NO. COA05-930

NORTH CAROLINA COURT OF APPEALS

Filed: 18 April 2006

STATE OF NORTH CAROLINA

v. Pitt County
No. 04 CRS 8482

KENNETH ALEXANDER BARNES,
Defendant.

Appeal by defendant from judgment entered 4 August 2004 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 22 March 2006.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State.

McAfee Law, P.A., by Robert J. McAfee, for defendant-appellant.

STEELMAN, Judge.

Talita Irizarry (Irizarry) is married to defendant. She had been separated from defendant for nearly three months when, on 24 April 2004, at around 7:00 a.m., defendant showed up at her apartment. According to statements Irizarry made shortly after these events, defendant assaulted her that morning. Later that day, Irizarry drove herself to the Pitt County Memorial Hospital, where she was treated for injuries to her arms, breast, abdomen, back and head. Irizarry had a cut to her eyebrow that required stitches. Soon after the assault, Irizarry wrote a statement by

her own hand, which she signed, describing how her injuries occurred. On 26 April 2004, this statement was sworn to in front of a Pitt County Clerk of Court, and included in a complaint and motion for a domestic violence protective order. In her statement, Irizarry swore that:

> On April 24th, 2004 Kenneth A. Barnes was intoxicated laying on my couch in the living room when I woke up at 7:00 a.m. I asked him to leave my residence. He refused and told me to leave him alone because he wasn't going anywhere.
>
> I told him that I would call the police and have him removed, and he said, "If I go to jail I'm going to jail for a reason" and proceeded to beat on me. He began punching me in my face and my arm. He bit my face and finger.
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> He gave me a black eye on my right eye and he head-butted me two times and busted my left eye. Kenneth refused to let me leave the house to get medical treatment. During that time he was beating on me I was trying to defend myself, so he did receive some scratches. When he fell into a drunken sleep while trying to hold me, I slipped away from him and ran out of the back door with no shoes on and drove myself to the Pitt County Memorial Hospital E.D.
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> Treatment received, six stitches to the left eye and prescribed 800 milligrams of ibuprofen. I am afraid of him. He is a mudslinger and he's trying to destroy my reputation.

In addition, Irizarry made oral statements to hospital staff, police officials, and prosecutors implicating defendant in the beating.

Defendant was indicted for second-degree kidnapping and assault inflicting serious bodily injury, and tried before a jury

on 16-17 November 2004. At the trial, Irizarry testified that she had no memory of the events surrounding the injuries she sustained on 24 April 2004. The State was permitted to treat her as a hostile witness, and was further permitted, over defendant's objection, to allow Irizarry to read the above portion of the statement she signed on 26 April 2004.

The State also called Officer Robert Parker of the Greenville County Police Department. Officer Parker testified that when he arrived at the hospital, Irizarry was "out of it" and complaining of pain in her head. He further testified that her bed was covered in blood. Irizzary made statements to Officer Parker consistent with her written statement implicating defendant. Officer Parker also testified that as he was interviewing Irizarry, she was "crying – bordering on the side of sobbing, actually. She was afraid, she was nervous, sitting there shaking. We had to keep stopping because she would go into shaking and she was so scared .... Of course, she had bruises all over her, she had a large gash over her eye."

Following the State's evidence, the trial court granted defendant's motion to dismiss the felony charge of assault inflicting serious bodily injury, but allowed the lesser included offense of misdemeanor assault inflicting serious injury to be submitted to the jury. The jury found defendant not guilty on the kidnapping charge, but guilty of the misdemeanor assault. The trial court found defendant to be a prior record level III, and

imposed a 150 day active sentence. From this judgment, defendant appeals.

In defendant's first argument, he contends that the trial court erred in allowing certain evidence to be admitted at trial. We disagree.

Defendant first contends that the trial court erred by admitting into evidence the motion for a domestic violence protective order and complaint, because "the victim refused to admit making such application and did not admit the truth of any statements in the application."

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion." *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004). The trial court allowed Irizarry to read a portion of the complaint pursuant to Rule 803(5) of the North Carolina Rules of Evidence, titled "Hearsay exceptions; availability of declarant immaterial" which states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (5) Recorded Recollection. -- A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

"In order to admit 'recorded recollection' pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(5), the party offering the recorded

recollection must show that the proffered document meets three foundational requirements:" State v. Love, 156 N.C. App. 309, 314, 576 S.E.2d 709, 712 (2003).

> (1) The document must pertain to matters about which the declarant once had knowledge; (2) The declarant must now have an insufficient recollection as to such matters; (3) The document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined [and adopted] . . . when the matters were fresh in [her] memory.

Id. In the instant case, Irizarry testified that she could not remember the events surrounding her hospitalization on 24 April 2004. She was shown the complaint, and admitted that the relevant portion was in her handwriting and signed by her under oath on 26 April 2004. She further testified: "If I signed it and wrote it, then I told the truth." These facts satisfy the requirements for admission under Rule 803(5). *See State v. Leggett*, 135 N.C. App. 168, 519 S.E.2d 328 (1999). The trial court did not abuse its discretion by allowing Irizarry to read those portions of her written statement implicating defendant in the assault.

Defendant includes two additional assignments of error in the heading of this argument, but fails to argue them in his brief and fails to cite any authority. Defendant has abandoned these assignments of error. *State v. Hatcher*, 136 N.C. App. 524, 526-27, 524 S.E.2d 815, 817 (2000); *State v. Stevenson*, 136 N.C. App. 235, 244, 523 S.E.2d 734, 739 (1999).

In defendant's second argument, he contends that the trial court erred by "instructing the jury that [Officer Parker's]

testimony was offered to corroborate the victim's earlier testimony, where the victim had not earlier testified that she made a written statement in a domestic violence protective order application." We disagree.

"It is well established that a witness' prior consistent statements may be admitted to corroborate the witness' sworn trial testimony but prior statements admitted for corroborative purposes may not be used as substantive evidence." *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340 (2000). Defendant argues Irizarry's testimony at trial was that she had no recollection of how she was injured on 24 April 2004, and therefore Officer Parker's testimony, though it may have corroborated the written statement of Irizarry read into evidence at trial, did not corroborate her actual trial testimony.

Irizarry testified that she could not remember the relevant events of 24 April 2004. Irizarry read portions of her written statement to the jury which described how defendant beat her on 24 April 2004 resulting in the injuries she sustained. She then testified that because she wrote and signed the statement, it must be the truth. We have held that this statement was properly read into evidence pursuant to Rule 803(5). We hold that the contents of this written statement, which were read into evidence and adopted by Irizarry, constitute a portion of Irizarry's trial testimony.

Officer Parker testified that Irizarry made a statement to him in which she described the beating by defendant on 24 April 2004.

Officer Parker recounted that statement to the jury. Defendant makes no argument that the prior statement of Irizarry testified to by Officer Parker is inconsistent with the written statement she adopted by her trial testimony. We hold that the trial court properly admitted this prior consistent statement for the purpose of corroboration. This argument is without merit.

In defendant's third argument, he contends that the trial court erred "by denying defendant's motion to dismiss for insufficiency of the evidence as to the charge of assault inflicting serious injury ...." We disagree.

At the close of State's evidence, defendant moved to dismiss the charge of second-degree kidnapping and the charge of "felonious assault inflicting serious bodily injury." Defendant argued to the trial court that the "Courts have drawn a distinction between the misdemeanor of inflicting serious injury and the felony of inflicting serious bodily injury ...." Defendant argued that the evidence presented by the State did not establish that Irizarry suffered "serious bodily injury" as defined by N.C. Gen. Stat. § 14-32.4. The trial court denied defendant's motion to dismiss the charge of second-degree kidnapping, but granted his motion to dismiss the felony assault charge, stating: "I'm going to grant the defendant's motion to dismiss so far as it relates to the charge of assault inflicting serious bodily injury; however, I'm going to let it go as to [the lesser included misdemeanor offense of] assault inflicting serious injury." Defendant presented evidence. At the close of all the evidence, the trial court inquired if there were

any motions from the defendant, and defendant's counsel replied: "I have a motion to dismiss as to the kidnapping - - second-degree kidnapping charge and commend my prior arguments to the Court." Assuming *arguendo* that defendant's motion to dismiss at the close of State's evidence encompassed the misdemeanor assault charge, because he did not renew his motion to dismiss this charge at the close of all the evidence, he has failed to preserve this question for appellate review. N.C. R. App. P. Rule 10(b)(3); *State v. Buchanan*, __ N.C. App. __, 613 S.E.2d 356 (2005). This argument is without merit.

NO ERROR.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).