NO. COA08-136

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v. Rowan County
No. 06CRS050585

TRACY WRIGHT COLEMAN

Appeal by defendant from judgments entered 4 June 2007 by Judge Kimberly S. Taylor in Rowan County Superior Court. Heard in the Court of Appeals 9 September 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant appellant.

McCULLOUGH, Judge.

Defendant Tracy Wright Coleman was tried at the 29 May 2007 Session of Rowan County Superior Court where she was found guilty of felonious breaking and entering and robbery with a dangerous weapon. Defendant received a sentence of 6 to 8 months for the breaking and entering and 64 to 86 months for robbery with a dangerous weapon. She was also ordered to pay $600 in restitution.

The evidence at trial tended to show that: The victim, Michael Lee Russell, made a 911 call on 19 January 2006, around 11:00 p.m. In the call the victim stated he had been bound and robbed at

gunpoint by Steven Coleman and his wife, defendant. The victim's statement to the 911 operator was descriptive of the crime and fully identified the Colemans as the perpetrators.

The police arrested Steven Coleman in a red Trans Am registered to defendant two days later. At the time of his arrest, defendant was a passenger in the car. A t.v. remote which operated the victim's t.v. was in the car, along with a very realistic looking toy gun. When arrested, defendant denied robbing the victim, even though the police had not yet informed her of the robbery.

Prior to the trial, the victim died and the trial court admitted the 911 tape, along with testimony from the victim's son and daughter-in-law where they related what the victim told them about the robbery.

Defendant first argues that the 911 tape should have been excluded at trial, as the admission of the tape denied him the right to confront his accusers, and thus, pursuant to *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), was inadmissible.

The U.S. Supreme Court provided guidance on whether out-of-court statements were testimonial which requires the availability of the witness for cross-examination in *Davis v. Washington*, 547 U.S. 813, 165 L. Ed. 2d 224 (2006), where the Court stated:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the

> circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822, 165 L. Ed. 2d at 237.

This Court dealt with this issue in *State v. Hewson*, 182 N.C. App. 196, 642 S.E.2d 459 (2007), *disc. review denied*, 361 N.C. 572, 651 S.E.2d 229 (2007), where the victim called 911 stating that her husband was shooting at her and she needed assistance. We held that the tape was non-testimonial, as the victim was clearly asking for assistance and was not for the purpose of establishing a past fact. *Id.* at 206, 642 S.E.2d at 467.

We believe the present 911 tape is similar to *Hewson* as the victim is requesting assistance in response to the operator's statement of "What is your emergency?" The victim stated, "I'm afraid he's going to kill me." Defendant argues that because the robbery had ended about an hour prior to the victim's 911 call, that he was not reporting events as they occurred and the emergency was not ongoing. However, the evidence demonstrated that the reason for the delay in the 911 call was that the robbers had tied up the victim and it took him an hour to free himself so that he could make the call. In the call, which lasted only 3 minutes, 18 seconds, the victim immediately identified defendant and Mr. Coleman and said that they had threatened to kill him, they had a gun, and that he was scared and needed help. It is clear from the tape that the victim is asking for assistance and is not responding

to an interrogation aimed at establishing a past fact. This assignment of error is without merit and is overruled.

The next assignment of error concerns the testimony of victim's son and daughter-in-law regarding statements the victim made about the circumstances of the crime. The State moved to admit these statements pursuant to Rule 804(b)(5) of the North Carolina Rules of Evidence which provides:

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2007). The State complied with the notice requirements of the Rule. After a hearing, the trial court found that the State gave notice as required, that no other hearsay exception applied, that the statements concerned a material fact and were more probative than any other evidence the State could provide, and that the interests of justice were served by the admission of the statements.

In *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), our Supreme Court upheld similar statements where the declarant and the witness had a close personal relationship, and the record showed no reason for the declarant to lie. *Id.* at 11-12, 340 S.E.2d at 742. The trial court also made adequate findings of fact as required by *Triplett*.

We hold that the statements in the case *sub judice* were likewise admissible under the reasoning set forth in *Triplett*. This assignment of error is overruled.

Next, defendant argues that the testimony of the victim's son and daughter-in-law regarding the effect of the crime should not have been admitted. The State acknowledges that such testimony in the guilt-innocence phase is only admissible if it depicts the context or circumstances surrounding the commission of the offense. *State v. Graham*, 186 N.C. App. 182, 191, 650 S.E.2d 639, 646 (2007), *disc. review denied, appeal dismissed*, ___ N.C. ___, 666 S.E.2d 765 (2008). The State concedes that the testimony admitted at trial does not comport with this rule.

Nonetheless, this testimony is analyzed under the plain error rule and will only lead to reversal when the reviewing court determines that, absent these statements, a different verdict would have been rendered. *E.g.*, *State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986).

Given the victim's contemperaneous identification of defendant and her husband as the perpetrators on the 911 tape, the fact that the victim's remote was in defendant's car at the time of the arrest and her statement of denial, we cannot say that this brief and somewhat redundant testimony would have resulted in a not guilty verdict had it been excluded. Thus, this assignment of error is overruled.

Finally, defendant argues that the trial court's order of restitution of $600 is defective as there was no supporting

evidence. The victim is entitled to restitution under N.C. Gen. Stat. § 15A-1340.36 so long as the restitution order is based on evidence and not the unsworn statements of the prosecutor. *See State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007).

Here the trial court based its determination on a victim's impact statement filled out by the victim and introduced at the sentencing of defendant's husband. It was proper for the trial court to take judicial notice of the evidence presented in her codefendant's case. *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

No prejudicial error.

Judges McGEE and STROUD concur.

Report per Rule 30(e).