An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-615

No. COA21-465

Filed 6 September 2022

New Hanover County, Nos. 17 CRS 53329, 53234, 5688

STATE OF NORTH CAROLINA

v.

JARED EUGENE NICHOLSON, Defendant.

Appeal by Defendant from judgment entered 1 June 2018 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 22 March 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.

North Carolina Prisoner Legal Services, Inc., by Kristen L. Todd, for Defendant-Appellant.

JACKSON, Judge.

¶ 1 Jared Eugene Nicholson ("Defendant") appeals from judgment entered after a jury found him guilty of possession of a firearm by a felon and felony larceny. After careful review, we find no error.

I. Background

¶ 2 On 11 and 25 September 2017, Defendant was indicted by a New Hanover County Grand Jury on one count each of possession of a firearm by a felon, felonious breaking and entering, felony larceny, safecracking, possession of burglary tools, and attaining habitual felon status. On 8 May 2018, the matter came on for trial in New Hanover County Superior Court.

¶ 3 The State's evidence tended to show the following:

¶ 4 On 20 April 2017, landscaper Michael Cliff and his partner Frank went to cut the grass at 1930 Farley Drive. When they arrived, Mr. Cliff saw two men trying to fit a flatscreen TV into the backseat of a small burgundy car, possibly a Jetta. Mr. Cliff knew a man who lived at the house with his mother but did not know the men carrying the TV or if they might be roommates. He asked the men whether they were moving out and they said yes. Unable to fit the TV in the car, the men left it outside and drove off within the next ten minutes.

¶ 5 About five minutes later, one of the residents, Timothy Spade, pulled up to the house. After talking to Mr. Cliff, Mr. Spade realized that the TV was from inside the house and went to investigate further. Mr. Spade found the side door unlocked, which was unusual, although there was a hide-a-key on the front porch. Upon entering the house, Mr. Spade realized the safe in his parents' room was missing. Mr. Spade then called his mom, Richelle Spade, to tell her their house had been broken into. Mr. Spade also called law enforcement. When Ms. Spade arrived home, she looked around

inside and realized a shotgun, a DirectTV box, and pieces of their sound system were missing in addition to the safe, which contained a black and purple SCCY 9mm pistol, $3,000 in cash, and personal documents.

¶ 6 Detective Jose Lugo of the New Hanover County Sheriff's Office responded to the scene and spoke with Mr. Spade and Ms. Spade who told him that a safe, a stereo system, a Mossberg shotgun, and a SCCY 9mm pistol were missing. Mr. Spade told Detective Lugo he thought a man named David Duncan could be a suspect. Mr. Duncan was an old friend of Mr. Spade who had fallen on hard times.

¶ 7 Detective Cham Carey with the crime scene investigation unit also responded to photograph the scene and look for fingerprints. Detective Carey lifted a left thumb print and left palm print from the TV, and they were later found to match Defendant's prints.

¶ 8 Later that same day, Deputy Brandon Ramos responded to a call of a man possibly using narcotics in a brown sedan outside 4438 Robin Dale Court. The address was later determined to be the residence of Frank Bediako, the second landscaper who was working with Mr. Cliff at the Spade home. Deputy Ramos approached the driver's side of the car and saw a man, later identified as Scott Schoff, passed out inside the car. He also saw a needle sitting on the passenger seat and a jar of what looked like marijuana in the backseat. Deputy Ramos woke Mr. Schoff up and then searched the vehicle. Among other items, Deputy Ramos found a black

and purple SCCY 9mm pistol in the car. He determined via serial number that this was the pistol stolen from the Spade home earlier that day. Deputy Ramos placed Mr. Schoff under arrest and brought him to the station.

¶ 9 Detective Lugo then interviewed Mr. Schoff. Based on the information he received during the interrogation, Detective Lugo continued his investigation by focusing on Defendant's involvement. He researched vehicles associated with Defendant and found that Defendant's mother, Brenda Stewart, owned a 2000 Volkswagen.

¶ 10 The next day, 21 April 2017, Joshua Thurston was doing landscaping work at an Extended Stay Hotel. He and his supervisor were picking up trash around the building when he heard his supervisor call out that he found a shotgun in some bushes. The bushes were located directly under the window for Room 139. While his supervisor went to tell the hotel manager, Mr. Thurston saw a tall man come out, grab the shotgun out of the bushes, and place the shotgun in the trunk of a red Volkswagen Jetta.

¶ 11 Officer Bryce St. Pierre of the Wilmington Police Department responded to the hotel. He spoke with Mr. Thurston who said he saw a white man with brown hair, approximately 6-foot-2, wearing a red shirt pick up the shotgun and drive off in a red Volkswagen Jetta. Mr. Thurston also told Officer St. Pierre that after speaking with hotel management, the man he saw was supposedly staying in Room 139. Officer St.

Pierre learned that Room 139 was registered to Brenda Stewart. Officer St. Pierre then looked up Brenda Stewart and found a report listing Defendant as her son. He also found a physical description of Defendant, which matched the description Mr. Thurston gave of the man who took the shotgun. Additionally, Officer St. Pierre searched the area where the shotgun was found and located several other items including an AR15 tactical stock, an AR15 banana magazine, multiple pieces of stereo equipment, and a Garmin GPS with a "Property of UNCW" sticker.

¶ 12 Officer St. Pierre then went to the UNCW police department to return the Garmin GPS. UNCW police could not tell him whether the GPS had been lost or stolen. Afterwards, Officer St. Pierre learned that the New Hanover County Sheriff's Office had an active warrant out on Defendant. He contacted the sheriff's office and told them he may have located Defendant at a nearby hotel. Officer St. Pierre drove back to the hotel to meet a sheriff's deputy. Upon arriving, Officer St. Pierre saw a white male wearing a red shirt standing next to a red Volkswagen Jetta. The man matched the photo Officer St. Pierre had seen of Defendant, so Officer St. Pierre placed the man under arrest. The Jetta was later impounded and searched. A Mossberg shotgun was located inside the trunk and a hammer, crowbar, and gloves were found inside the car.

¶ 13 After the close of all evidence, the jury found Defendant guilty of possession of a firearm by a felon and felony larceny but was unable to reach unanimous verdicts

on felonious breaking and entering, safecracking, and possession of burglary tools. Defendant pled guilty to attaining the status of a habitual felon. The trial court entered a consolidated judgment, sentencing Defendant to 110 to 144 months imprisonment.

¶ 14 On 12 January 2021, Defendant filed a Petition for Writ of Certiorari seeking reinstatement of his right to direct appeal of the judgment entered on 1 June 2018. This Court granted Defendant's petition on 29 January 2021.

II. Analysis

¶ 15 On appeal, Defendant argues that the trial court erred on three occasions, each error necessitating a new trial, and also that the cumulative effect of these errors was sufficiently prejudicial as to warrant a new trial. We disagree.

A. Detective Lugo's Testimony

¶ 16 Defendant argues first that the trial court committed prejudicial error by allowing implicit hearsay testimony from Detective Lugo that the non-testifying co-defendant, Scott Schoff, had informed him during an interview that Defendant was involved in the breaking and entering. "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."

N.C. Gen. Stat. § 15A-1443(a) (2021). Defendant has the burden of proving prejudice. *Id.*

¶ 17 Hearsay is defined as "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." *Id.* § 8C-1, Rule 801(c). "Out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Golphin*, 352 N.C. 364, 440, 533 S.E.2d 168, 219 (2000). Our Supreme Court has held "that statements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as nonhearsay evidence." *State v. Thomas*, 350 N.C. 315, 339, 514 S.E.2d 486, 501 (1999). "Statements by non-testifying witnesses which may implicate the defendant in a crime are permissible when they are only used to explain the subsequent actions of the testifying witness." *State v. Rollins*, 226 N.C. App. 129, 139, 738 S.E.2d 440, 448 (2013). This is true even where the testimony creates a "strong inference" of the defendant's involvement in a crime—as long as the statement is not admitted for the truth of the matter asserted, the inference is not problematic. *Id.*

¶ 18 In the case at bar, the State elicited the following testimony from Detective Lugo:

> Q. After Mr. Schoff was arrested, did you, I guess, bring him down to the detectives and conduct an investigation with him, an interview with him?

A. Yes.

Q. Based on the information that you received from Mr. Schoff, what did you do next?

A. The information when I interviewed Mr. Schoff, he indicated that –

MR. DEAVER: Your honor.

THE COURT: He hasn't said anything yet, I don't think.

That last statement that was trying to be uttered by the witness would not be evidence in the case, ladies and gentlemen of the jury, and you should not consider whatever was said as evidence in the case.

MR. DEAVER: Your Honor, I will ask that anything that Mr. Schoff, S-c-h-o-f-f, stated to the detective just be excluded.

MR. VAN TRIGT: I agree with that.

THE COURT: All right. Do you understand that, Mr. Witness, that you cannot say anything that Mr. Schoff said to you?

THE WITNESS: Okay.

Q. Based on the information you received in the interview, did you then begin investigating [Defendant]?

A. That's correct.

MR. DEAVER: Your Honor, objection to that. I think it's just another way of saying what he said.

THE COURT: All right. Well, sustained as to the form of the question.

Q. After the interview with Mr. Schoff, what did you do?

A. We continued our investigation on the second defendant.

Q. Okay. And that being who?

A. Jared Eugene Nicholson.

MR. DEAVER: Your Honor, I'd ask that – that statement be stricken from the record. It's the same way of saying what was said. It's an attempt by the prosecution to bring in evidence that they know is inadmissible.

THE COURT: All right. Objection overruled.

¶ 19 Defendant argues that Detective Lugo's testimony amounts to implicit hearsay testimony that Mr. Schoff told Detective Lugo that Defendant was involved in the breaking and entering. In support of this contention, Defendant cites *State v. Canady*, 355 N.C. 242, 559 S.E.2d 762 (2002), to stand for the principle that while statements used to explain subsequent conduct are admissible non-hearsay evidence, testimony that goes beyond a mere explanation of subsequent conduct is inadmissible.

¶ 20 In *Canady*, a detective testified about information he received from a prison inmate regarding a double homicide. *Id.* at 246, 559 S.E.2d at 764. The detective

testified not only that the inmate told him that a fellow inmate—the defendant—told him he and another man had killed the victims, but also testified about the details of the murders the inmate said the defendant told him, "including how defendant broke into the victims' house through a window, went into the bathroom with a rifle, shot one of the victims, and fled with a bag of money." *Id.* at 249, 559 S.E.2d at 765. Our Supreme Court concluded this testimony "provided more than a mere explanation of his subsequent actions." *Id.* Furthermore, the prosecution recited the specific details provided by the inmate during closing arguments, which indicated that the prosecution was relying on the detective's testimony as substantive evidence and to imply the defendant had given a full confession. *Id.* at 249, 559 S.E.2d at 766. The Court determined the prosecution was trying to admit the truth of the matter asserted, and therefore the trial court erred in "permitting the State to admit details of the murders via hearsay testimony from [the detective]." *Id.* at 251, 559 S.E.2d at 767.

¶ 21 Here, Detective Lugo did not testify to any specific statements made by Mr. Schoff, only that he interviewed Mr. Schoff. Detective Lugo also did not testify to any details about any crime that he and Mr. Schoff discussed, meaning there were no details admitted that the State could rely on as substantive evidence in closing arguments. Unlike the detective in *Canady*, Detective Lugo only testified that after interviewing Mr. Schoff, he subsequently investigated Defendant. Such testimony is

admissible as non-hearsay evidence. Even if this testimony created a strong inference in the minds of the jurors that Mr. Schoff implicated Defendant in the breaking and entering, such an inference is not impermissible. While a limiting instruction may have been helpful to inform the jury such testimony should only be viewed as an explanation of Detective Lugo's next steps in the investigation, Defendant did not ask for a limiting instruction and such a choice may have been a strategic decision during trial.

¶ 22 Accordingly, we hold that the trial court did not commit prejudicial error in admitting Detective Lugo's testimony that his interview with Mr. Schoff led to an investigation of Defendant.

B. Identification of Defendant

¶ 23 Defendant argues second that the trial court plainly erred by allowing the State to elicit an identification of Defendant by Joshua Thurston through a leading question.

¶ 24 Ordinarily, "an examining counsel should not ask his own witness leading questions on direct examination." *State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 235 (1974). The trial court, however, has the discretion to permit leading questions in certain instances and absent a showing that the trial court abused its discretion, the trial court's ruling will not be disturbed on appeal. *Id.; see also State v. Mann*, 237 N.C. App. 535, 542-43, 768 S.E.2d 138, 144 (2014). In the case at bar, Defendant

did not object to the question or identification at trial, and therefore we review this issue for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. 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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (cleaned up).

¶ 25 The relevant questioning took place during the State's direct examination of Joshua Thurston, one of the two landscapers who found the shotgun in the bushes at the Extended Stay Hotel:

> Q. Tell the jury what, if anything, you remember from that day.
>
> A. That day I – me and my supervisor, Jarold, were – we pulled up at the job and proceeded to do what we normally do. I started picking up trash, so did he. I went around the side. He went around one side, I went around the other side and he – next thing I know, he cried out "Shotgun in the bushes." I walked up to it, he said not to touch it. So he went inside to tell the manager what happened. I fell back too – I continued working, picking up trash, and I see a man, tall man come out, grab the gun out of the bushes, throw it in his trunk and leave. And –
>
> Q. You said a "tall man." Do you know about how tall he was?

A. He was taller than me, 6-2, 6-4 somewhere around that range.

Q. You said throw it in the trunk of a car; do you recall what that car looked like?

A. A red Volkswagen Jetta.

Q. Do you recall what kind of clothing that individual was wearing?

A. He was wearing a red shirt and jeans, I believe.

Q. I know it's been a long time, but is the individual sitting next to Mr. Deaver, the defendant, the individual that picked up the shotgun and put it in the trunk of the car?

A. His hair is shorter but yes, that's him.

¶ 26 Defendant contends that the trial court permitting the last question and answer is an error so fundamental that a new trial is required. While there are guidelines delineating when the trial court can permit leading questions on direct examination, *see Greene*, 285 N.C. App at 492-93, 206 S.E.2d at 236, the trial court retains ultimate discretion to permit a leading question under the given circumstances. Unless allowing a leading question is a decision manifestly unsupported by reason, then the trial court will not have abused its discretion. Furthermore, here, in reviewing this leading question for plain error, we cannot say that permitting this question prejudiced the entirety of Defendant's trial such that it had an impact on the jury's verdict. The identification is significant, but there was

additional testimony linking Defendant to the shotgun, including the fact that Officer St. Pierre saw Defendant, who matched the description Mr. Thurston gave at the scene, standing next to a red Volkswagen Jetta in the parking lot of the Extended Stay Hotel and a shotgun was later found in the trunk of the Jetta after it was impounded.

¶ 27 Accordingly, we hold that the trial court did not plainly err in permitting the identification of Defendant by Mr. Thurston via a leading question from the State.

C. Jury Instructions

¶ 28 Defendant argues third that the trial court plainly erred by not naming the specific property allegedly stolen by Defendant in the jury instructions for felony larceny. Defendant did not object at trial to the jury instructions and therefore we review only for plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

¶ 29 The trial court gave the following instructions, in part, for the felony larceny charge:

> Now I charge that for you to find the defendant guilty of felonious larceny, the State must prove six things beyond a reasonable doubt:
>
> First, that the defendant, acting either by himself or acting together with Scott Schoff, took property belonging to another person;
>
> Second, that the defendant, acting either by himself or acting together with Scott Schoff carried away the property;

> Third, that the victim did not consent to the taking and carrying away of the property;
>
> Fourth, that at the time of the taking, the defendant intended to deprive the victim of its use permanently;
>
> Fifth, that the defendant knew he was not entitled to take the property;
>
> And sixth, that the property was taken from a building after a breaking and entering.

¶ 30 Defendant contends that the trial court erred by not listing the individual property items included in the indictment and only using the general term "property" in the instructions. The indictment specified the following items as personal property of Richelle Spade that were feloniously taken away by Defendant: a flatscreen television; a laptop computer; an entertainment system (speakers, receiver, subwoofer, and blue ray player); 9mm and 20-gauge ammunition; a safe; $3,000 in U.S. currency; a SCCY 9mm pistol; and a Mossberg shotgun. The crux of Defendant's argument is that because Officer St. Pierre testified to the following, the jury could have convicted Defendant of the larceny of property not named in the indictment:

> A. I went over to inspect the area where the shotgun was supposedly located because they advised there was more merchandise that looked to be stolen. Over there was a side-folding AR15 tactical stock; a banana AR15 magazine, it's just an extended magazine that looks the shape of a banana; multiple pieces of stereo equipment; a bag of feces; and a black Garmin Nuvi GPS with a sticker on the back that said "Property of UNCW."

¶ 31 Defendant cites *State v. Locklear*, 259 N.C. App. 374, 816 S.E.2d 197 (2018), in asserting there was a fatal variance between the indictment and the jury instructions for felony larceny such that a new trial is required. In *Locklear*, our Court held that a trial court erred by not mentioning the specific misrepresentation listed in an indictment for obtaining property by false pretenses in the jury instructions for the charge. *Id.* at 384, 816 S.E.2d at 205. This Court determined that since evidence of several misrepresentations was presented at trial, the trial court had to specify which misrepresentation was listed in the indictment. *Id.* This Court went on to conclude that the trial court committed plain error because "the trial court's erroneous instructions allowed the jury to convict [the] defendant on a theory not alleged in the indictment and it is unlikely the jury would have convicted [the] defendant on the theory alleged in the indictment[.]" *Id.* at 385, 816 S.E.2d at 205.

¶ 32 This case differs from *Locklear*. Here, beyond Officer St. Pierre listing the items in his testimony, there was no evidence presented that the other items not in the indictment—the AR15 tactical stock, the AR15 banana magazine, and the Garmin GPS—were property that was taken or carried away from a building after a breaking and entering. While we agree with Defendant's contention that the whole of Officer St. Pierre's testimony likely suggests that the additional three items found in the bushes outside Defendant's rented hotel room may have been stolen, there is simply no evidence that Defendant took those items from a building after a breaking

and entering.

¶ 33 This is the key distinction between the case at bar and *Locklear*. In *Locklear*, there was evidence presented at trial of an alternate theory not alleged in the indictment of an essential element—the misrepresentations—of obtaining property by false pretenses. Here, there was no evidence of the sixth element of felony larceny—that Defendant took the three items from a building after a breaking and entering. Therefore, it is unlikely that the jury convicted Defendant on a theory not alleged in the indictment. Rather it is likely that the jury convicted Defendant on the theory alleged in the indictment: that he took and carried away the listed property of Ms. Spade. Best practice advises identifying the specific property taken in jury instructions for felony larceny. However, where it was unlikely that the jury convicted Defendant on a theory not alleged in the indictment, it was not plain error for the trial court to only use the term "property."

¶ 34 Accordingly, we hold that the trial court did not plainly err by not identifying the specific property items listed in the indictment in the jury instructions for felony larceny.

D. Cumulative Effect of Errors

¶ 35 Defendant argues lastly that the cumulative effect of the trial court erroneously permitting Detective Lugo's testimony about the information Mr. Schoff provided him and the identification of Defendant by Mr. Thurston following a leading

question from the State prejudiced Defendant to an extent necessitating a new trial. As we held that neither piece of evidence was admitted erroneously, we therefore cannot conclude the evidence had a cumulative prejudicial effect on the outcome of Defendant's trial.

III. Conclusion

¶ 36 For the foregoing reasons, we conclude that the trial court did not prejudicially err in permitting Detective Lugo's testimony about his subsequent action following his interview with the non-testifying co-defendant and did not commit plain error by permitting the identification of Defendant from a leading question or by not delineating the specific items of stolen property in the jury instructions for felony larceny.

NO ERROR.

Chief Judge STROUD and Judge HAMPSON concur.

Report per Rule 30(e).