NO. COA01-1581

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

STATE OF NORTH CAROLINA

v. Rockingham County
Nos. 01 CRS 93-94

JOHNNY ORLANDO CAHILL

Appeal by defendant from judgment entered 24 July 2001 by Judge A. Moses Massey in Rockingham County Superior Court. Heard in the Court of Appeals 9 December 2002.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State

Osborn & Tyndall, P.L.L.C., by Amos Granger Tyndall, for defendant-appellant.

CAMPBELL, Judge.

On 5 March 2001, defendant was indicted for felonious breaking and entering, felonious larceny, and felonious possession of stolen goods. Defendant was also indicted as being an habitual felon. The case was tried at the 23 July 2001 Criminal Session of Rockingham County Superior Court.

The State presented evidence at trial which tended to show the following: On 4 January 2001, Sergeant Andrew Powell of the Madison County Police Department responded to the call of a

security alarm at U-Save Auto Lot. When he arrived, Sergeant Powell found that a window had been broken beside the back door and the door unlocked. The area was well lit, and Sergeant Powell noticed someone working under the dash of a 1983 white Toyota Celica. At the same time Sergeant Powell saw the person, the person looked up and saw him, removed something from his lap and started running with Sergeant Powell in pursuit. Eventually, the person, identified at trial as the defendant, fell to the ground, and Sergeant Powell restrained him. Officer Richard Rumley arrived, and noticed that defendant had an open knife in his hand. Officer Rumley put his foot on defendant's wrist, and defendant let go of the knife and was arrested. Officer Rumley read defendant his rights and searched him. While searching defendant, Officer Rumley retrieved a handful of keys, two knives and a watch.

Detective Shane Bullins arrived and inspected the office. Detective Bullins found that the window to the building was broken, and found several drops of blood on a small chair and on top of the desk inside. Detective Bullins testified that defendant's right hand was bleeding. Detective Bullins went to investigate the Celica, and found that somebody had tried to remove the car's stereo system. Also, Detective Bullins learned that several sets of keys were missing from the building, and found several sets of keys in the trunk of the car. The owner of the lot, Rubin Mitchell, identified the keys as being his property. Mitchell also testified that the knives found on defendant were knives Mitchell kept in his desk drawer and used as letter openers, and the watch

found on the defendant was also his.

Defendant testified that he approached the car lot at approximately 10:30 p.m., and noticed some people leaving the lot. As defendant got to the lot, he saw same car door open on a white Toyota Celica. Defendant stated that he thought the car belonged to a friend of his who worked at the lot. Defendant went to investigate, and saw keys on the ground, which he picked up so he could return them to his friend. Defendant then noticed that a stereo system was outside of the car, and knives were thrown all over the car. Defendant testified that somebody had "ramsacked[sic]" the car. Defendant then testified that he had a knife in his hand, because he thought he saw another individual who he feared was "trying to attack me or something." Defendant denied removing any item or property from the vehicle, and denied entering the building on the lot.

Defendant was convicted of breaking or entering, communicating threats, larceny after breaking or entering, and being an habitual felon. The offenses were consolidated for judgment and defendant was sentenced to a term of 120 to 153 months imprisonment. Defendant appeals.

We first consider whether the trial court erred by barring evidence of statements made by defendant to Detective Bullins explaining his possession of the stolen property. During Detective Bullins' testimony, defendant moved to introduce evidence of statements he made to Detective Bullins in which he explained how he discovered the keys. Detective Bullins had recorded defendant's

statements in his notes while investigating the crime. Defendant contends that the record of his statements made to Detective Bullins should have been admitted as an exception to the rule against hearsay since the statements were recorded in Detective Bullins' notes and reports as a regularly conducted activity. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2001). Defendant asserts that the statements were recorded by Detective Bullins at or near the time they were made based on an information for a person with knowledge. *Id.* Alternatively, defendant argues that the statements should have been admitted as a then existing mental, emotional or physical condition or excited utterance. N.C. Gen. Stat. § 8C-1, Rule 803(2) & (3) (2001). Defendant further argues that because the evidence was not admitted, he was forced to testify. We disagree.

First, "[t]he statement cannot be admitted under the 'Public Records and Reports' exception of N.C.G.S. § 8C-1, Rule 803(8), since that rule specifically excludes 'in criminal cases matters observed by police officers and other law enforcement personnel.'" *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988).

Second, an "excited utterance" is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C. Gen. Stat. § 8C-1, Rule 803(2) (2002). "For this statement to qualify as an excited utterance, 'there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.'" *Maness*, 321 at 459, 364 S.E.2d at 351 (quoting

State v. Smith, 315 N.C. 76, 86, 337 S.E.2d 833 (1985)). Here, defendant was in custody for thirty to forty minutes before telling Detective Bullins that he found the keys and planned to return them. The "interval between the event and the statement precludes the statement from being 'a spontaneous reaction, not one resulting from reflection or fabrication.'" *Id.* *See also State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988) (Defendant made statement over an hour after the crime was discovered, and the trial court properly could conclude that he had time to manufacture the statement and did not make it spontaneously), *sentence vacated and remanded for further consideration*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990).

Third, "[e]vidence tending to show the [declarant's] state of mind is admissible so long as the [declarant's] state of mind is relevant to the case at hand." *State v. Stager*, 329 N.C. 278, 314, 406 S.E.2d 876, 897 (1991). For example, "[i]n interpreting Rule 803(3), [our Supreme Court has] held that the rule allows the admission of a hearsay statement of a then-existing intent to engage in a future act." *State v. Ransome*, 342 N.C. 847, 851, 467 S.E.2d 404, 407 (1996) (citing *State v. McElrath*, 322 N.C. 1, 17-18, 366 S.E.2d 442, 451 (1988)). Here, the defendant's state of mind when he was arrested was not relevant. The statement was not made for the purposes of showing his state of mind, but was exculpatory in nature. Under these circumstances, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Accordingly, the assignment of error is

overruled.

We next consider whether the trial court erred by allowing the State to elicit evidence that defendant exercised his constitutional right to silence after being arrested and advised of his *Miranda* warnings. Detective Bullins testified that defendant told him he found the keys and was planning on holding them so they would not be stolen. Detective Bullins was then subjected to cross-examination as to what the defendant did and did not say. Specifically, the prosecutor asked Detective Bullins if defendant elaborated or gave any other explanation for his presence at the car lot, the items found in defendant's possession, or his intention to prevent the items from being stolen. Defendant contends that the prosecutor's questions regarding his post-arrest silence violated his constitutional rights.

After careful review of the record, briefs and contentions of the parties, we find no error. "The Supreme Court stated that the *Miranda* warnings contain an implicit assurance to a person who is given them that he will not be penalized for his postarrest silence." *State v. Mitchell*, 317 N.C. 661, 666, 346 S.E.2d 458, 461 (1986) (citing *Doyle v. Ohio*, 426 U.S. 610, 618, 49 L. Ed. 2d 91, 98 (1976)). "In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* In the case *sub judice*, however, defendant did not remain silent after being given *Miranda* warnings. Instead, defendant told Detective Bullins that he had found the keys, and

was going to give them back so they would not be stolen. "[A] defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." *State v. Westbrooks*, 345 N.C. 43, 65, 478 S.E.2d 483, 497 (1996) (citing *Anderson v. Charles*, 447 U.S. 404, 408, 65 L. Ed. 2d 222, 226 (1980)). "Therefore, any references to omissions or inconsistencies in statements defendant made after receiving [his] Miranda warnings were proper." *Id.* at 66.

Finally, the defendant argues the trial court erred by failing to consider and find mitigating factors submitted by him. We are not persuaded. Because defendant was found to be an habitual felon, he was sentenced as a Class C felon. N.C. Gen. Stat. § 14-7.6 (2001). Pursuant to G.S. 15A-1340.17, defendant was sentenced in the presumptive range as a Class C, Level IV felon, to a minimum 120 months imprisonment, and a corresponding maximum sentence of 153 months imprisonment. "A trial court is not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation." *State v. Campbell,* 133 N.C. App. 531, 542, 515 S.E.2d 732, 739, *disc. review denied,* 351 N.C. 111, 540 S.E.2d 370 (1999). "The court may deviate from the presumptive range of a minimum sentence. . .if it finds, pursuant to [N.C. Gen. Stat. §] 15A-1340.16, that aggravating or mitigating circumstances support such a deviation." *State v. Caldwell,* 125 N.C. App. 161, 162, 479 S.E.2d 282, 283 (1997). Accordingly, because the trial court sentenced defendant within the

presumptive range, and was not required to make written findings of aggravation or mitigation, we find no abuse of discretion.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).