IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-214

Filed: 15 November 2016

Rutherford County, No. 13 CRS 51105

STATE OF NORTH CAROLINA

v.

ERIC SCOTT TURNER

Appeal by defendant from judgment entered 15 July 2015 by Judge Marvin P. Pope Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 23 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Melissa H. Taylor, for the State.

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

BRYANT, Judge.

Where a witness's pretrial statements made to officers are admissible both as present sense impressions and as corroborating her trial testimony, the trial court did not err in admitting those statements into evidence. Further, where defendant did not object to the admission of the statements or request a limiting instruction, the trial court did not commit plain error.

In April 2013, Melody Deanna Turner had been living in Golden Valley, Rutherford County, North Carolina with defendant Eric Scott Turner, before the couple broke up early that month. On 14 April 2013, at about 1:00 a.m., Melody was awakened by a four-wheeler pulling into her yard. Someone outside began yelling at her to come to the door. "[The voice] was male. It sounded like [defendant]." He said that Melody's cousin, Joshua, was dying, that Joshua was dead. Melody responded by telling him to take Joshua to his father's house, as his father was a paramedic. Almost immediately, the window of her door was punched in, then a gunshot was fired into her home. Melody could smell the smoke of a pistol. Melody ran out the back door of her house to her uncle's home, which was about 100 yards away on the same property, and called 911. Rutherford Sheriff's Deputy Chad Nazelrod was the first officer to respond to the call, and when Rutherford Sheriff's Corporal Shane Ruppe arrived a few minutes later, the two officers went to Melody's house.

When the officers arrived, they saw a four-wheeler in the gravel driveway on the right side of the house. A white male was sitting on the ground next to the four-wheeler, but was unresponsive when ordered by the officers to show his hands. Deputy Nazelrod brought him to the ground and he was put in handcuffs and into a patrol car. At that time, the white male was not identified.

Approaching Melody's house, the officers observed the front door standing open. Glass from the broken window was scattered inside and there was a gouge mark

in the floor where it had been struck by a bullet. A bullet fragment was found nearby, but no weapon was found.

The man taken into custody was subsequently identified as Joshua Ledford, Melody's cousin. He was extremely intoxicated; he smelled strongly of alcohol, his speech was slurred to the point of incomprehension, and he did not know where he was. Upon searching Ledford, the officers found an open pocket knife and eleven rounds of .22-caliber ammunition in his pockets, but no gun. Rutherford Sheriff's Detective Brandon Rothrock, who was assigned to lead the investigation, testified that the bullet fragment found inside the house appeared to be from a .25- or .22-caliber bullet.

On 6 June 2013, defendant was indicted on charges of attempted first-degree burglary, attempted first-degree murder, and discharging a weapon into an occupied dwelling. The case was tried at the 14 July 2015 Criminal Session of Superior Court for Rutherford County, the Honorable Marvin P. Pope Jr., Judge presiding.

At trial, Melody testified that she did not see the man who was at her front door that night, as her window was covered by a curtain. She also testified that she did not *see* defendant at the house that night. However, Melody admitted at trial that on the night of the incident, she told the officers that she believed the man at the front door to be defendant because, *inter alia*, the voice she heard was male and "sounded like [defendant]"; earlier that day, defendant had been riding four-wheelers

with Ledford; and Melody got into an argument with defendant that same day. At trial, and consistent with her statement to law enforcement, Melody testified that the voice she heard was male and "sounded like [defendant]."

Melody testified that she "was very strung out on drugs" the night of the incident. She had taken methamphetamines, crack cocaine, and two Xanax. Detective Rothrock testified, however, that Melody did not exhibit any characteristics of being high or on methamphetamines that night. He stated he was comfortable taking her statement as he did not see any evidence of impairment. According to Detective Rothrock, Melody stated that defendant was at her house that night and she knew his voice well. He also testified that "[Melody] was very scared, very shaken up. She was scared for her safety, for one, because he had left the scene and we didn't have him in custody. . . . She was very very scared." Deputy Nazelrod also spoke with Melody that evening. She told him defendant came to her house, broke the glass in the window, stuck a gun through the window, and fired a round. Deputy Nazelrod also testified that Melody was "visibly shaken. You could tell she had been emotionally crying. She was still visibly -- her hands were shaking what I would assume would have been out of fear. Just nervous, scared, shaking." He also noted no signs of impairment in Melody.

No objections were made to Melody's pretrial statements to the officers. No instruction was requested or given to the jury limiting admissibility of the pretrial

statements, instructing that they were not substantive evidence and could not be considered for their truth. Defendant was found guilty after a trial by jury of first-degree burglary and discharging a weapon into an occupied dwelling, but was found not guilty of attempted first-degree murder. Defendant was sentenced to a minimum term of sixty months and a maximum term of eighty-four months' confinement. Defendant appealed.

Defendant's sole argument on appeal is that the trial court committed plain error by admitting Melody's pretrial statements that were in direct conflict with her trial testimony, and failing to instruct the jury that the pretrial statements were not substantive evidence and could not be considered for the truth of the matter asserted. We disagree.

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule of law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2015); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th

Cir. 1982)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted). "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case . . . ." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (alterations in original) (citation omitted).

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter[,]" and is not excluded by the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(1) (2015). "The basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." *State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997) (citation omitted). "But, '[t]here is no rigid rule about how long is too long to be "immediately thereafter." ' " *State v. Little*, 191 N.C. App. 655, 664, 664 S.E.2d 432, 438 (2008) (quoting *State v. Clark*, 128 N.C. App. 722, 725, 496 S.E.2d 604, 606 (1998)).

Here, the statements made by Melody were made the night of the incident, shortly after the officers arrived at the scene. According to the officers, Melody was visibly shaken and very scared when she told them defendant had just broken the glass and fired a gun into her house at about 1:00 in the morning. As such, these

statements were admissible under the present sense impression exclusion to the hearsay rule. *See* N.C.G.S. § 8C-1, Rule 803(1). However, defendant contends that because no limiting instruction was given regarding the pretrial statements not being substantive evidence, those pretrial statements should not have been considered for the truth of the matter asserted therein, and to allow such was plain error. We disagree.

A witness's prior consistent statements may be admitted for the limited purpose of corroborating the witness's trial testimony. *State v. Lloyd*, 354 N.C. 76, 103, 552 S.E.2d 596, 617 (2001) (citing *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340 (2000)). The prior statements are not rendered inadmissible for corroborative purposes merely because there are some variations between the prior statements and the witness's trial testimony. *See id.* at 104, 552 S.E.2d at 617. "Such variations affect only the weight of the evidence which is for the jury to determine." *Id.* (citation omitted). "Accordingly, 'prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness'[s] in-court testimony.' " *Id.* (quoting *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992)).

Here, contrary to defendant's argument, Melody's statements made the night of the incident and Melody's trial testimony do not conflict. Melody made the following statements, *inter alia*, the night of the incident: (1) she told Officer Rothrock that

defendant was at her house that night and she knew his voice well; (2) that defendant was yelling for her because Ledford was dying or dead; (3) she told Officer Nazelrod that defendant came to her house beating on the door, broke the door's glass, stuck a gun through the opening and fired. At trial, Melody testified as follows: (1) she thought the person outside her house was defendant; (2) she recognized the individual's voice as male and it sounded like defendant's voice; and (3) "when they asked me who it was I told them I thought it was [defendant]."

While defendant contends that the pretrial statements made to the officers contradict Melody's trial testimony, the statements in fact corroborate it. Even if Melody's trial testimony indicates that she did not remember making the pretrial statements to the officers, her statements are not rendered inadmissible for corroborative purposes merely because her recount of the events of that evening did not include a positive identification of defendant as the perpetrator. *See id.* Indeed, at trial Melody testified that she knew the voice was male and that "[i]t sounded like defendant." This corroborates her pretrial statements that defendant was at her house that night, she knew his voice well, and that defendant was yelling for her. Thus, as Melody's pretrial "narration of events is substantially similar to [her] in-court testimony," "any new or additional information" does not render Melody's pretrial statements inadmissible. *Id.* (citation omitted).

Defendant also argues that the trial court erred by not providing limiting instructions regarding the corroborating statements, even though defendant did not request such limiting instructions. It is well settled in North Carolina that "an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such an instruction." *State v. Smith*, 315 N.C. 76, 82, 337 S.E.2d 833, 838 (1985). Therefore, the trial court was not required to provide such instructions to the jury and committed no error by not doing so.

Melody's pretrial statements made to the officers are admissible both as present sense impressions and as corroborating her trial testimony. As such, the trial court did not err in admitting those statements into evidence, nor did it err by not issuing a limiting instruction. As defendant did not object to the admission of the statements and has failed to show that their admission amounted to plain error, defendant's arguments are overruled.

NO ERROR.

Judges STEPHENS and DILLON concur.

Report per Rule 30(e).