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NO. COA05-195

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Rowan County
Nos. 03CRS4040, 03CRS50660,
03CRS50738, 04CRS3745 and
04CRS3746

CALVIN EUGENE PHILLIPS

Appeal by defendant from judgments entered 8 October 2004 by Judge W. David Lee in Superior Court, Rowan County. Heard in the Court of Appeals 18 October 2005.

Attorney General Roy Cooper, by Assistant Attorney General Lisa H. Graham, for the State.

Richard G. Roose for defendant-appellant.

McGEE, Judge.

Calvin Eugene Phillips (defendant) was indicted on two counts of felonious breaking and/or entering, two counts of larceny after breaking and/or entering, and two counts of felonious possession of stolen goods on 26 April 2004. Defendant was also indicted for being an habitual felon. Defendant was convicted of all charges and pleaded guilty to the status of habitual felon on 8 October 2004. The trial court arrested judgment on the charges of felonious possession of stolen goods and sentenced defendant to two consecutive terms of 121 months to 155 months in prison.

At trial, Michael Cecil (Cecil) testified that he was a field superintendent for Weaver-Cook Construction Company (Weaver-Cook) and had worked on a construction project on Newsome Road in Salisbury, North Carolina in January 2003. He testified he discovered that a copier, a fax machine, a telephone and some paperwork were missing from Weaver-Cook's trailer on Newsome Road on 20 January 2003. He also testified that a door to the trailer had been pried open. Cecil reported the missing items to the Salisbury Police Department. The police later recovered the property and returned it to him.

Jason Chong testified at trial that he was the owner of Crystal Cleaners in Salisbury, North Carolina. He testified that on 28 January 2003, he discovered that the back door to his business had been broken, and that two computers, a printer, a comforter, a blanket, some customers' clothing, a laundry cart, and a credit card machine were missing. He testified the items were found later by the Salisbury Police Department and were returned to him.

Mark Euart (Euart) testified that in 2002-2003, he owned a paving company and had hired defendant as a general helper in November 2002. Euart said defendant sold him a scanner, a copier, a telephone, an answering machine, and possibly a fax machine in late December 2002 or early January 2003, for approximately twenty or thirty dollars. Euart also stated that his computer was stolen around that time and that he called Detective Wyrick of the Rowan County Sheriff's Office to report the computer stolen. Detective

Wyrick went to Euart's house to investigate the stolen computer. While Detective Wyrick was at Euart's house, Euart showed him the equipment he had purchased from defendant. Euart testified that Detective Wyrick took the answering machine with him. Euart later turned over the rest of the equipment to the Salisbury Police Department.

Euart further testified that defendant called him about two weeks later at 4:30 a.m. and offered to sell him a computer and other items. Euart said that after defendant's initial call at 4:30 a.m., defendant continued to call him about the sale of the computer every fifteen to thirty minutes. Euart called Detective Wyrick later that morning to tell Detective Wyrick that defendant had offered to sell him a computer and other items that Euart thought were stolen.

Euart met with Detective Wyrick and Rita Rule, an investigator with the Salisbury Police Department, later that day. Euart agreed to buy the computer and the other items from defendant. Euart would purchase the property, load it into his truck, and the police would stop Euart's truck and recover the items. Euart testified that he and defendant went to an apartment and loaded two computers, a comforter and a laundry cart into Euart's truck. They drove away from the apartment and were stopped by the police.

Detective Wyrick testified that he determined the answering machine that Euart purchased from defendant had been stolen from Weaver-Cook's trailer on Newsome Road in Salisbury, North Carolina on 20 January 2003. Shelly Lingle, a sergeant with the Salisbury

Police Department, testified that she identified the fax machine, copier and telephone Euart had purchased from defendant as property that had also been stolen from Weaver-Cook's trailer. Rita Rule testified the computer equipment, credit card machine, comforter and laundry cart recovered from Euart's truck on 28 January 2003 had been stolen from Crystal Cleaners on 28 January 2003. She also testified she retrieved clothing from the home of defendant's sister on 29 January 2003 and she identified the clothing as having been stolen from Crystal Cleaners.

Defendant presented evidence on his own behalf. Defendant argues that the trial court erred in overruling defendant's objections to the State's questions to defendant during its cross-examination. Defendant testified on direct examination as follows:

Q. But what I'm trying to understand and to get clear in my mind and before this jury, have you ever taken those items that you said you brought by, the answering machine, the copy machine, and those other pieces of equipment, and sold them to . . . Euart?

A. No, sir. [Euart] was mad because the checks got stolen, and he didn't know who stole them, and I guess he was trying to find out somehow to get back at me. You know what I'm saying?

On cross-examination of defendant, the following colloquy occurred between the State and defendant:

Q. Now, were you aware that . . . Euart had some business checks stolen from him?

MR. GRAY: Objection.

A. No, ma'am.

MR. GRAY: Objection.

THE COURT: Overruled.

Q. Were you aware-

MR. GRAY: Move to strike the answer.

THE COURT: Overruled. Go ahead.

Q. Were you aware that . . . Euart had some business checks stolen?

MR. GRAY: Objection.

THE COURT: Overruled. Counsel, approach just a minute.

(Bench Conference)

Q. Mr. Phillips, I believe I asked you if you were aware that . . . Euart had some business checks stolen.

A. No, ma'am.

Q. Did you not testify on direct testimony that when you found out about the checks, something happened? Didn't you testify about that on direct testimony?

A. That was later on after all this breaking and entering occurred. Like I say, you want me to call the name of who- speaking of the check, you want me to call the name of how it went down or something, you know. You can't really-

Q. Okay. Well, let me just ask you since you brought it up on your direct testimony. You are aware that . . . Euart had some business checks stolen, are you not?

A. Yeah. At the time. Yeah.

Q. And you were aware that some information had been provided to . . . Euart about those stolen checks, were you not?

A. No, ma'am.

Q. You weren't aware of a conversation with Mike Phillips?

A. No, ma'am.

Q. You weren't aware of that?

A. No.

Q. So the fact of the matter is, you and Mike Phillips and Brian Davis took those checks to the Rowan County Library and were typing those checks out to each other, cashing them at these same stores where you were getting the payroll checks cashed, and splitting the proceeds. Isn't that true?

MR. GRAY: Objection, Your Honor.

The trial court overruled defendant's objection. Defendant also made a motion for a mistrial which the trial court denied.

Defendant contends the trial court erred in overruling defendant's objection to the State's questions to defendant about "entirely unrelated criminal misconduct for which he had not been convicted." Specifically, defendant argues the State's proffered instances of alleged misconduct by defendant were not probative of defendant's truthfulness or untruthfulness, as is required by North Carolina Rule of Evidence 608(b). N.C. Gen. Stat. § 8C-1, Rule 608(b) (2003). Under Rule 608(b),

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness[.]

Our Supreme Court recognized several types of misconduct which are clearly admissible under Rule 608(b): "[U]se of false identity,

making false statements on affidavits, applications or government forms (including tax forms), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.'" *State v. Bishop*, 346 N.C. 365, 390, 488 S.E.2d 769, 782 (1997) (quoting *State v. Bell*, 338 N.C. 363, 382, 450 S.E.2d 710, 720 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995)) (internal citations omitted).

In reviewing evidentiary rulings of a trial court, we apply an abuse of discretion standard of review. *State v. Boston*, 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004); see *Bishop*, 346 N.C. at 391, 488 S.E.2d at 783 (where the North Carolina Supreme Court applied an abuse of discretion standard to the review of a trial court's determination that the State's questions were probative of the defendant's untruthfulness in accordance with N.C. Gen. Stat. § 8C-1, Rule 608(b)). An "[a]buse of discretion results where the [trial] 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. Roache*, 358 N.C. 243, 284, 595 S.E.2d 381, 408 (2004) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Our Supreme Court has held that alleged prior, unrelated acts of larceny by a witness, without more, are not probative of untruthfulness under the standard of Rule 608(b). *Bell*, 338 N.C. at 382-83, 450 S.E.2d at 721. However, in *Bishop*, our Supreme Court held the trial court did not abuse its discretion by allowing the State to inquire about the defendant's alleged forgery of a

loan application and a check. *Bishop*, 346 N.C. at 391, 488 S.E.2d at 783. In *Bishop*, the evidence tended to show that the defendant and her boyfriend committed first-degree murder. *Id.* at 376, 488 S.E.2d at 774. In *Bishop*, the State asked the defendant on cross-examination about allegations that the defendant applied for a loan against her boyfriend's life insurance policy and that the defendant forged her boyfriend's signature on the application. *Id.* at 391, 488 S.E.2d at 783. The defendant testified that she signed the loan application with her boyfriend's consent. *Id.* She further testified that she received and cashed a check, which was made payable to her boyfriend, and that she gave her boyfriend the money. *Id.*

On appeal, the defendant argued that "taking money from a friend does not inherently involve dishonesty and that nothing in the context of the challenged questions suggested that the 'taking' involved any deceit or was probative of [the] defendant's truthfulness or untruthfulness." *Bishop*, 346 N.C. at 391, 488 S.E.2d at 783. The Court, however, observed that "[t]he 'taking' referred to by the [State's] inquiry involved the allegation that [the] defendant forged [her boyfriend's] name on both a loan application and a check and that she cashed the check without [her boyfriend's] permission." *Id.* The Court held the trial court did not abuse its discretion pursuant to Rule 608(b) by allowing the questioning because the State's purpose for the inquiry was to establish the defendant's character for untruthfulness. *Id.*

In the present case, the State's inquiry was analogous to the

State's inquiry in *Bishop*. In the present case, it is clear that the context of the State's questions suggested deceit and untruthfulness on the part of defendant. The State asked whether defendant and others "took [Euart's] checks" and "typed [Euart's] checks out to each other." The State further asked whether defendant and others "cash[ed] [Euart's checks] at [the] same stores where [defendant] [was] getting the payroll checks cashed" and whether defendant and others "split[] the proceeds." As in *Bishop*, the State's inquiries in the present case suggested that defendant stole Euart's checks, forged them, cashed them and then took the proceeds. We conclude the State's inquiry in the present case was intended to show conduct indicative of defendant's untruthfulness and was therefore permissible under Rule 608(b).

We also note that a witness who testifies concerning an issue on direct examination opens the door to cross-examination on the same issue. *State v. Thompson*, 110 N.C. App. 217, 223, 429 S.E.2d 590, 593-94 (1993). In the present case, defendant opened the door to cross-examination concerning the theft of Euart's business checks by raising the issue on direct examination and by suggesting that Euart testified against defendant because Euart was mad that his business checks had been stolen. For the reasons stated above, we overrule defendant's assignment of error.

Defendant also argues that if the alleged misconduct was probative of defendant's untruthfulness, any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, pursuant to North

Carolina Rule of Evidence 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2003). Rule 403 states that "[a]llthough 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." *Id.* The decision whether or not to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court and the trial court's decision will only be reversed for an abuse of discretion. *State v. Campbell*, 359 N.C. 644, 674, 617 S.E.2d 1, 20 (2005).

In the present case, defendant argues the State's inquiry predisposed the jury to convict defendant based solely upon negative character evidence. As discussed earlier, the State properly impeached defendant's character for truthfulness pursuant to Rule 608(b). The State also presented plenary evidence of defendant's guilt of the offenses of which defendant was convicted. Accordingly, the trial court did not abuse its discretion.

Defendant has abandoned his remaining assignments of error by failing to set them out in his brief. N.C.R. App. P. 28(b)(6).

No error.

Judges WYNN and GEER concur.

Report per Rule 30(e).