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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-118

Filed: 6 September 2016

Rowan County, No. 15 CRS 000869

STATE OF NORTH CAROLINA

v.

SUE LEE ROBERSON, Defendant.

Appeal by defendant from judgments entered 6 August 2015 by Judge Anna M. Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 10 August 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Donna D. Smith, for the State.

Stephen G. Driggers for defendant.

ELMORE, Judge.

A jury found Sue Lee Roberson (defendant) guilty of two counts of obtaining property by false pretenses. She was sentenced to consecutive terms of five to fifteen months of imprisonment, suspended, placed on sixty months of supervised probation, and ordered to pay $33,978.97 in restitution. Defendant appealed, arguing principally that the trial court erred in admitting into evidence an audio recording

and transcripts of a conversation between defendant and the victim. After review, we conclude that defendant received a trial free from prejudicial error.

I. Background

The State's evidence at trial tended to show the following: In 2013, Brigette Parsons founded Saving Grace K9s, a nonprofit organization that trains service dogs for veterans in need. She began operating her business out of a building occupied by Manpower to Horsepower, a veteran's rehabilitation center founded by defendant and her partner, Matthew Young. At the time, defendant and Ms. Parsons were close friends.

In March 2013, Ms. Parsons wrote a check for $10,000 to reimburse defendant for money that defendant claimed she paid to Charles Lawing with the Veterans Administration (VA) to have Saving Grace K9s "approved as a vendor." At defendant's request, Ms. Parsons made the check payable to Mr. Young because defendant stated "that she did not have an account and that she also didn't have an account under Manpower." Defendant told Ms. Parsons that as an approved vendor, the VA would give her money to help fund her organization. Ms. Parsons was aware that defendant had developed a professional relationship with Mr. Lawing, and as her friend, Ms. Parsons "had no reason not to believe [defendant]."

In December 2013, defendant approached Ms. Parsons again for money. She told Ms. Parsons that Pullin Media Group was scheduled to film a reality series

involving Manpower to Horsepower and Saving Grace K9s, and they had requested $25,000 from defendant to help pay a performance bond. Defendant assured Ms. Parsons that the filming would begin in a couple of weeks, and she would have her money back in a couple of months. Ms. Parsons agreed and, at defendant's request, wired $23,978.97 to Mr. Young's account. She had set that money aside for her and her daughter to live off while she started Saving Grace K9s.

Several months later, Ms. Parsons learned—and bank records confirmed—that defendant never paid $10,000 to the VA for "vendor approval," and never used the $23,978.97 to pay a performance bond. Mr. Lawing testified that organizations were not required to pay any sort of fee to become an approved vendor with the VA, and defendant never provided him with money to approve Saving Grace K9s. In addition, Doug Ames, the owner of a sports marketing company, testified that he shot a "sizzle reel" for Manpower to Horsepower and had Pullin Media Group edit the film. He never required a performance bond from defendant, however, and to his knowledge defendant never provided Pullin Media Group with $25,000.

Ms. Parsons confronted defendant about the money and secretly recorded the conversation using a digital voice recorder. A copy of the audio recording and transcripts were properly authenticated and admitted into evidence over defendant's objection. The court allowed the State to publish the audio recording to the jury, but withheld publication of the transcripts until it could review them with the audio.

After the audio was played, the court allowed—without objection—a redacted version of the transcripts to be published to the jury.

II. Discussion

Defendant argues that the trial court erred in admitting a copy of the audio recording and transcripts in violation of the best evidence rule. We disagree.

At the outset, we note that defendant initially objected to the admission of the audio recording and transcripts but failed to renew her objections when redacted copies of the transcripts were later published to the jury. "Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995) (citations omitted). Accordingly, we review for plain error, as argued by defendant in the alternative.

> 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 affects the fairness, integrity or public reputation of judicial proceedings.

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

Rule 1002 of the North Carolina Rules of Evidence, commonly known as the "best evidence" rule, states that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." N.C. Gen. Stat. § 8C-1, Rule 1002 (2015). It "requires the exclusion of secondary evidence offered to prove the *contents* of a document whenever the original document itself is available." *U.S. Leasing Corp. v. Everett, Creech, Hancock & Herzig*, 88 N.C. App. 418, 423, 363 S.E.2d 665, 668 (1988) (citations omitted). The rule does not apply to collateral matters, N.C. Gen. Stat. § 8C-1, Rule 1004 (2015), and it "does not prevent a fact which exists independently of a writing, but which is related to it in some way, to be proved through evidence other than the writing itself." *Hedgecock Builders Supply Co. of Greensboro v. White*, 92 N.C. App. 535, 540, 375 S.E.2d 164, 168 (1989) (citations omitted). If, however, "a party *elects* to prove an independent fact through the content of a writing, the best evidence rule applies." *Id.*; *see also* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 254, at 1002 (7th ed. 2011). Even so, Rule 1003 clarifies that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." N.C. Gen. Stat. § 8C-1, Rule 1003 (2015).

In this case, the State offered the audio recording into evidence as proof of the conversation between defendant and Ms. Parsons. Even assuming that the best evidence rule applies and that the content of the recording was not of a collateral matter, defendant raised no question as to the authenticity of the original recording at trial. Instead, she objected to the admission of the audio recording merely because it was a copy. And while defendant now argues that the chain of custody casts doubt on the reliability of the recording, claiming it was a "copy of a copy," her argument lacks evidentiary support.

In addition, the record does not show circumstances that made it unfair to admit the duplicate audio recording. Throughout an extensive discovery process, the State produced "all the communications" between Ms. Parsons and defendant to the satisfaction of defendant's counsel. Despite counsel's contention at trial that he had "never seen the original," the original was never requested. As the State aptly notes, "if defense counsel had questions about the authenticity of the original recording, he would have requested that the original be produced during discovery."

Finally, even if it was error to admit the transcripts as secondary evidence, *see State v. York*, 347 N.C. 79, 91, 489 S.E.2d 380, 387 (1997), it was not an error that prejudiced defendant. The audio recording was published to the jury and the transcripts only reiterated what the jury heard from the recording. The trial court also read through the transcripts with the audio to ensure their accuracy before

admitting redacted versions into evidence. Defendant has therefore failed to show prejudice, and accordingly, we also reject her claim for ineffective assistance of counsel. *See State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985) ("The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." (citation omitted)).

III. Conclusion

The best evidence rule did not bar the admission of the duplicate audio recording, and even if it was error to admit the transcripts, such error did not prejudice defendant. Ultimately, there was no genuine question of authenticity, and it was fair under the circumstances to admit the evidence at trial.

NO PLAIN ERROR.

Judges DAVIS and DIETZ concur.

Report per Rule 30(e).