IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-418

Filed: 4 June 2019

Mecklenburg County, No. 10 CRS 232870, 15 CRS 025910

STATE OF NORTH CAROLINA,

v.

ANTONIO LYNDELL FORNEY, Defendant.

Appeal by Defendant from judgment entered 17 August 2017 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

MURPHY, Judge.

Where a hearsay statement is nontestimonial, a trial court does not violate the Confrontation Clause by allowing that statement into evidence. Here, the trial court did not err in allowing certain out-of-court statements into evidence, either under the Confrontation Clause or the North Carolina Rules of Evidence regarding hearsay. Additionally, the trial court did not abuse its discretion in excluding impeachment

testimony under Rule of Evidence 608. In sum, we hold Defendant received a fair trial, free from error.

BACKGROUND

In the early morning hours of 22 March 2009, police responded to a report of a car fire on Tyvola Road in Charlotte. The fire investigator concluded the fire had been intentionally started using an accelerant, but police were unable to gather fingerprints or DNA evidence from the scene or locate any witnesses to the fire. The car was registered to Priti Porter ("Porter"). The previous day, Porter's mother, Tanya Davis ("Davis"), was called to a local convenience store because Porter was "hysterical[,] . . . crying[,] . . . upset, wailing, while speaking with a police officer." Davis testified she heard Porter tell police that Defendant, Antonio Forney, had pushed Porter out of her car and told her she would not see it again. At the time, Porter and Defendant had been dating for two to three years. Porter and Davis reported the car stolen. Three or four days later, Davis overheard Porter talking on the phone. After she hung up the phone, Porter told Davis it had been Defendant, calling to apologize to her, and their relationship was over.

In October 2009, police enlisted a confidential informant, Ronald Williams ("Williams"), who was then incarcerated in Gaston County Jail. Detectives arranged for electronic surveillance to be placed in Williams's cell, and audio recordings were made over the course of the following month. During one such conversation an

individual, identified at trial as Defendant, described setting a car on fire and went into detail about how he got the car—"[Porter] gave him the keys . . . and he just didn't bring the car back"—why he did not want to return it, and how there were no fingerprints left on the car.

Six years passed between the underlying crime and Defendant's March 2015 indictment for burning personal property and obtaining habitual felon status. Porter was unavailable to testify, but Davis testified to her personal knowledge regarding the incident. At the conclusion of a jury trial in Mecklenburg County Superior Court, Defendant was convicted of burning personal property and subsequently pled guilty to his habitual felon status.

ANALYSIS

A. Statements by Unavailable Witness While at the Crime Scene

Defendant first argues the trial court erred in allowing Davis to testify regarding Porter's statements to police at the crime scene on 21 March 2009, which were made in front of Davis. Davis testified, "[Porter's] car was gone. It had been taken from her. [Defendant] pushed her out of the car, and he took the car, and he told her that she would never see her car again. . . . That's what she told the officer. I overheard them." Defendant objected to Davis's testimony on both hearsay and Confrontation Clause grounds, and makes the same arguments on appeal.[1]

[1] The State argues Defendant did not preserve these arguments for appeal, but the transcript shows defense counsel properly preserved both arguments through timely objections at trial.

1. Confrontation Clause

We review Constitutional issues de novo. "The Confrontation Clause of the Sixth Amendment prohibits admission of 'testimonial' statements of a witness who did not appear at trial unless: (1) the party is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the witness." *State v. Glenn*, 220 N.C. App. 23, 25, 725 S.E.2d 58, 61 (2012) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004)). Here, it is undisputed the declarant-witness, Porter, was unavailable to testify, and that the Defendant did not have a prior opportunity to cross-examine her. What remains at issue is whether the statements in question are "testimonial" such that the trial court erred in failing to exclude them under the Confrontation Clause.

In *Crawford*, the Supreme Court held statements "taken by police officers in the course of interrogations are also testimonial" in nature. *Crawford*, 541 U.S. at 52, 158 L. Ed. 2d. at 193. The Court explicitly noted, "the term 'interrogation' [is used] in its colloquial, rather than any technical legal, sense. . . . [The] recorded statement [in question], knowingly given in response to structured police questioning, qualifies under any conceivable definition." *Id.* at 53, 158 L. Ed. 2d at 194, n. 4. In *Davis v. Washington*, the Court further clarified the definition of testimonial by holding statements 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." 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006). Conversely, "[s]tatements 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." *Id.*

The Supreme Court addressed the "primary purpose" test again in *Michigan v. Bryant*, 562 U.S. 344, 179 L. Ed. 2d 93 (2011), stating, "whether an ongoing emergency exists is simply one factor . . . that informs the ultimate inquiry regarding the 'primary purpose' of an interrogation." *Id.* at 366, 179 L. Ed. 2d at 112. "[T]here may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." *Id.* at 358, 179 L. Ed. 2d at 107. Therefore, the primary purpose inquiry must consider "all of the relevant circumstances" to determine whether the primary purpose of the police questioning was to resolve an ongoing emergency. *Id.* at 369, 179 L. Ed. 2d at 114.[2]

The Supreme Court's latest word on the matter came in *Ohio v. Clark*, 135 S.Ct. 2173, 192 L. Ed. 2d 306 (2015), addressing statements made by a young victim to a preschool teacher. *Id.* at 2177-78, 192 L. Ed. 2d at 312. In *Clark*, the Court reiterated its holding from *Bryant* but also stated, "[T]he primary purpose test is a

[2] *See also* Jessica Smith, UNC School of Government, *A Guide to* Crawford *and the Confrontation Clause* 9-10 (Sept. 2012).

necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." *Id.* at 2180-81, 192 L. Ed. 2d at 315. Furthermore, the Court noted that statements "to individuals who are not law enforcement officers . . . are much less likely to be testimonial than statements to law enforcement officers." *Id.* at 2181, 192 L. Ed. 2d at 315.

Our State Supreme Court has also grappled with the issue of what qualifies as a testimonial statement for purposes of the Confrontation Clause. *See State v. Miller*, ___ N.C. ___, 814 S.E.2d 93 (2018). In *Miller*, our Supreme Court analyzed *Crawford* and its progeny and held a domestic violence victim's statements to police were nontestimonial and therefore properly allowed into evidence over a confrontation clause objection. *Id.* at ___, 814 S.E.2d at 100. In reaching that determination, the North Carolina Supreme Court noted the challenged statements were made "during the course of an ongoing emergency . . . to ensure that defendant, whose current location was unknown, had departed and no longer posed a threat to [the witness's] safety." *Id.* Additionally, the Court found it important that the discussion "was clearly informal and took place in an environment that cannot be reasonably described as 'tranquil'[.]" *Id.*

As mandated by both the Supreme Court of the United States and North Carolina Supreme Court, our analysis of the challenged statements in this case requires an objective review of the circumstances to determine the primary purpose

of Porter's communication. Almost every police investigation starts with nontestimonial statements because the responding officer must initially determine what happened, whether the victim is still in danger, and whether the alleged bad actor poses a risk to other members of the community. There is a turning point when and if an officer determines the situation is not dangerous and, at that point, statements become testimonial in nature because they are offered to apprehend and charge the perpetrator rather than to resolve an ongoing emergency. Here, the officer who was actually taking the report did not testify, so our objective review begins and ends with Davis's testimony about the circumstances surrounding Porter's statement. After careful review of the factors examined in *Bryant* and *Miller*, we hold the statements in question were nontestimonial and their admission at trial did not violate the Confrontation Clause.

According to Davis, police were at the scene "to take [Porter's] report" regarding her stolen car. As was the case in *Miller*, Defendant's location was unknown when Porter spoke with police and the discussion took place in a public environment rather than a police station or other controlled area. *Miller*, ___ N.C. at ___, 814 S.E.2d at 100. The incident took place in public, the perpetrator's location and motive were unknown, the questioning took place shortly after the event, and the location was unsecured, all of which indicate an emergency was ongoing and that the statements were nontestimonial. *Bryant*, 562 U.S. at 363, 179 L. Ed. 2d at 110-11

("An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue."). Although this case is admittedly a close one, in applying the U.S. Supreme Court's current Confrontation Clause framework to the facts of this case, we hold Porter's statements to police were nontestimonial in nature and Davis's testimony at trial did not violate the Confrontation Clause.[3]

2. Admissibility under the Rules of Evidence

In addition to his argument regarding the Confrontation Clause, Defendant argues the trial court should have excluded Davis's testimony as impermissible hearsay. "This Court reviews a trial court's ruling on the admission of evidence over a party's hearsay objection *de novo*." *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015). Our Rules of Evidence prohibit the admission of hearsay except as provided by statute or by the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 802 (2017). A party seeking to introduce testimony under a hearsay exception has the burden of showing the exception applies. *State v. Hinnant*, 351 N.C. 277, 287, 523 S.E.2d 663, 669 (2000). Here, the State sought to introduce

[3] It is immaterial to our analysis whether the individual judges of this panel find the opinions of Justices Scalia and Ginsburg—in *Bryant* and *Clark*, respectively—more persuasive than those expressed by the authoritative and binding opinions of their respective Majorities. *See State v. Barker*, 34 N.C. App. 315, 317, 238 S.E.2d 152, 153 (1977) (noting "we are bound by the opinion[s] of the United States Supreme Court" when interpreting rules regarding the U.S. Constitution).

Porter's out-of-court statement for the truth of the matter asserted therein and bears the burden of showing an exception applies.

The testimony at issue here is actually hearsay within hearsay, which requires analysis at each level. Davis testified that she overheard Porter tell police that Defendant said she would never get her car back; each statement—Porter's statement to police and Defendant's statement to Porter—must be admissible through a hearsay exception in order for Davis's testimony to be admissible under the Rules of Evidence. *State v. Larrimore*, 340 N.C. 119, 147, 456 S.E.2d 789, 803 (1995). Defendant's statement that Porter would never see her car again is undisputedly admissible as a statement of a party opponent under N.C.G.S. § 8C-1, Rule 801(d)(A) (2017). *See State v. Gregory*, 340 N.C. 365, 401, 459 S.E.2d 638, 658 (1995) (holding "[a] statement made by [a] defendant and offered by the State against him is admissible as an exception to the hearsay rule as a statement of a party-opponent").

Turning to Porter's statement, the State argues her statement that Defendant pushed her out of the car and said she would never see it again is admissible as a present sense impression, an excited utterance, or a then existing mental, emotional, or physical condition. At trial, the State only argued for the first two exceptions but made no mention of the then-existing condition exception. Therefore, our review is limited to whether Porter's statement to police meets either the present sense impression or excited utterance hearsay exception. *See Piraino Bros., LLC v. Atl. Fin.*

Grp., Inc., 211 N.C. App. 343, 348, 712 S.E.2d 328, 332, *disc. review denied*, 365 N.C. 357, 718 S.E.2d 391 (2011) ("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 in the appellate courts.").

A present sense impression is a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" and is not excluded by the rule against hearsay. N.C.G.S. § 8C-1, Rule 803(1) (2017). "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." *State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997). "Although there is no *per se* definition of 'immediately thereafter,' prior holdings of [the Supreme] Court indicate that a brief lapse in time does not disqualify a statement from falling under Rule 803(1)." *State v. Morgan*, 359 N.C. 131, 155, 604 S.E.2d 886, 900-01 (2004); *see also State v. Cummings*, 326 N.C. 298, 314, 389 S.E.2d 66, 75 (1990) (holding a statement made after having driven from Willow Springs to Raleigh was sufficiently close to the event to be admissible as a present sense impression); *State v. Odom*, 316 N.C. 306, 313, 341 S.E.2d 332, 336 (1986) (holding a statement to police ten minutes after the event in question is admissible as a present sense impression).

Evidence presented at trial indicates Porter made the statement in question within ten to fifteen minutes of having her car taken. Porter's statement that "[Defendant] pushed her out of the car, and he took the car, and he told her that she would never see her car again[,]" is a description and explanation of the event that had taken place ten to fifteen minutes earlier. This meets the definition of a present sense impression under our caselaw, and the trial court did not err in allowing the testimony over Defendant's hearsay objection.

Under both the Confrontation Clause and our Rules of Evidence, the trial court did not err in allowing Davis to testify as to Porter's statement to police at the crime scene.

B. Statements by Unavailable Witness on the Phone

Defendant next argues the trial court erred by allowing Davis to testify that days after her car was stolen, Porter spoke with Defendant on the phone and then told Davis "she was apologized to, but that she wasn't accepting it and that the relationship with her and [Defendant] was over."[4] We review this issue de novo to determine whether this statement meets an exception to the rule against hearsay.

Regarding the phone call, the State contends Davis's testimony was admissible as either a present sense impression or an excited utterance. A statement can meet the definition of a present sense impression even without a startling event. *Compare*

[4] The State argues Defendant failed to preserve this issue for appellate review, but that is incorrect; the transcript reveals the Defendant objected to this testimony on hearsay grounds.

N.C.G.S. § 8C-1, Rule 803(1) *with* Rule 803(2) (defining an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). Davis testified that she heard Porter talking on the phone and—once the conversation ended—Porter told her what the conversation had been about: "That the Defendant had apologized to her, she was not going to accept it, and the relationship was done." That statement describes an event, the phone call, immediately after the declarant, Porter, experienced it. As such, under the reasoning of the Rule, there was no moment for fabrication, and the statement could be admitted without violating our Rules of Evidence. The trial court committed no error in allowing Davis to testify about Porter's description of the phone call.

C. Impeachment Evidence

Next, Defendant argues "the trial court abused its discretion in barring defense counsel's line of cross-examination" regarding Davis's prior accusation of embezzlement. At trial, outside the presence of the jury, the defense attempted to ask Davis if it is "true that you were accused of embezzlement . . . [a]nd you went through the deferred prosecution program[?]" Defense counsel expressed his intent to "ask that question . . . because I think it goes toward [N.C. Rule of Evidence] 608(b)." After the State objected, the trial court exercised its discretion and prohibited the defense from impeaching Davis by bringing up her prior accusation of embezzlement.

We review a trial court's discretionary determinations for abuse of discretion, and an appellant bears the burden of proving "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Medlin v. FYCO, Inc.*, 139 N.C.App. 534, 540, 534 S.E.2d 622, 627 (2000). North Carolina Rule of Evidence 608 concerns "evidence of character and conduct of [a] witness." N.C.G.S. § 8C-1, Rule 608 (2017). Section (b) states, in relevant part, a witness's credibility may be attacked or supported during cross-examination by specific instances of conduct, "in the discretion of the court, if probative of truthfulness or untruthfulness." *Id.* at (b). Our Supreme Court has held that specific instances of conduct are admissible under 608(b):

> [O]nly in the very narrow instance where (1) the purpose of producing the evidence is to impeach or enhance credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness; and (2) the conduct in question is in fact probative of truthfulness or untruthfulness and is not too remote in time; and (3) the conduct in question did not result in a conviction; and (4) the inquiry into the conduct takes place during cross-examination.

State v. Morgan, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986) (internal alterations omitted).

In deciding issues regarding Rule 608—and Rule 609, which specifically addresses prior convictions—our appellate courts have never explicitly held that embezzlement is probative of untruthfulness. Our Supreme Court has listed the

following types of crimes as those which can most readily be described as probative of one's truthfulness or untruthfulness: "use of false identity, making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others." *Morgan*, 315 N.C. at 635, 340 S.E.2d at 90. Although embezzlement can be categorized as an attempt to cheat another, it is not clear from our caselaw that a prior accusation of embezzlement is necessarily probative of truthfulness or untruthfulness. The law on this matter is unsettled.

As the party seeking admission, defense counsel bore the burden of proving this line of questioning was proper under 608(b). Defendant failed to provide the trial court—or this Court—with any caselaw indicating a prior accusation of embezzlement must be admitted under Rule 608 such that a trial court abuses its discretion where it fails to do so. After careful review of the record on appeal and our Rule 608 caselaw, we hold the trial court's ruling was not wholly arbitrary or manifestly unsupported by reason.

D. Cumulative Error

Defendant's final argument for a new trial is that the trial court's alleged errors, viewed cumulatively, deprived him of a fair trial. "Cumulative error" can be grounds for a new trial where, although no single error would have been prejudicial in isolation, the cumulative effect of multiple errors "create[s] sufficient prejudice to

deny [a] defendant a fair trial." *State v. Canady*, 355 N.C. 242, 246, 559 S.E.2d 762, 764 (2002). In both of the cases Defendant cites, the appellate court found multiple non-prejudicial errors. *State v. Hembree*, 368 N.C. 2, 20, 770 S.E.2d 77, 89 (2015); *Canady*, 355 N.C. at 254, 559 S.E.2d at 768. Where there are not multiple errors there cannot be cumulative error. Here, we have not found the trial court committed any of the errors Defendant alleges and cannot conclude his trial was rendered unfair by cumulative error.

CONCLUSION

In conclusion, the trial court did not err in allowing the challenged out-of-court statements into evidence, either under the Confrontation Clause or the North Carolina Rules of Evidence regarding hearsay. The trial court did not abuse its discretion in excluding the impeachment testimony Defendant sought to admit under Rule of Evidence 608. Defendant received a fair trial, free from error.

NO ERROR.

Judge DILLON concurs, writing separately.

Judge ARROWOOD concurs in the result only.

Report per Rule 30(e).

DILLON, Judge, concurring, writing separately.

I agree that Defendant received a fair trial, free from prejudicial error.

I agree that the testimony by the victim's mother regarding what her daughter said to investigating officers did not violate the Confrontation Clause, as the daughter's statements were nontestimonial in nature. *See Davis v. Washington*, 547 U.S. 813, 822 (2006).

Regarding Defendant's argument that the testimony by the victim's mother violated our Rules of Evidence, I conclude that any error in this regard was not prejudicial, based on other evidence presented by the State proving Defendant's guilt, namely the recording of Defendant admitting to the crime to his cellmate.

Regarding Defendant's argument that the trial court should have allowed him to impeach the victim's mother during cross-examination about her being accused of embezzlement in the past, I believe there is a strong argument that such inquiry is within the scope of Rule 608(b) of our Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 608(b) (2015). That is, there is a strong argument that an act of embezzlement is an act of dishonesty. *See State v. Morgan*, 315 N.C. 626, 534, 340 S.E.2d 84, 89-90 (1986) ("Among the types of conduct most widely accepted as [admissible under Rule 608(b)] are use of false identity, making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to

corrupt or cheat others, and attempting to deceive or defraud others.") (internal citations omitted). But again, in light of Defendant's recorded confession, I believe that any error by the trial court in this regard was not prejudicial.