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NO. COA08-1595

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v.

Avery County
No. 02CRS51200-01
03CRS247

PAUL BRANTLEY LEWIS

Appeal by Defendant from judgments entered 17 July 2008 by Judge Laura J. Bridges in Avery County Superior Court. Heard in the Court of Appeals 9 June 2009.

Attorney General Roy A. Cooper, by Assistant Attorney General Leonard Green, for the State.

Reita Pendry, for Defendant.

BEASLEY, Judge.

Defendant Paul Brantley Lewis appeals from judgments entered on his convictions of felonious robbery with a dangerous weapon, felonious breaking and entering, and first-degree sexual offense. For the reasons stated below, we reverse and remand with instructions to the trial court to dismiss Defendant's charges.

On 1 December 2002 in the early morning, G.F.¹ awoke to a knocking on her door at her residence. G.F. saw two men that she did not recognize. She spoke with the taller of the two men who

¹ To protect the privacy of the victim, her initials are used in this opinion.

informed her that they had been in an accident and needed to use her telephone. G.F. described the taller man, later identifying him as Defendant, as "an unkempt person, had a scruffy unshaven look, dirty blond hair" and "very tall." Before G.F. had the opportunity to open the door, Defendant kicked in the door, knocked her down and entered her home.

Defendant unzipped his pants, held a knife to G.F.'s throat, grabbed her by the hair, and put his penis in her mouth. When Defendant bent down, Fields was able to see his face. G.F. described Defendant's knife as a "yellow and brown handled pocketknife" that was "very dull and old." Meanwhile, the second man was looking through Fields' kitchen cabinets.

Defendant then pushed G.F. to the floor and G.F. testified that she did not remember much but thought that she might have passed out. G.F. testified that after some time, she woke up, pulled herself across the room, and managed to reach her Lifeline unit. The Lifeline unit was a mechanism that allowed her to summon help to report that she had been attacked.

On the morning of 1 December 2002, Derek Roberts, a detective with the Avery County Sheriff's Office, met with G.F. at Cannon Memorial Hospital. Roberts testified that G.F. described her attacker as "very tall, lanky, had a shaggy beard, dirty blonde hair and looked older." After G.F. told Roberts she thought she would be able to identify a photograph of the attacker, Roberts went to the Sheriff's office to pick up a photo of Defendant. Roberts presented G.F. with the single photograph and testified

that G.F. became "very emotional, very upset" and said "yes, that's him[.]"

Roberts testified that G.F. described the knife used in the attack as a "[l]ighter-tan-colored bone handle style pocketknife, three-and-a-half inch blade approximately; dirty, discolored blade[.]" Roberts retrieved a knife from Defendant's residence that matched the description G.F. had given him, but did not show the knife to G.F.

Carolyn Lewis, Defendant's mother, testified that she was living with Defendant on Sunday, 1 December 2002, and that she and Defendant were together from the evening of 29 November 2002 until the morning of 1 December 2002.

Defendant was charged with robbery with a dangerous weapon, felonious breaking and entering, and first-degree sexual offense. In 2003, Defendant was found guilty of these charges. This Court affirmed Defendant's convictions in *State v. Lewis (I)*, 168 N.C. App. 730, 609 S.E.2d 498 (2005) (unpublished). Defendant then filed a motion for appropriate relief which was denied by the Avery County Superior Court. Defendant appealed to this Court, which reversed the Superior Court and ordered a new trial.

Venue for the second trial was changed and the trial was held in Wataugua County, North Carolina. On 17 July 2008, the jury returned verdicts of guilty on all the charges. Defendant was sentenced to consecutive terms of 94 to 122 months for robbery with a dangerous weapon, 11 to 14 months for felonious breaking and entering, and 307 to 378 months on the first-degree sexual offense.

MOTION IN LIMINE

Defendant first argues that the trial court erred by granting the State's motion *in limine*, preventing Defendant from either cross-examining Roberts to impeach his credibility or introducing evidence of jury-tampering from Defendant's first trial. We agree.

Defendant's counsel argued at trial that he wished to question Roberts regarding jury tampering that occurred during the first trial. During Defendant's first trial, Eddie Hughes, a deputy with the Avery County Sheriff's Department was called as a juror. Hughes was familiar with Defendant through his work with the Avery County Jail, having transported him to Central Prison in Raleigh on two occasions. Hughes also knew Roberts because he had assisted Roberts in preparing a photographic lineup for this case, including at least three pictures of Defendant. *State v. Lewis (II)*, 188 N.C. App. 308, 309, 654 S.E.2d 808, 809 (2008). Hughes testified at the hearing for the motion for appropriate relief that Roberts had approached him, informing him that Defendant had failed a polygraph test and said, "if we have . . . a deputy sheriff for a juror, he would do the right thing." In Hughes' affidavit however, Hughes recounted that Roberts had said, "[s]ince we have a deputy on the jury, *he should have this information so that he can do the right thing.*" *Id.* at 312, 654 S.E.2d at 810. This Court held that the trial court's ruling was erroneous and amounted to an abuse of discretion concluding that:

[t]his was not a "harmless conversation" between a juror and a third person not tending

to influence or prejudice the jury in their verdict. This was a conversation between a sheriff's deputy and a lead detective that was intended to influence the verdict. This was not a "clearly fair and proper" trial, but rather one where an "outside influence was improperly brought to bear upon a juror."

Id.

Defendant argues that the "misconduct in which Roberts engaged in the first trial was directly relevant to his credibility." He also argues that his cross-examination of Roberts would have addressed Roberts' bias against Defendant. The State filed a pretrial motion in limine to exclude any evidence "raised and litigated in a M[otion] for A[ppropriate] R[elief] hearing wherein the Defendant was subsequently ordered to have a new trial." The State sought to exclude any evidence of alleged jury tampering by Roberts from the first trial, contending that it would be irrelevant, unfairly prejudicial, of no probative value, and would confuse the issues, thereby misleading the jury. The trial court granted the State's motion, ruling that "[d]ue to unfair prejudice and confusion of the jury[,] . . . nothing should be said about a trial having been held, or any kind of conviction, or anything that went on in [the first] trial."

It is well established that, "[u]nder the North Carolina Rules of Evidence and prior case law . . . questioning [about a witness's interest in the case] is permitted to attack the credibility of the witness. We review the trial court's limitation of this line of questioning under the abuse of discretion standard." *State v. Alvarez*, 168 N.C. App. 487, 498, 608 S.E.2d 371, 378 (2005) (citing

Jones v. Rochelle, 125 N.C. App. 82, 85-86, 479 S.E.2d 231, 233 (1997)). "An abuse of discretion results when 'the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (quoting *State v. Peterson*, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227 (2007)).

"[A] witness may be cross-examined on any matter relevant to any issue in the case, including credibility.'" *Whaley*, 362 N.C. at 159, 655 S.E.2d at 390 (quoting N.C. Gen. Stat. § 8C-1, Rule 611(b)). A defendant may question a witness "on cross-examination [about] particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation.'" *Alvarez*, 168 N.C. App. at 498, 608 S.E.2d at 378 (quoting *State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 902-03 (1954)). Under North Carolina Rules of Evidence 608(b), specific instances of conduct offered to attack the credibility of a witness may be admissible provided that:

- (1) the purpose of producing the evidence must be to impeach or enhance the witness' credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness;
- (2) the conduct in question must be both probative of truthfulness or untruthfulness, and not too remote in time;
- (3) the conduct in question must be conduct that did not result in a conviction; and
- (4) the inquiry into the conduct must take place during cross-examination.

State v. Brown, 148 N.C. App. 683, 686, 560 S.E.2d 170, 173 (2002). Nevertheless, the trial court may exclude such evidence under Rule 403 if it determines that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Whaley*, 362 N.C. at 159-60, 655 S.E.2d at 390 (quoting N.C. Gen. Stat. § 8C-1, Rule 403).

In the present case, Defendant sought to cross-examine Roberts about his conduct during the investigation into G.F.'s attack and about his behavior during the first trial. Evidence of such conduct is relevant to the jury's assessment of the truthfulness of a witness. The cross-examination would also have addressed specific conduct that was not too remote in time because it occurred at Defendant's first trial in 2003, and did not result in Roberts being convicted of jury tampering. Based on the foregoing reasons, the State's motion *in limine* to exclude such examination should have been denied.

Likewise, Defendant was deprived of his constitutional right to cross-examine Roberts under the confrontation clause of the sixth amendment to the United States Constitution. "In all criminal prosecutions . . . the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution to be confronted with the witnesses against him.'" *State v. Sanchez*, 172 N.C. App. 330, 333, 621 S.E.2d 630, 632 (2005) (quoting *Lilly v. Virginia*, 527 U.S. 116, 123-24, 144 L. Ed.

2d 117, 126 (1999)). "[T]here are few subjects . . . upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" *State v. Clark*, 165 N.C. App. 279, 282, 598 S.E.2d 213, 216 (2004) (quoting *Barber v. Page*, 390 U.S. 719, 721, 20 L. Ed. 2d 255, 258 (1968)).

"Confrontation means more than being allowed to confront the witness physically. Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination. . . . Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.'" *Sanchez*, 172 N.C. App. at 333-34, 621 S.E.2d at 632 (quoting *Davis v. Alaska*, 415 U.S. 308, 315, 39 L. Ed. 2d 347, 353 (1974)) (internal quotations omitted). One of the purposes of confrontation is that it "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *California v. Green*, 399 U.S. 149, 158, 26 L. Ed. 2d 489, 497 (1970). By granting the State's motion *in limine*, the trial court denied Defendant his constitutional right to confront Roberts and to conduct a cross-examination that would have permitted the jury the opportunity to assess Roberts' credibility. We uphold Defendant's assignment of error.

Secondly, Defendant argues that the trial court erred by denying him the opportunity to confront and cross-examine G.F. regarding her misidentification of an alleged accomplice during Defendant's first trial. We agree.

The trial court granted the State's motion *in limine* to exclude evidence of the disposition of charges against a co-defendant. Before trial, Defendant's counsel argued that because G.F. was more certain of the co-defendant's identity than of the attacker's identity and the co-defendant's charges were dismissed when it was determined that the co-defendant had an alibi, G.F.'s ability to identify Defendant was questionable. Defendant argues that evidence of victim's misidentification of the alleged co-defendant was relevant on two grounds. First, because deputies incorrectly identified the alleged co-defendant as one of the perpetrators, it could be inferred that deputies incorrectly identified Defendant as the attacker. Secondly, that G.F.'s "powers of observation, memory and recall were compromised to the point that she misidentified one of the people she claimed was a perpetrator[.]"

The trial court should have permitted Defendant to cross-examine G.F. on any matter relevant to any issue in the case, including the credibility of her identification of Defendant. *Whaley*, 362 N.C. at 159, 655 S.E.2d at 390. Defendant was deprived of the opportunity to demonstrate that G.F.'s identification of the alleged co-defendant was erroneous and that charges against the co-defendant were dismissed. This showing would have enabled the jury

to evaluate her misidentification of the alleged co-defendant and weigh the strength of G.F.'s identification of Defendant accordingly.

MOTION TO EXCLUDE TESTIMONY

Defendant argues that the trial court erred in denying his motion to exclude testimony about a knife used by G.F.'s attacker, which a clerk of Superior Court in Avery County ordered to be destroyed before the re-trial of this case. We agree.

The State informed the trial court that some evidence, including the knife allegedly used by G.F.'s attacker, had been destroyed by a deputy clerk in the Avery County clerk's office after Defendant's convictions were affirmed on appeal. Defendant's counsel objected to admitting evidence about the knife because he had never seen the knife, had no opportunity to perform tests upon it, and could not ask the jury to make a comparison to G.F.'s description by showing them the knife.

"We review the trial court's decision to admit the evidence pursuant to Rule 403 for an abuse of discretion." *State v. Peterson*, 361 N.C. 587, 602-03, 652 S.E.2d 216, 227 (2007) (citing *State v. Al-Bayyinah*, 359 N.C. 741, 747-48, 616 S.E.2d 500, 506-07 (2005)). "'In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record.'" *Id.* (quoting *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007)). "This Court will find such an abuse of discretion only if the trial court's decision was 'unsupported by reason and could not have been

a result of competent inquiry.'" *McIntosh v. McIntosh*, 184 N.C. App. 697, 702, 646 S.E.2d 820, 823 (2007) (quoting *Wiencek-Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992)).

The State had a duty to preserve the knife under N.C. Gen. Stat. § 15-11.1 (2009), which provides that, "[i]f a law-enforcement officer seizes property pursuant to lawful authority, he shall safely keep the property under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial." When this duty is violated, "the effect, if any, of the release of this evidence . . . must focus on the question of whether defendant was thereby deprived of his rights to due process under the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution." *State v. Mlo*, 335 N.C. 353, 372, 440 S.E.2d 98, 107 (1994). The State's constitutional responsibility to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense.' The evidence must (1) possess an exculpatory value that was apparent before the evidence was destroyed and (2) be of such character that defendant would be unable to obtain comparable evidence." *State v. Banks*, 125 N.C. App. 681, 683, 482 S.E.2d 41, 43 (1997) (quoting *California v. Trombetta*, 467 U.S. 479, 488, 81 L. Ed. 2d 413, 422 (1984)).

The knife allegedly used during G.F.'s attack was material evidence to substantiate the State's theory of this case as it was the only item of physical evidence which linked Defendant to the

alleged crimes. If the knife did not fit G.F.'s description of the knife used by her attacker, this would be significant exculpatory evidence for Defendant. If the knife had not been destroyed, it would have been available for examination by Defendant and examination by the jury to determine whether it matched G.F.'s description. However, Defendant had never seen the knife and not even a photograph of the knife existed. Defendant had no opportunity to present comparable evidence as there was no photograph of the knife. Based on these considerations, the trial court abused its discretion and erred in admitting evidence of the knife allegedly used in the attack because admission of the knife violated Defendant's due process rights.

IN-COURT IDENTIFICATION

Defendant argues that the trial court erred in denying his motion to suppress G.F.'s in-court identification. Defendant contends that the identification was "unduly suggestive and unreliable" because of misconduct committed by law enforcement officers in regards to out-of-court identification procedures.

The State argues that we may not reconsider the issue of the "accuracy of [G.F.'s] in-court identification of [Defendant] as the person who kicked in her front door and sexually assaulted her" because under the "law of the case doctrine," we are bound by this court's opinion in *State v Lewis (I)*, contending that "[i]n [D]efendant's first appeal, this Court fully reviewed the facts of [G.F.'s] pre-trial identification of [Defendant] and its potential effect on her in-court identification of him" and "expressly

rejected [D]efendant's arguments[.]” The “law of the case doctrine” states that:

“when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both on subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.”

State v. Dorton, 182 N.C. App. 34, 39, 641 S.E.2d 357, 361 (2007) (quoting *Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956)).

The State is correct that this Court considered the same issue in the first appeal, but fails to address the additional evidence which was presented to the trial court in the second trial which was not available at the first trial and could not have been considered by this Court in the first appeal. Most importantly, the very reason that Defendant was granted a new trial by this Court in *State v. Lewis (II)* was the misconduct of the lead detective, Roberts, who presented the photographic lineup to G.F.² We have already determined above that evidence regarding Roberts' conduct during the investigation and behavior during the first trial is relevant evidence which Defendant should have been

² This Court held that the conversation between Roberts and Hughes, a juror, “was not a ‘harmless conversation’ between a juror and a third person not tending to influence or prejudice the jury in their verdict. This was a conversation between a sheriff’s deputy and a lead detective that was intended to influence the verdict. This was not a ‘clearly fair and proper’ trial, but rather one where an ‘outside influence was improperly brought to bear upon a juror.” *State v. Lewis*, 188 N.C. App. 308, 312, 654 S.E.2d 808, 810-11 (2008).

permitted to present to the jury. This new and additional information is relevant to the analysis of the "totality of the circumstances" in determining whether an identification procedure is unduly suggestive. *State v. Rogers*, 355 N.C. 420, 432, 562 S.E.2d 859, 868 (2002) (citation omitted).

Defendant points out that the trial court failed to make findings regarding evidence about how the photographic lineups were developed and presented, specifically "whether Roberts actually used three photographs of [Defendant] in a seven-suspect photographic lineup [and] whether the lineup shown to [G.F.] included three photographs of [Defendant.]" We note that the actual photographs used in the lineups were not in evidence before the trial court, because they were destroyed after Defendant's conviction at the first trial which was affirmed by this Court.³

Despite the additional evidence presented at the second trial regarding Roberts' actions, as well as evidence regarding the exact photographic lineups shown to G.F. which differed from the evidence at the first trial, the trial court denied Defendant's motion to suppress based upon the fact that there was no new evidence in the

³ The lack of the photographs presented is of less significance in this case than most, as the issue is often related to distinctions between the photographs of the defendant and other persons, *See e.g. State v. Rogers*, 355 N.C. 420, 562 S.E.2d 859 (2002) ("defendant argued that the array was defective for two reasons: (1) defendant's photograph was the only one that did not have a background of horizontal lines, suggesting that his was the only photograph that was not a mug shot; and (2) those in the array were all 'distinctively different' in coloration, hairstyle, and so forth." *Id.* at 431, 562 S.E.2d at 868.) Here, the photographs were admittedly either just one, of Defendant, or three out of seven of the Defendant.

second trial and that the court was bound by this Court's opinion. The trial court also adopted the findings of fact and the conclusions of law of the trial judge who heard the original motion to suppress identification at the first trial. Perhaps because the trial court had also ruled that evidence regarding Roberts' actions during the investigation and first trial should not be admitted into evidence and that Defendant would not be permitted to confront and cross-examine G.F. regarding her misidentification of the alleged accomplice at the first trial, the trial court appears to have disregarded this evidence for purposes of the motion to suppress the in-court identification as well. For the reasons stated above, the trial court should have considered this new evidence in analyzing Defendant's motion to suppress the in-court identification. The trial court's finding that there was no new evidence presented was not supported by the record and is therefore, erroneous.

Accordingly, we must reconsider whether the trial court erred in denying Defendant's motion to suppress G.F.'s in-court identification because it was based upon her identification of him in an unduly suggestive and unreliable photographic lineup that "created a substantial likelihood of irreparable misidentification." *Rogers*, 355 N.C. at 432, 562 S.E.2d at 868.

In evaluating whether an identification procedure is "unduly suggestive depends on the totality of the circumstances. A due process analysis requires a two-part inquiry. 'First, the Court must determine whether the identification procedures were

impermissibly suggestive.' If so, 'the Court must then determine whether the [suggestive] procedures created a substantial likelihood of irreparable misidentification.'" *Id.* (quoting *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 698 (2001)). Relevant factors in determining whether an identification procedure was unduly suggestive include the opportunity of the witness to examine the perpetrator at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the perpetrator, and the time period between the identification and offense. *Id.* In a situation where a witness identifies a defendant during an identification procedure, "this Court has considered pertinent aspects of the array, such as similarity of appearance of those in the array and any attribute of the array tending to focus the witness' attention on any particular person therein, as factors in determining whether the identification procedures are impermissibly suggestive." *Id.*

At the second trial, there was no change in G.F.'s testimony relevant to her opportunity to view the criminal at the time of the crime, her degree of attention, or the time between the offense and the identification. However, the new evidence that G.F. had misidentified the co-defendant, despite the fact that she was more certain of her identification of the co-defendant than of Defendant, raises serious questions as to the reliability of her identification of Defendant. In addition, as to the photographic lineup itself, we must consider "pertinent aspects of the array, such as similarity of appearance of those in the array and any

attribute of the array tending to focus the witness' attention on any particular person therein." *Id.* Although we do not have the photographs in the record before us, based upon Roberts' testimony, he presented either just one photograph of Defendant to Fields, or he presented seven photographs, three of which were of Defendant. In addition, we now have evidence of Roberts' misconduct at the first trial, as noted in *State v. Lewis (II)*. Regardless of whether he used one photograph or three of Defendant, the evidence is undisputed that Roberts assembled all of the photographs and presented them to G.F. As we are to consider the "totality of the circumstances" surrounding the identification procedure, we cannot ignore the evidence of Roberts' misconduct. We therefore, conclude that the identification procedure adopted in this case was unreliable and impermissibly suggestive, thereby violating Defendant's right to due process.

In addition, we must consider whether Defendant's in-court identification was tainted by the improper photographic identification. In *Rogers*, the court held that:

"the viewing of a defendant in the courtroom during the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a confrontation as will taint an in-court identification unless other circumstances are shown which are so 'unnecessarily suggestive and conducive to irreparable mistaken identification' as would deprive defendant of his due process rights."

Rogers, 355 N.C. at 433, 562 S.E.2d at 869. G.F. identified Defendant based upon a photograph or three photographs which Roberts showed her at the hospital. For the reasons as noted

above, this identification procedure was impermissibly suggestive. Based upon all of the circumstances, we hold that G.F.'s in-court identification of Defendant was not "made independently of the photographic identification procedure" and it therefore, should not have been admitted. See *Id.* Defendant's motion to suppress the in-court identification should have been granted.

MOTION TO DISMISS

Finally Defendant argues that the trial court erred in denying his motion to dismiss the charges at the end of the State's evidence because the evidence was insufficient to prove that Defendant was the perpetrator beyond a reasonable doubt. We agree.

"The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley*, __ N.C. App. __, __, 644 S.E.2d 615, 623 (2007) (internal citations omitted). We must determine whether:

"there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed."

State v. Scott, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114, 117 (1980)). The evidence must be viewed in the "light most favorable to the State, giving the State the benefit of all reasonable inferences." *Id.* at 596, 573 S.E.2d at 869 (internal quotations omitted). "Substantial evidence is that amount of relevant evidence necessary

to persuade a rational juror to accept a conclusion." *Id.* at 597, 573 S.E.2d at 869.

At the conclusion of the State's evidence, Defendant made a motion to dismiss all the charges against him. The trial court denied this motion. The State's evidence that Defendant was the perpetrator of the offense was solely based on G.F.'s identification of Defendant through the single photograph shown to her the morning of the offense and a photograph lineup some time later. No physical evidence or other testimonial evidence was presented to support the charge that Defendant was the perpetrator. Ordinarily, the question of credibility regarding a witness' identification of a defendant is left to the jury. However, this does not apply when the only evidence identifying Defendant as the perpetrator of the offense is inherently unreliable. *State v. Miller*, 270 N.C. 726, 731, 154 S.E.2d 902, 905 (1967). Therefore, Defendant's motion to dismiss should have been granted.

For the foregoing reasons, we reverse and remand to the trial court with instructions for dismissal of Defendant's charges.

Reversed and Remanded.

Judge STROUD concurs.

Judge WYNN concurs in part by separate opinion.

Judge WYNN concurred in separate opinion prior to 9 August 2010.

Report per Rule 30(e).

NO. COA08-1595

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

STATE OF NORTH CAROLINA

v.

Avery County
Nos. 02 CRS 51200-01
03 CRS 247

PAUL BRANTLEY LEWIS

WYNN, Judge, concurring in part.

Because Defendant was denied the opportunity to cross-examine Detective Roberts regarding his improper conversation with a juror during Defendant's first trial, I concur with the majority in that part of the opinion and would award Defendant a new trial on that basis only.

This is the third appeal of this case to this Court. Defendant was first convicted on 12 September 2003. That conviction was affirmed by this Court in an unpublished opinion on 1 March 2005. *State v. Lewis*, 168 N.C. App. 730, 609 S.E.2d 497 (2005) (unpublished). Defendant then filed a Motion for Appropriate Relief ("MAR") on the basis of improper statements made by Detective Roberts to a sheriff's deputy who was a member of the jury. On 15 January 2008, this Court granted Defendant a new trial on his appeal of an order denying that MAR. *State v. Lewis*, 188 N.C. App. 308, 654 S.E.2d 808 (2008). Regarding Detective Roberts' conduct, we noted specifically that "[t]his was a conversation between a sheriff's deputy and a lead detective that was intended to influence the verdict." *Id.* at 312, 654 S.E.2d at 811.

Before Defendant's retrial in this case, the State filed a pretrial motion *in limine* to prevent the introduction of any evidence or allegations concerning jury tampering by Detective Roberts during Defendant's first trial. The trial court granted the State's motion, stating,

[d]ue to unfair prejudice and confusion of the jury, I think that there will be substantial unfair prejudice both to your client and to the State if this information -- I think nothing should be said about a trial having been held, or any kind of conviction, or anything that went on in that trial.

Defendant was subsequently found guilty of robbery with a dangerous weapon, felonious breaking and entering, and first degree sexual assault.

"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) (2009).

Evidence that tends to show that a witness is biased with respect to a party or issue goes to credibility. Thus, a party may inquire of an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation. Although the scope of cross-examination is subject to the control of the trial court, it may not limit a showing of bias or interest, a recognized substantial legal right.

State v. Alvarez, 168 N.C. App. 487, 498, 608 S.E.2d 371, 378 (2005) (internal quotations and citations omitted).

The trial judge excluded evidence of Detective Roberts' improper communication fearing undue prejudice to Defendant and to

the State. Insofar as the evidence prejudiced Defendant, he himself argued for its admission. Insofar as it prejudiced the State, it could not be excluded by the trial court if it tended to demonstrate the bias of the witness. *See Id.* Clearly a witness's bias can be inferred from a prior attempt to tilt the verdict against a defendant.

The State argues that "the credibility of Detective Robert's [sic] testimony was of minimal importance in the trial[.]" Somehow the State concludes that this immunizes his testimony from valid impeachment. There is no authority for such a position. Detective Roberts was called as a State's witness, and Defendant was entitled to inquire into prior conduct of the witness that was probative of his credibility. *See* N.C. Gen. Stat. § 8C-1, Rule 608(b) (2009).

Because Detective Roberts' conduct was probative of his bias toward Defendant and therefore relevant to his credibility, I agree that the trial court abused its discretion in excluding the evidence. I concur with the majority's conclusion to the extent it comports with the reasoning in this concurrence.