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NO. COA01-444

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

STATE OF NORTH CAROLINA

v. Wake County
No. 99 CRS 26582

KEVIN OLIN SMITH

Appeal by defendant from judgment entered 24 June 1999 by Judge E. Lynn Johnson in Superior Court, Wake County. Heard in the Court of Appeals 12 February 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, for the State.

Peter Wood for defendant-appellant.

McGEE, Judge.

Kevin Olin Smith (defendant) was convicted of robbery with a dangerous weapon on 24 June 1999 and was sentenced to a term of ninety-five to one hundred and twenty-three months in prison. At trial, the State presented evidence that tended to show that Ray Charles (Charles) was in his apartment in Raleigh, North Carolina around noon on 4 March 1999. He answered a knock at his door, and three men forced their way into his apartment. Charles described two of the men as being "about [his] general height," around five feet ten inches tall, and the third man as being taller, roughly six feet or more. One of the men held him at gunpoint with a

shotgun while the other two ransacked his apartment. Charles managed to escape when the man holding the shotgun went into another room to see what the other two men were doing. Charles ran out of the apartment and asked a neighbor to call the police.

Charles looked back toward his apartment and saw the taller man and one of the shorter men running towards the woods. One of the men was carrying the shotgun. Charles also saw the third robber coming down the stairs of the apartment with a suitcase. Charles ran after the third robber and tackled him. After struggling with the man, Charles was able to subdue him with the help of a neighbor. The police arrived shortly thereafter.

Defendant's evidence tends to show that Amy Sue Deborde (Deborde) received a telephone call from defendant between 12:30 p.m. and 1:00 p.m. on 4 March 1999. Deborde testified that according to her caller ID, the telephone call came from defendant's house. She picked defendant up at his house at around 12:50 p.m., and the two drove to another friend's house and spent the remainder of the day together.

I.

Defendant first argues the trial court erred in allowing defendant's former attorney to testify, despite defendant not having waived the attorney-client privilege. Defendant contends he was unable to effectively cross-examine his former attorney and was unable to fully assert his right to cross-examine opposing witnesses. We disagree.

Defendant asserts that it "is an established rule of the

common law that confidential communications made to an attorney in his professional capacity by his client are privileged, and the attorney cannot be compelled to testify to them unless his client consents." *Dobias v. White*, 240 N.C. 680, 684, 83 S.E.2d 785, 788 (1954). However, "[t]he burden of establishing the attorney-client privilege rests upon the claimant of the privilege." *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 32, 541 S.E.2d 782, 791 (2001).

> "A privilege exists if (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated, and (5) the client has not waived the privilege."

State v. McIntosh, 336 N.C. 517, 523-24, 444 S.E.2d 438, 442 (1994) (quoting *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981)).

In the case before us, the testimony of defendant's former attorney did not contain any communication between defendant and his former attorney. As a result, the attorney-client privilege does not apply as to this testimony.

Defendant further argues that he was not able to properly cross-examine the witness for fear he might open the door for the State to present evidence of defendant's prior conviction. The "Sixth Amendment right to confront witnesses and cross-examine them is a fundamental right made applicable to the states by the

Fourteenth Amendment." *State v. Phillips*, 88 N.C. App. 526, 532, 364 S.E.2d 196, 199 (1988), *rev'd on other grounds*, 325 N.C. 222, 381 S.E.2d 325 (1989). However, defendant has failed to show how this right was violated by the trial court's allowing defendant's former attorney to testify. The trial court limited the testimony of defendant's former attorney to "issues involving corroborative evidence" regarding the testimony of the State's witness. The trial court also cautioned the State and defendant's former attorney "not to disclose those matters" involving defendant's prior conviction. With these limitations, the trial court did not err in allowing defendant's former attorney to testify to matters unrelated to the former attorney's representation of defendant. We overrule this assignment of error.

II.

Defendant next argues the trial court erred in failing to dismiss the charge of robbery with a dangerous weapon at the close of the State's evidence. Defendant contends the State failed to present evidence, when viewed in the light most favorable to the State, that defendant was the third gunman. We disagree.

When considering a motion to dismiss for insufficiency of the evidence, the trial court must "consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom." *State v. McNeil*, 280 N.C. 159, 161-62, 185 S.E.2d 156, 157 (1971). In reviewing a denial of a motion to dismiss based on insufficiency of the evidence, this Court's "test for sufficiency of the evidence

in a criminal case is whether there is substantial evidence of all elements of the offense charged that would allow any rational trier of fact to find beyond a reasonable doubt that the defendant committed the offense." *State v. Buckom*, 126 N.C. App. 368, 374, 485 S.E.2d 319, 323, *cert. denied*, 522 U.S. 973, 139 L. Ed. 2d 326 (1997). Our Supreme Court has held that the testimony of an accomplice is sufficient to sustain a conviction and to survive a motion to dismiss based on the insufficiency of the evidence, if the testimony produces convincing proof of the defendant's guilt. *See State v. Smith*, 237 N.C. 1, 15, 74 S.E.2d 291, 300 (1953).

In the case before us, the State presented evidence, through the testimony of an accomplice, that defendant participated in the crime charged. The State also presented evidence, through the testimony of the victim, that defendant matched the description of one of the suspects. We overrule this assignment of error.

III.

Defendant next argues the trial court committed prejudicial error when it explained to the jury the reason for the absence of one of defendant's witnesses. Defendant contends the trial court's explanation was unnecessary and unduly prejudiced the jury against him.

Defendant intended to call Deborde as an alibi witness in his defense. Deborde was present on the first day of trial; however, she was not present on the second day of trial when defendant was prepared to call her. Defendant explained to the trial court that Deborde might be present the following day. The trial court agreed

to hold the trial open for one additional day, but the trial court stated it would explain the witness's absence to the jury. Defendant objected. In the presence of the jury, the trial court stated the witness

> is under a court order to be here. She was here yesterday and for some unexplained reason has decided to go to Myrtle Beach, South Carolina. Her father . . . is making whatever communication he can with Ms. Deborde to put her on a bus to come back tonight . . . the Court is trying to bend over backwards to give [defendant] an opportunity to present whatever evidence he chooses to do so.

Defendant argues these comments prejudiced him because the trial court impeached the witness's credibility by making the witness seem immature and irresponsible.

> It is axiomatic, of course, that it is the lawful right of every litigant to expect utter impartiality and neutrality in the judge who tries his case and to have as well an equally unbiased and properly instructed jury. This right can neither be denied nor abridged. Any remark of the presiding judge made in the presence of the jury which has a tendency to prejudice the jury against the unsuccessful party may be grounds for a new trial.

Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 103, 310 S.E.2d 338, 344 (1984) (citations omitted). The trial court "must exercise extreme care to retain, and convey the appearance of retaining, a cold neutrality." *State v. Watson*, 1 N.C. App. 250, 252, 161 S.E.2d 159, 161 (1968).

However, because defendant "claims . . . he was deprived of a fair trial by the [trial court's] statements, he 'has the burden of showing prejudice in order to receive a new trial.'" *State v. Davis*, 353 N.C. 1, 41, 539 S.E.2d 243, 269 (2000), *cert. denied*, __

U.S. __, 151 L. Ed. 2d 55 (2001) (quoting *State v. Gell*, 351 N.C. 192, 207, 524 S.E.2d 332, 342, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000)). Furthermore, "'[w]hether the accused was deprived of a fair trial by the challenged remarks must be determined by what [was] said and its probable effect upon the jury in light of all attendant circumstances.'" *Davis*, 353 N.C. at 41, 539 S.E.2d at 269 (quoting *State v. Burke*, 342 N.C. 113, 122-23, 463 S.E.2d 212, 218 (1995)). In the case before us, defendant is unable to show he has been prejudiced by the trial court's statement. Even if Deborde's testimony was believed by the jury, it would have supported the jury's determination of guilt. Deborde testified defendant called her on her cell phone between 12:30 and 1:00 p.m. She then picked him up. However, the time periods Deborde testified to would still have allowed for defendant to commit the crime and flee to his home. While we believe the better practice would be for the trial court to refrain from such comments, the trial court in this instance committed no prejudicial error. We overrule this assignment of error.

IV.

Defendant next argues the trial court erred in failing to grant defendant's motion to dismiss the charge of robbery with a dangerous weapon. Defendant contends his alibi witness, Deborde, testified without impeachment that defendant called her from his home at 12:30 p.m. and that defendant was with her from 12:50 p.m. until nightfall. Thus, defendant reasons, Deborde's testimony provides him with an "airtight" alibi defense. However, as

discussed above, this alibi is not "airtight," as defendant had time to be at the crime scene when the crime was committed and still make it to his home by 12:30 p.m. Therefore, we overrule this assignment of error.

V.

Defendant next argues the trial court erred in failing to find any mitigating factors at defendant's sentencing hearing. Defendant contends he had strong ties to the community, but the trial court ignored this evidence. We disagree.

"Defendant must prove the existence of a mitigating factor by a preponderance of the evidence, and the trial court must find a statutory mitigating factor only if the evidence supporting it is substantial, uncontradicted, and manifestly credible." *State v. Applewhite*, 127 N.C. App. 677, 683, 493 S.E.2d 297, 301 (1997). In *Applewhite*, the defendant's mother and first cousin were present in the courtroom and announced that they were there supporting the defendant, but neither person actually lived in the same community as the defendant. A sister and a friend of the defendant did live in the same community; however, this Court held the "fact that these two people live in the same community as defendant, standing alone, does not mandate a finding that defendant has a support system in the community." *Id.*, 127 N.C. App. at 683-84, 493 S.E.2d at 301. In the case before us, defendant argues that he has proven a support system in the community by his mother's presence in the courtroom during the trial and her statement that she "love[s] [defendant] and . . . support[s] him whatever [the trial court's]

decision is[.]" However, as in *Applewhite*, we find this evidence is not "substantial, uncontradicted, and manifestly credible" to the extent that the trial court erred in not finding a mitigating factor. We overrule this assignment of error.

No error.

Judges GREENE and THOMAS concur.

Report per Rule 30(e).