NO. COA09-1634

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v. Cherokee County
No. 08 CRS 050859

SCOTT LEE RAYBURN

Appeal by defendant from judgments entered 26 March 2009 by Judge James U. Downs in Cherokee County Superior Court. Heard in the Court of Appeals 2 September 2010.

Attorney General Roy Cooper, by Assistant Attorney General Brandon L. Truman, for the State.

McKinney & Tallant, P.A., by Zeyland G. McKinney Jr., for defendant.

ELMORE, Judge.

A jury found Scott Lee Rayburn (defendant) guilty of assault inflicting serious injury, first degree kidnapping, and intimidating a witness. He was sentenced to 150 days' imprisonment for the assault conviction, 100 to 129 months' imprisonment for the kidnapping conviction, and eight to ten months' imprisonment for the intimidation conviction. Defendant appeals these convictions, alleging multiple evidentiary errors during his trial and challenging the trial court's denial of defendant's motions to dismiss two of the charges against him. After careful

consideration, we hold that defendant received a trial free from prejudicial error.

Background

On 24 June 2008, Brian Stiles was attacked by three men: Jay Arrowood, Kevin Coleman, and defendant. Stiles lived in the same neighborhood as Arrowood and defendant, and he had been friends or acquaintances with all three men before the assault. Defendant and Arrowood were brothers-in-law. When Stiles came home from work, the three men were standing in a neighbor's yard. Arrowood approached Stiles, and the two men chatted for a few minutes until Coleman and defendant also approached Stiles. All four men were then chatting calmly when Coleman accused Stiles of "fooling around with [his] wife." Coleman hit Stiles multiple times in the face, and then defendant began punching Stiles in the back of the head. At some point, defendant said something about Stiles "ratting on" his "brother," Arrowood. According to Stiles, Arrowood acted as the "cheerleader" or "quarterback," directing the other two men to continue beating and kicking Stiles and to "finish him off."

Eventually, Coleman and defendant brought Stiles to the ground, and all three men kicked and stomped him. Stiles, in his attempt to escape, made it up his front steps and to his front door, which was still locked. Defendant then grabbed Stiles by the arms and dragged him back down the steps. Stiles heard defendant say, "Brian, I like you but I'm going to have to kill you." Defendant then wrapped a garden hose around Stiles's neck several

times and pulled on it. Defendant, while standing, "put his knee into [Stiles's] back to get leverage to pull real hard." At that point, Stiles "blacked out." However, just before losing consciousness, Stiles saw defendant pick up a shovel. When Stiles regained consciousness, his yard was filled with law enforcement officers and paramedics. His injuries included extensive bruising all over his body, a black eye that had swelled shut, a blood-filled retina, strangulation marks around his neck, severe head pain, and chronic headaches.

Six months before the assault, Arrowood had stopped by Stiles's house. Stiles testified that, at the time, this was not abnormal. Within two or three minutes of Arrowood's arrival, Trooper Isaac Boring knocked on Stiles's door. He told Stiles that he had followed Arrowood from a nearby convenience store and had observed Arrowood driving without a license. By this time, Arrowood was in the bathroom. Stiles and Trooper Boring conversed for a few minutes until Trooper Boring said, "Brian, you need to just let me do my job. I'm taking him in for not having any license. I saw him come in here." At that point, both Trooper Boring and Stiles heard Arrowood drop a spoon on the ceramic tile of the bathroom. Stiles told Arrowood that Trooper Boring was there, and Arrowood unlocked the bathroom door. When Arrowood opened the bathroom door, he had a needle in his arm, and a spoon, a bottle of pills, and a .38 pistol sitting on the side of the sink. When Arrowood was prosecuted for drug trafficking, the State called Stiles as a witness.

Arguments

A. Leading Questions

Defendant first argues that the trial court erred by repeatedly allowing the prosecutor to ask leading questions of and suggest answers to Stiles. We disagree.

"[I]t is well settled in this state that a ruling on the admissibility of a leading question is in the sound discretion of the trial court, and these rulings are reversible only for an abuse of discretion." *State v. Howard*, 320 N.C. 718, 722, 360 S.E.2d 790, 792 (1987) (citations omitted).

> A leading question has been defined as a question which suggests the answer desired and is a question which may often be answered by a simple "yes" or "no." The traditional North Carolina view is that, as a general proposition, leading questions are undesirable because of the danger that they will suggest the desired reply to an eager and friendly witness. In effect, lawyers could testify, their testimony punctuated only by an occasional "yes" or "no" answer. However, the fact that a question may be answered yes or no does not make it leading. Whether a question is leading depends not only on the form of the question but also on the context in which it is put.

Id. at 721-22, 360 S.E.2d at 792 (quotations and citations omitted). Rule 611(c) of our Rules of Evidence states, in relevant part, that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." N.C. Gen. Stat. § 8C-1, Rule 611(c) (2009).

Defendant argues that the prosecutor asked a series of leading questions, all of which defense counsel objected to, and all of which objections the trial court sustained. He argues that the

trial court abused its discretion by permitting these leading questions to continue and by "not prohibiting the prosecutor from eliciting any further testimony after engaging in such leading questions." Our review of the transcript of the proceedings reveals that defense counsel objected to only one question as leading. Counsel objected to several other questions on other bases, and counsel did not object at all to some of the questions now challenged on appeal. Because our Rules of Appellate Procedure require a party to "have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context" in order to preserve a question for appellate review, N.C.R. App. R. 10(b)(1) (2009), defendant has not preserved these questions for our review.

With respect to the single question that defendant did object to at trial, that question is not properly before this Court because the trial court sustained defendant's objection. *See State v. Roache*, 358 N.C. 243, 296, 595 S.E.2d 381, 415 (2004) ("This Court will not review the propriety of questions for which the trial court sustained a defendant's objection absent a further request being denied by the court. No prejudice exists, for when the trial court sustains an objection to a question the jury is put on notice that it is not to consider that question. Accordingly, any error alleged by defendant to result from these questions is not properly before the Court[.]") (citations omitted).

B. Out of Court Statement by Christopher Haynes

Defendant next argues that the trial court erred by admitting Exhibit 21, notes pertaining to an out-of-court statement made by Christopher Haynes to Officer Jerry Crisp of the Cherokee County Sheriff's Department. During Officer Crisp's testimony, the trial court admitted the exhibit, without objection, for the purpose of corroborating Haynes's earlier testimony. Defendant now argues that the trial court should not have admitted the exhibit because it directly contradicted Haynes's testimony, and thus was not corroborative. However, defendant did not object to the exhibit's admission at trial. Accordingly, defendant has not preserved this issue for appellate review, and we do not review it. *See* N.C.R. App. P. 10(b)(1), 10(c)(4) (2009).

C. Testimony by Hannah[1] Haynes

Defendant next argues that the trial court erred by "allowing witness [Hannah] Haynes to comment on the truthfulness of a statement made to her by" defendant. Hannah Haynes had been engaged in the same conversation with defendant as her husband, Christopher. She immediately wrote a statement summarizing what defendant had said, and she gave the statement to her husband, who gave it to Officer Crisp. The State questioned her about the statement:

> Q. At some point after that evening did you write a statement out about what had happened

[1] The first name of the witness has been altered to protect her privacy.

> between Mr. Rayburn and you – or what you heard him say?
>
> A. Well, I went inside to write a statement because I felt like it was pertinent that I write down what I had heard. It didn't sound at all correct to me.
>
> [Defense Counsel]: I object to that, Your Honor.
>
> THE COURT: You what? Say it again?
>
> A. I went inside immediately after our conversation to write a statement because the words — I'll rephrase it a little bit.
>
> THE COURT: Just say what you said so I'll know whether or not to rule on it. I lost it in that microphone.
>
> A. I went inside to write a statement immediately after the conversation because of what was said did not seem to fit.
>
> THE COURT: Overruled.

Defendant now argues that Hannah's testimony was an impermissible lay opinion as to defendant's credibility and truthfulness and should have been excluded as such. Rule 701 of our Rules of Evidence limits lay opinions "to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2009). We review the trial court's admission of lay testimony for an abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000).

Here, Hannah's testimony was both rationally based on her perception and helpful to a clear understanding of her testimony. Hannah recounted what she recalled defendant telling her about the

altercation, and that what she recalled him telling her was internally inconsistent. For example, she recalled the following with respect to the shovel:

> And [defendant] said no, no, I don't know anything about a shovel. He said that several times throughout the conversation. Towards the end of the conversation he said, "You know, the only thing that I know about this shovel is that I took that shovel and I held it up to his neck and I said I was going to bury him with it."

She also recalled defendant as being disoriented, high strung, and rambling. Based on what she observed, she inferred that "[i]t didn't at all sound correct[.]" This inference also explained why she had prepared a written statement in advance of Officer Crisp's arrival, without a law enforcement officer asking her to offer a written statement. Accordingly, we hold that the trial court did not abuse its discretion by admitting her testimony.

D. Psychological History of Hannah Haynes

Defendant next argues that the trial court erred by sustaining the State's objection when defendant asked Hannah how long she had been seeing a psychiatrist. Defendant contends that, as a result, he was denied effective cross-examination of a witness because Hannah's mental history and mental state at the time she spoke with defendant related to her competency and credibility. Defendant is unpersuasive. Before defense counsel asked how long she had been seeing a psychiatrist, Hannah had already testified that she took two prescription mood stabilizers and one prescription sleeping

aid. She had also already testified that she suffered from post-traumatic stress disorder.

Although defendant does not argue one way or the other in his brief, this question is governed by Rule 611(b) of our Rules of Evidence, which states, "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). "In this jurisdiction, . . . we have allowed juries to evaluate . . . the effect of mental defects . . . on a witness' ability to perceive, retain, and recount." *State v. Williams*, 330 N.C. 711, 721, 412 S.E.2d 359, 365-66 (1992). However, this rule is not without limits; the witness being cross-examined must be a "key" State witness. *Id.* at 723, 412 S.E.2d at 366.

"On appeal, the trial court's decision to limit cross-examination is reviewed for abuse of discretion, and rulings in controlling cross examination will not be disturbed unless it is shown that the verdict was improperly influenced." *State v. Jacobs*, 172 N.C. App. 220, 228, 616 S.E.2d 306, 312 (2005) (quotations and citation omitted). Here, we find no abuse of discretion. Hannah was not a key State witness. She was not an eyewitness to the crime, nor was she the only witness who testified about the conversation that she, her husband, and defendant had after the assault. The victim himself testified about defendant's role in the crime. Indeed, even if we were to find error, it would not be prejudicial. Defendant elicited other information about Hannah's psychiatric history, and he could have asked other

questions relevant to Hannah's mental condition and ability to perceive, but he chose not to.

E. Testimony by Officer Crisp

Defendant next argues that the trial court erred by allowing Officer Crisp to testify about portions of a conversation that he had with Brian Stiles. Over defendant's objection, the trial court allowed Officer Crisp to testify for corroboration purposes. After overruling defendant's objection, he told the jury:

> You will consider it only, members of the jury, for corroboration or lack thereof of Mr. Stiles' sworn testimony. If you find it is consistent with what you remember his testimony to have been about whatever he did or did not tell this officer, you can let that be reflected in what credibility or lack thereof you give Mr. Stiles' sworn testimony about this particular point. But for considering it that way you won't consider it for any other purpose. Proceed.

Officer Crisp then testified:

> He said that the initial fight occurred up here on the deck, on the porch; and that it was Kevin Coleman that started the fight. He said they were making comments that, you know, you don't testify — you can't be testifying, you're going to be sending Jay Arrowood, my buddy, to jail, and that kind of stuff. He said that he was holding his own with Coleman.

"The abuse of discretion standard applies to decisions by a trial court that a statement is admissible for corroboration." *State v. Tellez*, ___ N.C. App. ___, ___, 684 S.E.2d 733, 739 (2009) (citation omitted).

> Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. In

> order to be admissible as corroborative evidence, a witness's prior consistent statements merely must tend to add weight or credibility to the witness's testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates. If the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement. A trial court has wide latitude in deciding when a prior consistent statement can be admitted for corroborative, nonhearsay purposes.

State v. Bell, 159 N.C. App. 151, 155, 584 S.E.2d 298, 301 (2003) (quotations and citations omitted; alterations in original). "Only if the prior statement contradicts the trial testimony should the prior statement be excluded." *Tellez*, ___ N.C. App. at ___, 684 S.E.2d at 740 (citation omitted).

Here, Officer Crisp's testimony was generally consistent with Stiles's testimony, and we cannot say that the trial court's decision to admit Officer Crisp's testimony was manifestly unsupported by reason. Even if the trial court had erred, defendant could not show prejudice because the trial court exercised an abundance of caution by giving a limiting instruction. *See Tellez*, ___ N.C. App. at ___, 684 S.E.2d at 741 ("Further, defendant cannot demonstrate prejudice, particularly in light of the abundance of caution exercised by the trial court in giving an appropriate limiting instruction.").

F. Motion to Dismiss the Charge of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury

Defendant next argues that the trial court erred by denying his motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury. According to defendant, the only evidence to support the charge was Officer Crisp's testimony, which defendant argued was inadmissible. We have already addressed the admissibility of Officer Crisp's statements and concluded that the trial court did not err by admitting them. As for defendant's claim that there is no other evidentiary support for the charge, we disagree.

> In ruling on a defendant's motion to dismiss for insufficiency of the evidence, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The trial court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Turnage, 362 N.C. 491, 493-94, 666 S.E.2d 753, 755 (2008) (quotations and citations omitted). "[T]he essential elements of assault with a deadly weapon with intent to inflict serious injury are (1) an assault; (2) with a deadly weapon; (3) inflicting serious injury; (4) not resulting in death." *State v. Lawson*, 173 N.C. App. 270, 279, 619 S.E.2d 410, 415-16 (2005).

From the evidence presented, we conclude that a jury could reasonably infer that defendant strangled Stiles with a garden

hose, intending to kill him. Stiles saw defendant wrap the garden hose around his neck, he felt defendant tighten the hose around his neck by pulling backwards and digging a knee into his back, and he heard Stiles tell him, "Brian, I like you but I'm going to have to kill you." Stiles suffered serious injuries as a result. The jury could also have reasonably inferred that defendant struck Stiles in the head with a shovel, intending to kill him. Stiles saw defendant approach him with a shovel after hearing him say, "Brian, I like you but I'm going to have to kill you," and then Stiles lost consciousness; when Stiles regained consciousness, he had a serious head injury. Accordingly, we hold that the trial court did not err by denying defendant's motion to dismiss.[2]

G. Motion to Dismiss the Charge of First-Degree Kidnapping

Defendant next argues that the trial court erred by denying his motion to dismiss the charge of first-degree kidnapping. However, defendant has not preserved this issue for appellate review.

> If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his

[2] We also note that the jury did not convict defendant of assault with a deadly weapon with intent to kill inflicting serious injury or the lesser included crime of assault with a deadly weapon inflicting serious injury, which renders this argument moot. *See State v. Boyd*, 287 N.C. 131, 141, 214 S.E.2d 14, 20 (1975) (observing, "In any event the lack of a conviction on the murder charge makes this question moot," after holding that the trial court did not err by denying the defendant's motion to require the State to elect whether it was proceeding under the felony murder rule).

> evidence and cannot urge such prior motion as ground for appeal. The defendant, however, may make such motion at the conclusion of all the evidence in the case, irrespective of whether or not he made a motion for dismissal or judgment as in case of nonsuit theretofore. . . . If the motion is refused, the defendant may on appeal, after the jury has rendered its verdict, urge as ground for reversal the trial court's denial of his motion made at the close of all the evidence[.]

N.C. Gen. Stat. § 15-173 (2009). Here, defendant moved for dismissal at the close of the State's evidence, introduced his own evidence, and failed to renew his motion at the close of all of the evidence. Because he introduced evidence and did not renew his motion, defendant has not preserved this issue for appeal. Accordingly, we do not review this argument.

H. Cross-examination of Defendant's Wife

Defendant next argues that the trial court erred by allowing the State to cross-examine defendant's wife, Christy Rayburn, about a criminal conviction that was more than ten years old, in violation of Rule 609. We hold that the trial court erred by permitting the State to pursue this line of questioning, but the error was not prejudicial because the witness did not answer the question.

During cross-examination, the State asked defendant about several prior convictions, including a 1999 conviction for resisting, obstructing, or delaying a public officer. Defense counsel objected because the conviction was outside the ten-year period permitted by Rule 609. The trial court sustained

defendant's objection. Later, while cross-examining defendant's wife, the State asked, "But you're aware that your husband has been convicted of two counts of resisting a public officer?" Defense counsel immediately objected, pointing out that they had "covered this once." The trial court overruled the objection, and defendant's wife replied, "I never usually go to court with Scott. I don't."

Rule 609(a) sets out the following general rule: "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." N.C. Gen. Stat. § 8C-1, Rule 609(a) (2009). Part (b) of the rule provides a time limit for admitting evidence of these convictions:

> Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Id., Rule 609(b). Although both parties focus on the admissibility of the evidence under Rule 609(a), that rule governs the

admissibility of evidence of a witness's past convictions when "elicited *from the witness* or established by public record." *Id.*, Rule 609(a) (emphasis added). Here, the State sought to elicit testimony from a witness about *defendant's* past convictions, not the witness's. Indeed, it appears that the State was not attempting to attack the witness's credibility; instead, it was attempting to attack defendant's credibility. As our Supreme Court has explained, "The purpose of permitting inquiry into specific acts of criminal or degrading conduct is to allow the jury to consider these acts in weighing the credibility of a witness who has committed them." *State v. McClintick*, 315 N.C. 649, 656, 340 S.E.2d 41, 46 (1986) (quotations and citation omitted). Accordingly, the State's pursuit of this line of questioning was outside both the letter of Rule 609(a) and its spirit.

The appropriate evidentiary rule is 404(b), which allows a witness to testify about a defendant's prior bad acts in limited circumstances. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."). Neither the parties nor the trial court addressed Rule 404(b), and we assume *arguendo* that Mrs. Rayburn's testimony about her husband's prior conviction was inadmissible, and that the trial court erred by overruling defendant's objection

to the State's line of questioning. Nevertheless, we hold that the error was harmless. Mrs. Rayburn did not answer the State's question about defendant's 1999 conviction; she simply replied that she did not go with him to court. In addition, there was strong substantive evidence against defendant, including the victim's testimony. Accordingly, we cannot hold that the result would have been different had this testimony been excluded, and we hold that the error, if any, was harmless. *See State v. Willis*, 332 N.C. 151, 168, 420 S.E.2d 158, 165 (1992) (holding that, though a trial court erred by improperly admitting testimony under Rule 404(b), the error was harmless "[i]n light of the strong substantive evidence against the defendant") (citations omitted).

Conclusion

We hold that defendant received a trial free from prejudicial error.

No prejudicial error.

Judges JACKSON and STEPHENS concur.

Report per Rule 30(e).