NO. COA07-175

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2007

STATE OF NORTH CAROLINA

v. Columbus County
No. 06 CRS 050036

ANDRE ALEXANDER FREEMAN

Appeal by defendant from judgment entered 7 September 2006 by Judge B. Craig Ellis in Columbus County Superior Court. Heard in the Court of Appeals 18 October 2007.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Sofie W. Hosford, for defendant-appellant.

TYSON, Judge.

Andre Alexander Freeman ("defendant") appeals from judgment entered after a jury found him to be guilty of attempted robbery with a dangerous weapon. We find no error.

I. Background

A. State's Evidence

On 4 January 2006, Alisa Mitchell ("Mitchell") was working as a cashier at Sam's Pit Stop. Shannon Ward ("Ward") entered the store and told Mitchell that a man was standing outside. Mitchell asked Ward to stand at the front door while she took the trash out the back door to the dumpster. Mitchell saw a man sitting on a

newspaper box on the side of the store and asked him what he was doing. Mitchell identified the man she spoke with as defendant in court. Defendant informed Mitchell that he was waiting for his father to come back from the beach. Mitchell testified defendant had been in the store earlier that day to purchase chewing gum. She had also seen defendant several times prior to that date.

The last customer of the night was defendant's mother, Wilhemina Freeman ("Mrs. Freeman"). At 11:00 p.m., Mitchell closed the store. Defendant knocked on the window and asked if he could use the store's telephone. Mitchell informed defendant that no one was allowed inside the store after closing hours.

As Mitchell was walking towards her car, she saw defendant sitting on a red and silver bicycle. Mitchell testified she did not see anyone else on the store's premises at that time. Defendant put a bandana over his face, approached Mitchell with a knife, and yelled, "Give me all your money. I'll kill you." Mitchell began to walk backwards toward the store to unlock the door. Defendant was holding a knife against Mitchell's chest near her heart.

Mitchell advised defendant that all of the money was in the store's safe, which she could not unlock. Mitchell subsequently unlocked the store's door, struggled with defendant, pushed the panic button, locked the store's door, and called 911 on her cellular telephone. Defendant left after hearing the alarm. Mitchell identified defendant as the perpetrator of the crime in a

lineup. The store's security videotape corroborated Mitchell's account of events.

B. Defendant's Evidence

Mrs. Freeman testified that while she was on her way home from work on 4 January 2006, she saw defendant standing in front of the firehouse and he motioned for her to stop. Defendant asked Mrs. Freeman to buy him a pack of cigarettes from Sam's Pit Stop. Mrs. Freeman complied with his request. Mrs. Freeman testified she then pulled out of the parking lot, stopped at the intersection, watched defendant ride his bike toward his sister's house, and turn into her yard. Mrs. Freeman testified she saw her grandson, Junior Bracey ("Bracey"), at the store as she drove away. Mrs. Freeman indicated she tried to tell the investigating officers this information that evening, but the officers would not listen to her account.

Defendant was charged with attempted robbery with a dangerous weapon and second-degree kidnapping. During the trial, defendant denied committing the attempted robbery and testified his nephew, Bracey, was responsible. On 6 September 2006, at the close of the State's evidence, the trial court granted defendant's motion to dismiss the second-degree kidnapping charge. On 7 September 2006, a jury convicted defendant of attempted robbery with a dangerous weapon. The trial court sentenced defendant to a minimum of 77 months and a maximum of 102 months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) overruling his objection to the introduction of extrinsic evidence offered to impeach Mrs. Freeman and (2) allowing Detective Nealey to testify about defendant's post-arrest statement without requiring the State to establish the statement was knowingly and voluntarily made.

III. Prior Inconsistent Statement

Defendant argues the trial court improperly overruled his objection to the introduction of extrinsic evidence offered to impeach Mrs. Freeman. We disagree.

A. Standard of Review

The trial court's decision to exclude or admit evidence is generally reviewed for an abuse of discretion. *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (citations omitted), *cert. denied*, 360 N.C. 575, 635 S.E.2d 429 (2006). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

B. Analysis

"The credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607 (2005). Our Supreme Court has stated:

> A witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony, but where such questions concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be

> permitted to contradict them by other testimony.

State v. Green, 296 N.C. 183, 192, 250 S.E.2d 197, 203 (1978). "Generally speaking, material facts involve those matters which are pertinent and material to the pending inquiry, while collateral matters are those which are irrelevant or immaterial to the issues before the court." *State v. Riccard*, 142 N.C. App. 298, 303, 542 S.E.2d 320, 323 (citing *State v. Whitley*, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984)), *cert. denied*, 353 N.C. 530, 549 S.E.2d 864 (2001).

At trial, Mrs. Freeman admitted speaking with Detective Nealey on the night the crime occurred. Mrs. Freeman testified as follows:

> I tried to tell [Detective Nealey] that my son couldn't have done it from the time I seen [sic] him turn into the thing, but he didn't want to listen to nothing [sic] I said, he turned his back on me. And I said well you've pretty much made up your mind [about] what you want to do. And he said so much so. So much so and then —

Mrs. Freeman also testified she told Detective Nealey: (1) he had permission to interview defendant; (2) she did not want to be present in the interviewing room; and (3) asked the detective to call her at home when he completed the interview with defendant.

On rebuttal, Detective Nealey testified Mrs. Freeman provided defendant with an alibi by stating he was at home when the robbery occurred. Mrs. Freeman stated she left defendant at home to get him a pack of cigarettes at the time the crime was committed. Mrs. Freeman denied telling Detective Nealey this information.

Mrs. Freeman's trial testimony corroborated defendant's testimony. Mrs. Freeman was impeached by her prior inconsistent statement relating to defendant's location and activities on the night the crime was committed. Detective Nealey's testimony impeaching Mrs. Freeman related to a material issue: whether defendant could have committed the crime charged or asserted an alibi. *See State v. Wellmon*, 222 N.C. 215, 217, 22 S.E.2d 437, 439 (1942) ("The testimony of the impeaching witness[]. . . respected the whereabouts of the defendant at the time the offense is alleged to have been committed. . .[S]ince the defendant's defense was that of an alibi, [it] could, in no view of the case, be construed to be only collateral.") Mrs. Freeman's statements to Detective Nealey were not "collateral to the issues" and were properly impeached by extrinsic evidence. *Green*, 296 N.C. at 192, 250 S.E.2d at 203.

Further, Mrs. Freeman admitted making several statements to Detective Nealey that night, but denied trying to provide an alibi for defendant. This Court has stated:

> [W]here there is testimony that a witness fails to remember having made certain parts of a prior statement, *denies having made certain parts of a prior statement*, or contends that certain parts of the prior statement are false, our courts have allowed the witness to be impeached with the prior inconsistent statement.

Riccard, 142 N.C. App. at 303, 542 S.E.2d at 323 (emphasis supplied). The weight and credibility of Mrs. Freeman's and defendant's testimony were properly considered by the jury. The trial court did not abuse its discretion by allowing Mrs. Freeman's

testimony at trial to be impeached by her prior statements. This assignment of error is overruled.

IV. Post-Arrest Statement

Defendant argues the trial court committed plain error when it permitted Detective Nealy to testify about his post-arrest statement without the State first establishing that it was made knowingly and voluntarily. We disagree.

A. Standard of Review

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and quotations omitted).

B. Analysis

A defendant must be given his *Miranda* warnings prior to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 726 (1966). A custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444, 16 L. Ed. 2d at 706.

"A defendant may waive his Miranda rights, but the State bears the burden of proving that a defendant made a knowing and intelligent waiver." *State v. Reid*, 335 N.C. 647, 663, 440 S.E.2d 776, 785 (1994) (citations omitted).

After Mitchell identified defendant as the perpetrator of the crime, he was transported to the "law enforcement center" to be interviewed by Detective Nealey. Before the interview, defendant was read his juvenile rights pursuant to N.C. Gen. Stat. § 7B-2101 and subsequently gave Detective Nealey a statement of his version of the events that occurred that night. Defendant corrected the mistakes Detective Nealey had made and signed the statement.

Magistrate Brent Lanier went to defendant's holding cell after his interview with Detective Nealey and advised defendant he was being charged with robbery with a dangerous weapon and second-degree kidnapping. Defendant responded "she wasn't kidnapped, she walked on her own." Defendant argues the State failed to meet its burden of establishing this statement was knowingly and voluntarily made before the trial court could admit the statement into evidence. We disagree.

At the time defendant made the challenged statement he: (1) had been read his juvenile rights which include his right to remain silent and to have counsel present; (2) had voluntarily given Detective Nealey a statement; and (3) had made corrections to and signed the statement. Defendant was no longer being "questioned by a law enforcement officer" when the magistrate read the charges

against him. *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706. The trial court properly admitted defendant's statement at trial.

Presuming *arguendo*, the trial court erred by admitting defendant's statement, such error would be harmless beyond a reasonable doubt and did not have "a probable impact on the jury's finding that the defendant was guilty." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. The State presented other overwhelming evidence of defendant's guilt, including two eye-witness identifications. The admission of defendant's statement was not plain error to warrant a new trial. This assignment of error is overruled.

V. Conclusion

The trial court properly allowed Mrs. Freeman, defendant's alibi witness, to be impeached with extrinsic evidence of her prior inconsistent statements. Defendant was advised of his right to remain silent and to have counsel present prior to providing, correcting, and signing his statement. Defendant was not being interrogated when the magistrate read the charges against him. The trial court properly admitted defendant's post-arrest statement at trial. Defendant received a fair trial, free from the prejudicial errors he preserved, assigned, and argued. Defendant's assignment of plain error does not warrant a new trial and is overruled.

No Error.

Judges JACKSON and STROUD concur.

Report per Rule 30(e).