IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-332

No. COA20-705

Filed 6 July 2021

Rowan County, Nos. 17 CRS 51921-22, 18 CRS 4008-09

STATE OF NORTH CAROLINA

v.

DONALD LEE FRYE

Appeal by defendant from judgments entered 16 April 2019 by Judge Julia Lynn Gullett in Rowan County Superior Court. Heard in the Court of Appeals 9 June 2021.

Joshua H. Stein, Attorney General, by Special Deputy Attorney General K.D. Sturgis, for the State.

Leslie Rawls for defendant.

ARROWOOD, Judge.

¶ 1 Donald Lee Frye ("defendant") appeals from judgments entered 16 April 2019 for convictions of first-degree murder, robbery with a dangerous weapon, and felonious breaking and entering by a habitual felon. For the following reasons, we hold that defendant received a fair trial free of prejudicial error. We thus affirm the judgments entered following defendant's convictions for the offenses noted above.

I. Background

¶ 2 On 27 April 2017, Jessica Lind ("Mrs. Lind") exchanged text messages with her mother, Sheila Nance Godfrey ("Ms. Godfrey"), regarding the latter babysitting Mrs. Lind's two children the following day. Ms. Godfrey, a widow, resided by herself in Salisbury, North Carolina; owned a white Chevrolet Blazer; and smoked Salem Slim Lights menthol cigarettes. Later that evening, Mrs. Lind messaged Ms. Godfrey after realizing that she had not provided Ms. Godfrey with an exact time to arrive the next day. Ms. Godfrey did not respond. The last contact Ms. Godfrey had with anyone occurred around 6:30 p.m. on 27 April 2017.

¶ 3 As of 27 April 2017, defendant resided in a single-wide trailer in Kannapolis, North Carolina. Defendant frequently allowed Sarah Wetter ("Ms. Wetter") and Braden Lawing ("Mr. Lawing") to stay at his residence. Ms. Wetter returned the favor by helping defendant obtain crack cocaine.

¶ 4 On the night of 27 April 2017, defendant informed Ms. Wetter that he wanted to visit a friend in Salisbury and asked whether Ms. Wetter would drop him off using his car (a tan Honda). Defendant said he would allow Ms. Wetter to use his car during the interim. On the way to Salisbury, Ms. Wetter testified that defendant had "some porn DVDs, and he had some sex lube."

¶ 5 Around 7:00 p.m. that evening, the pair arrived in Salisbury, and Ms. Wetter dropped off defendant at a location approximately 176 yards from Ms. Godfrey's

residence. Defendant told Ms. Wetter that he would call her if he needed a return ride and then exited the vehicle and headed toward a bushy area near the roadside. Later that evening, defendant and Ms. Wetter spoke by phone; defendant stated that his friend had lent him a car so he did not need a ride home and that he would talk to Ms. Wetter later.

¶ 6 That same evening, a white Chevrolet Blazer was captured by surveillance cameras at a Shell gas station in Salisbury at the same time and location as one attempted and one successful transaction on Ms. Godfrey's debit card. Then, surveillance cameras at the Super Speedwash laundromat in Salisbury recorded video of the same car and a white male—later identified before the jury as defendant—exiting the driver's side of the vehicle. The driver was wearing blue jeans, sneakers, a hat, and a green shirt with a distinctive insignia. This person entered the laundromat, discarded an unknown object in the trash can, and left on foot.

¶ 7 Around midnight, defendant called Ms. Wetter and told her that he had ran out of gas and that he needed for her to pick him up at the Super Speedwash laundromat in Salisbury—though he promptly rerouted Ms. Wetter to the nearby Shell station because two police cruisers were stationed near the laundromat. After picking up defendant, the couple drove to a local Wal-Mart. While Ms. Wetter was inside the store, defendant called and told her that he had left his cigarettes in the

other vehicle and that he was going back to retrieve them. Defendant ultimately picked up Ms. Wetter from Wal-Mart and drove back to Kannapolis. En route, Ms. Wetter noticed that defendant was smoking menthol cigarettes, which, in her opinion, was odd as he did not usually smoke this type of cigarette.

¶ 8 Once back at defendant's trailer, defendant showed Mr. Lawing a tan lockbox. The two pried it open, and Mr. Lawing noticed papers that had the name "Godfrey" imprinted on them as well as an angel pendant, which defendant gifted to Mr. Lawing. Defendant and Mr. Lawing then left defendant's trailer to get food. During the trip, defendant pulled over the vehicle on a bridge and tossed the lockbox into the waterway below.

¶ 9 On 28 April 2017, multiple transactions were made on Ms. Godfrey's debit card by a person who appeared to be the same person shown in the Super Speedwash recordings. One transaction took place at an ATM at a CVS in Kannapolis and two others were made at Marathon gas stations. On that date, the same white male wearing the same green shirt and blue jeans from the Super Speedwash cameras was recorded on surveillance videos making a transaction at the Rushco gas station in Kannapolis at the same time and place, and in the same amount, as a transaction recorded on Ms. Godfrey's debit card statement. Video footage from a Domino's pizza in Kannapolis also showed a "white male . . . with the bluejeans, hat and green shirt from previous videos" purchase pizza and other items at the same time and place as

a transaction noted on Ms. Godfrey's debit card statement. Law enforcement collected all available videos from the various businesses where Ms. Godfrey's cards were used.

¶ 10 On the *morning* of 28 April 2017, Ms. Godfrey did not show up to babysit Mrs. Lind's children. Given that Ms. Godfrey was infrequently late, Mrs. Lind called her husband, Jacob Lind ("Mr. Lind"), and also asked Ms. Godfrey's neighbor whether her mother's car was at the house. The neighbor was not home, but he confirmed Ms. Godfrey's car was not there when he left for work that morning. Mrs. Lind then used a cell-phone locator to ping her mother's cellular device. The tracker picked up a particular location, and Mr. and Mrs. Lind proceeded toward the direction of the ping signal.

¶ 11 As they drove, Mrs. Lind recognized her mother's car in the parking lot of the Super Speedwash. The couple approached the car and noticed that the windows were down, various personal items in the passenger seat, and that Ms. Godfrey's purse was positioned on the passenger floor. Given the disconcerting circumstances, Mrs. Lind contacted a friend who worked for the Alcohol Law Enforcement Agency, Jerry Dean ("Agent Dean"). Agent Dean advised Mrs. Lind to contact local law enforcement and agreed to meet the Linds at the scene.

¶ 12 After speaking to the responding officers at the Super Speedwash, Mr. Lind, Mrs. Lind, and Agent Dean drove to the area where the cell-phone tracker had pinged

Ms. Godfrey's phone. While searching for the phone, Mrs. Lind repeatedly called Ms. Godfrey's cellular device and to her surprise James Lambert ("Mr. Lambert") answered the phone—Mr. Lambert was Ms. Godfrey's neighbor at the time. Agent Dean spoke with Mr. Lambert, and they agreed to meet at the location on the road where Mr. Lambert recovered the phone while taking his daily walk on 28 April 2017.

¶ 13 The Linds and Agent Dean then drove to Ms. Godfrey's home. Agent Dean and Mr. Lind approached the house and noticed that the front door frame had been forcibly separated from the wall. As they entered the breached door, they observed Ms. Godfrey's lifeless body in a pool of blood with a drop cord wrapped twice around her neck. After checking her vitals, Agent Dean called 911. A subsequent autopsy revealed that the cause of death was blunt force injury of the head and ligature strangulation.

¶ 14 The Kannapolis Police Department immediately issued two press releases regarding the murder of Ms. Godfrey along with two still photographs extracted from the Super Speedwash videos, seeking the public's help in identifying the person in the photos. Mr. Lawing, defendant's housemate, recognized defendant in the photographs and immediately contacted the Kannapolis Police Department. Mr. Lawing identified defendant as the person in question.

¶ 15 Thereafter, law enforcement searched defendant's trailer and recovered a Domino's pizza box with labels for the same exact time, location, and dollar amount

as a transaction recorded in Ms. Godfrey's debit card records. Police also found a green shirt matching the shirt worn by the person caught on the surveillance videos discussed above. Moreover, swabbing of blood on one of defendant's shoes matched Ms. Godfrey's DNA. Defendant's expert agreed with this forensic conclusion. Law enforcement also confirmed that a small safe was missing from Ms. Godfrey's home—the lockbox that Mr. Lawing and defendant had breached at defendant's trailer.

¶ 16 In May 2017, the Rowan County Grand Jury returned indictments charging defendant with robbery with a dangerous weapon and first-degree murder. Subsequently, in December 2018, the grand jury returned additional indictments charging defendant with habitual felon status and felonious breaking and entering. The trial court granted the State's motion to join all matters for a single trial. The jury found defendant guilty of all charges, and defendant admitted to habitual felon status.

¶ 17 On 16 April 2019, the trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction. For the robbery with a dangerous weapon conviction by a habitual felon, the court sentenced defendant to a minimum 127 months' and a maximum 165 months' incarceration to run consecutive to the murder sentence. Lastly, the trial court sentenced defendant to a minimum 111 months' and a maximum 146 months' imprisonment for the conviction of breaking and entering by a habitual felon.

¶ 18 Defendant gave oral notice of appeal in open court immediately after sentencing. Defendant's appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444.

II. Discussion

¶ 19 Defendant argues that the trial court committed plain error by failing to inform the jury that it had granted defendant's objection, outside the presence of the jury, to a lay person's testimony identifying defendant as the individual seen in the Super Speedwash videos. Defendant also contends that the trial court erred by overruling defendant's objection to the admission of photographs of two pornographic DVDs and sexual lubricant found in defendant's residence as Ms. Wetter could not confirm that those exhibits were the same items she observed while riding in defendant's car on 27 April 2017. We address each issue in turn.

A. Objection

¶ 20 Defendant argues that the trial court committed plain error by not informing the jury that, out of the jury's presence, it had sustained an objection related to testimony from Lieutenant Chad Moose ("Lt. Moose") identifying defendant as the person in the Super Speedwash videos. As defendant did not raise this issue in the trial court, the challenge is unpreserved. This Court reviews unpreserved challenges to the admission of lay opinion testimony for plain error. N.C.R. App. P. 10(a)(4).

¶ 21 For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *State v. Odom,* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (internal quotation marks and citations omitted). Because 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.* (internal citation omitted) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Moreover, plain error has been described as "so fundamental as to amount to a miscarriage of justice or which *probably* resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley,* 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (emphasis added) (citations omitted).

¶ 22 During trial, Mr. Lawing testified that defendant was the person in the photographs extracted from the Super Speedwash videos. Defendant was also identified to be the person seen in the videos from CVS, the Rushco gas station, Domino's pizza, and the Marathon gas stations. As noted above, the videos from these stores recorded an individual, matching defendant's physical description, consummating transactions at the same time and place, and in the same amount, as

transactions shown on Ms. Godfrey's bank statements. Defendant neither objected nor moved to strike any of the above testimony.

¶ 23 Later, Lt. Moose also testified that defendant was the person captured on the Super Speedwash videos. Defendant did not object. When Lt. Moose again identified defendant as the person shown in the surveillance videos from the Super Speedwash, defendant objected and asked to be heard outside the presence of the jury. Defense counsel acknowledged that he had "let the first slide [sic]" in regard to repeated testimony identifying defendant as the person in the Super Speedwash videos. Nonetheless, the court sustained defendant's objection. When the jury returned, defendant did not ask the trial court to inform the jury of its ruling. On appeal, defendant contends that the trial court's failure to notify the jury that it had sustained defendant's objection was tantamount to overruling defendant's objection. We disagree.

¶ 24 As noted above, several witnesses had previously identified defendant as the person captured on surveillance videos taken from locations where transactions were made on Ms. Godfrey's debit card on the night in question. This evidence was admitted without objection. Even if one instance of allowing evidence over objection was error, where "the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995) (citations omitted). When defendant finally

(and successfully) objected to testimony identifying him as the person in the Super Speedwash videos, the trial court did not commit plain error by failing to inform the jury *ex mero motu* that it had sustained the objection.[1]

¶ 25 In short, defendant fails to show that but for the trial court's failure to inform the jury that it had sustained defendant's objection to like testimony that had been previously admitted without objection, the outcome of the proceeding would have probably resulted in the jury reaching a different verdict than it otherwise would have reached. *Bagley,* 321 N.C. at 213, 362 S.E.2d at 251. The trial judge was not required to inform the jury that it sustained defendant's objection to one portion of Lt. Moose's testimony identifying defendant as the person in the subject surveillance videos when several other witnesses testified to the same issue without objection.

¶ 26 In sum, because the same identification evidence was presented to the jury on at least three prior occasions, the trial court's failure to notify the jury that it had sustained defendant's objection to Lt. Moose's second statement identifying defendant as the individual in the Super Speedwash videos did not amount to plain error. Defendant's argument is without merit.

B. Evidentiary Challenge

[1] Indeed, after the court sustained defendant's objection, Lt. Moose subsequently testified during cross examination that four videos from the Super Speedwash "captured" defendant. Despite the court's prior ruling, defendant did not object to this testimony.

¶ 27 Defendant lastly contends that the trial court erred by overruling defendant's objection to the admission of photographs of pornographic DVDs and personal lubricant similar to the items observed by Ms. Wetter in defendant's car on 27 April 2017.

¶ 28 "The standard of review on admissibility of evidence is abuse of discretion." *Peeler v. Joseph*, 263 N.C. App. 198, 205, 823 S.E.2d 155, 160 (2018) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

¶ 29 On the way to Salisbury, Ms. Wetter testified that defendant had "some porn DVDs, and he had some sex lube." During her testimony, the State corroborated this statement by introducing, over objection, photographs of two pornographic DVDs and a tube of personal lubricant that were found in defendant's residence. Ms. Wetter testified that she could not "say for certain that they're the exact movies [she observed in defendant's car on the night in question], but I know he had two [pornographic DVDs] with him."

¶ 30 Defendant now argues that these items were erroneously admitted because they were not relevant to the charges, not sufficiently connected to the items defendant had with him in the car on 27 April 2017, and were more prejudicial than probative. We disagree.

¶ 31 Defendant neither objected to Ms. Wetter's testimony that defendant possessed pornographic videos and lubricant on the evening in question nor to her trial testimony that the items in the photographs were recovered in a subsequent search of defendant's home. By failing to object to the substantive testimony that defendant possessed such items on the night in question, defendant cannot reasonably argue that the "admission of the evidence in question served little or no purpose other than to inflame the passions of the jury." *State v. Young*, 368 N.C. 188, 211, 775 S.E.2d 291, 306 (2015) (citation omitted).

¶ 32 We conclude that this evidence was properly admitted as it corroborated Ms. Wetter's unchallenged testimony that defendant possessed pornographic videos and sexual lubricant in his car as they drove to Salisbury on 27 April 2017 and her separate unchallenged testimony that the items shown in the photographs were seized from defendant's residence. *See generally State v. Rhue*, 150 N.C. App. 280, 287, 563 S.E.2d 72, 77 (2002) (explaining corroborative evidence). Assuming *arguendo* we were to conclude that the trial court erred by permitting the introduction of these items, defendant still fails to show that the trial judge's decision to allow the evidence was manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527 (citation omitted).

¶ 33 As noted above, the evidence of defendant's guilt was overwhelming, and the inclusion of this particular evidence, even if inadmissible, did not tilt the jury toward a guilty verdict based on the inflammatory nature of these exhibits. Indeed, defendant acknowledges that "other evidence tended to suggest [defendant] might be guilty of the charged offenses[.]" In short, the trial judge did not abuse her discretion by allowing the introduction of the aforementioned evidence, and defendant fails to show undue prejudice from the admission of the same.

III. Conclusion

¶ 34 For the foregoing reasons, we hold that defendant received a fair trial free of prejudicial error.

NO PLAIN ERROR.

Judges TYSON and INMAN concur.

Report per Rule 30(e).