NO. COA01-666

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v. Beaufort County
No. 00 CRS 2074

BRICE EDDIE ARTHUR

Appeal by defendant from judgment entered 16 November 2000 by Judge Carl L. Tilghman in Beaufort County Superior Court. Heard in the Court of Appeals 28 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General K.D. Sturgis, for the State.

McCotter, McAfee & Ashton, PLLC, by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellant.

MARTIN, Judge.

Defendant was charged in a bill of indictment with the first degree murder of Derrick Burrus. A jury found defendant guilty of first degree murder. Defendant appeals from a judgment entered upon the verdict, imposing a sentence of life imprisonment without parole.

Briefly summarized, the evidence at trial tended to show that defendant arrived at the home of Deshana Sutton on the evening of 15 March 2000, and announced to those present that he was going to kill Derrick Burrus. Deshana Sutton testified that fifteen or twenty minutes after defendant left her home, she heard gunshots.

Tina Selby, who was standing outside Bud Johnson's house when the shooting occurred, testified that she saw a man walk up the street "making a lot of noise," and enter Johnson's yard where the victim stood. According to Selby, the man "got up in Derrick's face," and Burrus then took off running. At that moment, Selby heard a gunshot and ran away. Selby testified that she was unable to see the man's face and could not be certain the man walking up the street had a gun. Robert Earl "Bud" Johnson testified that on the night of the murder he witnessed defendant walk up to the victim in an agitated state. When defendant brandished a handgun, Johnson made his way inside his home; as he attempted to open his door, he heard a shot. While Johnson did not testify that he saw defendant shoot the victim, he did say that defendant "was the only one out there with a gun that I seen."

Willie Simmons also testified for the State. He stated he saw defendant on the night of the murder standing on a street corner, yelling obscenities, saying he was going to kill Derrick Burrus "tonight." Simmons also testified that defendant had a gun in his hand on the night of the murder.

Leon Martin testified on behalf of the defendant. Martin testified that he and Robert Johnson were outside Johnson's house on the evening of 15 March and observed a confrontation or argument between Jametrius Jennette, Willie Jennette, Tina Selby, and Marquita Jennette. Martin testified that defendant was not present. Martin testified that Johnson told him to come into the house. Johnson went into the house and Martin followed him; as

Martin was pulling the door closed, Martin heard three gunshots. He testified that he did not see defendant in the yard where the shooting occurred on the night of the killing. Martin also stated that Robert Johnson was a frequent user of crack cocaine, and that Deshana Sutton smoked marijuana.

James Lewis also testified for the defendant. Following the gunshots on 15 March 2000, Lewis observed Vaughan Hanton "goin' through" the pockets of the victim, Derrick Burrus, who was lying in Johnson's backyard; sometime later in the evening Lewis saw Hanton counting a "wad of money." Finally, Tina Selby testified that she did not hear defendant make any threats toward the victim on the night of the murder.

In rebuttal, the State offered the testimony of Willie Jennette, who stated that he was standing on the corner closest to Robert Johnson's house talking to the victim on the evening of 15 March 2000. Jennette stated that defendant walked up to him and Burrus and asked Burrus, "Were you lookin' for me?" Burrus made no response, and defendant then reached into his front pocket, pulled a gun, and "started shootin' at him." Jennette testified that he saw defendant pull the trigger and that he shot the gun "about three" times. He did not see Burrus get shot.

I.

In his first assignment of error, defendant contends he was denied his constitutional rights because the "short-form" indictment was insufficient to allege each of the elements of the

crime of first degree murder. However, as defendant recognizes, this argument has been considered and rejected by the North Carolina Supreme Court which has held short-form murder indictments authorized by G.S. § 15-144 to be "in compliance with both the North Carolina and United States Constitutions." *State v. Wallace*, 351 N.C. 481, 504-05, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001) (citing *State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996); *State v. Avery*, 315 N.C. 1, 12-14, 337 S.E.2d 786, 792-93 (1985); *State v. Williams*, 304 N.C. 394, 422, 284 S.E.2d 437, 454 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982)). These assignments of error are overruled.

II.

Defendant next argues the State's failure to timely tender the statement of witness Robert Earl Johnson after he testified unduly prejudiced defendant and entitles him to a new trial. Johnson was called as a witness for the State during the first day of defendant's trial; at the end of Johnson's direct examination, defendant requested a copy of Johnson's statement to law enforcement officers pursuant to G.S. § 15A-903(f)(2) ("After a witness called by the State has testified on direct examination, the court shall, on motion of the defendant, order the State to produce any statement of the witness in the possession of the State that relates to the subject matter as to which the witness has testified."). The State responded that there were no written statements by Johnson. Defendant then proceeded with his cross-

examination of witness Johnson. On the following day, however, the prosecutor acknowledged that Johnson had made a statement to SBI Agent Malcolm McLeod. After a *voir dire* of the agent, the trial court directed that Johnson's statement be provided to defendant, and offered defendant the opportunity to re-call Johnson for additional cross-examination. Defendant declined to do so.

The mode and order of the examination of witnesses and the presentation of evidence is within the sound discretion of the trial court, and its rulings will not be disturbed absent a showing that the trial court has abused that discretion to the prejudice of the defendant. *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). No such abuse of discretion has been shown in this case. The trial court, upon discovering the existence of the prior statement, promptly conducted a *voir dire* of the interviewing officer, ordered the statement to be provided to defendant, and gave defendant the opportunity for further cross-examination of Johnson. Moreover, defendant has shown no prejudice resulting from the delay in receiving Johnson's statement. Accordingly, defendant's assignment of error is overruled.

III.

In his fourth assignment of error, defendant contends the trial court erred by allowing hearsay testimony of two declarants without providing the jury a cautionary instruction.

We have reviewed the relevant portions of the trial transcript regarding Tina Selby's prior statements to Officer McLeod, and we

discern no hearsay testimony. Additionally, the State was fully within its rights to question the witness regarding her prior statement. N.C. Gen. Stat. § 8C-1, Rule 607 (2000); *see State v. Spinks*, 136 N.C. App. 153, 160, 523 S.E.2d 129, 134 (1999) (citations omitted) ("the State may attempt to impeach a hostile witness by asking him whether he previously made certain prior inconsistent statements."). Moreover, the trial court sustained defendant's objection and motion to strike as to Deshana Sutton's hearsay testimony concerning a statement by Marquita Jennette. Sutton's testimony regarding a statement by Tina Selby, even if the testimony did not corroborate Selby's previous in-court testimony, we conclude it was nevertheless admissible as an excited utterance exception to the rule against hearsay. N.C. Gen. Stat. § 8C-1, Rule 803(2) (2000).

> The excited utterance hearsay exception allows admission of out-of-court statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." [citation omitted] To qualify as an excited utterance, the statement must relate "'(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.'"

State v. Nicholson, 355 N.C. 1, 35, 558 S.E.2d 109, 133 (2002) (citations omitted).

In this case, the statement which defendant claims unfairly prejudiced him was Sutton's testimony that "about five minutes" after hearing the gun shots, Tina Selby, accompanied by Marquita Jennette, ran into her house "totally upset," and said, "Eddie

goin' crazy. He' shootin' at Derrick." It is clear that Tina Selby's statement to Sutton was made "under the stress of excitement caused by the event" of the shooting, thus Sutton's testimony with respect to the statement was admissible. *Id.*

IV.

Defendant next argues the trial court erred in limiting defendant's cross-examination of the State's rebuttal witness regarding his pending charges. As noted above, the trial court "has broad discretion over the scope of cross-examination." *State v. Call,* 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998). Moreover, the court's ruling on the scope of cross-examination will not be disturbed absent a showing of abuse of discretion. *Maynard*, 311 N.C. 1, 316 S.E.2d 197.

"The right to cross examine a witness to expose the witness' bias is not unlimited." *State v. Hatcher*, 136 N.C. App. 524, 526, 524 S.E.2d 815, 816 (2000) (citation omitted). However, a defendant has the right to cross-examine a witness regarding pending charges at the time of his testimony in order to establish possible bias. *State v. McRae*, 139 N.C. App. 387, 393, 533 S.E.2d 557, 561 (2000) (citing *State v. Evans,* 40 N.C. App. 623, 624, 253 S.E.2d 333, 334 (1979)). In *McRae*, this Court held that the trial court did not err by prohibiting the defendant from inquiring into the specific details of the charges pending against the witness. *Id.*

In the present case, the trial court permitted defendant to cross-examine the State's rebuttal witness on several elements of

the pending charge against him:

> I'm going to overrule the objection and allow the Defendant to cross-examine the witness as to the fact of him being in custody, the fact that he cannot make bond, his potential court date, the fact that he's been in custody 30 days, the fact that he has no attorney appointed to him, and make inquiry generally as to whether there are any deals with the prosecution affecting his pending charge and the testimony in this case today.

The court denied defendant's request to ask the witness about the specific details of the crime charged. The trial court based its ruling on Rule 608(b) and on the balancing test of Rule 403. Defendant proceeded to cross-examine Willie Jennette regarding certain details of the charge pending against him, including the amount of time the witness had spent in jail, the fact that he had not been appointed an attorney, nor advised that he was entitled to an attorney. Defendant also questioned the witness regarding prior contradictory statements he had made to a law enforcement officer. On this record we discern no abuse of discretion in the trial court's ruling. Defendant was given sufficient opportunity to question Jennette with respect to his incarceration pending trial, and the jury was permitted to see the manner in which the witness changed his story at trial from his initial statement to law enforcement, which revealed the possibility of motive or bias in the witness' testimony. Defendant's assignment of error is overruled.

V.

Defendant next contends the trial court erred in allowing Jennette to testify in rebuttal that he had seen defendant with a

gun in the past. Evidence of other crimes or acts is inadmissible for the purpose of showing the character of the accused or for showing his propensity to act in conformity with a prior act. N.C. Gen. Stat. § 8C-1, Rule 404(b). However, such evidence may be admissible for the purpose of showing opportunity. *Id.* The North Carolina Supreme Court has held that Rule 404(b) is a general rule of inclusion of relevant evidence. *State v. Golphin,* 352 N.C. 364, 533 S.E.2d 168 (2000) (citation omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). In the present case, Jennette's testimony that he had observed defendant in possession of a handgun in the past, if believed, was admissible to show that defendant had the means and opportunity to shoot the victim, and the probative value of such testimony was not substantially outweighed by the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403.

VI.

Defendant argues the trial court erred in denying defendant's motion for a mistrial after the statement of Robert Earl Johnson was published to three of the twelve jurors. However, defendant has waived his right to object to this occurrence at trial, and his assignment of error is overruled.

Once the pre-trial statement of Johnson was discovered to have been inadvertently published to three members of the jury, the trial court conducted a conference to determine the appropriate action to take. Defendant's counsel stated:

> Well, Judge, I guess we're the ones that have the real problem here. But, Judge, we have discussed this at length with the Defendant and also with the private investigator, and

> Your Honor, we feel like that, or the Defendant feels like that he would like to go forward with his case and not move for a mistrial based on that. We believe that Mr. Johnson testified to a majority of what was in this anyway and don't feel like that it has jeopardized our case to the point where we need to move for any remedy or for mistrial, Judge.

Defendant then asked the trial court to instruct the jury to disregard the written statement. When the jury returned, the trial court instructed,

> [m]embers of the jury, before I sent you out, Court Exhibit No. 1 was circulated to I believe the first three jurors on the front row which was in error. That exhibit was not admitted into evidence and should not have been given to you to read. So I'm going to ask that you disregard any statements that you have read from Court Exhibit No. 1 in your deliberations.

The trial court also offered defendant the opportunity to re-call the witness and cross-examine him further based on the statement, but defendant declined to call the witness. Finally, defendant specifically acknowledged that he assented to the trial court's course of action. *See State v. Green*, 129 N.C. App. 539, 552, 500 S.E.2d 452, 460 (1998), *affirmed*, 350 N.C. 59, 510 S.E.2d 375 (1999) (trial court found that the defendant had waived his right to a mistrial after having indicated to the court that he did not want a mistrial).

VII.

Finally, defendant contends the trial court erred in denying defendant's motion to dismiss the first degree murder charge based on the insufficiency of the evidence.

In reviewing the denial of a motion to dismiss, this Court

> must examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. Evidence is "substantial" if a reasonable person would consider it sufficient to support the conclusion that the essential element exists.

State v. McKinnon, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). The test is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citations omitted).

As defendant acknowledges, the evidence presented against him included the testimony of several witnesses. Willie Simmons testified that he saw defendant on the night of the murder with a gun in his hand yelling that he was going to kill Derrick Burrus "tonight." Robert Earl Johnson testified that he saw defendant with a gun and heard a shot on the night of the murder, and that defendant was the only person in the yard with a gun, but that he did not see defendant shoot the victim. Willie Jennette testified that defendant walked up to him and Burrus on the night of the murder, spoke briefly to the victim, pulled a gun and "started shootin' at him." Jennette testified that he saw defendant pull the trigger and that he shot the gun "about three" times. Taking this evidence in a light most favorable to the State, we hold that "a rational trier of fact could have found the essential elements" of premeditation and deliberation to support defendant's conviction of first degree murder. *McKinnon*, 306 N.C. at 298, 293 S.E.2d at 125. Defendant's assignment of error to the contrary is overruled.

We have carefully considered defendant's remaining assignment of error and conclude, without the necessity of discussion, that it is without merit. Defendant received a fair trial, free from prejudicial error.

No error.

Judges TYSON and THOMAS concur.

Report per Rule 30(e).