NO. COA09-168

NORTH CAROLINA COURT OF APPEALS

Filed: 8 December 2009

STATE OF NORTH CAROLINA

v. Guilford County
No. 06 CRS 102498

JUAN CARLOS OLIVO RAMIREZ

Appeal by defendant from judgment entered 9 October 2008 by Judge Leon A. Stanback, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 20 August 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley, for the State.

Parish, Cooke & Condlin, by James R. Parish, for defendant.

ELMORE, Judge.

Juan Carlos Olivo Ramirez (defendant) appeals his conviction for first degree murder. For the reasons stated below, we hold that defendant received a trial free from prejudicial error.

Defendant and the victim, April Caldwell (April), began a romantic relationship in March 2004. They had a child together in September 2005 and moved into a rental house in Greensboro a year later. On 29 October 2006, Jody Dodson, who lived next door to April and defendant, heard screaming coming from April's house and saw April run out of her house screaming, "You hit me, I'm calling the police, that's it." Defendant left in his car. Greensboro

Police Officer Danielle Budusky arrived at the scene, and April told Officer Budusky that she and defendant had had an argument and that he had pushed her head into the door frame. Officer Budusky observed a swollen lump on April's head and asked April if she wanted defendant charged with domestic assault or to go to the hospital. April chose not to have defendant charged and said that she would visit the hospital later. Officer Budusky then left the scene. After returning from the hospital later that night, April told Dodson, "I'm going to get out of this, I'm going to get out of here." April and her child moved out of the house.

In December 2006, Javier Tezoquipa and his roommate Eddie encountered April and defendant fighting in the street. Defendant asked Tezoquipa and Eddie to take April with them because defendant did not want her in his car. Tezoquipa said that April seemed very scared, so he and Eddie took her back to their apartment and gave her some food and helped her calm down. Later that night, Tezoquipa and Eddie returned April to the spot where she and defendant had been arguing. Three or four days later, April moved into Tezoquipa and Eddie's apartment, but Tezoquipa testified that neither he nor Eddie had a sexual relationship with April and that she slept in the living room.

On 25 December 2006, Eddie took April to her parents' house for Christmas, where she stayed for most of the day. Defendant showed up at the house, and April's mother, Anna, invited him inside. Defendant begged April to return to him, but April refused. Anna asked defendant to leave and he did. April returned

to Tezoquipa and Eddie's apartment later that night, and they made plans to attend a movie. However, defendant showed up at the apartment to talk to April and they spoke briefly. After this conversation, defendant left, but later returned; April called Anna and asked to be picked up because defendant had discovered where she was living.

While April was waiting for her mother, Tezoquipa and Eddie saw defendant grab April from behind, place his arm around her neck, and try to stick a knife into her stomach. Wounded, April broke free from defendant's grip and ran outside. Defendant ran after her, with Tezoquipa and Eddie also running out of the apartment in different directions. Tezoquipa started to turn back when he saw April faint in the yard, but defendant was standing over her with the knife in his hand and Tezoquipa decided to keep running. Defendant had fled by the time Anna arrived to discover April lying in the yard with a knife stuck in her chest; April died in the yard. Tezoquipa returned soon thereafter and also saw the knife in April's chest.

After stabbing April, defendant fled to Mexico. From there, he called Anna repeatedly and told her that April had been on drugs and alcohol and that "he done what he had to do." Anna testified that defendant had also told her, "After [April had] seen the knife, that she told him she would come home and he told her it was too late," and that "if he couldn't have April wasn't nobody going to have her."

Police matched the knife, which had a 7.5 inch blade, to other knives in defendant's house. After defendant was apprehended in Arizona, he told detectives that he had seen April having oral sex with a man at Tezoquipa and Eddie's apartment. He claimed that, after talking to April, he had returned to his house and retrieved a knife so that he could defend himself from Tezoquipa and Eddie. However, once he returned to the apartment, he could not stop himself from stabbing April.

Defendant was charged with first degree murder and two counts of attempted first degree murder; the attempted first degree murder charges were dismissed by the trial court at the close of the State's evidence. Defendant admitted at trial that he had stabbed April, and the jury found defendant guilty of first degree murder. After the jury verdict but before sentencing, defendant pleaded guilty to a separately pending charge of statutory rape of April. The trial court sentenced defendant to life imprisonment without parole.

Defendant first argues that the trial court erred by admitting Jody Dodson's testimony that April had screamed, "You hit me, I'm calling the police, that's it," and later told Dodson, "I'm going to get out of this, I'm going to get out of here," over defendant's objection. Although defendant objected to Dodson's testimony during voir dire, the trial court overruled the objection and admitted Dodson's testimony. He now argues that Dodson's testimony was inadmissible hearsay. We disagree.

"The trial court has wide discretion in ruling on motions *in limine* and will not be reversed absent an abuse of discretion. With regard to evidence that has been admitted over a hearsay objection, this Court reviews the trial court's decision *de novo*." *State v. Rainey*, ___ N.C. App. ___, ___, 680 S.E.2d 760, 765 (2009) (quotations and citations omitted).

> Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Even relevant evidence is subject to Rule 403, which disallows evidence when the probative value is outweighed by the danger of unfair prejudice. Evidence of a defendant's misconduct toward his wife during the marriage is admissible under Rule 404(b) to prove motive, opportunity, intent, preparation, [or] absence of mistake or accident with regard to the subsequent fatal attack upon her. However, if the evidence is used to prove the truth of the matter asserted, it must still be admissible under the rules against hearsay. If it is merely a recitation of facts, offered for the truth of the matter asserted, it is inadmissible.

State v. Murillo, 349 N.C. 573, 586, 509 S.E.2d 752, 759-60 (1998) (quotations and citations omitted). In *Murillo*, the defendant argued that his "victim's sisters and friends were improperly allowed to testify to various beatings that the victim described." *Id.* at 588, 509 S.E.2d at 761. Our Supreme Court held that because the victim spoke to the witnesses immediately after the beatings, their testimony was admissible pursuant to the Rule 803(2) excited-utterance exception to the hearsay rule. *Id.* The defendant also argued that testimony by a witness that the victim had told the witness that she intended to leave the defendant was

also inadmissible hearsay. *Id.* at 586, 509 S.E.2d at 760. Our Supreme Court disagreed, explaining,

> The victim's statement indicating the parties were separated or separating bore directly on the relationship between the victim and defendant at the time of the killing and [was] relevant to show a motive for the killing. Statements from the victim indicating that she intended to end the marriage reflected her state of mind and were therefore admissible under Rule 803(3).

Id. (quotations and citations omitted).

Dodson's testimony was similarly admissible. Her testimony that she heard April scream, "[defendant] hit me, I'm calling the police, that's it," occurred immediately after April and defendant fought and was admissible as an excited utterance under Rule 803(2). Dodson's testimony that April told her, "I'm going to get out of this, I'm going to get out of here," after she returned from the hospital reflected April's state of mind and was admissible under Rule 803(3). Accordingly, defendant's first argument is without merit.

Defendant next argues that the trial court erred by allowing Officer Budusky to testify about what April told her following the 29 October 2006 domestic violence incident. He argues that April's statements to Officer Budusky were testimonial in nature and, thus, inadmissible. Though we agree that April's statements were testimonial, we hold that their improper admission subjected defendant only to harmless error.

The Confrontation Clause is violated when a "testimonial" statement from an unavailable witness is introduced against a

defendant who did not have a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d. 177, 203 (2004). Testimonial statements include prior testimony and statements taken by police officers during the course of interrogations. *Id.* However, even statements to a police officer are "non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006). Our Supreme Court considered the issue of an "ongoing emergency" in *State v. Lewis*, 361 N.C. 541, 648 S.E.2d 824 (2007). It identified the following factors as support for the Supreme Court's conclusion in *Davis* that the police interrogation occurred as part of an ongoing emergency:

> (1) the victim "was speaking about events as they were actually happening, rather than describing past events"; (2) the victim was facing an ongoing emergency and her "call was plainly a call for help against bona fide physical threat"; (3) "the elicited statements were necessary to be able to resolve the present emergency"; (4) the interrogation was very informal and the victim's "frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe."

Id. at 546-47, 648 S.E.2d at 828 (quoting *Davis*, 547 U.S. at 827, 165 L. Ed. 2d at 240). In *Lewis*, the Supreme Court also identified contrasting factors from D*avis*'s companion case, *Hammon v. Indiana*, which concluded that a police interrogation was not part of an ongoing emergency and was, thus, testimonial:

> (1) when the police arrived the victim "told them that things were fine"; (2) the victim faced "no immediate threat to her person"; (3) the officer questioning the victim "was not seeking to determine . . . 'what is happening,' but rather 'what happened'"; (4) the interrogation was "formal enough" because it was conducted in a separate room away from the defendant as part of a police officer's investigation; (5) the victim's statement "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"; and (6) the interrogation occurred "some time after the events described were over."

Id. at 547, 648 S.E.2d at 828 (quoting *Davis*, 547 U.S. at 830, 165 L. Ed. 2d at 242).

The Supreme Court concluded that the police interrogation in *Lewis* was not part of an ongoing emergency and more closely resembled the interrogation in *Hammon*, rather than *Davis*. In *Lewis*, a police officer responded to a telephone report of a robbery from neighbors who discovered the victim's door ajar and the victim, badly bruised, in her apartment. *Id.* at 543, 648 S.E.2d at 826. After speaking with the neighbors and the victim, the officer called an ambulance for her and took her statement, in which she described the defendant following her into her apartment and demanding money. *Id.* When the victim refused, the defendant beat her with a flashlight, a phone, and a walking stick. *Id.* The Supreme Court explained:

> The circumstances surrounding Officer Cashwell's interrogation of Carlson [the victim] objectively indicate that no ongoing emergency existed and that the primary purpose of the interrogation was to establish or prove past events potentially relevant to a later criminal prosecution. The assault occurred hours before Carlson was discovered, and

> Carlson's neighbors were with her for a period of time before Officer Cashwell arrived. Although defendant's location was unknown at the time of the interrogation, *Davis* clearly indicates that this fact does not in and of itself create an ongoing emergency. Carlson's statements were neither a cry for help nor the provision of information enabling Officer Cashwell immediately to end a threatening situation. Rather, Carlson deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. As such, Carlson's statements to Officer Cashwell were testimonial, and admission of those statements at trial violated [the] defendant's right to confrontation because she was not afforded an opportunity to cross-examine Carlson.

Id. at 548-49, 648 S.E.2d at 829-30 (quotations and citations omitted).

Here, Officer Budusky's interaction with April was more similar to the interaction in *Lewis* than the interrogation in *Davis*. The domestic violence incident was no longer in progress when Officer Budusky arrived and April was no longer facing an immediate threat to her person. Although April was injured, *Lewis* demonstrates that a victim still requiring medical attention when police arrive is not determinative of an ongoing emergency. Officer Budusky endeavored to learn what had happened, not what was happening. The interaction was certainly informal, apparently occurring in the yard, but the interrogation in *Hammon* was deemed "formal enough" simply because it was conducted away from defendant, "[n]otwithstanding that flames were coming out of the shattered glass door of the home's living room gas heating unit and that the defendant repeatedly tried to intervene in the victim's conversation with the police[.]" *Id.* at 547, 648 S.E.2d at 828-29.

Finally, April was describing past events to Officer Budusky and the interaction occurred after the violent incident ended. Accordingly, we hold that April's statements to Officer Budusky were testimonial, and their admission violated defendant's right to confrontation because he had no opportunity to cross-examine defendant.

"A violation of [a] defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443 (2007). "The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction . . . not whether the appellate court is able to conclude beyond a reasonable doubt that the evidence was harmless to the rights of a defendant." *State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981). However, "[t]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) (citation omitted).

Here, the State presented overwhelming evidence of defendant's guilt notwithstanding Officer Budusky's testimony: Jody Dodson witnessed and described past violence between defendant and April; Tezoquipa testified that he saw defendant attempt to stab April and chase her with a knife; Tezoquipa also testified that he saw defendant standing over April with a knife in his hand; and defendant admitted to police that he could not stop himself from

stabbing April. Accordingly, we hold that defendant was not prejudiced by the admission of Officer Budusky's improper testimony.[1]

For the foregoing reasons, we hold that defendant received a trial free from prejudicial error.

No prejudicial error.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).

[1] Because we conclude that Officer Budusky's testimony was harmless error, do not address the issue of forfeiture or its possible application. *See Lewis*, 361 N.C. App. at 550, 648 S.E.2d at 830 ("Both *Crawford* and *Davis* explicitly reaffirmed that defendants can forfeit their Confrontation Clause rights[.]").