

NO. COA14-490

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v.

New Hanover County
Nos. 10 CRS 61706, 62183

BO ANDERSON TAYLOR

Appeal by defendant from judgments entered 16 September 2011 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 8 October 2014.

Attorney General Roy Cooper, by Associate Attorney General Melody Hairston, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant.

ERVIN, Judge.

Defendant Bo Anderson Taylor appeals from judgments entered based upon his convictions for misdemeanor larceny, felonious breaking or entering a trailer, and five counts of obtaining property by false pretenses. On appeal, Defendant contends that the trial court erred by allowing the admission of evidence affirming the truthfulness of the alleged victim and by allowing the State to elicit extensive testimony that Defendant had exercised his right to remain silent as part of its case in

chief. After careful consideration of Defendant's challenges to the trial court's judgments in light of the record and the applicable law, we conclude that Defendant is entitled to a new trial.

I. Factual Background

A. Substantive Facts

1. State's Evidence

In October 2010, Defendant and his girlfriend, Gail Lacroix, were living with Defendant's sister, Crystal Medina. In view of the fact that Ms. Lacroix was Defendant and Ms. Medina's step-mother, no one in the family was happy about the relationship between Defendant and Ms. Lacroix.

Because she did not have any room in her house to accommodate Defendant and Ms. Lacroix, Ms. Medina allowed them to stay in a shop located in her backyard. At the time that Defendant and Ms. Lacroix moved in, the Medinas were planning to separate and Ms. Medina's husband was in jail.

The Medinas had formerly owned and operated a residential and commercial concrete business and had purchased several tools for use in the business, including two lasers that had been purchased for \$1,495 each. The tools in question were stored in locked trailers located in Ms. Medina's backyard. Defendant had access to the keys to these trailers. As part of the divorce

settlement, Ms. Medina planned to let her husband keep the tools while she would keep the house. In view of the fact that she "didn't trust [her husband's] family," Ms. Medina had photographed all of the tools and recorded their serial numbers.

On 2 October 2010, Defendant pawned a hammer drill at Picasso Pawn for \$50. On 4 October 2010, Defendant pawned two generators at Pawn USA for \$300. Defendant returned to Picasso Pawn on 13 October 2010 and pawned an air compressor for \$35. On 6 November 2010, Defendant pawned two lasers at National Pawn for \$200. On each of these occasions, Defendant signed a statement indicating that he owned the items that were being pawned.

In November 2010, Ms. Medina found a pawnshop ticket on the floor of her truck indicating that Defendant had pawned the lasers. Upon making this discovery, Ms. Medina called Defendant to ask about the ticket. However, Defendant hung up on her. Although Ms. Medina subsequently confronted Defendant at her home, he denied knowing anything about the ticket. At that point, Ms. Medina left to go to an appointment. Upon her return, Defendant and Ms. Lacroix had packed up their belongings and left. After Defendant and Ms. Lacroix departed, Ms. Medina discovered another pawnshop ticket in the shop in which Defendant and Ms. Lacroix had been staying.

Ms. Medina did not immediately call the police because she did not want Defendant to get in trouble. Instead, Ms. Medina just wanted to recover the tools. After having failed to get Defendant, who knew that he did not have permission to pawn the tools, to return the items in question, Ms. Medina contacted the New Hanover County Sheriff's office and reported that Defendant had stolen two lasers, three generators, an air compressor, and a hammer drill from the trailers in her backyard.

The investigation into the allegations that Ms. Medina had made against Defendant was conducted by Detective Angie Tindall of the New Hanover County Sheriff's Department. Although Detective Tindall left messages for Defendant with numerous family members, she never reached him. As part of her investigation, Detective Tindall checked into the validity of Ms. Medina's claims after being told by a family member that Defendant had been asked to pawn the items for Ms. Medina because Ms. Medina had stolen \$500 from her employer. However, Detective Tindall was unable to find any support for this accusation. As a result of the fact that Ms. Medina was in a position to provide the serial numbers for the items that had been pawned, Detective Tindall was able to locate the missing tools and obtain the return of most of the missing property to Ms. Medina. In spite of her recognition that this matter was

replete with family drama, Detective Tindall proceeded with the investigation because Ms. Medina "seemed to be telling [her] the truth."

2. Defendant's Evidence

Defendant traveled to South Carolina in order to turn himself in on unrelated criminal charges on 1 October 2010. Ms. Medina wired \$200 to Defendant in order to enable him to post bond. However, Ms. Medina told Defendant that she needed him to repay the money that she had loaned him for the purpose of making bond promptly because she had taken \$500 from the safe at Friendly Check Cashing, where she was employed, in order to secure Defendant's release and to pay for a party that she planned to host. More specifically, Ms. Medina told Defendant that she needed to replace all of the money that she had taken from the safe before an audit that was going to be conducted on the following Monday. As part of the repayment process, Ms. Medina gave Defendant two broken generators and told him that he could have them if he could get them running.

On 2 October 2010, Defendant, with Ms. Medina's permission, pawned a drill that he had received from Ms. Medina, gave half of the money that he received as a result of this transaction to Ms. Medina, and used the other half to purchase gas which he used to drive to Leland as part of an attempt to get the broken

generators running. Ms. Medina's fiancé, Juan, helped Defendant load the generators into a truck since they were too heavy for Defendant to lift on his own.

At some point, Defendant was able to pawn the two generators for \$300 and handed the proceeds to Ms. Medina outside Friendly Check Cashing. After the transfer had been completed, Defendant and Ms. Medina entered Friendly Check Cashing, where Ms. Medina put the cash in a rolled up newspaper, slipped the newspaper to Defendant from behind the glass, and told Defendant to give the cash to her manager, who was working beside her. Upon receiving these instructions, Defendant took \$250 from the newspaper and gave it to the manager, who took the cash and then swiped her ATM card for the apparent purpose of replacing the remaining \$250 that Ms. Medina had taken from the store's safe.

On 6 November 2011, Defendant pawned two lasers that he had received from Ms. Medina at National Pawn for \$200 and took the proceeds directly to Picasso Pawn for the purpose of making a payment relating to certain items of jewelry that Ms. Medina had pawned there. While at Picasso Pawn, Defendant pawned an air compressor that Ms. Medina had thrown away for \$35. Defendant left the pawn ticket for the lasers in Ms. Medina's

truck, along with the receipt for the payment that he had made to assist in the process of redeeming her jewelry.

Defendant denied having stolen anything from Ms. Medina, asserted that Ms. Medina was aware that he was pawning the tools, and testified that "she was basically hand in hand with everything I did." Similarly, Ms. Lacroix testified that she knew that Defendant was pawning certain items, that Defendant and Ms. Medina had discussed the transactions in which Defendant had engaged and the manner in which the resulting proceeds would be used, and that she and Defendant had moved away from Ms. Medina's property because they were fighting about the pawn tickets and Defendant's relationship with Ms. Lacroix.

According to Defendant, the members of his family frequently called the police about each other's activities. Although Ms. Medina denied that she was referring to Defendant, Defendant pointed out that Ms. Medina had written a Facebook message calling upon people to "Bring That White Trash Down" by helping her get "dirt" on Defendant, who was known by the nickname of "White Trash."

B. Procedural History

On 7 November 2010, a warrant for arrest was issued charging Defendant with obtaining property by false pretenses. On 18 November 2010, a warrant for arrest was issued charging

Defendant with felonious larceny and two additional counts of obtaining property by false pretenses. On 21 February 2011, the New Hanover County grand jury returned bills of indictment charging Defendant with felonious larceny, felonious breaking or entering into a trailer, and five counts of obtaining property by false pretenses. The charges against Defendant came on for trial before the trial court and a jury at the 12 September 2011 criminal session of New Hanover County Superior Court. On 15 September 2011, the jury returned verdicts finding Defendant guilty of misdemeanor larceny, felonious breaking or entering a trailer, and five counts of obtaining property by false pretenses. At the conclusion of the ensuing sentencing hearing, the trial court entered judgments sentencing Defendant to a term of 8 to 10 months imprisonment based upon his consolidated convictions for misdemeanor larceny and felonious breaking or entering a trailer and to two consecutive terms of 11 to 14 months imprisonment based upon his consolidated convictions for obtaining property by false pretenses. On 15 October 2013, Defendant filed a petition seeking the issuance of a writ of *certiorari* by this Court. This Court granted Defendant's *certiorari* petition on 31 October 2013.

II. Substantive Legal Analysis

In his initial challenge to the trial court's judgments, Defendant contends that the trial court committed plain error by permitting Detective Tindall to testify that she moved forward with her investigation into the allegations that Ms. Medina had made against Defendant because she believed that Ms. Medina was telling her the truth. More specifically, Defendant contends that the challenged testimony constituted an impermissible vouching for Ms. Medina's credibility in a case in which the only contested issue was the relative credibility of Ms. Medina and Defendant. Defendant's argument has merit.

A. Standard of Review

As he candidly concedes in his brief, Defendant did not object to the admission of the challenged portion of Detective Tindall's testimony at trial. For that reason, our evaluation of the validity of Defendant's contention is limited to determining whether the admission of the challenged portion of Detective Tindall's testimony constituted plain error. A plain error is an error that is "so fundamental that it undermines the fairness of the trial, or [has] a probable impact on the guilty verdict." *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240 (2002). In order to obtain relief on plain error grounds, "[D]efendant must convince this Court not only that there was error, but that absent the error, the jury probably

would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

B. Relevant Legal Principles

"It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (citing *State v. Holloway*, 82 N.C. App. 586, 587, 347 S.E.2d 72, 73-74 (1986)). "The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial-determination of the truth." *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986). For that reason, it is well established that "a witness may not vouch for the credibility of a victim," *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd*, 363 N.C. 826, 689 S.E.2d 858-59 (2010), with this rule being applicable regardless of whether the improper vouching for the credibility of another witness occurs during the testimony of an expert, *State v. Dixon*, 150 N.C. App. 46, 52, 563 S.E.2d 594, 598 (2002) (stating that "[e]xpert opinion testimony is not admissible to establish the credibility of the victim as a witness"), *aff'd* 356 N.C. 428, 571 S.E.2d 584 (2002), or a lay witness. *State v. Freeland*, 316 N.C. 13, 16-17, 340 S.E.2d 35, 36-37 (1986) (holding that the trial court

erred by allowing the alleged victim's mother to testify that her daughter tells the truth).

C. Plain Error Analysis

In the course of Detective Tindall's testimony on direct examination, the State and Detective Tindall engaged in the following colloquy:

[Prosecutor]: At any point did you ever question this case, this has a lot of family drama?

[Det. Tindall]: Yes

[Prosecutor]: What made you go forward?

[Det. Tindall]: [Ms. Medina] seemed to be telling me the truth, she gave me all the information possible that she had and we are required to investigate everything to the fullest.

By testifying that Ms. Medina seemed to be telling her the truth, Detective Tindall vouched for Ms. Medina's credibility,¹ a result that is clearly forbidden by basic principles of North Carolina evidence law. *Giddens*, 199 N.C. App. at 121, 681 S.E.2d at 508. As a result of the fact that testimony of the type given by Detective Tindall is clearly inadmissible, the

¹Although our dissenting colleague argues that Detective Tindall's testimony did not vouch for the credibility of a witness, the record reflects that Ms. Medina testified at trial and that Detective Tindall's explanation for her decision to continue the investigation stemmed from her belief that Ms. Medina was telling the truth. Under that set of circumstances, we have no hesitation in concluding that Detective Tindall vouched for Ms. Medina's credibility.

only remaining question for our consideration is whether the jury would have probably reached a different outcome had it not been allowed to hear the challenged portion of Detective Tindall's testimony.

The importance of Ms. Medina's testimony to the State's case against Defendant should be apparent from even a cursory examination of the record. Simply put, the State's case hinged almost entirely on Ms. Medina's credibility. As a result of the fact that Defendant freely admitted that he had pawned the tools that Ms. Medina accused him of converting to his own use, the extent to which the jury convicted or acquitted Defendant necessarily depended on whether the jury believed Defendant's claim to have been authorized to pawn the tools in question by Ms. Medina or whether the jury believed the State's assertion that Defendant took the tools from the storage trailers and pawned them without obtaining Ms. Medina's permission.

The only evidence presented at trial to the effect that Defendant lacked permission to pawn the Medinas' tools consisted of Ms. Medina's testimony to that effect, which Defendant directly disputed when he took the witness stand. As a result of the fact that law enforcement officers have the responsibility of conducting a fair investigation before initiating criminal charges against anyone, the jury "most

likely gave [Detective Tindall's] opinion more weight than a lay opinion." *Giddens*, 199 N.C. App. at 122, 681 S.E.2d at 508. As a result, given the importance that the jury probably gave to Detective Tindall's assessment of the relative credibility of the positions taken by Ms. Medina and Defendant and the fact that the outcome in this case depended largely on Ms. Medina's credibility, we have no hesitation in holding that the admission of the challenged portion of Detective Tindall's testimony constituted plain error. *Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (stating that "the admission of such an opinion is plain error when the State's case depends largely on the prosecuting witness's credibility"); see also *Giddens*, 199 N.C. App. at 122, 681 S.E.2d at 508 (holding that the trial court committed plain error by allowing the admission of non-expert testimony that the Department of Social Services had substantiated a claim of sexual abuse given that the only evidence to that effect in the record was the children's testimony and their prior consistent statements).

In attempting to persuade us to reach a different result, the State relies upon our decision in *State v. O'Hanlan*, 153 N.C. App. 546, 570 S.E.2d 751 (2002), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397-98 (2004), in which a law enforcement officer testified that he had refrained from conducting a more

thorough investigation of the available physical evidence in a sexual assault case because the victim of the sexual assault was able to positively identify her assailant. In upholding the defendant's conviction, we rejected the defendant's argument that the officer had impermissibly vouched for the witness' credibility, holding that, instead of expressing an opinion that the victim had, in fact, been assaulted, the officer had merely explained why he did not request more thorough testing of the physical evidence during the course of his investigation and stated that the officer's testimony was "helpful to the fact-finder in presenting a clear understanding of his investigative process." *O'Hanlan*, 153 N.C. App. at 563, 570 S.E.2d at 762. Although the State asserts that the challenged portion of Detective Tindall's testimony was admissible on the basis of the same logic that we deemed persuasive in *O'Hanlan*, we do not believe that *O'Hanlan* is controlling here given that, in *O'Hanlan*, the defendant specifically challenged the officer's failure to conduct additional testing of the physical evidence on cross-examination while Defendant never questioned Detective Tindall's decision to proceed to have charges taken out against Defendant.² In view of the fact that Defendant did not directly

²Similarly, in an attempt to suggest that Detective Tindall's testimony was admissible, our dissenting colleague relies upon our decision in *State v. Westall*, 116 N.C. App. 534,

challenge Detective Tindall's decision to proceed against him, there was no need for the State to explain why she did so.³ As a result, *O'Hanlan* provides no basis for a decision in the State's favor.⁴

III. Conclusion

546-47, 449 S.E.2d 24, 31-32 (1994), in which we held that the trial court did not err by admitting the testimony of an investigating officer to the effect that he had not taken notes during the interview of a particular witness because he believed that the witness was lying given that the officer had been questioned on cross-examination about his failure to take notes during his interview of the witness. We do not believe that *Westall* is relevant to this case given that Detective Tindall made the statement that is discussed in the text on direct examination and had never been subject to cross-examination concerning the reason that she decided to pursue the investigation.

³Admittedly, Defendant questioned Ms. Medina on cross-examination in such a manner as to challenge her credibility. Although the State argues that Defendant's decision to question Ms. Medina in this manner authorized the admission of the challenged portion of Detective Tindall's testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 608(a) (providing that "[t]he credibility of a witness may be attacked by evidence . . . in the form of reputation or opinion as provided in [N.C. Gen. Stat. § 8C-1,] Rule 405(a)," subject to the limitation that "(1) such evidence may refer only to character for truthfulness or untruthfulness" and that "(2) evidence of truthful character is admissible only after the character of the witness has been attacked by opinion or reputation evidence or otherwise"), we do not find this argument persuasive given that Detective Tindall's testimony was not focused on Ms. Medina's "character for truthfulness or untruthfulness" and given that Ms. Medina's character, as compared to her credibility, had not been attacked.

⁴As a result of our determination that Defendant is entitled to a new trial for the reason discussed in the text, we need not address Defendant's remaining challenge to the trial court's judgments.

Thus, for the reasons set forth above, we conclude that the trial court committed plain error by permitting Detective Tindall to improperly vouch for Ms. Medina's credibility. As a result, Defendant is entitled to a new trial.

NEW TRIAL.

Judges ELMORE concurs.

Judge BRYANT dissents in separate opinion.

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BRYANT, Judge, dissenting.

The majority remands for a new trial based on their determination that the trial court committed plain error in allowing Detective Tindall's testimony that "[Ms. Medina] seemed to be telling me the truth[.]" Because I do not believe the admission of that testimony meets the threshold needed for plain error, I respectfully dissent.

As acknowledged in the majority opinion, "[i]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury." *Hannon*, 118 N.C. App. at 451, 455 S.E.2d at 496 (citation omitted). And, I would hold that in this case, the jury's ability to make such a credibility determination about Ms. Medina—a woman thirty-one years old and mother of four—who testified before them, was unimpeded.

Detective Tindall testified that she investigated the claims made by Ms. Medina, and the detective was aware of the "family drama" surrounding defendant and Ms. Medina.

A family member advised me that [defendant] was asked to pawn the items for [Ms. Medina], that [Ms. Medina] had stolen Five Hundred Dollars from her employer. I investigated that and learned that there was no evidence of this occurring so, therefore, [Ms. Medina] was never charged and I had no evidence.

When asked what made her move forward, Detective Tindall testified, "[Ms. Medina] seemed to be telling me the truth, she gave me all the information possible that she had and we are required to investigate everything to the fullest." Detective Tindall expressed a lay opinion in response to a proper question regarding why she moved forward with her investigation and charges.⁵ Furthermore, Detective Tindall provided the basis for her opinion: "she gave me all the information possible that she had" See *State v. Westall*, 116 N.C. App. 534, 546-47, 449 S.E.2d 24, 31-32 (1994) (holding no error where the detective expressed his lay opinion that the defendant was not

⁵ N.C. Gen. Stat. § 8C-1, Rule 701 (2013) ("If the witness is not testifying as an expert, [her] testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.").

being truthful during an interview as a basis for the detective's failure to take any notes during the interview).

For error to rise to the level that it requires a new trial, when no objection was made at trial and the alleged error is brought forth for the first time on appeal, such error must be

fundamental error, something so basic, so prejudicial, so lacking in its elements 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, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial

Lawrence, 365 N.C. at 516-17, 723 S.E.2d at 333 (citation omitted). We apply the plain error rule cautiously and only in exceptional cases where the defendant can show extreme prejudice. Such is not the case on this record. Defendant challenges the detective's response to a question regarding the investigation. The response was not one in which the detective was vouching for the credibility of a trial witness. Such a response cannot be deemed a fundamental error resulting in the denial of a fair trial to defendant. Therefore, because defendant cannot meet his burden and show plain error, defendant is not entitled to a new trial. Accordingly, I would overrule

defendant's argument, acknowledge the verdict of the jury, and affirm the judgment of the trial court.