

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1090

Filed: 1 October 2019

Mecklenburg County, No. 16CRS200252

STATE OF NORTH CAROLINA

v.

SHELTON ANDREA KIMBLE, Defendant.

Appeal by defendant from judgment entered 16 March 2018 by Judge Andrew Taube Heath in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General, Marc X. Sneed, for the State.

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

BERGER, Judge.

On March 16, 2018, Shelton Andrea Kimble (“Defendant”) was convicted of first-degree murder for killing Tyrone Burch (“Burch”). On appeal, Defendant contends that the State violated his Fourteenth Amendment right to substantive due process by failing to correct false testimony given by witness Sharon Martin (“Martin”). We disagree.

Factual and Procedural Background

STATE V. KIMBLE

Opinion of the Court

On January 3, 2016, Defendant shot and killed Burch in the parking lot of a dance club in Charlotte, North Carolina. Martin testified that earlier that night, between 10:30 and 11:00 p.m., she arrived alone at the dance club and noticed Defendant was sitting at the bar. Martin bought Defendant a drink and the two went to the dance floor and continued to talk. Subsequently, Burch arrived at the dance club and met Martin near the dance floor. Martin testified that Burch was her boyfriend at the time of the shooting and that she had previously dated Defendant for eight years.

Martin and Burch left to talk outside. Afterward, Defendant walked outside, and as he passed Martin and Burch, he said something, which prompted Burch to punch Defendant in the face. The two then fought for approximately 30-45 seconds. A bouncer and a patron of the dance club broke up the fight.

The facts are disputed as to the exact circumstances that followed, but on appeal both parties concede that Defendant fired a gun multiple times at Burch causing fatal injuries. The bouncer testified that he observed Defendant go to his vehicle and subsequently fire a gun at Burch while Defendant chased after him. Martin testified that she saw Defendant open the driver's side door of his vehicle and that Defendant typically kept his gun in a pocket on the driver's side door. After firing his gun, Defendant ran to his vehicle, dropping his gun in the process, and

STATE V. KIMBLE

Opinion of the Court

drove home. Later that same night, Defendant turned himself in to authorities, and he was charged with murdering Burch.

An autopsy of Burch's body showed multiple injuries consistent with gunshot wounds. One of the gunshot wounds was to the top back right side of his head, and the projectile traveled "almost straight down" through his head and lodged near the brain stem on the right side. A second gunshot wound was to the right side of his neck, which had a similar trajectory as the projectile that entered near the top of Burch's head. This second projectile exited through the chest. Another gunshot wound was under his right underarm, and the projectile exited near his back shoulder. A fourth projectile entered near Burch's back left shoulder blade and lodged in his chest. The fifth projectile entered the back of his left thigh and exited through the front of the same thigh. A firearms and toolmark expert testified that the five projectiles recovered from the scene and from Burch's body were fired from the same firearm.

Prior to trial, Martin met with prosecutors to prepare for her testimony. During the meeting, Martin was given the 35-page statement she had made to detectives on the day of the incident. Martin read the statement and informed the prosecutors that it reflected what had taken place on the night of the incident. In her statement, Martin told detectives that she did not see the shooting, but that she saw Defendant "holding a gun" and "running" towards Burch. After the meeting,

prosecutors provided defense counsel a page and a half of notes that they had taken from the meeting with Martin.

However, at trial Martin testified that she saw Defendant shoot Burch, saw Burch fall to the ground, and saw Defendant stand over Burch and shoot him. When challenged about her failure to tell anyone about witnessing the shooting, Martin testified that she had told a prosecutor those same details during a pre-trial meeting.

Outside the presence of the jury, the State informed the trial court and defense counsel that during their pre-trial meeting, Martin had never told them that she had witnessed Defendant stand over Burch and shoot him. Defense counsel requested, in an attempt to correct any false evidence from Martin's testimony, that the State make a statement to the jury explaining that Martin had not informed the State that she had in fact witnessed Defendant stand over Burch and shoot him. The State replied that had they received new information, they would have turned it over to defense counsel in compliance with discovery rules and that any misunderstandings could be cured by cross-examination.

The trial court did not require the State to enter into any stipulation or make a statement to the jury. It reasoned that this was not a statutory violation, but rather a "discrepancy between what the witness believes she told the State and what the State has recorded in their notes." The trial court then provided defense counsel the opportunity to further cross-examine Martin, which it declined to do.

The jury found Defendant guilty of first-degree murder, and he was sentenced to life in prison. Defendant appeals, arguing that he was denied due process by the State's failure to correct Martin's false testimony. We disagree.

Analysis

It is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. Further, with regard to the knowing use of perjured testimony, the Supreme Court has established a standard of materiality under which the knowing use of perjured testimony requires a conviction to be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Thus, when a defendant shows that testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction, he is entitled to a new trial.

State v. Murrell, 362 N.C. 375, 403, 665 S.E.2d 61, 80 (2008) (citation, quotation marks, and brackets omitted).

“Evidence that affects the jury’s ability to assess a witness’ credibility may be material.” *State v. Wilkerson*, 363 N.C. 382, 403, 683 S.E.2d 174, 187 (2009) (citation omitted). “To establish materiality, a defendant must show a reasonable likelihood that the false testimony could have affected the judgment of the jury.” *State v. Phillips*, 365 N.C. 103, 126, 711 S.E.2d 122, 140 (2011) (internal citation and quotation marks omitted). However, to the extent that a witness’s testimony may have led jurors mistakenly to believe false evidence against the defendant,

STATE V. KIMBLE

Opinion of the Court

subsequent admissions during cross-examination may correct any misunderstandings elicited and allow the jury to assess a witness's credibility. *See Wilkerson*, 363 N.C. at 404-05, 683 S.E.2d at 188 (determining that “the State did not obtain defendant’s conviction through the use of false testimony, nor did the State permit false testimony to go uncorrected” because “[t]o the extent that Mrs. Davis’ testimony may have led jurors mistakenly to believe that she could not receive a benefit from her testimony against defendant, any misunderstanding was corrected by her subsequent admission during cross-examination that she hoped her sentence would be further reduced.”).

In *State v. Phillips*, the defendant asserted that the witness’s trial testimony was false and material because “it contradicted the notes made of her pretrial statements and that the State benefited in both the guilt-innocence and penalty portions of the trial.” 365 N.C. at 126, 711 S.E.2d at 140. Our Supreme Court disagreed with the defendant’s argument and reasoned as follows:

Although Cooke’s trial testimony is inconsistent with the notes taken by others during her pretrial interviews, the record does not establish whether Cooke’s direct testimony was inaccurate, whether her pretrial interview statements were inaccurate, whether the notes of those interviews were inaccurate, or whether Cooke’s recollection changed. At any rate, it is not apparent that Cooke testified falsely at trial or that her trial testimony conflicted in any material way with her pretrial statements. Moreover, any inconsistency was addressed in the presence of the jury by Cooke’s subsequent cross-examination when she made the following pertinent clarification:

STATE V. KIMBLE

Opinion of the Court

[Defense Counsel:] You testified that you do not recall [defendant] saying anything about I have nothing left to live for?

[Cooke:] Not on those terms, no.

[Defense Counsel:] Do you remember telling [Investigator] Kimbrell in this year that [defendant's] brother had been shot and he had nothing left to live for?

[Cooke:] I don't think that I put it quite that way, but I might have, but that is not the way that [defendant] actually, you know, said it.

Id. at 126-27, 711 S.E.2d at 140.

In the present case, Martin testified on direct-examination that she saw Defendant stand over Burch and shoot him. On cross-examination, defense counsel used Martin's 35-page statement to refresh Martin's memory and to impeach her.

The following exchange then occurred:

[Defense Counsel:] Okay. Now, you did not see the shooting, did you?

[Martin:] I seen him running with the gun shooting it.

[Defense Counsel:] Now, but didn't you tell the police a few hours after this happened back on January 3rd, 2016, you did not see the shooting?

[Martin:] That was incorrect.

[Defense Counsel:] Okay. So what you told them after the – excuse me. What you told them on January 3rd right after everything happened, you're saying that part wasn't right?

STATE V. KIMBLE

Opinion of the Court

[Martin:] I seen Mr. Kimble running with the gun (gesturing) shooting. That's what I seen.

[Defense Counsel:] And my question to you was: Do you recall telling the police on January 3rd you did not see the shooting?

[Martin:] I don't remember. I was traumatized after all of this. So what I said then, I don't remember.

[Defense Counsel:] Permission to approach the witness, Your Honor?

THE COURT: Granted.

[Defense Counsel:] All right. Ms. Martin, I'm showing you once again your 35-page statement that you gave the police. When you get a moment, please look over page 15, page 20, page 24, and page 25. Let me know when you finish. . . .

[Defense Counsel:] Now, Ms. Martin, now that you've had an opportunity to look over pages 15, 20, 24 and 25, does that refresh your memory as to what you told the police about whether or not you saw the shooting?

[Martin:] Yes.

[Defense Counsel:] Okay. And isn't it true, you told the police you did not see the shooting?

[Martin:] Yes.

[Defense Counsel:] Now, Ms. Martin, since January 3rd of 2016, have you had any interaction with the Burch family?

[Martin:] No.

STATE V. KIMBLE

Opinion of the Court

[Defense Counsel:] Now, on direct, you testified that you saw Mr. Kimble walk up and shoot Mr. Burch while he was on the ground. Isn't that what you said?

[Martin:] Yes.

[Defense Counsel:] But do you recall when you spoke to the police on January 3rd, 2016, they asked you that exact same question, didn't they?

[Martin:] Yes.

[Defense Counsel:] They said, did you see him walk up and shoot Mr. Burch on the ground? They asked you that; right?

[Martin:] Yes.

[Defense Counsel:] You said no, I didn't see that.

[Martin:] Yes.

On re-direct of Martin, the State clarified that when Martin met with prosecutors two weeks prior to trial, she told them that the written statement was an accurate reflection of what happened.

[The State:] Can you just flip through [the statement] and make sure it's complete, please?

[Martin:] (Complies.)

[The State:] Is this the same transcript that you reviewed when you met with [the prosecutor] and I before trial?

[Martin:] Uh-huh.

[The State:] If I could direct your attention to page 25. If you would read that for – to yourself, please.

[Martin:] (Complies.)

[The State:] Thank you, ma'am. Ms. Martin, after looking at your transcript, and specifically page 25, do you recall what you told the detectives that night about what you actually saw?

[Martin:] Yes.

[The State:] And what did you tell them?

[Martin:] I told them that I seen him shoot the gun and thought that he was firing and then –

[Defense Counsel:] Objection. Speculation. What she thought.

[The State:] Your Honor, it's her own statement.

[Defense Counsel:] Still speculation.

THE COURT: Hang on a second. If y'all can approach.
(Bench conference held.)

THE COURT: Okay. For the record, that objection is sustained.

[The State:] Your Honor, may I approach the witness?

THE COURT: Yes.

[The State:] Ms. Martin, I'm showing you page 25 of your transcript. Didn't you tell the detectives I saw him holding a gun and I seen him running?

[Martin:] Yes.

[The State:] Thank you. Nothing further, Your Honor.

(Emphasis added).

STATE V. KIMBLE

Opinion of the Court

It is clear that defense counsel addressed the difference between Martin's prior statement to detectives and her testimony at trial during cross-examination. Moreover, the State, over defense counsel's objection, also addressed the discrepancy between Martin's testimony at trial and what they had discussed prior to trial. Both Martin's cross-examination by defense counsel and re-direct by the State occurred in the presence of the jury.

Then on re-cross by defense counsel, the following exchange occurred, which is what Defendant contends constituted false testimony:

[Defense Counsel:] When you said you shared those additional facts before, who did you share them with?

[Martin:] With the DA.

[Defense Counsel:] Okay. So you told the DA these additional facts?

[Martin:] Yes.

[Defense Counsel:] All right. When did you tell the DA these additional facts?

[Martin:] Two weeks ago.

[Defense Counsel:] When you spoke to the DA two weeks ago, you told the DA that you saw Mr. Kimble walk up and shoot Mr. Burch while he was on the ground?

[Martin:] Yes.

[Defense Counsel:] All right. So if you said that, then – well, let me rephrase. Were you aware that any new information that you have, the DA turns over to me?

[Martin:] Yes.

[Defense Counsel:] Okay. So as being aware of that then, would you be surprised to know that that new information was not contained in anything that the DAs gave to me?

[Martin:] No.

[Defense Counsel:] Okay. You wouldn't be surprised by that?

[Martin:] I wasn't aware.

On appeal, Defendant does not take issue with Martin's testimony regarding what she witnessed on the night of the murder. Rather, Defendant contends the State refused to correct Martin's testimony.¹ Even assuming, *arguendo*, that Martin falsely testified that she had informed the State of this inconsistent information prior to trial, Defendant has still failed to show *both* that (1) Martin's testimony that she had informed prosecutors was material, and (2) the State knowingly and intentionally used the false testimony to convict Defendant. *See State v. Sanders*, 327 N.C. 319, 337, 395 S.E.2d 412, 424 (1990).

In order to be material, the misleading testimony must have "contributed to defendant's conviction" and that, had the witness testified truthfully, "the trial's result would have been no different." *Id.* First, we note that the State did not rely

¹ Defendant's appellate counsel confirmed at oral argument that the false testimony Defendant was challenging was not that Martin witnessed Defendant shoot Burch, but rather Martin's testimony that she told the prosecutor she had witnessed Defendant shoot Burch.

exclusively on Martin's testimony to convict Defendant. The bouncer testified to similar facts, including witnessing the circumstances leading up to Defendant firing the gun at Burch. The bouncer further testified that he heard a total of at least three shots. Moreover, the five entry wounds found on Burch were determined to have come from the same .38 caliber firearm.

More importantly, on appeal, Defendant does not take issue with *what* Martin saw. Instead, Defendant takes issue with *when* and *whether* Martin informed the State of what she had witnessed. This inconsistency goes only to Martin's credibility as a witness. The inconsistency is not material because the jury still had the opportunity to consider Martin's testimony in light of Defendant's cross-examination and the State's redirect, and also observe her demeanor and consider her credibility as she testified. *See Phillips*, 365 N.C. at 126, 711 S.E.2d at 140 (noting that the witness's testimony, although inconsistent with the notes taken by others during her pretrial interviews, was not entirely false and "any inconsistency was addressed in the presence of the jury"). Therefore, there is no reasonable likelihood the testimony concerning *when* and *whether* the information was provided to prosecutors by Martin affected the judgment of the jurors in light of the other evidence at trial. The jury was aware that Martin's recollection of what she previously told law enforcement about the events she witnessed differed from what law enforcement and prosecutors recorded. Thus, "[t]he jury heard conflicting evidence," *Sanders*, 327 N.C. at 337, 395

S.E.2d at 424, and “any inconsistency was addressed in the presence of the jury by [Martin]’s subsequent cross-examination.” *Phillips*, 365 N.C. at 126, 711 S.E.2d at 140.

Furthermore, Defendant has presented no supporting evidence for his assertion that the State “knowingly or intentionally” allowed Martin to testify falsely. “There is a difference between the knowing presentation of false testimony and knowing that testimony conflicts in some manner. It is for the jury to decide issues of fact when conflicting information is elicited by either party.” *State v. Allen*, 360 N.C. 297, 305, 626 S.E.2d 271, 279 (2006) (brackets omitted). “Inconsistencies and contradictions in the State’s evidence are a matter for the jury to consider and resolve,” and “there is no prohibition against a prosecutor placing inconsistencies before a jury.” *State v. Edwards*, 89 N.C. App. 529, 531, 366 S.E.2d 520, 522 (1988).

The record reflects that the State did not know Martin would provide inconsistent testimony. Outside the presence of the jury, the State informed the trial court that Martin had not informed them of this information and the pre-trial notes provided to defense counsel reflect this. Also, when the trial court classified Martin’s testimony as “a discrepancy between what the witness believes she told the State and what the State has recorded in their notes,” and not a violation of statutory discovery rules, defense counsel responded in the affirmative. Moreover, during defense counsel’s cross-examination of Martin, counsel was able to elicit testimony that the

STATE V. KIMBLE

Opinion of the Court

State was not in fact aware of the inconsistent testimony and that the State's notes to defense counsel were not consistent with Martin's testimony. The jury heard this conflicting testimony and when defense counsel was provided the opportunity to re-cross Martin, counsel declined to do so.

Conclusion

Martin's inconsistent testimony was neither material nor was it knowingly and intentionally used by the State to obtain Defendant's conviction. Defendant's due process rights were not violated. Accordingly, we find no error.

NO ERROR.

Chief Judge McGEE and Judge COLLINS concur.