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NO. COA 12-596  
NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2012

STATE OF NORTH CAROLINA

v.

Mecklenburg County  
No. 11 CRS 30472, 204129

CLEVELAND LEWIS WILLIAMS

Appeal by defendant from judgments entered 15 September 2011 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 October 2012.

*Attorney General Roy Cooper, by Assistant Attorney General Bethany A. Burgon, for the State.*

*Paul F. Herzog, for defendant-appellant.*

ERVIN, Judge.

Defendant Cleveland Lewis Williams appeals from judgments sentencing him to two concurrent terms of 84 months to 110 months imprisonment based upon his convictions for possession of cocaine with intent to sell and deliver and trafficking in cocaine by possession and his plea of guilty to having attained habitual felon status. On appeal, Defendant contends that the trial court committed plain error by admitting into evidence the written out-of-court statement of Kamika Gilliard and allowing

the jury to review that statement during its deliberations. Alternatively, Defendant contends that he was denied effective assistance of counsel by virtue of his trial counsel's failure to object to the introduction of Ms. Gilliard's statement into evidence. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that the trial court's judgments should remain undisturbed.

I. Factual Background

A. Substantive Facts

On 25 January 2011, Detective Mark Watson of the Charlotte-Mecklenburg Police Department was assigned to conduct surveillance on a residence located at 6207 Cross Creek Drive. In order to conduct this surveillance, Detective Watson parked his unmarked car three houses away from the location in question while other officers secured a warrant authorizing a search of the premises. At the time of his arrival, Detective Watson saw that two cars were parked in front of the residence, with a white Ford being located on the same side of the street as the residence and a green BMW being located on the opposite side of the street.

Detective Watson watched the residence for approximately one hour and fifteen minutes. During that time, Detective

Watson observed a dark-clad, bald black male, whom he later identified as Defendant, emerge from the residence and approach the green BMW on three occasions. On the first occasion, the individual leaned into the car through the front door for several seconds and then returned to the residence. On the second and third occasions, Detective Watson observed the individual open the trunk, "fumbl[e] with something" in the back left corner, and shove his left hand into his pocket before returning to the residence. Detective Watson relayed this information to another officer who was in the process of obtaining the search warrant.

Shortly thereafter, investigating officers arrived with and executed the search warrant on the residence. During that process, an officer discovered Defendant on the bathroom floor while the toilet was flushing. In addition, investigating officers found Defendant's cousin, Cleveland Murphy, who had dreadlocks or corn rows and was "thicker set" than Defendant, and a child in the residence. After executing the search warrant, investigating officers requested Detective Watson to come into the residence for the purpose of identifying the black male he had observed entering the green BMW. After identifying Defendant without hesitation as the man he had observed entering the BMW, Detective Watson took a statement from Ms. Gilliard,

Mr. Murphy's girlfriend and the mother of the child found on the premises at the time of the search, who had arrived at the residence during or after the search.

Although investigating officers seized \$740.00 from Defendant's person, they did not find the keys to the BMW, which were later discovered in the living room. Nothing contained in the BMW provided any indication of the identity of the vehicle's owner. After the arrival of a K-9 unit, investigating officers discovered controlled substances in both the house and the trunk of the BMW near the point at which Defendant had been seen "fumbling with something." More specifically, investigating officers found three bags containing 56.96 grams of cocaine in the BMW's trunk.

#### B. Procedural History

On 7 February 2011, the Mecklenburg County grand jury returned bills of indictment charging Defendant with trafficking in between 28 and 200 grams of cocaine by possession and possession of cocaine with the intent to sell or deliver. On 31 May 2011, the Mecklenburg County grand jury returned an additional bill of indictment charging Defendant with having attained the status of an habitual felon. The charges against Defendant came on for trial before the trial court and a jury at

the 12 September 2011 criminal session of the Mecklenburg County Superior Court.

At trial, Ms. Gilliard testified on behalf of the State, which also introduced into evidence the statement that Detective Watson took from Ms. Gilliard on the date of the search. During its deliberations, the jury asked to review the testimony of Ms. Gilliard and Detective Watson and to examine the statement that Detective Watson took from Ms. Gilliard. The trial judge allowed the jury to review Ms. Gilliard's statement in the courtroom.

On 14 September 2011, the jury returned verdicts convicting Defendant of trafficking in between 28 and 200 grams of cocaine by possession and possession of cocaine with the intent to sell or deliver. After the acceptance of the jury's verdict, Defendant pled guilty to having attained habitual felon status. Based upon the jury's verdicts and Defendant's plea, the trial court sentenced Defendant to two concurrent terms of 84 to 110 months imprisonment.<sup>1</sup> Defendant noted an appeal to this Court from the trial court's judgments.

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<sup>1</sup>Although the trial transcript reflects that the trial court sentenced Defendant to a term of 35 to 42 months based upon Defendant's trafficking conviction, the written judgments reflect the sentences described in the text of this opinion. In view of the fact that Defendant's plea to having attained habitual felon status would be equally applicable to both of the substantive charges that had been lodged against him, the fact

II. Legal Analysis

A. Admission of Ms. Gilliard's Statement

1. Events Surrounding Admission of Ms. Gilliard's Statement

In his first challenge to the trial court's judgments, Defendant contends that the trial court committed plain error by admitting Ms. Gilliard's statement into evidence. More specifically, Defendant argues that the admission of Ms. Gilliard's statement for the purpose of impeaching her trial testimony was a subterfuge which allowed the State to obtain the admission of otherwise inadmissible evidence. We do not find Defendant's argument persuasive.

At trial, the State called Ms. Gilliard for the apparent purpose of establishing that Defendant owned the green BMW. Ms. Gilliard testified that she resided at the residence at which Defendant was arrested and was involved in a romantic relationship with Mr. Murphy, who was charged with committing the same substantive offenses as Defendant.

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that the trafficking sentence reflected in the trial transcript is inconsistent with the results which would be obtained from sentencing Defendant for trafficking as an habitual felon, and the fact that both parties have described the trial court's judgments in their briefs in a manner consistent with that outlined in the text of this opinion, we have taken the liberty of assuming that the written judgments, rather than the trial transcript, accurately reflect the trial court's ultimate sentencing decision.

According to Ms. Gilliard, she received a telephone call from a police officer on the afternoon of the search and was instructed to return home. When asked if she had made a statement to the police, Ms. Gilliard acknowledged having conversed with an officer whose name she could not remember. However, Ms. Gilliard also claimed that she did not know that the comments that she had made to the officer constituted a statement, that she was hysterical at the time that she talked with the officer because he was threatening to take her child away, that she did not recall what she told the officer, that the officer wrote the statement for her, and that she did not read the statement before signing it.

At that point, the State identified a document that Ms. Gilliard had signed at the bottom and on which Ms. Gilliard had initialed a correction as the statement that Detective Watson had taken from Ms. Gilliard. Upon the State's motion and without objection from Defendant's trial counsel, the trial court admitted the statement into evidence subject to a limiting instruction precluding the jury from considering the statement for any purpose other than impeaching Ms. Gilliard's testimony. More specifically, the trial court instructed the jury that<sup>2</sup>:

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<sup>2</sup>The trial court reiterated this instruction at the time that the jury sought an opportunity to review Ms. Gilliard's statement during its deliberations.

. . . State's Exhibit 1 is received for the limited purpose of the determining [sic] and you may consider it for the purpose of determining the credibility of this witness' in-court testimony. You may not consider it for any other purpose. In other words, you can consider it not as to the truth of some matter that occurred earlier, at an earlier time, but only for purposes of determining whether you will believe or disbelieve her testimony at this trial.

After the statement was received into evidence, the State questioned Ms. Gilliard about the green BMW in which the cocaine had been discovered. Although Ms. Gilliard acknowledged that a green car was parked in front of her house at the time of the search, she claimed that she was "not good at cars" and could not say that it was a BMW. When asked if she had told Detective Watson that the green BMW was the only vehicle that she had seen the Defendant drive, Ms. Gilliard stated that, while she had seen Defendant drive a green car, she did not know whether the vehicle that she had seen Defendant drive was the green BMW that was parked near her house on the date of the search. After Ms. Gilliard affirmatively denied having said that she had never seen Defendant drive any vehicle other than a green car when he came to her home, the State asked whether Ms. Gilliard was claiming that the statement she had given to Detective Watson was not true. In response, Ms. Gilliard noted that she was concerned about her children and denied having read the statement at the time that Detective Watson wrote it. On cross-



examination, Ms. Gilliard testified that she had seen Defendant drive many other cars because he sold vehicles to make money.

2. Standard of Review

As a result of the fact that Defendant did not object to the admission of Ms. Gilliard's statement at trial, we are limited to reviewing the admission of the statement for plain error. N.C. R. App. P. 10(a)(4). Plain error is "*fundamental error, something 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.), cert. denied, 459 U.S. 1018, 103 S. Ct. 381, 74 L. Ed. 2d 513 (1982)). A defendant is entitled to relief on plain error grounds "only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

3. Admissibility of Ms. Gilliard's Statement

"The credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607 (2011). "[A] witness may be impeached by proof of prior conduct or statements which are inconsistent with the witness's testimony." *State v. Whitley*, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984). A prior statement used to impeach a witness' credibility does not constitute substantive evidence. *Id.*,

*State v. Martinez*, 149 N.C. App. 553, 558, 561 S.E.2d 528, 531 (2002).

A prior inconsistent statement used to impeach a witness on non-collateral matters may be shown through the use of extrinsic evidence. See, e.g., *Whitley*, 311 N.C. at 662-64, 319 S.E.2d at 588-90 (holding that extrinsic evidence of a witness' prior inconsistent statement was admissible in an instance in which the witness denied any memory of having made certain statements concerning the events which led to the charges which had been lodged against Defendant). As a result, when a witness admits to having made a prior statement while claiming either not to remember making or to having not made certain statements which are directly relevant to the crime with which the defendant has been charged, extrinsic evidence is admissible for the purpose of showing what the witness actually said. For example, in *State v. Riccard*, 142 N.C. App. 298, 542 S.E.2d 320, cert. denied, 353 N.C. 530, 549 S.E.2d 864-65 (2001), two witnesses, while admitting to having made statements that implicated the defendant as having been the individual who fired certain shots, denied that certain parts of their statements were accurate or claimed to be unable to remember having made those statements. *Riccard*, 142 N.C. App. at 304, 542 S.E.2d at 323. As a result of the fact that the witnesses acknowledged having made the

prior statements, this Court held that the trial court did not err in allowing the admission of extrinsic evidence concerning their prior inconsistent statements for impeachment-related purposes. *Id.*

At trial, Ms. Gilliard admitted to having had a conversation with Detective Watson concerning events relevant to the seizure of cocaine from the BMW and to signing a statement that Detective Watson had prepared based on that conversation. As was also the case with respect to one of the two witnesses whose testimony was at issue in *Riccard*, Ms. Gilliard claimed that she could not remember what she told Detective Watson at the time of the statement given her child-related concerns. *Riccard*, 142 N.C. App. at 304, 542 S.E.2d at 323. As a result, extrinsic evidence of the statement that Ms. Gilliard made to Detective Watson was admissible for impeachment-related purposes.

In seeking to persuade us to reach a different result, Defendant argues that the State sought to have Ms. Gilliard's statement admitted "as a *mere subterfuge* to get before the jury evidence not otherwise admissible." *State v. Hunt*, 324 N.C. 343, 349, 378 S.E.2d 754, 757 (1989) (quoting *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975)) (internal quotation marks omitted). Admittedly, as the trial court acknowledged, a

party is prohibited from using "impermissible hearsay as impeachment in order to get its substance before the jury." *Id.* at 351, 378 S.E.2d at 758 (citing *State v. Bell*, 87 N.C. App. 626, 362 S.E.2d 288 (1987)). According to the Supreme Court, the State may, in "good faith and the absence of subterfuge" attempt to impeach its own witness in the event that (1) "the witness's testimony was extensive and vital to the government's case[;]" (2) "the party calling the witness was genuinely surprised by his reversal[;]" or (3) "the trial court followed the introduction of the statement with an effective limiting instruction[.]" *Id.* at 350, 378 S.E.2d at 758 (citations omitted).<sup>3</sup> As a result, on the one hand, the Supreme Court held in *Hunt* that the trial court erred by allowing the admission of evidence concerning a witness' prior out-of-court statement since the witness' testimony shed little light on the underlying incident, the witness had indicated prior to trial that she would not adhere to her previous statement, the trial court did not give a proper limiting instruction when the prior statements

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<sup>3</sup>Defendant appears to argue that the fact that the State's only apparent purpose in calling Ms. Gilliard was to tie Defendant to the green BMW and the fact that the State had no real reason to challenge Ms. Gilliard's credibility establishes that the State acted for an improper motive. However, once Ms. Gilliard testified that she could not tell whether the vehicle that she observed outside her residence on the date of the search was a BMW, the State had ample reason to want to challenge Ms. Gilliard's credibility.

were admitted into evidence, and the relevant portion of the trial court's concluding instructions was ambiguous. *Id.* at 351-52, 378 S.E.2d at 758-59. On the other hand, this Court held in *State v. Gabriel*, 207 N.C. App. 440, 700 S.E.2d 127 (2010), *disc. review denied*, 365 N.C. 211, 710 S.E.2d 19 (2011), that the trial court did not err by admitting an out-of-court statement offered by the State for impeachment-related purposes given that the witness' testimony was material, the prosecution was not previously aware that the witness was going to recant, and the trial judge provided a proper limiting instruction, with the "most notable difference" between *Hunt* and *Gabriel* being the delivery of a clear limiting instruction at the time that the statement in question was admitted into evidence. *Id.* at 449, 700 S.E.2d at 132. In light of this set of circumstances, we held that the admission of the statements in question did not result in a "mere subterfuge" under which the jury was allowed to hear otherwise inadmissible evidence and that the limiting instruction delivered by the trial court was "sufficient for the jury to distinguish [the] evidence as impeachment evidence, rather than substantive evidence." *Id.* at 450, 700 S.E.2d at 133.

The record before the Court in this case contains no conclusive indication that the State had prior knowledge that

Ms. Gilliard would not testify in accordance with her prior statement at the time of trial.<sup>4</sup> Moreover, the extent to which Defendant could be tied to the green BMW was clearly important to both the State and Defendant.<sup>5</sup> Finally, the record establishes that the trial court clearly and definitively instructed the jury that the statement that Ms. Gilliard gave to Detective Watson could only be used for the purpose of evaluating Ms. Gilliard's credibility and that the jury could not use the information contained in that statement for any substantive purpose. Interestingly, the trial court delivered this limiting instruction despite the fact that Defendant did

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<sup>4</sup>Although Defendant argues that the fact that the prosecutor identified Ms. Gilliard's statement relatively early in her direct examination demonstrates that the State had prior knowledge that Ms. Gilliard would not testify consistently with the information contained in the statement that she gave to Detective Watson, we do not believe that the record supports such an inference given that the prosecutor did not make any significant use of the statement until after Ms. Gilliard testified inconsistently with it.

<sup>5</sup>Defendant's argument that Ms. Gilliard's testimony was not of any particular significance seems inconsistent with his claim that the admission of Ms. Gilliard's statement constituted plain error. Although the trial court stated at the time that the State sought to recall Detective Watson to testify concerning the contents of Ms. Gilliard's statement that "she didn't say much of anything on direct other than she signed the statement under duress, she says, and she didn't give any evidence or any testimony about what happened that day other than the fact she signed the statement," when read in context, this statement amounted to a commentary on the limited use which the State was entitled to make of Ms. Gilliard's statement rather than a comment on the significance of Ms. Gilliard's testimony.

not lodge an objection at the time that the statement was admitted into evidence. As a result, we conclude that, in light of the totality of the circumstances, the trial court's decision to allow the admission of Ms. Gilliard's statement into evidence did not allow the improper presentation of otherwise inadmissible hearsay evidence before the jury.

Even if we were to conclude that the trial court erred by allowing the admission of Ms. Gilliard's statement into evidence, we do not believe that Defendant has established that the jury would have likely "reached a different result" in the absence of that alleged error. *Jones*, 355 N.C. at 125, 558 S.E.2d at 103. Simply put, the record contains ample evidence, consisting of the testimony of Detective Watson that an individual identified as Defendant entered the trunk of the BMW in which the cocaine was found at least two times shortly before the search of Ms. Gilliard's residence. In addition, the only other adult male in the vicinity at the time of the search did not appear to closely resemble Defendant. At the time that the search warrant was executed, investigating officers found that Defendant was apparently attempting to get rid of something that he did not wish the officers to discover. Finally, Ms. Gilliard did testify that Defendant sometimes drove a green car. As a result, particularly given that the trial court clearly



precluded the jury from using Ms. Gilliard's statement for substantive purposes, we are unable to conclude that any error arising in the admission of this statement rose to the level of plain error. For these reasons, we conclude that Defendant is not entitled to relief from the trial court's judgments based on the admission into evidence of Ms. Gilliard's statement.

B. Jury Review of Ms. Gilliard's Statement

Secondly, Defendant contends that the trial court erred by allowing the jury to review Ms. Gilliard's statement during its deliberations. In support of this assertion, Defendant essentially reiterates his challenge to the admissibility of Ms. Gilliard's statement. Defendant's argument lacks merit.

According to N.C. Gen. Stat. § 15A-1233(a), "[i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence . . . [t]he judge in his discretion, after notice to the prosecutor and defendant, . . . may permit the jury to reexamine in open court the requested materials admitted into evidence." "Whether to allow the jury in a criminal trial to reexamine evidence previously admitted lies within the [sole] discretion of the trial court." *State v. Dover*, 308 N.C. 372, 376, 302 S.E.2d 232, 234 (1983); *see also State v. Lee*, 128 N.C. App. 506, 509, 495 S.E.2d 373, 375, *disc. review denied*, 348 N.C. 76, 505 S.E.2d 883 (1998) (holding that

the trial judge properly permitted the jury to view a fingerprint card containing the defendant's latent fingerprint in open court upon request). As a result, we review challenges to trial court decisions allowing the jury to examine evidence pursuant to N.C. Gen. Stat. § 15A-1233(a) for an abuse of discretion. *Lee*, 128 N.C. App. at 509, 495 S.E.2d at 375. An abuse of discretion occurs when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citing *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985)).

We are unable to conclude that the trial court abused its discretion by allowing the jury to review Ms. Gilliard's statement during the course of its deliberations. As we have already demonstrated, the trial court did not err by admitting Ms. Gilliard's statement into evidence. Upon receiving the jury's request to review Ms. Gilliard's statement, the trial court, acting in compliance with N.C. Gen. Stat. § 15A-1233(a), consulted with counsel, called the jury into the courtroom, and allowed the jury to view the exhibit in the courtroom. Before allowing the jury to review Ms. Gilliard's statement, the trial court reiterated its instruction concerning the purposes for which the jury was permitted to consider that statement. The

trial court acknowledged the fact that the decisions it was making in response to the jury's request were discretionary in declining to have the testimony of Ms. Gilliard and Detective Watson read by the court reporter. In view of the fact that the jury had specifically requested to review Ms. Gilliard's statement and the fact that the trial court scrupulously complied with applicable statutory requirements, we are unable to see how the trial court's decision to grant that request could constitute an abuse of discretion. As a result, the trial court did not err by allowing the jury to review Ms. Gilliard's statement after the beginning of the jury's deliberations.

C. Ineffective Assistance of Counsel

Finally, Defendant contends that he received deficient representation from his trial counsel given her failure to object to the introduction into evidence of Ms. Gilliard's statement. We are not persuaded that Defendant's ineffective assistance claim has merit.

A valid ineffective assistance claim requires proof that a defendant's "counsel's performance was deficient" to such an extent that it "fell below an objective standard of reasonableness" and that the deficiencies in the performance of the defendant's trial counsel "were so serious as to deprive the defendant of a fair trial." *Strickland v. Washington*, 466 U.S.

668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Although a convicted criminal defendant has the right to assert an ineffective assistance of counsel claim on direct appeal, such "claims brought on direct review will [only] be decided on the merits when the cold record reveals that no further factual investigation is required[.]" *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002). When the information needed to resolve an ineffective assistance of counsel claim does not appear "on the face of the record on appeal," *State v. Stroud*, 147 N.C. App. 549, 555, 557 S.E.2d 544, 547 (2001), *cert. denied*, 356 N.C. 623, 575 S.E.2d 758 (2002), a reviewing court should dismiss the ineffective assistance of counsel claim without prejudice to the defendant's right to assert that claim in a subsequent motion for appropriate relief. *Id.* at 554, 557 S.E.2d at 547; *see also State v. Long*, 354 N.C. 534, 540, 557 S.E.2d 89, 93 (2001) (stating that "[t]he record discloses that in this case evidentiary issues may need to be developed before defendant will be in position to adequately raise his possible [ineffective assistance of counsel] claim.").

An analysis of the "cold record" before the Court in this case reveals the presence of sufficient information to permit us

to determine that Defendant's ineffective assistance of counsel claim lacks merit. As this Court stated in *State v. Mewborn*, 200 N.C. App. 731, 738, 684 S.E.2d 535, 540 (2009) (citing *State v. Lee*, 348 N.C. 474, 492, 501 S.E.2d 334, 345 (1998)), "the failure to object to admissible evidence does not constitute an error which would satisfy the first prong of the *Strickland* test." Defendant's ineffective assistance claim ultimately rests on a contention that Defendant's trial counsel should have objected to evidence that we have held to have been admissible. Having held that the trial court did not err by allowing the admission of Ms. Gilliard's statement, we necessarily conclude that the failure of Defendant's trial counsel to object to its admission did not constitute constitutionally deficient representation. As a result, Defendant's ineffective assistance of counsel claim lacks merit.

### III. Conclusion

Thus, for the reasons set forth above, we conclude that none of Defendant's challenges to the trial court's judgments have any merit. As a result, the trial court's judgments should, and hereby do, remain undisturbed.

NO ERROR.

Chief Judge MARTIN and Judge STEELMAN concur.

Report per Rule 30(e).