NO. COA13-501

NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

STATE OF NORTH CAROLINA

v. Greene County
No. 09 CRS 50159

AARON BROWN, JR.

Appeal by Defendant from judgment entered 2 August 2012 by Judge Phyllis M. Gorham in Greene County Superior Court. Heard in the Court of Appeals 24 October 2013.[1]

Attorney General Roy Cooper, by Assistant Attorney General Kathleen N. Bolton, for the State.

Paul F. Herzog for Defendant.

STEPHENS, Judge.

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[1] During Defendant's trial, the trial court found Defendant's counsel, David C. Sutton, in criminal contempt of court after Sutton grimaced at the judge and accused her of admitting inadmissible evidence introduced by the State. On 3 August 2012, the court entered a contempt order against Sutton which designated the matter as 12 CRS 284. Sutton gave notice of appeal from the contempt order. On 9 May 2013, the State moved to dismiss Sutton's appeal. This Court allowed that motion and dismissed Sutton's appeal by order entered 24 May 2013.

Procedural History and Evidence

Defendant Aaron Brown, Jr. ("Defendant"), appeals from the judgment entered upon his conviction on the charge of second-degree murder in the shooting death of John D. Bizzell ("Bizzell").

The evidence at trial tended to show the following: Defendant and Bizzell enjoyed a close friendship of some thirty to forty years, and they often drank alcohol together. During the evening of 13 February 2009, several people, including Defendant, Bizzell, Ricky Wade, and Defendant's girlfriend, Tammy Dixon ("Dixon"), had been drinking heavily in a barn on Defendant's property. Defendant used his barn, in part, as a place to illegally sell liquor and beer. At some point during the evening, Bizzell left the barn and, upon his return, sat down at a table. Shortly before 8:00 p.m., Bizzell suffered one gun shot to his neck. At approximately 8:04 p.m., Dixon called Wade, who had left the barn before the shooting, and said that Defendant had shot Bizzell. Wade returned to the barn and saw Bizzell on the floor with a silver pistol resting under his left hand. Defendant was seated at a table in the barn with a handgun on it. Wade asked if the authorities had been contacted

and Defendant stated that he could not find his phone. Wade used his own cellular phone to call 911 and report the shooting.

Deputy Cliff Faulkner ("Faulkner") of the Greene County Sheriff's Office ("GCSO") responded to the call and secured the premises. Shortly thereafter, EMS personnel arrived and pronounced Bizzell dead at 8:30 p.m. While in the barn, EMS workers overheard Defendant state that he had shot Bizzell. One EMS worker heard Defendant say that he and Bizzell had an argument about money, Bizzell pulled out a gun and shot at Defendant, and Defendant shot Bizzell in self-defense. In response to Faulkner's questions about the shooting, Defendant replied, "[Bizzell] came in waving a gun and asking for money and I shot him."

Three GCSO detectives, including Detectives Matt Sasser ("Sasser") and Daniel Hawkins ("Hawkins"), responded to the scene. Faulkner informed Sasser that two firearms had been found: one on the table near Defendant and the other on the floor in Bizzell's hand. The two firearms were later identified as a Sig Sauer Model P229 .40 caliber pistol and a silver Bryco Jennings 9mm pistol. Three spent .40 caliber casings, which were fired from the .40 caliber pistol, were found in the yard

outside the barn. The 9mm pistol was later determined to be inoperable.

After his conversation with Faulkner, Sasser asked Defendant if he would go to the GCSO for questioning, and Defendant agreed to do so. Before questioning Defendant, Sasser took part in the crime scene investigation. Of particular interest to him was the fact that a bag of partially eaten pork rinds was found next to Bizzell's body. Sasser also found pork rind remnants inside Bizzell's mouth. Sasser and Hawkins concluded their investigation of the crime scene at approximately 11:50 p.m., and headed to the sheriff's office, where they conducted a videotaped interview of Defendant during the early morning hours of 14 February 2009. At that time, the two detectives were treating Defendant as the victim of an armed robbery, not a murder suspect. Throughout the interview, Defendant maintained that Bizzell had entered the barn waving a gun and saying that he needed money. Defendant claimed that, as a result of those threats, he picked up a gun, aimed it at Bizzell, and fired. Defendant also stated that he had called 911 after the shooting. Despite being confronted with the fact that Wade had placed the 911 call and several other discrepancies in his statement, Defendant "pretty much stuck

with the same storyline." Sasser formed the opinion that Defendant was not being forthright and felt it was unlikely that Bizzell attempted an armed robbery while seated at a table eating pork rinds.

Defendant was later charged with second-degree murder. At trial, Sasser was asked about the statements that Faulkner made to him at the crime scene.[2] After a timely objection from Defendant, Sasser was examined on *voir dire* and testified in pertinent part:

> Q. Based on your communication with law enforcement officers, who did you — Were you able to determine who the first deputy was on the scene?
>
> A. I was.
>
> Q. Who was that?
>
> A. Deputy Faulkner.
>
> . . .
>
> Q. When you [spoke with him], was Officer Faulkner in a position that he would be able to tell you what happened?
>
> A. Yes, sir, he was.
>
> Q. Okay. What did you ask Deputy Faulkner when you walked into this building?

[2] Faulkner did not testify at trial. At the time Defendant was tried, Faulkner was no longer with the GCSO and was at home on his death bed.

> A. When I walked in I asked him what had happened, what was going on.
>
> Q. Did Deputy Faulkner tell you what had happened?
>
> A. He did.
>
> Q. Did he respond appropriately to that question?
>
> A. Yes, he did.
>
> [A.] Deputy Faulkner stated that upon his arrival he went in and found the decedent, Mr. John Bizzell, lying on the floor with a handgun in his *right hand* and that [Defendant] was located by a table with his head down and a handgun was on the table.
>
> . . .
>
> Q. So as an investigator in this matter hearing this statement from Deputy Faulkner, was there any other information that would lead you to any other, at that particular time any other direction in your investigation than an armed robbery at that point?
>
> A. No, sir.

(Emphasis added).

During *voir dire*, Sasser also testified that any information he receives from a first responding officer helps determine his subsequent steps in an investigation. In addition, Sasser testified that, as a result of his conversation with Faulkner, Sasser questioned Dixon about whether she

witnessed the shooting, asked Defendant to give a statement about the incident, and used the information obtained from Faulkner when interviewing Defendant at the GCSO.

Defense counsel then objected on hearsay grounds to the portion of Sasser's testimony that recounted Faulkner's statements, and argued that the admission of such testimony would violate Defendant's Sixth Amendment right to confrontation. In overruling Defendant's objection, the trial court ruled that the evidence was not hearsay because it was offered to explain Sasser's investigatory conduct following his conversation with Faulkner.

When the jury returned, the prosecutor resumed his direct examination of Sasser:

> Q. In the course of investigating this case, did you ask Officer Faulkner, Deputy Faulkner what had happened?
>
> A. I did.
>
> . . .
>
> Q. Based on that statement, did you direct your investigation or was your investigation in any particular direction?
>
> A. At that point we were leading towards a robbery situation.
>
> Q. Did Detective or Deputy Faulkner tell you where any firearms, if at all, were found?

> A. He did.
>
> Q. Okay. Where did he and when I say he, Deputy Faulkner, where did Deputy Faulkner find the firearms?
>
> A. Deputy Faulkner advised that one of the firearms was found on the table by [Defendant] and the other firearm was found *in the hand* of the decedent, Mr. Bizzell, on the floor.

(Emphasis added). Once again, defense counsel timely objected on hearsay grounds; that objection was noted and overruled. The trial court then gave the jury the following limiting instruction:

> Ladies and gentlemen of the jury, I'm going to give you a limited [sic] instruction at this point. You've just heard statements made by Deputy Faulkner to Detective Sasser in Detective Sasser's testimony. Those statements were made on February 13, 2009, and those statements are to be considered by you only for the purpose of showing what Detective Sasser did as a result of hearing those statements from Deputy Faulkner. Those statements are not to be considered by you as a fact that has been proven in this case.

Defendant elected to testify in his own defense, and his testimony revealed a much different account of the shooting than the one he provided to Sasser and Hawkins. According to Defendant, during the evening of the shooting, he and Bizzell were drinking moonshine in the barn when "the kids" (presumably Defendant's sons) informed him that dogs had been chasing them.

After firing three or four shots at the dogs, Defendant placed the gun in his back pocket and returned to the barn. Defendant further testified that he sat down, stood back up, removed the gun from his pocket, and prepared to lay it on the table, at which time the gun fired. After Bizzell "hit the floor[,]" Defendant ran toward Bizzell and exclaimed, "I shot him, I shot my best friend." At that time, someone handed Defendant a silver gun, which Defendant placed on the floor near Bizzell's hand. Defendant admitted that he lied to the detectives when he told them that Bizzell had pointed a silver gun at him. In addition, Defendant admitted that the .40 caliber pistol found at the scene belonged to him.

The trial court entered judgment upon the jury's conviction of Defendant for second-degree murder and imposed a prison sentence of 125 to 159 months. Defendant appeals.

Discussion

Defendant argues that the trial court erred in admitting into evidence Sasser's testimony about the statements made to him by Faulkner regarding the location of the firearms found in Defendant's barn. Specifically, Defendant contends that this portion of Sasser's testimony was inadmissible hearsay and that its admission violated his Sixth Amendment right to confront the

witnesses against him. Additionally, Defendant argues that the admission of the challenged testimony was so prejudicial as to require a new trial. We disagree with all of Defendant's contentions.

A. Hearsay

Defendant contends that "Sasser's statements concerning what he was told by . . . Faulkner about the exact location of [the] two firearms [Faulkner] saw when he arrived on the scene constituted . . . inadmissible hearsay." Specifically, Defendant argues that the trial court erred by admitting Faulkner's statements to Sasser to explain Sasser's subsequent investigatory conduct because "nothing about what . . . Faulkner said caused [Sasser] to collect any evidence or do anything he wouldn't have normally done." Defendant's assertions are without merit.

On appeal, we review *de novo* a trial court's determination of whether an out-of-court statement constitutes hearsay. *State v. Miller*, 197 N.C. App. 78, 87–88, 676 S.E.2d 546, 552, *disc. review denied*, 363 N.C. 586, 683 S.E.2d 216 (2009). North Carolina Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth

of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). Consequently, "out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998). In particular, "statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (citation omitted), *cert. denied sub nom. Gainey v. North Carolina*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). Thus, such "directive" statements are admissible not because they fall under an exception to the hearsay rule, but rather because "they simply are not hearsay – they do not come within the . . . legal definition of the term." *Long v. Paving Co.*, 47 N.C. App. 564, 569, 268 S.E.2d 1, 5 (1980).

Based upon these principles, this Court has repeatedly upheld the admission of testimony by law enforcement officers about witness statements that explained the officer's subsequent actions in an investigation. *See, e.g., State v. Rollins*, __ N.C App. __, 738 S.E.2d 440 (2013); *State v. Castaneda*, __ N.C. App. __, 715 S.E.2d 290, *appeal dismissed and disc. review denied*, 365 N.C. 354, 718 S.E.2d 148 (2011); *State v. Alexander*,

177 N.C. App. 281, 628 S.E.2d 434 (2006). We find *Castaneda* and *Alexander* particularly analogous to the facts of this case.

In *Castenada*, the defendant made a pre-trial motion to redact portions of the transcript from a police interview, which contained "statements indicating that witnesses saw the defendant pick up a knife and stab the decedent." __ N.C. App. at __, 715 S.E.2d at 292-93. The trial court denied the motion, ruled that the evidence was not being offered for the truth of the matter asserted, and stated that it would give a limiting instruction to the jury. *Id.* at __, 715 S.E.2d at 292. This Court held that the evidence was not hearsay and was properly admitted because it was offered to "provide context for [the] defendants' answers and to explain the detectives' interviewing techniques." *Id.* at __, 715 S.E.2d at 293.

In *Alexander*, a police officer investigating an armed robbery was told by a detective that an informant had "important" information about the robbery. 177 N.C. App. at 283-84, 628 S.E.2d at 435-36. At trial, the officer testified that the informant gave him a description of the suspect and the name "Vaughntray," which was the defendant's middle name. *Id.* at 283, 628 S.E.2d at 435. This information led to the defendant's arrest and subsequent conviction for armed robbery.

Id. On appeal, the defendant argued that the officer's testimony regarding information given to him by the informant and the detective was inadmissible hearsay. *Id.* This Court rejected that argument, holding that

> [the officer's] testimony regarding his interaction with the detective and [the informant] was nonhearsay and proper to explain his subsequent actions. It was not admitted to prove that the information [the informant] offered was "important" or that someone named "Vaughntray" committed the crime. Rather, the testimony explained how [the officer] had received information leading him to form a reasonable suspicion that [the] defendant was involved in the robbery, which in turn justified his inclusion of [the] defendant's photograph in the lineup.

Id. at 284, 628 S.E.2d at 436.

Here, as noted by the trial court in overruling Defendant's objections at trial, Sasser's references to statements made by Faulkner regarding his findings at the crime scene were not admitted as "fact[s] that [had] been proven in [the] case." Instead, the challenged testimony was admitted to show how Faulkner's statements directed Sasser's conduct in his subsequent investigation of the shooting. By informing Sasser that one pistol was found beside Defendant and the other near Bizzell's hand, Faulkner provided important context to the story Defendant told at the scene, which was that Bizzell came in

waving a gun and Defendant shot him in self-defense. Thus, Faulkner's statements substantially impacted Sasser's initial decision to investigate the matter as an armed robbery. Furthermore, applying *Castenada* and *Alexander* to the present facts, we find that the challenged testimony explained Sasser's approach to his interview with Defendant. Indeed, Sasser confirmed that he used information obtained from Faulkner to question Defendant, who was initially viewed as the victim of an attempted armed robbery and not a murder suspect. As the challenged testimony was not offered to prove the truth of the matter asserted, it did not constitute hearsay, and the trial court properly admitted the evidence.

We further note that when evidence is competent for one purpose but incompetent for another, the party it is offered against is entitled to request a limiting instruction. *State v. Bryant*, 282 N.C. 92, 191 S.E.2d 745 (1972), *cert. denied sub nom. White v. North Carolina*, 410 U.S. 958, 35 L. Ed. 2d 691 (1973). Here, the trial court instructed the jury not to consider the challenged testimony for its truth, but "only for the purpose of showing what . . . Sasser did as a result of hearing those statements from . . . Faulkner." In North Carolina, "[t]he law presumes that the jury heeds limiting

instructions that the trial judge gives regarding the evidence." *State v. Shields*, 61 N.C. App. 462, 464, 300 S.E.2d 884, 886 (1983). Accordingly, for the reasons stated above, Defendant's argument is overruled.

B. Confrontation Clause

Defendant also argues that the admission of the challenged portions of Sasser's testimony violated his Sixth Amendment right to confront the witnesses against him. We hold that it did not.

The United States Supreme Court has held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). It well established, however, that "[t]he Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *Miller*, 197 N.C. App. at 87, 676 S.E.2d at 552 (quoting *Crawford*, 541 U.S. at 59 n. 9, 158 L. Ed. 2d at 197–98 n. 9). Therefore, because Sasser's testimony regarding Faulkner's statement was not admitted for the truth of the matter asserted – that Faulkner found one pistol on the floor under Bizzell's hand and the other

pistol on a table near Defendant – the admission of this evidence raises no Confrontation Clause concerns. Accordingly, Defendant's confrontation rights were neither implicated nor violated. This argument is rejected.

C. Prejudicial Error

Finally, Defendant argues that the admission of Sasser's testimony was so prejudicial to his case that he is entitled to a new trial. We hold that it was not.

The erroneous admission of hearsay "is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986) (citations omitted). Rather, Defendant must show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at [his] . . . trial[.]" N.C. Gen. Stat. § 15A-1443(a) (2011). Moreover, any violation of Defendant's "[constitutional rights] is prejudicial unless [this Court finds] it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b).

Here, Defendant relies on a discrepancy in Sasser's testimony – specifically, Sasser testified on *voir dire* that Faulkner saw a pistol near Bizzell's *right hand*; on direct examination, Sasser testified that Faulkner saw a pistol near

Bizzell's *hand*. At trial, the State elicited testimony showing that Bizzell was left-handed. Accordingly, Defendant argues, the prosecutor used Sasser's challenged testimony for its truth and to advance the State's theory that "[Defendant] cleaned up the scene and placed the gun in Mr. Bizzell's non-dominant, right hand."

Given that the trial court properly admitted Sasser's testimony, we find no merit in Defendant's argument. Nevertheless, even if we assume that this evidence was erroneously admitted, it did not change the result at trial and was harmless beyond a reasonable doubt.

To begin, the trial judge's limiting instruction clearly forbade the jury from considering the challenged testimony for the truth of the matter asserted. As mentioned above, we assume the jury heeded those instructions.

We also emphasize that Sasser's *voir dire* testimony was not before the jury. By contrast, Sasser's direct examination testimony – during which he stated that Faulkner found a gun near Bizzell's *hand* – was before the jury. This evidence could not convey to the jury that a gun was found near Bizzell's non-dominant, right hand. It is therefore significant that Wade testified to seeing a silver pistol lying under Bizzell's left

hand after the shooting. In addition, after the shooting and before law enforcement officers arrived, Dixon's son noticed a gun lying under Bizzell's hand. Consequently, there was ample evidence, apart from Sasser's testimony, regarding the general location of the pistol found near Bizzell's body.

Finally, Defendant testified himself that someone handed him a silver pistol after the shooting, and that he placed it near Bizzell's hand. Defendant nevertheless argues that, absent the admission of Sasser's challenged testimony, he "would have been well advised not to take the stand . . . [because] his version of events was . . . tendered by . . . Dixon [] during the State's [case in chief]." We decline to speculate on Defendant's decision to testify at his trial. Furthermore, Defendant's own admissions, along with the testimony of Wade and Dixon's son, constitute overwhelming evidence that Defendant placed a pistol under one of Bizzell's hands after shooting him. Accordingly, this argument is also overruled.

For the reasons stated above, we hold that Defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges GEER and ERVIN concur.

Report per Rule 30(e).