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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-120

Filed: 3 October 2017

Watauga County, Nos. 16CRS 575, 50168-69

STATE OF NORTH CAROLINA

v.

AMANDA CANTRELL THOMAS, Defendant.

Appeal by Defendant from judgment entered 9 September 2016 by Judge Susan E. Bray in Watauga County Superior Court. Heard in the Court of Appeals 24 August 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.*

*Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for the Defendant.*

DILLON, Judge.

Amanda Cantrell Thomas (“Defendant”) appeals from the trial court’s judgment convicting her of breaking or entering a motor vehicle, financial transaction card theft, obtaining property by false pretenses, and misdemeanor larceny. Defendant argues that the trial court violated her constitutional right to present a

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complete defense by not allowing her to call a particular witness, and that the trial court erred in allowing witness testimony regarding her truthfulness. We hold that the trial court's actions did not amount to prejudicial error, and thereby affirm.

I. Background

The evidence at trial tended to show the following:

Sometime on the evening of 26 January 2016, bank cards and other items were stolen from a vehicle in the community of Vilas. Shortly thereafter, the vehicle owner received notifications that her bank cards were being used at several retailers to make purchases. The police discovered from the retailers' surveillance videos that the same couple, driving a white truck, made each of the purchases: a man wearing a red hooded sweatshirt and a woman wearing a "teal blue hoodie" and an oversized blue jacket.

An investigator recognized the truck used by the two suspects as belonging to Timothy Brewer. A few days later, Mr. Brewer and Defendant were stopped by a patrolman while traveling in Mr. Brewer's truck. Mr. Brewer was dressed in a red hooded sweatshirt, and Defendant was wearing a teal hoodie and a blue jacket. A search of the truck revealed many of the items taken from the vehicle in Vilas.

Defendant testified on her own behalf, admitting to purchasing items with the stolen bank cards but recanting a confession she had made to the detective assigned to the case that she was involved in or knew about the vehicle break-in.

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The jury found Defendant guilty. Due to an error in her written notice of appeal, Defendant also submitted a petition for writ of *certiorari* with this Court. We grant *certiorari* and review the merits of Defendant's appeal.

II. Analysis

Defendant makes two arguments on appeal. We address each argument in turn.

A. Defendant's Right to Call Mr. Brewer as a Witness

Defendant first contends that the trial court improperly denied her constitutional right to present a complete defense by refusing, on two separate occasions during the trial, to allow Mr. Brewer to testify on her behalf. On the first occasion, Defendant attempted to present Mr. Brewer as a witness, but the court refused to allow his testimony after he invoked his Fifth Amendment privilege against self-incrimination. After Defendant testified, she once again tried to introduce Mr. Brewer as a witness, informing the court that Mr. Brewer would waive his Fifth Amendment privilege. But the trial court once again refused to allow Mr. Brewer's testimony.

The United States Supreme Court has stated that "a fundamental element of due process" is a defendant's "right to present [her] own witnesses to establish a defense." *Washington v. Texas*, 388 U.S. 14, 19 (1967). However, our Supreme Court has instructed that when a witness offered by a defendant exercises his or her Fifth

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Amendment right against self-incrimination, the trial court must decide whether one can reasonably infer from the question that the answer may incriminate the witness. *State v. Pickens*, 346 N.C. 628, 637, 488 S.E.2d 162, 167 (1997).

On the first occasion, Defendant sought to call Mr. Brewer to testify that he alone broke into the vehicle, he alone intended to break into and steal items from the vehicle, and that Defendant had no part in using or possessing the stolen property. However, when the trial court conducted *voir dire* to determine the content of Mr. Brewer's testimony outside the presence of the jury, it became evident that Mr. Brewer would not offer such testimony but would assert his Fifth Amendment privilege against self-incrimination. During *voir dire*, Mr. Brewer began by stating that Defendant knew nothing of his plan to steal from the vehicle. Ultimately, based on advice from his lawyer, Mr. Brewer asserted his Fifth Amendment privilege in response to all further questions. The court entertained arguments concerning an acting in concert theory, and ultimately decided that it would not allow Mr. Brewer to testify.

Later in the trial, Defendant again attempted to introduce Mr. Brewer as a witness. Defendant told the trial court that Mr. Brewer, who was not in the courtroom, had indicated in a phone call that he had fired his lawyer and no longer wanted to remain silent. The court, though, once again refused to allow Mr. Brewer's testimony, partially because Mr. Brewer's whereabouts were unknown and partially

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because his decision to assert his Fifth Amendment privilege was already on the record. Defendant claims that the court committed prejudicial error by not allowing the jury to hear Mr. Brewer's testimony.

Both parties focus their arguments on our Supreme Court's opinion in *Pickens*, and we find that case instructive here. In *Pickens*, a defendant on trial for murder sought to have his former co-defendant admit to killing the victim. *Pickens*, 346 N.C. at 640, 488 S.E.2d at 168. The former co-defendant asserted his Fifth Amendment privilege on the stand, and the Court refused to let him testify in an effort to prevent the jury from becoming unnecessarily confused. Our Supreme Court noted that allowing a witness who planned to invoke the Fifth Amendment to testify was wrought with "potential for unfair prejudice," as the defendant could build a case on a foundation of "improper speculation" by the jury. *Id.* at 639, 488 S.E.2d at 168. The Court, applying this principle, found that the acting in concert theory of guilt at issue in the case alleviated any need for the jury to determine who actually committed the underlying murder itself, as both defendants participated in the criminal scheme. There was a danger that the jury would infer from the co-defendant's assertion of his Fifth Amendment privilege that the co-defendant was solely guilty. *Id.* at 640, 488 S.E.2d at 168. The Court held that the trial court properly refused the co-defendant's testimony, and, further, the evidence presented supported the defendant's guilt such that any error was ultimately harmless to the defendant's case. *Id.*

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Here, we hold that the trial court's decision to not allow the Defendant to offer the testimony of a witness who had indicated to the court that he would assert his Fifth Amendment privilege was proper. The last reliable information available to the trial court was that Mr. Brewer would invoke his Fifth Amendment privilege when placed on the stand. The trial court, concerned with improper speculation by the jury, correctly considered acting in concert as a theory of guilt, and determined that Mr. Brewer's testimony would ultimately be "immaterial." Like in *Pickens*, the probative value of Mr. Brewer's assertion of his Fifth Amendment privilege in front of the jury, where the prosecution was proceeding on a theory of acting in concert, was low. Similar to the scenario in *Pickens*, the trial court here did not abuse its discretion in refusing to allow Mr. Brewer to testify. The "factual possibility" that Mr. Brewer personally stole the items from the vehicle "was immaterial since the two [] had the common purpose to commit [a crime], and [a crime] was in fact committed." *Id.* Here, Defendant's actual role in the events was in dispute, and the trial court did not err by keeping out testimony that may have unnecessarily confused the jury regarding what was important to the offense as charged.

Even if the trial court erred in its refusal to allow Mr. Brewer to testify, such error was harmless based on the State's "acting in concert" theory of the case. In North Carolina, the doctrine of acting in concert is described as follows:

If two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only

guilty as a principal if the other commits that particular crime, but [he or she] is also guilty of any other crime committed by the other in pursuance of the common purpose or as a natural or probable consequence thereof.

*State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (citations and marks omitted). The evidence showed that Defendant willingly participated in the overall criminal scheme. Defendant's written confession stated that she stole the items from the vehicle. Defendant admitted to swiping the financial cards and acquiring money, even if the money was for Mr. Brewer. Surveillance videos also showed Defendant swiping the stolen financial cards at various retailers. Defendant claimed to know where the stolen items were, and in fact brought them to the Detective at the police station. We find that the evidence supported Defendant's participation in the overall criminal scheme.

This case does differ from *Pickens* in that, according to Defendant, Mr. Brewer had elected to recant the invocation of his Fifth Amendment right to remain silent. At trial, though, Defendant did not present convincing evidence concerning Mr. Brewer's whereabouts, the status of his legal representation, or his decision to recant and testify. We find that the trial court rightfully relied on its previous ruling that Mr. Brewer's testimony may have caused the jury to improperly infer that he alone was guilty.

#### B. Testimony Regarding Defendant's Truthfulness

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Defendant's second argument alleges that the trial court erred in allowing the detective assigned to the case to testify regarding the truthfulness of the Defendant's own testimony. Control over the presentation of evidence during trial is in the court's discretion. N.C Gen. Stat. § 8C-1, Rule 611(a) (2015). We review the trial court's decisions in this regard for an abuse of discretion. *State v. McNeil*, 47 N.C. App. 30, 36, 266 S.E.2d 824, 827-28 (1980). If evidence is admitted in error, a new trial is not warranted unless that error was prejudicial, and the defendant can show a reasonable possibility that, absent the error, the trial court would have returned a different result. *State v. Jacobs*, 363 N.C. 815, 825, 689 S.E.2d 859, 865-66 (2010).

It is improper for a witness to directly opine as to whether another witness told the truth on the stand. "The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784 (1995). "[I]t is fundamental to a fair trial that the credibility of the witnesses be determined by the jury and that *testimony to the effect that a witness is credible, believable, or truthful is inadmissible.*" *State v. Castaneda*, 215 N.C. App. 144, 149, 715 S.E.2d 290, 294 (2011) (emphasis added).

In this case, the jury received conflicting evidence regarding Defendant's knowledge of the location of the owner's stolen property. Defendant testified that she did not know where the stolen items were until several days after the break-in, after

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she went to look for them. In regard to this testimony, the State asked the detective assigned to the case:

Q: Did you hear the Defendant testify that she did not know where any of the stolen property was until after she saw you at the gas station on January 30<sup>th</sup>?

[Detective]: Yes, I heard her testify to that.

Q: Is that true?

A: No, sir.

Defendant objected to the State's question, "Is that true?" The court overruled the objection, and allowed the detective to testify that Defendant had not testified truthfully.

We conclude that this particular form of questioning was improper. Whether a witness has told the truth on the stand during a jury trial is rightfully a question for the jury, and the jury alone. The trial court erred by allowing the detective to testify directly that Defendant's testimony was blatantly untrue. Testimony to the effect that a witness is not credible, should not be believed, or is untruthful is inadmissible.

However, though the form initially used to solicit the information was erroneous, we conclude that the substance of the evidence admitted was not prejudicial. The North Carolina Rules of Evidence liberally permit the admission of another witness's testimony for the sole purpose of impeaching a prior witness. N.C.

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Gen. Stat. § 8C-1, Rule 607 (2015). After asking the Detective whether Defendant had testified truthfully, the State asked the Detective to elaborate. The Detective explained that the Defendant had known where the stolen items were, contradicting Defendant's testimony that she only discovered the items at a later time. The use of a prior inconsistent statement is a proper means of exposing a contradiction in a witness's testimony and impugning her credibility. *See State v. Bishop*, 346 N.C. 365, 387, 488 S.E.2d 769, 780 (1997). Therefore, we find that the Detective's answers were not prejudicial.

Further, there was other ample evidence admitted during trial supporting the jury's verdict. The uncontradicted evidence showed that Defendant swiped the financial cards herself and was wearing the same clothing seen on multiple security recordings when stopped by the police. Defendant confessed to having used the owner's financial cards to acquire value, and initially made a written confession that she stole them from the vehicle. Defendant knew the location of and personally returned the stolen items to the police station. We conclude that there is not a reasonable possibility that the jury would have rendered a different verdict had the detective not offered the challenged testimony.

III. Conclusion

For the reasons stated above, we find that the trial court's actions did not amount to prejudicial error.

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AFFIRMED.

Judges HUNTER, JR., and ARROWOOD concur.

Report per Rule 30(e).