Third District Court of Appeal

State of Florida

Opinion filed August 5, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1172
Lower Tribunal No. 16-8531

Gary Butler,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Joseph Mansfield, Judge.

Carlos J. Martinez, Public Defender, and Deborah Prager, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Christina L. Dominguez, Assistant Attorney General, for appellee.

Before SCALES, HENDON and LOBREE, JJ.

SCALES, J.

Gary Butler appeals his conviction for attempted burglary. We affirm because the trial court did not abuse its discretion by allowing, over Butler's hearsay objections, the supervising officer to testify as to matters rebutting Butler's direct testimony that Butler had been invited to the victim's home.

I. Relevant Facts and Procedural Background

Butler was charged by amended information with (i) an April 15, 2016 burglary with assault or battery while armed (with a knife), and (ii) an April 23, 2016 attempted burglary of an occupied dwelling. These separate incidents involved the same property. The jury acquitted Butler of the April 15th armed burglary charge but convicted him of the April 23rd attempted burglary. The trial court sentenced Butler to five years in prison.

The property, a residence, was owned by Cheryl Coleman who had known Butler for many years and, according to Butler, once had a romantic relationship with him. In the April 15th incident, Butler entered the yard of Coleman's house, allegedly broke windows and the front door, and came inside the house brandishing a knife. Coleman's son, who lived in the house, repelled him.

In the April 23rd incident, Butler returned to Coleman's house at 5 a.m., parked around the block rather than in front of Coleman's house, banged on

Coleman's unrepaired door and windows, and further damaged a window.[1] While Butler was in Coleman's yard this second time, Coleman called the police. On the 911 recording that the State played for the jury, Butler could be heard yelling at and threatening Coleman. Another man was in the house with Coleman and heard Butler's intrusion. When the police arrived, Butler fled, jumping over neighbors' fences until he reached his parked car. There the police took Butler into custody.

At trial, in the defense's case-in-chief, Butler testified that he returned to Coleman's house on April 23rd because Coleman had invited Butler, via text messages, to retrieve clothing Butler had stored at Coleman's house. Butler testified that, despite Coleman's invitation, Coleman neither responded to Butler's knock on Coleman's door or to Butler's telephone call (a call that Butler asserted he made while Butler was positioned outside Coleman's residence).

To rebut Butler's testimony that Coleman had invited Butler to Coleman's house, the State recalled as a witness the supervising police officer, Sandra Valdez. Over Butler's hearsay objections, Valdez testified that: (i) the arresting police officers advised Valdez that they searched Coleman's house and found no men's clothing, other than that of Coleman's son; and (ii) Valdez had looked at Coleman's phone and, while she saw threatening text messages from Butler to Coleman, Valdez

[1] During the trial, the State introduced photographic evidence of the damage to Coleman's house.

had not seen any reference to the retrieval of clothing. Officer Valdez did not preserve the text messages. Butler's counsel had the opportunity to, and in fact did, vigorously cross-examine Officer Valdez regarding both assertions.

After the trial court entered judgment against Butler on the jury's guilty verdict for the April 23rd incident, Butler brought the instant appeal arguing that the trial court abused its discretion by allowing Officer Valdez to testify as to these matters over Butler's hearsay objections. We find no abuse of discretion, and address each of Butler's hearsay assertions in turn.

II. Analysis[2]

A. Officer Valdez's testimony about information from investigating officers

Butler first argues that the trial court reversibly erred by allowing the jury to hear Officer Valdez's testimony that Officer Valdez had been told – by an officer or officers who investigated the scene – that no clothing belonging to Butler was in Coleman's house.[3] Butler argues that Officer Valdez's testimony was improper inferential hearsay because it allowed the jury to infer Butler's guilt from statements made by non-testifying witnesses (i.e., the investigating officers). Butler relies on

[2] We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. Young v. State, 979 So. 2d 1097, 1099 (Fla. 3d DCA 2008).

[3] Two other officers on the scene besides Officer Valdez testified at trial, though neither testified to the search of clothing at Coleman's house. The record is not clear which of these officers, if not a different officer, advised Officer Valdez that none of the clothing belonged to Butler.

inferential hearsay cases where the testimony was found to be inadmissible. Postell v. State, 398 So. 2d 851, 854 (Fla. 3d DCA 1981); see also Keen v. State, 775 So. 2d 263, 275-76 (Fla. 2000); Wilding v. State, 674 So. 2d 114, 119 (Fla. 1996) receded from on other grounds, Devoney v. State, 717 So. 2d 501 (Fla. 1998); Roman v. State, 937 So. 2d 235, 237 (Fla. 3d DCA 2006); Trotman v. State, 652 So. 2d 506, 507 (Fla. 3d DCA 1995).

These cases are distinguishable, though, because they each involve the improper admission of statements by non-testifying witnesses who provided the police with information *that tied the defendant to the crime and led the police to investigate and arrest the defendant.* In this case, the statement of the non-testifying witness was not used in the State's case-in-chief to establish Butler's guilt; rather, it was introduced in rebuttal solely to impeach Butler's direct testimony that Butler had been invited to Coleman's home to retrieve clothing. Indeed, Butler was already under arrest when the officers went searching for his clothing.

A defendant who takes the stand, like any witness, may have his credibility impeached. Butler v. State, 842 So. 2d 817, 827 (Fla. 2003). And, impeachment evidence may be introduced to prove that "material facts are not as testified to by the witness being impeached." § 90.608(5), Fla. Stat. (2016). "A statement inadmissible as hearsay can still be admissible for another reason, such as for impeachment purposes." Dias v. State, 812 So. 2d 487, 495 (Fla. 4th DCA 2002)

(concluding that rebuttal testimony to expose a witness's prior inconsistent statement was not inadmissible hearsay); see also Hunt v. Seaboard Coast Line R.R. Co., 327 So. 2d 193, 195 (Fla. 1976) ("Merely because the statement would not be admissible for one purpose does not mean it is not admissible for another."); Byrd v. State, 221 So. 3d 659, 663 (Fla. 4th DCA 2017).[4]

We thus conclude that, while Officer Valdez's testimony – based on information provided to her by investigating officer(s) at the scene – was hearsay, it nevertheless was admissible to impeach Butler's narrative that he arrived at Coleman's house to retrieve clothing. The trial court, therefore, did not err by allowing this testimony.

B. Officer Valdez's testimony about text messages

Butler next argues that Officer Valdez's rebuttal testimony about text messages she saw on Coleman's phone also constituted inadmissible hearsay. In the defense's case, Butler testified that Butler had received text messages from Coleman inviting Butler to come retrieve his clothing. In rebuttal, Officer Valdez testified that, at the scene, Coleman had told her that text messages from Butler were on Coleman's phone. Officer Valdez testified that she then looked at Coleman's phone, read Butler's text messages, and saw no reference in those text messages to

[4] We note that the Florida Supreme Court, in dictum, has cited favorably to the holding in Dias in Williamson v. State, 961 So. 2d 229, 235 (Fla. 2007).

retrieving clothing from Coleman's home. In her testimony, Officer Valdez recalled viewing text messages from Butler to Coleman containing threatening language. The State did not introduce the text messages because Officer Valdez did not arrange to have them preserved.

Butler argues that the trial court erred both by allowing Officer Valdez, over Butler's hearsay objections, to testify: (i) that Coleman told Officer Valdez that the text messages were sent by Butler; and (ii) as to the content of the text messages allegedly sent by Butler to Coleman. Again, though, Officer Valdez's testimony was not offered in the State's case-in-chief to prove that Butler committed the burglary. Rather, it was offered to rebut Butler's direct testimony that Coleman had texted Butler to invite Butler to her house to retrieve his clothing. Officer Valdez testified that she viewed the text messages Butler sent to Coleman and, contrary to Butler's direct testimony, Officer Valdez observed no text messages about retrieving clothing.

While this testimony may have amounted to hearsay,[5] it was not offered to prove Butler's guilt. It was offered by the State in rebuttal and was used solely to

[5] The State argues that Butler's text messages to Coleman were admissions by Butler, and therefore, excepted from the hearsay prohibition of section 90.803(18) of the Florida Statutes. See Gayle v. State, 216 So. 3d 656, 659 (Fla. 4th DCA 2017) (finding Gayle's text message sent to the victim was an admission under section 90.803(18)(a)). Because we conclude that the content of Butler's messages was admissible as impeachment evidence refuting Butler's direct testimony, we need not, and do not, reach this argument on behalf of admissibility.

impeach Butler's direct testimony. Dias, 812 So. 2d at 495. We, therefore, conclude that the trial court did not abuse its discretion in admitting this testimony.

III. Conclusion

The trial court did not abuse its discretion by allowing the jury to hear Officer Valdez's hearsay testimony in the State's rebuttal case. Her testimony was not offered to prove Butler's guilt, but rather, it was offered solely to impeach Butler's direct testimony that he had been invited to Coleman's home to retrieve his clothing.[6]

Affirmed.

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[6] The State argues that, even if the trial court erred in allowing Officer Valdez's testimony, any such error was harmless. In light of the extensive evidence of Butler's guilt, we agree. Under the harmless error test, the burden is on the State, as the beneficiary of the error, to demonstrate beyond a reasonable doubt that the error complained of did not affect or contribute to the verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The State met the harmless error burden in this case. An abundance of evidence supported Butler's conviction so that any error by the trial court in admitting the rebuttal testimony of Officer Valdez had no effect on the jury's verdict: (a) the direct testimony of Coleman and her son as to Butler's actions; (b) photographic evidence of the damage Butler caused to the windows and front door of Coleman's house; (c) the 911 recording of Butler threatening Coleman; and (d) police officers' testimony about their arriving to find Butler on Coleman's property followed by Butler's fleeing the scene by jumping over neighbors' fences.