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NO. COA11-1573
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Wake County
No. 10 CRS 201599

YAJAIRA LIBETANA JOA

Appeal by Defendant from judgment entered 11 February 2011 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 8 May 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert M. Curran, for the State.

Guy J. Loranger, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Yajaira Joa ("Defendant") appeals from a jury verdict finding her guilty of fraudulently burning a dwelling. Defendant argues the trial court erred by admitting testimony from an Emergency Medical Technician ("EMT") that was based on a report prepared by a non-testifying EMT and thus constituted impermissible hearsay. Defendant also argues the trial court

erred by not permitting cross-examination of a witness where the inquiry was relevant to the witness's credibility and asked in good faith. We disagree and find no error.

I. Factual & Procedural Background

On 8 March 2010, Defendant was indicted for fraudulently burning a dwelling. Defendant was tried before a jury on 7 February 2011 in Wake County Superior Court, the Honorable Paul G. Gessner, presiding. The State's evidence tended to show the following. On 31 May 2009, at 3:48 a.m., firefighters responded to a house fire on Maume Court in Cary. Upon arriving at the scene, firefighters found a "fully involved" house fire. Firefighters found Defendant and her two sons standing in front of the house. Firefighters entered the home and contained the fire.

On the scene, Defendant complained of pain in her right arm and ankles. Responding to the fire, an EMT transported Defendant on a stretcher to an ambulance and then to the hospital. When asked if he noticed anything unusual about Defendant on the night of the fire, the EMT testified that, according to the report, "the patient was covered in what appears to be soot and a possible smell of gasoline." As the report was written by a non-testifying EMT, Defendant objected

and moved to strike the testimony. The court overruled Defendant's objection on the basis that the EMT could "testify as to what his personal observations of the patient are or were." The EMT went on to testify that, according to his perception, there was an odor of gasoline on Defendant which "got stronger once we were inside the back of the ambulance."

Upon arrival at the scene, an investigator with the Wake County Fire Marshal's Office observed unburned magazines strewn up and down a set of external stairs along one side of the house. The magazines appeared to have been soaked in gasoline. Samples of the magazines were collected and sent to the State Bureau of Investigation. An SBI forensic scientist testified that one sample contained the presence of residual gasoline. Moreover, following a visual inspection and observing fire damage at the home in locations where there was no obvious reason for such damage, an accelerant detection K-9 was called to the home. The K-9 alerted to the presence of fire accelerant eleven separate times.

An insurance claim investigator met with Defendant four times in the weeks following the fire. Defendant told the investigator that her shoes had smelled of gasoline while at the hospital, though she could not explain why.

At trial, Defendant's husband, Michael Joa, testified that in July 2008, he consented to a domestic violence protective order. Asked if he had set fire to the home, Mr. Joa testified, "Absolutely not. . . . I would never harm anyone, much less my own kids." On cross-examination, Defendant's counsel asked Mr. Joa if he had committed acts of domestic violence against Defendant. The State objected. Defendant argued the purpose of the question was to show Defendant "is justifiably afraid of him" and to see if Defendant might lie about the incident. Specifically, defense counsel claimed, "It would depend on what his answer was. If he denies it, then that's contrary to this." The court sustained the State's objection on the basis that Defendant was seeking to offer specific instances of the prior conduct of a witness without a permissible purpose and that the prejudicial effect outweighed the probative value of the testimony.

Defendant moved to dismiss the charge of fraudulently burning a dwelling due to lack of sufficient evidence. The court denied the motion. Defendant herself did not testify or otherwise present evidence.

The jury found Defendant guilty of fraudulently burning a dwelling. Defendant was sentenced to six to eight months

imprisonment. The sentence was suspended, and Defendant was placed on supervised probation for 36 months. Defendant entered timely notice of appeal in open court.

II. Jurisdiction

As Defendant appeals from the final judgment of a superior court, an appeal lies of right with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

III. Analysis

Defendant first argues the trial court abused its discretion by admitting an EMT's testimony in which he read from a report prepared by a non-testifying EMT. Defendant specifically contends that the EMT's testimony constituted impermissible hearsay which does not meet any exception to the hearsay rule and amounts to prejudicial error. Although we agree the trial court erred by admitting the EMT's testimony because it constituted impermissible hearsay, we disagree that the error was prejudicial.

"When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, ___ N.C. App. ___, ___, 706 S.E.2d 790, 797 (2011). 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). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802.

Here, the EMT read from the report of a non-testifying EMT that Defendant smelled of gasoline on the morning of the fire. This constitutes hearsay as it is an out-of-court statement offered for the truth of the matter asserted: that Defendant smelled of gasoline on the morning of the fire. As the testimony fails to fall under any recognized exception, it constitutes impermissible hearsay.

"However, even when the trial court commits error in allowing the admission of hearsay statements, one must show that such error was prejudicial in order to warrant reversal." *In re M.G.T.-B*, 177 N.C. App. 771, 775, 629 S.E.2d 916, 919 (2006). "A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2011).

Here, the EMT's testimony was not limited to reading the report but also included his own observations. The EMT

testified that he personally smelled the odor of gasoline and that "[t]he odor got stronger once we were inside the back of the ambulance." Moreover, Defendant validated such testimony when she admitted to an insurance claim investigator that her shoes had smelled of gasoline while at the hospital, though she could not explain why. Therefore, we hold that although it was error for the trial court to admit the hearsay testimony of the EMT regarding Defendant's odor, it was not prejudicial error because other properly admitted evidence also established Defendant's odor.

Defendant next argues the trial court erred by not permitting cross-examination on the domestic violence protection order of Defendant's ex-husband, Michael Joa. Defendant claims the inquiry was necessary to question Mr. Joa's credibility in regard to a prior statement that he would "never harm anyone[.]" However, we do not reach the merits of Defendant's argument.

"As Defendant impermissibly presents a different theory on appeal than argued at trial, this assignment of error was not properly preserved for appellate review." *State v. Smith*, 178 N.C. App. 134, 139, 631 S.E.2d 34, 38 (2006); *see also State v. Holliman*, 155 N.C. App. 120, 123-24, 573 S.E.2d 682, 685-86 (2002) (holding that where the defendant argued different

theories at trial and on appeal, he failed to properly preserve assignment of error on appeal). Our Supreme Court "has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount.'" *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

In *Sharpe*, the State objected to admission of specific testimony, arguing it constituted impermissible hearsay. *Id.* at 193, 473 S.E.2d at 5. In response to the State's argument, the defendant contended the testimony should be admitted under an exception to the hearsay rule: statement of the declarant's then-existing mental, emotional, or physical condition. *Id.* The trial court sustained the State's objection and excluded the proffered testimony. *Id.* The defendant appealed and argued the trial court erred by excluding the testimony. *Id.* at 194, 473 S.E.2d at 5. However, on appeal, the defendant argued new grounds for admission of the testimony based on a different hearsay exception: statement against declarant's interest. *Id.* Our Supreme Court held that "the trial court did not err in excluding the proffered testimony[,]" overruling the defendant's assignment of error. *Id.* at 195, 473 S.E.2d at 6.

The case at hand is analogous to *Sharpe*. Here, the State objected to Defendant's attempt to cross-examine Mr. Joa regarding a domestic violence protective order entered against him. At trial, Defendant's argument for permitting the cross-examination was to show that Defendant "is justifiably afraid of [Mr. Joa]" and to see if Mr. Joa might deny the domestic violence incident listed on the protective order. Defense counsel claimed, "It would depend on what [Mr. Joa's] answer was. If he denies it, then that's contrary to this." The trial court sustained the State's objection and denied Defendant cross-examination of Mr. Joa regarding the domestic violence protective order. On appeal, Defendant's argument in favor of allowing cross-examination on the domestic violence protective order, however, is different from what she argued at trial. Defendant now argues the cross-examination should have been permitted for the purpose of calling into question Mr. Joa's truthfulness by comparing the order to a previous statement Mr. Joa made: that he "would 'never harm anyone[.]'" By presenting this Court with a theory never argued to the trial court, Defendant is attempting "to swap horses between courts in order to get a better mount." See *Sharpe*, 344 N.C. at 194, 473 S.E.2d at 5 (quotation marks and citation omitted). Therefore, we hold

the trial court did not err by refusing to permit cross-examination on the domestic violence protective order, and Defendant's assignment of error is overruled.

IV. Conclusion

For the foregoing reasons, we conclude Defendant received a fair trial, free of prejudicial error.

No error.

Judges MCGEE and STEPHENS concur.

Report per Rule 30(e).