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NO. COA01-899

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

STATE OF NORTH CAROLINA

v.

Union County
Nos. 00 CRS 1662, 1663, 5008

NEIL TAFFARIO WILLOUGHBY

Appeal by defendant from judgments entered 29 January 2001 by Judge Kimberly S. Taylor in Union County Superior Court. Heard in the Court of Appeals 13 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Vlahos & Vlahos, P.C., by Nicholaos G. Vlahos, for defendant-appellant.

TYSON, Judge.

I. Facts

The State's evidence tended to show the following: On 28 January 2000, Sharon Voiers ("Voiers") was working as a cleaning lady for Mr. and Mrs. Hartsell. While at the Hartsell residence, Voiers was unloading some items from her car into the house. When Voiers turned to shut the storm door there was a tall black male standing at the door with a newspaper in his hand. Voiers identified Neil Taffario Willoughby ("defendant") from a photographic lineup and at trial as the man at the door.

After Voiers informed defendant that she could not help him

with directions, defendant jerked the storm door open and pulled out a gun. Defendant told Voiers "Lady, if you do as I say, I will not harm you." Defendant then forced Voiers to a bedroom and instructed her to stand at the bedpost and put her hands behind her around the bedpost. Defendant proceeded to tie Voiers' hands with some telephone cords he pulled out of the wall. Defendant asked Voiers where her money was located and when Voiers told him that she did not have any money, defendant replied "[d]on't lie to me." Defendant asked Voiers where her purse was located and Voiers told him that it was in her car. Defendant retrieved Voiers' purse from her car. Defendant untied Voiers and told her to get the money out. Voiers gave defendant eleven dollars in cash, her ATM card, and her PIN number.

Three other individuals testified for the State that they were robbed by defendant in a similar fashion. Defendant testified at trial and denied any involvement in the robberies.

Defendant was tried on indictments for robbery with a dangerous weapon, first-degree kidnapping, felonious breaking and entering, felonious larceny, and felonious possession of stolen goods. The jury returned a verdict of guilty of all charges. Defendant appeals. We find no error.

II. Issues

The sole assignment of error argued in defendant's brief is whether the trial court erred in admitting improper hearsay testimony of Detective William Guild with respect to why defendant's photograph was included in the photographic lineup.

Defendant's remaining assignments of error that are not argued are deemed abandoned. See N.C.R. App. P. 28(b)(5) (2001).

III. Hearsay Testimony

Defendant assigns error to the trial court's allowance of testimony from Detective William Guild ("Detective Guild") in explanation of why defendant's picture was included in the photographic lineup shown to the victims. Defendant argues that Detective Guild's testimony included inadmissible hearsay statements of witnesses and unauthenticated documents. Defendant moved for a mistrial and then a motion to strike the entire testimony of Detective Guild. The trial court denied both motions and held that the testimony was "to show cause or the reasons why they focused on [defendant] and placed his photographic lineup [sic], not for the truth of the matter asserted."

The testimony by Detective Guild was as follows:

Q. How did you arrive at putting [defendant's] photo in the photographic lineup?

. . . .

A. In Mrs. Moore's case, a cell phone was -- was stolen. We subpoenaed her --

. . . .

THE WITNESS: We subpoenaed her phone records for the cell phone. And from the date forward from when it was stolen, we got the phone numbers that were used on the phone. We proceeded to start making phone calls, driving, whatever needed to be to the residences that these phone calls came back to. We spent two days down here in Union County tracking down these phone numbers. One name kept coming up time and time again.

. . . .

THE WITNESS: By the name of Jonathan Rorie. .
. . Warrants were signed on Jonathan Rorie
for possession of stolen property.

Q. That being a cell phone?

A. Yes, ma'am. We knew that or we felt that
Jonathan Rorie was not the perpetrator in this
crime.

. . . .

THE WITNESS: Because Jonathan Rorie is about
five foot five.

. . . .

THE WITNESS: We were then notified --

. . . .

THE WITNESS: We -- the Monroe Police
Department notified us later that the warrant
had been served on Jonathan Rorie.

. . . .

THE WITNESS: Myself and Investigator Waters
came to the Union -- I'm sorry, Monroe Police
Department and interviewed Jonathan Rorie. He
informed us that --

COUNSEL: Objection. Hearsay.

THE COURT: Is Mr. Rorie going to be
testifying?

COUNSEL: No, Your Honor.

THE COURT: Sustained.

Q. Based on some information that you had
received, what did you do?

. . . .

A. Talked to the person he got the phone
from, and who in turn gave us the person he
got the phone from.

Q. And did all that lead you to --

. . . .

COUNSEL: -- find [defendant]?

. . . .

A. Yes. The last person that has used the phone told us that she had stayed at a hotel on Highway 74.

COUNSEL: Objection. Hearsay.

THE COURT: Well, you can't testify what she said unless she's going to be testifying.

THE WITNESS: Yeah. We went to a motel on Highway 74. And there was a registration with the name Neil Willoughby on it.

The North Carolina Rules of Evidence define "hearsay" 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." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2001). Out-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed. *State v. Coffey*, 326 N.C. 268, 282, 389 S.E.2d 48, 56 (1990).

In the present case, Detective Guild's testimony was not offered to prove the truth of the matter asserted, but rather to explain his subsequent actions. This testimony was permissible so that the jurors would understand why defendant was a suspect and included by Detective Guild in the photographic lineup. This testimony was proper nonhearsay evidence. The trial court did not err in admitting it into evidence. Even if inclusion of Detective

Guild's testimony was erroneous, it would be harmless error in light of the overwhelming evidence against defendant. See *State v. Autry*, 321 N.C. 392, 403, 364 S.E.2d 341, 348 (1988) (holding overwhelming evidence of a defendant's guilt may render constitutional error harmless).

No error.

Chief Judge EAGLES and Judge McGEE concur.

Report per Rule 30(e).