NO. COA05-1053

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

STATE OF NORTH CAROLINA

v. Robeson County
No. 00 CRS 16318-19; 01 CRS 4251-52
00 CRS 16322-24, 16325;
01 CRS 4249-50

BARRY MCPHAUL and
DUAWN WESLEY MCMILLIAN

Appeal by defendants from judgments entered 13 April 2004 by Judge B. Craig Ellis in Robeson County Superior Court. Heard in the Court of Appeals 30 March 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan P. Babb, for the State. (Barry McPhaul)

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State. (Duawn Wesley McMillian)

Marilyn G. Ozer for defendant-appellant McPhaul.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant McMillian.

STEELMAN, Judge.

Each defendant was indicted on charges of first-degree murder, assault with a deadly weapon with intent to kill and inflicting serious injury, attempted robbery with a dangerous weapon, first-degree burglary, and conspiracy to commit armed robbery. Their cases were joined for trial pursuant to N.C. Gen. Stat. § 15A-926.

The evidence at trial tended to show that on the evening of 29 July 2000, defendants, Duawn Wesley McMillian (McMillian) and Barry McPhaul (McPhaul), came to the home of Santiago Montero Moreno (Santiago), located at 13 Front Street in Red Springs, although they did not know anyone who lived there. Santiago shared his home with his nineteen-year-old son, Gabriel Montero Cruz (Gabriel), his girlfriend, Nancy Robinson, and their two young children, Santiagin and Fabian. The family had been playing volleyball in the backyard, while Robinson and Fabian were asleep in the bedroom, when there was a knock at the door. Santiago opened the inner wooden door and found defendants standing on the porch. Santiago testified McMillian opened the outer glass door and McPhaul pointed a gun at his head and demanded money. Robinson testified that loud voices woke her and she went towards the living room to see what was happening. She saw McPhaul pointing a gun at Santiago and saw Gabriel holding a rifle. She then testified that as Gabriel started out of the bedroom, she heard a gunshot, and saw Gabriel fall to the floor. Santiago testified that after McPhaul shot Gabriel, he pulled away from McPhaul, but was stuck by a bullet as he ran to grab Gabriel's rifle.

Officer John Simmons of the Red Springs Police Department responded to a call concerning the shooting. He stated that as he pulled onto Front Street, he spotted a man matching the description given for one of the persons involved in the shooting. He recognized the man as McMillian from previous contact. Officer Simmons called McMillian to his police car and asked what he was

doing. McMillian stated someone was shooting at him. Officer Simmons asked McMillian to get in the car and eventually took him to the police station. Officer Ben Smith, also of the Red Springs Police Department, interviewed McMillian at the police station after he was advised of his rights. He obtained a statement from McMillan at the police station regarding his involvement in the shootings and reduced McMillian's statement to written form. Sergeant Ronnie Patterson was in and out of the interview room while Officer Smith was obtaining McMillian's statement. Sgt. Patterson testified that McMillian told them he had gone to rob some Mexicans of drugs earlier that evening, although Officer Smith had not included this when he reduced McMillian's statement to writing.

Defendant McPhaul testified at trial. His testimony conflicted with that of Robinson and Santiago. He asserted he and McMillian had gone to Santiago's home to buy marijuana, not to rob them. He said Robinson first answered the door with a child in her arms, but then Santiago approached and asked what was up. McPhaul testified he understood the way Santiago opened the door as an invitation to enter the house. He said McMillian walked in first, pulled out some money, and asked for "a 20 bag of weed." He testified Santiago said something in Spanish, which he could not understand, and then he saw out of the corner of his eye the barrel of a riffle being raised and pointed at him. McPhaul testified that as soon as Gabriel entered the hallway with the rifle McMillian ran out of the house. McPhaul then pulled a gun out of

his back pocket, fired, and ran out of the house. Upon learning that an all points bulletin had been issued for him, he voluntarily went to the police station. McPhaul testified that neither he nor McMillian went to the house to rob it, but only to purchase marijuana, and that neither of them ever demanded money.

The jury found defendants guilty of first-degree murder under the felony murder rule, attempted robbery with a firearm, assault with a deadly weapon inflicting serious injury, first-degree burglary, and conspiracy to commit armed robbery. The trial court sentenced each defendant to life without parole for first-degree murder. The charge of attempted robbery with a firearm merged into the conviction for felony murder and the trial court arrested judgment on that charge. The trial court sentenced McPhaul to consecutive terms of imprisonment of: 25 to 39 months for assault with a deadly weapon inflicting serious injury; 64 to 86 months for first-degree burglary; and 25 to 39 months for conspiracy to commit armed robbery. The trial court sentenced McMillian to consecutive terms of imprisonment of: 34 to 50 months for assault with a deadly weapon inflicting serious injury; 103 to 133 months for first-degree burglary; and 34 to 50 months for conspiracy to commit armed robbery. Defendants appeal.

Each defendant has made separate assignments of error. We first address the assignments of error that are common to their appeals and then address their distinct assignments of error.

I. Common Assignment of Error

A. Joinder of Defendants for Trial

McPhaul contends the trial court erred in allowing the State's motion to join the cases for trial. Prior to trial, the State made a motion to join McPhaul and McMillian's cases arising out of the 29 July 2000 events for trial. Over defendants' objections, the trial court granted the State's motion. Defendants renewed their motions to sever their cases on several occasions during the trial, but these motions were denied. McPhaul contends the trial court erred by denying their motions to sever and he did not receive a fair trial. We disagree.

The decision to allow joinder of criminal defendants for trial pursuant to N.C. Gen. Stat. § 15A-926 is vested within the sound discretion of the trial court. *State v. Bell*, 359 N.C. 1, 16-17, 603 S.E.2d 93, 105 (2004), *cert. denied*, ___ U.S. ___, 161 L. Ed. 2d. 1094 (2005). Thus, absent a showing that a defendant has been deprived of a fair trial, we will not overturn the judge's decision. *Id.* at 17, 603 S.E.2d at 105. Joinder of defendants for trial is appropriate when: "(1) each defendant is charged with accountability for each offense; or (2) the offenses charged were (a) part of a common scheme, (b) part of the same transaction, or (c) so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others." *Id.* at 16, 603 S.E.2d at 105 (citing N.C. Gen. Stat. § 15A-926(b)(2)). Public policy strongly favors consolidation of cases where two defendants are to be tried for the same crimes. *State v. Workman*, 344 N.C. 482, 492, 476 S.E.2d 301, 306 (1996).

McPhaul does not argue that the offenses in question are not transactionally related. Rather, he contends his right to a fair trial was violated, and thus joinder was improper because a statement by his co-defendant, McMillian, was admitted into evidence. McPhual asserts that despite the State's redaction of any reference to him in McMillian's statement, the statement contained information from which the jury could readily infer McPhaul was included within the incriminating statement.

Where a defendant has objected to joinder because of a co-defendant's out-of-court statement, it is permissible for the trial court to allow "a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him." N.C. Gen. Stat. § 15A-927(c)(1)b (2005). The United States Supreme Court has held that a defendant's Sixth Amendment right to cross-examine witnesses against him is not violated by the introduction of a co-defendant's statement where the judge gives a proper limiting instruction and the confession is redacted to eliminate the defendant's name and any reference to his existence. *Richardson v. Marsh*, 481 U.S. 200, 95 L. Ed. 2d 176 (1987).

The redacted portion of McMillian's statement presented to the jury by Sgt. Patterson is as follows: "Duawn Wesley McMillian stated that he had gone to rob some Mexicans of drugs earlier that evening, but had not - - but had gone to the wrong house." McPhaul argues that since the jury knew he and McMillian went to the house

together to purchase marijuana and all the evidence at trial showed they were together, the redacted statement incriminated McPhaul by implication.

In the instant case, the redacted confession does not refer to McPhaul's existence, nor does it leave the impression that someone was left out of the statement. *See Gray v. Maryland*, 523 U.S. 185, 191-92, 140 L. Ed. 2d 294, 300-01 (1998). In addition, the trial court gave a proper limiting instruction to the jury not to consider McMillian's statement in any way against McPhaul. On appeal, "a jury is presumed to follow the instructions given to it by the trial court." *State v. Wiley*, 355 N.C. 592, 637, 565 S.E.2d 22, 52 (2002). In addition, our Supreme Court has held the admission of incriminating statements of a co-defendant may be harmless error where there is other admissible or overwhelming evidence establishing the defendant's guilt. *State v. Brewington*, 352 N.C. 489, 513, 532 S.E.2d 496, 511 (2000). In the case at bar, both Santiago and Robinson identified McPhual as the man who put a gun to Santiago's head, demanded money, and then shot both Gabriel and Santiago.

After careful review of the redacted statement and the additional testimony at trial that McPhaul demanded money, we conclude McPhaul was not deprived of a fair trial by the admission of McMillian's redacted statement. The trial court did not abuse its discretion in granting the State's motion for joinder.

We note that defendant McMillian adopted the argument submitted by McPhaul in his brief that it was reversible error for

the trial court to grant the State's motion to join the two defendants for trial. He made no additional arguments concerning this issue. For the reasons stated above, we also find the trial court did not abuse its discretion as to defendant McMillian. This argument is without merit.

B. Closing Arguments

Both defendants assert the prosecution made improper closing arguments accusing defense counsel of attempting to appeal to the jurors' possible prejudice against illegal aliens. After defense counsel gave its closing argument, the prosecutor, in rebuttal, stated to the jury:

> [Prosecutor]: You know, you might even have the feeling, not just of outrage at the crime, but of outrage at what is happening here, because if you listen to the arguments some of counsel have put forth and in some of the testimony such as Mr. McPhaul's, there's apparently two levels of justice in this country. Apparently, an illegal alien doesn't have any rights, doesn't have the --
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> [Defense Counsel]: Objection.
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> [Prosecutor]: -- right to be complaining about somebody --
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> The Court: Overruled.
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> [Prosecutor]: -- shooting and killing someone in their family because they shouldn't be believed if they do. They don't have the right to go to the police or to testify about it. They don't have the right to defend themselves in their homes, a right that, in fact, we all do have. Makes you wonder whatever has happened to "and justice for all." Is that, "and justice for all citizens"? Is it in the U.S. it's only justice if you are a citizen? But that's not the law. That's not the constitution. That's not the way it is in the U.S. Not in mine and

> not in yours. Everybody here, everybody has a right to be protected in their homes from the kind of violent felonious assaults and murder that took place here, and it is an outrage to suggest anything else, an outrage. But that's what they suggest.
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> [Defense Counsel]: Objection.
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> The Court: Sustained.

McPhaul timely objected to the argument, thus our standard of review is whether the trial court's overruling the objection to the first part of the prosecution's argument was an abuse of discretion. *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). The trial court will be deemed to have abused its discretion if the ruling is such that it could not be the result of a reasoned decision. *Id.* Such is the case where defendant can demonstrate: (1) the prosecutor's closing remarks were improper, and (2) those remarks "were of such a magnitude that their inclusion prejudiced defendant." *Id.* "[I]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others." *Id.* When determining whether a prosecutor's remarks were improper, the comments should not be viewed in isolation, but in "'"the context in which the remarks were made and the overall factual circumstances to which they referred."'" *State v. Augustine*, 359 N.C. 709, 725-726, 616 S.E.2d 515, 528 (2005) (citations omitted).

During the cross-examination of Santiago and Robinson, counsel for both defendants questioned and emphasized their status as "illegal aliens" and use of various items of false identification.

A character witness for Santiago, Michael Hawn, was also questioned regarding Santiago's status as an "illegal alien" and use of false identification. Furthermore, during closing arguments counsel for defendants explicitly argued the victim's status as illegal aliens should be considered by the jury in assessing their credibility.

> [McPhaul's Attorney]: If you will remember, Mr. [Santiago] Montero was questioned about things in his life that pointed to his truthfulness or untruthfulness. He operates under a fake name and a Social Security number that he has purchased. He has a conviction, a conviction for giving false information to a police officer. Mr. Montero testified that since this came up, he's straightened out his name which is false, but he said he's never filed taxes. His wife got up the next morning and said now, that was wrong, he has filed taxes under his own Social Security number. But then, in a stoke of genius, his boss was called to the stand who says even to this day Mr. Montero is telling his employer that he's Enrique Gonzales. Even to this day. So, he told you "Yeah, I had done that before, but I straightened that out." But his own boss came in and he was asked, who is that man? "Well, as far as I know it's Enrique Gonzales." They did an investigation, and throughout that investigation, he maintained that he was Enrique Gonzales. He's been convicted of lying, he lied on the stand, he's lied to his boss.(T. 3859-60).

> [McMillan's Attorney]: Let's talk about Nancy Acuna Robinson and Santiago Montero and their believability. They have admitted that they were living together. They were living as husband and wife. [The prosecutor] mentioned, I think, in his opening statement his common law wife. Well, there is no common law marriage in North Carolina. That's an illegal act. And that they were illegal aliens. That they used names that were not their own. They used Social Security cards that were not their own. They used those Social Security numbers and those names to get jobs, and then they went and got a bank account telling the bank that that Social Security number was not their

> own and that that name was not their own, admitting to you that they have lied before, committed illegal acts before, and Nancy Acuna Robinson is telling you that she's still using that name and she's using that name to this date and is still misrepresenting herself. And Santiago Montero, he's telling you oh, I've gotten married, and that changes everything; everything is all right. Guess what he's done? He's not done that to make everything alright. He's married a U.S. citizen. What does that do for him? He can stay.
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> [Prosecutor]: Objection, your Honor. That's a misstatement of the law, and this offense is outside --
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> The Court: It's a statement not in evidence.
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> [McMillian's Attorney]: Ladies and gentlemen, I'm asking you to look at their improper conduct in the past, their conduct that continues to determine whether or not you believe everything they said about what happened that night. . . .

Given defense counsel's statements made during closing arguments, in addition to their cross-examination of the victims, and their emphasis on Santiago and Robinson's status as illegal aliens, we cannot say the prosecutor's rebuttal argument made, in response to defense counsel's closing remarks, were improper. Counsel is to be granted wide latitude in making closing arguments. *State v. Anderson*, ___ N.C. App. ___, ___, 624 S.E.2d 393, 400 (2005). This includes sufficient leeway to respond any arguments made by defense counsel and to "restore the credibility of a witness who has been attacked in defendant's closing argument." *State v. Perdue*, 320 N.C. 51, 62, 357 S.E.2d 345, 352 (1987). Since we do not find the remarks improper, defendants have failed to meet their burden of

showing the trial court abused its discretion in overruling his objection to the first portion of the prosecutor's argument[1].

As to the balance of the prosecutor's closing remarks, the trial court sustained defense counsel's objection. "It is well established in this State that 'when an objection is made to an improper argument of counsel and the court sustains the objection, that court does not err by failing to give a curative instruction if one is not requested.'" *State v. Goblet*, ___ N.C. App. ___, ___, 618 S.E.2d 257, 264 (2005) (citations omitted). By sustaining the objection, the trial court "indicated to the jurors that the remark had no place in the trial." *State v. Correll*, 229 N.C. 640, 644, 50 S.E.2d 717, 720 (1948). This was all defendant requested the trial court do. He did not ask the trial court to give a curative instruction. Although the record does not show the judge made further effort to correct the transgression, we are unable to hold as a matter of law that defendants were prejudiced by the improper remarks. This argument is without merit.

II. Defendant McPhaul's Remaining Arguments

A. Closing Arguments

McPhaul contends the trial court erred in failing to intervene *ex mero motu* to strike certain portions of the prosecution's

[1] We note that the State argues that since McPhaul, and not McMillian, objected to this argument at trial, McMillian should not gain vicarious benefit from his co-defendant's objection and should have the higher standard of review, of whether the argument was "grossly improper" applied. We need not resolve this issue since we determined that the prosecution's closing argument did not meet the "abuse of discretion" standard, which is the lower standard a defendant would have to meet in order to obtain a new trial for improper closing arguments.

closing arguments that referred to defendant McMillian's statement to the police that he went to the house with the intent to rob the Mexicans who lived there, and then told the jury this statement could be used to show the intent of both defendants.

Defense counsel did not object to this argument. Therefore, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*" in not recognizing and correcting an argument which defense counsel apparently did not believe was prejudicial when he heard it. *State v. Thompson*, 359 N.C. 77, 109-110, 604 S.E.2d 850, 873 (2004). "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* When reviewing whether a prosecutor's remarks are grossly improper, we review the comments in the context in which they were made and in light of the facts to which they refer. *Augustine*, 359 N.C. at 725-726, 616 S.E.2d at 528. Closing arguments must be "'(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial.'" *State v. Mann*, 355 N.C. 294, 310, 560 S.E.2d 776, 786 (2002) (citations omitted).

The portion of the prosecutor's argument which McPhaul cites as error reads as follows:

> If you remember, there is more evidence of [defendants' intent to commit armed robbery]

> as well. Defendant McMillian, in speaking to Detective Ben Smith, said he wanted $20 for a bag of weed. He had gone to rob some Mexicans to accomplish it. Now, that wasn't all, although certainly right there you have evidence tying both defendants, McMillian and McPhaul, to their intention to commit armed robbery.

McPhaul objects to this argument, first, because he asserts it was Sgt. Patterson who testified that McMillian told him they had gone to the house to commit robbery and not Officer Smith, as argued by the prosecutor. McPhaul contends this was prejudicial to his case because the prosecutor attributed the more credible police officer with having heard the statement.

This error does not amount to a "grossly improper" argument, but a *lapsus linguae*. Thus, the trial court did not abuse its discretion by failing to intervene *ex mero motu* in the argument to correct the misstatement. Further, there is no reasonable possibility that a different result would have been reached at trial had the court taken corrective action. *See State v. Pierce*, 346 N.C. 471, 497, 488 S.E.2d 576, 591 (1997). The trial court instructed the jury to rely solely upon their recollection of the evidence presented during trial, not the recollection contained in counsels' closing arguments. Upon appellate review, the jury is presumed to have followed the judge's instructions. *Wiley*, 355 N.C. 592, at 565 S.E.2d at 52. This argument is without merit.

McPhaul also contends the prosecutor argued outside of the evidence by referring to McMillian's statement that he had gone to the house to rob some Mexicans and then transferring that intent to McPhaul. Counsel is allowed "wide latitude" in making his closing

remarks to the jury and "may argue the law, all the facts in evidence, and any reasonable inference drawn from the law and facts." *Anderson*, ___ N.C. App. at ___, 624 S.E.2d at 400. However, it was improper for the prosecutor to argue McMillian's statement of intent could be used to show the intent of both defendants in light of the fact McMillian's statement had been redacted so that no reference was made to McPhaul. While this argument was improper, we cannot say the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair given the other evidence presented at trial of McPhaul's intent to commit robbery. Further, the trial court instructed the jury not to consider McMillian's statement in any way against McPhaul. On appeal, we presume the jury followed the trial court's instructions. *Wiley*, 355 N.C. 592, at 565 S.E.2d at 52. This argument is without merit.

McPhaul further argues the prosecutor made uncomplimentary comments about opposing counsel during his closing arguments. After defense counsel gave its closing argument, the prosecutor, in rebuttal, stated to the jury:

> [Prosecutor]: [Defense counsel] would like you to feel that this is a very confusing case, its so complicated, and then he more or less asks you to become confused.
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> [Defense Counsel]: Objection.
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> The Court: Overruled.
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> [Prosecutor]: He wants to confuse you --
>
> [Defense Counsel]: Objection.
>
> The Court: Overruled. This is argument.

McPhaul timely objected to the argument, thus our standard of review is whether the trial court's denial of the objection was an abuse of discretion. *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. As stated above, we review the statements in the context in which they were given to determine whether they were improper, and if so, whether the remarks result in prejudice to the defendant. *Id*; *Augustine*, 359 N.C. at 725-726, 616 S.E.2d at 528.

"[A] trial attorney may not make uncomplimentary comments about opposing counsel." *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994). However, counsel may comment on opposing counsel's arguments. *Perdue*, 320 N.C. at 62, 357 S.E.2d at 352. In the instant case, the prosecutor was giving his rebuttal argument and was responding to defense counsel's argument that there was conflicting evidence about what occurred the night of the murder. The prosecutor's statement was not improper and did not rise to the level of being an uncomplimentary comment about opposing counsel or name calling. Rather, the prosecution's argument addressed a tactic defense counsel employed in his closing argument. This was not improper. Thus, there was no abuse of discretion and we refuse to disturb the trial court's ruling. This argument is without merit.

Finally, McPhaul contends the prosecution mocked his religious practices during closing arguments.

> [Prosecutor]: For that matter, [McPhaul] put in very carefully that he spent the night before in church, all night. Well, that's very good. It doesn't quite explain how he was so affected by that experience that as he did every day, he went out and got stoned the

> next afternoon and walked around with a gun concealed in his pocket until, of course, as we know, he used it. Quite a religious experience, I'm sure.
>
> [McPhaul's Attorney]: Objection.
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> The Court: Overruled.
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> [Prosecutor]: But Mr. McPhaul has to have that explanation for everything. Even if it's a ridiculously futile one.

McPhaul objected. Therefore, we review the matter under an abuse of discretion standard. *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. Even assuming *arguendo* that this remark was improper, we are unable to say that the comments were of such magnitude that their inclusion prejudiced the defendant given the other evidence against him. This argument is without merit.

In his last argument, McPhaul contends the trial court erred by admitting into evidence his out-of-court statement which he had not signed or otherwise adopted because it violated his constitutional rights. We disagree.

Sgt. Patterson testified that McPhaul voluntarily came to the police station and turned himself in. He read McPhaul his Miranda rights, which McPhaul waived, and then asked McPhaul to tell him what happened. Sgt. Patterson reduced McPhaul's statement to writing and reviewed the statement with McPhaul. McPhaul did not make any corrections or additions to the statement, but he stated he did not want to sign it. At trial, the State moved to introduce this document as McPhaul's statement. Defense counsel objected, but was overruled by the trial court. The document was introduced into evidence and Sgt. Patterson read the statement to the jury.

"'"[T]here is no requirement that an oral confession be reduced to writing or that the oral statement, after transcription by another, be signed by the accused."'" *State v. Cole*, 293 N.C. 328, 335, 237 S.E.2d 814, 818 (1977) (citations omitted). A defendant's statement, which is reduced to writing by the hand of one other than the defendant, although unsigned by the defendant, will nevertheless be admissible where the statement contains the defendant's own words, rather than an interpretive narration of the defendant's confession. *Id.* at 334-35, 237 S.E.2d at 818. "There is a sharp difference between reading from a transcript which, according to sworn testimony, records the exact words used by an accused, and reading a memorandum that purports to be an interpretative narration of what the officer understood to be the purport of statements made by the accused." *State v. Walker*, 269 N.C. 135, 141, 152 S.E.2d 133, 138 (1967).

In the instant case, Sgt. Patterson testified McPhaul's statement was an accurate representation of what McPhaul told him. McPhaul asserts that because Sgt. Patterson was not asked if the writing was a "verbatim" record of what McPhaul said, it does not fit within the rule stated in *Cole*. This is an insufficient distinction on which to bar admission of McPhaul's statement where there was sworn testimony that these were McPhaul's actual words.

In addition, it is clear from the written statement that it was not Sgt. Patterson's interpretive narration of defendant's confession or the officer's impressions of the import of defendant's statement. The statement is written in the first

person and contains no impressions from the recording officer, only facts. The statement Sgt. Patterson transcribed reads as follows:

> "First of all, I wasn't there from one to seven. I was with my Aunt Cynthia helping her move furniture in her den. From seven I was with my cousin William, and then I went to Rachel's house, went home, listed to my D'Angelo CD around about approximately 9:30" -- or correction, "9:13 p.m. My gray shirt in sister's car."

Therefore, we hold the trial court did not err in admitting McPhaul's oral statement into evidence. This argument is without merit.

NO ERROR

Judge MCCULLOUGH and CALABRIA concur.

Report per Rule 30(e).