IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-575

No. COA20-614

Filed 19 October 2021

Durham County, No. 13 CRS 59913, No. 16 CRS 2178-79

STATE OF NORTH CAROLINA

v.

RAKEEM MONTEL BEST

Appeal by Defendant from judgment entered 14 December 2018 by Judge James Hardin in Durham County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Amy L. Bircher, for the State.

Appellant Defender Glenn Gerding, by Assistant Appellant Defender James R. Grant for Defendant-Appellant.

CARPENTER, Judge.

¶ 1 Rakeem Montel Best ("Defendant") appeals pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) from judgment entered after a jury found him guilty of first-degree murder, conspiracy to commit robbery with a dangerous weapon, and two counts of discharging a firearm into an occupied vehicle while in operation. We find

no error in the lower court's decision, without prejudice to Defendant's ability to bring a petition for appropriate relief for the ineffective assistance of counsel.

I. Factual & Procedural Background

¶ 2 The record from the superior court trial tended to show the following: On 18 April 2013 around 9:00 p.m., Jejuan Taylor was killed after being shot twice during an attempted armed robbery at Duke Manor Apartments in Durham, North Carolina. Hope Farley, one of the individuals who orchestrated the robbery, confessed less than a week later. Defendant attended North Carolina Central University at the time of the robbery and had no prior criminal record.

¶ 3 Farley provided an account of the robbery. According to Farley's testimony, on 18 April 2013 at around 3:00 p.m., Farley met Thomas Clayton at a bus terminal. Clayton was in his girlfriend's Isuzu Trooper vehicle. After about twenty minutes, Clayton saw Timothy Moore and called him to get into the car.

¶ 4 Clayton drove Farley and Moore to Campus Crossing Apartments where they met a fourth person. Clayton referred to this fourth person as "King." Sometime during their time in the apartment, the four discussed committing a robbery. Farley suggested robbing Jejuan Taylor, a friend of hers who sold marijuana.

¶ 5 Farley's cell phone could only make calls or send texts when she was connected to Wi-fi because she did not have a carrier. However, she was able to use her phone at King's apartment and later while inside the Isuzu. She initially contacted Taylor

on her phone but used King's phone to keep in contact with Taylor as they drove to meet him. Cell phone data showed Defendant's phone was used to communicate with Taylor between 5:10 p.m. and 9:06 p.m.

¶ 6 Taylor arrived and backed into a spot in front of the stairwell where Farley was sitting and rolled down the window. Taylor began to hand Farley the marijuana. At that point, King and Moore, wearing red bandanas over their faces, ran to Taylor's car and pushed Farley out of the way. Moore fired at least two shots into the car hitting Taylor at least twice. The incident lasted about six or seven seconds.

¶ 7 Security footage from Duke Manor showed three people in the Isuzu leaving the gatehouse and a lone fourth person quickly walking out of the complex shortly after. Taylor died at the scene before EMS arrived.

A. The Investigation

¶ 8 Farley gave an interview with the lead detective assigned to the case, Investigator Sean Pate ("Pate"). She confessed to her involvement and named the three others involved. Two weeks after the robbery, Farley was presented with a photo array seeking to identify King. Farley did not make an identification. About a year later, Farley was presented with another photo array, at which time she identified Defendant as "Keem that was involved in the murder."

¶ 9 The record shows that Pate was the lead detective on the case and worked off-duty security at the Food Lion where Defendant also worked. Pate testified that he

noticed less than a month after the robbery, Defendant changed his hair from longer braids to short hair. Pate also testified he saw Defendant at the Food Lion after the robbery and asked to speak with Defendant. Defendant then quit his job at Food Lion, though Pate testified he did not know why. The record reflects Defendant requested to change apartments and moved to the other side of the complex on 6 June 2013. Defendant was arrested in October 2013. The record reflects that at the time of his arrest, Defendant had a flip phone and not the iPhone Farley had allegedly borrowed. Defendant's phone was disconnected two days after Taylor's murder.

¶ 10 During Pate's interrogation of Defendant, Defendant denied having any knowledge of the shooting or knowing the other three suspects. Defendant told Pate he quit his job at Food Lion because he did not have rides between work and school, his phone was off, and the workload was too much to handle with school. Defendant stated he did not recall where he was six months earlier on the night in question but gave Pate two phone numbers for friends with whom he usually spent time with on the weekday in question. Pate did not follow up with these friends.

¶ 11 At some point, Pate was given information which caused him to investigate Hakeem Prince in connection with the robbery, but Farley did not identify him.

B. Trial Testimony

1. Expert Witness Testimony

¶ 12 During trial, the State asked two record custodians about the ability to spoof calls in 2013.[1] Both custodians testified spoofing was "very difficult to do[,]" if not impossible back in 2013. The defense called an expert witness, who testified one could use an app called Verizon Plus "as a replacement for your phone" if one did not have access to their phone and that "spoofing existed" in 2013. On rebuttal, the State called an FBI agent who provided the opinion there had been no spoofing in the case.

2. Lead Detective Testimony

¶ 13 Pate testified at length about the investigation. The State elicited from Pate a comparison between his interview style with Farley and his interview style with Defendant. Defendant was asked many questions, and Farley was asked a few questions with little interruption. During the direct examination of Investigator Pate, the following occurred:

> State: How, why were you using a different technique with Hope than you were with Rakeem Best?
>
> Pate: Because Hope was answering the questions, which I felt was truthful at the time.
>
> State: So these witnesses were giving, well, you talked about that. Hope was implicating herself, and you talked about that even in the interview to Rakeem Best?
>
> Pate: Yes.

[1] Spoofing is when a caller deliberately falsifies the information transmitted to the receiving party's caller ID display to disguise their identity.

> State: And so you said that was why you didn't want to push her because she was already implicating herself and you wanted to let her just keep digging that hole deeper.
>
> Pate: Absolutely.
>
> State: Okay. But Rakeem Best wasn't doing that?
>
> Pate: Correct.

3. Breyanna Newman's Testimony

¶ 14 Clayton's girlfriend, Breyanna Newman, also testified. Newman knew Defendant as "Keem." During direct examination of Newman, the following occurred:

> [State:] But when you talked with [Clayton], you said that was in person?
>
> [Newman:] Yes.
>
> [State:] Okay. Now, umm, as a result of talking with him, did you think about any people that you mutually knew?
>
> [Newman:] Yes.
>
> [State:] Who did you think about?
>
> [Newman:] Umm, I knew Hope and Keem.
>
> [State:] Hope and Keem?
>
> [Newman:] Yes.

¶ 15 On 28 October 2013, Defendant was indicted by a grand jury for first-degree murder. On 5 July 2016, Defendant was indicted for attempted robbery with a

dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and two counts of discharging a firearm into an occupied vehicle in operation. On 14 December 2018, the jury found Defendant guilty of all charges. Defendant was sentenced to life without parole for the first-degree murder conviction, twenty-five to forty-two months for the conspiracy to commit robbery with a dangerous weapon conviction, and sixty-four to eighty-nine months for each discharging a firearm into an occupied vehicle while in operation conviction. Defendant orally appealed to this Court. The record appeal was filed in this Court 13 August 2020.

II. Jurisdiction

¶ 16 Jurisdiction lies in this Court as a matter of right over a final judgment of a superior court, pursuant to N.C. Gen. Stat. §§ 7A-27(b) (2019) and 15A-1444(a) (2019).

III. Issues

¶ 17 The issues before this Court are: (1) whether the trial court committed plain error in allowing the lead detective to testify he believed a witness was telling the truth; and, (2) whether the trial court committed plain error by allowing a witness to testify about subsequent thoughts following a conversation with a co-defendant.

IV. Standard of Review

¶ 18 Issues not preserved by objection noted at trial may be made the basis of an appeal when the judicial action questioned is specifically and distinctly contended to

amount to plain error. N.C. R. App. P. 10(a)(4). On appeal of an unpreserved evidentiary error, an error will constitute a plain error when a defendant demonstrates "that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). To establish an error as fundamental, "a defendant must establish prejudice—that, after examining the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.'" *Id.*, 723 S.E.2d at 334 (citations omitted). Since "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[.]'" *Id.*, 723 S.E.2d at 334 (citations omitted).

V. Analysis

A. Lead Detective Testimony

¶ 19 Defendant contends that the trial court committed plain error by admitting testimony from the lead detective when he testified on the difference between the interrogations of Farley and Defendant. Specifically, Defendant contends the trial court committed plain error in allowing Investigator Pate to testify as to Farley's credibility during her interrogation. By allowing Investigator Pate to testify as to Farley's truthfulness during her interview, Defendant contends the State elicited Investigator Pate's personal opinion on the question of Defendant's guilt while simultaneously vouching for Farley's credibility. Defendant argues this error

amounts to plain error because Farley's credibility was central to the case against Defendant, and law enforcement testimony has traditionally been afforded deference by jurors.

¶ 20 The question of whether a witness is telling the truth is one of credibility, and therefore, a matter for the jury alone. *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784 (1995). *See also State v. Holloway*, 82 N.C. App. 586, 587, 347 S.E.2d 72, 74 (1986) (holding "it is fundamental that the credibility of witnesses must be determined by [the jury], unaided by anyone[.]"); *State v. Chul Yun Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) ("The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial—determination of the truth.").

¶ 21 Rule 701 of the North Carolina Rules of Evidence allows a lay witness to testify "in the form of opinions or inferences" "limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2019). A law enforcement officer can testify about details rationally based on their perception and experience to assist the factfinder in presenting a clear understanding of the investigative process. *See State v. O'Hanlan*, 153 N.C. App. 546, 562-63, 570 S.E.2d 751, 761-62 (2002) (holding no error for officer's testimony "rationally based on his perception and experience" as the investigating

detective and "helpful to the fact-finder in presenting a clear understanding of his investigative process"), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397 (2004). Testimony from an officer carries "great weight with the jury." *Tyndall v. Harvey C. Hines, Co.*, 226 N.C. 620, 623, 39 S.E.2d 828, 830 (1946).

¶ 22 This Court has held a police officer may not testify that a defendant is guilty. *See State v. Turnage*, 190 N.C. App. 123, 129, 660 S.E.2d 129, 133, *rev'd on other grounds*, 362 N.C. 491, 666 S.E.2d 753 (2008) (finding a police officer's testimony the defendant was "probably in the process of breaking into a residence" constituted an improper opinion as to guilt and invaded into the job of the jury); *State v. Carrillo*, 164 N.C. App. 204, 210, 595 S.E.2d 219, 223 (2004) (holding it was error for a police officer to testify a defendant knew a package sent to him contained drugs).

¶ 23 This Court has repeatedly found error when a witness testifies as to credibility—even when the testimony only implied a defendant was being untruthful. *See Chul Yun Kim*, 318 N.C. at 621, 350 S.E.2d at 351 (finding error when an expert witness testified that the victim had "never been untruthful with [him]"); *State v. Health*, 316 N.C. 337, 341–42, 341 S.E.2d 565, 568 (1986) (holding an expert is not allowed to render an opinion as to the credibility of a witness); *State v. Giddens*, 199 N.C. App. 115, 123, 681 S.E.2d 504, 509 (2009) (holding it was error for a DSS social worker to testify the investigator had "substantiated" that Defendant was the

perpetrator). By allowing Investigator Pate to testify "[he] felt [Farley] was truthful at the time," the trial court allowed a witness to testify to Farley's credibility.

¶ 24 Furthermore, Investigator Pate's testimony went beyond stating his opinion regarding Farley's credibility, but also likely established Pate's opinion on Defendant's guilt. By testifying that Farley's confession implicating herself and Defendant appeared truthful, Investigator Pate impliedly testified Defendant was guilty. Investigator Pate stated he was allowing Farley to continue talking to "keep digging [her] hole deeper" and because he felt she was "truthful" during her interrogation. Pate's testimony may have implied Defendant was being untruthful during the interrogation. A jury could reasonably infer that based on Investigator Pate's interview style between Farley and Defendant, Pate believed Defendant was guilty and thus was lying when he would not implicate himself.

¶ 25 Since Investigator Pate's testimony both established Farley's credibility and Pate's opinion on Defendant's guilt, the trial court committed error when it admitted this portion of Investigator Pate's testimony. *See Turnage*, 190 N.C. App. at 129, 660 S.E.2d at 133; *See Chul Yun Kim*, 318 N.C. at 621, 350 S.E.2d at 351. Because Defendant failed to object to this testimony during trial, he must show a fundamental error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. The error committed by the trial court would have to have probable impact on the jury's finding the defendant was guilty. *Id.*, 723 S.E.2d at 334.

¶ 26 There is substantial other evidence in the record tending to show Defendant's guilt. Defendant's cell phone records and the victim's cell phone records corroborated Farley's testimony. The cell phone records presented at trial tend to show Defendant's phone and the victim's phone were engaged in several calls leading up to the robbery. Defendant's cell phone was disconnected two days after the murder without explanation. Defendant no longer had an iPhone at the time of his arrest, but instead had a flip phone. Defendant cut his long, braided hair within less than a month after the murder. Defendant quit his job after being approached by Pate about the murder. He requested to move apartments in his housing complex two months after the murder, even though his lease had not yet expired. This evidence could have been considered by the jury to establish Defendant's guilt.

¶ 27 Though the trial court committed error in allowing Investigator Pate to testify as to Farley's credibility in her interview, the error did not rise to the level of plain error. No evidence in the record suggests the removal of a single sentence spoken by Investigator Pate would have had any impact on the jury verdict. The cell phone records, co-defendant identification in the line-up, and Defendant's behavior following the murder could lead a reasonable jury to find Defendant guilty. Further, Investigator Pate's testimony came after Farley testified and either corroborated or impeached the testimony Farley had already given for the jury's consideration. The timing of the testimony coupled with the lack of objection could lead to a reasonable

jury inference the testimony was being offered to corroborate Farley's earlier testimony. Thus, we find no plain error.

B. Statement by Co-Defendant

¶ 28 Defendant argues Breyanna Newman's testimony as to Clayton's statement amounts to impermissible hearsay that should not have been admitted by the trial court. Specifically, by asking Newman whom she "thought about" after her conversation with Clayton about the shooting, Newman's statement introduced hearsay testimony from Clayton. Defendant contends it was error to allow Newman to testify she had "thought about" Keem and Hope, as it implied Clayton told Newman that Hope and Keem were involved in the robbery. Further, Defendant argues this error amounted to plain error as the State was able to provide evidence that two co-defendants implicated Defendant in the shooting.

¶ 29 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801. Hearsay is generally inadmissible. N.C. Gen. Stat. § 8C-1, Rule 802. "A 'statement' is . . . an oral or written assertion or . . . nonverbal conduct of a person, if it is intended by him as an assertion." N.C. Gen. Stat. § 8C-1, Rule 801(a). However, "[o]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473, *cert. denied*, 537 U.S. 896, 154 L. Ed.

2d 165 (2002) (citations omitted). "Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *Id.*, 558 S.E.2d at 473 (citations omitted).

¶ 30 A hearsay statement "is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . a statement by a coconspirator of such party during the course and in furtherance of the conspiracy." N.C. Gen. Stat. § 8C-1, Rule 801(d)(E). The Supreme Court of the United States recognized that improperly admitted codefendant confessions can have a highly prejudicial and unfair impact on the jury. *See Bruton v. United States*, 391 U.S. 123, 124–36 (1968) (finding a defendant's confrontation rights were violated where a codefendant's confession implicating the defendant was admitted at their joint trial; this evidence was so harmful a limiting instruction was insufficient to cure the prejudice to the defendant).

¶ 31 Newman's testimony is not hearsay, as it does not include a statement made by someone other than the declarant. Newman testified as to whom she thought about after speaking with Clayton about the shooting, a reflection of her personal thoughts, not Clayton's statement. Defendant argues this statement is hearsay as it infers Clayton made a statement regarding Farley and Defendant's involvement in the crime. Even if the testimony by Newman implied Clayton mentioned Defendant and Farley, the testimony does not amount to hearsay, as it was not provided to prove the truth of the matter asserted. The testimony by Newman was offered to show her

personal subsequent thoughts and actions, not to prove what Clayton said. At trial, the State specifically mentioned "that [Newman] should not blurt out anything that Thomas Clayton said to her. But if people ask [Newman] questions about what she did or what she thought about as a result, that might be permissible."

¶ 32 Additionally, we do not know what Clayton said to Newman. The mere mention of her thought of Farley and Defendant does not establish that Clayton told her they were involved. Without knowing what Clayton said, we do not have a statement; instead, we have Newman testifying to her own thoughts and actions. This is not a statement as it was not intended to be an assertion. *See* N.C. Gen. Stat. § 8C-1, Rule 801(a). It was intended to explain Newman's subsequent thoughts and actions and therefore is not hearsay. *See Gainey* at 87, 558 S.E.2d at 473 (citations omitted). The trial court did not err in admitting Newman's testimony. Even assuming arguendo that Newman's testimony was erroneously admitted, the error would not rise to the level of plain error.

VI. Conclusion

¶ 33 We hold the trial court's decision to admit the lead detective's testimony as to a co-defendant's credibility and his opinion as to Defendant's guilt was error. However, this error does not amount to plain error, as the testimony did not have a probable impact on the jury's verdict. We do not find error in the admission of testimony regarding a witness' personal thoughts after speaking with a co-defendant,

as such testimony did not amount to hearsay. Defendant has failed to show plain error in the lower court's decision. Our ruling is without prejudice to Defendant's ability to bring a petition for appropriate relief for the ineffective assistance of counsel.

NO ERROR.

Judge TYSON concurs.

Judge GRIFFIN concurs.

Report per Rule 30(e).