NO. COA01-1201

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 99 CRS 144164

JOEL VON GOAD

Appeal by defendant from judgment entered 29 March 2001 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 April 2002.

Attorney General Roy Cooper, by Associate Attorney General Kimberly P. Hunt, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

MARTIN, Judge.

On appeal to superior court from a conviction in district court, defendant was found guilty of failure to give required information after an accident involving property damage in violation of G.S. § 20-166(c1), a Class I misdemeanor. He was sentenced to forty-five days in jail, which was suspended and defendant was placed on supervised probation for twenty-four months. Defendant appeals.

The State presented evidence tending to show that on 13 October 1999, the prosecuting witness was proceeding in an automobile through an intersection in Charlotte when she

experienced an impact to the right side of her vehicle. She removed her vehicle from the lane of travel and inspected the right side of her vehicle, which had been damaged by the impact. She looked back in the vicinity of the intersection and saw defendant operating a forklift. Suspecting defendant's forklift had inflicted the damage to her vehicle, she approached defendant and inquired about the accident. She told defendant that she had reported the accident to the police. Defendant left the scene before the police arrived. The investigating officer determined that defendant had been operating the forklift. The foreman of the construction site where defendant was working called defendant, and defendant returned to the scene approximately forty five minutes later. Defendant admitted to the officer that the forks of the forklift had collided with the vehicle of the prosecuting witness.

Defendant testified that the prosecuting witness' vehicle struck a sign, not his forklift, and that he offered to call for help. After the prosecuting witness declined his offer, he resumed working.

At the beginning of the State's re-cross examination of defendant, the following transpired:

> Q. Sir, it was your testimony on direct that you were operating your vehicle very safely, isn't that correct.
> A. Yes, ma'am. And I've got the record to prove it.
> Q. You have the driving record to prove it?
> A. Yes, ma'am. I sure do.
> Q. So, you are saying that you have a safe driving record?
> A. Yes, ma'am. . . ..

The prosecutor subsequently inquired about a conviction on 4

January 2001 of failing to stop for a siren or red light and about offenses in the 1980's resulting in the suspension of defendant's operator's license in 1986, including convictions of unsafe movement violation and improper turn, in addition to speeding.

Defendant's sole contention is that the court committed plain error and abused its discretion in permitting the prosecutor to re-cross examine defendant regarding his past driving record because the evidence was inadmissible (1) under G.S. § 8C-1, Rules 608 and 609; and (2) under G.S. § 8C-1, Rules 401, 402, 403 and 404(b). He also contends the evidence should have been excluded because it went beyond the scope of redirect examination.

Plain error may be found only in the rare and exceptional case in which "it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done' . . . ." *State v. Odom,* 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). The present case does not qualify for a finding of plain error. It is a settled principle of evidence that when a party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in rebuttal even though the rebuttal evidence would have been incompetent if it had been offered by the rebutting party initially. *State v. Albert*, 303 N.C. 173, 277 S.E.2d 439 (1981). Further, Rule 404 of the Rules of Evidence provides that the prosecution may introduce evidence to rebut evidence of a pertinent

trait of character offered by the defendant. N.C. Gen. Stat. § 8C-1, Rule 404(a) (1999). When an accused testifies and places his credibility at issue, the prosecutor may cross-examine the accused regarding his prior criminal record. N.C. Gen. Stat. § 8C-1, Rule 609 (1999). Finally, the scope of cross and re-cross examination is within the discretion of the trial judge, whose rulings will not be disturbed absent a clear showing of abuse of discretion. *State v. Atkins*, 304 N.C. 582, 284 S.E.2d 296 (1981).

Here, defendant subjected himself to examination by the prosecutor regarding defendant's driving record when defendant asserted that he had a safe driving record. We find no abuse of discretion.

No error.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).