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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1012

Filed: 7 May 2019

Durham County, Nos. 13CRS060812, 13CRS061115

STATE OF NORTH CAROLINA

v.

ANGEL TYQUAN PHILLIP, Defendant.

Appeal by defendant from judgment entered 27 July 2017 by Judge Andrew Taube Heath in Durham County Superior Court. Heard in the Court of Appeals 28 March 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John F. Oates, Jr., for the State.

Marilyn G. Ozer for defendant-appellant.

BERGER, Judge.

On July 27, 2017, Angel Tyquan Phillip ("Defendant") was found guilty of first degree murder and possession of a firearm by a felon. Defendant appeals, arguing that the trial court erred (1) when it joined for trial his first degree murder and possession of a firearm by a felon charges because it violated his right to a fair trial; (2) when it admitted into evidence an audio recording of a call between a 911

dispatcher and an unidentified caller because it violated Defendant's right to confront a witness pursuant to the Sixth Amendment of the United States Constitution, and was inadmissible hearsay under the North Carolina Rules of Evidence; and (3) when it admitted into evidence another audio recording of a call between a 911 dispatcher and another unidentified caller because it was so grossly prejudicial that it required exclusion under the North Carolina Rules of Evidence. We find no error.

Factual and Procedural Background

The evidence presented at trial tended to show that on November 3, 2013 at approximately 8:07 p.m., Kiani Thomason ("Thomason") and Starshema Wood ("Wood") had been arguing over $20.00. While they were arguing, Jonathan Moore ("Moore"), Wood's boyfriend, and Defendant had been standing nearby. Everyone dispersed, but Thomas, Wood, Moore, and Defendant met again shortly thereafter at McDougald Terrace, an apartment complex in Durham, North Carolina. After a few words had been exchanged between Thomas and Wood, Defendant pulled out a gun and fired multiple shots into the air. As a result, Wood and Moore began to flee. Wood then heard more gun shots, turned around and saw Moore fall to the ground. After Moore fell to the ground, Defendant stood over him and fired more shots. Defendant then fled the scene. Defendant was arrested in New York City in 2014 and was subsequently extradited to North Carolina.

Defendant was indicted for murder and possession of a firearm by a felon. On May 9, 2017, the State moved to join Defendant's first degree murder and possession of a firearm by a felon charges. In response to the State's motion for joinder, Defendant moved to sever. Additionally, Defendant filed a motion to exclude the introduction of three 911 audio recordings made on November 3, 2013. During the pre-trial motions hearing, the Court granted the State's motion for joinder and denied Defendant's motion to sever. The trial court also denied defendant's motion to exclude the three 911 audio recordings. On July 27, 2017, Defendant was found guilty of first degree murder and possession of a firearm by a felon. Defendant was sentenced to life imprisonment without parole for the first degree murder charge, and a concurrent term of seventeen to thirty months for the possession of a firearm by a felon charge. Defendant appeals.

I. Joinder of Offenses

Defendant first argues that the trial court erred when it granted the State's motion for joinder and denied his motion to sever. He specifically contends that joinder was prejudicial because his prior common law robbery conviction would not have been admissible had the trial court not joined the two charges. We disagree.

"The motion to join is within the sound discretion of the trial judge, and the trial judge's ruling will not be disturbed absent an abuse of discretion. However, if there is no transactional connection, then the consolidation is improper as a matter

of law." *State v. Jenrette*, 236 N.C. App. 616, 621, 763 S.E.2d 404, 408 (2014) (citations and quotation marks omitted). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Little*, 191 N.C. App. 655, 663, 664 S.E.2d 432, 438 (2008) (citations and quotation marks omitted).

"Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2017). A two-part analysis is utilized in ruling upon a motion for joinder:

> (1) a determination of whether the offenses have a transactional connection and (2) if there is a connection, a consideration of whether the accused can receive a fair hearing on the consolidated offenses at trial....

Jenrette, 236 N.C. App. at 621, 763 S.E.2d at 408 (citations and quotation marks omitted). There may not be "inherent prejudice in joining a charge of firearm possession by a felon with another charge . . . [that] includes the element of a dangerous weapon" even though joinder permits the State to "introduce evidence which would ordinarily not be admissible, *i.e.*, that defendant had a prior felony conviction." *State v. Cromartie*, 177 N.C. App. 73, 78, 627 S.E.2d 677, 681 (2006). Moreover, when "the evidence was not complicated and the trial court's instruction to the jury clearly separated the two offenses," a defendant will not be found to have

been unjustly or prejudicially hindered to defend himself or to receive a fair hearing. *Id.*

In the present case, Defendant does not challenge the transactional connection between the two charges, but argues that joinder hindered his ability to defend against the charge of first degree murder. Defendant invoked his right not to testify at trial, thus he contends that joinder was prejudicial because it allowed the State to admit his prior common law robbery conviction, which would not have otherwise been admissible. However, in *State v. Legrand*, this Court held that the joinder of a firearm by a felon charge with a first degree murder charge did not unjustly or prejudicially hinder a defendant's defense even though joinder permitted the State to introduce the defendant's prior common law robbery conviction. *State v. Legrand*, 180 N.C. App. 692, 639 S.E.2d 143, 2006 WL 3717911, *2 (2006) (unpublished). In *Legrand*, this Court reasoned that the trial court did not abuse its discretion when it joined defendant's charges because the evidence was "not complicated and the trial court's instruction to the jury [had] clearly separated the two offenses." *Id.* at *3.

Here, Defendant contends that the evidence at trial was complicated because the State's witnesses presented contradictory testimony. However, trial testimony was not complicated and the trial court's jury instruction was clear. While charging the jury, the trial court emphasized that the jurors are "the sole judges of the credibility of each witness and the weight to be given to the testimony of each

witness." Moreover, the trial court's instruction to the jury clearly separated the two offenses. The trial court first instructed on first degree murder and second degree murder. The trial court then instructed on possessing a firearm after having been convicted of a felony. The trial court emphasized and ended its instruction on possession of a firearm by a felon with: "[y]ou may consider the evidence of a conviction of common law robbery only as it pertains to the charged offense of possession of a firearm by a convicted felon. You may not consider this evidence for any other purpose."

After reviewing the record, the trial court did not abuse its discretion in joining the charges of first degree murder and possession of a firearm by a felon. Since there was no error in the joinder of the two offenses, Defendant cannot demonstrate prejudice. Accordingly, we find no error.

II. Sixth Amendment Right to Confront Witnesses

Defendant also argues that his constitutional right to confront a witness against him under the Sixth Amendment of the United States Constitution was violated when an audio recording of a 911 call between the dispatcher and an unidentified caller was admitted into evidence. We disagree.

"We review a trial court's decisions regarding a defendant's allegations of constitutional violations de novo." *State v. McKiver*, 369 N.C. 652, 655, 799 S.E.2d 851, 854 (2017) (citation omitted). "A violation of the defendant's rights under the

Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2017).

> The Confrontation Clause of the Sixth Amendment to the Federal Constitution declares: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." U.S. Const. amend VI. The Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365, 158 L. Ed. 2d 177, 194 (2004). The Confrontation Clause does not, however, apply to nontestimonial statements. *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S.Ct. 1173, 1183, 167 L. Ed. 2d 1, 13 (2007).

McKiver, 369 N.C. at 655, 799 S.E.2d at 854.

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

"In determining whether a declarant's statements are testimonial, courts should look to all of the relevant circumstances." *Michigan v. Bryant*, 562 U.S. 344, 369 (2011). Factors for the courts to consider include:

> (1) the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred; (2) objective determination of whether an ongoing emergency existed; (3) whether a threat remained to first responders and the public; (4) medical condition of declarant; (5) whether a nontestimonial encounter evolved into a testimonial one; and (6) the informality of the statement and circumstances surrounding the statement.

State v. Glenn, 220 N.C. App. 23, 26, 725 S.E.2d 58, 61 (2012) (citation and quotation marks omitted). An ongoing emergency is described as

> a call for help against a bona fide physical threat or speaking about events *as they were actually happening*, rather than describ[ing] past events. Statements made during a 911 call often describe current circumstances requiring police assistance rather than provide a narrative of past events. Moreover, the existence of an ongoing emergency and its duration depend on the type and scope of danger posed to the victim, the police, and the public. For example, assessing whether an emergency is ongoing, and is therefore a continuing threat to the public and law enforcement, may depend in part on the type of weapon employed.

McKiver, 369 N.C. at 655-56, 799 S.E.2d at 854 (citations and quotation marks omitted). Also, "the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Davis*, 547 U.S. at 827.

In the present case, multiple audio recordings of 911 calls were admitted into evidence. On appeal, Defendant challenges the admittance of two audio recordings. Defendant concedes that the first challenged 911 call began as an emergency call. However, Defendant argues that once the operator informed the caller that an ambulance had been dispatched, the remaining statements made by the unidentified caller on the 911 audio recording were testimonial because the statements related more to the criminal investigation than to the emergency. The audio recording of the first challenged call between the 911 dispatcher and the unidentified caller was played to the jury:

> Call Center: Durham 911. What is your emergency.
>
> Caller: Yes. Uh. Uh. Uh. Excuse me. A boy just got shot at Building 44 about 5 times, point-blank. I mean the boy –
>
> Call Center: Okay. What's the address. Building 44? You talking about McDougald?
>
> Caller: Yeah. Lawson Street.
>
> Call Center: Okay.
>
> Caller: (indiscernible) I think he did (indiscernible) because the boy stood in front of him and shot him five times.
>
> Call Center: All right. And what's the phone number you're calling from?
>
> Caller: I'm calling form (*sic*) a friend of mine's phone.
>
> Call center: Okay. And you don't have the phone number?

Caller: (indiscernible) or something (indiscernible)

Call center: Are you with the boy now?

Caller: (indiscernible) I mean, I am in the house looking (indiscernible) (indiscernible), I mean.

Call center: I need you to calm down, sir. I know you're trying to help –

Caller: (indiscernible) (indiscernible) killed somebody (indiscernible)

Call center: (indiscernible) are already on the way. Okay? Somebody already called it in.

Caller: (indiscernible)

Call center: Did you see the person who shot him?

Caller: No. It's dark out there and they had hoodies on. (indiscernible) look like they're kids. I'm inside the house, looking out the window.

Call center: Which way did they run?

Caller: He ran back across the street near Building 33 on Lawson Street.

Call center: Okay. And you said they looked young?

Caller: (indiscernible) I mean, he (indiscernible). They look like little kids, 15, 16-year-old-boy. I mean, the boy stood in front (indiscernible) point-blank –

Call center: How many of them were there?

> Caller: – (indiscernible) about five times. It was the one (indiscernible) now by hisself but it was two little kids with him.
>
> Call center: Okay. You said –
>
> Caller: (indiscernible) Excuse me. Say it again?
>
> Call center: You said, sir, you said they were about – it was about four of them with two little kids?
>
> Caller: There was – there was three boys. One's laying down (indiscernible) and I think he's dead. And two more of them was together shot him. I mean, there was two boys more together. One of them shot him. I mean, just stood over top of him and shot him about five times. You (indiscernible) (indiscernible).
>
> Call center: Okay. All right. Well, we have them on the way. Okay?
>
> Caller: Yes, ma'am. I see the police cars right now.
>
> Call center: All right. Bye-bye.
>
> Caller: Yes. (End audio.)

In reviewing all relevant circumstances, the statements between the 911 dispatcher and the unidentified caller were not testimonial because they were not elicited "to establish a past fact, but 'to describe current circumstances requiring police assistance.' " *State v. Hewson*, 182 N.C. App. 196, 206, 642 S.E.2d 459, 467 (2007) (quoting *Davis*, 547 U.S. at 827). A violent crime had just taken place in an apartment complex. The caller was attempting to inform the dispatchers of the emergency for which he called seeking assistance. The caller stated that he was

inside his home and had just witnessed the possible murder of an individual who had been shot at least five times at point-blank range. Although the 911 dispatcher had informed the caller that help had been dispatched, there was still an ongoing emergency.

Defendant and other fleeing suspects continued to pose a threat to public safety in and around the apartment complex. A suspect armed with a firearm and "little kids" who were also possible suspects had fled the scene. The dispatcher's questions were designed to obtain relevant information regarding the description and location of the suspects. *See McKiver*, 369 N.C. at 656, 799 S.E.2d at 855 (determining that the anonymous caller's statements while on the phone with a 911 dispatcher describing the suspect with a firearm outside her home on a public street in a residential subdivision were nontestimonial because they enabled law enforcement to meet an ongoing emergency and threat to the public). The dispatcher asked the caller if he (1) saw the individual who had shot the victim, (2) could clarify the description provided, (3) could tell how many suspects there were, and (4) could provide information regarding the direction the suspects fled. These questions, and the responses to those questions, established that, even though the suspects had fled the scene, there was still an active threat to first responders, law enforcement, and potentially residents of the apartment complex. Thus, the caller's statements to the 911 dispatcher "were nontestimonial because they were provided in an effort to assist

police in meeting an ongoing emergency and to aid in the apprehension of armed, fleeing suspects." *State v. Guy*, ___ N.C. App. ___, ___, 822 S.E.2d 66, 72 (2018). Therefore, the statements were admissible without violating the Confrontation Clause.

III. Evidentiary Rulings

Defendant also contends that the audio recording of the second 911 call was inadmissible hearsay evidence pursuant to Rules 801 and 802 of the North Carolina Rules of Evidence. He further argues that the audio recording of the third 911 call should not have been admitted because its prejudicial impact greatly outweighed its probative value under Rule 403 of the North Carolina Rules of Evidence. We disagree.

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Little*, 191 N.C. App. at 663, 664 S.E.2d at 438 (citations and quotation marks omitted). Hearsay is "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) (2017). Although generally inadmissible at trial, hearsay may be allowed as provided by statute or the

North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2017). Here, the audio recordings were admissible under two exceptions.

The "present sense impression" exception permits the admission of statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." N.C. Gen. Stat. § 8C-1, Rule 803(1) (2017). "There is no rigid rule about how long is too long to be immediately thereafter. . . . The basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." *Little*, 191 N.C. App. at 664, 664 S.E.2d at 438 (citations, quotation marks, and brackets omitted).

In the present case, as discussed above, after having witnessed an individual get shot at point-blank, the caller immediately called 911 and informed the dispatcher what he had just observed. Moreover, while still on the phone with the 911 dispatcher, the caller described what the individuals had looked like and in what direction they had run. Because the statements fall within the "present sense impression" exception to the hearsay rule, the trial court did not abuse its discretion when it admitted the statements.

The caller's statements were also admissible under the "excited utterance" exception. The "excited utterance" exception permits the admission of statements "relating to a startling event or condition made while the declarant was under the

stress of excitement caused by the event or condition." N.C. Gen. Stat. § 8C-1, Rule 803(2) (2017). "For a statement to be considered an 'excited utterance' there must be: (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Wright*, 151 N.C. App. 493, 496, 566 S.E.2d 151, 154 (2002) (citations and quotation marks omitted). "[O]ur courts have consistently held that statements or comments made in response to questions do not necessarily rob the statements of spontaneity." *Id.* at 497, 566 S.E.2d at 154 (citations and quotation marks omitted).

Here, the caller's statements to the 911 dispatcher were made immediately after the caller had witnessed the shooting of the victim, and while the caller was still under the stress of excitement. While the caller was attempting to explain what he had just witnessed, the 911 dispatcher had to ask the caller "to calm down." Moreover, the caller's statements made in response to the 911 dispatcher's questions were made as the events were actually happening. There was little time for the caller to reflect on his thoughts, or a likelihood that the story was fabricated because of the short amount of time between the actual shooting and the statement. Because the statements also fall within the "excited utterance" exception to the hearsay rule, the trial court did not abuse its discretion when it admitted the statements. Accordingly, we find no error.

Defendant also challenges the admittance into evidence of the audio recording of the third 911 call under Rule 403 of the North Carolina Rules of Evidence. He argues that while the third call was relevant, it was cumulative and grossly prejudicial" because "publishing the call created the danger of the jurors deciding based on an improper basis."

"The decision to exclude evidence under Rule 403 is left to the discretion of the trial court, and will only be reversed on appeal upon a showing that the decision was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Jordan*, 128 N.C. App. 469, 475, 495 S.E.2d 732, 736 (1998) (citation omitted). 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 (2017). "Although relevant, evidence may be excluded if its probative value 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 (2017). "Unfair prejudice, as used in Rule 403, means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. Wilkerson*, 363 N.C. 382, 418, 683 S.E.2d 174, 196 (2009) (citations and quotation marks omitted).

Here, Defendant challenges the following 34-second audio recording between the 911 dispatcher and an unidentified caller that began at 8:28 p.m.:

> Call center: 911. What is your emergency?
>
> Caller: (indiscernible) (indiscernible) we – somebody just got shot right here on Lawson, the corner of Lawson and Ridgeway. We need a ambulance immediately. . . .
>
> Caller center: All right. The ambulance is on the way. Are you with the patient now?
>
> Caller: It's right here on – yes. I'm with the patient now, like right now.
>
> Call center: Okay.
>
> Caller: It's a lot of people out here. It's at the corner of Ridgeway and Lawson Street.
>
> Call center: Okay. Is he awake?
>
> Caller: Yes. He is awake. He is moving like – he is moving. Don't move, brah, just stay calm, man. Just stay calm, brah. We're in front of Building 44 – 44A Lawson Street. Hello?
>
> Call center: I'm still here. We have a unit that's –
>
> Caller: Yeah. (indiscernible) stay calm, brah. Stay calm. Yes, yes. They coming (indiscernible). We need a ambulance.
>
> Call center: The ambulance is coming too they will be there soon.
>
> Caller: Yes. It's a officer (indiscernible) coming up right now. I'm being serious, brah.

> Call center: All right. They will be there soon, sir. The ambulance is coming is (*sic*) well. (End audio recording.)

Defendant concedes that the third call was relevant, but argues that it had a prejudicial impact on the jury's ability to decide on an improper emotional basis. However, at the pre-trial hearing, the trial court engaged in an "evidentiary balancing test" after hearing arguments from both parties. All three 911 calls that were admitted detail the scene of the crime before, during, and after the victim was shot. Because the third call ties all three calls together, the trial court's decision to admit the third call was not manifestly unsupported by reason or so arbitrary to warrant reversal. Accordingly, we find no error.

Conclusion

For the reasons stated above, we find no error.

NO ERROR.

Chief Judge MCGEE and Judge DILLON concur.

Report per Rule 30(e).