NO. COA07-1450

NORTH CAROLINA COURT OF APPEALS

Filed: 15 July 2008

STATE OF NORTH CAROLINA

v. Alamance County
No. 05 CRS 59313

MALCOLM L. FULLER

Appeal by defendant from judgment entered 7 March 2007 by Judge James C. Spencer in Alamance County Superior Court. Heard in the Court of Appeals 30 June 2008.

Attorney General Roy Cooper, Jr., Assistant Attorney General Richard A. Graham, for the State.

Winifred H. Dillon, for defendant-appellant.

CALABRIA, Judge.

Malcolm L. Fuller ("defendant") appeals a judgment entered upon a jury verdict finding him guilty of communicating threats and assault on a female. We find no error.

The State's evidence showed that Vicki Mebane ("Mebane") had been dating defendant for about nine years. On 17 October 2005, defendant was visiting Mebane at her apartment. The two started to argue about Mebane having another boyfriend. The argument became physical when defendant cornered Mebane in the kitchen, put his hands around her neck and squeezed. Defendant pulled out a knife

from a kitchen drawer, held the knife up to Mebane's shoulder and told Mebane that he would stab her. Defendant left the apartment, but returned about twenty minutes later. Defendant approached Mebane who was sitting in a recliner and sat in her lap. Defendant then pressed hard on Mebane's chest.

Mebane's next door neighbor, Fred Enoch, heard Mebane and defendant arguing through the common wall of their apartments. While defendant was in the bathroom, Mebane knocked on the wall, which was a signal for Enoch to call the police. Upon receiving a phone call from Enoch, officers from the Burlington Police Department arrived and spoke to defendant and Mebane. Mebane told police that defendant had tried to choke her and came after her with a butcher knife. Officer Tommy Day ("Officer Day") noticed Mebane had some redness and bruising on her body. After defendant's arrest, defendant gave a statement to the police in which he denied committing any offense against Mebane.

A jury found defendant not guilty of assault by strangulation and guilty of communicating threats and assault on a female. The trial court sentenced defendant to 75 days imprisonment in the North Carolina Department of Correction, suspended the sentence and placed defendant on supervised probation for 48 months. Defendant appeals.

In defendant's sole argument on appeal, defendant contends the trial court erred in excluding evidence related to Mebane's credibility. We disagree.

During cross-examination, defense counsel attempted to ask Mebane if she obtained a 50B domestic violence protective order ("protective order") soon after the alleged assault. The trial court sustained the State's objection to cross-examination regarding the protective order. After his cross-examination of Mebane, defense counsel asked to make an offer of proof "[w]ith respect to why [he] wanted to pursue that line of questioning involving [the] 50B." The trial court allowed defense counsel to conduct a *voir dire* examination of Mebane outside the presence of the jury.

During the subsequent voir dire, defense counsel elicited from Mebane that she obtained a protective order on 18 October while she was living in a shelter and looking for a place to live locally; that she filed a motion to set aside the protective order on 8 November; and that her reasons for setting aside the protective order were that she was no longer in contact with defendant and that she was relocating. Mebane admitted that at the time she moved to set aside the order, she and defendant "saw each other every now and then" and that defendant had accompanied her to court on the day her motion was heard. Defense counsel also introduced as a voir dire exhibit the court's 27 November 2005 order dissolving the protective order. The trial court declined to reconsider its ruling stating, "It's not relevant to these issues."

Defendant asserts on appeal that he should have been allowed to cross-examine Mebane in front of the jury about dissolving the 50B protective order because the proffered evidence showed that

Mebane lied in her motion to set aside the order and, therefore, "was admissible for impeachment purposes[.]"

North Carolina Rule of Evidence 611(b), governing the scope of cross-examination, states "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2007). "[S]pecific instances of a witness's conduct may be inquired into on cross-examination if probative of the witness's 'character for truthfulness or untruthfulness,' and admission of the evidence is subject to the discretion of the trial court." *State v. Taylor*, 154 N.C. App. 366, 374, 572 S.E.2d 237, 243 (2002) (citing N.C. Gen. Stat. § 8C-1, Rule 608(b)). "Among the types of conduct most widely accepted as falling into this category are 'use of false identity, making false statements on affidavits, applications or government forms (including tax forms), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.'" *State v. Bishop*, 346 N.C. 365, 390, 488 S.E.2d 769, 782 (1997) (citations and quotations omitted). "[T]he scope of cross-examination is subject to appropriate control in the sound discretion of the court." *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990); N.C. Gen. Stat. § 8C-1, Rule 611(a).

Here, the trial court determined that evidence related to the protective order, specifically the reasons Mebane asked for the protective order to be set aside, were not relevant. We cannot conclude that the trial court committed an abuse of discretion in excluding the evidence. Defense counsel was free to cross-examine

Mebane regarding the alleged assault. Defendant was also able to challenge the truthfulness and credibility of Mebane's testimony by cross-examining other witnesses for the State. Defense counsel elicited from Officer Day that on the day the assault took place, Mebane did not report to him that defendant went to the bathroom or that defendant sat on her while she was sitting in the recliner, although she testified to these facts at trial. Further, defendant has not shown 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 out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a)(2007). The assignment of error is overruled.

No error.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).