NO. COA14-350
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

STATE OF NORTH CAROLINA

v. Guilford County
Nos. 12 CRS 89900-02

RASHEED SYHEED-JAMIL HARRIS

Appeal by Defendant from judgments entered 2 December 2013 by Judge William Z. Wood, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 9 September 2014.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for Defendant.

McGEE, Chief Judge.

Rasheed Syheed-Jamil Harris ("Defendant") appeals his convictions of assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon inflicting serious injury, and assault with a deadly weapon. Defendant contends that the trial court (1) committed plain error by allowing the introduction of a particular corroborative

witness statement at trial and (2) committed reversible error when it failed to act *ex mero motu* after the State allegedly made an "erroneous summary" of the facts during closing.

I. Background

Defendant drove his black Mazda ("the Mazda") to Fulton Place Apartments ("Fulton Place"), a gated apartment community in Guilford County, late in the evening of 19 September 2012. Defendant was visiting an acquaintance, Dejahna Oliver ("Ms. Oliver"), who lived at Fulton Place. After spending some time inside Ms. Oliver's apartment, along with numerous other people, Defendant learned that his Mazda had been towed. Defendant contacted Gotcha Towing and Recovery ("Gotcha Towing"), the company that towed his Mazda, and spoke to the company's owner, Darrell Lassiter ("Mr. Lassiter"). Mr. Lassiter agreed to return Defendant's Mazda to Fulton Place in exchange for a fee of approximately $190.00. Defendant agreed to Mr. Lassiter's terms.

Defendant left Ms. Oliver's apartment, exited through the Fulton Place pedestrian gate, and met some friends who had parked across the street in a Chevy Cavalier ("the Cavalier"). Defendant and his friends waited for Mr. Lassiter to arrive with Defendant's Mazda. Mr. Lassiter arrived soon thereafter driving

a white pickup truck ("the pickup truck") and parked behind the Cavalier. Mr. Lassiter was followed by Louis Gaddy ("Mr. Gaddy"), who was driving a Gotcha Towing tow truck ("the tow truck") with the Mazda hitched to it.

The Gotcha Towing crew's account of what happened next, which was largely corroborated by two witnesses, including Ms. Oliver, was as follows. After Mr. Lassiter arrived at Fulton Place, he was approached by Defendant and his friends. Defendant was polite to Mr. Lassiter, although Defendant's friends verbally harassed Mr. Lassiter. In response, Mr. Lassiter told Defendant's friends to "back up" and called for assistance from two other Gotchya Towing employees, Kenneth Maxwell ("Mr. Maxwell") and Darian Dolberry ("Mr. Dolberry"), who arrived shortly thereafter in a Dodge Charger ("the Charger"). Mr. Gaddy remained in the tow truck. Mr. Lassiter spoke to Defendant and reiterated how much Defendant owed him. Defendant said that his money was in the Mazda. Mr. Lassiter testified that he was unarmed at this point, although he did have a gun in his pickup truck. Mr. Maxwell and Mr. Dolberry were armed only with flashlights with a close-contact Taser function. Mr. Gaddy had a gun in the tow truck's glove box, although it was not used that evening.

At Mr. Lassiter's request, Mr. Dolberry walked over to accompany Defendant while Defendant retrieved his wallet from the Mazda. However, Mr. Dolberry became concerned when Defendant moved to the back of the Mazda and opened the trunk. Mr. Dolberry hurried over to the Mazda and saw Defendant pull out of the trunk what appeared to be an assault rifle. At this point, Mr. Dolberry raised his hands. Defendant then shot into the air twice and then shot Mr. Dolberry. Mr. Lassiter and Mr. Maxwell also testified that they were shot by Defendant around this same time. Mr. Lassiter obtained his gun from his pickup truck and began firing back at Defendant. Defendant fled the scene and the Gotcha Towing crew sought medical attention.

Defendant's account at trial of these same events differed, was corroborated in part by two other witnesses, and was as follows: Defendant testified that Mr. Lassiter was armed with a gun in his waistband during the entirety of their interactions. When Defendant and his friends approached Mr. Lassiter, Mr. Lassiter put his hand on his gun and told everyone to back up. At some point, the tow truck arrived, driven by Mr. Gaddy, as did Mr. Maxwell and Mr. Dolberry in the Charger.

Defendant went to the Mazda, opened its trunk, and started looking for his wallet. When Defendant got his wallet, he looked up and saw two or three of the Gotcha Towing crew

approaching him. Defendant testified that Mr. Lassiter then pointed a gun at Defendant and moved behind Defendant. Defendant testified that Mr. Dolberry pulled a gun on him soon thereafter.[1] Defendant testified it was only then that he looked in his own gun case, which was in the trunk of the Mazda and already "slightly open." Reportedly out of fear that he was about to be robbed, Defendant removed his gun from its case and cocked it. Defendant then immediately heard "a loud bang . . . like something hit some metal" from behind and believed that Mr. Lassiter was shooting at him. A gun fight ensued, and Defendant ran away after he ran out of bullets. Defendant was picked up by one of his friends in the Cavalier and they drove to a convenience store. Defendant then called 911.

A number of detectives and police officers testified at trial about their investigation of what occurred that evening at Fulton Place. Officer William Barham ("Officer Barham") testified he interviewed Defendant immediately after the incident. According to Officer Barham, Defendant reported that he never saw the Gotchya Towing crew with guns before he began firing; instead, he only saw Mr. Lassiter reach for his waistband and then heard a gun fire. Detective Benjamin Mitchell

[1] This alleged gun was never recovered by the police.

("Detective Mitchell") testified in part about his interview with Ms. Oliver. This portion of Detective Mitchell's testimony was admitted with a limiting instruction, at defense counsel's request, that it could only be treated as corroborative of Ms. Oliver's earlier testimony. According to Detective Mitchell, Ms. Oliver stated during their interview that "[t]here's no way [Defendant] was defending himself."

Defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury; assault with a deadly weapon inflicting serious injury; and assault with a deadly weapon. Defendant appeals.

II. Defendant's Assignment of Plain Error

A. Standard of Review

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

B. Analysis

At trial, Defendant did not object to Ms. Oliver's out-of-court statement that "[t]here's no way [Defendant] was defending himself," which was introduced during Detective Mitchell's testimony. Instead, on appeal, Defendant assigns plain error to the trial court's failure to strike this statement from the record. Defendant argues that "[n]o witness in a criminal case may testify directly or indirectly to an opinion of guilt." In support of this contention, Defendant provides several sources of authority, specifically *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986); *State v. Heath*, 316 N.C. 337, 341-342, 341 S.E.2d 565, 568 (1986); and *State v. Galloway*, 304 N.C. 485, 489, 284 S.E.2d 509, 512 (1981). However, these cases hold that *expert* witnesses may not testify as to the credibility of a witness or expressly state whether a defendant is guilty of the crime charged. They do not speak to out-of-court statements of a lay witness being introduced for the purposes of corroboration.

Defendant also argues that, even if the statements were correctly admitted and a proper limiting instruction given, admitting Ms. Oliver's statements nonetheless derailed the "central purpose" of Defendant's criminal trial, which was to determine the factual question of Defendant's guilt or

innocence. Specifically, Defendant contends that allowing Ms. Oliver's out-of-court statement "gave Ms. Oliver's recitation of events a stamp of credibility" that unduly prejudiced Defendant's right to a fair trial. We disagree.

"Prior consistent statements of a witness are admissible for purposes of corroboration even if the witness has not been impeached." *State v. Swindler*, 129 N.C. App. 1, 4, 497 S.E.2d 318, 320 (1998) "In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact *tends to add weight or credibility* to such testimony." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986). Indeed, the very purpose of allowing the introduction of a witness' prior out-of-court statement for corroborative purposes is to "add weight or credibility" to that witness' testimony. *See id.* Therefore, the mere fact that Ms. Oliver's prior consistent statements may have made her testimony more credible provides an insufficient basis for us to find plain error.

Moreover, Defendant has not provided specific instances in the record where Ms. Oliver's out-of-court statement was used by the State for any purpose besides corroboration of Ms. Oliver's testimony. Defendant asserts that one such instance occurred

during the State's closing argument, during which the State declared that Ms. Oliver's testimony does "terrible things to [Defendant's] claim." However, this declaration does not necessarily invoke Ms. Oliver's out-of-court statement, let alone use it for an impermissible purpose. Such a statement was not an unreasonable position for the State to take in light of Ms. Oliver's actual testimony in the record, corroborated or not. Defendant has not established that the trial court committed plain error by allowing Ms. Oliver's out-of-court statement to be introduced with a limiting instruction.

III. Whether Trial Court Should Have Intervened *Ex Mero Motu*

A. Standard of Review

> Where, as here, defendant failed to object to any of the closing remarks of which he now complains, he must show that the remarks were so grossly improper that the trial court erred by failing to intervene *ex mero motu*. In order to carry this burden, defendant must show that the prosecutor's comments so infected the trial that they rendered his conviction fundamentally unfair. Moreover, the comments must be viewed in the context in which they were made and in light of the overall factual circumstances to which they referred.

State v. Call, 349 N.C. 382, 419-20, 508 S.E.2d 496, 519 (1998) (citations omitted).

B. Analysis

Defendant next asserts that the trial court should have intervened *ex mero motu* because the State made an "erroneous summary" of the facts during its closing arguments. Specifically, Defendant takes issue with the State's following recitation at closing:

> It was then that [] [D]efendant claimed one of the tow truck drivers, one, reached for his waistband. But when Officer Barham specifically asked whether or not he saw a gun, [Defendant] told the officer he did not before firing his.

During Defendant's interview with Officer Barham, Defendant also stated that he heard what sounded like a bullet ricochet before firing his gun. The State omitted this fact from its recitation at closing. Because of this omission, Defendant contends that the State "attribute[ed] an admission to [Defendant] that he fired first" and thus the trial court committed reversible error by not intervening. We disagree.

As an initial matter, the meaning Defendant imbues to the State's recitation above seems misplaced. Defendant's stating that he fired before seeing anyone else's gun is not an admission that he fired first -- it is an admission that Defendant fired before seeing anyone else's gun. Indeed, Defendant told Officer Barham that he heard what sounded like a gun being fired before firing his own weapon, but Defendant also

stated that he never actually saw the Gotcha Towing crew with guns beforehand.

It is true that the State's recitation is not a complete account of Defendant's statements to Officer Barham, and it supports an inference that Defendant fired before anyone else. However, "[i]t is well settled that . . . counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Thus, viewing the State's comments in light of the overall factual circumstances at trial, we cannot say that the State's recitation ventured outside of this wide latitude. Indeed, Defendant notes in his own brief that the trial court "heard eighteen different versions" of the facts in this case from witnesses at trial. Most of these accounts do not support Defendant's assertion that another gun was fired, let alone drawn, before his. While the State is not allowed to make statements at closing that are "calculated to mislead or prejudice the jury," neither is the State required to promote Defendant's version of the facts at trial. *Cf. State v. Riddle*, 311 N.C. 734, 738, 319 S.E.2d 250, 253 (1984) (holding that the State was permitted to argue at trial, over the defendant's objection, that the defendant fled McDowell County after committing a burglary because deputy sheriffs were unable to

find the defendant for several weeks thereafter, even though the defendant contended he did not flee the county). At the very least, the State's recitation did not "so infect[] the trial that [it] rendered [Defendant's] conviction fundamentally unfair." *See Call*, 349 N.C. at 420, 508 S.E.2d at 519. As such, the trial court did not commit reversible error by not intervening *ex mero motu* during the State's closing arguments.

No error.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).