IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-779

Filed 19 March 2024

Iredell County, Nos. 21 CRS 51625–26

STATE OF NORTH CAROLINA

v.

DAVID ELIJAH BOYCE, Defendant.

Appeal by Defendant from judgment entered 14 December 2022 by Judge William R. Bell in Iredell County Superior Court. Heard in the Court of Appeals 21 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the State.

Stephen G. Driggers, PLLC, by Stephen G. Driggers, for Defendant-Appellant.

CARPENTER, Judge.

David Elijah Boyce ("Defendant") appeals from judgment after a jury convicted him of assault with a deadly weapon with intent to kill inflicting serious injury, discharging a weapon into occupied property, and illegally carrying a concealed weapon. On appeal, Defendant argues the trial court erred by instructing the jury on flight. Defendant also asks this Court to dismiss his ineffective-assistance-of-counsel

("IAC") claim without prejudice, thus allowing him to bring the claim through a motion for appropriate relief. After careful review, we disagree with Defendant concerning his jury-instruction argument, and we dismiss his IAC claim with prejudice.

I. Factual & Procedural Background

On 2 June 2021, an Iredell County grand jury indicted Defendant for attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, discharging a weapon into occupied property, and illegally carrying a concealed weapon. On 12 December 2022, the State began trying Defendant in Iredell County Superior Court.

Trial evidence tended to show the following. On 4 April 2021, Defendant and his sister drove to a convenience store. David Warren ("Victim") was inside the store when Defendant and his sister arrived. When Victim exited the store, Defendant's sister confronted Victim, and the two argued.

Defendant's sister bumped and slapped Victim, and Victim punched Defendant's sister. Defendant then shot at Victim, striking him with five bullets. One bullet fired by Defendant shattered the glass of the convenience store, which was occupied by a store employee. Without assisting Victim or calling for assistance, Defendant left the scene on foot.

During the charge conference, the trial court agreed to give an instruction on "flight." Defendant did not object. Concerning flight, the trial court instructed the jury as follows:

> The State contends that the defendant fled. Evidence of flight may be considered by you together with other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt.

On 14 December 2022, the jury found Defendant not guilty of attempted first-degree murder, guilty of assault with a deadly weapon with intent to kill inflicting serious injury, guilty of discharging a weapon into occupied property, and guilty of illegally carrying a concealed weapon. The trial court sentenced Defendant to between 104 and 137 months of imprisonment for assault with a deadly weapon with intent to kill inflicting serious injury, between 36 and 56 months, to run consecutively with Victim's first sentence, for discharging a weapon into occupied property, and to pay fines and costs of $1,205.50 for illegally carrying a concealed weapon. Defendant filed a timely written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issues

The issues on appeal are whether: (1) the trial court erred by instructing the jury on flight; and (2) the record suffices to rule on Defendant's IAC claim.

IV. Analysis

A. Flight Instruction

On appeal, Defendant argues the trial court erred by instructing the jury on flight. After careful review, we disagree.

"In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that issue." *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(b)(1)). In criminal cases, however, we will "review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citing *State v. Sierra,* 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994)). But an appellant must "specifically and distinctly" argue plain error for us to review for plain error. *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995) (citing N.C. R. App. P. 10(a)(4)).

Here, Defendant "specifically and distinctly" argued that the trial court committed plain error. So although Defendant failed to preserve his jury-instruction argument, we will nonetheless review the trial court's jury instruction for plain error. *See Gregory*, 342 N.C. at 584, 467 S.E.2d at 31; *Frye*, 341 N.C. at 496, 461 S.E.2d at 677.

To find plain error, this Court must first determine that an error occurred at trial. *See State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). Second,

Defendant must demonstrate the error was "fundamental," which means the error probably caused a guilty verdict and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *State v. Grice*, 367 N.C. 753, 764, 767 S.E.2d 312, 320–21 (2015) (quoting *State v. Lawrence*, 365 N.C. 506, 518–19, 723 S.E.2d 326, 334–35 (2012)). Notably, the "plain error rule . . . is always to be applied cautiously and only in the exceptional case . . . ." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

"Evidence of a defendant's flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt." *State v. King*, 343 N.C. 29, 38, 468 S.E.2d 232, 238 (1996). A trial court may instruct on flight if there is "some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997) (quoting *State v. Fisher*, 336 N.C. 684, 706, 445 S.E.2d 866, 878 (1994)). But "mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991).

Evidence that a defendant left the crime scene without helping the victim, plus additional evidence of avoidance, is enough to show that the defendant took steps to avoid apprehension. *See, e.g., State v. Taylor*, 362 N.C. 514, 540, 669 S.E.2d 239, 262

(2008) (holding that evidence of the defendant giving misleading statements about the crime scene and leaving the scene without rendering aid to the victim was enough to show avoidance of apprehension); *State v. Fisher*, 336 N.C. 684, 706, 445 S.E.2d 866, 878 (1994) (holding that evidence of the defendant taking off his jacket and leaving the scene without rendering aid to the victim to be enough to show avoidance of apprehension).

Here, there is no dispute that Defendant left the scene on 4 April 2021. The only dispute is whether Defendant "took steps to avoid apprehension." *See Thompson*, 328 N.C. at 490, 402 S.E.2d at 392. After shooting Victim, Defendant left the scene without helping Victim; Defendant also failed to call for help. Additionally, Defendant left the scene in a different way than he arrived: Defendant drove to the convenience store with his sister, but after shooting Victim, Defendant left alone on foot.

Accordingly, the trial court did not err by instructing the jury on flight because Defendant did not help Victim, Defendant left the scene, and Defendant left the scene in a different manner than he arrived. *See, e.g., Taylor*, 362 N.C. at 540, 669 S.E.2d at 262. Therefore, there is "some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *See Allen*, 346 N.C. at 741, 488 S.E.2d at 193. And because the trial court did not err, it did not plainly err. *See Towe*, 366 N.C. at 62, 732 S.E.2d at 568.

B. Ineffective Assistance of Counsel

Next, Defendant asks this Court to hold that "an ineffective assistance claim brought now would be premature, and to dismiss the claim without prejudice, allowing Defendant to bring the claim pursuant to a subsequent motion for appropriate relief in the trial court." On the other hand, the State argues that the record is sufficient to rule on Defendant's IAC claim and asks this Court to dismiss the claim with prejudice. We agree with the State.

We review IAC claims de novo. *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014) (citing *State v. Martin,* 64 N.C. App. 180, 181, 306 S.E.2d 851, 852 (1983)). Under a de novo review, this Court "'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

"IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001).

To establish IAC, a defendant must satisfy a two-part test. *See State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). First, a defendant must show that his trial counsel's performance was below an

objective standard of reasonableness. *Id*. at 561–62, 324 S.E.2d at 248. Second, the defendant must show that he was prejudiced by his counsel's unreasonableness; he must show that there was a reasonable probability of a different result but for his counsel's performance. *Id*. at 562–63, 324 S.E.2d at 248.

To satisfy the first *Strickland* prong, Defendant must show that his trial counsel's failure to object to the trial court's flight instruction was objectively unreasonable. *See id*. at 561–62, 324 S.E.2d at 248. On appeal, Defendant questions his trial counsel's strategy for not objecting to the trial court's flight instruction. But as we detailed above, the trial court appropriately instructed the jury on flight, *see Taylor*, 362 N.C. at 540, 669 S.E.2d at 262, so regardless of trial counsel's subjective strategy, not objecting to the flight instruction was reasonable, *see Braswell*, 312 N.C. at 562, 324 S.E.2d at 248.

Other than his trial counsel's alleged poor strategy, Defendant points to nothing else in the record that needs further development. Thus, the record is sufficient to rule on Defendant's IAC claim. *See Fair*, 354 N.C. at 166, 557 S.E.2d at 524. Therefore, because the record suffices to show that Defendant cannot satisfy the first *Strickland* prong, we dismiss Defendant's IAC claim with prejudice. *See Braswell*, 312 N.C. at 562, 324 S.E.2d at 248.

V. Conclusion

We hold that the trial court did not err by instructing the jury on flight, and we dismiss Defendant's IAC claim with prejudice.

NO ERROR.

Judges ARROWOOD and THOMPSON concur.

Report per Rule 30(e).