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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-376

No. COA20-773

Filed 20 July 2021

McDowell County, No. 19-CRS-50990

STATE OF NORTH CAROLINA,

v.

BILLY JACK BEARD, Defendant.

Appeal by defendant from judgment entered 27 February 2020 by Judge Nathaniel J. Poovey in McDowell County Superior Court. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney Amy L. Bircher, for the State.

Stephen G. Driggers for Defendant-Appellant

CARPENTER, Judge.

¶ 1 Billy Jack Beard (“Defendant”) appeals pursuant to N.C. Gen. Stat. § 7A-27(b) and N.C. Gen. Stat. § 15A-1444(a) from judgment entered after a jury found him guilty of assault on a female. After careful review, we find no error.

I. Procedural & Factual Background

¶ 2 On 10 June 2019, Defendant was served summons for assault by pointing a gun and assault on a female. On 16 August 2019, District Court Judge Clarence R.

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Pool found Defendant guilty of both offenses and sentenced him to a suspended sentence of 150 days in custody, subject to twenty-four months of supervised probation and special probation of ten days in custody. Defendant appealed to McDowell County Superior Court the same day. On 27 February 2020, Superior Court Judge Nathaniel Poovey, following a jury trial, found Defendant guilty of assault on a female and not guilty of assault by pointing a gun. Defendant was given a suspended sentence of seventy-five days in custody, subject to eighteen months supervised probation. On the same date, Defendant filed written notice of appeal to this Court.

¶ 3

The record from the superior court trial tended to show the following: On 28 May 2019, Barbara Smith (“Ms. Smith”) was transporting Defendant’s wife, Aja Hannah Kuputsos (“Ms. Kuputsos”), home from a battered women’s center. Ms. Smith referred to Ms. Kuputsos as her friend on two occasions during her testimony. Defendant and Ms. Kuputsos were living separately at the time, but their individual properties were in close proximity and were on the same road. Ms. Smith drove past Defendant’s property where she observed him unloading his things from Ms. Kuputsos’ car. After passing by, the two women returned to Defendant’s home after a short time, and a physical altercation between Defendant and Ms. Kuputsos ensued. Then, Defendant and Ms. Kuputsos left the scene in Ms. Kuputsos’ car. Ms. Smith called the police and remained at the scene before the couple returned around

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seven minutes later. Upon their return, Ms. Smith testified Defendant and Ms. Kuputsos began yelling, “Don’t call the police,” and insisted she leave the area. Ms. Smith testified Defendant ran at Ms. Smith, leaned through her car window, and grabbed her arm and leg. According to Ms. Smith, Defendant then moved away from her, tilted a handgun toward her, and said, “[g]et out of here bitch.” Ms. Smith testified she did not exit her vehicle or open her car door for the entirety of the incident, which lasted forty-five minutes to an hour.

¶ 4

Defendant testified, “I put [Ms. Smith’s] foot in the car. No aggression. No nothing. I was begging her to please move her car, please. And she just would not do it.” He also testified the handgun was never pointed or removed from the holster before he stored the firearm away from his person. During cross-examination of Ms. Smith, the following occurred:

Defense:	After the date of this incident, did you file a complaint for a restraining order against Ms. Kuputsos?
Ms. Smith:	No, not against Ms. Kuputsos. No, sir.
Defense:	So it’s your testimony you did not file a complaint?
Ms. Smith:	Not against her. I, I –
State:	Objection.
Court:	Sustained.
Ms. Smith:	Against him I did, yes.
Court:	You don’t have to answer when I say sustain.
Ms. Smith:	Oh, I’m sorry.
Court:	That’s okay.
Defense:	May I be heard?

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Court: No. Ask your next question.

¶ 5

After redirect examination of Ms. Smith, and with the jury out of the courtroom, defense counsel was given the opportunity to be heard on the objection. Defense counsel stated he should have been allowed to continue the line of questioning “as to credibility” because “when asked about it, she did claim that it didn’t happen. And she swore under oath at a later date that she was asking for a restraining order that was eventually granted.” The restraining order was filed by Ms. Smith, five months after the incident at issue, on 28 October 2019. Also, the defense stated the restraining order was relevant because the jury “may infer that [Defendant] has some tendency for violence leading up to the altercation at issue in this trial” based on testimony of Defendant’s altercation with Ms. Kuputsos. The State reiterated its objection along with rationale based on relevance.

¶ 6

The court agreed with the State again and summarized its rationale:

[S]he testified that she could not remember taking out a restraining order. Frankly, I’m not so sure what I would have – and maybe she did object and I didn’t rule on it – I’m not so sure that I would have sustained an objection to that question to begin with. Your question that elicited the response, “I can’t remember,” that you now seek to impeach with an outside court file. I think was an improper question to begin with because it calls for irrelevant evidence – highly prejudicial evidence by the way – a completely separate incident involving a third party to this case.

¶ 7

After reaffirming its rationale, the court then offered to put the witness back

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on the stand so defense counsel could make a proffer:

So, so your original question was irrelevant. I don't know whether she objected to it or not, but if she would have, I would have sustained it. Your follow-up question to impeach her answer to the improper question to begin with I would likewise sustain. I feel pretty comfortable with that. I'll let you make a proffer of it if you want to. You can introduce that. I'll let you put – we can put her back on the stand and let you ask her those questions and impeach her if you'd like to, but I don't think any of that is coming in. I'll, I'll let you make a proffer for the record though.

¶ 8 Defense counsel declined to place the witness back on the stand. The jury found Defendant guilty of assault on a female and not guilty of assault by pointing a gun.

II. Jurisdiction

¶ 9 Jurisdiction lies in this Court as a matter of right over a final judgment of a superior court, pursuant to N.C. Gen. Stat. § 7A-27(b) (2019) and N.C. Gen. Stat § 15A-1444(a) (2019).

III. Issue

¶ 10 The issue before this Court is whether the trial court abused its discretion, under Rules 403 and 608(b) of the North Carolina Rules of Evidence, when it sustained the State's objection to defense counsel's inquiry on cross-examination of a witness concerning her filing of a restraining order against Defendant's wife following the incident at issue.

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IV. Standard of Review

¶ 11 Pursuant to Rule 608(b), it is within the trial court’s discretion whether to allow cross-examination of a witness regarding specific instances of conduct if the conduct is relevant to the witness’ veracity. N.C. Gen. Stat. § 8C-1, Rule 608(b) (2019). Furthermore, “[i]t is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). “Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

V. Analysis

¶ 12 Defendant’s primary contention is that the trial court abused its discretion by not allowing Defendant to impeach Ms. Smith’s credibility after she stated she did not file a restraining order against Ms. Kuputsos. Also, Defendant argues that the initial question regarding the restraining order was to challenge the veracity of Ms. Smith’s statements that Ms. Kuputsos was her friend. Defendant contends that the second inquiry was probative of Ms. Smith’s veracity because she denied taking out the restraining order when defense counsel knew that she filed it on 28 October 2019. Additionally, Defendant notes defense counsel was initially denied the opportunity to

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be heard regarding the State's objection, and that the trial court misquoted Ms. Smith's answer to the question about the restraining order as, "I can't remember." Defendant has thus concluded the trial court was under a false impression of the witness' statement, and that is why the court barred defense counsel from impeaching the statement under 608(b).

¶ 13 The State correctly asserts, however, the defense counsel's argument at trial, for admissibility of the questioning, was not related to the veracity of Ms. Smith's friendship with Ms. Kuputsos. The State also argues that the follow up question was immaterial because the court sustained the objection to the initial question based on relevance. We agree with the State.

¶ 14 "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2019).

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may not be proved by extrinsic evidence. They may, however, in

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the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C. Gen Stat. § 8C-1, Rule 608(b) (2019). In *State v. Morgan*, our Supreme Court clarified “the very narrow” circumstance where specific instances of conduct are admissible evidence pursuant to Rule 608(b):

(1) the purpose of producing the evidence is to impeach or enhance credibility by proving that the witness’ conduct indicates his character for truthfulness or untruthfulness; and (2) the conduct in question is in fact probative of truthfulness or untruthfulness and is not too remote in time; and (3) the conduct in question did not result in a conviction; and (4) the inquiry into the conduct takes place during cross-examination. If the proffered evidence meets these four enumerated prerequisites, before admitting the evidence the trial judge must determine, in his discretion, pursuant to Rule 403, that the probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues or misleading the jury, and that the questioning will not harass or unduly embarrass the witness.

State v. Morgan, 315 N.C. 626, 634, 340 S.E.2d 84, 89–90 (1986). Our Supreme Court has also determined, “extrinsic evidence of prior inconsistent statements may not be used to impeach a witness where the questions concern matters collateral to the issues.” *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989). Testimony is collateral when it contradicts “a witness’s denial that he made a prior statement when

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that testimony purports to reiterate the substance of the statement.” *Id.* at 348, 378 S.E.2d at 757. “While it is axiomatic that the cross-examiner should be allowed wide latitude, the trial judge has discretion to ban . . . inquiry into matters of tenuous relevance.” *State v. Hatcher*, 136 N.C. App. 524, 526, 524 S.E.2d 815, 816 (2000).

¶ 15 The State’s argument is compelling and closely aligns with the trial court’s explicit reasoning for using its discretion under Rule 403. The court expressly stated the inquiry into the restraining order “was an improper question to begin with because it calls for irrelevant evidence – highly prejudicial evidence by the way – a completely separate incident involving a third party to this case.” The court’s statements at trial make its position clear the restraining order was prejudicial and remote from the case being tried, which shows the probative value was weighed against the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 401; N.C. Gen. Stat. § 8C-1, Rule 403. Based on the record, there is little indication the line of questioning was initially introduced to challenge the veracity of the witness’ statement that she was friends with Ms. Kuputsos. Though at the time of objection, the court’s determination to sustain under Rule 403 may have not considered Rule 608(b), the court provided defense counsel the opportunity to raise the argument for consideration outside the jury’s presence. The court’s express rationale for the objection, its consideration of defense counsel’s credibility argument later in the trial, and its offer to return the witness to the stand does not support Defendant’s

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contention that sustaining the objection was “unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.” *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

¶ 16 Despite being denied the opportunity to be heard at the time of the objection, defense counsel was heard on the matter after the jury was removed from the courtroom. During this discussion, the trial court made clear it considered the evidence inadmissible at the initial inquiry into the restraining order. Additionally, the court showed that it understood that defense counsel intended to use the line of questioning for impeachment purposes, by stating: “your original question was irrelevant. I don’t know whether she objected to it or not, but if she would have, I would have sustained it. Your follow-up question to impeach her answer to the improper question to begin with I would likewise sustain.” The court misquoted Ms. Smith’s response as “I don’t remember,” but the statements above show the court’s determination was based on the line of questioning as a whole, and after continued discussion, took into account admission of the testimony for impeachment purposes. Thus, the court’s false recollection of the witness’ response to defense counsel’s question did not cause its use of discretion to be arbitrary or manifestly unsupported by reason. *See id.* at 285, 372 S.E.2d at 527.

¶ 17 Regarding Defendant’s primary contention that he was not allowed to impeach Ms. Smith’s credibility, the trial court expressly offered defense counsel the

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opportunity to put Ms. Smith back on the stand for the purpose of impeaching her. After defense counsel argued the line of questioning should have been allowed to discredit Ms. Smith's testimony, the court stated:

I'll let you make a proffer of it if you want to. You can introduce that. I'll let you put – we can put her back on the stand and let you ask her those questions and impeach her if you'd like to, but I don't think any of that is coming in. I'll, I'll let you make a proffer for the record though.

¶ 18 Though the judge reiterated his aversion to the line of questioning proposed, he offered defense counsel an opportunity to impeach Ms. Smith. Defense counsel declined. Thus, Defendant was not denied the opportunity to impeach Ms. Smith's credibility, and the trial court did not abuse its discretion.

VI. Conclusion

¶ 19 We hold the trial court's decision to sustain the objection, to consider counsel's concerns with the jury absent, and to offer an additional opportunity for impeachment of the witness was supported by reason and within the court's discretion.

NO ERROR.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).