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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-70

Filed: 6 November 2018

Lincoln County, No. 15 CRS 053563

STATE OF NORTH CAROLINA

v.

JOSHUA SHANE BAKER

Appeal by defendant from judgment entered 13 December 2016 by Judge Richard L. Doughton in Lincoln County Superior Court. Heard in the Court of Appeals 17 September 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Joseph P. Lattimore, for defendant-appellant.

CALABRIA, Judge.

Joshua Shane Baker ("defendant") appeals from a judgment following a jury trial in which the jury found defendant guilty of possession of a firearm by a felon. Defendant argues that the trial court (1) plainly erred by admitting a prior written statement from a witness for the purpose of corroborating her testimony, (2) plainly erred by allowing a witness to testify as to another witness's prior inconsistent

statements, and (3) committed reversible error by admitting a supplemental report from an arresting officer for the purpose of impeachment.

After careful review, we hold defendant failed to establish plain error as to the admission of the prior written statement and the admission of the officer's testimony, and failed to show prejudice from the trial court's admission of the supplemental report; we therefore affirm defendant's judgment.

I. Facts and Procedural History

On 12 September 2015, two officers with the Lincoln County Sheriff's Office, Deputy Brandon Cesena ("Officer Cesena") and Sergeant Rude Hoernlen ("Officer Hoernlen"), responded to a domestic dispute at 2235 Otis Dellinger Road in Lincolnton, North Carolina. The dispute was between defendant and Sylvia Ginestri ("Ms. Ginestri"),[1] who were dating at the time. As the dispute died down, defendant and Ms. Ginestri agreed it would be best for defendant to leave the house and reside with his parents for a time. Defendant, Ms. Ginestri, and her two children—neither biologically related to defendant—had been living together at 2235 Otis Dellinger Road for approximately two years.

Shortly after defendant began collecting his belongings, most of which were located outside the house in a separate building, defendant's father—Hershel

[1] The transcript lists the witness as "Sylvia Gastrini;" however, the parties spell her name as "Sylvia Ginestri." For consistency, we adopt the parties' spelling and will refer to Syliva Ginestri as "Ms. Ginestri."

Baker—defendant's brother—Jason Baker—and Jason's girlfriend—Dana Cowan arrived to assist defendant with moving his belongings to Hershel's house. Defendant and his family packed up his father's truck as well as Ms. Ginestri's truck and left the house.

Officer Cesena, the first officer to respond, approached 2235 Otis Dellinger Road, and spotted the suspect's truck heading in the opposite direction and activated his lights. Both trucks drove to the side of the road and waited as Officer Cesena approached. Hershel was driving the truck, defendant was riding in the passenger seat, and both gave their driver's licenses to Officer Cesena. Upon confirming the passenger was defendant, Officer Cesena began ascertaining information as to the domestic dispute.

Because the call Officer Cesena received from dispatch indicated a gun may have been involved, Officer Cesena asked defendant if he had any firearms. Defendant responded very calmly and cooperatively that yes he did have two shotguns located in the back of the truck. By this time, Officer Hoernlen had arrived and the two officers determined the situation was safe enough such that Officer Hoernlen could proceed to Ms. Ginestri's house. Officer Cesena searched defendant within CJLEADS[2] and discovered that defendant had a felony conviction on his

[2] CJLEADS is "a secure, centralized database of comprehensive, up-to-date information about offenders for use by state and local government criminal justice professionals." North Carolina Department of Information Technology, CJLEADS, https://it.nc.gov/cjleads.

record. Officer Cesena approached defendant with this information and stated to defendant that he was not permitted to possess firearms, to which defendant responded that he "grabbed the guns with his personal belongings, when packing up his things, and that he had put them in his truck." Defendant then retrieved the shotguns and turned them over to Officer Cesena.

While Officer Cesena was talking with defendant, Officer Hoernlen arrived at 2235 Otis Dellinger Road and was signaled into the house. Upon entry, Office Hoernlen noticed what appeared to be several damaged items including a laptop and an iPad. He met with Ms. Ginestri in the kitchen and investigated her side of the dispute.

Defendant was ultimately taken to the magistrate's office where an order was issued charging defendant with possession of a firearm by a felon. Defendant was indicted on 9 November 2015 for possession of a firearm by a felon and for attaining habitual felon status. The case came before a jury on 12 December 2016.

At trial, the State presented testimony from Ms. Ginestri, Officers Cesena and Hoernlen, as well as the supervising officer on the day of defendant's arrest. In addition to the testimony, the State submitted into evidence the firearms seized on 12 September 2015, a written statement from Ms. Gastrini provided to Officer Hoernlen on 12 September 2015, and case supplements drafted by the officers at the

time of defendant's arrest. Defendant presented testimony from Hershel and Ms. Cowan.

The jury returned a verdict finding defendant guilty of possession of a firearm by a felon and defendant pleaded guilty to attaining habitual felon status. The trial court sentenced defendant to a mitigated sentencing range of 66 to 92 months in the custody of the North Carolina Department of Adult Corrections with an immediate work release. Defendant filed a petition for writ of certiorari on 22 June 2017, which this Court granted on 13 July 2017.

II. Prior Consistent Statements

Defendant's first argument is that the trial court's admission of Ms. Ginestri's prior written statement to law enforcement regarding defendant's possession of the shotguns was plainly erroneous because the statement does not fall within the corroborative evidence exception for prior consistent statements. To the extent such an admission was in error, we disagree with defendant that the error rises to the level of plain error.

A. Standard of Review

Defendant acknowledges that Ms. Ginestri's prior written statement was entered into evidence without objection, and therefore his challenge to its admissibility is reviewed only for plain error. Rule 10(a)(4) of the North Carolina

Rules of Appellate Procedure governs unpreserved challenges in criminal cases and provides:

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2017). Our appellate courts have explained, pursuant to this rule, that courts may examine issues for plain error so long as they involve either "(1) errors in the judge's instructions to the jury, or (2) *rulings on the admissibility of evidence*." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (emphasis added) (citation omitted). Plain error arises when an 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) (alteration in original) (emphasis in original) (internal quotation marks and citation omitted). "Under the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury *probably* would have reached a different result."

State v. Jordan, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (emphasis added) (citation omitted).

B. Discussion

The North Carolina Rules of Evidence define hearsay 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 (2017). Rule 802 mandates that any hearsay statement is inadmissible, unless an appropriate exception applies. N.C. Gen. Stat. § 8C-1, Rule 802; *see also State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997) ("Any hearsay statement as defined in Rule of Evidence 801(c) is inadmissible except as provided by statute or the Rules of Evidence."). One such exception relevant to the case at hand "is the prior consistent statement exception to the hearsay rule." *State v. Lee*, 348 N.C. 474, 484, 501 S.E.2d 334, 341 (1998). Under this exception, the prior statement must corroborate the witness's testimony, regardless of whether the witness has been impeached. *Id.* at 484, 501 S.E.2d at 341. The North Carolina Supreme Court has explained, to be corroborative the prior statement of the witness

> need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony. Our prior statements are disapproved to the extent that they indicate that additional or "new" information, contained in the witness's prior statement but not referred to in his trial testimony, may never be admitted as corroborative evidence. However, the witness's prior

> statements as to facts not referred to in his trial testimony *and not tending to add weight or credibility* to it are not admissible as corroborative evidence. Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony.

State v. Ramey, 318 N.C. 457, 469, 349 S.E.2d 566, 573-74 (1986) (alteration in original) (internal citations omitted).

Early in Ms. Ginestri's testimony, the prosecutor moved to admit, without objection, the prior written statement Ms. Ginestri made to law enforcement on 12 September 2015. The statement, which Ms. Ginestri read out loud from the stand, was as follows:

> I know Josh Baker had three shotguns that always stay at 2235 Otis Dellinger Road. Josh took all his stuff from the house, had his dad, his brother and his brother's girlfriend load up all his stuff. Before he left, I had him leave one shotgun because it's in my name. We got it for my son for Christmas, so he left it at my house. When he left, he took his 12 and 20 gauge shotgun, and he left one. The barrel was gone or sawed off. It needs a new barrel. One is black. One is black and brown. We were in a disturbance. He destroyed my property, and the cops were called, and he was stopped at the end of the road with the guns in his car.

The prosecutor then elicited testimony from Ms. Ginestri regarding defendant's possession of the three shotguns in which she testified:

> [Prosecutor]: . . . Now, to start with, you mentioned a third gun?
>
> [Ms. Ginestri]: Huh uh. Yes.
>
> [Prosecutor]: And tell me whose gun was that?

[Ms. Ginestri]: That was the gun I bought from Walmart for my 15 year old son.

. . .

[Prosecutor]: And did you maintain possession of that?

[Ms. Ginestri]: It was not at the house, no.

. . .

[Prosecutor]: So it was never in the house on that day?

[Ms. Ginestri]: Never in the house, no.

[Prosecutor]: And you mentioned a black gun?

[Ms. Ginestri]: Yes.

. . .

[Prosecutor]: Okay. And the other gun, the black and brown gun, is that a gun that you were familiar with?

[Ms. Ginestri]: Not really, no.

[Prosecutor]: Okay. And had you seen it prior in the house?

[Ms. Ginestri]: No.

. . .

[Prosecutor]: Did you ever maintain those guns in any way?

[Ms. Ginestri]: No.

On cross-examination, defense counsel elicited the following from Ms. Ginestri, which is contrary to the prior written statement:

> [Defense Counsel]: Now, when Hershel arrived—this is Hershel sitting in the front row?
>
> [Ms. Ginestri]: Yes, it is.
>
> [Defense Counsel]: He brought something with him, didn't he?
>
> [Ms. Ginestri]: Yes, he did.
>
> [Defense Counsel]: What did he bring with him?
>
> [Ms. Ginestri]: Those two shotguns right there.
>
> [Defense Counsel]: Where were they—to your knowledge, where had they been located prior to Hershel bringing them to you?
>
> [Ms. Ginestri]: In Iron Station at Hershel's house in the safe.
>
> [Defense Counsel]: Okay. And why would they be there?
>
> [Ms. Ginestri]: Because I have children in my house, and there's no place for me to put them, and Josh is a felon and can't be around them.

Defendant argues that it was erroneous for the trial court to have admitted the prior written statement because the statement was in direct conflict with Ms. Ginestri's trial testimony and doing so was inconsistent with the North Carolina Supreme Court's holding in *Ramey*. *Ramey*, 318 N.C. at 469, 349 S.E.2d at 573-74 (holding

that it is improper to admit prior conflicting statements under the guise of corroborating evidence).

The State agrees that a witness's prior *contradictory* statements may not be admitted under the guise of corroboration. *See, e.g., State v. Alexander*, 152 N.C. App. 701, 703-04, 568 S.E.2d 317, 319 (2002) ("Where a witness's prior statement contains facts that manifestly contradict his trial testimony, however, such evidence may not be admitted under the guise of corroborating his testimony." (internal quotation marks and citation omitted)). However, the State asserts that nothing in the transcript suggests the prosecutor was aware that Ms. Ginestri's testimony would contradict her written statement, which was admitted before the contradictory testimony was elicited. The State further highlights that Ms. Ginestri admitted on cross-examination that she had not informed the prosecutor prior to trial of the new version of the events on 12 September 2015.

We, however, need not determine whether the admission of Ms. Ginestri's prior written statement to law enforcement was in error. Even assuming *arguendo* that such admission was erroneous, an examination of the other evidence presented at trial reveals that any such error does not prejudice defendant, let alone amount to plain error.

In addition to Ms. Ginestri's testimony, the State presented testimony from the arresting officers. Officer Cesena indicated that following his ascertainment that

defendant was a convicted felon, Officer Cesena stated that Defendant told him "he [defendant] grabbed the guns with his personal belongings, when packing up his things, and that he had put them in his truck." Defendant then directed Officer Cesena to the location of the guns under the back seat of the truck, and retrieved the guns for the officers. Officer Cesena proceeded to bring defendant to the magistrate's office, where, having been read his rights, defendant admitted to being in possession of the guns and having purchased them from two individuals.

While Defendant argues Ms. Cowan's statements present a challenge to Officer Cesena's version of the events on the side of the road, the prior written statement concerns the validity of neither Officer Cesena's nor Ms. Cowan's testimonies. Under plain error analysis, defendant bears an exceptionally high burden of demonstrating that absent the error, the jury *probably* would have reached a different result. *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). Given the substantial evidence of defendant's possession of the firearms on the date of his arrest, we are bound to conclude that defendant failed to establish the trial court's admission of Ms. Ginestri's prior written statement amounted to plain error. Accordingly, we overrule defendant's argument.

III. Officer Hoernlen's Testimony

Defendant next argues that the trial court plainly erred by permitting Officer Hoernlen to testify as to statements Ms. Ginestri made to him during his investigation on 12 September 2015. We disagree.

A. Standard of Review

Defendant again acknowledges that Officer Hoernlen's testimony was admitted without objection and is therefore subject to plain error review. As discussed above, for a defendant to be successful under plain error, he must demonstrate that the error was so fundamental as to have had a probable impact on the jury's finding of the defendant guilty. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 ("To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." (internal quotation marks and citation omitted)).

B. Discussion

Rule 607 of the North Carolina Rules of Evidence states "[t]he credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607 (2015). The North Carolina Supreme Court has explained:

> 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) (citation omitted); *see also State v. Jerrells*, 98 N.C. App. 318, 321, 390 S.E.2d 722, 724 (1990) ("when a witness is cross-examined on a collateral matter, the party who draws out unfavorable answers will not be permitted to contradict them using other testimony." (citation omitted)).

In *State v. Hunt*, the North Carolina Supreme Court held it is improper to impeach a witness with the substance of a prior inconsistent statement where the witness has merely denied making the statement. *State v. Hunt*, 324 N.C. 343, 348-49, 378 S.E.2d 754, 757 (1989). However, our Court recently noted: "in cases where the witness not only denies making the prior statements but also testifies inconsistently with the prior statements, *Hunt* does not prohibit impeaching a witness's inconsistent testimony with the substance of the prior statements." *State v. Gabriel*, 207 N.C. App. 440, 447, 700 S.E.2d 127, 131 (2010) (citations omitted).

Here, defendant challenges the testimony from Officer Hoernlen regarding the prior statements Ms. Ginestri made to him during his initial investigation—*i.e.*, Ms. Ginestri's fear of defendant and Ms. Ginestri's knowledge of a handgun previously owned by defendant. Defendant argues these statements were improperly admitted as a means of getting evidence before the jury that would otherwise be inadmissible. Defendant's contention is that these matters, for which Officer Hoernlen's testimony

was being admitted for impeachment purposes, are collateral to the issues at trial and therefore it was inappropriate for the State to use extrinsic evidence.

A review of the transcript reveals that Officer Hoernlen's testimony went beyond merely impeaching Ms. Ginestri's denial of having made certain statements and addresses the substance of what she said. While this testimony may have been inadmissible in so far as Ms. Ginestri testimony was not inconsistent with her denial on those subjects, it was nevertheless not prejudicial. Because defendant did not object at trial, we review its admission for plain error under which defendant is required to demonstrate that absent the error the jury probably would have returned a different result. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. As discussed above, there was sufficient evidence apart from the disputed evidence that prevents defendant from meeting his burden. Accordingly, we hold defendant failed to demonstrate that any error arising from the admission of Officer Hoernlen's testimony amounted to plain error.

IV. Supplemental Report

Defendant lastly argues the trial court committed reversible error by admitting Officer Hoernlen's supplemental case report. We disagree.

A. Standard of Review

Unlike Defendant's other two challenges, defendant did object to the admission of Officer Hoernlen's supplemental case report and therefore it is not subject to the

same plain error standard. Rather, we turn to Section 15A-1443 of the North Carolina General Statutes, which requires that in order for a defendant to establish a reversible error, the defendant must demonstrate "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) (2015); *see also State v. Milby*, 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981) ("The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction . . . .").

B. Discussion

As discussed above, Officer Cesena's testimony provided ample evidence from which the jury was able to conclude that defendant was in possession of the firearms on the 12 September 2015. Defendant's additional admission to purchasing and possessing the firearms while at the magistrate's office provides substantial evidence such that even assuming the admission of the supplemental case report was in error, defendant has failed to demonstrate prejudice. Accordingly, we reject defendant's argument.

V. Conclusion

For the foregoing reasons, we hold defendant has failed to demonstrate prejudicial or plain error, and therefore affirm his judgment.

NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge DIETZ concur.

Report per Rule 30(e).