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NO. COA00-1468

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

STATE OF NORTH CAROLINA

v. Johnston County
Nos. 98 CRS 21813 and
99 CRS 2799

WILLIAM MARCELLOUS JOHNSON

On writ of certiorari to review judgments dated 10 August 1999 by Judge Henry W. Hight, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 8 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Emery E. Milliken, for the State.

Kelly K. Daughtry for defendant-appellant.[1]

GREENE, Judge.

William Marcellous Johnson (Defendant), by writ of certiorari, appeals his conviction for possession of a counterfeit controlled substance with intent to sell and selling a counterfeit controlled substance, N.C.G.S. § 90-95(a)(2) (1999), and being a habitual felon, N.C.G.S. § 14-7.1 (1999).

Defendant was tried before a jury on 9 August 1999. Testimony at trial by Benson Police Officer Chad Thompson (Thompson), a

[1]The attorney representing Defendant on this appeal did not serve as Defendant's counsel at trial.

narcotics agent with the Johnston County Interagency Drug Task Force, revealed that he was participating in an undercover campaign on 15 August 1998. That day, Thompson was sitting in his truck and speaking to George Dixon (Dixon), a man who was a target of the campaign. Dixon was standing in the street next to the driver's side of Thompson's truck. Defendant, the driver of a four-door Plymouth vehicle (the Plymouth), pulled up alongside Thompson's truck. Dixon spoke with someone named Ronnie D. Anderson (Anderson), who was sitting in the passenger seat of the Plymouth, and Defendant asked Thompson what he needed. Thompson replied he wanted a "20 dub," i.e. twenty dollars worth of crack cocaine. Defendant produced a large chunk of a white lumpy substance, which Thompson recognized as a counterfeit manufactured to look like crack cocaine. Defendant cut a piece from the chunk and handed it to Dixon who, in turn, gave it to Thompson. Thompson then handed Dixon a $20.00 bill. Dixon took the bill, reached across Anderson, and gave Defendant the money.

Thompson then drove away and radioed Kenly Police Officer Scott Richardson (Richardson) asking him to perform a vehicle stop on the Plymouth to obtain a positive identification on Defendant. Richardson stopped the Plymouth approximately ten minutes after the drug transaction had taken place but did not arrest Defendant at that time. Richardson found three people in the Plymouth: the driver of the Plymouth, who was identified as Christopher Conway Williams; Defendant, whom Richardson recognized based on the description Thompson had given him; and one other passenger. At

Richardson's request, Defendant produced either a North Carolina Identification card or a North Carolina Drivers License.

On 16 December 1998, Lieutenant David Daughtry presented Thompson with a photographic lineup and requested Thompson to attempt to identify the person involved in the undercover purchase on 15 August 1998. Thompson identified Defendant. Defendant denied participating in the drug transaction.

On 15 August 1998, Thompson prepared a police report within three or four hours of the events. In the report, he refers to a "driver" in one sentence and a "suspect" in another. The report does not state that the "driver" and the "suspect" are the same person. The report also states that "Richardson obtained the suspect's name and driver's license for identification purposes." A subsequent police report prepared by Thompson and Richardson did not use the word "suspect" and identified Defendant as the "driver." This subsequent report further indicated Richardson obtained either Defendant's North Carolina Drivers License or North Carolina Identification card for identification purposes. Defendant did not have a drivers license.

At trial, the State questioned Thompson during redirect examination about the police report discrepancies without objection. Thompson testified that, as to his first report, "[t]he driver and the suspect are one and the same. I just worded it different [sic] for one sentence than I did the other." When asked by the State if Thompson remembered a request for him to submit a second police report for clarification of the identity of the

driver, Thompson said he did not remember. Thereupon, the State asked Thompson if it were "possible that you and I had a conversation wherein I asked you to clarify your report and write a second report." Thompson answered "yes," adding that such requests had "happened before."

The State also asked Richardson about the report discrepancies. Richardson testified he remembered the State asking him to do a revised report and that he complied with this request. When asked at trial why the second report stated Defendant "produced either a North Carolina [D]rivers [L]icense or a North Carolina [I]dentification card," Richardson explained: "Because I can't recall. A North Carolina [D]rivers [L]icense and a North Carolina ID are particularly [sic] the same card. The only difference in the writing is one says ID, the other says drivers license."

Prior to trial, the State had filed a motion *in limine* requesting the trial court not to allow Defendant during the trial of this case "to allude to the pending civil action against [Thompson] in any way". The trial court ruled that:

> the fact that there's a civil action pending is not to be mentioned before the jury or questioned in front of the jury. If [Defendant] want[s] to ask [Thompson] any questions to the subject of those, . . . [Defendant] will let me know and I will excuse the jury . . . and then I will hear [Defendant] and let [Defendant] ask those questions in the absence of the jury on the record[,] and if I find that they are admissible then I will allow them in, and if not then we have at least preserved them for the record.

Defendant, however, chose not to *voir dire* Thompson as permitted by the trial court.

The issues are whether: (I) the State's questions concerning the revised police reports constituted error; and (II) Defendant properly preserved his assignment of error regarding the trial court's ruling on the State's motion *in limine*.

I

Defendant argues the trial court committed reversible error by allowing the State to interject itself into the examination of the State's witnesses by commenting on the completion of the revised police reports to the point that it in essence became a witness, improperly bolstering the credibility of the State's case and witnesses. We disagree.

Defendant did not object to the State's questions at trial, thereby restricting our review to a plain error analysis. *See* N.C.R. App. P. 10(c)(4). Plain error analysis places the burden on a defendant to show the error occurred and the error "had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 379 (1983). The error must be a "'"fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done."'" *Id.* at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

When asking leading questions, the examiner may not "inject

into questions 'his own knowledge, beliefs, and personal opinions not supported by the evidence.'" *State v. Sanderson*, 336 N.C. 1, 14, 442 S.E.2d 33, 41 (1994) (quoting *State v. Britt*, 288 N.C. 699, 711, 220 S.E.2d 283, 291 (1975)). In this case, Thompson testified he did not recall having had a conversation with the State in which the State asked him to clarify his initial report. The State then questioned Thompson whether it was possible that such a conversation did in fact take place. The State did not interject any personal knowledge unsupported by the evidence as Richardson corroborated that the State had asked for a clarification of the first police report and Thompson explained that such requests for clarification had "happened before." The existence of such a conversation is further supported by the fact that Thompson, in accordance with his subsequent police report, testified the "driver" and "suspect" mentioned in his first police report were the same person, i.e. Defendant, and Richardson explained that while the first report mentioned only Defendant's drivers license, he did not remember whether he checked Defendant's drivers license or North Carolina Identification card, as is apparent from the second report. Accordingly, the State's examination of its witnesses did not constitute error.

II

Defendant further contends the trial court erred in allowing in part the State's motion *in limine* seeking to exclude evidence relating to the pending civil suit against Thompson.

The trial court's ruling in regard to the State's motion *in*

limine was not final. It stated the trial court would permit Defendant to examine Thompson outside the jury's presence, whereupon the trial court reserved the right to rule on the admissibility of Defendant's questions. Defendant chose not to examine Thompson in this manner, thereby forgoing his chance to obtain a final ruling on the issue. Accordingly, Defendant did not properly preserve this issue for appeal. *T & T Dev. Co. v. S. Nat'l Bank of S.C.*, 125 N.C. 600, 602-03, 481 S.E.2d 347, 348-49. (Because rulings on motions *in limine* are "merely preliminary and subject to change . . . [,] [a] party objecting to an order granting . . . a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to . . . attempt to introduce the evidence at trial."), *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997).

Even if we were to assume appeal was taken from a final evidentiary ruling, Defendant failed to reference in his brief to this Court any specific evidence that was excluded and was relevant to the issue of bias and hostility. *See Currence v. Hardin*, 296 N.C. 95, 99-100, 249 S.E.2d 387, 390 (1978) ("the significance of the excluded evidence must be made to appear in the record" and a specific offer of proof is required unless the significance of the evidence is obvious from the record); *see also State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) ("[i]t is well established that an exception to the inclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify").

Defendant's contention that he was prejudiced because he was unable to impeach Thompson by showing bias and hostility does not suffice and his assignment of error is therefore overruled.

No error.

Judges HUNTER and TYSON concur.

Report per Rule 30(e).