No. COA12-431
NORTH CAROLINA COURT OF APPEALS

Filed: 20 November 2012

STATE OF NORTH CAROLINA

v. Mecklenburg County
09 CRS 259831

SABRINA ANN BLACK

Appeal by defendant from judgment entered 15 August 2011 by the Honorable Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 October 2011.

Attorney General Roy Cooper by Special Deputy General Daniel Snipes Johnson for the State.

Paul F. Herzog for defendant-appellant.

STEELMAN, Judge.

The trial court did not err in denying defendant's motion to suppress her statement to police. The admission of testimony from the mother of the deceased that she had lost another daughter at a young age did not constitute plain error.

I. Factual and Procedural Background

On the evening of 12 December 2009, Sabrina Ann Black (defendant) arrived at Dot's Hot Spot in Mecklenburg County with a small group of people. Sometime after 11:00 p.m., Mary Wilson went to the bar to meet defendant. A fight broke out inside of the bar between defendant's brother and another man. The fight was broken up, and everyone involved was removed from the bar. Shortly thereafter, another fight occurred in the parking lot of the bar, again involving defendant's brother. Someone kicked defendant's brother in the head. Defendant said, "I got something. . ." and went to her vehicle. There was then a single gunshot from defendant's direction. Mary Wilson was struck and fell dead. Defendant left the bar parking lot before police arrived. Defendant turned herself in at the Mecklenburg County Jail at approximately 6:00 p.m. that evening.

Detective Sarvis and Detective McSwain of the Charlotte-Mecklenburg Police Department interviewed defendant. Defendant was advised of her rights and signed an "Adult Waiver of Rights" form at 7:20 p.m. In her videotaped interview, defendant admitted to firing the gun that killed Mary Wilson, but asserted that it was an accident.

The grand jury indicted defendant for first-degree murder on 4 January 2010. On 26 July 2011, defendant filed a motion to

suppress her statement to police. On 15 August 2011 the trial court granted the motion in part and denied it in part. The jury found defendant guilty of voluntary manslaughter. Defendant was sentenced to an active prison term of 62-84 months.

Defendant appeals.

II. Denial of Motion to Suppress

In her first argument, defendant contends the trial court erred in not suppressing her entire statement to the police. We disagree.

A. Standard of Review

Great deference is given to the trial court's ruling on a motion to suppress because it is able to hear testimony, observe the demeanor of the witnesses, and resolve conflicts in the evidence. *State v. Stover*, 200 N.C. App. 506, 511, 685 S.E.2d 127, 131 (2009) (quoting *State v. Hernandez*, 170 N.C. App. 299, 303-04, 612 S.E.2d 420, 423 (2005)). Therefore, when reviewing the trial court's denial of a motion to suppress, this Court is bound by the trial court's findings of fact as long as they are supported by competent evidence in the record. *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997). "'The trial court's conclusions of law, however, are reviewable *de novo*.'"

In re D.L.D., 203 N.C. App. 434, 437, 694 S.E.2d 395, 399 (2010) (quoting *In re J.D.B.*, 196 N.C. App. 234, 237, 674 S.E.2d 795, 798 (2009)). When reviewing the trial court's conclusions of law, this Court's task is to determine whether the findings of fact support the conclusions of law. *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000) (citing *State v. Rhyne*, 124 N.C. App. 84, 89, 478 S.E.2d 789, 791 (1996)).

B. Analysis

Defendant contends that she invoked her right to silence when, at 7:34 p.m., she stated, "I don't even want to talk no more[,]" and again at 7:43 p.m. when she stated, "I don't even want to talk no more. . . I'm too tired to." The trial judge granted her motion to suppress as to the portion of her statement after 7:43 p.m., but denied the motion to suppress as to the portion of her statement from 7:34 p.m. to 7:43 p.m.

If, at any stage of a custodial interrogation, a defendant indicates in any manner that he does not wish to be interrogated, the police must cease questioning. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). However, if the invocation of the right to silence is ambiguous rather than unequivocal, the police do not need to immediately cease interrogation. *State v. Waring*, 364 N.C. 443, 473, 701 S.E.2d 615, 635 (2010)

(quoting *State v. Forte*, 360 N.C. 427, 438, 629 S.E.2d 137, 145 (2006)). If a defendant continues to talk without significant prompting by an officer, he has failed to "unambiguously" invoke his right to silence. *State v. Ash*, 169 N.C. App. 715, 724, 611 S.E.2d 855, 861 (2005).

In *Forte*, the defendant replied "no" when he was asked whether he would answer any more questions. 360 N.C. at 438, 629 S.E.2d at 145. After being asked for clarification, defendant answered that he was tired and would answer more questions "after he slept." *Id.* The Supreme Court held that the defendant's "no" was ambiguous and that the officer did not violate the defendant's constitutional rights by asking for clarification. *Id.*

In *Ash*, the defendant told the detective that he did not want to talk any more. 169 N.C. App. at 724, 611 S.E.2d at 861. However, he continued to answer questions after the detective asked him another question. *Id.* We held that defendant had failed to unequivocally invoke his right to silence because he continued to talk without significant prompting by the officer. *Id.*

Even if a defendant does unequivocally indicate that he is done answering questions, if he initiates another conversation,

he waives his right to silence. *State v. Johnson*, 136 N.C. App. 683, 689, 525 S.E.2d 830, 834 (2000) (quoting *State v. Bragg*, 67 N.C. App. 759, 760, 314 S.E.2d 1, 1-2 (1984)). The officers may then take an inculpatory statement. *Id.*

In *Johnson*, the defendant stated that he did not wish to answer any questions. 136 N.C. App. at 690, 525 S.E.2d at 834. However, he immediately turned to the officer and nodded his head and then replied "yes" when asked if he wished to answer questions. *Id.* at 690, 525 S.E.2d at 834-35. This Court found that by nodding his head, defendant had initiated further conversation and therefore had waived his right to silence. 136 N.C. App. at 690, 525 S.E.2d at 835.

In the instant case, defendant contends she asserted her right to silence at 7:34:01 p.m. when she stated, "I don't even want to talk no more." However, she immediately followed that statement with another statement indicating that she was not finished talking when she said "I don't understand why it had to be my best friend[,]" at 7:34:13 p.m. Defendant voluntarily initiated further conversation by making a subsequent comment following her assertion that she was finished talking. Defendant waived her right to silence by making another comment and continuing to talk and respond to the detectives' questions.

Defendant unambiguously invoked her right to silence around 7:43 p.m. when she stated, "I don't even want to talk no more. I'm too upset." The trial judge did not err by allowing the jury to hear defendant's statement until 7:43 p.m. when she unequivocally invoked her right to silence.

This argument is without merit.

III. Testimony of Mother of Mary Wilson

In her second argument, defendant contends that the trial court committed plain error when it allowed the State's witness, Elsie Armitage, to testify that she had another daughter who died at an early age. We disagree.

A. Standard of Review

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); see also *State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007).

Plain error arises when the error is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *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. 1982)). The "defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E2d 692, 697 (1993). The error must be viewed in light of the entire record and should be cautiously applied only in exceptional cases. *State v. Lawrence*, __ N.C. App. __, __, 723 S.E.2d 326, 334 (2012). Therefore, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]" *State v. Odom*, 307 N.C. at 660, 300 S.E.2d at 378; *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806 (1983).

B. Analysis

Elsie Armitage testified that she had two daughters – Lisa Armitage and Mary Wilson. She testified that Lisa died at the age of 27. Out of a total of over 184 pages of trial testimony, Ms. Armitage's discussion of her other daughter amounted to less than two pages. The State presented substantial evidence of defendant's guilt, including her own statement in which she admitted to firing the gun that killed Mary Wilson.

In *State v. Buie*, 194 N.C. App. 725, 671 S.E.2d 351 (2009), the defendant argued that by allowing good character evidence of

the victim, the trial court committed plain error. *Buie*, 194 N.C. App. at 728, 671 S.E.2d at 353. We held that, even though the admission of the evidence was in error, it was harmless because there was sufficient evidence to refute the defendant's claim that "but for the admission of the character evidence, there [was] a reasonable possibility that the jury would have reached a different verdict." *Id* at 730, 671 S.E.2d at 354.

In the instant case, defendant contends that the testimony of Elsie Armitage concerning her other daughter had a prejudicial effect upon the jury. Defendant asserts that the evidence had little to no probative value because it had no logical tendency to prove the elements of first-degree murder, but instead generated sympathy for Elsie Armitage and predisposed the jurors to the view that the death of Mary Wilson was a crime demanding justice. Defendant contends that the prejudicial effect of this evidence outweighed any probative value.

We hold that the admission of this testimony does not amount to plain error. As in *Buie,* there was overwhelming evidence against defendant. The testimony of Armitage, of which defendant now complains, was a small portion of the State's evidence, and did not deal with the events that took place at

the bar in December of 2009. Defendant cannot meet her heavy burden of showing that, but for this testimony, the jury would have probably reached a different result.

This argument is without merit.

IV. Disposition

The trial court did not err in denying defendant's motion to suppress. The testimony of Elsie Armitage did not rise to the level of plain error.

NO ERROR

Chief Judge MARTIN and Judge ERVIN concur.

Report per Rule 30(e).