NO. COA13-56
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

STATE OF NORTH CAROLINA

v.

Wake County
No. 08 CRS 20841, 08 CRS 38000, 38002; 12 CRS 5593-95

ANTOINE JERROD WATKINS

Appeal by defendant from judgments entered 10 August 2012 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 4 June 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields, III, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant-Appellant.

ERVIN, Judge.

Defendant Antoine Jerrod Watkins appeals from judgments sentencing him to life imprisonment without the possibility of parole based upon his conviction for first-degree murder; to a concurrent term of 130 to 165 months imprisonment based upon his convictions for first-degree burglary and having attained the status of an habitual felon; and to a consecutive term of 130 to 165 months imprisonment based upon his convictions for robbery

with a dangerous weapon, and two counts of possession of a firearm by a felon. On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the burglary, robbery, and murder charges that had been lodged against him for insufficiency of the evidence and by admitting evidence concerning the substance of a statement which one of the State's witnesses had made to agents of the prosecution. 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

The charges against Defendant arose from three separate incidents in 2008 during which a masked gunman attacked and attempted to rob victims at three Raleigh residences. The principal issue which the jury was called upon to resolve at trial was whether the State had proven beyond a reasonable doubt that Defendant was the perpetrator of these criminal offenses.

1. State Street Incident

On 25 January 2008, a masked gunman approached Antonio Hernandez Armenta as he left his apartment at 727 South State Street. Mr. Armenta could not identify either the masked

individual's race or the type of weapon he had. After the masked individual demanded Mr. Armenta's money, a struggle ensued between the two men, during which the masked individual shot Mr. Armenta in the stomach before fleeing.

2. Jones Street Incident

On 22 February 2008, Luis Alonzo Martinez, his brother, Carlos Humberto Martinez, and two other individuals were at Luis Martinez's apartment, which was located at 1207-B Jones Street. According to Luis Martinez, a masked man armed with a nine millimeter handgun, who was holding a neighbor at gunpoint, forced his way into the apartment and demanded money from those present. While in the apartment, the intruder shot Carlos Martinez fatally in the chest. The intruder fired a total of three shots inside the apartment and two more shots outside the apartment as he fled.

At the time that he entered the apartment, the intruder's face was covered by a tee shirt or rag which left only his eyes exposed to view. During the struggle between Luis Martinez and the intruder, the tee shirt slipped from the intruder's face, allowing Luis Martinez to observe that the intruder was an African-American male with dreadlocks or long hair. At trial, Luis Martinez identified Defendant several times as the person

who had entered the apartment, stating "[t]hat's how he is, like the hair and everything. That's how he is."

After a neighbor called 911 at 7:50 p.m., investigating officers and emergency medical personnel came to the scene. In the course of examining the apartment, investigating officers recovered a spent nine millimeter bullet and a spent Winchester nine millimeter shell casing. In addition, investigating officers found another spent nine millimeter shell casing outside of the apartment.

Special Agent Timothy Baize of the State Bureau of Investigation, an expert in forensic DNA analysis, testified that he had detected the presence of Defendant's DNA on the fired casings recovered at the scene of the Jones Street incident. On one of the shell casings, only Defendant's DNA was present. On the second casing, however, a mixture of Defendant's DNA and that of another person, whom Special Agent Baize could not identify, was detected.

Willimina Barr, Defendant's former girlfriend, testified that Defendant possessed a cell phone that was registered to her. According to the relevant cell phone and tower records, a call originating from a location less than one mile from the site of the Jones Street robbery was made from this cell phone

within three minutes of the time at which the Jones Street robbery was reported.

3. East Lenoir Street Incident

Victor Salinas Esperanza testified that he was at Isidro Torres' apartment at 7278 East Lenoir Street on 16 March 2008. On that occasion, an African-American male with long hair broke into the apartment and threatened to shoot the occupants unless they gave him their money. During the ensuing struggle, the intruder shot Mr. Salinas in the leg. After taking credit cards, a driver's license, and three hundred dollars, the intruder fled. While examining the East Lenoir Street apartment, investigating officers collected a spent nine millimeter shell casing and a fired bullet.

4. Wake Forest Shooting Incident

On 30 June 2007, law enforcement officers responded to a report that four or five shots had been fired near the intersection of North Allen and Nelson Streets in Wake Forest. At the scene of this incident, investigating officers recovered four spent nine millimeter shell casings.

5. Ballistics Evidence

Special Agent Stephanie Barnhouse, who worked as a firearms examiner in the State Bureau of Investigation crime laboratory, testified that she had conducted a comparative ballistics

analysis of the spent shell casings and projectiles recovered at the time of the Jones Street, East Lenoir Street, and Wake Forest shooting incidents. According to Special Agent Barnhouse, all of the recovered shell casings were Winchester nine millimeter Luger shells. In Special Agent Barnhouse's opinion, the two shell casings recovered from the scene of the Jones Street incident, the shell casing recovered from the scene of the East Lenoir Street incident, and the four shell casings recovered from the scene of the Wake Forest shooting incident had all been fired from the same firearm. Finally, Special Agent Barnhouse testified that, although the spent projectiles recovered from the scenes of the Jones and East Lenoir Street incidents had "strong microscopic similarities," these similarities were insufficient to permit a definitive determination that they had been fired from the same gun.

B. Procedural History

On 10 April 2008, a warrant for arrest was issued charging Defendant with murdering Carlos Martinez. On 26 June 2008, warrants for arrest were issued charging Defendant with first degree burglary, assaulting Mr. Salinas with a deadly weapon with the intent to kill inflicting serious injury, assaulting Mr. Armenta with a deadly weapon with the intent to kill inflicting serious injury, robbing Mr. Salinas with a dangerous

weapon, and the attempted robbery of Mr. Armenta with a dangerous weapon. On 5 May 2008, the Wake County grand jury returned a bill of indictment charging Defendant with murdering Carlos Martinez in the first degree. On 16 August 2008, the Wake County grand jury returned bills of indictment charging Defendant with first degree burglary, assaulting Mr. Salinas with a deadly weapon with the intent to kill inflicting serious injury, robbing Mr. Salinas with a dangerous weapon, assaulting Mr. Armenta with a deadly weapon with the intent to kill inflicting serious injury, the attempted robbery of Mr. Armenta with a dangerous weapon, and having attained the status of an habitual felon. On 29 December 2011, Judge Paul G. Gessner entered an order determining that Defendant was mentally retarded as that term is defined in N.C. Gen. Stat. § 15A-2005(a)(1)a, "declare[d] this matter to be noncapital," and prohibited the State from "seek[ing] the death penalty against" Defendant. On 26 June 2012, the Wake County grand jury returned bills of indictment charging Defendant with three counts of possession of a firearm by a convicted felon.

The charges against Defendant came on for trial before the trial court and a jury at the 6 August 2012 criminal session of Wake County Superior Court. At the conclusion of the evidence, the trial court dismissed the charges arising from the State

Street incident. On 10 August 2012, the jury returned verdicts convicting Defendant of the first degree murder of Carlos Martinez, first degree burglary, robbing Mr. Salinas with a dangerous weapon, and two counts of possession of a firearm by a convicted felon and acquitting Defendant of assaulting Mr. Salinas with a deadly weapon with the intent to kill. On the same date, the jury returned a verdict finding that Defendant had attained the status of an habitual felon. At the conclusion of the ensuing sentencing hearing, the trial court entered judgments sentencing Defendant to a term of life imprisonment without the possibility of parole based upon his conviction for first degree murder; to a concurrent term of 130 to 165 months imprisonment based upon his convictions for first degree burglary and having attained the status of an habitual felon; and to a consecutive consolidated term of 130 to 165 months imprisonment based upon his convictions for robbery with a dangerous weapon, and two counts of possession of a firearm by a convicted felon. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Sufficiency of the Evidence

In his initial challenge to the trial court's judgments, Defendant contends that the trial court erred by denying his

motion to dismiss the charges stemming from the Jones Street and the East Lenoir Street incidents. More specifically, Defendant contends that the record, when taken in the light most favorable to the State, does not contain sufficient evidence to permit a reasonable inference that Defendant was the perpetrator of the offenses committed at the time of these two incidents. We do not find Defendant's argument persuasive.

1. Standard of Review

A motion to dismiss for insufficiency of the evidence must be granted unless there is substantial evidence of the existence of each essential element of the crimes charged and of the defendant's identity as the perpetrator of the crimes. *State v. Banks*, 210 N.C. App. 30, 35, 706 S.E.2d 807, 812 (2011); *see also State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). The "substantial evidence" necessary to support denial of a dismissal motion exists in the event that "a reasonable mind might accept [the State's evidence, considered in its entirety] as adequate to support a conclusion." *Id.* (quoting *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982)). In making this determination, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference." *Id.* (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83

(1998)). Although the State is entitled to rely on circumstantial evidence in attempting to prove a defendant's guilt, such evidence must be real and substantial, rather than merely speculative, in order to withstand a dismissal motion. *State v. Reese*, 319 N.C. 110, 139, 353 S.E.2d 352, 368 (1987), *overruled on other grounds in State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997), *cert. denied*, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998). As a result, if the circumstantial evidence upon which the State relies is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *Powell*, 299 N.C. at 98, 261 S.E.2d at 117). On the other hand, the State's evidence need not exclude "every reasonable hypothesis of innocence." *Powell*, 299 N.C. at 101, 261 S.E.2d at 118. As a result, in the event that the circumstantial evidence upon which the State relies is sufficient to permit a reasonable inference that the defendant committed the offense with which he or she had been charged, any dismissal motion made by the defendant should be denied. *See State v. Ledford*, 315 N.C. 599, 613-14, 340 S.E.2d 309, 318-19 (1986). This Court reviews the denial of a motion to dismiss

for insufficiency of the evidence using a *de novo* standard of review. *E.g., State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). In conducting such a *de novo* review, we consider the matter anew and freely substitute our judgment for that of the trial court. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

2. Evidence Supporting Specific Charges

a. Jones Street Incident

As the record reflects, Luis Martinez identified Defendant as the perpetrator of the offenses committed during the Jones Street incident several times during the course of Defendant's trial. Luis Martinez described the perpetrator as an African-American male with long hair or dreadlocks; stated that he saw the perpetrator's face during the time that he was struggling with him; identified Defendant as the perpetrator of the offenses committed during the Jones Street incident; and identified the perpetrator's weapon as a nine millimeter handgun. In addition, the State presented evidence that Defendant's DNA was present on two nine millimeter shell casings found at the scene of the Jones Street incident and that information derived from cell phone and tower records indicated that a call had been placed from a phone in Defendant's possession within one mile of the crime scene just three minutes

after the 911 call reporting the robbery had been made. Finally, Dontez Jones testified that he had been present at the time that a group which included Defendant had fired shots in Wake Forest on 30 June 2007 and Special Agent Barnhouse testified that four nine millimeter shell casings recovered at the Wake Forest shooting incident and the two shell casings recovered in the aftermath of the Jones Street incident had been fired from the same weapon. As a result, we hold that the evidence described above, when taken in the light most favorable to the State, is more than sufficient to raise a reasonable inference that Defendant was the perpetrator of the Jones Street incident.

In seeking to persuade us to reach a different result, Defendant argues that the record did not demonstrate that the DNA found on the shell casing had been deposited at or near the time of the Jones Street incident, that Luis Martinez did not identify Defendant, that the available cell phone records did not link Defendant to the shooting of Carlos Martinez, that the State offered no substantive evidence that Defendant had fired a gun in Wake Forest, and that the ballistics evidence did not connect Defendant to the crimes. In essence, however, each of Defendant's arguments reflects an attempt to address issues relating to the weight, rather than the sufficiency of the

State's evidence. For example, the extent to which the State's evidence tends to show that Defendant's DNA could only have been deposited on the shell casings recovered at the scene of the Jones Street incident at or near the time of the crime in question is only critical in the event that the DNA in question constituted the sole basis for tying the defendant to the commission of the crime with which he or she had been charged. *State v. Bass*, 303 N.C. 267, 272, 278 S.E.2d 209, 212 (1981) (stating that, "when the State relies on fingerprints found at the scene of the crime, in order to withstand motion for nonsuit, there must be substantial evidence of circumstances from which the jury can find that the fingerprints could have been impressed only at the time the crime was committed"). Similarly, although the record suggests the existence of certain reasons for questioning the credibility of Luiz Martinez's testimony, including the equivocal nature of his testimony identifying Defendant as the perpetrator of the crimes committed at the time of the Jones Street incident, we believe that such weaknesses and equivocations go to the credibility of his testimony rather than its sufficiency to support the jury's verdict. Similarly, the fact that there might be alternative explanations for the information revealed by the cell phone records and the fact that the ballistics evidence could be

characterized as less than conclusive relates to the weight, rather than the sufficiency, of the evidence of Defendant's guilt. However, when all of the State's evidence is considered in its entirety, we have no doubt that it sufficed to support the jury's verdicts convicting Defendant of various offenses stemming from the Jones Street incident. As a result, the trial court did not err by denying Defendant's motion to dismiss the charges that had been lodged against Defendant stemming from the Jones Street incident for insufficiency of the evidence.

b. East Lenoir Street Incident

At trial, Mr. Salinas testified that an African-American male with long hair had committed the East Lenoir Street robbery and shot him in the leg. Investigating officers recovered a spent shell casing and a fired bullet from the scene of that incident. According to Special Agent Barnhouse, the nine millimeter shell casing recovered from the scene of the East Lenoir Street incident had been fired from the same gun as the shell casings recovered at the scene of the Jones Street and the Wake Forest shooting incidents. In addition, Special Agent Barnhouse opined that the fired bullet recovered from the scene of the East Lenoir Street incident had "strong microscopic similarities" to the projectile recovered at the scene of the Jones Street incident. When considered in the light most

favorable to the State, we conclude that this evidence is sufficient to permit a reasonable inference that the crimes which were committed during the Jones Street and East Lenoir Street incidents had been committed by the same person and that the person in question was Defendant.

In his brief, Defendant argues that we should overturn the trial court's refusal to grant his dismissal motion on the grounds that no witness identified Defendant as the perpetrator of the East Lenoir Street incident, that the description of the perpetrator provided by those at the scene of the East Lenoir Street incident did not match Defendant's appearance, and that the evidence indicating that the shell casings found at the scene of the East Lenoir Street incident had been fired from the gun used during the Jones Street incident was, at best, inconclusive. Once again, however, we conclude that Defendant's arguments relate to the weight to be given to the State's evidence rather than to its sufficiency. As a result, the trial court did not err by denying Defendant's motion to dismiss the charges which had been lodged against him relating to the East Lenoir Street incident.

B. Admissibility of Mr. Jones' Statement

In his second challenge to the trial court's judgments, Defendant contends that the trial court erred by allowing the

admission of testimony concerning statements that Mr. Jones had made to investigating officers. More specifically, Defendant contends that, instead of constituting proper impeachment testimony, the admission of evidence concerning Mr. Jones' statements to investigating officers amounted to the presentation of inadmissible hearsay which seriously prejudiced his chances for a more favorable jury verdict. We do not find Defendant's argument persuasive.

1. Relevant Facts

On 16 July 2012, Mr. Jones told agents of the prosecution that Defendant had been one of two individuals who had fired a handgun during the Wake Forest shooting incident. At trial, Mr. Jones testified that (1) he had made this statement to law enforcement; (2) that shots had been fired between groups of individuals; (3) that shots had been fired at the group to which Mr. Jones belonged; and (4) that Defendant, who was a member of the other group, had been present on the occasion when the shots were fired. However, when asked if Defendant had fired a weapon, Mr. Jones responded that he did not "know" and did not "remember." In addition, when asked if he had told investigating officers on 16 July 2012 that Defendant had fired shots at the time of the Wake Forest incident, Mr. Jones testified that he did not "know" and denied having any memory of

what he had told investigating officers. Although Mr. Jones stated that three individuals had fired shots on the occasion in question, he did not name them. Defense counsel's objections to this testimony, which had been considered during a *voir dire* proceeding at which Mr. Jones testified consistently with the testimony which he provided before the jury and which rested upon the restrictions on the admission of "other crimes, wrongs, or acts" evidence spelled out in N.C. Gen. Stat. § 8C-1, Rule 404(b), were overruled.

After the completion of Mr. Jones' testimony, Detective Martin Schlosser of the Raleigh Police Department testified, over Defendant's objection, that he had been present when Mr. Jones gave his 16 July 2012 statement concerning the Wake Forest incident to agents of the prosecution. According to Detective Schlosser, Mr. Jones told investigating officers that Defendant was one of two individuals in the group to which Defendant belonged who had fired shots at the time of the Wake Forest incident and that Mr. Jones said that he had been within fifteen feet of Defendant at the time that Defendant discharged his weapon. In addition, Detective Schlosser testified that Mr. Jones claimed to have known Defendant for several years at the time of the Wake Forest incident and that he had dated Defendant's cousin.

In objecting to Detective Schlosser's testimony, Defendant argued that the State could not lawfully call Mr. Jones as a witness despite knowing that he would not testify consistently with his prior statement and then call Detective Schlosser to testify concerning the contents of Mr. Jones' 16 June 2012 statement given the Supreme Court's decision in *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989). In addition, Defendant asserted that the admission of the challenged evidence amounted to inadmissible "prior bad act" evidence that should be excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b). The trial court overruled Defendant's objection on the grounds that, even after Mr. Jones had testified on *voir dire*, no one "knew" what Mr. Jones would testify to because he never "said the same thing twice." In addition, the trial court determined, in reliance upon this Court's decision in *State v. Wilson*, 197 N.C. App. 154, 161-62, 676 S.E.2d 512, 517, *disc. review denied*, 363 N.C. 589, 684 S.E.2d 158 (2009), that, since Mr. Jones had not denied making the 16 June 2012 statement, the admission of Detective Schlosser's testimony concerning that statement did not run afoul of the principle enunciated in *Hunt*. Finally, the trial court concluded that any risk of unfair prejudice resulting from the admission of Detective Schlosser's testimony did not substantially outweigh the probative value of that evidence. As

a result, the trial court allowed Detective Schlosser to testify before the jury concerning the contents of Mr. Jones' 16 June 2012 statement.

2. Standard of Review

The extent to which a trial court impermissibly allowed the admission of hearsay evidence is subject to *de novo* review. *State v. Gabriel*, 207 N.C. App. 440, 445, 700 S.E.2d 127, 130 (2010), *disc. review denied*, 365 N.C. 211, 710 S.E.2d 19 (2011). On the other hand, a trial court's rulings pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, or N.C. Gen. Stat. § 8C-1, Rule 607, are reviewed on appeal using an abuse of discretion standard. *Banks*, 210 N.C. App. at 37-38, 706 S.E.2d at 814. As a result, a trial court's decision to admit or exclude evidence on the basis of N.C. Gen. Stat. § 8C-1, Rule 403, or N.C. Gen. Stat. § 8C-1, Rule 607, will not be disturbed in the absence of a showing that the challenged ruling was "so arbitrary that it could not have been the result of a reasoned decision." *Hunt*, 324 N.C. at 353, 378 S.E.2d at 760 (quoting *State v. Thompson*, 514 N.C. 618, 626, 336 S.E.2d 78, 82 (1985)).

3. Applicable Legal Principles

According to N.C. Gen. Stat. § 8C-1, Rule 801(c), hearsay evidence consists of an out-of-court statement offered for the truth of the matter asserted. Pursuant to N.C. Gen. Stat. § 8C-

1, Rule 802, "[h]earsay is not admissible except as provided by statute or by the rules." An out-of-court statement that is substantially similar to a witness' trial testimony may be admitted for corroborative purposes without violating the prohibition against the admission of hearsay evidence. *E.g., State v. Garcell*, 363 N.C. 10, 40, 678 S.E.2d 618, 637, *cert. denied*, 558 U.S. 999, 130 S. Ct. 510, 175 L. Ed. 2d 362 (2009). However, prior statements that are inconsistent with a witness' trial testimony are not admissible for corroborative purposes. *State v. Stills*, 310 N.C. 410, 415, 312 S.E.2d 443, 447 (1984). A witness' inconsistent statements may be admitted for impeachment-related purposes without running afoul of the hearsay rule as well. *See State v. Young*, 166 N.C. App. 401, 405, 602 S.E.2d 374, 377 (2004), *disc. review denied*, 359 N.C. 326, 611 S.E.2d 851 (2005). In other words, "[a] prior inconsistent statement is admissible to contradict a witness's testimony, although it may not be considered as substantive evidence." *State v. Martinez*, 149 N.C. App. 553, 558, 561 S.E.2d 528, 531 (2002). Similarly, out-of-court statements offered to explain the subsequent conduct of the party to whom the statement was made do not constitute inadmissible hearsay. *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473, *cert.*

denied, 537 U.S. 896, 123 S. Ct. 182, 154 L. Ed. 2d 165 (2002); *Young*, 166 N.C. App. at 404-10, 602 S.E.2d at 376-80.

Although a party, including the State, is permitted to impeach its own witness pursuant to N.C. Gen. Stat. § 8C-1, Rule 607, the State is prohibited from impeaching its own witness by presenting extrinsic evidence containing the substance of unsworn prior statements in the event that the presentation of the alleged impeachment evidence effectively places inadmissible hearsay evidence before the jury. *E.g.*, *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758. Such a use of the authority to impeach a party's own witness pursuant to N.C. Gen. Stat. § 8C-1, Rule 607, is prohibited given the likelihood that a jury will "confuse the substance of the statements with their use for purposes of impeachment." *Id.* at 351, 378 S.E.2d at 759. As a result, an attempt by the State to utilize prior inconsistent statements for the purpose of impeaching its own witness should be carefully scrutinized given the "potential [for] such [impeachment] statements to confuse the jury as to what *is* substantive evidence in [a] case." *Stills*, 310 N.C. at 416, 312 S.E.2d at 447. However, in certain "rare" or "exceptional" cases, a trial court is entitled to determine that an effort by the State to impeach its own witness was not primarily motivated by a desire to put the substance of a prior statement before the

jury, with such impeachment having been deemed permissible in situations evidencing good faith or an absence of subterfuge, including situations involving testimony that is "extensive and vital" to the State's case, when the State is genuinely surprised by the witness' failure to testify consistently with his or her prior statements, and when an effective limiting instruction is given, *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758, since the jury is presumed to follow the trial court's instructions. *Banks*, 210 N.C. App. at 41, 706 S.E.2d at 816 (citing *State v. Watts*, 357 N.C. 366, 375, 584 S.E.2d 740, 747 (2003), *cert. denied*, 541 U.S. 944, 124 S. Ct. 1673, 158 L. Ed. 2d 370 (2004)). However, "in the absence of a special request, it is not error for the trial judge to fail to explain in his charge to the jury the difference between corroborative evidence and substantive evidence." *State v. Williams*, 341 N.C. 1, 13, 459 S.E.2d 208, 215 (1995), *cert. denied*, 516 U.S. 1128, 116 S. Ct. 945, 133 L. Ed. 2d 870 (1996).

In *Hunt*, the Supreme Court addressed the admissibility of evidence concerning a witness' prior statement in light of the legal principles discussed above and held that the trial court erred by allowing an investigating officer to recite the substance of certain out-of-court statements made by a witness after the witness repeatedly denied having any knowledge of or

memory of making the statement in question. In reaching this conclusion, the Supreme Court noted that a witness' prior inconsistent statements are not admissible for substantive purposes and are only admissible for the purpose of impeaching the witness' testimony. *Hunt*, 324 N.C. at 350, 378 S.E.2d at 758. As a result, when a witness denies having made a prior statement, the State is not entitled to impeach the witness' testimony by introducing the substance of the prior statement, *Id.* at 348, 378 S.E.2d at 757; *see also State v. Williams*, 322 N.C. 452, 456, 368 S.E.2d 624, 626 (1988); *State v. Jerrells*, 98 N.C. App. 318, 321-22, 390 S.E.2d 722, 724, *disc. review denied*, 326 N.C. 802, 393 S.E.2d 901 (1990), on the theory that the admission of the substance of the witness' extrajudicial statements violated the long-standing prohibition against allowing the admission of extrinsic evidence relating to a collateral matter for the purpose of impeaching the witness' testimony. *Hunt*, 324 N.C. at 348, 378 S.E.2d at 757. As a result, the Supreme Court held that, while the State was authorized to attack the witness' credibility by requesting and receiving permission to cross-examine her as a hostile witness, the trial court's decision to admit extrinsic evidence concerning the content of her statements was erroneous. *Id.* at 348-49, 378 S.E.2d at 757.

In addition, the Supreme Court held in *Hunt* that the State may not call a witness whom it knows will not give useful evidence and then introduce the witness' prior inconsistent statements for impeachment-related purposes so as to "tak[e] advantage of the jury's likely confusion regarding the limited purpose of impeachment evidence." *Id.* at 349-51, 378 S.E.2d at 757-58. In *Hunt*, the Supreme Court determined that the State had engaged in such an impermissible subterfuge given that it was on notice prior to trial that the witness in question would not testify consistently with her prior statements as a result of conversations between the witness and individuals associated with the presentation of the State's case. *Id.* at 351, 378 S.E.2d at 758-59. However, the showing needed to trigger the application of this rule must be relatively direct. For example, the Supreme Court held in *State v. Williams* that the fact that the witness had met with the defendant in jail and had ridden home with defendant's mother did not establish that the State had knowledge that the witness would refuse to testify in accordance with his prior statements. 341 N.C. at 11, 459 S.E.2d at 214. Similarly, this Court has held that the fact that a witness failed to appear prior to the issuance of a show cause order did not establish that the State knew that the witness would fail to testify in accordance with her prior

statements. *Gabriel*, 207 N.C. App. at 450, 700 S.E.2d at 133. As a result, mere awareness that other influences had been or were being brought to bear on the witness did not suffice to show that the State knew that the witness would refrain from testifying consistently with his or her prior statement.

As we have already noted, our Supreme Court held in *Hunt* "that once a witness denies having made a prior statement, the State may not impeach that denial by introducing evidence of the prior statement." *State v. Wilson*, 135 N.C. App. 504, 507, 521 S.E.2d 263, 264-65 (1999); *see also State v. Minter*, 111 N.C. App. 40, 48-49, 432 S.E.2d 146, 151, *cert. denied*, 335 N.C. 241, 439 S.E.2d 158 (1993). However, in *State v. Wilson*, this Court interpreted *Hunt* as standing for the proposition that evidence of a prior inconsistent statement is not "collateral" under *Hunt* if the witness to be impeached does not deny having made the prior statement. 197 N.C. App. at 161-62, 676 S.E.2d at 517. As a result, "[w]here the witness admits having made the prior statement, impeachment by that statement has been held to be permissible." *State v. Riccard*, 142 N.C. App. 298, 303, 542 S.E.2d 320, 323, *cert. denied*, 353 N.C. 530, 549 S.E.2d 864 (2001). In *Riccard*, two witnesses testified with respect to the events leading up to a robbery and assault. *Id.* at 304, 542 S.E.2d at 323. Both witnesses admitted that they had made prior

statements to the police concerning these events and implicated defendant. However, both witnesses also testified that parts of their prior statements were inaccurate and one of the two witnesses testified that he did not remember making certain parts of his prior statement. *Id.* On appeal, this Court held that, in the event that a witness admitted having made a prior statement and then claimed that he or she did not remember having made certain parts of the prior statement, he or she could be impeached using his or her prior statement. *Id.* at 303-04, 542 S.E.2d at 323. As a result, the decisions of this Court clearly indicate that there is a material difference between a situation in which a witness denied having made a prior inconsistent statement and a situation in which a witness claimed to be unable to remember whether he or she had made a particular statement.

In his brief, Defendant argues that the use of the testimony of Detective Schlosser concerning Mr. Jones' out-of-court statements to impeach his trial testimony represented nothing more than an attempt to get the substance of his statement before the jury given that the State knew that Mr. Jones would repudiate his pre-trial statement in the event that he was called to testify at Defendant's trial. In advancing this assertion, Defendant relies on the fact that Mr. Jones

testified consistently with his trial testimony on *voir dire*. The trial court determined, however, that no one, including the State, knew how Mr. Jones would testify in front of the jury because he never "said the same thing twice." A careful review of the record reveals that the trial court had ample basis for reaching this conclusion. Mr. Jones made his out-of-court statement to agents of the State within twenty-three days of the date of his trial testimony. Nothing in the record suggests that the State learned anything between the date upon which Mr. Jones made his out-of-court statement and the date upon which he was called to testify at Defendant's trial which provided the State with a clear indication that he would fail to testify in accordance with his earlier statement. A considerable portion of Mr. Jones' trial testimony was, in fact, consistent with the statements that he made on 16 July 2012. In addition, the testimony which Mr. Jones gave on *voir dire* was not completely consistent with the testimony which he gave before the jury, given that he acknowledged at one point that Defendant had fired shots and denied remembering any such thing shortly thereafter. As a result, we conclude, consistently with the result reached by the trial court, that the record does not establish that the State's attempt to impeach Mr. Jones with his out-of-court statement constituted a subterfuge by means of which the State

sought to place Mr. Jones' out-of-court statement before the jury for substantive purposes.

In addition, as the trial court noted, Mr. Jones, unlike the witness in *Hunt*, never denied having made the statement that the State sought to impeach him with. Instead, Mr. Jones acknowledged having made a statement to agents of the prosecution about the Wake Forest shooting incident and indicated that he did not know when asked if Defendant had fired shots that day. Upon being asked if he had told law enforcement that Defendant shot at him on the day in question, Mr. Jones responded: "I don't know," and "I don't remember." Although Defendant contends that the nature of Mr. Jones' responses to these questions should not affect the outcome which we reach with respect to this issue and that evidence of Mr. Jones' prior statements should be deemed inadmissibly "collateral" regardless of whether Mr. Jones denied having made the statement in question or claimed to have no memory of having made the statement in question, the trial court's decision to reject this argument is consistent with our prior decisions addressing similar issues which treat this distinction as material. *Wilson*, 197 N.C. App. at 161-62, 676 S.E.2d at 517; *see also Banks*, 210 N.C. App. at 40, 706 S.E.2d at 815; *Riccard*, 142 N.C. App. at 303, 542 S.E.2d at 323.

Finally, we are not persuaded that the trial court abused its discretion by failing to exclude evidence concerning Mr. Jones' out-of-court statement pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. At trial, the trial court heard and carefully considered the arguments advanced by the parties in support of and in opposition to the admission of the challenged portion of Detective Schlosser's testimony. In the course of this process, the trial court effectively determined that any unfairly prejudicial effect stemming from the admission of the challenged testimony did not outweigh the disputed evidence's probative value. The only "prejudice" upon which Defendant relied in the course of seeking the exclusion of the challenged portion of Detective Schlosser's testimony was that it strengthened the State's case against him, a type of "prejudice" that this Court has held insufficient to support exclusion of the challenged evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 403. *Gabriel*, 207 N.C. App. at 452, 700 S.E.2d at 134. In his brief, however, Defendant argues that Detective Schlosser's "impeaching" testimony lacked any probative value and was likely to be treated as substantive, rather than impeaching, during the jury's deliberations. However, as Defendant noted at trial:

> The State is trying to get this evidence in so that they can then take the shell casings, give them to Detective Barnhill – or Barnhouse – I mean Agent Barnhouse and

> then argue to the jury, "Well, there was an instance that happened in Wake Forest in which Antoine Watkins was out there shooting and had a gun.

As Defendant noted in the court below, the information contained in Mr. Jones' out-of-court statement does tend to explain the reasons for the State's decision to compare the shell casings recovered at the scene of the Wake Forest shooting incident with those recovered at the scene of the Jones Street and East Lenoir Street incidents. As a result, contrary to the argument advanced in Defendant's brief, Mr. Jones' out-of-court statement did have probative value stemming from its tendency to explain the reasons underlying certain investigative decisions made by the State. On the other hand, aside from arguing that the admission of Detective Schlosser's testimony concerning Mr. Jones' out-of-court statement created an undue risk that the jury would consider the evidence in question for substantive purposes, Defendant has not shown that there is any reason to believe that the jury made such an improper use of the challenged evidence or advanced any argument tending to explain why any theoretical risk that the jury would act in the manner posited in Defendant's brief should be deemed to outweigh the probative value of the challenged portion of Detective Schlosser's testimony given the significance of the ballistics evidence described above to the strength of the State's case

against Defendant. As a result, we are unable to conclude that the trial court abused its discretion by refusing to exclude the challenged portion of Detective Schlosser's testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 403.

Finally, although Defendant did not request the delivery of a limiting instruction describing the manner in which the jury was entitled to use the challenged portion of Detective Schlosser's testimony, the trial court delivered such an instruction, which Defendant expressly approved, in its final instructions to the jury. At the jury instruction conference held after the presentation of the parties' evidence, the trial court announced that it intended to instruct the jury that, in considering evidence of a witness' prior inconsistent statements admitted for impeachment-related purposes, "[y]ou must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial." In response, Defendant acknowledged that the proposed instruction addressed his concerns about the admission of the challenged portion of Detective Schlosser's testimony. Defendant did not object to the delivery of the limiting instruction before, during, or after the trial court's final instructions to the jury and has not challenged the correctness of this instruction before this Court in any way or adequately

explained why this instruction was not sufficient to dissuade the jury from considering the evidence concerning Mr. Jones' out-of-court statement for substantive purposes. *See Williams*, 341 N.C. at 11, 459 S.E.2d at 215; *Gabriel*, 207 N.C. App. at 452, 700 S.E.2d at 134. As a result, for all of these reasons, we conclude that the trial court did not err by overruling Defendant's objection to the admission of Detective Schlosser's testimony concerning the extrajudicial statements that Mr. Jones made to investigating officers.

III. Conclusion

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

NO ERROR.

Judges MCGEE and STEELMAN concur.

Report per Rule 30(e).