NO. COA06-649

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

STATE OF NORTH CAROLINA,
Plaintiff,

v. Mecklenburg County
No. 03 CRS 224203
STEPHEN BALDWIN, 03 CRS 224204
Defendant.

Appeal by defendant pursuant to N.C. Gen. Stat. § 7A-32(c) to review the judgment and order entered on or about 26 May 2004 by Judge James E. Lanning in Superior Court, Mecklenburg County. Heard in the Court of Appeals 10 January 2007.

Attorney General Roy Cooper, III by Assistant Attorney General Derrick C. Mertz for the State.

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

STROUD, Judge.

This matter is before the Court on writ of certiorari to review the trial court judgment and restitution order entered upon defendant's convictions for attempted robbery with a dangerous weapon and assault with a deadly weapon. Defendant raises four questions for review on appeal: (1) whether the trial court erred by admitting inadmissible hearsay testimony from three separate witnesses, (2) whether the trial court's admission of hearsay

testimony violated defendant's Sixth Amendment right to confront witnesses against him, (3) whether the trial court erred by failing to consider defendant's available resources when ordering defendant to pay $871.65 restitution to the victim, and (4) whether defendant was prejudiced by ineffective assistance of counsel because defense counsel did not object to the admission of hearsay testimony and to the amount of restitution ordered by the trial court. We find no reversible error in defendant's trial and affirm the trial court's restitution order.

I. Background

On 23 July 2003, the Mecklenburg County Grand Jury indicted defendant Stephen Baldwin for the offenses of assault with a deadly weapon and robbery with a dangerous weapon. Defendant was tried at the 24 May 2004 Criminal Session of Superior Court, Mecklenburg County, with Judge James E. Lanning presiding.

The State called nine witnesses at trial, including the victim Jose Sanchez, eyewitness Andres Garcia, Mecklenburg County Police Department Officers Todd Mozingo, A.S. Rice, and R. Quilez, and and Mecklenburg County Police Department Detective Randy Carroll. Evidence presented by the State established that defendant attempted to rob Sanchez at gunpoint at approximately 4:50 p.m. on 23 May 2003 in the parking lot outside Sanchez's apartment, which was located at 6200A Elgywood Lane in Charlotte, North Carolina. At that time, Sanchez and his brother-in-law Garcia were returning home from work and they had just exited their car.

Defendant approached Sanchez while he was locking the car door and Garcia was walking toward the apartment. He pointed a revolver at Sanchez's head and demanded Sanchez's money. Sanchez responded that he did not have any money. Hearing the altercation, Garcia started to walk back toward Sanchez and defendant. Defendant then pointed the revolver at Garcia and pulled the trigger, but the gun did not fire.

In response, Sanchez hit defendant on the right hand with his lunch box. Defendant cursed at Sanchez and hit him on the face with the gun. Defendant also tried to shoot Sanchez twice by pointing the gun at Sanchez's head and body and pulling the trigger. Again, the gun did not fire. Sanchez threw the lunch box at defendant, after which defendant shot Sanchez in the hand. Defendant fired one additional shot that struck the ground.

Defendant then ran to a white car and entered the rear seat. As the car drove away, defendant fired two more shots that also struck the ground. Garcia drove Sanchez to the hospital where Sanchez was treated and released.

Responding Officers Mozingo and Rice saw three people riding in a white car near Sanchez's apartment approximately one hour after the shooting. Sanchez's neighbors pointed at the car, telling the officers that it was the car they were looking for, but when the officers approached the car, it "sped away." Officers Mozingo and Rice followed the white car, which came to a "running stop" against another vehicle in the 6200 block of Elgywood Lane. Defendant and one other man exited the car while it was still

moving and fled through the neighborhood. Officer Mozingo and Officer Rice pursued and apprehended both men on foot. When Officer Mozingo apprehended defendant, he was hiding in a storage building.

Defendant was taken into custody and placed in the back of a patrol car. The man who fled with defendant and the third person in the white car, a woman, were also taken into custody. Officers Mozingo and Rice recovered a single shot .45 caliber pistol from the back seat of the white car and cartridges and bullets for use in a semi-automatic handgun from the glove compartment. They did not find a revolver. The officers learned later that the white car had been stolen in Charlotte, North Carolina on 19 May 2003.

Thereafter, Sanchez and Garcia identified defendant as the person who assaulted them at gunpoint and attempted to rob them. In so doing, both Sanchez and Garcia expressly ruled out the two other detained individuals as the shooter. They also gave responding officer Quilez written statements. Defendant was then transported to the police station.

At the police station Detective Randy Carroll interviewed defendant. During the interview, defendant gave Detective Carroll an alibi, stating that he was at home with his stepmother Cheryl Madison at 4:50 p.m., the approximate time Sanchez was shot. When Detective Carroll spoke with Madison by phone, she stated that defendant had left home at 4:00 p.m.

Defendant did not present evidence at trial. On 25 May 2004, the jury found defendant guilty of attempted robbery with a

dangerous weapon and assault with a deadly weapon. Judge Lanning sentenced defendant to a consolidated sentence of sixty-eight to ninety-one months imprisonment and ordered payment of $871.65 restitution to Sanchez. This is the cost of medical expenses incurred by Sanchez for treatment of his injuries. On 14 July 2005, this Court granted defendant's petition for writ of certiorari to review the trial court judgment and restitution order.

II. Hearsay and Confrontation

Defendant assigns plain error to the trial court's admission of the testimony of four witnesses at trial: Officer Mozingo, Officer A.S. Rice, Officer R. Quilez, and Detective Randy Carroll. In support of his assignments, defendant argues that portions of the officers' testimony contained inadmissible hearsay that should have been excluded pursuant to North Carolina Rules of Evidence, Rule 802, and that admission of the disputed testimony violated the Confrontation Clauses of the Sixth Amendment to the United States Constitution and Article one, Section twenty-three of the North Carolina Constitution.

A. Standard of Review

Plain error is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 214, 362 S.E.2d 244, 251 (1987) (quoted in *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993)), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). A

criminal defendant may seek plain error review of "a question which was not preserved by objection noted at trial" by "specifically and distinctly" assigning plain error to the "judicial action questioned." N.C. R. App. P. 10(b)(4) (2005).

B. Hearsay

N.C. Gen. Stat. § 8C-1, Rule 801 defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." For purposes of N.C. Gen. Stat. § 8C-1, Rules 801 through 806, "the nonverbal conduct of a person" is a statement "if it is intended by him as an assertion." N.C. Gen. Stat. § 8C-1, Rule 801(a)(2). Thus, hand gestures are statements when they are intended by the person gesturing to communicate a fact or idea. *State v. Satterfield*, 316 N.C. 55, 340 S.E.2d 52 (1986) (declarant made a statement by gesturing toward a chest of drawers which contained a knife allegedly used to commit a rape and robbery). "Oral assertions" are also "statements" for purposes of N.C. Gen. Stat. § 8C-1, Rules 801 through 806.

Out-of-court statements offered for the purpose of corroboration are not hearsay because they are not offered to prove the truth of the matter asserted; rather, such statements strengthen or confirm other evidence. *State v. Riddle*, 316 N.C. 152, 156-57, 340 S.E.2d 75, 77-78 (1986). For example, this Court has held that a non-testifying forensic firearms examiner's out-of-court statement that the two nine millimeter bullets recovered from a victim's body were fired from the defendant's gun was properly

admitted to corroborate the testimony of the State's forensic firearm's expert, who concluded the same. *State v. Walker*, 170 N.C. App. 632, 613 S.E.2d 330, *disc. rev. denied*, 359 N.C. 856, 620 S.E.2d 196 (2005). Moreover, "[a] prior consistent statement of a witness is admissible to corroborate the testimony of the witness whether or not the witness has been impeached." *State v. Jones*, 329 N.C. 254, 257, 404 S.E.2d 835, 836 (1991) (emphasis added).

Likewise, out-of-court statements offered to explain the subsequent conduct of the person to whom the statement was directed are not hearsay. This is true even when the out-of-court statement was directed to an investigating police officer, if the statement is offered to explain the subsequent course of the officer's investigation. *State v. Alexander*, ___ N.C. App. ___, ___, 628 S.E.2d 434, 436 (2006), *appeal dismissed and disc. rev. denied*, ___ N.C. ___, ___ S.E.2d ___ (2007). When there is a risk that jurors will use an out-of-court statement for both hearsay and non-hearsay purposes, the opposing party may request a limiting instruction to clarify the appropriate evidentiary use of the statement. N.C. Gen. Stat. § 8C-1, Rule 105 (limited admissibility) ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

C. Confrontation

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy . .

. the right to confront witnesses against him." U.S. Const. amend. VI. Article I, Section 23 of the North Carolina Constitution provides that "[i]n all criminal prosecutions, every person charged with a crime has the right . . . to confront witnesses against him." N.C. Const. art. I, § 23. "[B]ecause the United States Constitution is binding on the states, the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be 'accorded lesser rights' no matter how we construe the state Constitution." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). For this reason, the Sixth Amendment provides a "constitutional floor" guaranteeing the right of every criminal defendant to confront witnesses against him, *see id.*, and we apply Sixth Amendment analysis to defendant's state and federal constitutional arguments in the case *sub judice*.

In *Crawford v. Washington*, the United States Supreme Court explained that, for purposes of the Sixth Amendment, a "witness against" a criminal defendant is an individual who gives testimony against the defendant. 541 U.S. 36, 49, 158 L. Ed. 2d 177 (2004)(emphasis added). Thus, a defendant must be given the opportunity to confront witnesses who testify against him at trial. When a witness does not appear to testify at trial, his "testimonial statements" are inadmissible unless the State shows that the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 53-54, 158 L. Ed. 2d at 194.

Testimony is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51, 158 L. Ed. 2d at 192 (quoting 1 N. Webster, An American Dictionary of the English Language (1928)). "*Ex parte* testimony at a preliminary hearing" and "[s]tatements taken by police officers in the course of interrogations are . . . testimonial." *Id.* at 52, 158 L. Ed. 2d at 193. Out-of-court statements are also testimonial "when the circumstances [surrounding their making] objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, ___ U.S. ___, ___, 165 L. Ed. 2d 224, 237 (2006).

However, "[t]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59, n.9, 158 L. Ed. 2d at 197, n.9; *Walker*, 170 N.C. App. at 635, 613 S.E.2d at 333. For example, in *Tennessee v. Street*, the United States Supreme Court held that a defendant's right to confront witnesses is not violated by the trial court's admission of an out-of-court statement for the non-hearsay purpose of rebutting the defendant's testimony. 471 U.S. 409, 85 L. Ed. 2d 425 (1985). *Tennessee v. Street* was cited with approval in *Crawford v. Washington*. *Crawford*, 541 U.S. at 59, n.9, 158 L. Ed. 2d at 197, n.9. In *State v. Walker* and *State v. Jones*, this Court explained that the Confrontation Clause does not bar the use of testimonial statements offered for the non-hearsay purposes of corroborating other

evidence and showing the effect of the statement on the listener respectively. *Walker*, 170 N.C. App. at 635, 613 S.E.2d at 333; *Jones*, 329 N.C. App. at 259, 628 S.E.2d at 436-37.

D. Testimony of Officer Todd Mozingo

Defendant assigns plain error to the testimony of Charlotte-Mecklenburg Police Officer Todd Mozingo, whom the State called to testify during its case-in-chief. On direct examination, Officer Mozingo described how he and Officer A.S. Rice secured the crime scene and later apprehended defendant.

In particular, Officer Mozingo testified that "a couple of witnesses in the area tried to tell us exactly what happened. They explained that there had been a shooting and that there was a white car with black male suspects." Officer Mozingo stated that he "put that out on the radio." Thereafter, the prosecutor asked Officer Mozingo to describe how the investigation proceeded.

> Q. What did you do next?
> A. I continued to circle the area and, like, canvass the neighborhood, speak to people.
> . . .
> We canvassed the neighborhood a little more and tried to locate any other witnesses in the area.
> Q. What did you do after that?
> A. After the scene--we secured the scene, we left the scene, I guess, a little while later. I started a report. We left the actual scene and I started a report.
>
> Andy was driving--Officer Rice was driving. Probably an hour-- maybe an hour--a little more than an hour later I was doing the report in the car on the computer, we rode back around the same area. Some of the people that we spoke with earlier were pointing at this car in the 6200 block of Elgywood again. They were pointing at the car yelling--saying that that was the car that we were looking for.

> Q. What did you do?
> A. Well, Officer Rice was driving, and he saw it too at the same time. The car sped away. It backed out of the parking lot and came back around on Elgywood.
> . . .
> It pulled into an area and then backed out and pulled out onto--it backed up initially and then pulled out onto Elgywood. It turned into the 6100 block of Elgywood. Based [on] the information that we had prior, we were going to attempt to stop the car.

During cross-examination, defense counsel questioned Officer Mozingo about the report that he produced documenting the incident.

> Q. Officer Mozingo, are you familiar with a kind of report that you do in your office called the Officer's Internal Incident Report . . . ?
> A. Yes.
> Q. In this case, you were the officer who filed that report; is that correct?
> A. The reporting officer. Yes.
> Q. That report is composed of both a narrative and answers to form questions; correct?
> A. Yes.
> . . .
> Q. Now, you refer in this to Witness Number 1, who you have listed as a Francisco Javier [LaBonita].
> A. Yes.
> Q. That witness, according to your narrative report, stated that he saw four black males in a white four-door car; is that correct?
> A. Initially, yes.
> Q. That was what he saw at the shooting correct?
> Q. Is Mr. [LaBonita] here to testify today?
> A. Not that I am aware of. No.

On re-direct, the State followed up on defense counsel's question about LaBonita.

> Q. [Defense Counsel] asked you if you recall, that a witness out there named Francisco Javier LaBonita said some things about what he had seen?
> A. Yes.

Q. He also pointed out the defendant, didn't he?
A. Yes. At the show-up, yes.

1.

Defendant argues that Officer Mozingo's direct examination testimony that "[s]ome of the same people that we spoke with earlier were pointing at this car in the 6200 block of Elgywood again. They were pointing at the car yelling--saying that that was the car that we were looking for" was inadmissible hearsay and that its admission violated the Sixth Amendment to the United States Constitution. We disagree.

The statements of people who "were pointing at" defendant's car, and "yelling . . . that that was the car [Officers Mozingo and Rice] were looking for" were elicited by the State when asking Officer Mozingo to describe how his investigation proceeded and were offered to show why Officer Mozingo and Officer Rice turned on the blue lights and followed the white car, which had "sped away" from the crime scene. Thus, these statements were admissible to show their effect on the listener, Officer Mozingo, and to explain the subsequent course of his investigation. These are purposes other than the truth of the matter asserted. For the reason stated above, the disputed testimony is not hearsay and its admission does not violate either N.C. Gen. Stat. § 8C-1, Rule 802, or defendant's right to confront witnesses against him. This assignment of error is overruled.

2.

Defendant also argues that Officer Mozingo's re-direct testimony that LaBonita "pointed out" defendant "at the show-up," was inadmissible hearsay. Although the State responds that Labonita's action is not a "statement" within the meaning of N.C. Gen. Stat. § 8C-1, Rule 801, we conclude that "pointing out" a suspect at a "show-up" is nonverbal conduct intended to communicate an assertion. We agree with defendant that the disputed testimony was offered by the State to prove the truth of the matter asserted by LaBonita, which is that LaBonita identified defendant as the person who committed the crimes at issue. Thus, the statement is inadmissible hearsay pursuant to N.C. Gen. Stat. § 8C-1, Rules 801 and 802.

We further agree that LaBonita's statement is testimonial. When a witness identifies a suspect at a "show up," the "primary purpose" of the identification is usually to prove a fact "relevant to later criminal prosecution": that the suspect committed a crime. On the record *sub judice* we take "pointing out" at a "show up" to mean selecting the suspect from a group of individuals detained at the crime scene by responding police officers. In "pointing out" defendant, LaBonita made a "testimonial statement." Because the State has not shown that LaBonita was unavailable to testify at trial or that defendant had a prior opportunity to cross-examine LaBonita, admission of LaBonita's statement violates defendant's right to confront witnesses against him. The trial court erred by admitting Officer Mozingo's testimony concerning LaBonita.

Even so, we conclude that admission of the disputed testimony is not error for which defendant is entitled to a new trial, meaning the admission was not plain error. *See State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378-79 (1983) (adopting the plain error rule in North Carolina but noting that the adoption "does not mean" that every error "mandates reversal regardless of the defendant's failure to object"). Plain error is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *Bagley*, 321 N.C. at 214, 362 S.E.2d at 251. In *State v. Lemons*, the North Carolina Supreme Court held that a trial court did not commit plain error by admitting a co-defendant's out-of-court statement that the defendant was "the shooter" during a capital sentencing proceeding. 352 N.C. 87, 97-98, 530 S.E.2d 542, 548 (2000), *cert. denied*, 531 U.S. 1091, 148 L. Ed. 2d 698 (2001). Although the defendant argued that admission of the statement violated his constitutional right to confront the co-defendant, the Supreme Court emphasized that "there was evidence in addition to [the co-defendant's] statements supporting a jury decision not to find the (f)(4) mitigating circumstance or the nonstatutory mitigating circumstance that defendant was not the shooter." *Id.* at 97, 530 S.E.2d at 548. Similarly, in *State v. Locklear*, this Court held that a trial court did not commit plain error by admitting evidence of the defendant's prior bad acts in light of substantial evidence of the defendant's guilt presented at trial. 174 N.C. App. 547, 553-54, 621 S.E.2d 254, 258 (2005).

Lemons and *Locklear* guide our plain error analysis in the case *sub judice*.

Here, the State presented ample independent evidence of defendant's guilt at trial to support defendant's convictions. Both the victim Sanchez and eyewitness Garcia identified defendant as the shooter at the crime scene. They also identified defendant in open court as the shooter. Both witnesses described the car in which the shooter was traveling and that description matched the car from which defendant fled before being apprehended. Defendant was seen driving this car near the crime scene less than one hour after the shooting and fled from the car when approached by Officers Mozingo and Rice. Based on this evidence, and our review of the record in total, we conclude that there was ample evidence of defendant's guilt, independent from LaBonita's statement.

For the reasons stated above, we conclude that the trial court did not commit plain error by admitting LaBonita's statement. The error was not "so fundamental as to amount to a miscarriage of justice" and did not "probably result[] in the jury reaching a different verdict than it otherwise would have reached." This assignment of error is overruled.

E. Testimony of Officer A.S. Rice

Defendant assigns plain error to the testimony of Charlotte-Mecklenburg Police Officer A.S. Rice, whom the State also called to testify during its case-in-chief. On direct examination, Officer Rice described the crime scene and the subsequent apprehension of defendant.

In particular, Officer Rice testified that after securing the crime scene, he and Officer Mozingo patrolled the area in his police vehicle. While driving near the 6200 block of Elgywood Lane, Officer Rice noticed "a white, small four-door car in the parking lot there." Moreover, Officer Rice testified that "[t]here were Hispanic males standing outside" and "[t]hey all started pointing frantically at the car." Thereafter, Officer Rice "did a U-turn" to approach the white car, which "sped off." When Officers Rice and Mozingo caught up with the white car, defendant and one other individual fled on foot. Officers Rice and Mozingo followed.

The State asked Officer Rice what happened after he and Officer Mozingo apprehended defendant:

> Q. What happened then?
> A. At that time, other officers start[ed] arriving at the scene. Officer Quilez arrived with either a witness or a victim. Actually, I believe at that time we put him in the car--[defendant]. We told everybody that we had two subjects that had been arrested.
>
> We started searching the [defendant's] car. There was a .45 caliber, Derringer that was laying in the backseat of the car. It was just laying in the middle of the backseat.
>
> Officer Mozingo got the gun. It also had a live round in it as well. Then I think at that time Officer Quilez arrived with the witness. I got my--[Defendant] was in our car. I got [defendant] out of the backseat. Everybody nodded that that was the subject that had robbed or attempted to rob them.
> Q. What happened after that?
> A. At that time, we transported or I transported [defendant] to the law enforcement center at 601 East Trade Street to be interviewed by the detectives.

On re-direct, the State asked Officer Rice "[d]id anybody while you were out there--after you had caught the defendant, did anybody say, 'No. That is not him?,'" and Officer Rice responded, "No."

1.

Defendant argues that Officer Rice's description of the crime scene when he and Officer Mozingo returned, including his testimony that "[t]here were Hispanic males standing outside" who "all started pointing frantically at the car," was inadmissible hearsay and that its admission violated the Sixth Amendment to the United States Constitution. Officer Rice's testimony is functionally equivalent to the testimony of Officer Mozingo addressed above. For the reasons stated above, we conclude that these statements are not hearsay; rather they were admissible to show their effect on Officer Rice, who responded by turning on the blue lights, making a U-turn, and following the white car. Accordingly, admission of these statements does not violate either N.C. Gen. Stat. § 8C-1, Rule 802, or defendant's right to confront witnesses against him. This assignment of error is overruled.

2.

Defendant also argues that Officer Rice's testimony that when he removed defendant from the backseat of his vehicle, "[e]verybody nodded that [defendant] was the subject that had robbed or attempted to rob them," was inadmissible hearsay and that its admission violated the Sixth Amendment to the United States Constitution. We disagree. In so doing, we consider the statement

in context, concluding that the term "everybody," as used by Officer Rice, actually referred to Sanchez and Garcia who asserted that defendant "had robbed or attempted to rob them." The statement was admissible for the non-hearsay purpose of corroborating their testimony.

The testimony of Officer Rice immediately preceding the challenged statement was that "[a]t that time, other officers start[ed] arriving at the scene. Officer Quilez arrived with either a witness or a victim." Additionally, Sanchez and Garcia both testified on direct examination that they identified defendant as the shooter at the scene after a police officer removed defendant from a patrol car where he was being detained.

Sanchez testified that he identified defendant as the shooter upon his return from the hospital.

> A. When I arrived at the parking lot right there in front of the apartment, this young child that came by told me that there was a police officer on the other side of the building.
> Q. What time was that?
> A. I would say around 7:30.
> Q. What did you do when you found out that the police were nearby?
> A. The child said that the policeman was saying that he wanted to see me.
> Q. What did you do?
> A. I went to where he was.
> Q. What did he say when you got there?
> A. He said, "If I show you somebody, can you identify that person as being the one who shot you?"
> Q. What did you say?
> A. I said, "Yes. It's possible that I can do that."
> Q. So then what happened?
> A. Then the officer went to his car. He took out the subject, and I identified awhile ago.
> Q. You identified awhile ago?

> A. The one I identified here in court.
> Q. Oh, okay. So the officer took the defendant out of the police car at that point?
> A. Yes.
> Q. What happened then?
> A. I said, "Let's see him. It's not somebody else. It's him."

Sanchez also identified defendant during the trial in open court.

On cross-examination, defense counsel attempted to impeach Sanchez with the statement he gave Officer Quilez at the scene. In particular, defense counsel questioned Sanchez about the age, height, and physical build of the man who shot him, attempting to demonstrate that Sanchez's prior statement was inconsistent with his testimony on direct examination.[1]

Thereafter, the State called Garcia as a witness. On direct examination, Garcia testified that he described the shooter to responding police officers. He explained that when defendant and his friends returned to the parking lot in the white car, he notified the police by "signal[ing] to them and indicat[ing] that they were the guys." The State then elicited the following testimony from Garcia:

> Q. When you say "They" who are you talking about?
> A. That black man there (indicating).
> Q. Who else?
> A. And his friends.
> Q. What happened after that?
> A. Then the police caught him. Then at that moment, they asked me if I recognized the one who had assaulted Jose [Sanchez, the victim].
> Q. Where were you when they asked you that?

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[1] From this exchange, it is reasonable to infer that the alleged discrepancies resulted in part from the fact that Spanish is Sanchez's first language and his English vocabulary is limited.

> A. I was there in the parking lot where they caught him.
> Q. Where was the defendant when the police asked you that?
> A. He was in the patrol car, but they brought him out.

On cross-examination, defense counsel also attempted to impeach Garcia with the statement he gave Officer Quilez at the scene. In particular, defense counsel questioned Garcia about the clothing worn by the shooter, attempting to demonstrate that Garcia's identification of defendant was inconsistent with his prior description of the shooter, in which Garcia had stated that the shooter wore a white shirt and khaki pants.

Based on the context surrounding the disputed portion of Officer Rice's testimony, the testimony of Sanchez and Garcia, and our review of the record in total, we conclude that the term "everybody," as used by Officer Rice, actually referred to Sanchez and Garcia who asserted that defendant "had robbed or attempted to rob them." The statement was admissible for the purpose of corroborating their testimony, which is a purpose other than the truth of the matter asserted. Accordingly, the statement is not hearsay and its admission does not violate either N.C. Gen. Stat. § 8C-1, Rule 802, or defendant's right to confront witnesses against him.[2] This assignment is overruled.

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[2] We recognize that jurors may also have understood "everybody" to include LaBonita. Although we have already concluded that the trial court erred by admitting LaBonita's statement identifying defendant, we held that the admission was not plain error. For the same reasons stated above, admission of Officer Rice's testimony recounting functionally equivalent testimony was not plain error.

3.

Defendant also argues that the trial court erred by admitting Officer Rice's re-direct testimony that nobody at the scene said defendant was not the shooter. In support of his argument, defendant contends that the disputed testimony was inadmissible hearsay and that its admission violated the Sixth Amendment to the United States Constitution. We disagree.

As explained above, "the nonverbal conduct of a person" is only a statement "if it is intended by him as an assertion." N.C. Gen. Stat. § 8C-1, Rule 801(a)(2). Sometimes circumstances surrounding a witness's silence indicate that the silence is intended as an assertion. For example, a defendant's silence may be considered an admission when the defendant fails to deny a statement implicating him in the crime and a reasonable person would have denied involvement under the circumstances. *State v. Thompson*, 332 N.C. 204, 420 S.E.2d 395 (1992). Here, there is no evidence that the silence of individuals at the scene was intended by those present to be an assertion implicating defendant. Accordingly, the silence of individuals present at the crime scene is not a "statement" pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(a)(2). Admission of the disputed testimony does not violate either N.C. Gen. Stat. § 8C-1, Rule 802, or defendant's right to confront witnesses against him. This assignment of error is overruled.

F. Testimony of Officer R. Quilez

Defendant assigns plain error to the testimony of Charlotte-Mecklenburg Police Officer R. Quilez, whom the State also called to testify during its case-in-chief. On direct examination, Officer Quilez testified that he interviewed Sanchez at the hospital and then went to the crime scene.

Officer Quilez described the crime scene when he arrived.

> Q. What did you see or do there?
> A. After I got over there, there was a big commotion over there. People all over the place. I got out of the vehicle. There was a Hispanic Male who was a little upset. He was pointing towards a black female who was there.
>
> I got out and asked him to calm down. I asked him what was going on. He told me that the female there was in the vehicle with the people that shot the victim.
>
> I heard Officer Mozingo saying that he had another one in custody. I started questioning some of the people. I found a person there–which I can't recall his name at this moment–I talked to him for a few minutes. He told me that–he repeated to me what had happened.
>
> What he told me was similar to what the victim had told me about the incident. I asked him if he was able to identify the shooter if he saw him again. He told me, yes, because he had seen his face.
>
> At that time I heard there was a third suspect who was apprehended. We went over there. Everybody was coming back over to the scene where they had the guys in custody. We got one of the guys out of the patrol car. I asked the guy if he could identify the individual that they took out of there.
>
> Then, I think, he said no; that was not one of them. Then the guy that was the defendant . . .–I asked him, "Is that the guy?" He said, "Yes. That is the guy."
>
> Then I went around to start looking to see if somebody knew where the victim was. I knew he was getting ready to get out of the hospital. I said, "Can somebody go get the victim or tell me where he is?"
>
> The lady who was there said he is at the drugstore; he should be back shortly, within a

> few minutes. People started going around to locate the victim, and they found him and brought him over to the scene.
>
> I remember I went over to where he was. At that time they took one of the guys that we had in custody. At that time I thought it was Tyrone–he came out of the car. The victim said, "That is him." I asked him again, "Are you sure?"
>
> He said, "Yes."
>
> "Are you sure?"
>
> "Yes."

Shortly thereafter, the State presented Officer Quilez with the statement made by Garcia at the scene. Garcia's statement provided: "This statement is written for me by Officer R. Quilez on 5-23-03." The State then asked Officer Quilez to read Garcia's statement into evidence.

1.

Defendant argues that the trial court erred by admitting Officer Quilez's testimony that a witness, whose name Officer Quilez could not remember, identified defendant as the shooter. In support of his argument, defendant contends that the disputed testimony was inadmissible hearsay and that its admission violated the Sixth Amendment to the United States Constitution. We disagree. In so doing, we consider the statement in context and conclude that the unnamed witness was Garcia. In fact, our review of the transcript shows that the State asked Officer Quilez to read Garcia's statement aloud for the purpose of refreshing Quilez's memory and establishing Garcia as the unnamed witness. Garcia's written statement is consistent with Officer Quilez's preceding testimony.

Garcia's prior consistent statement was admissible for the purpose of corroborating his earlier testimony. This is a purpose other than the truth of the matter asserted. For this reason the statement is not hearsay and its admission does not violate either N.C. Gen. Stat. § 8C-1, Rule 802, or defendant's right to confront witnesses against him. This assignment of error is overruled.

G. Testimony of Detective Randy Carroll

Defendant assigns plain error to the testimony of Charlotte-Mecklenburg Police Department Detective Randy Carroll, whom the State also called to testify during its case-in-chief. Detective Carroll interviewed defendant at the police station. During the interview, defendant told Detective Carroll that he was at home with his stepmother Cheryl Madison at the time of the shooting, and that if Detective Carroll called Madison, she would corroborate his alibi. Detective Carroll then called Madison.

On direct examination, Detective Carroll testified that

> [Madison] said she had left their home early that morning about 10:00am to go to the store. She said that [defendant] was at home at that time. He had just gotten out of bed. She said that she thought he left the house about noon and return[ed] home about 3:00 p.m. and then [left] at 4:00 p.m. She said she couldn't remember what he was wearing during that day.

1.

Defendant argues that Detective Carroll's testimony recounting Madison's statement was inadmissible hearsay and that its admission violated the Sixth Amendment to the United States Constitution. The State responds that Detective Carroll's testimony does not

actually contain statements made by Madison; rather, the State argues that the testimony is "the recollection of [Detective Carroll] that [Madison] did not provide [d]efendant with an alibi." The State further argues that because "the disputed evidence does not purport to show where [d]efendant actually was, or what he was doing," the evidence "is not offered for the truth" of the matter asserted. We disagree.

Madison told Officer Carroll that defendant "left the house about noon and return[ed] home about 3:00 p.m. and then [left] at 4:00 p.m." on the day of the shooting. These words are an "oral assertion," which is a "statement" for purposes of N.C. Gen. Stat. § 8C-1, Rule 801(c). The "matter asserted" is that defendant was not home between noon and 3:00 p.m. and after 4:00 p.m. on the day of the shooting, and Madison's statement was offered to prove this fact; thus, it was offered for its "truth." Therefore, the statement is inadmissible hearsay pursuant to N.C. Gen. Stat. § 8C-1, Rules 801 and 802.

We further agree that Madison's statement is testimonial. When a witness is asked by an investigating detective to confirm the alibi put forth by a defendant, that witness' response is made for the "primary purpose" of establishing a fact "relevant to later criminal prosecution": that the defendant's alibi is true or false. By stating that defendant "left the house about noon and return[ed] home about 3:00 p.m. and then [left] at 4:00 p.m.," Madison made a "testimonial statement." Because the State has not shown that Madison was unavailable to testify at trial, or that

defendant had a prior opportunity to cross-examine Madison, admission of Madison's statement violates defendant's right to confront witnesses against him.

Even so, we conclude that admission of the disputed testimony was not plain error. As discussed above, the State presented substantial evidence of guilt, independent of Madison's statement.

Accordingly, we hold that the trial court did not commit plain error by admitting Madison's statement. The error was not "so fundamental as to amount to a miscarriage of justice" and did not "probably result[] in the jury reaching a different verdict than it otherwise would have reached." This assignment of error is overruled.

III. Restitution

Defendant also assigns error to the trial court order awarding Sanchez restitution in the amount of $871.65. This is the amount of medical expenses incurred by Sanchez as a result of the assault.

A. Standard of Review

When determining the amount of restitution, "the trial court is not required to make findings of fact or conclusions of law,"; however, "the amount of restitution must be limited to that supported by the record." N.C. Gen. Stat. § 15A-1340.36 (2005). On appeal, this Court considers *de novo* whether the restitution order was "'supported by evidence adduced at trial or at sentencing.'" *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)). Although defendant did not object to the

trial court's entry of the restitution order, N.C. Gen. Stat. § 15A-1446(d)(18) provides that an appellate court may review error asserting that a defendant's "sentence . . . was illegally imposed or otherwise invalid as matter of law[,]" even when "no objection . . . has been made in the trial division." *See also Shelton*, 167 N.C. App. at 233, 605, S.E.2d at 233.

B. N.C. Gen. Stat. § 15A-1340.36 (2005).

Defendant argues that the trial court failed to consider factors set forth in N.C. Gen. Stat. § 15A-1340.36 related to his financial ability to pay restitution. For this reason, defendant requests a new sentencing hearing.

N.C. Gen. Stat. § 15A-1340.36(a) provides

> In determining the amount of restitution to be made, the court shall take into consideration the resources of the defendant including all real and personal property owned by the defendant and the income derived from the property, the defendant's ability to earn, the defendant's obligation to support dependents, and any other matters that pertain to the defendant's ability to make restitution, but the court is not required to make findings of fact or conclusions of law on these matters. The amount of restitution must be limited to that supported by the record, and the court may order partial restitution when it appears that the damage or loss caused by the offense is greater than that which the defendant is able to pay. If the court orders partial restitution, the court shall state on the record the reasons for such an order.

This statute expressly requires the trial court to "take into consideration" a number of factors "that pertain to the defendant's ability to make restitution," but also expressly provides that the trial court "is not required to make findings of fact or

conclusions of law on these matters." N.C. Gen. Stat. § 15A-1340.36(a). This Court has remanded a defendant's case for a new sentencing hearing when the "record . . . reveal[ed] that the trial court did not consider any of the factors related to [the] defendant's ability to pay the full amount of restitution." *State v. Mucci*, 163 N.C. App. 615, 626, 594 S.E.2d 411, 419 (2004) (emphasis added). However, when there is "some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *State v. Davis*, 167 N.C. App. 770, 775, 607 S.E.2d 5, 10 (2004) (quoting *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986)).

Here, the record shows that the trial court considered defendant's insurance situation, age, indigency, education, and living arrangements during sentencing. The trial court also provided defendant with an opportunity to earn the ordered restitution through work release. This is sufficient evidence of defendant's financial resources and obligations from which the trial court could determine an appropriate amount of restitution.

For the reasons stated above, we conclude that the trial court properly considered factors related to defendant's financial ability to pay restitution as set forth in N.C. Gen. Stat. § 15A-1340.36. This assignment of error is overruled.

IV. Ineffective Assistance of Counsel

Defendant assigns error to defense counsel's failure to object to the disputed testimony of Officers Mozingo, Rice, and Quilez, and Detective Carroll as discussed above. Defendant also assigns

error to defense counsel's failure to object to the trial court order awarding restitution to Sanchez. In support of these assignments, defendant argues that defense counsel's failure to object deprived him of his Sixth Amendment right to effective assistance of counsel.

A. Standard of Review

The two-part test for ineffective assistance of counsel is the same under both the state and federal constitutions. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). A defendant must first show that his defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). "To establish deficient performance" defendant "must show that counsel's representation 'fell below an objective standard of reasonableness.'" *Wiggins v. Smith*, 539 U.S. 510, 521, 156 L. Ed. 2d 471, 484 (2003) (quoting *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693). "[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 534, 156 L. Ed. 2d at 493 (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698).

B. Hearsay

As stated above, we conclude that the trial court properly admitted all but two of the disputed statements to which defendant assigned error: Officer Rice's testimony that LaBonita "pointed out" defendant at a "show up" and Detective Carroll's testimony that Madison contradicted defendant's alibi. Because the remaining statements are not hearsay, and their admission did not violate either N.C. Gen. Stat. § 8C-1, Rule 802 or defendant's right to confront witnesses against him, defense counsel's performance in declining to object to their admission was not deficient.

Assuming, without deciding, that defense counsel's performance in failing to object to admission of the statements made by LaBonita and Madison was deficient for purposes of the Sixth Amendment, we conclude that the deficiency was not prejudicial. In undertaking plain error review, we have already determined that these errors were not "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *Bagley*, 321 N.C. at 214, 362 S.E.2d at 251. Likewise, we conclude, for purposes of Sixth Amendment ineffective assistance of counsel analysis that there is not "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Wiggins*, 539 U.S. at 534, 156 L. Ed. 2d at 493 (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698). Accordingly, this assignment of error is overruled.

C. Restitution

As stated above, we have already concluded that the trial court properly considered factors related to defendant's financial ability to pay restitution as set forth in N.C. Gen. Stat. § 15A-1340.36, and that the trial court did not err in entering a restitution order awarding $871.65 to Sanchez. Because the trial court did not err by entering the restitution order, defense counsel's performance in declining to object to entry of the order was not deficient. This assignment of error is overruled.

V. Conclusion

For the reasons stated above we conclude that defendant received a fair trial and sentencing hearing free from plain error. The trial court judgment and restitution order are, therefore, affirmed.

NO ERROR IN PART; AFFIRMED IN PART.

Judges TYSON and STEPHENS concur.

Report per Rule 30(e).