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NO. COA14-543
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 10 CRS 257480
11 CRS 023263

JAMES EDWARD JOHNSON
Defendant.

Appeal by defendant from judgment entered 8 August 2013 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 October 2014.

Roy Cooper, Attorney General, by Robert D. Croom, Assistant Attorney General, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

DAVIS, Judge.

James Edward Johnson ("Defendant") appeals from his convictions of felonious hit and run and attaining the status of a habitual felon. On appeal, he contends that the trial court erred by excluding evidence of a pertinent trait of his character that was relevant to the offense for which he was

convicted. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State's evidence at trial tended to establish the following facts: At approximately 5:00 a.m. on 28 November 2010, Oleg Faliy ("Faliy") was driving southbound on Brookshire Boulevard in Mecklenburg County. Defendant was driving a pickup truck in the opposite direction while speaking on the phone with Aliza Dildy ("Dildy"). Faliy suddenly heard a "big crack" and saw "a body fly up" and hit the windshield of Defendant's vehicle. As Faliy passed Defendant's vehicle, he observed from his rearview mirror Defendant's truck "go over the body and take off." Faliy immediately called 911, turned his vehicle around, and waited with the injured victim, George Lee Calebro ("Calebro"). At approximately 5:25 a.m., Calebro was pronounced dead.

Officer Michael Courchaine of the Charlotte-Mecklenburg Police Department ("CMPD") responded to the 911 call shortly after paramedics had arrived. Several other CMPD officers were also dispatched to assist with the investigation and accident reconstruction.

After hitting Calebro, Defendant ran a red light and proceeded to drive home. He parked his truck in front of his

house, woke up his girlfriend, Stephanie Robinson ("Robinson"), and "told her what had happened." Defendant and Robinson then went outside to examine the truck, and Robinson "agreed that he had struck something" based on the damage to the truck. She drove Defendant back to the scene of the accident in her vehicle, and upon arrival, they observed the presence of multiple police cars with their blue lights activated.

Without stopping to investigate further or talk with law enforcement personnel at the scene, Defendant and Robinson turned around and drove back to Defendant's home. They moved Defendant's truck from the front of the house to the backyard. Defendant later admitted that this was the only time he had ever parked his truck in his backyard.

On 29 November 2010, Defendant voluntarily went to the CMPD Law Enforcement Center, bringing with him the truck involved in the collision. Defendant gave a statement to Sergeant Jesse Wood of the CMPD in which he stated that "I knew I had been in a crash but I didn't know if I hit a deer, a dog or a man or a woman, anything, you know what I mean." At the conclusion of the interview, Defendant was placed under arrest.

On 25 April 2011, Defendant was indicted for felonious hit and run and attaining the status of a habitual felon. On 4 March 2013, Defendant was reindicted for attaining the status of

a habitual felon. A jury trial was held in Mecklenburg County Superior Court on 5 August 2013.

At trial, Defendant testified in his own defense. According to his testimony, he was driving on Brookshire Boulevard and speaking on the phone with Dildy when suddenly he heard a "bang[,] and the windshield cracked." Defendant immediately ducked his head, unaware of what his vehicle had struck. Defendant checked each of his mirrors but could not see anything on the road. Defendant then left the scene of the collision and drove home.

Dildy testified as a witness for Defendant. The following exchange, which provides the basis for Defendant's appeal, occurred during her direct examination regarding her telephone conversation with Defendant at the time of the collision:

> Q. And in your opinion, when you were speaking with [Defendant], when the accident happened, [Defendant] thought that he had hit some kind of animal like a deer or a dog?
>
> A. Yes.
>
> Q. Did you have any sign or indication from [Defendant] on that night that he thought that this accident involved something more than an animal or object?
>
> A. No.
>
> Q. Was there any sign that [Defendant] on that night that he had — he thought or suspected that he hit a person?

> A. No. If he thought that he had hit someone, he would have stayed there. That's the type of person he is.
>
> > [Prosecutor]: Objection.
> >
> > THE COURT: Sustained as to that. Ladies and gentlemen, disregard that comment.
> >
> > [Defendant's trial counsel]: Thank you, Ms. Dildy, I don't have any further questions for you.

The jury found Defendant guilty of felonious hit and run. Defendant pled guilty to attaining the status of a habitual felon. The trial court sentenced Defendant to a presumptive-range term of 84 to 110 months imprisonment. Defendant filed a timely notice of appeal.

Analysis

Defendant's sole argument on appeal is that the trial court committed reversible error in excluding the above-quoted testimony by Dildy that "[i]f [Defendant] thought that he had hit someone, he would have stayed there. That's the type of person he is." Defendant contends that the testimony was improperly stricken, arguing that it was evidence of a pertinent trait of his character and, therefore, admissible under Rule 404(a)(1) of the North Carolina Rules of Evidence. We disagree.

Rule 404(a)(1) states, in pertinent part, as follows:

> (a) Character evidence generally. — Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> > (1) Character of accused. — Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same[.]

N.C.R. Evid. 404(a)(1). Rule 405(a) further provides, in pertinent part, that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." N.C.R. Evid. 405(a).

Our Supreme Court has held that "Rule 404(a) is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character." *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989). "However, as an exception to this general rule of exclusion, Rule 404(a)(1) permits the accused to offer evidence of a 'pertinent trait of his character' as circumstantial proof of his innocence." *State v. Tatum-Wade*, __ N.C. App. __, __, 747 S.E.2d 382, 385 (2013) (citation and internal quotation marks omitted).

Even assuming, without deciding, that the stricken portion of Dildy's testimony constituted evidence of a character trait of Defendant's that was pertinent to the offense for which he

was charged, we believe the trial court did not err in excluding this testimony. In order to introduce evidence of a defendant's character trait pursuant to Rule 404(a)(1), "the defendant [must] first interject[] his character into the proceedings by offering his own evidence tending to show [he] possesses a certain character trait." *State v. Dennison*, 163 N.C. App. 375, 381, 594 S.E.2d 82, 86 (2004), *rev'd on other grounds*, 359 N.C. 312, 608 S.E.2d 756 (2005). A defendant seeking to offer character evidence must first lay a proper foundation for its admission. *See State v. Hernendez*, 184 N.C. App. 344, 349, 646 S.E.2d 579, 583 (2007) ("There must be a proper foundation laid for the admission of opinion testimony as to another's character. . . . That foundation is personal knowledge." (citation and internal quotation marks omitted)); *see also State v. Bush*, 289 N.C. 159, 169, 221 S.E.2d 333, 339 ("In North Carolina the rule is that when a character witness is called he must first state that he knows the general reputation of the party about whom he proposes to testify. If he does not know the general reputation of the person in question, the witness may not properly testify as to the reputation and character of that person."), *vacated in part on other grounds*, 429 U.S. 809, 50 L.Ed.2d 69 (1976); N.C.R. Evid. 405 cmt. ("Opinion testimony on direct . . . ought in general to correspond to reputation

testimony . . . *i.e.,* be confined to the nature and extent of observation and acquaintance upon which the opinion is based.”).

No such foundation was laid here. A review of the trial transcript makes clear that Defendant’s counsel did not seek to elicit an opinion from Dildy as to a pertinent character trait of Defendant’s in a manner authorized by our Rules of Evidence. Instead, his counsel asked her a purely factual question — whether Defendant gave her any indication during their conversation that he thought or suspected that his vehicle had struck a person. In answering the question, Dildy then *volunteered* her opinion that Defendant was the “type of person” who would have stayed at the scene had he suspected that his vehicle had hit another person. Moreover, Defendant’s trial counsel did not thereafter seek to lay a proper foundation for the introduction of such character evidence from Dildy.

Defendant also argues that the State’s objection to this testimony was not sufficiently specific. However, our Supreme Court has held that “[a] sustained general objection is sufficient if there is any valid ground of objection. Where a general objection is sustained, it seems to be sufficient, if there is any purpose for which the evidence would be inadmissible.” *State v. Jacobs*, 363 N.C. 815, 821, 689 S.E.2d 859, 863 (2010) (internal citations, quotation marks, brackets,

and parenthesis omitted). Because, as explained above, no adequate foundation was laid for the introduction of such character evidence by Dildy, the absence of such a foundation would have served as a proper basis for the State's objection.

Finally, while the trial court instructed the jury to disregard Dildy's comment on its own without any request from the State that it do so, we are not persuaded that its decision to do so constituted reversible error. *See State v. Khouri*, 214 N.C. App. 389, 403 716 S.E.2d 1, 11 (2011) (expressing no concern regarding trial court's striking of witness' testimony after granting State's objection "before the State could make a motion"), *disc. review denied*, 365 N.C. 546, 742 S.E.2d 176 (2012).

Conclusion

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

NO ERROR.

Judge HUNTER, Robert C., and DILLON concur.

Report per Rule 30(e).