IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-182

Filed 21 November 2023

Madison County, No. 20-CRS-50060

STATE OF NORTH CAROLINA

v.

OTIS LEE MELTON

Appeal by defendant from judgment entered 31 August 2022 by Judge Gregory R. Hayes in Madison County Superior Court. Heard in the Court of Appeals 19 September 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne J. Brown, for the State.

Leake & Stokes, PLLC, by Larry Leake and Alexandria E. Leake, for defendant-appellant.

THOMPSON, Judge.

In this appeal, defendant asks the Court to vacate the judgment entered upon his conviction on a single count of second-degree forcible rape, arguing that the trial court erred in allowing certain testimony to be admitted and committed plain error

in instructing the jury. We are not persuaded, and accordingly, we find no error.

I. Factual Background and Procedural History

The evidence at defendant's trial tended to show the following: On the morning of 29 January 2020, Detective Steven Carver of the Madison County Sheriff's Department (MCSD) conducted a brief interview with Natasha Chandler in connection with a report received from Mission Hospital that Chandler had been raped. Chandler told Carver the following: Chandler had been living with various friends and family members for approximately six months after being evicted from the apartment where she had previously resided with her husband. Chandler and defendant, who knew each other from school, had been interacting via social media for several years, and defendant had offered Chandler a place to stay in light of her housing difficulties. Late on the night of 27 January 2020, a friend drove Chandler to meet defendant, and then defendant drove Chandler to his home, where she noted that he had a pet dog. After they sat on defendant's sofa and talked for some time, defendant showed Chandler the room where she would be sleeping. When Chandler observed numerous cockroaches on the bed, however, she informed defendant that she did not want to stay with him after all.

At that point, defendant pushed Chandler onto the bed, causing Chandler to strike her head on the adjacent wall and lose consciousness for a brief period. When Chandler regained consciousness, defendant had removed her pants and his pants, and had climbed on top of her. Chandler struggled against defendant, saying "No, no,

no. I don't want this." Nonetheless, defendant forced vaginal intercourse upon Chandler, ejaculating inside her body. At that point, defendant allowed Chandler to get dressed but became angry, telling Chandler that he had a girlfriend who must not find out about his assault of Chandler. Defendant told Chandler she had to leave, and Chandler called a friend to come and retrieve her from defendant's home, but the friend was not able to do so. An argument then ensued between defendant and Chandler, with defendant ultimately striking Chandler multiple times, including on her chest. Chandler, who had a pacemaker implanted, told defendant that the device was "messing up" and was able to convince defendant to transport her to a hospital.

Carver made contemporaneous notes of his interview with Chandler and then provided her with a victim statement form promulgated by the MCSD on which Chandler could record the events surrounding the assault in her own words. After Chandler completed her written victim statement, she and Carver each signed the form and Carver additionally noted the time, date, and location of the account.

Following his interview of Chandler, Carver conducted an audio- and video-recorded interview with defendant. Defendant first acknowledged arriving at his home at about midnight of 27 January 2020 and stated that he drove Chandler to the hospital because she had told him that her pacemaker was "acting up." When Carver asked defendant if he had sex with Chandler, defendant said yes and reported that Chandler "had talked [him] into it." Defendant elaborated that while Chandler was at his residence, he had cooked dinner for himself while Chandler sat on his sofa, and

when asked whether anything else happened, defendant replied, "I pretty much told you what happened."

At that point Carver left the interview room to speak with Lieutenant Coy Phillips of the MCSD, who then completed defendant's interview without Carver. Speaking to Phillips, defendant confirmed that he and Chandler knew each other from school, Chandler had been at defendant's home on the night in question, the two had argued about the presence of cockroaches in defendant's home, and that defendant had sex with Chandler. Further, defendant admitted to Phillips that Chandler had told defendant that she did not want to have sex with defendant, but that defendant did not stop at that point due to "sexual desire." Shortly thereafter, defendant asked to end the interview, but once in the lobby of the MCSD, he asked Phillips if they could continue speaking. On their way back to the interview room, defendant asked Phillips how much trouble he would be in if Chandler had told him "no" three times. Once back in the MCSD interview room, defendant told Phillips that Chandler had actually told him "no" two times, but defendant did not stop having intercourse with Chandler because "he was horny." Defendant also acknowledged to Phillips that what he had done to Chandler "was wrong."

On 7 February 2020, defendant was indicted on one count of second-degree forcible rape. About a year and one-half after the alleged crime and about one year prior to defendant's trial, Chandler was involved in an accident and suffered at least five strokes, resulting in memory loss among other impacts. The case came on for trial

before the Honorable Gregory R. Hayes, Judge presiding, at the 29 August 2022 session of Superior Court, Madison County. At trial, Carver was permitted to testify to his memory of what Chandler told him in their verbal interview over defendant's hearsay objection. While allowing the testimony, the trial court first stated that Carver could testify "not for the truth of the matter asserted, just to show how [Carver] responded to the report." Part of the way through Carver's testimony, defendant interjected that Carver appeared to be "reading notes off of something." Carver agreed that he was referring to his contemporaneously recorded notes of the interview with Chandler and then continued his testimony, but shortly thereafter, the prosecutor asked specifically about Chandler's comments to Carver, at which point defendant lodged a general hearsay objection. The trial court allowed Carver to continue his testimony about what Chandler told him on 29 January 2020, noting that Carver's account of Chandler's remarks was "subject to being corroborated later by [] Chandler." The State further had Carver identify Chandler's written victim statement dated 29 January 2020 although the statement itself was not admitted.

When Chandler was called to testify, her memory issues caused her to only be able to recall and testify about fragmentary aspects of her encounter with defendant: knowing defendant from school, being driven by her friend to meet defendant, sitting on a sofa in defendant's home, seeing roaches all over the home including on a bed, seeing defendant's dog, and scratching defendant's back. Chandler could not recall and therefore did not testify regarding other details of the night of 27–28 January

2020. While Chandler was able to recognize her handwriting on the written victim statement that she prepared for Carver, she was not able to read the statement. Defendant objected to the introduction of the written statement on hearsay grounds, and following discussion among the court and counsel, the trial court ruled that Carver could read the statement to the jury, citing the recorded recollection hearsay exception established under Rule of Evidence 803(5).[1]

At the conclusion of Chandler's testimony, Carver was recalled to the stand to read Chandler's written victim statement:

> We talked on Facebook. I told him I homeless. He told me he can help me out till I find a place to rent, and told me okay. He told me he got off at 11 PM. Told me, meet him at the end of the road at 11:45 PM. Told him okay. My friend took me down the road to meet him. I got in his car and we went to his house. We went in his house. We sat on couch. He played with his phone and I was petting the dog. And talked to him—talked to him or her. Then I told them, use bathroom. He took me to bathroom and after that he took me bedroom. Showed me where I sleep. I told him, well, don't sleep in bed. I have bugs all over bed and wall and floor. And after he turned off the light—he turned the light off, he pushed me on his bed and hit my hit. Went out a few minutes, then he took pat off. I told him no. Then he took my . . . [Carver could not read the following word or words].

[1] Rule of Evidence 803 establishes hearsay exceptions in circumstances where a declarant is available and subsection (5) applies to "[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." N.C. Gen. Stat. § 8C-1, R. 803(5) (2021).

Defendant does not argue on appeal that the trial court erred in admitting Chandler's victim statement as a recorded recollection under Rule 803(5).

> Then he put his thing inside me. I told him no. He keep doing sex on me and I try to scratch his back, get off me. then he done. He was argument, then he hit me in chest and arm and legs. Then I call my friend to come get me. She said she took sleeping pill. She could—he got made at me. The we went to his car. I told, I told take me to hospital, then we get in argument in car. He hit me in chest, then he took me hospital, then he left.

Defendant did not cross-examine Carver following the reading of Chandler's written statement.

Thereafter, the recording of the interviews of defendant by Carver and Phillips was played for the jury without objection. Additional testimony from the friend of Chandler's who drove her to meet defendant and from the sexual assault nurse examiner (SANE nurse) who examined Chandler at Mission Hospital confirmed most of the details from Chandler's oral and written statements about the events surrounding her rape by defendant.

Defendant did not present evidence, but his theory of the case was that defendant had engaged in sexual intercourse with Chandler at the time and place as alleged in the rape indictment, but that the encounter had been consensual.

A few minutes after the jurors began their deliberations, they sent a message to the trial court asking for Chandler's written statement. The trial court noted that the statement itself had not been admitted as an exhibit, and indeed could not be admitted as an exhibit pursuant to Rule 803(5) because defendant had not offered it. The prosecutor suggested that the jury be brought back to the courtroom and Carver

be asked to reread the statement to the jury. The trial court recalled the jury to the courtroom and offered them this option. When multiple jurors agreed to the proposed solution, the trial court directed Carver to reread Chandler's written statement. Defendant did not object at any point to this method of accommodating the jury's request. After Carver reread Chandler's written victim statement, the trial court reinstructed the jury regarding the burden of proof and reasonable doubt. The trial court then asked counsel for the State and for defendant whether they had any objections to the instructions just given or desired that any additional instructions be given. Counsel affirmed that they had no objections and no additional requests.

After further deliberations, the jury returned a verdict of guilty on the rape charge. The trial court entered a sentence upon that judgment of 73 to 148 months, and defendant gave notice of appeal in open court.

II. Analysis

Defendant presents this Court with three arguments: that the trial court 1) erred by allowing testimony from Carver about the out-of-court statements made by Chandler; 2) erred by allowing Carver to read a previously admitted statement to the jury for a second time during the course of their deliberations; and 3) plainly erred by failing to reinstruct the jury to consider all of the evidence after allowing Carver to reread Chandler's statement to the jury. We reject each of defendant's arguments.

A. Carver's testimony about his interview of Chandler

Defendant first challenges the trial court's admission of Carver's testimony about what Chandler told him in their oral interview. Specifically, defendant contends that Carver's account, which was admitted for the purpose of corroboration of Chandler's evidence, manifestly contradicted Chandler's later trial testimony such that the trial court should have stricken that portion of Carver's testimony and instructed the jury to disregard it. We disagree.

Appellate courts review most evidentiary issues for an abuse of discretion, *see State v. Corbett*, 376 N.C. 799, 819, 855 S.E.2d 228, 224 (2021), a high bar to overcome which requires a showing by the appellant that the trial court's decision was "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).

At trial, defendant objected to Carver's testimony about what Chandler told him on hearsay grounds. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," N.C. Gen. Stat. § 8C-1, Rule 801(c) (2021), and is generally inadmissible at trial. *State v. Morgan*, 359 N.C. 131, 154, 604 S.E.2d 886, 900 (2004), *cert. denied*, 546 U.S. 830 (2005). Out-of-court statements fall outside the bounds of hearsay, however, when they are not "offered in evidence to prove the truth of the matter asserted," N.C. Gen. Stat. § 8C-1, Rule 801(c), but are rather offered for some other purpose. Prior statements of a witness that are admitted for *corroborative*

purposes rather than as *substantive* evidence, for example, are not hearsay and thus may be admitted with appropriate instructions to the jury on how such statements may be considered. *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303–04 (1991). "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980).

In assessing whether the prior statement of a witness is admissible as corroborative, we look only to whether a witness's prior statement " 'tend[s] to add weight or credibility to the witness'[s] testimony. . . .' Moreover, 'if the previous statements are generally consistent with the witness'[s] testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement.' " *State v. Walters*, 357 N.C. 68, 88–89, 588 S.E.2d 344, 356–57 (2003) (first quoting *State v. Farmer*, 333 N.C. 172, 192, 424 S.E.2d 120, 131 (1993), and then quoting *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983)). *See also State v. Thompson*, 250 N.C. App. 158, 165–66, 792 S.E.2d 177, 182–83 (2016), *appeal dismissed and disc. rev. denied*, 369 N.C. 485, 795 S.E.2d 366 (2017). Moreover, " 'wide latitude' [is] 'grant[ed] to the admission of this type of evidence,' " *State v. Caballero*, 383 N.C. 464, 475, 880 S.E.2d 661, 669 (2002) (alterations in original) (quoting *Martin*, 309 N.C. at 476, 308 S.E.2d at 284). Ultimately, of course, whether an admitted out-of-court statement has actually corroborated a witness's

trial testimony is a question for the factfinder to resolve. *Id.* at 477, 880 S.E.2d at 670 (citation omitted).

Defendant cites *State v. Frogge*, 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997) for the proposition that it is error for a statement to be admitted for corroborative purposes where that statement is "manifestly contradictory" to the witness's evidence at trial. The State counters that because the written victim statement created by Chandler on 29 January 2020 and read to the jury by Carver was admitted as a recorded recollection under Rule of Evidence 803(5), it constituted substantive evidence and, therefore, the proper comparison when assessing the corroborative nature of Carver's account of his interview of Chandler is Chandler's written victim statement rather than Chandler's trial testimony. The State's position is correct on this point.

Rule 803(5) creates a hearsay exception and accordingly, evidence admitted pursuant to this rule may be considered by the jury as substantive evidence. *See State v. Hocutt*, ___ N.C. App. __, ___, 890 S.E.2d 730, 734 (2023). We thus consider whether Carver's testimony about what Chandler told him was corroborative of Chandler's written victim statement.

Here, Carver's testimony was plainly corroborative of Chandler's written victim statement. Moreover, in our view, there are no "manifest[ ] contradict[ions]," *Frogge*, 345 N.C. at 618, 481 S.E.2d at 280, even between Chandler's trial testimony and either her written victim statement or Carver's account of what Chandler told

him during their interview on 29 January 2020. While at the time of trial Chandler could only recall certain parts of the evening when defendant raped her, the details she did recall were fully corroborative of her reports made at the time of the incident, and Chandler was candid and consistent about what she did not recall. As for any differences amongst these pieces of evidence, any "[s]uch variations affect only the credibility of the evidence which is always for the jury." *Harrison*, 328 N.C. at 682, 403 S.E.2d at 304 (citation and internal quotation marks omitted). Given the repeated testimony from Chandler herself about her memory issues, the jury in this case was surely equipped with adequate knowledge with which to assess her credibility and weigh the evidence about the interaction between defendant and Chandler which took place on 27–28 January 2020. Accordingly, we perceive no error by the trial court in admitting the challenged testimony from Carver as corroborative evidence.

We note moreover that, given additional, unchallenged testimony offered in this case from the friend who drove Chandler to meet defendant and the SANE nurse, who each gave testimony that was consistent with and thus corroborated Chandler's 2020 statements, both written and verbal, in conjunction with defendant's own statements to Phillips—acknowledging that he, at a minimum, continued to have sex with Chandler even after she told him "no" at least twice and that defendant knew that what he did was wrong—even if there had been any error by the trial court, defendant would be unable to show that he was prejudiced by such an error. *See* N.C. Gen. Stat. § 15A-1443(a) (2021).

B. Rereading of Chandler's statement

Defendant next argues that the trial court abused its discretion in allowing Carver to reread Chandler's written statement to the jury shortly after the jury began its deliberations. Defendant particularly contends that the trial court abused its discretion in that "the court on the day before specifically stated 'the rationale behind [not allowing the written statement to be admitted as an exhibit] is to prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined.' " We disagree and observe that defendant may have misunderstood the import of the statutes relevant to his argument on this issue.

As an initial matter, we note that the trial court did *not* admit the written victim statement as an exhibit, but rather only permitted Carver to read the statement to the jury as specifically permitted under Rule of Evidence 803(5). As discussed in more detail above, Carver's testimony in the form of his reading Chandler's written victim statement was properly admitted under Rule 803(5), and defendant has not challenged that decision in this appeal. Further, pertinent to our resolution of defendant's argument, the North Carolina General Statutes provide that:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. *The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury* and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the

> judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2021) (emphasis added). The relevant standard thus being one of discretion, we reiterate that a trial court's ruling constitutes an abuse of discretion only where such decision was "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

Given that Carver's reading of the written victim statement was already part of the testimony given at trial and thus was already evidence before the jury, and because N.C. Gen. Stat. § 15A-1233(a) explicitly permits the rereading of testimony to the jury upon its request, we hold that the trial court did not err, much less abuse its discretion, in complying with this statutory provision. The phrasing of defendant's appellate argument on this point suggests that what he is actually taking issue with is the ability for a recorded recollection to be introduced via testimony, under Rule of Evidence 803(5) and then for such testimony to be reread to the jury during its deliberations, under Section 15A-1233(a). Whatever the merits of defendant's concerns about the potential prejudicial impact of these statutes, they are better directed to the General Assembly, as this Court is tasked with simply applying those explicit provisions in line with existing precedent.

C. Jury instruction following the rereading of the victim statement

In his final argument, defendant asserts that it was plain error for the trial court to fail to instruct the jury that it must consider all of the evidence adduced at trial following Carver's rereading of Chandler's written victim statement a short time into the jury's deliberations. We perceive no prejudicial error by the trial court here.

We begin by noting again that defendant did not object to the rereading of the written victim statement, and furthermore, when the trial court asked defendant if he had any objection to the trial court's repeated instructions at that point—regarding the burden of proof and reasonable doubt—or desired that the trial court give any additional instructions to the jury, defendant answered in the negative. Accordingly, as he acknowledges, defendant is entitled only to plain error review of this issue.

"An issue that was neither preserved by an objection lodged at trial nor deemed to have been preserved by rule or law despite the absence of such an objection can be made the basis of an issue on appeal if the judicial action in question amounts to plain error." *Caballero*, 383 N.C. at 473, 880 S.E.2d at 667–68 (citing N.C. R. App. P. 10(a)(4)).

> Plain error is error that seriously affects the fairness, integrity, or public reputation of judicial proceedings and is to be applied cautiously and only in the exceptional case. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial, with the defendant being required to show prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

Id. at 473–74, 880 S.E.2d at 668 (citations, quotation marks, and brackets omitted).

Defendant cites *State v. Weddington* for the proposition that a trial court, having allowed a jury's request during deliberations to review trial testimony under N.C. Gen. Stat. § 15A-1233(a), then "must instruct the jury that it must remember and consider the rest of the evidence." 329 N.C. 202, 207, 404 S.E.2d 671, 674 (1991) (citing *State v. Watkins*, 89 N.C. App. 599, 605, 366 S.E.2d 876, 880, *disc. review denied*, 323 N.C. 179, 373 S.E.2d 123 (1988)). While the trial court here did not separately instruct the jury to "remember and consider the rest of the evidence," it did reinstruct the jury on the burden of proof and reasonable doubt, specifically as those legal concepts apply to the charge of second-degree forcible rape.

Assuming without deciding that this constituted error, we conclude that defendant has not demonstrated plain error because, in light of the evidence from Chandler, her friend, and the SANE nurse, along with defendant's recorded admissions that he had sex with Chandler despite her saying no multiple times at the time and place when and where she reported that her rape occurred and further acknowledged that he knew he had done something wrong, defendant has not shown that the jury probably would have reached a different result had the trial judge instructed the jury that "it must remember and consider the rest of the evidence." *Weddington*, 329 N.C. at 207, 404 S.E.2d at 674 (citation omitted).

III. Conclusion

For the reasons explicated above, we conclude that defendant received a trial free from prejudicial error.

NO ERROR; NO PREJUDICIAL ERROR.

Judges HAMPSON and STADING concur.

Report per Rule 30(e).