IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-954

Filed: 4 August 2020

Union County, No. 18 CRS 54012

STATE OF NORTH CAROLINA

v.

CESAR AUGUSTO LAVANDIER

Appeal by defendant from judgment entered 23 May 2019 by Judge Jeffery K. Carpenter in Union County Superior Court. Heard in the Court of Appeals 1 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth Connolly Stone, for the State.

Richard Croutharmel for defendant-appellant.

ZACHARY, Judge.

Defendant Cesar Augusto Lavandier appeals from the judgment entered upon a jury's verdict finding him guilty of communicating threats. On appeal, Defendant argues that the trial court erred by admitting into evidence a computer printout of his inmate property record. After careful review, we conclude that Defendant failed to preserve appellate review of this issue. Therefore, we dismiss Defendant's appeal.

Background

On 1 August 2016, Defendant was placed on supervised probation for 24 months, due to his conviction for violating a domestic violence protective order. In November 2017, Officer Clint Simpson was assigned to supervise Defendant. Pursuant to the terms of his probation, Defendant was required to remain in contact with Officer Simpson and to provide him with his contact information. On occasion, Defendant would contact Officer Simpson by text message. To that end, between 19 March 2018 and 3 August 2018, Officer Simpson received a number of text messages from Defendant regarding his probation.

In May 2018, Officer Simpson filed a violation report alleging that Defendant had violated the conditions of his probation by failing to pay court costs and to complete a court-mandated batterer's intervention treatment program. Defendant's first probation violation hearing was held in Union County District Court on 3 August 2018. During the hearing, Defendant "was very uncooperative" and "hostile toward[ ] the court[.]" Due to Defendant's actions, the trial court terminated the hearing and held Defendant in contempt of court. At approximately 11:50 a.m., Defendant was booked into custody at the Union County courthouse, where he remained in the holding cell until his release at 1:01 p.m.

Later that day, Defendant allegedly sent Officer Simpson the following text messages:

> I will be filing charges against You, Judge and Prosecutor. I will be making claims of treason, spend your money wisely
>
> ALL RIGHTS RESERVED.
>
> FYI: You and the state of nc breach of contract
>
> No one takes the time to read documents just fillings
>
> In our contract entered to the courts $150,000 in gold/silver legal tender per occurrences, I know have the power to issue leans against Tyranny
>
> Contract was entered and acknowledged via clerk of courts
>
> Under The Common Law I find You guilty of TREASON and sentence You to Death per Constitution

Upon receiving these messages from Defendant, Officer Simpson "immediately felt concerned" for his safety and that of his wife and child. Accordingly, on 3 August 2018, a magistrate issued a warrant for Defendant's arrest, charging Defendant with communicating threats, a Class 1 misdemeanor, in violation of N.C. Gen. Stat. § 14-277.1.

On 12 October 2018, Defendant's trial on the charge of communicating threats commenced before the Honorable Stephen V. Higdon in Union County District Court. Following a bench trial, Judge Higdon found Defendant guilty and entered judgment sentencing him to 100 days in the custody of the Sheriff of Union County, and imposing $200 in court costs. Defendant gave notice of appeal for a trial de novo in superior court.

On 11 December 2018, Defendant was assigned court-appointed counsel, who was subsequently permitted to withdraw. On 25 February 2019, Defendant, proceeding *pro se*, waived formal arraignment and entered a plea of not guilty. On 29 April 2019, Defendant appeared *pro se* before the Honorable Jeffery K. Carpenter and made an oral motion for a speedy trial, which was granted.

On 22 May 2019, Defendant's charge of communicating threats came on for trial de novo in Union County Superior Court before the Honorable Kevin M. Bridges. Defendant waived his right to counsel and proceeded *pro se*. Accordingly, the trial court appointed standby counsel. During pretrial discussions, however, Defendant was repeatedly disruptive. Despite the trial court's warnings that Defendant's actions could cause him to be held in criminal contempt, Defendant continued to interrupt the judge; turned his back to the bench and addressed the audience; and made numerous snide, disrespectful remarks to the trial court. After Defendant used a racial epithet against the judge in open court, Judge Bridges announced that he was holding Defendant in criminal contempt, and sentenced him to 30 days in jail and imposed a $500 fine. Defendant was removed from the courtroom, and Judge Bridges recused himself from the case. Later that day, Defendant's pretrial matters resumed before Judge Carpenter.[1] After the trial court addressed Defendant's conduct and the court's authority to remove him from participating in the proceeding

[1] During trial, Defendant made a motion to dismiss, which the trial court denied. During the charge conference, Defendant renewed his motion to dismiss, which the trial court again denied.

if his behavior continued, jury selection resumed and Defendant again proceeded *pro se*.

On 23 May 2019, the jury found Defendant guilty of communicating threats to his probation officer. The trial court entered judgment sentencing Defendant to 120 days in the Misdemeanant Confinement Program, with a credit of five days for time served. The trial court also entered a civil judgment against Defendant for court costs. Defendant gave notice of appeal in open court.

Discussion

On appeal, Defendant argues that the trial court "reversibly erred by admitting into evidence a computer printout of [his] jail booking report" because the State "failed to lay a proper foundation for admission of the evidence[,]" which "was crucial to the outcome of the case." However, for the reasons explained below, we conclude that Defendant failed to properly preserve appellate review of this issue, and thus, we decline to reach its merits.

At trial, Defendant contended, *inter alia*, that he "didn't have a phone" on 3 August 2018, and was therefore unable to send threatening text messages to Officer Simpson. The State sought to rebut Defendant's argument by introducing "State's Exhibit Number 6," which contained three computer-generated documents created when Defendant was booked on 3 August 2018: (1) the inmate log, (2) the inmate

property record (the "Property Record"), and (3) the booking report.[2] The Property Record indicated that Defendant had a cell phone in his possession when the Union County Sheriff took him into custody on 3 August 2018.

The State also called Union County Sheriff's Officer Fred Spruill as a witness. Officer Spruill testified that his duties included "courtroom security, recordkeeping, [and] video surveillance" for the courthouse. On direct examination, he explained the procedures followed when individuals are "brought in and held in custody," and the records created during that processing:

> [THE STATE:] So when an inmate is brought in and held in custody – and I understand that there is a holding facility here or some holding facility here and then there is a jail somewhere else; is that correct?
>
> [OFFICER SPRUILL:] That's correct.
>
> Q Okay. So when an individual is going to possibly go to the jail or be held they first start off at the courthouse?
>
> A If they're taken into custody at the courthouse, they would start at the holding area of the courthouse.
>
> Q And is there a process?
>
> A They're taken downstairs and their information is taken. Their property is cataloged and they're booked into our jail system from the courthouse.
>
> Q And are all those document – all that information

[2] Throughout his brief, Defendant refers to these three documents as his "jail booking report" and "State's Exhibit 6." However, it is clear from his arguments that the focus of his appeal concerns the Property Record, the document that Defendant "signed when he was booked into the jail indicating he agreed to the list of items that had been removed from his person."

documented into the – into a computer?

A Yes. It's inserted into the computer system.

Q All right. So booking is in the computer?

A Yes, sir.

Q Property is in the computer?

A Yes, sir.

Q And vital information; –

A Yes.

Q – is that correct?

(State's Exhibit Number 6 was marked for identification.)

[DEFENDANT]: There is a problem with these documents here.

THE COURT: Hold on a second. Ladies and gentlemen –

[DEFENDANT]: They have been altered.

THE COURT: Hold on a second. Ladies and gentlemen, I'm going to ask that you step to the jury room for a moment. There are matters we need to take up outside of your presence.

. . . .

THE COURT: Let the record reflect that all the jurors have left the courtroom.

[Defendant], do you wish to be heard in regards to the documents that I presume will be printed – will be presented as State's Exhibit 6?

> [DEFENDANT]: Yes. Well, I see here that employee information. That date on the top right showing a date of May 3rd, 2019.
>
> THE COURT: Let's give the exhibit back to [the State] and let him make an offer of proof and then I'll here you . . . .

Following Defendant's statement that there was "a problem with these documents here[,]" the trial court had the jury removed from the courtroom, so the parties could conduct a voir dire of Officer Spruill. After the State laid the foundation to establish that the documents composing State's Exhibit Number 6—including the Property Record—constituted business records, and were, therefore, admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(6), Defendant questioned Officer Spruill:

> THE COURT: Thank you, sir. [Defendant], do you have questions in regards to the authenticity of the document?
>
> [DEFENDANT]: Yes I do.
>
> THE COURT: Ask your questions.
>
> VOIR DIRE EXAMINATION . . . by [Defendant]:
>
> [DEFENDANT:] When you are booked in the court jail here or in the local jail, you are – they give you a document to sign, correct, for your property?
>
> [OFFICER SPRUILL:] Yes, they do.
>
> Q Where on these three pages document, the document, the original documents drafted. Not this. Not this. But where is the signature and acceptance that you guys took

my possession and I signed for it?

A That is not here.

Q It's not anywhere because it doesn't exist; correct?

[THE STATE]: Objection, Judge. Motion to strike all of that.

THE COURT: Overruled. We're outside the presence of the jury. Go ahead and ask your question.

[DEFENDANT:] Where is the original document of receivement of this property and release of this property with my signature on it?

[OFFICER SPRUILL:] There was no release of the property. I do not know where the –

Q You took possession of the property; correct?

A I did not personally take possession of it. Intake downstairs took possession of it.

Q Correct. And they give you itemized where you have to sign the – they have taken possession of such; correct?

A That's correct.

Q And where is those documents?

A I don't know where that document is.

[DEFENDANT]: No further questions.

THE COURT: *So I'll hear you in regards to your objection, if you have one.*

[DEFENDANT]: It's unlawful documents was created some – this is prejudiced and biased. It has no standing.

> It's not the original document.
>
> THE COURT: The testimony thus far has been that these are business records kept – they're records kept in the regular course of business in close proximity to the time of the act. I believe that was the testimony; is that right, Mr. Spruill?
>
> [OFFICER SPRUILL]: That's correct.
>
> THE COURT: Okay. Which would qualify under the North Carolina Rules of Evidence as a hearsay exception therefore they can be admitted. Your concern, as I understood it when you first voiced it, was that these were not authentic.
>
> [DEFENDANT]: The original documents of their taking these possessions, this property off of me and releasing the property, that requires a signature of – they take the possession of the property and then another signature then releasing the property back to me. And both documents are lacking, they're missing.
>
> THE COURT: Okay. So that's a little different analysis than what I need to do in regards to whether these are admissible or not. Certainly an analysis that we can address once it becomes your time to cross examine, maybe. But for sure when it becomes your time to present evidence in your case in chief if you decide to do so. All right. So let's go ahead and bring the – *your objection is noted, it's overruled.* Go ahead and bring the jury back in. You'll need to re-lay the foundation, [State].

(Emphases added).

Following the voir dire hearing, the jury returned to the courtroom, and the State re-laid the foundation for the admission of the Property Record—as part of State's Exhibit Number 6—under the business records exception. State's Exhibit

Number 6 was subsequently offered and received into evidence. During direct examination, Officer Spruill testified to the contents of the three documents and explained how they were created and preserved. Although Defendant did not object when the trial court admitted State's Exhibit Number 6, nor at any time throughout Officer Spruill's testimony on direct examination, the trial court noted that it admitted the documents into evidence "over [Defendant's] objection."

During cross-examination, Defendant questioned Officer Spruill regarding the contents and authenticity of these documents:

> [DEFENDANT:] So how can you be 110 percent certain that the information on those documents is accurate?
>
> [OFFICER SPRUILL:] My officers enter that stuff in the computer and I trust that they do their job correctly.
>
> Q You trust them, but not true facts. You didn't witness it, did you?
>
> A I did not witness this.
>
> Q When you go over the booking process into your jail or here, there is a different type of documents, right, for your property, for the person being in, the catalog their property; correct?
>
> A There is a handwritten form for that.
>
> Q Where is the form with my signature on it?
>
> A We do not have that form.
>
> Q And but you have to sign this form when you guys accepting somebody's properties and when you release it as

> well; is that correct?
>
> A We do it when we accept the property.
>
> Q And upon release?
>
> A The jail usually does it upon release. But up here we don't have that form when you're released.
>
> Q But you don't have the one for acceptance, release, neither one?
>
> A I do not have neither one here.
>
> Q How about these documents here, do they have my signature on there?
>
> A They do not.
>
> Q They do not. No further questions.

In related arguments, Defendant asserts on appeal that the admission of State's Exhibit Number 6 (1) violates the best evidence rule, and (2) was erroneous because the documents were not authenticated. Defendant assumes that his objection during voir dire was sufficient to preserve the issue for appeal, and he accordingly argues that the trial court committed prejudicial error pursuant to N.C. Gen. Stat. § 15A-1443(a); however, Defendant is mistaken.

First, even if preserved, evidentiary errors are generally harmless unless Defendant demonstrates otherwise on appeal. *See State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 ("Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial."

(citation omitted)), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). Defendant cannot do so here, where the State's evidence included Defendant's phone records and a jailhouse audio recording of Defendant asking his wife to say that she sent the relevant texts to Officer Spruill.

Second, despite Defendant's apparent misunderstanding of the rules governing error preservation, the issues that Defendant raises in his brief were not properly preserved for appeal. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). "To be timely, an objection to the admission of evidence must be made *at the time it is actually introduced at trial*." *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) (emphasis added) (citation and internal quotation marks omitted); *see also State v. Gladden*, 315 N.C. 398, 415, 340 S.E.2d 673, 684 ("[A] defendant is not entitled to relief where there was no objection made *at the time the evidence was offered*." (citation omitted)), *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

Here, Defendant failed to object when the State ultimately proffered the Property Record, as part of Exhibit Number 6, for admission into evidence. Consequently, "[D]efendant is not entitled to relief [because] there was no objection made at the time the evidence was offered." *Gladden*, 315 N.C. at 415, 340 S.E.2d at

684 (emphasis omitted) (citation omitted). "An objection made only during a hearing out of the jury's presence prior to the actual introduction of the testimony is insufficient" to preserve the objection. *Snead,* 368 N.C. at 816, 783 S.E.2d at 737 (citations and internal quotation marks omitted). The trial court appears to have considered Defendant's earlier objection to constitute an objection at the time that the evidence was offered, but it was not renewed and thus was not a timely objection. Defendant's failure to "lodg[e] a timely objection . . . precludes appellate review for prejudicial error." *State v. Hairston*, 262 N.C. App. 106, 111, 820 S.E.2d 590, 594 (2018), *disc. review denied*, 372 N.C. 107, 824 S.E.2d 411 (2019).

Although certain unpreserved evidentiary and instructional errors "may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error[,]" N.C.R. App. P. 10(a)(4), here, Defendant makes no such contention. Citing the portions of the transcript during which voir dire was conducted and the trial court acknowledged that it was admitting State's Exhibit Number 6 "over [Defendant's] objection[,]" Defendant contends that he "timely objected to the admission into evidence of his jail booking report on the alleged offense date and therefore preserved this issue for review on appeal[.]" As explained above, Defendant is incorrect. And because Defendant fails to "specifically and distinctly" assert plain error, he is not entitled to such review. *Id.*; *State v. Lawrence,* 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012).

Conclusion

For the reasons stated herein, we conclude that Defendant failed to preserve the alleged error for appellate review. Accordingly, we dismiss Defendant's appeal.

DISMISSED.

Judge TYSON concurs.

Judge BROOK concurs in part and dissents in part by separate opinion.

Report per Rule 30(e).

BROOK, Judge, concurring in part, dissenting in part.

I agree with the majority opinion's conclusion that, even if we assume that the trial court erroneously admitted the evidence in question, the error was not prejudicial such that it entitles Defendant to a new trial given the other evidence of his guilt. *See State v. Allen*, 127 N.C. App. 182, 186, 488 S.E.2d 294, 297 (1997) (holding erroneous admission of evidence only prejudicial "when there is a reasonable probability that, had the error not been committed, a different result would have been reached").

I, however, believe that Defendant preserved his arguments for our review. During the course of the direct examination of Officer Spruill, Defendant, who was proceeding *pro se*, interjected "[t]here is a problem with these documents[.]" He specifically contended that "[t]hey have been altered." This objection resulted in a voir dire examination of Officer Spruill and argument before the trial court in which Defendant made variants on the best evidence and authenticity arguments that he makes on appeal. The trial court then admitted the evidence in question both in the absence and presence of the jury, noting in both instances Defendant's objection. This suffices to preserve these arguments for appellate review. *See* N.C. R. Evid. 103(a)(2) (2019) ("Once the court makes a definitive ruling on the record admitting . . . the evidence, either at or before trial, a party need not renew an objection . . . to preserve

a claim of error for appeal."); *see also State v. Randolph*, 224 N.C. App. 521, 528, 735 S.E.2d 845, 851 (2012) (holding defendant's objection to evidence at trial resulting in trial court convening voir dire of law enforcement officer and then denying motion to suppress sufficient to preserve objection for appellate review even when "Defendant did not object again during . . . testimony" on the subject matter of the previously denied motion to suppress).

I respectfully vote no prejudicial error instead of to dismiss Defendant's appeal.