NO. COA09-64

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

STATE OF NORTH CAROLINA

v. Wayne County
Nos. 07 CRS 50110-11

LEONARD DESHEA MIDDLETON

Appeal by Defendant from judgment entered 12 August 2008 by Judge Phyllis Gorham in Wayne County Superior Court. Heard in the Court of Appeals 18 May 2009.

Attorney General Roy Cooper, by Assistant Attorney General Richard H. Bradford, for the State.

Cheshire, Parker, Schneider, Bryan & Vitale, by John Keating Wiles, for Defendant.

STEPHENS, Judge.

I. Procedural History

On 12 August 2008, a jury found Defendant Leonard Deshea Middleton guilty of possession of a firearm by a convicted felon and possession of marijuana with intent to sell or deliver. The trial court entered judgment upon the jury verdict, sentencing Defendant to a term of 16 to 20 months in prison. From the trial court's judgment, Defendant appeals.

II. Factual Background

The evidence presented at trial tended to show the following: On the afternoon of 6 January 2007, Officer Jason Holliday of the

Mount Olive Police Departent received a dispatch to respond to 428 East Hillsboro Street. He was advised that Defendant would be wearing a brown coat. When Holliday reached the 300 block of East Hillsboro Street, he observed a man in a brown coat and recognized him as Defendant. Holliday saw Defendant walk behind a trash can and "drop a plastic bag behind the trash can after he fiddled with his pocket." As Holliday was getting out of his car to talk to Defendant, Defendant walked up to Holliday and said, "'Search me.'" Holliday began patting down Defendant for weapons as Officer Michael Pike of the Mount Olive Police Department pulled up. Holliday left Defendant in Pike's custody and walked behind the trash can. The only item around the trash can was a plastic bag with 10 small bags containing what was later determined to be marijuana. When Holliday asked Defendant if the bag was his, Defendant responded, "'No. That's not mine. I didn't drop anything.'" Holliday gave the bag to Pike and Pike put Defendant in handcuffs and took him to the police station. Holliday proceeded to 428 East Hillsboro Street.

Holliday testified that upon his arrival at 428 East Hillsboro Street, Keisha Manley, Defendant's girlfriend at the time, "jumped out in front of my car waving, frantic." As soon as Holliday got out of his car, "[s]he immediately yells out, 'The gun's under the house.'" Holliday further testified that Manley said, "'He's got weed on him. Did you find any weed?'" Manley then walked over to a vent on the side of the house and said while pointing, "'He put it under there.'" Holliday saw and seized a white-handled, silver,

.22 caliber revolver from the vent.

Holliday took a statement from Manley regarding what precipitated her call to 911 and then returned to the police station. He informed Defendant that he had found the gun under the house and that Manley had said Defendant put it there. Defendant replied that Manley had lied. When Holliday advised Defendant that he would be charged with possession of a firearm by a convicted felon, Defendant blurted, "'The gun ain't mine.'" When Holliday told Defendant that the gun was going to be sent to the lab for fingerprints, Defendant stated, "'Man, my prints are on that gun. I've messed with it.'" No identifiable fingerprints were found on the gun.

Manley testified that she recalled making a 911 call on 6 January 2007. After listening to a recording of the call in the courtroom, Manley acknowledged that it was her voice on the recording. Although Manley testified that she heard herself on the recording saying that Defendant had pulled a gun on her, she testified further that she did not remember having said that. When asked if it was her testimony that she made a false report to 911, Manley responded, "He didn't point a gun at me." Although Manley also testified that she heard herself on the recording describing the gun as an "old-timey gun with silver on the top[,]" she stated she could not remember what the gun looked like. Manley further testified that the first time she saw the gun, it was under the house and that Defendant did not point a gun at her.

After the cross-examination of Manley by defense counsel, the

State's request that the 911 recording be replayed was granted, without objection. The State then obtained the Court's permission to impeach Manley, over defense counsel's objection. Manley denied having said on the recording that Defendant pulled a gun on her and explained that she had been frightened when making the 911 call, but not because Defendant had pulled out a gun. She claimed that she did not recall saying, "'He's got it [the gun] on him in his coat,'" but admitted to hearing herself say this on the recording. Manley testified that she was telling the truth at trial.

Defendant testified and admitted that he had previously been convicted of felony breaking and entering. He also testified that he and Manley had been arguing on the day he was arrested and that she wanted him to leave her house, which he did when she threatened to call the police. Defendant further testified that after being told by Holliday that he was going to be charged with felonious possession of a firearm, he stated, "'How you going to charge me with something that ain't mine? You know, I don't know nothing about no firearm.'" He denied throwing the gun under the house or inside the vent, pointing a gun at Manley, having a gun on that day, and seeing the gun before trial.

After resting his case, Defendant's motion to re-open the case was allowed. Defendant recalled Holliday to the stand and Holliday testified that Manley had been charged with making a false report to the police based on her testimony that she had lied when filling out the police report.

III. Discussion

A. Sufficiency of the Evidence

Defendant first argues that the trial court erred in denying Defendant's motion to dismiss because the evidence was insufficient to show that Defendant possessed a firearm.

Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure states in pertinent part:

> A defendant may make a motion to dismiss the action . . . at the conclusion of *all* the evidence, irrespective of whether he made an earlier such motion. . . . However, if a defendant fails to move to dismiss the action . . . at the close of *all* the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(b)(3) (2007) (emphasis added). Furthermore, pursuant to N.C. Gen. Stat. § 15-173,

> [i]f the defendant introduces evidence, he thereby waives any motion for dismissal . . . which he may have made prior to the introduction of his 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. . . . 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 (2007) (emphasis added).

In the present case, Defendant moved to dismiss the charges against him for insufficient evidence at the close of the State's evidence. The motion was denied. After presenting evidence, Defendant rested his case and renewed his motion to dismiss. The motion was again denied. However, prior to closing arguments, Defendant moved to reopen his case to enter additional evidence.

The trial court allowed Defendant to reopen his case, and Defendant recalled and questioned Holliday. After presenting this additional evidence, Defendant did not renew his motion to dismiss for insufficiency of the evidence. The parties then presented their closing arguments.

As Defendant was required to "make a motion to dismiss the action . . . at the conclusion of *all* the evidence," N.C. R. App. P. 10(b)(3), and Defendant failed to renew his motion to dismiss after re-opening his case and presenting additional evidence, Defendant "may not challenge on appeal the sufficiency of the evidence to prove the crime charged." *Id.* The assignments of error upon which Defendant's argument is based are overruled.

B. Replaying the 911 Recording

Defendant also argues that the trial court committed plain error in allowing the State to replay the recording of the 911 call made by Manley.

> [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 . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Cummings, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000)

(citations omitted), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001).

Defendant asserts that by authorizing the State to replay the 911 recording, the trial court "tended to intimate the court's opinion on the weight of that evidence and, in that manner, contradicted N.C. Gen. Stat. § 15A-1232 [], which prohibits judicial expression of opinion." Defendant's argument is baseless.

N.C. Gen. Stat. § 15A-1232 states as follows: "In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232 (2007). This statute is wholly inapplicable in the present case, as the court was not instructing the jury when it allowed the State to replay the tape. Furthermore, by allowing the tape to be replayed upon the State's request, without objection from Defendant, the judge expressed no opinion whatsoever "as to whether or not a fact has been proved[.]" *Id.*

Defendant cites *State v. Grogan,* 40 N.C. App. 371, 253 S.E.2d 20 (1979), in support of his argument that the trial court's allowing the State to replay the 911 tape "may have led the jury to conclude that [the tape] was more important than, and should be given more weight than, any other evidence in the case." In *Grogan*, after the jury had commenced its deliberations, it requested that certain photographs be sent to the jury room. Only one of the photographs requested had been introduced into evidence.

The defendant consented to this photograph being sent to the jury room but did not consent to the remaining photographs being sent there for the jury's consideration. The trial judge had the jury returned to the courtroom and stated:

> Ladies and gentlemen of the jury, you have requested that the photographs be permitted to be taken to the jury room. The photograph of the automobile was formerly offered in evidence and there's no objection, and I will send that one. The other photographs taken purportedly by Mr. Wilson were not formerly offered in evidence, and I cannot send them without consent of both parties; and the defendant does not consent. So I can't permit you to take those three photographs with you to the jury room.

Id. at 372-73, 253 S.E.2d at 22. In ordering a new trial, this Court held that

> the trial judge's explanation of his ruling excluding the photographs in question may have led the jury reasonably to conclude that he felt the photographs were important evidence which the jury should see and which he would allow them to see but for defendant's act in withholding consent . . . in violation of [N.C. Gen. Stat. §§] 15A-1222 and 1232[.]

Id. at 374, 253 S.E.2d at 22-23.

Unlike in *Grogan*, the trial judge in this case made no remarks to the jury regarding the replaying of the 911 tape. By allowing the tape to be replayed, the trial court was not expressing an opinion to the jury regarding the recording's significance but, instead, was merely responding to the State's request, which was not objected to. Thus, the trial court's actions violated neither

N.C. Gen. Stat. § 15A-1222[1] nor N.C. Gen. Stat. § 15A-1232, and Defendant's reliance on *Grogan* is misplaced. We hold the trial court did not err, much less commit plain error, in allowing the 911 tape to be replayed. Accordingly, this assignment of error is overruled.

C. Impeaching the State's Witness

Finally, Defendant argues that the trial court abused its discretion in permitting the State to impeach its own witness.

"[T]he control of examination of witnesses is a matter of discretion vested in the trial court, reviewable only for an abuse of discretion." *State v. McNeil*, 47 N.C. App. 30, 36, 266 S.E.2d 824, 827-28, *disc. review denied*, 301 N.C. 102, 273 S.E.2d 306 (1980), *cert. denied*, 450 U.S. 915, 67 L. Ed. 2d 339 (1981). Under the abuse of discretion standard, the trial court's ruling should be reversed "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, 760 (1989) (quoting *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985)).

"The credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607 (2007). However,

> [i]mpeachment of a party's own witness may allow a party to use impermissible hearsay as

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[1] N.C. Gen. Stat. § 15A-1222 states, "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2007).

> impeachment material in order to get the substance of the hearsay statement before the jury. *See State v. Hunt*, 324 N.C. 343, 349, 378 S.E.2d 754, 758 (1989); *State v. Bell*, 87 N.C. App. 626, 633, 362 S.E.2d 288, 292 (1987). In order to prevent abuse of Rule 607, impeachment should only be allowed when "[c]ircumstances indicating good faith and the absence of subterfuge" are present. *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758. Several of these circumstances have been identified as when "the witness's testimony was extensive and vital to the government's case, that the party calling the witness was genuinely surprised by his reversal, or that the trial court followed the introduction of the statement with an effective limiting instruction." *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758 (citation omitted). It is the better practice for a trial court to make findings of fact to indicate the presence of these circumstances before allowing impeachment of a witness by the party that called the witness. *See Bell*, 87 N.C. App. at 633, 362 S.E.2d at 292. However, the 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. *See State v. Price*, 118 N.C. App. 212, 216, 454 S.E.2d 820, 822-23, *disc. rev. denied*, 341 N.C. 423, 461 S.E.2d 766 (1995); *State v. Spinks*, 136 N.C. App. 153, 523 S.E.2d 129 (1999).

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

There is no indication in this case that the State's impeachment of Manley was "used as a mere subterfuge to present improper evidence to the jury." *Id.* First, the 911 recording had been played for the jury twice, without objection, and admitted into evidence. Furthermore, upon Defendant's objection to the State's request to impeach Manley, the trial court excused the jury and heard the parties' arguments on the matter. The State

asserted, "This is a whole new story on the stand right now. . . . What I heard back there isn't what I'm hearing now, and certainly you can tell from the errors in her testimony that there's impeachable testimony." The trial court then allowed the State to impeach this witness.

Although the trial court did not make findings of fact to indicate the presence of "[c]ircumstances indicating good faith and the absence of subterfuge[,]" *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758, the trial court did conduct a *voir dire* upon Defendant's objection to the State's request. Furthermore, the record reveals that Manley's testimony regarding Defendant's possession of the gun was vital to the State's case and that the State was genuinely surprised by Manley's testimony on the stand. Thus, we find no abuse of discretion in the trial court's ruling to allow the State to impeach Manley.

Moreover, even if we determined this evidence was admitted in error, Defendant has failed to show how its admission prejudiced him. Defendant argues that he was harmed "because it permitted the State to get before the jury yet again Ms. Manley's out-of-court description of the gun, her statement that [Defendant] had 'it [i.e., the gun] on him,' and her statement that [Defendant] 'pulled a gun on [her].'" However, in light of the fact that Defendant permitted the playing of the 911 recording twice by not objecting to it, we are not persuaded by Defendant's contention that "[s]uch unnecessary cumulative rehearsal of Ms. Manley's out-of-court statements gave them more weight, and there is a reasonable

possibility that, had the court not permitted the State to impeach her as it did, the jury would have reached a different outcome." Accordingly, the assignment of error upon which this argument is based is overruled.

Defendant did not argue his remaining assignments of error, and they are deemed abandoned. N.C. R. App. P. 28(b)(6).

NO ERROR.

Chief Judge MARTIN and Judge HUNTER, JR. concur.

Report per Rule 30(e).