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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-40

Filed: 19 December 2017

Lincoln County, Nos. 15 CRS 53713, 1168

STATE OF NORTH CAROLINA

v.

NICHOLAS ANTHONY BORSELLO

Appeal by defendant from judgment entered 29 April 2016 by Judge Eric L. Levinson in Lincoln County Superior Court. Heard in the Court of Appeals 6 September 2017.

*Attorney General Joshua H. Stein, by Assistant Attorney General Gwenda Laws, for the State.*

*Jarvis John Edgerton, IV, for defendant-appellant.*

CALABRIA, Judge.

Nicholas Anthony Borsello (“defendant”) appeals from a judgment entered upon jury verdicts finding him guilty of possession of a firearm by a felon and attaining habitual felon status. After careful review, we conclude that defendant received a fair trial, free from error.

**I. Background**

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At approximately 3:30 p.m. on 25 September 2015, the Lincoln County Sheriff's Office received a call about a person shooting a gun on Jeff Kaylor Lane in Lincolnton, North Carolina. Sergeant Steven Grinnell ("Sergeant Grinnell") was the first officer to reach Jeff Kaylor Lane. While he waited for additional officers to arrive, Sergeant Grinnell approached another driver, who identified himself as defendant's across-the-street neighbor ("Mr. Kaylor"). Sergeant Grinnell asked Mr. Kaylor whether he had seen anyone on the street shooting a gun. After he responded affirmatively, Sergeant Grinnell asked whether defendant was the shooter, and Mr. Kaylor advised that defendant was currently shooting in his yard.

When Sergeant Grinnell arrived to the property, defendant was standing in his yard behind a white pickup truck with a folded-down tailgate. Another individual, Samuel Labrado ("Labrado"), was standing on the driver's side of the truck. Defendant's wife, Rachel Borsello ("Mrs. Borsello"), was standing near a target located in the trees, approximately 50 feet away from the truck. Sergeant Grinnell observed a .9-millimeter Hi-point rifle laying on the truck's tailgate, approximately 12 inches away from defendant. Since he knew defendant was a convicted felon, Sergeant Grinnell placed him under arrest for possession of a firearm by a felon.

Officers Rudy Hoernlen and Brandon Cesena subsequently arrived to assist Sergeant Grinnell. While the officers secured the scene, Mrs. Borsello ran up claiming that the rifle was hers, and that defendant was merely teaching her how to

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use it. The officers subsequently arrested Mrs. Borsello for aiding and abetting possession of a firearm by a felon.

On 9 November 2015, defendant was indicted for the offenses of possession of a firearm by a felon and attaining the status of a habitual felon. A jury trial commenced on 25 April 2016 in Lincoln County Criminal Superior Court. Following the State's presentation of evidence, Mrs. Borsello testified that she was attempting to sell the rifle to Labrado on 25 September 2015 after previously placing the gun for sale in a pawnshop. According to Mrs. Borsello, Labrado intended to pay the balance of the purchase price after he verified that the rifle worked; however, defendant unexpectedly arrived home while she and Labrado were shooting the gun on the Borsellos' property. Mrs. Borsello was checking her target when three law enforcement officers arrived. Although she tried to explain that the rifle was hers, the officers arrested both of them. Mrs. Borsello denied telling the officers that defendant was teaching her how to shoot.

On 28 April 2016, the jury returned verdicts finding defendant guilty of both charges. After finding two mitigating sentencing factors, the trial court ordered defendant to serve 58-82 months in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

**II. Analysis**

Defendant's sole argument on appeal is that the trial court committed plain error by allowing the State to impeach Mrs. Borsello with prior inconsistent statements, because her testimony concerned "collateral matters." Defendant is correct that

[a] witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony, but where such questions concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony.

*State v. Williams*, 322 N.C. 452, 455, 368 S.E.2d 624, 626 (1988). Collateral matters "include testimony contradicting a witness's denial that he made a prior statement when that testimony purports to reiterate the substance of the statement." *State v. Hunt*, 324 N.C. 343, 348, 378 S.E.2d 754, 757 (1989). Accordingly, "once a witness *denies* having made a prior inconsistent statement, the State may not introduce the prior statement in an attempt to discredit the witness; the prior statement concerns only a *collateral matter*, i.e., whether the statement was ever made." *State v. Najewicz*, 112 N.C. App. 280, 289, 436 S.E.2d 132, 138 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994).

However, it is well established that "[a] defendant is not prejudiced . . . by error resulting from his own conduct[.]" N.C. Gen. Stat. § 15A-1443(c) (2015), and "a defendant who invites error has waived his right to all appellate review concerning

the invited error, including plain error review.” *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 141 (2002). Here, during cross-examination, Mrs. Borsello denied telling the officers that defendant was teaching her how to shoot. Afterwards, the State recalled Officer Hoernlen to the witness stand and questioned him about Mrs. Borsello’s statements:

[THE STATE:] Okay. So as [Mrs.] Borsello approached you, did you hear her say anything?

[OFFICER HOERNLEN:] Yes. She was claiming that it was her gun and he was just teaching me how to use it.

Q. And is that the word she used, teaching?

A. I believe it was. Not verbatim, but something about him teaching, something to [the] effect of – I can’t remember the exact wording – that he was instructing her on how to use the weapon. That’s my interpretation. The exact words, I don’t recall.

Rather than objecting to this testimony, during recross-examination, defense counsel continued to question Officer Hoernlen about Mrs. Borsello’s prior inconsistent statements:

[DEFENSE COUNSEL:] The statement you said she made, he was just showing me how to shoot?

[OFFICER HOERNLEN:] Correct.

Q. Who’s he? Was it Mr. Labrado?

A. It could have been. I mean, she wasn’t really specific.

Q. You took it to be [defendant], though?

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A. Yes.

Q. Because that was the person that your supervisor, at the time, was arresting?

A. Correct.

The State subsequently elicited similar testimony from Officer Cesena:

[THE STATE:] And when you arrived, tell me what you observed, your initial observation.

[OFFICER CESENA:] When I arrived, [defendant] had already been detained. He was in the back of Sergeant Grinnell's car. Officer Hoernlen was speaking with [Mrs. Borsello].

Q. And what did you do?

A. I helped in assisting him to detain [Mrs. Borsello] when we put her under arrest for aiding and abetting.

Q. And did you hear any statements that she made?

A. She made the statement that he was showing her how to shoot the gun.

Q. Did she make any indication who she was talking about?

A. No. I assumed it was [defendant].

Q. Okay. But you didn't question her about that?

A. No.

Q. Did you hear any further statements?

A. Just that he was teaching her how to shoot.

Q. How many times did she say that?

A. More than once.

As with Officer Hoernlen, defense counsel did not object to the substance of Officer Cesena's testimony, but instead cross-examined him about Mrs. Borsello's inconsistent statements:

[DEFENSE COUNSEL:] So you just testified that you're not sure who "he" is, when she said, he was teaching me how to shoot.

[OFFICER CESENA:] That's correct.

...

Q. Did you question [Mrs.] Borsello?

A. No.

Q. So she shouts out, he was teaching me how to shoot, and no one asked her who "he" is?

A. I didn't.

Therefore, to the extent that this evidence was erroneously admitted, we hold that such error was invited. *See State v. Carter*, 210 N.C. App. 156, 167, 707 S.E.2d 700, 707-08 ("Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." (citation and quotation marks omitted)), *disc. review denied*, 365 N.C. 202, 710 S.E.2d 9 (2011); *see also id.* at 167, 707 S.E.2d at 708 (holding that the defendant's plain error challenge was "meritless" because "[e]ven assuming *arguendo* that [the forensic

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interviewer's] statement that 'something happened' was erroneously admitted, immediately following her statement, defense counsel repeated her testimony, thereby inviting [the witness] to again give her opinion that she thought 'something must have happened' ”).

Since defendant “has waived his right to all appellate review concerning the invited error, including plain error review[,]” *Barber*, 147 N.C. App. at 74, 554 S.E.2d at 416, we need not determine whether Mrs. Borsello’s testimony concerned “collateral matters.”

NO ERROR.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).