IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-498

Filed 16 April 2024

Mecklenburg County, Nos. 19CRS247338, 19CRS247340

STATE OF NORTH CAROLINA

v.

IBRAHIYM EARNELL, Defendant.

Appeal by defendant from judgment entered 28 October 2022 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 November 2023.

Attorney General Joshua H. Stein, by Assistant Attorney General Yvonne B. Walker, for the State-appellee.

Holladay Law Office, by Sarah Holladay, for defendant-appellant.

GORE, Judge.

Defendant, Ibrahiym Earnell, seeks appeal of his judgment for assault by strangulation. Defendant raises two evidentiary issues and one ineffective assistance of counsel issue. Upon review of the record and the briefs, we discern no prejudicial error.

I.

On 10 December 2019, Officer Walker was providing nightly security for a substance abuse treatment center when he overheard screaming in the parking lot. Officer Walker saw a woman, later identified as Laura James, defendant's girlfriend ("the victim"), standing outside of a car yelling at a man (defendant) who was still inside the car. Officer Walker witnessed the victim throwing something and saw defendant emerge from the vehicle and walk toward the victim before he lost sight of them. Officer Walker radioed the police department to request assistance and approached the vehicle. He discovered defendant on top of the victim (on the ground) and tased defendant to safely get defendant's body off the victim.

Multiple officers arrived and helped restrain defendant while the victim moved over to a nearby bus stop shelter with other officers. Officer Walker's body camera recording was admitted into evidence. Officer Hansford arrived after other officers had already restrained defendant; Officer Hansford talked to the victim at the nearby bus station. Officer Hansford asked the victim what happened, if defendant put his hands on her neck, if defendant had hurt her in the past, and asked her about her injuries. Officer Hansford's body camera recording of this questioning was admitted into evidence despite defendant's multiple objections. Officer Hansford is heard at the end of the video stating, "I believe she said she does not want to go to the hospital, but she needs pictures taken of her."

The victim was evaluated by medical providers at the hospital and later by a forensic nurse, who testified at trial concerning the forensic evaluation. The forensic

nurse took pictures of the victim's injuries, prepared an extensive forensic report, and evaluated the victim from head to toe. Prior to the forensic nurse's evaluation, she had the victim sign a consent form labeled "Forensic Medical Exam and Evidence–Authorization to Disclose Protected Health Information." The form stated, "I understand that a forensic medical exam is done to document any injuries I may have and to collect evidence for a possible criminal investigation," and "I understand I can refuse the forensic exam and evidence collection. . . . I can still get treatment for my injuries even if I decide I do not want the forensic exam."

Defendant was indicted with assault on a female and assault by strangulation and pled not guilty. The State subpoenaed the victim to testify, and she was present at trial. The State decided not to call the victim as a witness under the assumption it could admit the victim's prior statements to Officer Hansford and the forensic nurse through non-testimonial hearsay exceptions. Defendant objected during trial to admission of Officer Hansford's body camera arguing it was hearsay and would violate defendant's confrontation right.

The forensic nurse was qualified as an expert in forensic nursing and emergency department nursing. The forensic nurse testified the victim told her defendant strangled her; the forensic nurse provided extensive testimony of what the victim stated. The forensic nurse also explained what injuries she discovered while evaluating the victim and provided her medical expertise as to how these types of injuries could occur. Defense cross-examined the forensic nurse regarding both her

own testimony of what she personally observed and evaluated, her expert opinion, and what she testified the victim told her. Over defendant's objections, the trial court allowed admission of the pictures for illustrative purposes to the forensic nurse's testimony, admission of the nurse's partially redacted forensic report to corroborate her testimony, and admission of the forensic nurse's testimony about what the victim told her for substantive purposes.

During closing arguments, defense counsel made the following statements:

> Mr. Earnell has been charged with assault on a female. The indictment charged him with "by slamming her to the ground and grabbing her neck." He has also been charged with assault by strangulation "by grabbing the victim by the neck and applying pressure." All the State described about the punching *et. cetera*, that is evidence of assault on a female. You need more for assault by strangulation. . . . All they have is he placed his hands on the neck, punched, hit, and all that. Those qualify as assault, but you need more for strangulation. You don't have that.
> . . . At the end of it, I will ask you to return . . . verdicts of not guilty for my client especially because you haven't heard from the alleged witness. And when you go back to your jury deliberations, remember I said that placing a hand on someone's neck is an assault, but more is necessary for strangulation to occur. The State has not met that burden. If you think he was proven not guilty, the verdict is not guilty. If you think it is highly unlikely, especially because Ms. James is not here, the verdict is not guilty. . . . . I think he's probably guilty of assault on a female but I am not fully convinced, based on the evidence presented, or entirely convinced beyond a reasonable doubt of his guilt, it is not guilty. . . . . I think he may not be guilty, especially because we did not hear from Ms. James. It's a not guilty verdict. I don't really know if he's guilty, especially because we don't have all the medical records. We don't have the ER records. It's not guilty. . . . . I think he is probably guilty is not proved beyond a reasonable doubt. That is a not guilty verdict. I think guilt is likely is a not guilty verdict. I think guilt is highly likely is also a not guilty verdict. Only if you are fully satisfied and entirely convinced based on the evidence presented and 12 of you agree are you to return a

> verdict of guilty. But we think based on the evidence presented thus far, that the only verdict in this case is a not guilty verdict.

During deliberations, the jury sent five notes for the trial court's guidance, and ultimately returned guilty verdicts for both charges. The trial court arrested judgment of the assault on a female conviction and sentenced defendant to a suspended judgment of thirty months supervised probation with an intermediate punishment of 120 days imprisonment. Defendant orally and timely appealed the judgment.

II.

Defendant appeals of right pursuant to N.C.G.S. sections 7A-27(b) and 15A-1444(a). Defendant seeks review of the following issues: (1) whether the trial court erred by admitting the victim's hearsay statements made to a police officer under the excited utterance exception and in violation of the Confrontation Clause; (2) whether the trial court erred by admitting the victim's hearsay statements made to the forensic nurse under the medical diagnosis exception in violation of the Confrontation Clause; and (3) whether defense counsel provided ineffective assistance of counsel through her closing statements to the jury. Defense does not challenge the forensic nurse's qualification as an expert witness, nor does defense challenge the admission of the expert witness's testimony of her own observations and expert opinion of the physical evaluation. Defendant argues this Court should grant a new trial, and

alternatively, remand for an evidentiary hearing on the ineffective assistance of counsel claim. We disagree.

A.

Defendant argues the trial court erred by admitting Officer Hansford's body camera for substantive purposes, because it included the victim's out-of-court statements made to Officer Hansford about the incident. He argues that it is both a hearsay violation because the statements were not excited utterances, and the statements were a violation of his confrontation rights. Defendant argues even if the trial court correctly applied the excited utterance exception, the victim's statements should still have been excluded as a confrontation rights violation because the victim was available to testify but the State chose not to call her as a witness. We review challenges to the trial court's admission of evidence under a hearsay exception de novo. *State v. Lowery*, 278 N.C. App. 333, 336 (2021).

i.

> Hearsay is 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. Generally, hearsay is not admissible, except as provided by statute. One such exception are statements that may be classified as excited utterances. Excited utterances are defined by statute as statements relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. In order to fall within this hearsay exception, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.

Id. (quoting N.C. R. Evid. 801(c), 802, 803(2)) (cleaned up).

Although defendant argues the trial court erred by admitting both Officer Hansford's testimony of what the victim told her and the body camera video with the victim's statements, he provides no support for these arguments. He simply says the trial court erred by admitting these statements. Immediately after, he "assumes *arguendo* that this hearsay was admissible under an exception to the rule" and cites to the present sense impression hearsay exception and the excited utterance hearsay exception. *See* N.C. R. Evid. 803(2), (3). It would appear defendant concedes that the excited utterance or present sense impression exceptions were proper. Accordingly, we consider the Confrontation Clause challenge.

ii.

We review challenges to the Confrontation Clause de novo. *State v. Garner*, 252 N.C. App. 393, 400 (2017). The Confrontation Clause within the Sixth Amendment of the United States Constitution provides every defendant with the right to confront the witnesses brought against him; this right is imputed to the States through the Fourteenth Amendment. *State v. Calhoun*, 189 N.C. App. 166, 169 (2008); *see also* N.C. Const. art. I, § 23 ("[E]very person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses . . . .").

"A violation of the Confrontation Clause occurs when a testimonial statement from an unavailable witness is introduced against a defendant who did not have a prior opportunity to cross-examine the declarant." *Garner*, 252 N.C. App. at 400.

These three parts to the Confrontation Clause exception are not factors for balancing, instead,

> the trial court must *first* make a determination of whether the relevant evidence is testimonial in nature; *if* the trial court determines that the evidence is testimonial, *then* it must determine whether the declarant witness is unavailable for trial; *only* upon finding in the affirmative for the first two inquiries must the trial court make a determination concerning the defendant's prior opportunity to cross-examine the declarant witness.

State v. Clonts, 254 N.C. App. 95, 126 (2017), *aff'd*, 371 N.C. 191 (2018). The burden is upon the State to prove each of these "separate and sequential" steps. *Id.*, *see State v. Locklear*, 363 N.C. 438, 452 (2009) ("The State failed to show that either witness was unavailable to testify or that defendant had been given a prior opportunity to cross-examine them."). We now apply this precedent to the instant case.

The State argued, and the trial court agreed, that the victim's statements were non-testimonial, and therefore, the admission of these statements did not violate defendant's right to confront the victim. Conversely, defendant argues the statements were testimonial, because they were made to the police officer for the purpose of investigation and any exception, such as an ongoing emergency, was already resolved. In support, defendant points to *Davis v. Washington*, while the State points to *Michigan v. Bryant*.

In *Davis*, the United States Supreme Court considered two cases involving domestic abuse. 547 U.S. 813 (2006). The *Davis* Court articulated the Confrontation Clause standard, as stated within the seminal case of *Crawford v. Washington*, that

distinguishes between testimonial and non-testimonial statements. 547 U.S. 813, 821–22 (2006). The *Davis* Court expounded upon the distinction between what is testimonial and what is non-testimonial. *Id.* at 822. It held,

> [s]tatements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. The *Davis* Court considered two domestic abuse situations, one in which the trial court admitted statements made to a 911 operator, and one in which the trial court admitted statements made to a police officer "at an alleged crime scene." *Id.* at 826–27, 829–30, 832. The *Davis* Court concluded the primary purpose behind the statements made to the 911 operator were to "enable police assistance to meet an ongoing emergency," and the primary purpose behind the statements made to the officer at the alleged crime scene "was to investigate a possible crime." *Id.* at 828, 830. The *Davis* Court discussed multiple grounds for distinguishing between testimonial and non-testimonial statements: "speaking about events *as they were actually happening*, . . . that there was an ongoing emergency, that the elicited statements were necessary to be able to *resolve* the present emergency, and that the statements were not formal"; as opposed to testimonial statements: that described what happened, that lacked an ongoing emergency, that appeared formal in

questioning (by separating the victim from the defendant), and that lacked statements to "end a threatening situation." *Michigan v. Bryant*, 562 U.S. 344, 355–57 (2011) (internal quotation marks and citations omitted) (discussing what the *Davis* Court articulated).

In *Bryant*, the Court considered whether the statements made by a gunshot victim were testimonial. *Id.* at 370–78. Key to the *Bryant* Court's determination was that the police lacked information as to "why, where, or when the shooting . . . occurred." *Id.* at 375–76. The questions the police asked, "were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public." *Id.* at 376 (cleaned up). The *Bryant* Court held "because the circumstances of the encounter as well as the statements and actions of the victim and the police objectively indicate that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency," the victim's statements were non-testimonial. *Id.* at 377–78 (cleaned up).

Having discussed *Davis* and *Bryant* at length, we now consider whether the victim's statements to the police officer were testimonial in nature. Defendant points to the following evidence: the victim's description of past events, Officer Hansford's statement, "You're OK. You're OK. It's all over," Officer Hansford's questioning at a bus stop shelter away from defendant, defendant's restraint at the time, a secured the scene by multiple officers, and defendant unarmed. The State points to the

following evidence: the officer called for assistance to secure the scene in a domestic altercation, the questioning involved what happened to the victim and who assaulted her, the victim's injuries to her face and her shaken state; and the informality of the questioning because it was in a public space and somewhat disorganized. We agree with defendant that the questioning was similar to *Davis* and distinguishable from *Bryant*.

In the present case, there was no longer any ongoing emergency. Unlike *Bryant*, defendant had already been apprehended and restrained by handcuffs and multiple officers. Although the victim was still under the stress of the event, the questions were describing what happened rather than what was happening. Although the questioning was in a public space, it was away from the incident, away from defendant, and in a bus shelter space allowing the victim to collect herself and provide the police with information of any crime committed. The victim was no longer threatened with danger. The questioning did not appear focused on assisting in an ongoing emergency or preventing danger to the public. *See generally*, *State v. Lewis*, 361 N.C. 541, 548 (2007) (listing the similarities of the case with the *Davis* case to demonstrate the statements to the officer were testimonial in nature). Accordingly, we determine the victim's statements were testimonial in nature, because the questioning of the victim, "objectively indicate[s] that no ongoing emergency existed and that the primary purpose of the interrogation was to establish or prove past events potentially relevant to a later criminal prosecution." *Id.* at 548–49.

As discussed at length, once it is determined the statements are testimonial, the State must prove the witness was unavailable at trial. *See State v. Allen*, 265 N.C. App. 480, 483 (2019) ("[O]ur courts have held that finding witnesses unavailable for the purposes of the Confrontation Clause requires a finding that the prosecutorial authorities have made a good-faith effort to obtain [the declarant's] presence at trial."). In the present case there is no ruling by the trial court that the victim was unavailable because she was present at trial. The State subpoenaed the victim, and communicated its surprise that she was present at trial. However, the State determined it did not need to call her because it was confident her statements were admissible as a hearsay exception and as non-testimonial in nature. Based upon this record evidence, the State violated defendant's Confrontation rights by admitting testimonial statements without complying with the sequential steps of the Confrontation Clause exception analysis.

Having determined defendant's confrontation rights were violated, we now consider whether the admission of those statements was prejudicial. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless . . . it was harmless beyond a reasonable doubt." *Lewis*, 361 N.C. at 549 (quoting N.C.G.S. § 15A-1443(b) (2005)). The State has the burden to demonstrate the constitutional error was harmless. *State v. Garnett*, 209 N.C. App. 537, 545 (2011). "The presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *Id.* (citation omitted).

In the present case, the overwhelming evidence would cause a reasonable jury to come to the same conclusion the jury came to, that defendant was guilty of assault by strangulation. Placing the erroneously admitted statements to the side, the jury would still have the testimony of the officer who witnessed the assault, the testimony of the expert witness describing what she discovered upon her examination of the victim, her expert opinions based upon the examination, and the testimony from the officer who questioned the victim regarding how the victim looked and acted. Such overwhelming evidence would result in a reasonable jury rendering a guilty verdict. Accordingly, any error by the trial court was harmless beyond a reasonable doubt.

B.

Next, defendant takes issue with the admission of the victim's statements made to the expert witness, a forensic nurse. Defendant argues the statements did not qualify as a proper hearsay exception and even if the trial court determined they did, the statements were testimonial and violated his Confrontation rights. The State argues the statements were properly admitted under the medical diagnosis hearsay exception, and that the statements did not violate defendant's confrontation rights because they were non-testimonial.

As previously stated, we review challenges to hearsay exceptions de novo. The trial court admitted the victim's statements to the forensic nurse under the N.C. Rules of Evidence 803(4) exception. Rule 803(4) allows admission of hearsay

statements that are made for the purpose of medical diagnosis or treatment. N.C. R. Evid. 803(4).

> [H]earsay evidence is admissible under Rule 803(4) only when two inquiries are satisfied. First, the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment. The trial court may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent. Second, the trial court must determine that the declarant's statements were reasonably pertinent to medical diagnosis or treatment.

State v. Hinnant, 351 N.C. 277, 289 (2000).

Defendant argues the victim was evaluated and treated by medical providers prior to the forensic evaluation and that there was no additional treatment nor testing as a result of the forensic evaluation. After reviewing the record, we agree with defendant.

The State does not demonstrate that either inquiry under Rule 803(4) was met. The medical reports in the record have time stamps verifying defendant's argument that the victim was first treated by medical providers before the forensic evaluation. The medical notes state the victim was to receive a forensic evaluation under the section labeled, "Police and social work involvement." Additionally, the forensic report includes a consent form notifying the victim that the purpose for the evaluation is to "document any injuries . . . and to collect evidence for a possible criminal investigation." It also states, "the results of the forensics exam and the pictures and things collected . . . during the exam may be used as evidence in a criminal

investigat[ion] and/or in court." Finally, the consent form states the victim may refuse the forensic exam and that she will still be treated for her injuries. Based upon this record evidence, the trial court erred by admitting the hearsay statements under the medical diagnosis or treatment exception.

Although defendant also argues the admitted forensic evaluation victim statements violated his confrontation rights, we do not consider any Confrontation Clause violation. Having determined the trial court erred in admitting the statements under a hearsay exception, it is unnecessary to consider the Confrontation Clause. Instead, we consider whether the admission of the hearsay statements prejudiced defendant.

Even when the trial court erroneously admits hearsay statements, the burden lies with defendant to demonstrate the error was prejudicial. *State v. Hickey*, 317 N.C. 457, 473 (1986). The error is prejudicial when "a different result would have been reached at trial if the error had not been committed." *Id.* Putting aside the victim's statements to the forensic nurse, the following evidence is still available: the other medical providers' documentation regarding the victim's injuries and medical diagnosis, the forensic nurse's personal knowledge of the victim's injuries from her evaluation, and the forensic nurse's expert opinion of the medical significance of these injuries. Accordingly, there is sufficient and overwhelming evidence to determine defendant was not prejudiced by the erroneously admitted hearsay statements beyond a reasonable doubt.

C.

In his final issue raised, defendant argues his counsel provided ineffective assistance of counsel by conceding defendant's guilt of the assault on a female charge during closing arguments. He argues this was a violation of *State v. Harbison*. 315 N.C. 175, 180 (1985) ("We conclude that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent."). However, the trial court arrested judgment of the assault on a female conviction. Therefore, we determine defendant's argument is moot.

Notwithstanding defendant's moot argument, we elect to address defendant's reliance upon *State v. McAllister* because defendant orally argued a *Harbison* error impacts the remaining judgment. Defendant relies upon *State v. McAllister* to support his argument that defense counsel impliedly conceded defendant's guilt. 375 N.C. 455, 474–76 (2020). In *McAllister*, our Supreme Court pointed to three concerns with defense counsel's closing argument: (1) defense counsel affirmed the truthfulness of defendant's confession during police questioning; (2) defense counsel inserted personal opinions that the defendant "did wrong" and "God knows he did"; and (3) defense counsel only asked the jury to acquit defendant of some of the charges and excluded the assault on the female charge. *Id.* at 474. While we agree that some of defense counsel's statements in the present case appear concerning on their face,

when we look to the context of those statements, we determine they do not rise to the level of a *McAllister* error.

Defense counsel discussed assault within the context of arguing the evidence was lacking for assault by strangulation, requested the jury acquit defendant of both charges, and sought to cast doubt on both charges, unlike defense counsel in *McAllister*. Additionally, some confusion appears to arise from defense counsel speaking from a first-person point of view to explain how the jury might consider the weight of the evidence. The use of first-person point of view in that portion of the closing statement could create the appearance of a guilt concession if read from an alternative point of view. Finally, the trial court arrested judgment of the assault on a female conviction, and our determination of no prejudicial error with the assault by strangulation conviction moots defendant's challenge of ineffective assistance of counsel.

Generally, when a trial court arrests judgment on a verdict the purpose is either: "(1) to vacate the underlying judgment, or (2) to withhold the entry of judgment based on a valid jury verdict." *Garner*, 252 N.C. App. at 397. Trial courts are required to arrest judgment when the defendant is convicted of both a misdemeanor assault and a felony assault from the same incident. *See State v. Fields*, 374 N.C. 629, 633–34 (2020). Our Supreme Court previously explained in *Fields* the reasoning behind this rule is because of the "prefatory language" that challenged criminal statutes, "unless the conduct is covered under some other provision of law

providing greater punishment," plainly indicates the General Assembly intended one greater punishment, but not both punishments. *Id.*

Defendant's convictions are based upon N.C.G.S. sections 14-32.4(B) and 14-33(c)(2). Both statutes include the prefatory language discussed in *Fields*. *See* N.C.G.S. § 14-32.4(b) (2019) and N.C.G.S. § 14-33(c)(2) (2019). Therefore, the trial court properly arrested judgment on the assault on a female conviction because assault by strangulation provides the "greater punishment." *Id.* Accordingly, any claim defendant raised as to the assault on a female conviction is moot pursuant to the order arresting judgment.

III.

For the foregoing reasons, we discern no prejudicial error.

NO PREJUDICIAL ERROR.

Judges CARPENTER and FLOOD concur.

Report per Rule 30(e).