NO. COA08-507

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2009

STATE OF NORTH CAROLINA

v. Cleveland County
No. 06CRS054050

SAMUEL JUSTIN MCSWAIN

Appeal by defendant from judgment entered 17 October 2007 by Judge Timothy S. Kincaid in Superior Court, Cleveland County. Heard in the Court of Appeals 13 January 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Jill Ledford Cheek, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant.

WYNN, Judge.

"[T]he State may impeach a hostile witness by asking about prior inconsistent statements, if those questions are not a mere subterfuge for introducing improper and otherwise inadmissible evidence."[1] Defendant Samuel Justin McSwain argues that the trial court erred by allowing the State to impeach one of its witnesses with a prior inconsistent statement. Because the record indicates

[1] *State v. Lanier*, 165 N.C. App. 337, 352, 598 S.E.2d 596, 606 (citations omitted), *disc. review denied*, 359 N.C. 195, 608 S.E.2d 59 (2004).

that the State did not use the prior inconsistent statement as a subterfuge for getting inadmissible evidence before the jury, and the statement was otherwise admissible, we affirm the admission of the prior inconsistent statements.

The facts of this matter need not be fully detailed to understand the two issues presented on appeal by Defendant relating to the admission of impeachment evidence and the trial court's instruction to the jury regarding the use of the trial transcript. Summarily, this matter arose from several altercations that started on 21 June 2006 involving the shooting victim, Jesse McSwain, and his neighbors. Mr. McSwain and his pregnant wife lived in an apartment along side his friend, John Paul Franklin, who lived with his girlfriend in the other apartment in the duplex. Neither the record nor the transcript indicates what precipitated the altercations with the various neighbors but ultimately, the State's evidence tended to show that on 25 June 2006 Defendant used a .22 caliber rifle to shoot Mr. McSwain as he sat on his porch.

Before that shooting, Defendant confronted Mr. McSwain and Mr. Franklin contending that the men had pulled a gun on his mother in an earlier altercation with her. Both men denied having pulled a gun on Defendant's mother but Defendant did not believe them. Sometime later, Defendant attended a party at Dwight Stroud's house, where the record indicates several neighbors were "listening to music, drinking beer, smoking weed, smoking Xanexes, taking pills, having a good time." The State recounts the facts thereafter as follows:

> During the evening, they were rapping, and the defendant's lyrics were, "Oh dude gone pull a gun out on my mama, I'm going to kill him, fellow don't want to see me." Subsequently the defendant went inside and observed a .22 rifle, picked it up and walked out the door. He asked Stroud if there were any bullets in it and Stroud said yes. Stroud observed the defendant and [Jeffrey "Jay" Guyton] walking across the street toward the defendant's house.

According to the State's evidence, sometime thereafter "a gunshot was heard, and the defendant and [Mr. Guyton] came running across the road from the direction of the defendant's house to the Stroud residence."

Defendant does not contest on appeal the sufficiency of the State's evidence to convict him on the charge of first-degree murder; instead, he seeks a new trial on the grounds that the trial court erred by (I) allowing the State to present the prior inconsistent statement of Christopher Stroud – cousin of Dwight Stroud; and (II) instructing the jury that it could have a transcript of the testimony only if it was willing to wait a month for it to be prepared. We reject both arguments.

I.

Defendant first argues that the trial court erred by allowing the State to impeach its witness, Christopher Stroud, with his prior inconsistent statement because it was offered as a mere subterfuge for getting inadmissible evidence before the jury. Alternatively, Defendant argues that the trial court erred by not excluding the prior inconsistent statement under N.C. Gen. Stat. § 8C-1, Rule 403 (2007).

Any party, including the State, may impeach any witness. N.C. Gen. Stat. § 8C-1, Rule 607 (2007). However, it is well-settled that a prior inconsistent statement may only be used to attack a witness's credibility; it is not admissible as substantive evidence. *State v. Lynn*, 157 N.C. App. 217, 225, 578 S.E.2d 628, 634 (2003). Furthermore, North Carolina courts recognize the potential for parties to present prior inconsistent statements as a "mere subterfuge" for getting the otherwise inadmissible substance of those statements before the jury. *See State v. Lanier*, 165 N.C. App. 337, 352, 598 S.E.2d 596, 606 (2004). Therefore, before allowing a party to impeach its own witness, trial courts should inquire whether "[c]ircumstances indicating good faith and the absence of subterfuge are present." *Id.* (citations and quotation marks omitted). Those circumstances include whether: 1) the witness's testimony was extensive and vital to the government's case; 2) the party calling the witness was genuinely surprised by his reversal; and 3) the trial court followed the introduction of the statement with an effective limiting instruction. *Id.*

At trial, the State called Dwight Stroud's sixteen year-old cousin, Christopher Stroud, to testify about his observations on the night of the shooting. On direct examination, Christopher testified that he had gone down the street to a friend's house while Dwight, Defendant, and others partied in his backyard. He recalled seeing police cars around 1:00 or 2:00 A.M., when he returned home and learned that someone had been shot. Christopher

testified that he had seen Defendant at his home just once that night, while Defendant spoke with Dwight. Thereafter, the prosecutor sought to impeach Christopher's testimony with a signed prior inconsistent statement he had given to a police officer on 27 June 2006, and with statements Christopher made to the prosecutor a few weeks before trial. The exchange occurred, in relevant part, as follows:

> Q: Well, then I'll ask you again. What did you see the defendant doing on the night of the shooting?
> A: Talking to my cousin.
> Q: And do you recall saying anything about- -
> [Defense counsel]: Objection to the leading.
> [The court]: Overruled.
> Q: - - seeing him running, he and Jay?
> [Defense counsel]: Objection.
> [The court]: Overruled.
> A: That was part of the story I just put in there. That's why I said it somewhat matches; somewhat don't.
> . . .
> Q: Do you recall that on the night of the shooting you told them you saw Jay and [Defendant] running back from Tracey Street?
> [Defense counsel]: Objection.
> [The court]: Overruled.
> A: I do.
> Q: Sir?
> A: I did say that?
> Q: Okay. But now you're saying that's not true?
> A: That's what I'm saying now.

The State concedes in its brief that "Christopher was simply an additional fact witness to matters otherwise in evidence . . . ." The State points to Dwight's testimony as establishing every material point testified to by Christopher, including evidence that Defendant and Mr. Guyton ran back to the party together shortly after the shooting. Accordingly, Christopher's testimony was not "extensive and vital to the government's case."

However, the record supports the conclusion that the prosecutor was genuinely surprised by Christopher's testimony to a different version of events. Christopher admitted previous statements to police and the prosecutor in which he stated that he had seen Defendant and Mr. Guyton running back from Mr. McSwain's street just after the shooting. Moreover, Dwight testified to the same version of events; thus the State had no reason to foresee Christopher changing his story. Finally, because Dwight testified to the facts the State sought to elicit from Christopher, it is unlikely that the State was motivated to employ subterfuge to get Christopher's prior statement before the jury because those facts were already in evidence. Therefore, circumstances in the record suggest that the prosecutor was genuinely surprised by Christopher's contrary testimony.

At trial, after Officer Steven Seate testified about taking Christopher's prior written statement, the trial court gave the following limiting instruction:

> When a witness makes a statement outside of court that is prior to court such as . . . [listing witnesses including Christopher Stroud], you may consider the contents of that statement for one purpose only. That is, to determine if you believe such a statement, whether the witness is being truthful with you at this trial or not. You may not consider the contents of the earlier statements as evidence of the truth of what happened at the earlier time because it wasn't made under oath at this trial. But if you believe such a witness made such a statement then you may consider whether it is consistent with or whether it conflicts with the witness's testimony at this trial in deciding whether or not to believe that witness at this trial. Of course, that is together with all the other

> facts and circumstances and your common sense that you would use in determining the truthfulness of a witness.

Thus, the trial court instructed the jury that it could only consider Christopher's prior statement as evidence of his credibility. Accordingly, we hold that Defendant has not shown that the State offered the prior statement in bad faith, as a mere subterfuge for getting inadmissible evidence before the jury.

Defendant also argues that the trial court erred by failing to exclude the prior statement under N.C. Gen. Stat. § 8C-1, Rule 403 (2007). A trial court may exclude otherwise relevant evidence under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." *Id.* Whether to exclude evidence under Rule 403 is left to the trial court's sound discretion, and "the trial court's ruling should be reversed for abuse of discretion only when it can be shown to have been so arbitrary that it could not have been the result of a reasoned decision." *State v. Hunt*, 324 N.C. 343, 353, 378 S.E.2d 754, 759-60 (1989) (citations and quotation marks omitted).

Initially, we note that the trial judge held an off-the-record sidebar conference with the prosecutor and defense counsel to discuss the impeachment. Thereafter, the trial judge overruled each of defense counsel's objections to the contents of the prior statement.

We hold that the record shows that Defendant has not shown that the prior statement resulted in unfair prejudice, confusion of

the issues, or misleading the jury. Defendant was not prejudiced by Christopher's prior statement because, as explained above, Dwight had previously testified to all of the facts contained in Christopher's prior statement. Nor did the prior statement have any real potential to confuse the issues or mislead the jury because Defendant's whereabouts at the time of the shooting was one of the central issues of the case. Accordingly, this assignment of error is without merit.

II.

Defendant next argues that the trial court committed error by instructing the jury before it began deliberations as follows:

> [A] question often asked by jurors is, can we have a transcript. The answer is yes, if you want to wait about a month. What the court reporter does does not go into a way that can be printed off. It has to be printed, proofread, then redone and certified, and that will take several days if not weeks to complete. So although we can give you a copy of the transcript, you would be here a long time. If you do make that request, we'll certainly take it under advisement. That is in the discretion of the Court. But just to let you know, that might be a possible consequence.

Under N.C. Gen. Stat. § 15A-1233(a) (2007), the trial judge has two affirmative duties when there is a request from a deliberating jury: (1) the judge must conduct the jury to the courtroom; and (2) the judge must exercise discretion in responding to the jury's request. *State v. Ashe*, 314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985). The trial court's failure to comply with these mandates is reviewable on appeal even where there was no contemporaneous objection in the trial court. *Id.* at 39-40, 331

S.E.2d at 659. Moreover, the courts have found a violation of section 15A-1233's mandates where the jury did not make a request, but the trial court's comments effectively denied the jury the opportunity to make one. *See, e.g., State v. Johnson*, 164 N.C. App. 1, 18-20, 595 S.E.2d 176, 186-87 (2004). However, "[i]t is only prejudicial error to deny the jury an opportunity to ask to review certain testimony or evidence where the defendant can show that (1) such testimony or evidence 'involved issues of some confusion and contradiction,' and (2) it is likely that a jury would want to review such testimony." *Id.* (quoting *State v. Johnson*, 346 N.C. 119, 126, 484 S.E.2d 372, 377 (1997) (finding prejudicial error where the trial court refused to exercise its discretion to determine whether the jury may be permitted to review certain testimony that involved issues of some confusion and contradiction)).

Here, the record shows that the trial judge's comments do not indicate a lack of discretion to honor the jury's request for a transcript if it decided to make one. In contrast, the trial court informed the jury that it could have a transcript, but it would have to wait. *But cf. Johnson*, 346 N.C. at 125, 484 S.E.2d at 376 ("the trial court's comments are indicative of its understanding that it was not empowered to let the jurors review the testimony at issue."). The trial court's comments in this case do not indicate that it lacked the discretion to provide a transcript. Accordingly, we reject this assignment of error.

No error.

Judges ROBERT C. HUNTER and ERVIN concur.

Report per Rule 30(e).