NO. COA09-1310

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Lincoln County
No. 07 CRS 5396

DONNIE SCOTT CARPENTER,
Defendant.

Appeal by defendant from judgment entered 14 May 2009 by Judge J. Gentry Caudill in Lincoln County Superior Court. Heard in the Court of Appeals 23 March 2010.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Richard Croutharmel for defendant-appellant.

GEER, Judge.

Defendant Donnie Scott Carpenter appeals his conviction of assault inflicting serious bodily injury, contending that the trial court improperly admitted several hearsay statements as corroborative evidence. Certain of the statements were properly admitted as corroborating the alleged victim's testimony that defendant assaulted him. As for the remaining statements, defendant has failed to establish that their admission amounted to plain error. We, therefore, uphold the judgment below.

Facts

At trial, the State's evidence tended to show the following. On the evening of 30 June 2006, Charles Briggs had been drinking with his friend, Walt Beam, at a house on Lee Avenue in Lincolnton, North Carolina. Mr. Briggs was walking home from the house on Lee Avenue when two men approached him, hit him in the head and chest, and knocked him into a ditch. Mr. Briggs initially testified that the men also took his wallet, but later testified that he was mistaken. Although Mr. Briggs knew the men who attacked him, he could not recall their names at trial.

Mary Surratt, who lives on West Church Street in Lincolnton, was getting ready to go to bed that evening when she happened to look out her window. Ms. Surratt heard someone talking and saw three men standing in the street. She recognized one of the men as Mr. Briggs, whom she had known for many years. She did not recognize the other two men. Ms. Surratt saw one of the men hit Mr. Briggs and knock him to the ground. She testified that both of the men were black, and one of them was wearing a white shirt, but she did not know which man hit Mr. Briggs. The men looked around and then ran down the road.

Officer Dan Renn of the Lincolnton Police Department received a call around 1:00 a.m. on 1 July 2006 to investigate an assault at the intersection of West Church Street and Lee Avenue. When he arrived, he found Mr. Briggs lying in the roadway and a few other people trying to help him stand up. Mr. Briggs was unsteady on his feet and had a laceration on his chin. Officer Renn called EMS, which transported Mr. Briggs to the hospital. Mr. Briggs was taken

to Carolinas Medical Center in Charlotte because of internal bleeding in his brain. He also had a pacemaker installed.

Once Mr. Briggs was taken away by EMS, Officer Renn began interviewing potential witnesses. Officer Renn eventually obtained a description of the individuals involved and provided that description over the police radio to other officers in the area. Two to five minutes after sending out the radio call, Officer Renn saw defendant approximately three blocks from the crime scene. Defendant was wearing dark blue shorts and a white t-shirt. He was accompanied by Marvin Izzard, who was wearing a dark t-shirt and blue jeans.

The two men had been detained by another police officer, Sergeant Gary Wilson. While patrolling, Sergeant Wilson had heard the radio dispatch, spotted defendant and Mr. Izzard, and stopped and asked to speak to them. Sergeant Wilson searched defendant, but could not remember finding any money. Officer Renn, however, who observed the search, testified that Sergeant Wilson found four $20.00 bills, one $10.00 bill, one $5.00 bill, and two $1.00 bills on defendant's person. The officers did not find a wallet. Defendant was arrested on other unrelated charges.

Later that morning, Detective Joseph Painter interviewed Ms. Surratt, who said she saw the assault occur from her window. Ms. Surratt told Detective Painter that a black male wearing a white t-shirt hit Mr. Briggs. About a week later, on 7 July 2006, Detective Painter interviewed Mr. Briggs, who had been released from the hospital and was recovering at his sister's house. Mr.

Briggs' two sisters, Jo Ellen Lindsay and Frankie Rienhardt, were present for the interview.

After interviewing Mr. Briggs, Detective Painter reduced Mr. Briggs' statement to writing, and Mr. Briggs and his sisters signed it. The statement said:

> I was at Layla Ramsour's house on Lee Avenue drinking. Walt Beam was there too. I left out to walk home. I live at 615 Grove Street. I don't remember what time it was but it was late. I was at the corner of Lee Avenue and Church Street when Scott Carpenter and Marvin Izzard walked up to me. I don't remember what they said but I know they hit me and knocked me down. They took my wallet. My money was kept in my wallet. I don't remember how much money I had, I know it was more than twenty but less than a hundred. I know that it was Scott Carpenter and Marvin Izzard because I've known them all their lives. I don't remember which one hit me. I can't remember much that happened after I was robbed. My wallet had my ID, Social Security card, and other papers in it too. I don't remember if anyone else was around when this happened. I can't remember if I was walking home alone or not, but I think I was. I don't remember seeing anyone else with Scott or Marvin. This statement is the truth, I just can't remember every detail.

Since the assault on Mr. Briggs, his sisters and his roommate, Quincy Ijames, have noticed that he suffers from significant memory loss and has chest pains. Mr. Ijames now manages Mr. Briggs' personal affairs, including managing his finances, helping him with his medications and doctor's appointments, and doing his household errands.

On 20 August 2007, defendant was indicted for assault inflicting serious bodily injury. Although no additional indictments are included in the record on appeal, it appears from

the trial transcript that defendant was also charged with common law robbery and conspiracy to commit common law robbery. At the close of the State's evidence, the trial court allowed defendant's motion to dismiss the conspiracy charge, but denied his motion to dismiss the assault charge. The trial court never ruled on defendant's motion to dismiss the common law robbery charge.

Defendant presented evidence in his defense. Mr. Izzard testified that he was the one who had assaulted Mr. Briggs and that defendant was not present at the time. Mr. Izzard said he saw Mr. Briggs at the house on Lee Avenue on 30 June 2006. Mr. Briggs, who was highly intoxicated, asked to buy some drugs from Mr. Izzard. Mr. Izzard left the house, and Mr. Briggs followed him. At one point, another male whom Mr. Izzard did not know approached him and asked for a cigarette. Mr. Izzard gave one to him and continued walking. Mr. Briggs then came up behind Mr. Izzard and touched his shoulder. Mr. Izzard reacted by hitting Mr. Briggs who fell down. Mr. Izzard panicked and ran until he met up with defendant at the store and told him what happened. They were walking together when Sergeant Wilson detained them. Mr. Izzard subsequently pled guilty to felonious assault. He acknowledged during cross-examination that he had not previously told anyone that he was alone when the crime was committed.

Defendant's renewed motion to dismiss was denied. The jury found defendant guilty of assault inflicting serious bodily injury and not guilty of common law robbery. The trial court sentenced

defendant to 24 to 29 months imprisonment. Defendant timely appealed to this Court.

Discussion

On appeal, defendant contends the trial court erred in admitting (1) testimony by two witnesses that Mr. Briggs told them defendant was the one who hit him, (2) Mr. Briggs' written statement that the men who assaulted him took his wallet, and (3) testimony by Detective Painter that Ms. Surratt told him she saw a black male wearing a white shirt hit Mr. Briggs. Defendant argues that the trial court erred in concluding that the statements were admissible for purposes of corroboration.

As defendant did not object to any of this testimony, we review its admission for plain error.[1] *See State v. Petty*, 132 N.C. App. 453, 459, 512 S.E.2d 428, 432 (holding that defendant, by failing to object to testimony as contradictory rather than corroborative, failed to preserve issue for appeal), *appeal dismissed and disc. review denied*, 350 N.C. 598, 537 S.E.2d 490 (1999). The State contends plain error does not apply to issues, like this one, "which fall within the realm of the trial court's discretion." *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18

[1]Although defendant did object generally to the admission of Mr. Briggs' written statement, defendant failed to object to the specific portions of the statement that he challenges on appeal. *See State v. Harrison*, 328 N.C. 678, 682, 403 S.E.2d 301, 304 (1991) ("In a noncapital case, where portions of a statement corroborate and other portions are incompetent because they do not corroborate, the defendant must specifically object to the incompetent portions.").

(2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997, 121 S. Ct. 1131 (2001). This Court has, however, previously applied plain error analysis in reviewing whether corroborative evidence was properly admitted. *See State v. Chappelle*, 193 N.C. App. 313, 322-23, 667 S.E.2d 327, 333 (applying plain error analysis to review whether testimony was admissible as corroborative), *appeal dismissed and disc. review denied*, 362 N.C. 684, 670 S.E.2d 568 (2008); *State v. Love*, 152 N.C. App. 608, 615, 568 S.E.2d 320, 325 (2002) (holding that because defendant failed to object to admission of non-corroborative hearsay statement, defendant had to establish admission was plain error), *disc. review denied*, 357 N.C. 168, 581 S.E.2d 66 (2003).

As we are bound by these decisions, we review defendant's contentions regarding this testimony for plain error. The Supreme Court has held:

> "[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) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.),

cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)).

"'Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.'" *State v. Dunston*, 161 N.C. App. 468, 472, 588 S.E.2d 540, 544 (2003) (quoting *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980)). Our Supreme Court has held that prior statements of a witness can be admitted as corroborative evidence "if they tend to add weight or credibility to the witness' trial testimony." *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991). In order to be admissible, the previous statement offered in corroboration must pass a "'threshold test of substantial similarity.'" *Harrison*, 328 N.C. at 682, 403 S.E.2d at 304 (quoting *Rogers*, 299 N.C. at 601, 264 S.E.2d at 92). "New information contained within the witness' prior statement, but not referred to in his trial testimony, may also be admitted as corroborative evidence if it tends to add weight or credibility to that testimony." *McDowell*, 329 N.C. at 384, 407 S.E.2d at 212.

Defendant first challenges the testimony of Ms. Rienhardt and Mr. Ijames that Mr. Briggs told them that defendant was the one who hit him. Defendant argues that this testimony did not corroborate any statement by Mr. Briggs and, therefore, was improperly admitted.[2] This testimony was, however, in fact corroborative of

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[2]In his reply brief, defendant asserts that he did object to the admission of Ms. Rienhardt's testimony. The basis for that objection was, however, that "'none of this is in discovery.'" This objection was not, therefore, sufficient to preserve for appellate review the question whether this testimony was properly

Mr. Briggs' own trial testimony naming defendant as one of the men who assaulted him.

Mr. Briggs testified that on 30 June 2006, two men attacked him and knocked him in a ditch. More specifically, he testified at first:

> Q. Do you see — how many people were there?
>
> A. There was two.
>
> Q. All right. Do you see either one of them in court today?
>
> A. He was in here. I don't see him now.
>
> Q. All right. Who was the person that done it?
>
> A. I can't recall his name now.
>
> Q. Okay. What did they do to you?
>
> A. He hit me in the head and then hit me in the chest and knocked me in the ditch and robbed me.
>
> Q. Okay. And when you say they robbed you, what do you mean by that?
>
> A. They took my wallet.
>
> Q. Did you know both of the guys that did that?
>
> A. Yes, I knew them, yes.
>
> Q. Well, can you recall their names?
>
> A. I can't recall their names now, I can't.
>
> Q. But at that time did you know their names?

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admitted as corroborative evidence.

A. Yes.

Later, the prosecutor asked Mr. Briggs if he knew the defendant, and Mr. Briggs identified him by name ("Scott"). The following exchange then occurred:

> Q. Okay. And how long have you known Scott?
>
> A. Oh, a good many a years.
>
> Q. And do you recall when you spoke to Detective Sergeant Painter back about a week after you were assaulted in 2006?
>
> A. Yes.
>
> Q. All right. And do you recall giving him the name of the two people that assaulted you?
>
> A. Yes, he was one of them.
>
> Q. When you say, he, who are you referring to?
>
> A. Scott.
>
> Q. And that is the black gentleman seated over here to my right (indicating)?
>
> A. Right.
>
> *Q. Okay. And when you say he was one of them, are you saying that he was one of the two black men that assaulted you that night?*
>
> *A. Yes.*

(Emphasis added.) Ms. Rienhardt's and Mr. Ijames' testimony that Mr. Briggs told them that defendant hit him is substantially similar to Mr. Briggs' trial testimony that defendant was one of the men who assaulted him. We, therefore, hold that the trial court properly admitted their testimony as corroborative evidence.

Defendant also contends the trial court improperly admitted Mr. Briggs' written statement because that statement was contradictory to Mr. Briggs' trial testimony. In his written statement, Mr. Briggs said the men who assaulted him took his wallet. At trial, however, Mr. Briggs testified that he was mistaken about his wallet being stolen. Defendant did not specifically object to this portion of the written statement.[3] Even if he had properly preserved this issue for review, defendant has failed to show how he was harmed by this error. The trial court dismissed the charge of conspiracy to commit common law robbery, and the jury found defendant not guilty of common law robbery. Thus, defendant could not meet his burden of proving that there is a reasonable possibility that if this portion of the statement was excluded the jury would have reached a different verdict, *see* N.C. Gen. Stat. § 15A-1443(a) (2009), to say nothing of proving plain error.

Finally, defendant contends the trial court erred in allowing Detective Painter's testimony about what Ms. Surratt told him she observed on the night of the assault. Ms. Surratt testified at trial that she did not know which of the two men she saw outside her window hit Mr. Briggs. On the other hand, when Detective Painter was asked at trial what Ms. Surratt told him when he interviewed her, he testified: "She said that she saw the assault

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[3]To the extent defendant argues that the statement as a whole did not corroborate Mr. Briggs' testimony, we disagree. With the exception of the testimony regarding the wallet, the statement was substantially similar to Mr. Briggs' trial testimony.

occur from her window and said that the black male wearing the white T-shirt did the hitting."

The State argues that the difference between Ms. Surratt's trial testimony and her prior statement to Detective Painter is just a minor variance in detail that goes to the credibility of the witness. *See Dunston*, 161 N.C. App. at 472, 588 S.E.2d at 544 ("Variances in detail between the generally corroborative testimony and the testimony of another witness reflect only upon the credibility of the statement."). We disagree.

In *State v. Frogge*, 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997), the Supreme Court held that inconsistencies between a witness' trial testimony and the witness' prior statement about what a defendant said happened during a fight — who started the fight, the timing of the altercation, and why the defendant attacked the victims — were manifestly contradictory and, therefore, improperly admitted. Similarly, here the statements (1) that Ms. Surratt did not know which man hit Mr. Briggs, and (2) that she *did* know which man hit him, and it was the one wearing the white t-shirt, are more than just slightly variant. They are manifestly contradictory on the crucial issue to be determined in the case: who committed the assault.

Even though we believe the evidence was improperly admitted, the question remains whether the admission of this evidence constitutes plain error. Defendant has to show that "'the error in question "tilted the scales" and caused the jury to reach its verdict convicting the defendant.'" *State v. Tucker*, 317 N.C. 532,

539, 346 S.E.2d 417, 421 (1986) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83-84 (1986)). Defendant contends only that the admission of the statement was prejudicial because there was no other evidence that he was the one who hit Mr. Briggs. Mr. Briggs, however, testified that defendant, whom he identified physically and by his first name, was the man who assaulted him. This testimony was corroborated by Ms. Rienhardt and Mr. Ijames. Although defendant points to Mr. Izzard's testimony that he was alone when he attacked Mr. Briggs and that he met defendant (who was wearing a white shirt) later, Ms. Surratt testified that she saw three men talking together outside in the street, including a man in a white shirt, and that she saw one of the men strike Mr. Briggs. Thus, even without Detective Painter's testimony, we think it is highly unlikely, in light of the other evidence of defendant's guilt, that the jury would have reached a different verdict on the assault charge. Defendant has, therefore, failed to show plain error.

No error.

Judges McGEE and ERVIN concur.

Report per Rule 30(e).