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NO. COA10-215

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v.

Gaston County
No. 08 CRS 58646

FOREST WILLIAM WOOTEN

Appeal by defendant from judgment entered 21 August 2009 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 16 September 2010.

Attorney General Roy A. Cooper, III, by Assistant Attorney General LaToya B. Powell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

JACKSON, Judge.

Forest William Wooten ("defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of second-degree murder and sentencing him to 189 to 236 months imprisonment. For the reasons set forth below, we hold no prejudicial error.

At trial, the State's evidence tended to show the following. On 17 June 2008, defendant and his wife, Tammy Wooten ("Wooten"), moved into a house they recently had rented in Bessemer City, North Carolina. They were assisted by defendant's cousin, Bobby Hamrick

("Hamrick"), who was staying with the Wootens for several days. On the day of the move, Hamrick and defendant had been drinking heavily and taking Xanax and Hydrocodone pills since 9:00 a.m. Later that night, while Hamrick was inflating an air mattress in the bedroom where he was to sleep, defendant ran into the room and yelled, "Call 911 for Tammy[.]" Wooten's grandmother, Eula Robinson ("Robinson"), lived in a trailer directly behind the Wootens's house. Upon seeing Wooten lying dead on the floor, Hamrick ran to Robinson's trailer and called 911.

At approximately 1:00 a.m., Officer C.E. Owens ("Officer Owens") was the first officer to arrive on the scene. When he arrived, he found Wooten, lying on her back with a gunshot wound through her right eye. Officer Owens testified that Robinson told him that defendant had come to her trailer that evening and said, "I killed her, she's dead." Officer Owens also testified that Robinson said she had observed defendant get angry in the past and point his gun at Wooten, and only a few days prior, defendant had slapped Wooten across the face. However, at trial, Robinson testified that she did not speak to any officers on the night of the murder.

Later, on the night of the shooting, after the police had arrived and begun to investigate, an officer took defendant to Gaston Memorial Hospital with breathing difficulties. Defendant told his treating physician, Dr. Smith, that he had shot his wife. Dr. Smith told Detective William E. Howell ("Detective Howell") about defendant's confession. Detective Howell asked defendant to

accompany him to the police department for an interview, and defendant agreed to go. At the police department, defendant told several different stories about what had happened to Wooten during the nearly three-hour interview, but he maintained throughout that he was the person who shot Wooten.

Forest Wooten, Jr. ("Junior"), the Wootens's adult son, testified that defendant threatened to kill Wooten more than twice, and Wooten told Junior several times that she was afraid of defendant. Angela Wooten ("Angela"), the Wootens's adult daughter, and Junior had seen defendant point a gun at Wooten several times, and Angela had seen defendant shoot between Wooten's legs. Wooten once called the police when defendant pointed a gun at her. Defendant owned several guns and usually carried one in a holster on his side.

On 23 June 2008, the Gaston County Grand Jury indicted defendant with first-degree murder of Wooten. Defendant was tried non-capitally at the 17 August 2009 Criminal Session of Gaston County Superior Court. The jury found defendant guilty of second-degree murder, and the trial court sentenced defendant to a minimum term of 189 months and a maximum term of 236 months imprisonment. Defendant appeals.

On appeal, defendant presents three questions for review: (1) whether the trial court committed plain error in allowing evidence of defendant's prior bad acts; (2) whether the trial court committed plain error in allowing evidence of defendant's statements to Dr. Smith; and (3) whether the trial court committed

plain error in allowing evidence that defendant assaulted his wife several days before her murder.

The standard of review for each of the issues presented in this case is plain error. The North Carolina Rules of Appellate Procedure allow a criminal defendant to assert plain error on appeal when a question was not preserved by an objection noted at trial. N.C. R. App. P. 10(a)(4) (2009). Plain error analysis applies only to evidentiary matters and jury instruction. *State v. Garcell*, 363 N.C. 10, 35, 678 S.E.2d 618, 634, *cert. denied*, ___ U.S. ___, 175 L. Ed. 2d 362 (2009). "Under plain error review, defendant has the burden of convincing this Court: '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.'" *State v. McNeil*, 165 N.C. App. 777, 784, 600 S.E.2d 31, 36 (2004) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)), *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005).

[T]he plain error rule . . . is always to be applied cautiously and only in 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, 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 or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation and internal quotation marks omitted) (emphasis removed) (alterations in original). Plain error will be found only if "the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citation omitted).

First, defendant argues that the trial court admitted evidence of his prior bad acts for an improper purpose. We disagree.

North Carolina Rules of Evidence, Rule 404(b), provides in relevant part that

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2009). Our Supreme Court has explained that the rule is

a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant . . . requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2009).

In the case *sub judice*, Angela testified that defendant pointed a gun at her husband two or three years earlier. Junior testified that defendant had pointed a gun at him, his brother, and Angela on prior occasions. He also testified that defendant had fired a gun over his girlfriend's head. Angela testified that defendant had pointed a gun at both her brothers and her husband. The trial court also admitted written statements by Junior and Angela that described how defendant had "pulled guns" on them. At trial, the jury was instructed to consider whether the evidence tended to show defendant's identity, motive, intent, knowledge, opportunity, absence of mistake, and absence of accident. The trial court allowed the jury to determine whether it believed the evidence and whether it satisfied any of these purposes.

In the instant case, evidence of defendant's prior assaults with a gun was admissible to show absence of accident. While defendant's explanation of how he shot Wooten changed, he continued to maintain that the shooting was accidental. As such, the issue of whether the shooting was accidental or intentional was an issue at trial. In *State v. Lloyd*, our Supreme Court allowed evidence of the defendant's prior assaults when the defendant testified that the shooting was accidental and that he did not intend to shoot the victim. 354 N.C. 76, 89, 552 S.E.2d 596, 608-09 (2001). Our Supreme Court also has held that, where accident is alleged, "evidence of similar acts is more probative than in cases in which an accident is not alleged." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). Indeed, "[t]he doctrine of chances

demonstrates that the more often a defendant performs a certain act, the less likely it is that the defendant acted innocently." *Id.* at 305, 406 S.E.2d at 891 (citation omitted). In examining the similarities among the prior acts and the act at issue, we have noted that the similarities "'need not rise to the level of the unique and bizarre.'" Instead, 'the similarities simply must tend to support a reasonable inference that the same person committed both the earlier and later acts.'" *State v. Martin*, 191 N.C. App. 462, 467-68, 665 S.E.2d 471, 475 (2008) (quoting *Stager*, 329 N.C. at 304, 406 S.E.2d at 891) (emphasis removed), *disc. rev. denied*, 363 N.C. 135, 676 S.E.2d 49 (2009).

In the case *sub judice*, evidence that defendant had assaulted people with a gun on numerous occasions makes it less likely under the doctrine of chances that he accidentally pointed a gun and shot his wife. See *Stager*, 329 N.C. at 305, 406 S.E.2d at 891. Furthermore, Angela testified that defendant actually fired his gun between Wooten's legs. The similarity between that act and the act of shooting Wooten could provide a reasonable inference for the purpose of showing intent and absence of accident. See *Martin*, 191 N.C. App. at 467-68, 665 S.E.2d at 475 (holding that there was a reasonable inference of the defendant's motive and intent in committing first-degree larceny based upon previous acts including attempted larceny). Therefore, it follows that defendant's prior assaults with a firearm could be used to show that it was less likely that defendant accidentally shot Wooten. When at least one of the purposes for which the prior act evidence was admitted was

proper, there is no prejudicial error. *State v. Morgan*, 359 N.C. 131, 158, 604 S.E.2d 886, 903 (2004) (citations omitted). As such, there was no prejudicial error in allowing the evidence of defendant's prior bad acts.

Relevant evidence that is not excluded by Rule 404(b), however, still may be subject to exclusion pursuant to North Carolina Rules of Evidence, Rule 403. See N.C. Gen. Stat. § 8C-1, Rule 403 (2009). The trial court, in its discretion, must determine "if [the] probative value [of the proffered evidence] 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." N.C. Gen. Stat. § 8C-1, Rule 403 (2009). "'Once the trial court determines evidence is properly admissible under Rule 404(b), it must still determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice' under Rule 403." *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (quoting *State v. Bidgood*, 144 N.C. App. 267, 272, 550 S.E.2d 198, 202, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001)), *appeal dismissed and disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006). This determination is entrusted to the trial court's sound discretion. See *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. Furthermore, "[a] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been

the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

In the case *sub judice*, the trial court did not abuse its discretion by admitting the evidence. The trial court guarded against the possibility of undue prejudice by instructing the jury to consider defendant's testimony only for the limited and legitimate purposes of identity, motive, intent, knowledge, opportunity, absence of mistake, and absence of accident. See, e.g., *State v. Badgett*, 361 N.C. 234, 244-45, 644 S.E.2d 206, 212-13 (holding that the trial court did not abuse its discretion by admitting evidence pursuant to Rule 403 when the court gave proper limiting instructions in view of permissible evidentiary purposes pursuant to Rule 404(b)), *cert. denied*, 552 U.S. 997, 169 L. Ed. 2d 351 (2007); *State v. Hyatt*, 355 N.C. 642, 662, 566 S.E.2d 61, 75 (2002) (holding that prior misconduct was not unduly prejudicial pursuant to Rule 403 when the trial court gave limiting instructions regarding permissible uses of 404(b) evidence). Accordingly, the trial court did not abuse its discretion in allowing evidence of defendant's prior bad acts. Therefore, with respect to defendant's first argument on appeal, we hold no prejudicial error.

Next, defendant argues that the trial court's admission of defendant's statements to Dr. Smith constituted inadmissible double hearsay. We disagree.

Pursuant to North Carolina Rules of Evidence, Rule 801(c), hearsay is defined as "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) (2009). Generally, hearsay is not admissible. N.C. Gen. Stat. § 8C-1, Rule 802 (2009). In addition, when an out-of-court statement is presented through an out-of-court statement, it is inadmissible as double hearsay. N.C. Gen. Stat. § 8C-1, Rule 805 (2009). However, a hearsay statement contained within another hearsay statement is admissible if both statements are otherwise admissible through exceptions to the hearsay rule. *Id.*; see also *State v. Larrimore*, 340 N.C. 119, 147, 456 S.E.2d 789, 803 (1995).

In the case *sub judice*, both parties agree that defendant's statements to Dr. Smith were admissible as statements by a party-opponent. See N.C. Gen. Stat. § 8C-1, Rule 801(d) (A) (2009). Because defendant's statement to Dr. Smith falls within an exception, Dr. Smith's statements to Detective Howell also must fall within some exception to the hearsay rule to be admissible for a substantive purpose.

Out-of-court statements may be admissible as non-hearsay to explain why police officers take subsequent actions in an investigation. See *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (holding that the trial court did not commit error in allowing testimony for the sole purpose of explaining why police deputies were staked out, waiting for a stolen car). Specifically, "statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made."

State v. White, 298 N.C. 430, 437, 259 S.E.2d 281, 286 (1979) (citations omitted). See also *Coffey*, 326 N.C. at 282, 389 S.E.2d at 57 (holding that testimony showing why the person to whom the statement was made had confronted the defendant was admitted solely to explain that person's subsequent conduct).

In the case *sub judice*, upon being called to the hospital to assist in the investigation, Detective Howell acquired a digital audio recorder for the specific purpose of recording conversations with defendant or any other individuals at the hospital. At this point, the case was still in the information gathering stage. Detective Howell spoke to Dr. Smith before he made contact with defendant. Dr. Smith told Detective Howell that defendant admitted to shooting his wife and that "he believed he needed to go to jail." Moreover, the evidence shows that Detective Howell asked defendant to accompany him to the police department for an interview following his conversation with Dr. Smith. Therefore, because there was an indication that Detective Howell planned on interviewing defendant at the hospital before Dr. Smith told him of defendant's confession, Dr. Smith's statements to Detective Howell could explain Detective Howell's subsequent conduct in his decision to take defendant to the police station for their interview and ultimately arrest him. Accordingly, the evidence was competent for the purpose of explaining Detective Howell's subsequent decision to conduct the interview at the police station.

However, when evidence is competent for one purpose, but not for all purposes, the objecting party cannot rely on a general

objection. See N.C. Gen. Stat. § 8C-1, Rules 103 & 105 (2009). The objecting party must state the grounds for objecting and ask for any desired limiting instructions. See *State v. Rinck*, 303 N.C. 551, 558, 280 S.E.2d 912, 918-19 (1981). "It is a well recognized rule of procedure that when evidence competent for one purpose only and not for another is offered it is incumbent upon the objecting party to request the court to restrict the consideration of the jury to that aspect of the evidence which is competent." *State v. Ray*, 212 N.C. 725, 729, 194 S.E. 482, 484 (1938) (citations omitted). Consequently, the overruling of defendant's general objection at trial without an appropriate limiting instruction was not error.

Next, defendant argues that the trial court's admission of Officer Owens's testimony that Robinson told him that defendant assaulted his wife several days before her murder constituted non-corroborative inadmissible hearsay. We agree, but defendant fails to demonstrate prejudice as a result of the trial court's error.

"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) (citations omitted). The decision of whether to allow or exclude corroborative testimony rests in the discretion of the trial court. *State v. Henley*, 296 N.C. 547, 551, 251 S.E.2d 463, 466 (1979) (citation omitted). Our Supreme Court has held that

prior statements of a witness can be admitted
as corroborative evidence if they tend to add

weight or credibility to the witness' trial testimony. New information contained within the witness' prior statement, but not referred to in his trial testimony, may also be admitted as corroborative evidence if it tends to add weight or credibility to that testimony.

State v. McDowell, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991) (internal citations omitted). However, "prior contradictory statements may not be admitted under the guise of corroborating testimony." *State v. Frogge*, 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997) (citation and internal quotation marks omitted) (holding error and granting a new trial in a first-degree murder case when a witness for the State testified that the defendant admitted to stabbing the victims notwithstanding that, in one of the witness's prior statements, he indicated that he did not remember exactly what the defendant had said).

In *State v. Reynolds*, a co-defendant testified at trial that he could not remember whether the defendant took part in planning a robbery. 91 N.C. App. 103, 370 S.E.2d 600 (1988). The State later introduced a statement by the co-defendant that the defendant had participated in the discussions about the robbery. *Id.* at 105-06, 370 S.E.2d at 601-02. We held that the trial court erred because the co-defendant's prior statement added "neither weight nor credibility to his trial testimony" *Id.* at 107, 370 S.E.2d at 602. In *State v. McCree*, a victim testified at trial that he did not remember the defendant striking him with a gun. 160 N.C. App. 200, 207, 584 S.E.2d 861, 866 (2003). The State then introduced a prior statement by the victim that he had been beaten

with a gun by the defendant. *Id.* at 207, 584 S.E.2d at 866. This Court held that admission of the statement was error because the victim's prior statement and his trial testimony contradicted each other. *Id.* at 207-08, 584 S.E.2d at 866.

In the case *sub judice*, Officer Owens's testimony regarding Robinson's alleged out-of-court statement did not corroborate her in-court testimony. Officer Owens testified that Robinson spoke to him on the night of Wooten's murder and described defendant's abusive relationship with his wife. Officer Owens testified that Robinson told him that she has known defendant to get angry and point his gun at Wooten and that he had slapped Wooten in the face several days before Wooten's death. However, when Robinson testified, she stated that she remembered seeing the police on the night of Wooten's murder but "didn't say nothing to them." Robinson also testified that defendant and Wooten were a "pretty good couple."

Officer Owens's testifying about Robinson's out-of-court statements regarding defendant's and Wooten's abusive relationship and her in-court testimony that she did not speak with Officer Owens are not substantially the same accounts of the activity of the night of Wooten's death; in fact, their testimonies directly contradict each other. *Frogge*, 345 N.C. at 618, 481 S.E.2d at 280 (holding error when a prior statement "contained information manifestly contradictory to [trial testimony]"). Officer Owens's testimony did not add weight or credibility to Robinson's testimony; in fact, his testimony is at odds with Robinson's trial

testimony and, therefore, was inadmissible as corroborative testimony.

However, defendant still has the burden of proving plain error – error that occurs only in truly exceptional cases. *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. To hold plain error, “the appellate court must be convinced that absent the error[,] the jury probably would have reached a different verdict. Therefore, we must determine that the error in question ‘tilted the scales’ and caused the jury to reach its verdict convicting the defendant.” *Id.* (internal citations omitted). Defendant has not met his burden.

Irrespective of Officer Owens’s purportedly corroborative testimony with respect to the prior assault, Officer Owens also testified that Robinson told him that defendant said, “I killed her, she’s dead.” Robinson subsequently testified that defendant said to her, “I just shot and killed Tammy.”

There also was plenary evidence to support the jury’s verdict without Robinson’s alleged statements to Officer Owens that defendant had slapped Wooten just a few days before her murder. This evidence includes: defendant’s history of assaulting Wooten with a gun, his prior threats to kill Wooten, the fact that Wooten was afraid of defendant and wanted to leave him, the fact that Wooten was shot with one of defendant’s own guns which defendant himself identified, and that defendant previously had shot between Wooten’s legs. Furthermore, defendant knew how to handle guns safely; in fact, he had owned the murder weapon for several years.

The gun at issue contains a trigger guard and several other safety features to prevent accidental shooting, and the hammer must have been pulled back in order for it to fire as it was a single-action weapon. Junior testified that defendant knew how to handle the gun safely if he chose to do so, and, at trial, defendant correctly identified the gun's safety features.

Because several instances of permissible in-court testimony established the same facts contained in Robinson's non-corroborative hearsay, the erroneous admission of Robinson's statement is insufficient for this Court to conclude that without the error the jury would have reached a different result. Under the plain error standard, the error does not warrant a new trial. See *State v. Martin*, 322 N.C. 229, 238-39, 367 S.E.2d 618, 623-24 (1988) (holding that the admission of a prior statement was not prejudicial where other evidence showed the same facts).

For the foregoing reasons, we hold no prejudicial error.

No Prejudicial Error.

Judges ELMORE and STEPHENS concur.

Report per Rule 30(e).