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NO. COA10-677

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v.

Pitt County
No. 09 CRS 7269

MICHELLE YVETTE POLLARD

Appeal by defendant from judgment entered 27 January 2010 by Judge William R. Pittman in Pitt County Superior Court. Heard in the Court of Appeals 3 November 2010.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

Richard E. Jester, for defendant-appellant.

JACKSON, Judge.

Michelle Yvette Pollard ("defendant") appeals her 27 January 2010 convictions for felonious obstruction of justice and willfully failing to discharge duties. For the reasons stated herein, we dismiss without prejudice in part and hold no error in part.

Defendant was a sworn deputy with the Pitt County Sheriff's Department ("the Sheriff's Department"), having taken her most recent oath on 4 December 2006. Defendant worked in the Operations Section of the Sheriff's Department; her direct supervisor was Chief John Guard ("Chief Guard"). Defendant's job duties included

the supervision of school resource officers, including Sergeant Shannon Stewart ("Sergeant Stewart").

Gina Wooten ("Wooten") previously had been employed with the Sheriff's Department as a training officer for the Pitt County jail. During her employment with the Sheriff's Department, Wooten and Sergeant Stewart had developed a relationship that produced a child.

On 15 April 2009, Wooten was stopped by Detective Michael Stroud ("Detective Stroud") of the narcotics unit of the Sheriff's Department on suspicion of possession and distribution of marijuana. Although he discovered marijuana in Wooten's truck, Detective Stroud did not arrest her; instead, he "told [her] that if [she] could maybe help them out some, then he maybe could help [her] out some on the charges."

On 20 and 21 April 2009, Wooten was contacted by an individual named Richie Huggins ("Huggins"). Unbeknownst to Wooten, Huggins was a confidential informant for the Sheriff's Department. Huggins contacted Wooten and requested that she arrange to purchase approximately \$200.00 worth of cocaine for him from a mutual acquaintance. Huggins brought the money for the cocaine purchase to Wooten's house, she bought the cocaine, and she delivered it to Huggins's workplace that same day.

Detective Vance Head ("Detective Head") recorded the phone calls between Huggins and Wooten and observed their interactions at Wooten's residence. He then entered that information into the Sheriff's Department's central computer system - known as

PISTOL – for the purpose of preparing a report. The information included details about the transaction, a dog in Wooten's yard, the presence of a child in Wooten's vehicle, and Huggins's presence at Wooten's house. Only persons with proper security clearance for the PISTOL system had access to the report. Defendant was among those who had access to the PISTOL system.

Sergeant Stewart subsequently learned that Wooten had been stopped with marijuana in her possession. Upon learning of Wooten's involvement in drug-related activity, Sergeant Stewart became concerned for the welfare of his child. On 21 April 2009, Sergeant Stewart asked defendant if she knew a good attorney to retain should he decide to pursue a custody action. Sergeant Stewart and defendant then began a conversation about Wooten and her current situation. Sergeant Stewart mentioned to defendant that he had been unable to locate any information about the marijuana stop in the PISTOL system.

On 22 April 2009, Sergeant Stewart visited defendant's office with respect to another matter. While he was there, defendant told Sergeant Stewart that she had located information about Wooten in the PISTOL system; the information indicated that Wooten was involved with more than marijuana. Defendant permitted Sergeant Stewart to read the information in the PISTOL system from her computer, including information related to the marijuana stop and the cocaine transaction with "a confidential informant." After Sergeant Stewart read the information, he and defendant argued about how to handle the situation. Finally, Sergeant Stewart told

defendant that he "was not going to tell [Wooten] anything about it and that [defendant] didn't need to either." Sergeant Stewart subsequently told Chief Guard that he was concerned that defendant may tell Wooten about the investigation.

Also on 22 April 2009, defendant called Wooten and asked her to return the call at a time when she was alone. Prior to returning defendant's call, Wooten contacted Detective Stroud to determine whether or not he knew the reason for defendant's call. When Wooten returned defendant's call, defendant sought assurance from Wooten that the call was not being recorded. She then told Wooten that she had seen information in the PISTOL system about Wooten's involvement in drug activity and that Wooten "need[ed] to stop whatever [she was] doing." Wooten then informed defendant that Detective Stroud knew about defendant's first call to Wooten. According to Wooten, defendant uttered an expletive and then said, "[J]ust tell him it was girl talk, that I wanted to ask you about a guy I was dating." Based upon her conversation with defendant, Wooten knew that Huggins "was the police." However, the following weekend, Wooten's boyfriend, David Nobles ("Nobles"), also told Wooten that Huggins "had set [her] up."

On 23 April 2009, defendant informed Sergeant Stewart that the reports related to Wooten's involvement in drug activity were no longer in the PISTOL system. Detective Head had removed the information when he had received a report of defendant's attempt to contact Wooten. Instead, Detective Head kept the information as a word processing document to which only he had access.

Detective Stroud attempted to set up other drug transactions with Wooten through Huggins, but those attempts were unsuccessful. Detective Stroud testified that "[i]t was quite obvious [Wooten] wasn't going to do anything else."

Detective Head began to investigate defendant's actions. In late May or early June 2009, defendant called Wooten and told her to tell investigators that, on 22 April 2009, they had run into each other at WalMart and exchanged phone numbers; defendant had called Wooten's number in order to save it in her phone. That same day, defendant called Wooten again and told her that the Sheriff's Department was looking into the WalMart surveillance tapes; therefore, Wooten should tell investigators that the conversation had taken place in McDonald's. In June 2009, Special Agent W.R. Myers ("Special Agent Myers") of the North Carolina State Bureau of Investigation began an investigation into defendant's conduct.

On or about 27 July 2009, a grand jury indicted defendant on charges of obstruction of justice and willful failure to discharge duties. At defendant's 25 January 2010 trial, the State offered the testimony of seven witnesses, including Sergeant Stewart, Wooten, Detective Stroud, Detective Head, and Special Agent Myers. On 27 January 2010, the jury found defendant guilty of both felonious obstruction of justice and willfully failing to discharge duties. That same day, the trial court entered a judgment and commitment, imposing a prison term of between six and eight months for obstruction of justice. The judgment was arrested with respect

to the willful failure to discharge duties charge. Defendant gave notice of appeal on or about 27 January 2010.

Defendant's first argument on appeal is that the trial court erred by admitting the hearsay testimony of Special Agent Myers. Defendant argues that Special Agent Myers's testimony was merely a regurgitation of the testimony of each of the State's witnesses, which constituted an improper bolstering of testimony. We disagree.

"[T]he proper standard of review for reviewing a trial court's decision to admit or exclude evidence is abuse of discretion.'" *State v. Bettis*, ___ N.C. App. ___, ___, 698 S.E.2d 507, 510 (2010) (quoting *State v. Early*, 194 N.C. App. 594, 599, 670 S.E.2d 594, 599 (2009)) (alteration in original). A trial court has abused its discretion if its "decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* (quoting *Leggett v. AAA Cooper Transp., Inc.*, ___ N.C. App. ___, ___, 678 S.E.2d 757, 761 (2009)).

Defendant acknowledges that testimony that would otherwise be inadmissible hearsay is admissible for purposes of corroboration. See *State v. Freeman*, 93 N.C. App. 380, 387, 378 S.E.2d 545, 550 (citation omitted), *disc. rev. denied*, 325 N.C. 229, 381 S.E.2d 787 (1989). Nonetheless, she argues that "[i]t is not permissible to corroborate a witness's testimony with 'extrajudicial declarations of someone other than the witness purportedly being corroborated.'" (quoting *State v. Hunt*, 324 N.C. 343, 352, 378

S.E.2d 754, 759 (1989), *aff'd*, 339 N.C. 622, 457 S.E.2d 276 (1995)). Specifically, defendant argues that Special Agent Myers did not become involved in the investigation until nearly two months after it began and, upon his entry into the investigation, he "took statements from the witnesses that were well rehearsed recitations of their stories" that "avoided the misstatements and lies told previously by the witnesses." Defendant concedes, however, that if Special Agent Myers's interviews had been conducted in closer "temporal proximity to the events in question, they would be admissible as corroborative[.]" This argument is unpersuasive.

"It has long been recognized in North Carolina that prior consistent statements made by a witness are admissible for corroborative purposes when the witness is impeached in any manner." *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983) (citations omitted). However, "the prior statements of a witness must in fact corroborate the testimony of the witness." *Id.* "If the previous statements are generally consistent with the witness'[s] testimony, slight variations will not render the statements inadmissible, but such variations only affect the credibility [rather than the admissibility] of the statement." *Id.* (citing *State v. Britt*, 291 N.C. 528, 535, 231 S.E.2d 644, 650 (1977)).

Here, defendant objected to Special Agent Myers's trial testimony with respect to the substance of the statements he had

taken from Detective Head, Detective Stroud, and Wooten. She then argued to the trial court, outside the presence of the jury, that

all [Special Agent Myers] is doing is regurgitating the testimony of each of the State's previous witnesses, thereby trying to bolster their credibility. He is adding nothing to it at all. He is simply restating what all the other witnesses have already told this jury. And it can only be used to bolster the testimony or the credibility of the prior witnesses.

In response to defendant's objection, the trial court inquired of defendant's counsel, "Do you believe that you have challenged the credibility of the witnesses by your cross-examination?" Defendant's counsel responded, "Yes, sir, Your Honor. I think so." Ultimately, the trial court ruled that, because the credibility of the witnesses had been challenged by defendant's cross-examination, Special Agent Myers's testimony was admissible for corroborative purposes. As the trial transcript clearly demonstrates, defendant conceded that the credibility of the State's witnesses had been challenged by virtue of defendant's rigorous cross-examination. Accordingly, consistent with our prior holdings, the trial court did not abuse its discretion by admitting Special Agent Myers's testimony for corroborative purposes.

Defendant next contends that the trial court erred by denying defendant's motion to dismiss at the close of the evidence. Specifically, defendant argues that, in the light most favorable to the State, the evidence showed only that defendant had told Wooten that she had committed a crime and that people knew about it. We disagree.

The standard of review for a motion to dismiss is “whether there is substantial evidence of each essential element of the offense charged and of the defendant[’s] being the perpetrator of the offense.” *State v. Clagon*, ___ N.C. App. ___, ___, 700 S.E.2d 89, 92 (2010) (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)).

Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom.

Id. (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). Evidence which merely raises suspicion, even a strong suspicion, as to a necessary element is insufficient to withstand a motion to dismiss. *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982).

In the instant case, defendant challenges the trial court’s denial of her motion to dismiss only with respect to the felony obstruction of justice charge. Defendant argues that, taken in the light most favorable to the State, the evidence is merely speculative. Specifically, defendant contends that the State’s evidence failed to establish that defendant’s conversation with Wooten was the reason Wooten’s involvement in further drug transactions with Huggins ended, because Nobles also informed Wooten of Huggins’s involvement in police operations. This argument is not persuasive.

Obstruction of justice is a common law offense, which consists of "any act which prevents, obstructs, impedes or hinders public or legal justice." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983) (citation omitted). In order to establish the commission of a felony, the State needed to prove that defendant acted with deceit and intent to defraud. See N.C. Gen. Stat. § 14-3(b) (2005) (setting forth the elements necessary to elevate an unspecified misdemeanor to a felony). See also *State v. Preston*, 73 N.C. App. 174, 175, 325 S.E.2d 686, 688 (1985) ("At common law, obstruction of justice was a misdemeanor.").

In the case *sub judice*, the substance of the obstruction of justice charge is based upon defendant's 22 April 2009 telephone conversation with Wooten, during which she told Wooten that she had learned, via the PISTOL system, that Wooten was involved in drug activity; she also told Wooten that she "need[ed] to stop whatever [she was] doing." According to the State, defendant's phone call effectively exposed Huggins's identity as a confidential informant. Immediately following this conversation, Wooten refrained from engaging in further drug transactions with Huggins.

Testimony by the State's witnesses at trial establishes that, as a result of defendant's "blowing" Huggins's cover, the investigation into the drug organization, of which Wooten and another individual were targets, "terminated." Detective Head testified that the goal of the investigation in which Huggins was assisting was "to climb the ladder, so to speak, to get inside of [the] organization[.]" At the time of defendant's conversation

with Wooten, the investigation was in its early stages. When asked on direct examination what effect "Huggins's cover being blown [had] on your investigation[,] " Detective Head replied, "It terminated the investigation. Gina Wooten, the target of the investigation, would no longer deal with our informant, which pretty much stopped our investigation."

Wooten's trial testimony confirmed that she learned of Huggins's identity as an informant through her conversation with defendant. Moreover, Wooten testified that the statement from Nobles as to Huggins's identity as an informant was confirmation of the information she had received from defendant. Specifically, Wooten testified:

Later that same week, the weekend, the following weekend, David Nobles told me that [Huggins] had set me up. That was like on Tuesday, and this--he didn't tell me until Saturday. And [defendant]--I probably wouldn't have believed him if I didn't know that it--he was telling the truth, because [defendant] had called and said the same things.

The testimony of either Detective Head or Wooten, standing alone, is relevant evidence that a reasonable person might accept as adequate to support a conclusion that defendant intentionally prevented, obstructed, impeded, or hindered justice. Therefore, it constitutes substantial evidence. Accordingly, the trial court, viewing the evidence in the light most favorable to the State and drawing all inferences in its favor, properly denied defendant's motion to dismiss, because there existed "'substantial evidence of each essential element of the offense charged and of the

defendant['s] being the perpetrator of the offense.'" *Clagon*, ___ N.C. App. at ___, 700 S.E.2d at 92 (citation omitted).

Defendant's final contention is that trial counsel provided ineffective assistance by failing to present evidence and/or by not requesting that the trial court inquire as to whether she desired to either present evidence or testify. Defendant raises this issue only for the purpose of preserving it for a subsequent motion for appropriate relief (MAR). We dismiss this argument without prejudice.

First, as in *State v. Thompson*, defendant here "has expressly stated in [her] brief . . . that [she] is not requesting substantive review of any ineffective assistance of counsel claims[.]" 359 N.C. 77, 122, 604 S.E.2d 850, 880-81 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). Therefore, "the Court will not analyze whether [her] ineffective assistance of counsel claims meet the standard established by *Strickland*. See N.C. R. App. P. 28(a)¹ ('Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned.')." *Id.* at 122, 604 S.E.2d at 881 (footnote added).

Second, our Supreme Court in *Thompson* set forth the standards governing the filing of an MAR.

¹ Because defendant appealed her case after 1 October 2009, this appeal is subject to our revised Rules of Appellate Procedure. However, Rule 28(a), as cited by *Thompson*, is substantially similar to the current Rule 28(a). See N.C.R. App. P. 28(a) (2009) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

A motion for appropriate relief is denied when "[u]pon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." [North Carolina General Statutes,] [s]ection 15A-1419 "'is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review. Instead, the rule requires North Carolina courts to determine whether the particular claim at issue could have been brought on direct review.'"

Id. (internal citations omitted) (first alteration in original).

It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

Id. at 122-23, 604 S.E.2d at 881 (internal citations omitted).

In the instant case, defendant argues that, because opening and closing statements were not recorded and because the record contains no evidence as to a potential trial strategy, a cold record review cannot establish an ineffective assistance of counsel claim based upon failure to introduce evidence on behalf of defendant. She, therefore, asks us "to rule that no rights as to future Motion for Appropriate Relief or other post-conviction actions have been waived." Although defendant advances a more specific basis for her inability to raise the ineffective assistance of counsel claim on direct appeal than did the defendant

in *Thompson*, we nonetheless "decline to determine whether [her] potential claims are subject to the procedural bar established by N.C.G.S. § 15A-1419(a)(3)." *Id.* at 124, 604 S.E.2d at 882. Further, we "note that defendant's attempt to raise this issue on direct appeal in no way precludes [her] from raising [her] ineffective assistance of counsel claims during a future proceeding." *Id.*

For the reasons discussed herein, we hold that the trial court did not abuse its discretion by admitting Special Agent Myers's testimony and that it properly denied defendant's motion to dismiss. Defendant's third argument as to ineffective assistance of counsel is dismissed, but she is not precluded from bringing forth that claim in a subsequent proceeding.

No error in part; dismissed without prejudice in part.

Judges HUNTER and ELMORE concur.

Report per Rule 30(e).