Jones interacted, and other witnesses to the alleged juror misconduct. However, this Court has said:

> Where juror misconduct is alleged . . . the trial court must investigate the matter and make appropriate inquiry. However, there is no absolute rule that a court must hold a hearing to investigate juror misconduct upon an allegation. The trial court has the responsibility to conduct investigations [into apparent juror misconduct], including examination of jurors *when warranted*, to determine whether any misconduct has occurred and has prejudiced the defendant. An inquiry into possible misconduct is generally required only where there are reports indicating that some prejudicial conduct has taken place. . . . *Only when there is substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial*. . . . Allegations of juror misconduct are determined by the facts present in each case; the trial judge is in a better position to investigate such allegations and make appropriate findings. Therefore, it is well settled that the trial court's determination on the question of juror misconduct will not be reversed on appeal unless it is clearly an abuse of discretion.

Harris, 145 N.C. App. at 576-77, 551 S.E.2d at 503-04 (emphases altered) (internal quotation marks, brackets, and citations omitted). In *Harris*, we concluded that the

decision of whether to conduct a hearing because a juror had allegedly created notes to be disseminated to other jurors in contravention of the court's instructions was within the trial court's discretion. The *Harris* Court noted:

> While we concede that a better course of action might have been for the trial court to have conducted a *voir dire* of [the juror] here, the trial court was by no means required to do so, and we hold that no abuse of discretion occurred, because we discern no substantial or irreparable harm to defendant's case resulting from the juror's notes.

Id.

Our review of the record leads us to conclude that the same result should follow in this case. In our view, the interactions between Jones and the jurors—which the trial court asked Jones, Collins, and Defendant's trial counsel to describe on the record, and which none of the three described as meaningful—did not create a "substantial reason to fear that the jury has become aware of improper and prejudicial matters[.]" *Id.* Accordingly, although the trial court might have chosen to pursue a different course of action, we conclude that the trial court's decision to rule upon Defendant's motion for a mistrial without conducting a formal hearing regarding the alleged juror misconduct was not an abuse of discretion.

Regarding the denial of Defendant's motion for a mistrial, the question is whether the trial court's conclusion that Jones' interactions with the jurors did not "result[] in substantial and irreparable prejudice to the defendant's case[,]" N.C. Gen.

Stat. § 15A-1061, was "manifestly unsupported by reason." *Clark*, 301 N.C. at 129, 271 S.E.2d at 63.

It is not appropriate for witnesses for the State to meaningfully interact with jurors during the course of a criminal trial, because such interactions may cause unfair prejudice to the defendant. *See generally Mattox v. United States*, 146 U.S. 140, 150 (1892) ("Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."). Moreover, our Supreme Court has said that "where a witness for the State acts as a custodian or officer in charge of the jury in a criminal case, prejudice is conclusively presumed." *State v. Mettrick*, 305 N.C. 383, 385, 289 S.E.2d 354, 356 (1982) (emphases and citation omitted); *see id.* at 386, 289 S.E.2d at 356 (ordering new trial based upon presumed prejudice because sheriff and deputy drove jurors for several hours and thereby had the "jurors' safety and comfort . . . in [their] hands" and thereafter testified for the State). However, the Court has also said that "when the jury's contact with witnesses for the state has been brief, incidental, and entirely within the courtroom, we have held that such exposure was without legal significance and have not presumed prejudice." *State v. Nicholson*, 355 N.C. 1, 28, 558 S.E.2d 109, 129 (2002) (internal quotation marks and citations omitted).

The record demonstrates that Jones' interactions with the jurors was brief, incidental, and entirely within the courtroom. *See State v. Jeune*, 332 N.C. 424, 432-33, 420 S.E.2d 406, 411 (1992) (declining to apply a presumption of prejudice because the State's witness "had no contact with jurors outside the courtroom, had no communication with any of the jurors, except to tell them to take their seats, and had no custodial authority over them. The only service performed by [the State's witness] was in holding the gate open and opening the jury room door[,]" and that such contact was "brief, incidental, and without legal significance." (citation omitted)). As described above, beyond opening the jury-room door for two jurors, the extent of Jones' interactions with the jurors was to respond to one of the jurors' questions by saying that it was inappropriate for them to converse and that he did not recognize him. Following *Jeune*, we conclude that such contact is without legal significance, and is insufficient to presume prejudice.

Because we do not presume prejudice, the question is whether "we discern [] substantial or irreparable harm to defendant's case resulting from" Jones' interactions with the jurors. *Harris*, 145 N.C. App. at 578, 551 S.E.2d at 504. We conclude that Defendant has not shown any harm to his defense.

We accordingly conclude that the trial court did not abuse its discretion by denying Defendant's motion for a mistrial.

III. Conclusion

Because we conclude that the evidence of Defendant's involvement in the Cary home invasion was relevant within the meaning of Rule 401 and admissible under Rule 404(b), we discern no error from the trial court's decision to admit the evidence. Because the alleged juror misconduct did not create a substantial reason to fear that the jury had become aware of improper and prejudicial matters, and because Defendant has not shown that the alleged misconduct was legally significant or actually prejudiced his defense, we discern no error from the trial court's denial of Defendant's motion for a mistrial without conducting a formal hearing.

NO ERROR.

Judges STROUD and BERGER concur.

Report per Rule 30(e).