IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1190

Filed: 18 August 2015

New Hanover County, No. 04 CRS 58275

STATE OF NORTH CAROLINA

v.

VIRGIL JAY BROWN, Defendant.

Appeal by defendant from judgment entered 7 September 2007 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 7 April 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General Terence D. Friedman, for the State.

John R. Mills for defendant-appellant.

GEER, Judge.

Defendant Virgil Jay Brown appeals from a judgment entered on his conviction of assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"). Defendant contends only that the trial court committed plain error by allowing the State to question defendant on cross-examination whether defendant believed that the victim's father had lied during his testimony. We hold that defendant opened the door to this line of questioning by asserting during direct

examination that "[w]hat [the victim's father] said here was not the truth[,]" and the State was entitled to cross-examine defendant regarding this testimony.

Facts

It is undisputed that on 4 June 2004, defendant drove his father's gray Mustang to the apartment complex where his girlfriend's younger sister, Raven Waters, lived. There, he encountered Terry Green. Terry approached defendant's vehicle, and defendant shot Terry three times in the leg, and then drove away. Approximately three weeks later, Terry was killed in an unrelated incident. On 14 May 2007, defendant was indicted for AWDWIKISI. Defendant's case came on for trial on 4 September 2007. The only significant issue at trial was whether defendant acted in self-defense when he shot Terry.

At trial, the State's evidence tended to show the following facts. In June 2004, defendant had been dating Qualanoneka Brown for nine years. Defendant was like an older brother to Qualanoneka's younger sister Raven, and he helped Raven raise her children. Terry Green was the father of Raven's daughter Monaja, but as of June 2004, Terry and Raven were no longer romantically involved. A few days prior to the shooting, Terry's younger sister, Amanda Green, went to Raven's apartment to see Monaja. During the visit, Raven was upset because she and Terry had had a heated argument. Raven told Amanda that she was going to have someone shoot Terry.

The morning of 4 June 2004, defendant and his girlfriend were planning to meet at Raven's apartment to pick up Raven's children and take them to Chuck E. Cheese. Around 10:30 a.m., Raven's neighbor, Michael Roland, heard two people arguing outside his apartment in the parking lot. He looked outside and saw Terry standing at the window of defendant's car. Terry and defendant were arguing for about two minutes after which Mr. Roland heard five or six shots fired, and Terry dropped to the ground. The car then sped off. Mr. Roland did not see anything in Terry's hand and did not see Terry shoot at or do anything threatening towards defendant. Another neighbor, Elsee Berry, told the investigating detective Waymon Hyman of the Wilmington Police Department that she heard defendant say before the gunshots went off, " 'That's messed up, what you did.' "

At trial, Mr. Roland testified that after defendant sped off, an unidentified female came to help Terry up. When Terry got up, Mr. Roland saw Terry pull a gun out of his waistline and give it to the woman who ran off with it. Mr. Roland testified that he disclosed this information in his initial interview with Detective Hyman. However, Detective Hyman testified that the first time that Mr. Roland mentioned that Terry had a gun was not until July 2007 and that when he mentioned the gun then, Mr. Roland only told him that he had heard that Terry had passed off a gun to the woman -- not that Mr. Roland had witnessed it first-hand.

Detective Hyman testified that on 4 June 2004, as he left the police station after receiving the call that a shooting had occurred, he saw defendant walking up the steps to the police department. At that time, Detective Hyman did not know that defendant was involved in the shooting, but he recognized defendant because he had been defendant's school resource officer when defendant was in high school. When Detective Hyman arrived at the scene of the shooting, he found five nine-millimeter shell casings and one 40-caliber shell casing. Detective Hyman did not believe that the 40-caliber shell casing was connected with the June 4 shooting because the casing was bent and appeared to be old, and because the street where the shooting occurred experienced a lot of crime -- it was not unusual to find spent shell casings on the street.

At trial, defendant testified in his defense to the following. On 4 June 2004, he drove to Raven's home where he planned to meet his girlfriend and pick up Raven's children to take them to Chuck E. Cheese. When he arrived at Raven's apartment, he honked his horn, but no one came out. As he started to drive away, Terry started coming towards him, pulled out a gun, and fired a couple of shots. Defendant ducked down and grabbed his father's gun from the glove compartment and began shooting out of the car window. He then drove off, and as he looked in his rearview mirror he could still see Terry in the street shooting. At that point, he saw someone whom he

did not know at the time, but at trial identified as Mr. Roland, run over to Terry and take his gun.

Defendant then drove to the New Hanover County Sheriff's Department to tell them what had happened. He spoke with an officer who told him to go to the Wilmington Police Department. The person at the front desk at the police department told defendant to sit and wait for a detective. While defendant was waiting, however, he called his mother and told her what had happened. She told him to leave and go to his lawyer's office. Because his attorney was not at his office, defendant went to his mother's house.

The day after the shooting, defendant's attorney called to tell defendant that there was a warrant out for his arrest, so defendant went to the Wilmington Police Department to turn himself in. At some point after the shooting, the Mustang and the gun were taken to defendant's grandmother's house. Defendant's father eventually sold the car sometime before trial. Although defendant asserted that there were bullet holes in the Mustang, defendant never took any pictures of the car before it was sold.

The jury returned a verdict of guilty to AWDWIKISI. On 7 September 2007, the trial court sentenced defendant to a presumptive-range term of 80 to 105 months imprisonment. This Court granted defendant's petition for writ of certiorari on 3 April 2014.

Discussion

Defendant's sole argument on appeal is that the trial court erred by allowing the State to ask defendant on cross-examination whether he believed that the victim's father, Daryl Brown, lied during his sworn testimony. At trial, Mr. Brown explained that he and defendant are third cousins and that he had known defendant since defendant was a young boy. Mr. Brown testified that about five days after the shooting, defendant came to Mr. Brown's office and told him what had happened during the shooting.

According to Mr. Brown, defendant said that he and Terry "had some words over the phone" and later, when he saw Terry, he shot him. Mr. Brown also read into evidence his statement to Detective Hyman, in which he said that at the meeting with defendant, defendant "said that him and Terry had some words in reference to his child, and that some threats were made. He said he was riding on Maides Avenue when he saw Terry and that's when it happened. . . he shot Terry because he felt Terry was going to do something to him." Mr. Brown did not recall defendant telling him that Terry had a gun, that defendant acted in self-defense, or that Terry threatened defendant. As Mr. Brown put it, defendant "didn't say Terry had threatened him. He said him and Terry had some words."

Defendant's account of his meeting with Mr. Brown after the shooting was very different. During defendant's direct examination, defendant's attorney asked him what he told Mr. Brown at the meeting. Defendant responded:

> [W]hat I said exactly was, "You know, Daryl, you know how Terry is. Terry was making threats to me." And then I told him that, you know, I was riding down Maides Avenue and Terry started shooting at me.
>
> And that's when he said, "You know what? If somebody call[s] me and tell me that boy [is] dead, I won't even be surprised." That's what Mr. Brown told me. That's what we talked about. What he said here was not the truth.

On cross-examination, the State also asked defendant about what he had told Mr. Brown at their meeting after the shooting:

> Q. Terry was never shooting at you, was he?
>
> A. Yes, he was.
>
> Q. Did you ever tell that to Daryl Brown?
>
> A. Yes.
>
> Q. So Daryl Brown was lying to this jury when he said Terry[1] never said anything about having a gun or shooting?
>
> A. Exactly.

[1]On appeal, defendant interprets this question to ask whether Daryl Brown was lying when he said that *defendant* never said anything about Terry having a gun or shooting. Mr. Brown did not testify as to what Terry told him about the shooting, but he did testify as to what he recalled defendant telling him about the shooting.

> Q. So it's basically your word against Daryl's, would you say that?
>
> A. Yes.
>
> Q. Because one of you is wrong.
>
> A. Daryl.
>
> Q. Daryl's wrong?
>
> A. I told you, what Daryl told me was, "I know how my son is." And Daryl also told me that he went to the hospital, he visited Terry when he was shot. He said he asked Terry what happened. He said, you know, "Jay shot me for no reason." He said he told him, "I know him, I know how he was raised, he didn't just do that to you for nothing."
>
> That's what Daryl told me.

Defendant argues that admitting this testimony amounted to plain error and that the trial court should have intervened ex mero motu to stop the State from this line of questioning. However, ex mero motu analysis is not applicable to the admission of evidence. As our Supreme Court explained in *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998), "where a criminal defendant has not objected to the admission of evidence at trial, the proper standard of review is a plain error analysis rather than an *ex mero motu* or grossly improper analysis."

The only issue before this Court is, therefore, whether the admission of this testimony was plain error.

> 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) (internal citations and quotation marks omitted).

The question whether it was improper for the State to ask defendant if Mr. Brown was lying is controlled by *State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988). In *Aguallo*, the State presented evidence, including testimony from the defendant's wife, which tended to show that the defendant had vaginal intercourse with his step-daughter. *Id.* at 820, 823, 370 S.E.2d at 677, 678. The defendant testified in his own defense, and on cross-examination, the prosecution asked the defendant whether his wife had "made [her testimony] up," and whether the wife was "lying about" her version of events. *Id.* at 823, 370 S.E.2d at 678. The defendant insisted that his wife's version of events was "wrong," but refused to say that "she made [it] up[,]" and told the prosecutor, "Don't make me call my wife a liar." *Id.* The prosecution then pointed out that at a prior trial, defendant had called his wife a liar without hesitation. *Id.* at 824, 370 S.E.2d at 679. On appeal, the defendant argued

that the line of questioning exceeded the proper bounds of cross-examination because it called for defendant to comment on the credibility of another witness. *Id.*

The Supreme Court first set out the proper scope of cross-examination:

> The bounds of permissible cross-examination were stated in *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981). In *Dawson,* this Court held that: (1) the scope of cross-examination is subject to the discretion of the trial judge; and (2) the questions offered on cross-examination must be asked in good faith. *Id.* at 585, 276 S.E. 2d at 351 . . . . The cases in which this Court has found abuse of discretion based upon a challenge of improper cross-examination have involved instances where the prosecutor has affirmatively placed before the jury his own opinion or facts which were either not in evidence or not properly admissible. *See State v. Locklear*, 294 N.C. 210, 241 S.E. 2d 65 (1977 [sic]) (prosecutor said witness was lying through his teeth); *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975) (prosecutor informed jury that defendant had previously been on death row).

Id.

The Court then held that the trial court did not abuse its discretion in allowing the line of questioning because "the prosecutor was cross-examining defendant about his prior testimony at the first trial to reveal inconsistencies. Prior statements by a defendant are a proper subject of inquiry by cross-examination." *Id.* Furthermore, the record failed to show that the questions were not based on proper information or were not asked in good faith, and the "prosecutor did not offer his own opinion or present facts which were not in evidence or not properly admissible." *Id.*

Just as the defendant in *Aguallo* did not want to call his wife a liar, defendant here argues that he should not have been required to call his mentor, Mr. Brown, a perjurer. However, as in *Aguallo*, the State was cross-examining defendant regarding his prior testimony on direct examination and the testimony of Mr. Brown to emphasize to the jury the inconsistencies in the testimony. Under *Aguallo*, "[p]rior statements by a defendant are a proper subject of inquiry by cross-examination." *Id.* Although *Aguallo* involved the defendant's testimony from a prior trial, there is no meaningful distinction between a defendant's prior testimony from another trial and testimony during direct examination.

In addition, as in *Aguallo*, there is no indication in the record that the questions were asked in bad faith or were not based on proper information, and "[t]he prosecutor did not offer his own opinion or present facts which were not in evidence or not properly admissible." *Id.* The State's line of questioning simply raised questions regarding defendant's credibility and highlighted reasons for the jury to question his credibility. This type of cross-examination is permissible under *Aguallo*. Accordingly, we hold that the trial court did not err in admitting this testimony.

Defendant, however, argues that through this line of questioning, the State impermissibly called defendant a liar. He argues that this case is analogous to *Locklear*, *State v. Miller*, 271 N.C. 646, 157 S.E.2d 335 (1967), and *State v. Campbell*, 30 N.C. App. 652, 228 S.E.2d 52 (1976).

In *Locklear*, our Supreme Court held that it was grossly improper for the prosecutor to say, while cross-examining a witness for the defendant, that " 'you are lying through your teeth and you know you are playing with a perjury count[.]' " 294 N.C. at 214, 241 S.E.2d at 68. In *Miller*, the Court held that it was improper for the prosecutor to say during closing arguments that he " 'knew [the witness] was lying the minute he said that.' " 271 N.C. at 659, 157 S.E.2d at 345. The Court explained that "[i]t is improper for a lawyer in his argument to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar." *Id.*

Here, unlike *Locklear* and *Miller*, the prosecutor did not offer his personal opinion that defendant or Mr. Brown was lying. Rather, the State questioned defendant regarding his statement on direct examination that "[w]hat [Mr. Brown] said here was not the truth." The prosecutor was merely pointing out the discrepancies between Mr. Brown's testimony and defendant's testimony. As held in *Aguallo*, such questioning is proper.

In *Campbell*, a witness responded affirmatively when the defense counsel asked the witness on cross-examination whether another witness " '[would] be lying' " if he were to make a certain statement. 30 N.C. App. at 656, 228 S.E.2d at 55. The trial court struck the question and answer and told the jury to disregard the statement, explaining: " 'I'm not going to let anybody call a witness or anyone else a

liar in my court. It's for the jury to determine the credibility of a witness.' " *Id.* This Court held that the trial court did not abuse its discretion in limiting the cross-examination testimony "because the question and answer were highly improper." *Id.* To the extent that *Campbell* is inconsistent with *Aguallo*, it is no longer good law. *See State v. Mills*, ___ N.C. App. ___, ___, 754 S.E.2d 674, 678 ("[W]e are bound by the decisions of our Supreme Court[.]"), *disc. review denied*, 367 N.C. 517, 762 S.E.2d 210 (2014). In any event, *Campbell* does not apply where, as here, the defendant has already testified on direct examination that another witness was not telling the truth. *See Aguallo*, 322 N.C. at 824, 370 S.E.2d at 679 ("Prior statements by a defendant are a proper subject of inquiry by cross-examination.").

Finally, we disagree with defendant that the line of questioning on cross-examination was impermissible because it forced defendant to "choose between, on the one hand, calling someone he admired . . . a perjurer, and, on the other hand, pursuing his claim of self-defense." The questions merely highlighted for the jury their need to decide which witness -- defendant or Mr. Brown -- was telling the truth. Furthermore, defendant was not forced to call Mr. Brown a perjurer. The State only asked defendant if Mr. Brown was lying after defendant asserted on direct examination that what Mr. Brown said "was not the truth." It was, therefore, defendant, and not the State, who pitted the two witnesses against one another.

NO ERROR.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).