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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-831

Filed 7 May 2024

Edgecombe County, No. 21 CRS 52225

STATE OF NORTH CAROLINA

v.

ANTWAN ALLEN

Appeal by Defendant from Judgment entered 18 April 2023 by Judge L. Lamont Wiggins in Edgecombe County Superior Court. Heard in the Court of Appeals 19 March 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Robert C. Ennis, for the State.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP., by Sam J. Ervin, IV, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Antwan Allen (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury. The Record before us, including evidence presented at trial,

STATE V. ALLEN

Opinion of the Court

tends to reflect the following:

On 30 October 2021, Christopher Whitehead and Shaylan Suggs stopped at a convenience store in Tarboro, North Carolina. There, they encountered Henry Bullock, Whitehead's cousin, who invited them to a nearby house for drinks. According to Whitehead, they drove to 618 Linden Street. Suggs stayed in the passenger seat while Whitehead went to knock on the front door. At trial, Whitehead testified the following encounter occurred:

Whitehead knocked on the door and was told to come inside. He entered and walked toward the kitchen, where he saw Bullock. As Whitehead "got right by the kitchen, gunshots start ringing off." Whitehead stated he saw Defendant three to four feet away from him, and Defendant "just kept firing the gun" until Whitehead heard a click, indicating the magazine had run out of bullets. Whitehead was struck by twelve bullets in his torso, neck, and arms. He was also "grazed twice" by bullets. Whitehead then walked back to the car and drove himself to the hospital with Suggs. Whitehead received emergency medical treatment upon arriving at the hospital and was ultimately taken by helicopter to another hospital for further treatment and surgery.

Whitehead testified that while he was in the hospital, he received a phone call from Bullock, who then handed the phone to Defendant. According to Whitehead, Defendant stated he did not mean to shoot him and offered to pay him not to report the incident. Whitehead hung up the phone.

STATE V. ALLEN

Opinion of the Court

Police at the hospital believed the shooting occurred in the county rather than Tarboro, so they reported the incident to the local Sheriff's office in Greenville, North Carolina. Whitehead refused to cooperate with law enforcement at the time. Whitehead was discharged from the hospital on 5 November 2021.

On 17 November 2021, Whitehead returned to the hospital due to complications from his gunshot wounds. While there, he contacted the Tarboro Police Department for the first time about the shooting. The next day, Officer Bryant Lewis took Whitehead's statement, reporting the incident as recounted above. Whitehead told Officer Lewis he had not initially reported the incident to police because he was "in a confused state" and "wasn't sure he wanted to cooperate with police in the matter." Officer Lewis then transferred the case to the detective division.

Whitehead's report was investigated by Detective Brandon Richardson of the Tarboro Police Department. On 1 December 2021, Detective Richardson interviewed Whitehead, and Whitehead reported the same account he had given to Officer Lewis. The same day, Detective Richardson and Whitehead drove to 618 Linden Street to view the alleged scene of the incident. Detective Richardson knocked on the door and Lisa Pitt, Defendant's girlfriend, answered. Pitt declined to allow Detective Richardson to search the house at that time, and Detective Richardson gave her his contact information and set up a date to meet. Detective Richardson then took photographs of the vehicle Whitehead was driving on the night he was shot, which showed dark red or brown matter consistent with dried blood.

STATE V. ALLEN

Opinion of the Court

On 7 December 2021, Detective Richardson returned to 618 Linden Street and spoke with Pitt. When Detective Richardson searched the house, he observed no physical evidence of a shooting. Pitt stated she had been drinking on the day in question and was asleep at the house and did not hear anything. Pitt reported that when she woke up, she was told Whitehead had been shot.

On or about 10 October 2022, Defendant was indicted for Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury. The case came on for trial on 17 April 2023. At trial, defense counsel asked Detective Richardson about his conversation with Pitt during cross-examination. On redirect examination, the prosecutor returned to that conversation:

[State's Counsel]: But you did speak with Ms. Pitt, as Mr. Simmons said, and she told you that there was blood on the steps outside?

[Detective Richardson]: She told me that. Yes.

Defendant made no objection. Detective Richardson then testified that when he had inspected the premises, however, he saw no blood on the steps. Pitt later testified that she did not remember telling Detective Richardson she had seen blood on the steps and, in fact, she had never seen blood on the steps.

Additionally, on direct examination, the prosecutor asked Detective Richardson whether he had spoken to Defendant during his investigation. Detective Richardson stated he had "made it known" he was trying to find Defendant and he had gone by the house where he believed Defendant lived, but he was never able to

contact Defendant. Defendant did not object to this testimony.

On 18 April 2023, the jury returned a verdict finding Defendant guilty of Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury. The trial court sentenced Defendant to 84 to 113 months of imprisonment. Defendant orally entered Notice of Appeal in open court on 18 April 2023.

Issues

The issues are whether the trial court plainly erred by allowing Detective Richardson to testify that: (I) despite his efforts, he was unable to contact Defendant; and (II) Pitt had told him she had observed blood on the steps of the residence in which Whitehead stated the shooting occurred.

Analysis

As defense counsel acknowledges, Defendant did not object to the testimony related to either issue at trial. Consequently, our review is limited to plain error. *See State v. Worley*, 268 N.C. App. 300, 303, 836 S.E.2d 278, 282 (2019) (“In criminal cases, unpreserved issues 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.” (citation and quotation marks omitted)).

“For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, “[t]o show that an error was fundamental, a defendant must establish 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.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for “the exceptional case where, after reviewing the entire record, it can be said the claimed error is a ‘*fundamental*’ error, something so basic, so prejudicial . . . that justice cannot have been done,’ or ‘where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]’ ” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

I. Efforts to Contact Defendant

Defendant contends the trial court plainly erred by admitting Detective Richardson’s testimony regarding his inability to contact Defendant during the investigation. Defendant argues admission of this testimony violated the North Carolina Rules of Evidence, as well as the North Carolina and federal constitutions.

During direct examination, counsel for the State asked Detective Richardson whether he tried to speak with Defendant and several witnesses about the shooting. Detective Richardson testified he had “made it known that [he] was trying to locate [Defendant]” and had gone by the house in which he believed Defendant was residing, but was never able to contact Defendant. Defendant contends the State sought to introduce Richardson’s testimony as an implied admission or an admission by silence on Defendant’s part.

STATE V. ALLEN

Opinion of the Court

Except as provided in our Rules of Evidence, “[a]ll relevant evidence is admissible[.]” N.C. Gen. Stat. § 8C-1, Rule 402 (2021). Under our Rules of Evidence, “[h]earsay is not admissible except as provided[.]” N.C. Gen. Stat. § 8C-1, Rule 802 (2021). “ ‘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). A statement, for the purposes of hearsay, may include “nonverbal conduct of a person, if it is intended by him as an assertion.” N.C. Gen. Stat. § 8C-1(a) (2021). “[O]ut-of-court statements that are offered for purposes other than to prove the truth of the matter asserted are not considered hearsay.” *State v. Elkins*, 210 N.C. App. 110, 121, 707 S.E.2d 744, 752 (2011) (quoting *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998)).

Here, Detective Richardson’s testimony was admissible for a permissible, non-hearsay purpose. His testimony was admissible to explain his investigative process, which Defendant had suggested was flawed. “[W]hen a [party] in a criminal case offers evidence which raises an inference favorable to his case, the [other party] has the right to explore, explain or rebut that evidence.” *State v. McKoy*, 385 N.C. 88, 95, 891 S.E.2d 74, 79 (2023) (citation omitted). Further, “the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.” *Id.* (citation omitted). Moreover, prosecutors may generally defend the tactics of investigating authorities when those tactics are challenged. *State v. Lloyd*, 354 N.C.

76, 114, 552 S.E.2d 596, 623 (2001).

Defendant's cross-examination of Detective Richardson suggested his investigation was flawed by eliciting testimony that Whitehead's delay in reporting the incident negatively impacted the case and implying the case had not been thoroughly investigated because Detective Richardson had not spoken to several witnesses. Thus, Detective Richardson's statement was admissible for a permissible, non-hearsay purpose to explain his investigative process and rebut the negative inferences Defendant had elicited. Because the testimony was admissible, its admission does not constitute plain error.

II. Pitt's Alleged Statement

Defendant contends the trial court plainly erred by admitting Detective Richardson's testimony regarding a statement Pitt allegedly made to him. During redirect examination by counsel for the State, the following exchange occurred without objection:

[State's Counsel]: [Y]ou did speak with Ms. Pitt . . . and she told you that there was blood on the steps outside?

[Detective Richardson]: She told me that. Yes.

As we noted above, "out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *Call*, 349 N.C. at 409, 508 S.E.2d at 513; *see also State v. Frierson*, 153 N.C. App. 242, 245, 569 S.E.2d 687, 689 (2002) ("If a statement is offered for any other purpose [than the truth of the

STATE V. ALLEN

Opinion of the Court

matter asserted], it is not hearsay and is admissible.” (citation omitted)). Further, “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 (2002) (citation omitted).

In *Gainey*, the defendant challenged the admission of testimony about a phone call the victim’s father had received that led him to contact the police who, based on the information the victim’s father provided, apprehended the defendant. *Id.* There, our Supreme Court held the father’s testimony “was not offered to prove the truth of the matter asserted, but rather to explain his subsequent actions.” *Id.* Similarly, in *State v. Alexander*, this Court concluded a law enforcement officer’s testimony about a tip he received from a detective about a person with information regarding an ongoing case and his conversation with that person was admissible. 177 N.C. App. 281, 284, 628 S.E.2d 434, 436 (2006). There, this Court stated the above testimony “was nonhearsay and proper to explain [the officer’s] subsequent actions.” *Id.*

Likewise, in the present case, Detective Richardson’s testimony was admissible to explain his subsequent actions. Detective Richardson’s interview of Pitt occurred at the beginning of his investigation. At that point, the only evidence Detective Richardson had in this case was Whitehead’s statement. Pitt’s alleged statement was thus necessary to explain why Detective Richardson continued the investigation in the absence of physical evidence to substantiate Whitehead’s story. Such testimony is admissible, consistent with our precedent, as non-hearsay.

STATE V. ALLEN

Opinion of the Court

Therefore, we conclude the admission of this portion of Detective Richardson's testimony was not error and, consequently, was not plain error.

Defendant also contends this portion of Detective Richardson's testimony was inadmissible because counsel for the State asked a leading question. We disagree.

A leading question is "one which suggests the answer desired." *State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 235 (1974). Generally, "an examining counsel should not ask his own witness leading questions on direct examination." *Id.* "However, a trial judge must 'exercise reasonable control over the mode . . . of interrogating witnesses[.]'" *State v. Riddick*, 315 N.C. 749, 755, 340 S.E.2d 55, 59 (1986) (quoting N.C. Gen. Stat. § 8C-1, Rule 611(a) (1985)). A trial court's decision to allow leading questions on direct examination is discretionary. *Id.* at 756, 340 S.E.2d at 59; *see also State v. Smith*, 290 N.C. 148, 160, 226 S.E.2d 10, 18, *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L. Ed. 2d 301 (1976).

In *State v. Lesane*, this Court concluded the trial court did not abuse its discretion by permitting the prosecutor to ask a leading question. 137 N.C. App. 234, 243, 528 S.E.2d 37, 43 (2000). There, "the prosecutor asked the leading question only after [the witness] testified that she had seen nothing else; he thus did so in an attempt to refresh her memory." *Id.* The situation here is analogous. In this case, counsel for Defendant asked Detective Richardson several questions about his conversation with Pitt during cross-examination. In fact, Defendant's counsel asked an open-ended question: "[W]hat did [Pitt] tell you?" Detective Richardson answered,

STATE V. ALLEN

Opinion of the Court

relaying several things Pitt had told him, and also answered defense counsel's follow-up questions. His answers suggested he had testified to everything relevant he remembered about that conversation. It was, therefore, reasonable for the trial court to permit the prosecutor to ask a leading question. Thus, we conclude the trial court did not abuse its discretion, and admission of this portion of Detective Richardson's testimony was not plain error.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no plain error in Defendant's trial and affirm the Judgment.

NO ERROR.

Judges GRIFFIN and THOMPSON concur.

Report per Rule 30(e).