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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-162

Filed: 3 October 2017

Richmond County, No. 15 CRS 50942

STATE OF NORTH CAROLINA

v.

JAMES WILBERT THOMAS, JR., Defendant.

Appeal by Defendant from judgment entered 15 September 2016 by Judge Claire V. Hill in Richmond County Superior Court. Heard in the Court of Appeals 25 September 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Neal T. McHenry, for the State.*

*Hollers & Atkinson, P.C., by Russell J. Hollers, III, for Defendant-Appellant.*

MURPHY, Judge.

James Wilbert Thomas, Jr. (“Defendant”) appeals from judgment entered upon his conviction for assault with a deadly weapon with intent to kill inflicting serious injury (“AWDWIKISI”). On appeal, Defendant argues the trial court committed plain error by allowing a State’s witness to vouch for the victim’s credibility. After review, we find no error.

**Background**

On 11 April 2015, sometime around 3:00 a.m., David Ingram, Jr., drove to Cherokee Street in Richmond County. Ingram, along with his cousin and another friend, had been at Ingram's aunt's house "[d]rinking, play[ing] cards and stuff." Defendant was at Cherokee Street. After Ingram parked his car, Tyrania Ellerbe approached in her car. Ellerbe accused Ingram of running her off of the road. Ingram and Ellerbe began arguing, and Ingram accused Ellerbe of "trying to get insurance money[.]" Ingram's claim angered Ben Wall, who was both Ellerbe's and Ingram's cousin. Consequently, Wall became embroiled in the dispute. Defendant "wasn't around" during this argument. Ellerbe threatened to call the police and block Ingram's car so he could not leave.

Ingram and his companions began walking away towards his uncle's "liquor house" in order to "hang out and drink." As they left, Wall fired a gun into the air. Ingram and his companions continued walking, and Defendant, Wall, and a third man followed them. After walking a short distance, Defendant rushed up to Ingram's side while holding a gun. Ingram said to Defendant, "if you're going to shoot me, go ahead and shoot me." Defendant responded, "You think I ain't no killer?" Ingram stated that Defendant then pointed the gun directly to his back and pulled the trigger. After Ingram fell to the ground, Defendant stood over Ingram with the gun in his hand. Ingram told Defendant, "You just paralyzed me. Don't shoot me again." Defendant presented no evidence.

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The jury convicted Defendant of AWDWIKISI. The trial court sentenced Defendant to a term of 58 to 82 months of imprisonment. Defendant gave notice of appeal in open court.

**Analysis**

Defendant's sole argument on appeal is that the trial court committed plain error by allowing the State's witness, Captain Donald Childers, to improperly vouch for Ingram's credibility at trial.

To preserve an issue for review on appeal, a defendant "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2016). However,

[i]n criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4). Here, Defendant did not object to Childers's testimony, and, thus, we review Defendant's argument under plain error analysis.

Our Supreme Court has stated:

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because

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plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (citations, and quotation marks omitted).

At trial, Childers testified that he swore out a warrant for Defendant's arrest. The State asked Childers, "When you went down there and swore out a warrant, what did you base your probable cause on?" Childers responded, "Mr. Ingram's statement." Defendant contends that this portion of Childers's testimony constituted impermissible bolstering of Ingram's credibility. Specifically, Defendant argues that because Childers's testimony that Ingram's statement was the sole basis upon which he swore out a warrant for Defendant's arrest, the testimony implicitly informed the jury that Childers believed Ingram was telling the truth. Defendant further asserts that admission of Childers's testimony constituted plain error in light of the dearth of evidence linking Defendant to the shooting.

Defendant cites *State v. Giddens* 199 N.C. App. 115, 681 S.E.2d 504 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010) in support of his argument that Childers's testimony constituted impermissible opinion testimony. *Id.* at 121, 681 S.E.2d at 508 ("Our case law has long held that a witness may not vouch for the credibility of a victim.") (citations omitted). In *Giddens*, this Court considered whether the trial court committed plain error by allowing a child protective services

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investigator with the Buncombe County Department of Social Services to testify that her investigation had substantiated the defendant as the perpetrator of sexual abuse alleged by two minor children. *Id.* at 119, 681 S.E.2d at 507. This Court held that the testimony was “clearly improper” because:

[The investigator]’s testimony that DSS had “substantiated” Defendant as the perpetrator, and that the evidence she gathered caused DSS personnel to believe that the abuse alleged by the children did occur, amounted to a statement that a State agency had concluded Defendant was guilty. . . . Although [the investigator] was not qualified as an expert witness, [investigator] is a child protective services investigator for DSS, and the jury most likely gave her opinion more weight than a lay opinion.

*Id.* at 121-22, 681 S.E.2d at 508. Consequently, we held that it was plain error to admit the investigator’s testimony because “without [the investigator]’s testimony, the jury would have been left with only the children’s testimony and the evidence corroborating their testimony.” *Id.* at 123, 681 S.E.2d at 509.

However, Defendant’s reliance on *Giddens* is misplaced. Whereas in *Giddens* the DSS investigator substantiated the victim’s testimony, Childers’s testimony contained no such substantiation. When viewing the testimony in context, Childers was merely explaining the process for obtaining a warrant for Defendant’s arrest, and the basis for finding probable cause to arrest Defendant.<sup>1</sup> *See State v. Martin*, 315 N.C. 667, 677, 340 S.E.2d 326, 332 (1986) (“North Carolina has previously accepted a

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<sup>1</sup> Defendant did not argue on appeal that such testimony was not relevant, and it is not our duty to create an appeal for Defendant. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

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victim's description as sufficient identification to establish probable cause."); *see also State v. O'Hanlan*, 153 N.C. App. 546, 562-63, 570 S.E.2d 751, 761-62 (2002), *cert denied*, 358 N.C. 158, 593 S.E.2d 392, 397-98 (2004) (police detective's testimony was not considered impermissible bolstering because, when viewed in context, it made "clear [the detective] was not offering his opinion that the victim had been assaulted, kidnapped, and raped by defendant, but [instead] was explaining why he did not pursue as much scientific testing of physical evidence in this case as he would a murder case because the victim in this case survived and was able to identify her assailant. . . . His testimony was helpful to the fact-finder in presenting a clear understanding of his investigative process.").

We conclude that Childers's testimony did not constitute impermissible bolstering. Accordingly, we conclude that the trial court did not err in admitting Childers's testimony.

**Conclusion**

For the reasons stated above, we find no error.

NO ERROR.

Judges CALABRIA and TYSON concur.

Report per Rule 30(e).