IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-610

No. COA20-893

Filed 2 November 2021

Mecklenburg County, Nos. 17 CRS 223968, 223970

STATE OF NORTH CAROLINA

v.

GERRARD R. WHITE, Defendant.

Appeal by Defendant from judgments entered 4 October 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 September 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Phyllis A. Turner, for the State.

Edward Eldred for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Gerrard R. White ("Defendant") appeals from judgments entered upon a jury conviction finding him guilty of (1) violating a domestic violence protective order and (2) assault on a female. Defendant argues that the trial court's admission of out-of-court statements from the alleged victim and her mother violated

his right to confrontation and the rule against hearsay. We hold Defendant received a fair trial free from prejudicial error.

I. Factual and Procedural Background

¶ 2 On or about 24 June 2017, Defendant was charged with (1) violating a domestic violence protective order, and (2) assaulting a female. Defendant's case was tried by jury from 1 to 4 October 2019 in Mecklenburg County Superior Court.

¶ 3 Police officers Ryan Blackmon and Nicholas Luiz testified for the State. Tomia Alston (the alleged victim) and her mother did not testify. The State introduced into evidence photographs of Ms. Alston while she was hospitalized, which depicted her injuries. The court took judicial notice of a domestic violence protective order that was filed by Ms. Alston and issued against Defendant on 21 November 2016.

A. Officer Blackmon's Testimony

¶ 4 Officer Blackmon's testimony tended to show the following:

¶ 5 On the afternoon of 24 June 2017, Officer Blackmon responded to a call for service. About three or four minutes after receiving the call, he arrived on the scene and "found three individuals . . . on the side of the road." He saw "a black female that was on the ground that had a rag or shirt on her face. . . . [A]nother black female [was] standing behind her. She looked like she was supporting her. . . . [A] black male . . . was on scene standing next to them." The woman on the ground was Ms.

Alston, the other woman was Ms. Alston's mother ("Mother"), and the man was Mother's boyfriend.

¶ 6 Ms. Alston "was extremely upset and crying"; there was "blood on her person" and "a little bit of blood on the ground that appeared to be coming from the left side of her face." She was "holding the rag to the left side of her face" where there "appeared to be some sort of injury[.]" "[S]he was . . . bleeding from the left side of her face." "[Mother's boyfriend] seemed concerned about Ms. Alston and what was happening to her . . . [and] that she was on the side of the road injured."

¶ 7 Officer Blackmon testified, "When I first arrived on scene [Mother] gave me the full name of the alleged perpetrator[,] . . . Gerrard White." Officer Blackmon asked them how to spell the name. "The victim, Ms. Tomia Alston, she helped me to spell his first name, and then provided me with a date of birth of the alleged perpetrator." While Ms. Alston was on the ground, "[s]he said that it hurts, and . . . when I asked how many times she had been hit, she stated that she had been hit four times."

B. Officer Luiz's Testimony

¶ 8 Officer Luiz and Officer Choice arrived on the scene a few minutes after Officer Blackmon. Officer Luiz's testimony tended to show the following:

¶ 9 Ms. Alston was taken away from the scene in an ambulance. Afterwards, Officer Luiz and his partner received a call for service, and they realized that

Defendant had placed the call. The service call from Defendant was placed approximately 20 to 30 minutes after the call for service on behalf of Ms. Alston. Officer Luiz testified, "We responded to the area that he sa[id] he was at. And from there we proceeded to talk with him, get his side of the story, take his statement from him. And then after we completed all that, we placed the Defendant under arrest." Officer Luiz identified Defendant in court.

C. Defendant's Testimony

¶ 10 Defendant testified in his own defense. Defendant's testimony tended to show the following:

¶ 11 On 24 June 2017, Defendant "received a call from Ms. Alston stating that she wanted to go grab something to eat." Defendant then "drove to her house and picked her up."

¶ 12 During the drive, Ms. Alston "confront[ed] [Defendant] about a Facebook post along [sic] with [Defendant] having another child with another female." Defendant stated that Ms. Alston "was up-raged [sic] and angry." Defendant ignored her questions and kept driving. Eventually, Ms. Alston "got fed up[.]" Defendant "told her, I'll just turn around and take you back home then. I can easily go back to where I was at." In response, Ms. Alston "jumped across the seat", and started "swinging on" and "jumping on" Defendant. Defendant "had to use force to get her off of [him]." He moved his elbow, which made contact with Ms. Alston's body.

¶ 13 Ms. Alston called her mother "[l]iterally right after[, l]ike in the midst" of the incident. Within two minutes after Defendant pulled over to the side of the road and stopped, Mother and Mother's boyfriend arrived. They were "furious." Ms. Alston was "grabbing her face" when she got out of the car. Defendant drove away.

D. Objections, Motions to Dismiss, and Jury Verdict

¶ 14 Before Officer Blackmon testified as to Ms. Alston's statements, Defendant's counsel objected on the grounds of hearsay, confrontation, and due process. The State moved to admit Ms. Alston's statements as excited utterances. The trial court allowed the statements on that basis. The trial court added that Officer Blackmon would be allowed to testify as to Mother's statement naming Gerrard White as the alleged perpetrator, reasoning that "[M]other's statement just explained what happened next, why she had to spell his name or help spell his name."

¶ 15 Defendant moved to dismiss both charges at close of the State's evidence and at the close of all the evidence. The trial court denied Defendant's motions. The jury found Defendant guilty of both charges.

II. Analysis

A. Preservation

¶ 16 The trial transcript does not reflect that Defendant gave oral notice of appeal in court. "Without the trial transcript, we cannot make a determination as to whether [D]efendant gave proper oral notice of appeal to this Court[.]" *State v. Parker*, 214

N.C. App. 190, 192, 713 S.E.2d 770, 772 (2011) (citations omitted). Defendant did not file a written notice of appeal. "[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 321 (citations omitted), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005).

¶ 17 Other documents before this Court support a conclusion that Defendant did in fact give oral notice of appeal. The judgments and appellate entries indicate that Defendant gave notice of appeal to the North Carolina Court of Appeals. Defendant's trial counsel signed an affidavit stating that he "personally gave oral notice of appeal in open court from the judgments to the North Carolina Court of Appeals" pursuant to Defendant's direction and wishes.

¶ 18 Defendant has filed a petition for writ of certiorari requesting appellate review of his case. The State concedes that there is evidence that Defendant gave oral notice of appeal and does not oppose Defendant's petition for writ of certiorari. We grant Defendant's petition.

B. Hearsay

¶ 19 Defendant argues that the statements of Ms. Alston and Mother, introduced through Officer Blackmon's testimony, were inadmissible hearsay. We disagree that Ms. Alston's statements were inadmissible hearsay and hold that the admission of Mother's statement did not prejudice Defendant.

1. Standard of Review

¶ 20 Defendant objected on hearsay grounds to the admission of Ms. Alston's and Mother's statements. "When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011) (citation omitted).

2. Ms. Alston's Statements

¶ 21 Ms. Alston did not testify at trial. Defendant objected on hearsay grounds to the introduction of her statements via Officer Blackmon's testimony. The State argued that the statements were admissible as excited utterances. We agree that the statements fit within the excited utterance exception.

¶ 22 In *State v. Hamlette*, 302 N.C. 490, 493, 276 S.E.2d 338, 341 (1981), the North Carolina Supreme Court upheld the trial court's admission of a victim's statements to the police as excited utterances. The Supreme Court pointed to circumstances that supported the trustworthiness of the victim's statements: the victim "was suffering from three gunshot wounds, was bleeding from the mouth and chest, was at the crime scene and, at the time of the second statement, was being prepared by ambulance attendants for the trip to the hospital." *Id.* at 495, 276 S.E.2d at 342. The victim's statements were made within three to thirteen minutes of the shooting. *Id.* at 493, 276 S.E.2d at 341. The Supreme Court noted that "[t]he statements do not in any way lose their spontaneous character because they were in response to questions such

as: 'What is wrong?' 'Who shot you?' 'How did they leave?'" *Id.* at 495, 276 S.E.2d at 342 (citations omitted).

¶ 23 The present case is analogous to *Hamlette* and other controlling case law where out-of-court statements to the police were admissible as excited utterances. When Ms. Alston made the challenged statements to Officer Blackmon, she was bleeding from the face. *See id.* (noting fact that victim was bleeding as a circumstance supporting trustworthiness of statements). An ambulance took her to the hospital soon after she made the statements. *See id.* (noting fact that victim "was being prepared by ambulance attendants for the trip to the hospital" as a circumstance supporting trustworthiness of statements). Officer Blackmon stated that Ms. Alston "was extremely upset and crying[.]" *See State v. Murphy*, 321 N.C. 72, 77, 361 S.E.2d 745, 748 (1987) (holding that statement was excited utterance and noting that the out-of-court declarant "was crying and extremely upset when she gave the statement").

¶ 24 Although the evidence does not indicate exactly how much time elapsed between the alleged assault and Ms. Alston's statements, the evidence suggests a timespan of only a few minutes: Ms. Alston called her mother immediately after the alleged assault, Mother and Mother's boyfriend met Ms. Alston within two minutes after Defendant stopped his car, and Officer Blackmon arrived on the scene about three or four minutes after receiving the service call. *See Hamlette*, 302 N.C. at 493,

276 S.E.2d at 341 (statements made within three to thirteen minutes of shooting were admissible as excited utterances). "This was not a situation wherein the declarant had time to reflect and fabricate untruthful answers." *Id.* at 495, 276 S.E.2d at 342.

¶ 25 Ms. Alston's statements "were excited reactions to a startling event." *Id.* The admission of her statements did not violate the rule against hearsay.

3. Mother's Statement

¶ 26 Mother did not testify at trial. Defendant objected on hearsay grounds to the introduction of her statement via Officer Blackmon's testimony. The trial court allowed the testimony because Mother's statement "just explained what happened next, why she had to spell his name or help spell his name." We hold the statement was inadmissible hearsay, but that its admission did not prejudice Defendant.

¶ 27 "Out-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. Specifically, statements are not hearsay if they are made to explain the subsequent conduct *of the person to whom the statement was directed*." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (emphasis added) (citations omitted), *cert. denied*, 537 U.S. 896 (2002); *see also State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998) ("[S]tatements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as nonhearsay evidence." (citation omitted)).

¶ 28 The trial court reasoned that Mother's statement to Officer Blackmon was

admitted not for the truth of the matter asserted (i.e. that "Gerrard White" was "the full name of the alleged perpetrator"), but instead to explain "what happened next" (i.e. why Ms. Alston helped spell the name). Our review of case law has not yielded any support for the proposition that an out-of-court statement is admissible to explain the subsequent conduct of another declarant who does not testify. Mother's statement to Officer Blackmon was not admitted to explain the conduct of Officer Blackmon (the person to whom she made the statement); it was admitted to explain Ms. Alston's conduct. *See State v. Rollins*, 226 N.C. App. 129, 139, 738 S.E.2d 440, 448 (2013) ("Statements by non-testifying witnesses which may implicate the defendant in a crime are permissible when they are *only used to explain the subsequent actions of the testifying witness*." (emphasis added) (citations omitted)). Mother's out-of-court statement identified Defendant as the perpetrator of the alleged assault and was not offered to explain the conduct of Officer Blackmon, the testifying witness. Mother's statement was inadmissible hearsay.

¶ 29 Although Mother's statement was hearsay, Defendant has not met his burden to show "a reasonable possibility that . . . a different result would have been reached" had the statement not been admitted. *State v. Wilkerson*, 363 N.C. 382, 420, 683 S.E.2d 174, 197 (2009) (internal quotation mark omitted) (citing N.C. Gen. Stat. § 15A-1443(a) (2007)). Mother's statement identified Defendant ("Gerrard White") as the person who had hit Ms. Alston. However, Defendant himself testified that he

"use[d] force" against Ms. Alston and that his elbow made contact with her body. He even admitted that Ms. Alston was "grabbing her face" when she got out of his car. Because Defendant's own testimony established that he hit Ms. Alston and injured her face, there is no reasonable possibility that the jury would have reached a different conclusion had Mother's statement not been admitted. We hold Defendant has not demonstrated he was prejudiced by the admission of this statement.

C. Confrontation Clause

¶ 30 Defendant argues that the admission of Ms. Alston's and Mother's statements violated his right to confront the witnesses against him and prejudiced him. We hold that the admission of Ms. Alston's and Mother's statements did not prejudice Defendant.

1. Standard of Review

¶ 31 We review *de novo* an alleged violation of the Confrontation Clause. *State v. Garner*, 252 N.C. App. 393, 400, 798 S.E.2d 755, 760 (2017).

¶ 32 "A violation of the Confrontation Clause occurs when a 'testimonial' statement from an unavailable witness is introduced against a defendant who did not have a prior opportunity to cross-examine the declarant." *Id.* (citing *Crawford v. Washington*, 541 U.S 36, 68 (2004)). A statement is "testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events

potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). A nontestimonial statement is one "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* "[T]he existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, the ultimate inquiry is whether the 'primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency.'" *Michigan v. Bryant*, 562 U.S. 344, 374 (2011) (citing *Davis*, 547 U.S. at 822) (alterations in original).

¶ 33 "[E]valuating whether a defendant's right to confrontation has been violated is a three-step process. We must determine: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Allen*, 171 N.C. App. 71, 74-75, 614 S.E.2d 361, 364-65 (2005) (citations and internal quotation marks omitted). "These three steps are separate and sequential, they are *not* three factors in a balancing test." *State v. Clonts*, 254 N.C. App. 95, 126, 802 S.E.2d 531, 552 (2017).

2. Ms. Alston's Statements

¶ 34 Assuming without deciding that Ms. Alston's statements were testimonial and their admission violated the Confrontation Clause, such an error was harmless

beyond a reasonable doubt. "[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988). "In the present case, the evidence of [D]efendant's guilt, even without considering the [challenged] statements . . . is overwhelming." *Allen*, 171 N.C. App. at 78, 614 S.E.2d at 367. Defendant's own testimony established that he purposely used physical force against Ms. Alston. Whether Defendant hit Ms. Alston "four times" (as Ms. Alston claimed) or some other number was irrelevant to the charge of assaulting a female. We hold there is no prejudice to Defendant, even assuming that admission of the statements was error. *See State v. Galindo*, 200 N.C. App. 410, 415, 683 S.E.2d 785, 788 (2009) (holding "no prejudicial error" even though challenged testimony violated Confrontation Clause, because the defendant's "own statement, in conjunction with the unchallenged testimony . . . establishe[d] beyond a reasonable doubt that, absent the admission of [the contested] testimony, a reasonable jury would have found defendant guilty of [the charged crime]" (citations omitted)).

3. Mother's Statement

¶ 35 Mother's statement was testimonial. Her identification of "Gerrard White" as the person who assaulted Ms. Alston had little or no utility in assisting Officer Blackmon to end a present emergency; instead, it recounted a past event and incriminated Defendant. *See State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 829-

30 (2007) (holding statements were testimonial when they "were neither a cry for help nor the provision of information enabling [the police officer] immediately to end a threatening situation" (quoting *Davis*, 547 U.S. at 831) (internal quotation marks omitted)); *see also Davis*, 547 U.S. at 822 (a statement is "testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

¶ 36 It is undisputed that the trial court did not rule as to whether Mother was unavailable to testify, and that Defendant had no opportunity to cross-examine Mother. The admission of Mother's testimonial statement, when the trial court did not properly rule that Mother was unavailable and Defendant had no opportunity to cross-examine Mother, violated Defendant's right to confrontation. *See Allen*, 171 N.C. App. at 74-75, 614 S.E.2d at 364-65 (Confrontation Clause analysis requires determination of whether challenged statement was testimonial, "whether the trial court properly ruled the declarant was unavailable", and "whether defendant had an opportunity to cross-examine the declarant").

¶ 37 However, the erroneous admission of Mother's statement was harmless beyond a reasonable doubt. "[T]he presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *Autry*, 321 N.C. at 400, 364 S.E.2d at 346. "In the present case, the evidence of [D]efendant's

guilt, even without considering the [challenged] statements . . . is overwhelming." *Allen*, 171 N.C. App. at 78, 614 S.E.2d at 367. The identity of the person who hit Ms. Alston was not in question. Defendant himself admitted that he "use[d] force" against Ms. Alston and that his elbow made contact with her body. He testified that Ms. Alston was "grabbing her face" when she got out of his car. Officer Luiz identified Defendant in court. Because other evidence clearly established the identity of the person who hit Ms. Alston, there is no reasonable possibility that the jury would have reached a different conclusion had Mother's statement not been admitted. We hold there is no prejudice to Defendant, even assuming that the admission of Mother's statement was error. *See Galindo*, 200 N.C. App. at 415, 683 S.E.2d at 788 (finding "no prejudicial error" even though challenged testimony violated Confrontation Clause, because the defendant's "own statement, in conjunction with the unchallenged testimony . . . establishe[d] beyond a reasonable doubt that, absent the admission of [the contested] testimony, a reasonable jury would have found defendant guilty of [the charged crime]" (citations omitted)).

III. Conclusion

¶ 38 For the foregoing reasons, we hold Defendant received a fair trial free from prejudicial error.

NO ERROR.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).