NO. COA05-424

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

STATE OF NORTH CAROLINA

v.	Catawba County
	Nos. 04 CRS 6296
DENA MILLINE MCDOWELL, and	04 CRS 6297
SHON MARQUET MCDOWELL,	04 CRS 6298
Defendants.	04 CRS 6299

Appeal by defendants from judgments entered 12 November 2004 by Judge Julius A. Rousseau in Catawba County Superior Court. Heard in the Court of Appeals 7 December 2005.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State as to defendant-appellant Dena Milline McDowell.

Attorney General Roy Cooper, by Assistant Attorney General Spurgeon Fields, III, for the State as to defendant-appellant Shon Marquet McDowell.

Haakon Thorsen for defendant-appellant Dena Milline McDowell.

Hall & Hall Attorneys at Law, P.C., by Susan P. Hall and Douglas L. Hall, for defendant-appellant Shon Marquet McDowell.

GEER, Judge.

Defendant Dena Milline McDowell ("Ms. McDowell") appeals her convictions for embezzlement, obtaining property by false pretenses, and conspiracy to obtain property by false pretenses. Ms. McDowell's husband, defendant Shon Marquet McDowell ("Mr. McDowell"), appeals his conviction for conspiracy to obtain

property by false pretenses. Defendants argue primarily that the trial court erred in (1) denying a motion for a mistrial following alleged misconduct by a juror, (2) admitting testimony of the investigating officer regarding out-of-court statements made by a person interviewed, and (3) admitting lay opinion testimony regarding alteration of a document. We reject these contentions for the reasons set forth below.

Facts

At trial, the State's evidence tended to show the following facts. The Catawba County Department of Social Services ("DSS") administered a housing grant program called Temporary Assistance to Needy Families ("TANF") that provided short-term help with rent or utilities to eligible families. Families with incomes at or below 200% of the poverty level, with at least one minor child, and who were experiencing a short-term financial crisis, could apply for a TANF grant and, if approved, a check was issued to the applicant's landlord or utility provider.

Three TANF grants from April 2002 are involved in this case: a grant of $2,600.00 on behalf of William Harris to his landlord, Richard Rizk; a grant of $2,400.00 on behalf of Antonio Smith to his landlord, James Rogers; and a grant of $2,700.00 on behalf of David Strathers to his landlord, Eric Robertson. DSS began an investigation into these payments when the putative landlords failed to return tax information required by DSS. DSS discovered that the two checks issued to Mr. Rogers and Mr. Robertson were sent to the same address: a mailbox at a Mailboxes, Etc. located in

Hickory, North Carolina. Upon further investigation, DSS learned that the information on the three TANF applications was false.

In April 2002, Ms. McDowell was employed with DSS as one of two Service Intake Providers with the TANF program. Ms. McDowell's duties included meeting with TANF applicants, filling out the paperwork necessary to determine whether they were entitled to a grant, and referring ineligible applicants to other programs that could provide assistance. Ms. McDowell also had authority to approve TANF grants. The 11 April 2002 portions of the intake log identifying which Service Intake Provider saw Mr. Harris, Mr. Smith, and Mr. Strathers appeared to have been "whited-out," and Ms. McDowell's name was then written in the space for each. Further, although the intake log from that day showed that the Service Intake Providers generally alternated seeing applicants in the order they arrived, Ms. McDowell saw both Mr. Harris and Mr. Smith, even though the two signed in at the same time. Ms. McDowell also authorized each of the three TANF grants.

Eric Robertson testified that he was a recovering heroin addict who had previously purchased heroin from Mr. McDowell at his home. According to Mr. Robertson, he had met Ms. McDowell there on a number of occasions, and she knew him by name. On 11 April 2002, Mr. McDowell drove Mr. Robertson to DSS after they had discussed a means by which Mr. Robertson could obtain money to pay his rent. Mr. McDowell told Mr. Robertson that he would need to sign in under a false name, David Strathers, and speak to his wife, Ms. McDowell. After Mr. McDowell used his cellular phone from the DSS parking lot

to call Ms. McDowell, he sent Mr. Robertson into DSS to sign in as "David Strathers." Mr. Robertson then waited in the waiting room until Ms. McDowell called him into her office under the name "David," even though she knew his real name was Eric Robertson. Ms. McDowell then had Mr. Robertson provide her with his real social security number and sign some documents. Ms. McDowell told him that "she would take care of the rest." When Mr. Robertson reviewed his application at trial, he testified that he did not supply any of the information contained on that application, all of which was false.

After Mr. Robertson finished meeting with Ms. McDowell, Mr. McDowell was waiting in the parking lot to drive him home. Several weeks after 11 April 2002, Mr. McDowell brought Mr. Robertson a check from Catawba County in the amount of $2,700.00. Mr. McDowell took Mr. Robertson to a check cashing store, where Mr. Robertson cashed the check, gave Mr. McDowell $2,000.00, and used the remaining $700.00 to buy heroin from Mr. McDowell.

The check made out to Eric Robertson as the purported landlord for the fictitious David Strathers was sent to the Mailboxes, Etc. mailbox. That mailbox had been rented by Mr. McDowell, and he had listed on his service agreement that both Mr. Robertson and James Rogers, the purported landlord for Antonio Smith, were authorized users and could receive mail at that box.

With respect to the check issued to Richard Rizk as the purported landlord of William Harris, Mr. Robertson testified that he had been introduced to Mr. Rizk by Mr. McDowell, that Mr. Rizk

also purchased heroin from Mr. McDowell, and that Mr. Robertson had purchased heroin from Mr. Rizk. In addition, Officer Lance Foss of the City of Hickory Police Department determined that Mr. Harris, the supposed tenant of Mr. Rizk, did not reside at the address listed on his application.

The check issued to James Rogers as landlord for Antonio Smith was ultimately cashed by Jonathan McCluny, who testified that Mr. Rogers owed him about $400.00, and that Mr. Rogers satisfied this debt by endorsing a TANF check and turning it over to Mr. McCluny. Mr. McCluny had his girlfriend cash the check, he took $400.00, and he gave the balance to Mr. Rogers. Mr. Rogers had told him that he was hungry and needed to pay his hotel bill. Mr. McCluny had seen Mr. Rogers and Mr. McDowell together on several occasions. In addition, Officer Foss determined that there was no residence at the supposed address for which Mr. Rogers was the purported landlord.

On 12 April 2004, the McDowells were both indicted for conspiracy to obtain property by false pretenses, and Ms. McDowell was individually indicted for three counts of embezzlement by a public employee and three counts of obtaining property by false pretenses. The State successfully moved to join the cases against both defendants. As to Ms. McDowell, the jury returned verdicts of guilty on two counts of embezzlement, one count of obtaining property by false pretenses, and one count of conspiracy to obtain property by false pretenses. Mr. McDowell was found guilty of conspiracy to obtain property by false pretenses. The trial court

sentenced Ms. McDowell within the presumptive range to 15 to 18 months imprisonment for the embezzlement conviction to be served concurrently with two consecutive terms of 6 to 8 months imprisonment for the obtaining property by false pretenses and conspiracy convictions. The trial court sentenced Mr. McDowell within the presumptive range to a term of 4 to 6 months imprisonment, which the court suspended, with Mr. McDowell being placed on 36 months of supervised probation.

Discussion

I. Arguments Made Jointly by Defendants

A. Denial of Defendants' Motion for a Mistrial

Defendants, both of whom are African-American, argue that the trial court erred in denying their motion for a mistrial based on alleged misconduct of a juror suggesting racial bias. The North Carolina Constitution guarantees the right to trial by jury and contemplates no less than a jury of twelve persons. *See State v. Poindexter*, 353 N.C. 440, 443, 545 S.E.2d 414, 416 (2001). Consequently, any verdict reached by a jury containing a juror disqualified by misconduct will be a nullity and automatically entitles the defendant to a new trial. *See id.* at 443-44, 545 S.E.2d at 416 (concluding that disqualifying juror misconduct during the guilt phase of a capital trial rendered the guilty verdict void).

"Both the existence of misconduct and the effect of misconduct are determinations within the trial court's discretion." *State v. Murillo*, 349 N.C. 573, 600, 509 S.E.2d 752, 767-68 (1998), *cert.*

denied, 528 U.S. 838, 145 L. Ed. 2d 87, 120 S. Ct. 103 (1999). Accordingly, this Court generally will not overturn a trial court's decision if the trial court made "an appropriate inquiry and took corrective action to remedy [the] matter." *State v. Womble*, 343 N.C. 667, 694, 473 S.E.2d 291, 307 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719, 117 S. Ct. 775 (1997).

On the morning of the last day of the trial, following closing arguments but before jury instructions, the trial judge learned that juror number 5 had told a bailiff that one of the other jurors had spoken to her improperly about the case. The trial judge engaged in the following inquiry with juror number 5:

> THE COURT: . . . Reason I called you out the bailiff told me this morning that you had told him that one of the jurors had spoken to you about this case.
>
> JUROR: Made a couple [of] offhand comments, Your Honor.
>
> THE COURT: Do you recall what those comments were?
>
> JUROR: Yes, Your Honor, I do.
>
> THE COURT: What were they?
>
> JUROR: I wrote them down if I can —
>
> THE COURT: First, let me ask you: When did you hear those comments?
>
> JUROR: Upon leaving the building Wednesday afternoon, out in front of the building.
>
> THE COURT: What were the comments?
>
> JUROR: "Anyone who steals over $100,000 knows how to hide it. I worked with blacks for many years — "

THE COURT: Wait a minute. Anyone who steals a hundred thousand dollars knows what?

JUROR: Knows how to hide it.

THE COURT: What else?

JUROR: "I worked with blacks for many years and they know how to hide things."

THE COURT: And did anyone else hear it?

JUROR: Yes, Your Honor, number twelve, the young man.

THE COURT: Did he make any comment?

JUROR: Yes, Your Honor, he said — he reminded her — he said, "You aren't supposed to talk about the trial."

THE COURT: Now, having heard that, can you disabuse your mind of those statements and try the case on what you heard here in the courtroom?

JUROR: Yes, sir, Your Honor. Makes no difference to me. Not a bit.

The trial judge then returned juror number 5 to the other jurors and had juror number 12 brought out. He inquired as follows of that juror:

THE COURT: . . . [Juror number 5], we called her out — she's told the bailiff this morning that someone talked to her about the case.

JUROR: Uh huh.

THE COURT: She said you also heard that person say something.

JUROR: It's been overnight.

THE COURT: Did he actually say something in your presence?

JUROR: Is it a he?

> THE COURT: Sir? No, you're not going to get in any trouble.
>
> JUROR: I really don't remember . . . .

As with juror number 5, the trial judge asked juror number 12 whether he could be fair about the case and only "try it on what [he] heard in the courtroom." When the juror answered that he could, the trial judge returned him to the jury room.

Following defendants' motion for a mistrial, the trial judge questioned juror number 10, who had been identified as making the statements. Juror number 10 denied having made any of the comments attributed to her and stated that she could be fair and impartial and could decide the case based on the facts. The trial judge gave counsel an opportunity to question juror number 10, but they chose not to do so.

After oral argument on the motion for a mistrial, the judge denied the motion. When the jurors re-entered the courtroom, he instructed them as follows:

> Now, members of the jury, it came to my attention this morning that some of the jurors might have heard something that didn't — outside the courtroom that didn't pertain to this trial and that's why I called several of them out here in the courtroom individually. However, they all said they could be fair and impartial about it, render a fair and impartial verdict, and I assume all of you can do that. That's what you said Monday or Tuesday when we started this case.
>
> Anybody got any reason why they feel like they can't be fair in this case and try the case on the evidence that came from this witness stand and not something somebody might have said outside this courtroom? Can all of you do that? If you can, raise your hand.

The jurors each raised his or her hand.

Although the trial judge made no specific findings of fact in support of his denial of the motion for a mistrial, "'[t]he denial of a motion for a mistrial based on alleged misconduct affecting the jury is equivalent to a finding by the trial judge that prejudicial misconduct has not been shown.'" *State v. Degree*, 114 N.C. App. 385, 392, 442 S.E.2d 323, 327 (1994) (quoting *State v. Jones*, 50 N.C. App. 263, 268, 273 S.E.2d 327, 330, *cert. denied*, 302 N.C. 400, 279 S.E.2d 354 (1981)). In arguing that the trial court erred in denying the motion for a mistrial, defendants contend that the trial judge did not conduct a sufficient inquiry. According to Mr. McDowell, the trial judge should have questioned the remaining jurors, while Ms. McDowell argues that the court's investigation was "brief," did not have the necessary depth, and confused the situation.

Because further questioning of the remaining jurors, who may not have known of the alleged comments, had the potential to taint the other jurors, we cannot view as an abuse of discretion the trial court's decision to use an instruction to the entire panel rather than individual questioning. Further, although the trial judge exhibited some confusion over the identity of the juror alleged to have engaged in the misconduct, we do not believe that confusion — ultimately corrected — undermined the inquiry substantially. In addition, the court conducted a careful examination of juror number 12, who had made the allegations of misconduct, and juror number 10, who had been accused. We note

that trial counsel chose not to question any of the jurors further. Although the remarks attributed to juror number 10 are very troubling, based upon our review of the record, we are compelled to hold that the trial court did not abuse its discretion in denying the motion for a mistrial. *See State v. Bethea*, 173 N.C. App. 43, 51, 617 S.E.2d 687, 693 (2005) (finding that, after several jurors were told by courtroom spectators that the victims were liars, the trial court did not abuse its discretion by declining to order a mistrial when the judge investigated the matter by individually questioning each juror and asking about his or her ability to be fair and impartial).[1]

B. Officer Foss' Testimony Regarding Jenny Gaddis

Both defendants contend that the trial court erred in admitting testimony of Officer Foss regarding his conversation with Jenny Gaddis, who answered the door at the address attributed to Mr. Harris on one of the disputed applications. Mr. McDowell argues that the testimony constituted inadmissible hearsay, while Ms. McDowell argues both a violation of the hearsay rule and the Confrontation Clause.

At trial, Officer Foss was asked on direct examination about his efforts, with respect to each application, to validate the name of the client, the name of the landlord, and the other information

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[1]In the analogous context of peremptory strikes, the North Carolina Supreme Court has stated "that a prospective juror's bias may not always be provable with unmistakable clarity, and in such instances, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *Womble*, 343 N.C. at 679-80, 473 S.E.2d at 298 (internal quotation marks omitted).

contained in the application. Regarding the application completed by William Harris, Officer Foss testified about visiting the address listed on the application:

> A. . . . William Harris listed an address of 3117 Second Avenue Southwest, Hickory. That address is actually in Longview. I went to that address, spoke with a woman by the name of Jenny Gaddis. Miss Gaddis had lived at that residence for —
>
> MR. CLARK: Objection.
>
> THE COURT: OVERRULED as to who lived there.

The prosecutor nonetheless rephrased the question:

> Q. When you knocked on the door at that address, who knocked on the — who answered the door?
>
> A. Miss Gaddis.
>
> Q. How would you describe Miss Gaddis?
>
> A. She's a while [sic] female, retired. I would say she's mid-sixties.
>
> Q. Did you see anyone at that place, besides her, that's referred to on that application?
>
> A. No, sir.
>
> Q. Thank you. You may continue.
>
> A. I advised Miss Gaddis of the name and she was not familiar with the name.
>
> MR. CLARK: Objection.
>
> THE COURT: OVERRULED. Go ahead.

The only statements that arguably could constitute out-of-court statements and that were the subject of an objection are (1) the suggestion that Ms. Gaddis told Officer Foss that she lived at the

address, and (2) Ms. Gaddis' statement that she was not familiar with Mr. Harris' name.

As for Ms. McDowell's contention that admission of this testimony violated the Confrontation Clause, that objection was not made below. It is well established that "constitutional error will not be considered for the first time on appeal." *State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005). When a defendant fails to raise constitutional issues at trial, "he has failed to preserve them for appellate review and they are waived." *Id.* We, therefore, do not address Ms. McDowell's argument under the Confrontation Clause.[2]

With respect to the hearsay arguments, even if we assume, *arguendo*, that the statements were inadmissible, defendants have failed to demonstrate prejudice. Defendants argue that this testimony was necessary to establish that one of the addresses in the applications was false. With respect to Mr. McDowell, who was convicted only of one count of conspiracy to obtain property by false pretenses, there was overwhelming evidence to support his conviction even in the absence of consideration of this false address. As for Ms. McDowell, there was admissible evidence from Officer Foss that Mr. Harris did not live at the address on the application, that Mr. Rizk was not a landlord, and that Ms. McDowell saw Mr. Harris at the same time as Mr. Smith, whose

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[2]Likewise, we do not address Ms. McDowell's argument under the Confrontation Clause regarding admission of out-of-court statements of her husband. We have found no indication in the record that this argument was made below.

application was also false. In light of this specific evidence, as well as other circumstantial evidence, we do not believe that Ms. McDowell has demonstrated that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial" with respect to the charges relating to the Harris application. N.C. Gen. Stat. § 15A-1443(a) (2005).

C. Lay Opinion Testimony

Both defendants next contend that Ms. McDowell's supervisor, Terri Franco, was erroneously permitted to give inadmissible lay opinion testimony. The prosecutor asked Ms. Franco to hold up the intake log and state whether "a change has been made" where the log indicated which DSS worker saw Mr. Harris, Mr. Smith, and Mr. Strathers. Over defendants' objection, the trial court allowed Ms. Franco to "describe what she sees." Ms. Franco then stated: "There was white-out. Obviously there was something else there and it was whited out." Ms. McDowell's name appeared on the altered lines.

Rule 701 of the North Carolina Rules of Evidence governs the admission of lay opinion testimony:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2005). Here, Ms. Franco's testimony arose out of her personal examination of the document,

and the opinion directly related to her testimony regarding which DSS worker had seen the clients involved with the disputed applications.

Moreover, Ms. McDowell subsequently testified on cross-examination, without any objection to the questions, that the intake log had been "whited out and changed":

> Q. Do you see — would you hold it up to the light, ma'am, and tell if you see where it's been whited out and changed? Can you tell?
>
> A. Yes.
>
> Q. Describe to the jury what you see please.
>
> A. Looks like white-out.
>
> Q. And whose name is written over the white-out? Whose initials are written over the white-out?
>
> A. Mine.

It is well established that "[w]hen evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, as here, the benefit of the objection is lost." *State v. Morgan*, 315 N.C. 626, 641, 340 S.E.2d 84, 94 (1986). We, therefore, overrule this assignment of error.

II. Ms. McDowell's Additional Arguments

Ms. McDowell makes only one additional argument individually: she contends that there was insufficient evidence to convict her. In reviewing the sufficiency of the evidence, the trial court must determine whether there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C.

591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* at 597, 573 S.E.2d at 869. The court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869.

In support of this assignment of error, Ms. McDowell does not argue that the State failed to present evidence of any element of the charged offense. Instead, she states only that "[e]vidence presented by the State suggested Dena McDowell was an innocent participant in Shon McDowell's scheme to defraud the DSS" and points to Officer Foss' typewritten notes of his interview with Mr. McDowell. While the jury could have viewed these notes as suggesting Ms. McDowell's innocence, the State also presented ample other evidence supporting a finding that Ms. McDowell was an active participant in the scheme, as the jury ultimately concluded. This assignment of error is, therefore, overruled.

III. Mr. McDowell's Additional Arguments

A. References to Mr. McDowell as a "Drug Dealer"

Mr. McDowell argues that the trial court erred in allowing Eric Robertson (1) to refer to him as his drug dealer, (2) to testify that he saw Mr. McDowell almost daily, during the relevant time frame, for the purpose of purchasing heroin from Mr. McDowell, and (3) to identify other people who purchased drugs from Mr. McDowell. He contends that this testimony was inadmissible under Rules 403 and 404(b) of the Rules of Evidence.

During Mr. Robertson's testimony, the State asked him about the nature of his relationship with Mr. McDowell, and he responded, "He was my drug dealer." The trial court sustained defense counsel's objection and instructed the jury to disregard "that statement." The court, however, allowed Mr. Robertson subsequently to testify that he purchased heroin from Mr. McDowell "[a]lmost daily." Mr. Robertson was also allowed to testify that Richard Rizk bought heroin from Mr. McDowell.

With respect to Mr. Robertson's initial characterization of Mr. McDowell as his "drug dealer," the trial court sustained the defense counsel's objection and instructed the jury to disregard the testimony. Defendant has made no argument as to how the trial court erred given that it sustained the objection and gave a curative instruction.

As for the testimony regarding heroin sales, Rule 404(b) of the North Carolina Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Rule 404(b) is "a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime

charged." *State v. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001) (internal quotation marks omitted).

In this case, the fact that Mr. Robertson went to Mr. McDowell's home to purchase heroin from him showed how the two men knew each other and rebutted Ms. McDowell's contention that she did not know Mr. Robertson. Further, the evidence that Mr. Robertson and Mr. Rizk both purchased drugs from Mr. McDowell was relevant to "opportunity": how Mr. McDowell had the means to enlist them in the conspiracy to obtain TANF funds unlawfully. The relationship also (1) explained Mr. Robertson's motive in participating since he used his share of the funds to purchase heroin from Mr. McDowell, and (2) tended to prove that Mr. Rizk was not a legitimate landlord, although identified as such on the application. The evidence thus was admitted for proper purposes and was not offered solely "to prove the character of [defendant] in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b). *See State v. Ligon*, 332 N.C. 224, 235, 420 S.E.2d 136, 142 (1992) (evidence that defendant dealt drugs was properly admitted to show motive under Rule 404(b) where the State contended the victim was shot because he attempted to steal cocaine from defendant); *State v. Reid*, ___ N.C. App. ___, ___, 625 S.E.2d 575, 584 (2006) (holding that testimony that the witness knew the defendant because they sold drugs together was properly admitted to establish how the witness could identify the defendant).

While defendant has argued that unfair prejudice outweighed any probative value, our review of the record indicates that the

evidence of the nature of the parties' relationship was fundamental to establishing the nature of the scheme and, therefore, was admissible under Rule 403. Accordingly, we cannot say that the trial court abused its discretion in determining that any danger of unfair prejudice was outweighed by the testimony's probative value. *See State v. Garcia*, 358 N.C. 382, 416-17, 597 S.E.2d 724, 749 (2004) (the decision whether to exclude evidence under Rule 403 is reviewed for abuse of discretion), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122, 125 S. Ct. 1301 (2005). Defendant has also failed to make any persuasive argument that in the absence of this evidence the jury would have reached a contrary verdict on the conspiracy charge given the overwhelming evidence presented regarding Mr. McDowell's extensive involvement with respect to the applications and the fictitious nature of those applications.

B. Admission of Officer Foss' Notes

Mr. McDowell next argues that the trial court erred both by permitting Officer Foss to read the notes of his interview with Mr. McDowell to the jury and by later admitting into evidence the original longhand notes and a subsequently prepared typewritten version. We agree.

In *State v. Walker*, 269 N.C. 135, 139, 152 S.E.2d 133, 137 (1967), our Supreme Court held that a statement purporting to be a confession by a defendant that was reduced to writing by another person, is admissible by the State only if the defendant has "in some manner . . . indicated his acquiescence in the correctness of

the writing itself." The Court also held that "the reading verbatim of the typed statement to the jury [has] the same prejudicial force and impact as if such statement [is] identified and received in evidence as an exhibit." *Id.*

Subsequently, our courts recognized that "the written instrument is admissible, without regard to the defendant's acquiescence, if it is a 'verbatim record of the questions [asked] . . . and the answers' given by him." *State v. Bartlett*, 121 N.C. App. 521, 522, 466 S.E.2d 302, 303 (1996) (quoting *State v. Byers*, 105 N.C. App. 377, 383, 413 S.E.2d 586, 589 (1992)). Under this analysis, the Supreme Court's decision in *Walker* "does not preclude admission of an unsigned statement taken in longhand" if it contains a record "of a defendant's actual responses to the recorded questions." *State v. Wagner*, 343 N.C. 250, 256-57, 470 S.E.2d 33, 36 (1996).

In *Bartlett*, the officer testified that he had written down the defendant's answers during the course of an interview, but acknowledged that he did not write down the questions asked of the defendant. The record contained no other evidence suggesting that the officer's "handwritten notes were an exact reflection of the answers given by the defendant," and there was "no evidence that the defendant acquiesced in the correctness of the writing . . . ." *Bartlett*, 121 N.C. App. at 522, 466 S.E.2d at 303. Under those circumstances, this Court held: "It was . . . error to admit the document into evidence and allow the officer to read it to the jury." *Id.*

This case is indistinguishable from *Bartlett*. Mr. McDowell did not sign either the handwritten or typewritten version, and the record contains no evidence that he otherwise indicated an acquiescence in the accuracy of those documents. Further, Officer Foss merely testified that he took notes while talking with Mr. McDowell and that those notes "accurately reflect[ed] [his] recollection . . . of what this defendant told [him] at the police department[.]" He did not include the questions that he asked defendant and never testified that the notes reflected a verbatim rendition of Mr. McDowell's answers. To the contrary, he acknowledged that some of the words were his "terminology" rather than that of Mr. McDowell. Given Officer Foss' testimony, *Bartlett* compels the conclusion that the trial court erred in allowing Officer Foss to read aloud the statement and in admitting the handwritten and typewritten versions.

Bartlett further holds that "in the absence of some other evidence 'just as weighty,' [an] improperly admitted confession is prejudicial error and requires a new trial." *Id.* at 523, 466 S.E.2d at 303 (quoting *State v. Edgerton*, 86 N.C. App. 329, 335, 357 S.E.2d 399, 404 (1987), *rev'd on other grounds*, 328 N.C. 319, 401 S.E.2d 351 (1991)). Based upon our review of the record in this case, however, we believe defendant has failed to demonstrate prejudicial error under N.C. Gen. Stat. § 15A-1443(a).

The purported statement reported that Mr. McDowell knew Mr. Rogers, Mr. Robertson, and Mr. Rizk all needed rent money; that Mr. McDowell discussed with them going to DSS and told them what to

tell his wife to qualify for assistance; that he learned about the application process by going through his wife's briefcase and she knew nothing about the plan; that he intended to make money from the DSS plan; and that Mr. Robertson and Mr. Rizk had keys to the mailbox, but only Mr. Rogers and Mr. Robertson were authorized to retrieve mail. The State, however, also offered substantial evidence from other sources on each of the material points of the statement, with the exception of the portion exculpatory of Ms. McDowell. Based on this other evidence, we hold that admission of the statement did not constitute prejudicial error under N.C. Gen. Stat. § 15A-1443(a). Mr. McDowell has made no showing otherwise, but rather has relied solely on a bare assertion that admission of the evidence was "prejudicial." This assignment of error is, therefore, overruled.

C. Time Limitations on Opening Arguments

Mr. McDowell argues that the trial court erred in "*sua sponte* limit[ing] each side to three minutes for their opening statements." As an initial matter, we note that he mistakenly asserts that the two defendants were required to divide the three minutes. The record indicates, however, that the trial court granted each of the attorneys three minutes.[3]

Parties are entitled to "the opportunity to make a brief opening statement." N.C. Gen. Stat. § 15A-1221(a)(4) (2005). "Control over opening statements[, however,] rests within the sound

[3]The prosecutor unsuccessfully sought additional time, arguing that the three minute limitation meant that he had only 1 1/2 minutes to address each defendant.

discretion of the trial court." *State v. Call*, 349 N.C. 382, 396, 508 S.E.2d 496, 505 (1998). The North Carolina Supreme Court has found no error in situations similar to the instant case. *See id.* (finding no abuse of discretion where trial court limited counsel to five-minute opening statements in the guilt-innocence phase and *no* opening statements in the sentencing phase of a capital proceeding); *State v. Paige*, 316 N.C. 630, 647, 343 S.E.2d 848, 859 (1986) (finding no abuse of discretion where the trial judge limited counsel to five-minute opening statements and told counsel they could not comment on the other party's evidence, could not characterize any witness, could not comment on what the other lawyer may argue, and could not argue the law, but could only state what they contended their evidence would show); *see also* N.C. Gen. R. Prac. 9 ("Opening statements shall be subject to such time and scope limitations as may be imposed by the court.").

We note that the opening statements were not transcribed. Further, Mr. McDowell has made no specific argument as to how he was prejudiced, such as identifying what he would have included in his opening statement had he been granted additional time. Although we recognize that the trial court's time limitation resulted in extraordinarily "brief" opening statements, Mr. McDowell has failed to demonstrate that the decision in this case was an abuse of discretion.

D. Prosecutorial Misconduct

Finally, Mr. McDowell argues he is entitled to have his conviction vacated because of the State's violation of the

discovery statute by failing to disclose the existence of any agreements with Mr. Robertson in connection with his testimony. Mr. McDowell points to the prosecutor's denial at a pre-trial hearing that there were "any conversations, agreement, [or] innuendos that have been passed on to Mr. Robertson in exchange for his testimony." Mr. McDowell then argues that Mr. Robertson's and Officer Foss' testimony at trial contradicted the prosecutor's assertion.

Mr. McDowell contends that the State was, as a result, subject to sanctions under N.C. Gen. Stat. § 15A-910 (2005). He did not, however, seek sanctions at trial. Rule 10(b)(1) of the Rules of Appellate Procedure specifically provides that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." Since defendant did not seek discovery sanctions, he has not preserved this issue for appeal.

Recognizing this omission, defendant argues that he "could not have known at the time of trial that the State had failed to disclose the existence of discussions or arrangements with Robertson. This information came to light only with the undersigned examining Robertson's criminal case file at the Catawba County Courthouse." Although Mr. McDowell included in the record on appeal a copy of the dismissal of Mr. Robertson's charges, this document is not properly a part of the record on appeal in this

case since it was never presented to the trial court. *See* N.C.R. App. P. 9(a)(3)(i) (providing that the record on appeal should include "copies of all other papers filed and statements of all other proceedings had *in the trial courts* which are necessary for an understanding of all errors assigned" (emphasis added)). Because this argument relies upon information outside the record in this case, it cannot be argued on direct appeal, but might be the subject of a motion for appropriate relief under N.C. Gen. Stat. § 15A-1415 (2005). *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (holding that ineffective assistance of counsel claims should not be reviewed on direct appeal if they require consideration of information outside of the record on appeal and the verbatim transcript), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002).

No error.

Judges HUNTER and McCULLOUGH concur.

Report per Rule 30(e).