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NO. COA01-1041

NORTH CAROLINA COURT OF APPEALS

Filed: 16 July 2002

STATE OF NORTH CAROLINA

v.

Rockingham County
Nos. 99CRS003782-003787

DARRELL ANTHONY HERBIN, JR.

Appeal by defendant from judgments entered 26 August 1999 by Judge Michael E. Helms in Rockingham County Superior Court. Heard in the Court of Appeals 11 June 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Rudy E. Renfer, for the State.

Dow M. Spaulding and Christopher T. Watkins, for defendant-appellant.

HUNTER, Judge.

Darrell Anthony Herbin, Jr. ("defendant") appeals convictions for first degree burglary and five counts of robbery with a dangerous weapon. Defendant argues on appeal that the trial court erred in admitting the out-of-court statement of an unavailable witness, and that he received ineffective assistance of counsel. We find no error.

The State's evidence tended to show that in the early hours of 28 September 1998, four of the victims were playing video games at a residence in Eden, North Carolina. At approximately 1:00 a.m., four masked men armed with several firearms forced their way into

the residence and robbed the victims at gunpoint. During the robbery, a fifth victim, Wayne Clark, arrived at the residence in a van. Three of the gunmen came out of the residence, ordered Clark to lie on the ground, searched his pockets, and stole the keys to his vehicle.

In January 1999, defendant was interviewed by detectives regarding the robbery, and after waiving his constitutional rights, he confessed to being one of the gunmen. Defendant was indicted on 5 April 1999 for first degree burglary and five counts of robbery with a dangerous weapon. On 24 August 1999, the State filed a Written Notice of Intent to Offer Hearsay Evidence in which the State gave notice to defendant that it would be offering the out-of-court statement of Wayne Clark in the event that the court would declare Clark an unavailable witness under N.C. Gen. Stat. § 8C-1, Rules 803 and 804 (2001). The State provided defendant with the substance of Clark's statement which it intended to use. Defendant's trial commenced on 25 August 1999, and on 26 August 1999 the jury returned guilty verdicts on all counts. The trial court entered judgment thereon, sentencing defendant to a minimum of 80 months and maximum of 105 months in prison for each count. Defendant appeals.

Defendant brings forth two arguments on appeal. First, he argues that the trial court erred in allowing the State to introduce Clark's out-of-court statement under N.C. Gen. Stat. § 8C-1, Rule 804. In the statement, Clark described being robbed and confirmed that the gunmen stole his car keys. Under Rule 804, a

State may introduce hearsay statements of an unavailable declarant. A declarant may be deemed unavailable for various reasons, including that he "[i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance." N.C. Gen. Stat. § 8C-1, Rule 804(a)(5). The out-of court statement of an unavailable declarant may be admissible though hearsay where various criteria are met, including that the statement has circumstantial guarantees of trustworthiness. *State v. Isenberg*, 148 N.C. App. 29, 35, 557 S.E.2d 568, 572-73 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 288, 561 S.E.2d 268 (2002). The proponent of the statement must provide written notice stating its intention to offer the statement and must do so at a sufficiently early time "to provide the adverse party with a fair opportunity to prepare to meet the statement." N.C. Gen. Stat. § 8C-1, Rule 804(b)(5).

Defendant argues that the trial court erred in admitting Clark's statement because the State failed to give defendant sufficient notice of its intent to use the statement and because the trial court failed to make sufficient findings as to Clark's unavailability and the trustworthiness of the statement. Defendant fails to recognize that he stipulated at trial that the State provided adequate notice. Defense counsel responded affirmatively when asked whether defendant acknowledged that he received appropriate and timely notice. Additionally, as to Clark's status as unavailable, defense counsel stated that he "d[id] not doubt that [Clark] [wa]s unavailable" and that he "would accept" Clark's

status as unavailable. As we have previously noted, "[o]n appeal, [a] defendant cannot argue a matter he conceded at trial." *State v. Johnston*, 123 N.C. App. 292, 300, 473 S.E.2d 25, 31, *appeal dismissed and disc. review denied*, 344 N.C. 737, 478 S.E.2d 10 (1996); *see also State v. Garner*, 330 N.C. 273, 283, 410 S.E.2d 861, 866 (1991) (defendant cannot object on appeal to timeliness of State's notice of intent to use hearsay statement where defense counsel conceded at trial that notice was sufficient).

With respect to the trustworthiness of Clark's statement, defendant correctly notes that such a statement should not be deemed trustworthy solely on the basis of corroborating evidence offered at trial. *See State v. Tyler*, 346 N.C. 187, 200, 485 S.E.2d 599, 606, *cert. denied*, 522 U.S. 1001, 139 L. Ed. 2d 411 (1997). Rather, a trial court assessing whether such a hearsay statement is trustworthy should look to the following factors: "(1) assurance of personal knowledge of the declarant of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the testimony; and (4) the practical availability of the declarant at trial for meaningful cross-examination.'" *State v. Castor*, __ N. C. App. __, __, 562 S.E.2d 574, 580 (2002) (citation omitted). Statements may be admitted where supported "by particularized guarantees of trustworthiness based on the totality of the circumstances surrounding the making of the statement." *Tyler*, 346 N.C. at 200, 485 S.E.2d at 606.

In this case, although the trial court considered the presence of corroborating evidence in its analysis, the totality of the circumstances under which the statement was made support the trial court's determination of trustworthiness. The evidence established that Clark made the statement at the scene of the robbery shortly after it occurred, and that he was still "[s]haking," "[s]cared", and "upset" at the time he gave his statement. In his statement, Clark described only the events that he observed and which happened to him. There is no evidence that Clark ever recanted his statement. The trial court did not err in admitting Clark's statement under Rule 804.

Moreover, even if the trial court erred by failing to make specific findings to support its conclusion on the trustworthiness of Clark's statement, any error is harmless in light of the evidence supporting the trial court's conclusion and the existence of overwhelming evidence of defendant's guilt, including defendant's confession to being one of the robbers; the testimony of other victims that they observed Clark being held on the ground at gunpoint; and the testimony of an investigating officer who testified without objection that Clark expressed that his car keys had been stolen at gunpoint. See *State v. Daughtry*, 340 N.C. 488, 514, 459 S.E.2d 747, 760 (1995) (trial court's failure to make specific findings as to trustworthiness harmless beyond a reasonable doubt where record supports court's conclusion and where record contains overwhelming evidence of defendant's guilt), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996).

In his final argument, defendant maintains that he received ineffective assistance of counsel because his attorney stipulated that defendant received sufficient notice that the State intended to offer Clark's statement, and that Clark was unavailable within the meaning of N.C. Gen. Stat. § 8C-1, Rule 804. In order to establish a claim for ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficiency in performance was so serious that a reasonable probability exists that the result of the trial would have been different. *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488 (2002). "There is a presumption that trial counsel acted in the exercise of reasonable professional judgment." *Id.*

We hold that defendant has failed to show that his attorney's conduct was so lacking in reasonableness that it likely changed the result of his trial. Given that the State gave defendant notice of its intent to use Clark's statement prior to the commencement of trial, it was not wholly unreasonable for defense counsel to stipulate that it received sufficient notice. Moreover, it was also not wholly unreasonable for counsel to concede that Clark was unavailable, as the facts established that the State had repeatedly attempted to contact Clark prior to trial without success; that investigation revealed that Clark no longer lived at the address which the State had for him; that the other robbery victims indicated they had not seen Clark in several months and did not know his whereabouts; that Clark's mother indicated she had not

seen him in weeks and did not know his whereabouts; and that Clark had failed to appear on a pending charge in the district court of Surry County. In light of this evidence, we believe the trial court could reasonably have found that the State gave sufficient notice and that Clark was unavailable regardless of whether defense counsel conceded these issues. Accordingly, even if counsel's performance fell below an objective standard of reasonableness, defendant cannot establish the requisite prejudice. This assignment of error is overruled.

No error.

Judges GREENE and TIMMONS-GOODSON concur.

Report per Rule 30(e).