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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-463

Filed: 7 January 2020

Wayne County, No. 13 CRS 55207

STATE OF NORTH CAROLINA

v.

TIMOTHY JEROME MIDGETTE

Appeal by defendant from judgments entered 28 March 2018 by Judge Phyllis M. Gorham in Wayne County Superior Court. Heard in the Court of Appeals 5 December 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General K.D. Sturgis, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant-appellant.

TYSON, Judge.

Timothy Jerome Midgette (“Defendant”) appeals from a jury’s conviction of first-degree murder, robbery with a dangerous weapon, and discharging a firearm into occupied property. Under plain error analysis and review for prejudice, we find no reversible error.

I. Background

Defendant and Antonio Seaberry (“Seaberry”) were inside Laquan Pearsall’s (“Pearsall”) car on the evening of 17 September 2011. Pearsall was shot four times. One bullet travelled through his forehead and brain and was “fatal immediately.”

After both Defendant and Seaberry had testified, but before the case was submitted to the jury in Seaberry’s trial, Seaberry pled guilty to second-degree murder and robbery with a dangerous weapon on 31 October 2013. This plea resulted from a voluntary and knowing agreement between Seaberry and the State, in exchange for Seaberry’s truthful testimony against Defendant. Defendant was indicted for first-degree murder, robbery with a dangerous weapon, and discharging a firearm into occupied property on 2 December 2013.

Between the night of Pearsall’s murder and Defendant’s trial, Seaberry provided six different versions of the murder and robbery: four during police interviews in the fall of 2011; one at his own trial in October 2013; and one at Defendant’s trial in March 2018. At Defendant’s trial, Seaberry was extensively cross-examined by defense counsel about the inconsistencies among his previous statements to police, his testimony at his own trial, and his testimony at Defendant’s trial.

The State’s evidence in Defendant’s trial relied heavily on Seaberry’s testimony. That testimony tended to show Defendant and Seaberry had planned to

rob Pearsall. Defendant shot Pearsall so there would not be witnesses. Seaberry also testified, without relevant objection by Defendant's counsel, to the contents of text messages exchanged between Defendant and himself both before and after Pearsall's death.

Defendant's theory of the case and his defense asserted Seaberry had planned on robbing both Pearsall and Defendant. Defendant's counsel argued Seaberry shot Pearsall as both men simultaneously ran from him. Seaberry testified to his prior criminal convictions, including one for armed robbery in 2003. Defendant's counsel sought to further cross-examine Seaberry regarding the facts underlying that incident, and another incident from 2000, to establish a modus operandi of Seaberry "supposedly always [being] around these things, but never quite involved." The trial court limited Defendant's cross-examination of Seaberry to exclude questioning regarding the underlying facts of these prior incidents.

At the close of the State's evidence, Defendant moved to dismiss all charges for insufficient evidence. Defendant argued Seaberry's testimony and his prior inconsistent statements were "inherently incredible" and not sufficient evidence to submit the case to the jury. Defendant's motion to dismiss was denied. Defendant did not testify or introduce any evidence.

On 28 March 2018, the jury found Defendant guilty of first-degree murder, robbery with a dangerous weapon, and discharging a weapon into an occupied

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property. The first-degree murder charge was based on the felony murder rule, with the robbery with a dangerous weapon serving as the predicate felony. The jury rejected the aggravating factor that Defendant had “induced others to participate in the commission of the offense.”

The trial court sentenced Defendant to life imprisonment without the possibility of parole for the first-degree murder charge. It also sentenced him to a consecutive term of 29 to 44 months for the conviction of discharging a firearm into occupied property. The trial court arrested judgment on Defendant’s conviction for robbery with a dangerous weapon. Defendant entered notice of appeal in open court.

II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court: (1) erred by denying his motion to dismiss all charges for insufficient evidence; (2) committed reversible error by limiting his cross-examination of a witness against him in violation of the Confrontation Clause; and, (3) committed plain error by allowing the admission of the contents of text messages into evidence in violation of the best evidence rule.

IV. Sufficiency of Evidence

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Defendant argues the trial court erred in denying his motion to dismiss for insufficient evidence.

A. Standard of Review

This Court's standard of review on Defendant's motion to dismiss is well established. "The denial of a motion to dismiss for insufficient evidence is a question of law, which this Court reviews *de novo*." *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007) (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). We review Defendant's arguments *de novo*.

B. Analysis

Defendant cites *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967), for the proposition that trial courts have “the duty of taking the case from the jury” when evidence to support the case is “inherently incredible.” *Id.* at 731, 154 S.E.2d at 905 (citations omitted). Defendant argues Seaberry’s inconsistency in his multiple statements renders his testimony “inherently incredible,” and the trial court erred by not granting his motion to dismiss. To accept Defendant’s argument would drastically expand *Miller* by encroaching upon the jury’s exclusive role to determine the credibility of witnesses and to determine the truth. *See State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 351 (1986) (“The jury is the lie detector in the courtroom and is the only proper entity to perform the ultimate function of every trial -- determination of the truth.”) (citations omitted).

Our Supreme Court clarified its holding in *Miller* to apply to “evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature.” *State v. Cox*, 289 N.C. 414, 422-23, 222 S.E.2d 246, 253 (1976) (citation omitted).

In *Miller* the State’s evidence was ample to show that the building of the Hall Oil Company in Charlotte was broken and entered by two or more men on the night of 28 September 1966 and that its safe, containing money and other valuables, was then damaged in an effort to force it open. The exterior of the building and surrounding grounds were well lighted by nearby street lights, floodlights at the front and back, and spotlights attached to the eaves. The building was 286 feet from a Texaco service station with a vacant lot between. The only

evidence tending to identify defendant as one of the perpetrators of the offense was the testimony of a sixteen-year-old witness who identified defendant in a lineup as one of the persons he had seen at the scene of the crime. The witness was never closer than 286 feet to a man he saw running along the Hall Oil Company building. The witness had never seen the man theretofore and testified he saw this man run once in each direction, stop at the front of the building, peep around it and look in the witness's direction. The witness could not describe the color of the man's hair or eyes, or the color of his clothing, except that his clothes were dark.

Id. at 422, 222 S.E.2d at 252-53.

In *Miller*, our Supreme Court held “the uncontradicted testimony as to the physical facts disclosed that the witness’s observation of defendant was insufficient to support the subsequent identification of defendant with that degree of certainty which would justify submission of the case to the jury.” *Id.* at 422, 222 S.E.2d at 253. By contrast, upon a defendant’s motion to dismiss, “[c]ontradictions and discrepancies, even in the State’s evidence, are for the jury to resolve and do not warrant nonsuit.” *Id.* at 423, 222 S.E.2d at 253.

Seaberry’s inconsistencies represent the very contradictions and discrepancies our Supreme Court held are properly submitted for the jury to resolve. *See id.* A witness’s testimony that is inconsistent with prior statements, but which are not “indisputable physical facts or laws of nature,” rests within the jury’s responsibility of weighing credibility, and is not within the trial court’s “duty of taking the case from

the jury” when the evidence is “inherently impossible.” *Miller*, 270 N.C. at 731, 154 S.E.2d at 905.

Although Seaberry’s multiple statements were inconsistent, viewed in the light most favorable to the State and with the benefit of inferences therefrom, the State presented substantial evidence tending to show Defendant committed the charged offenses. The trial court did not err in denying Defendant’s motion to dismiss. Defendant’s argument is overruled.

V. Cross-Examination of Seaberry

At trial, Defendant sought to cross-examine Seaberry about the facts underlying two previous incidents; one resulting in his pleading guilty to two counts of armed robbery, and another arrest for armed robbery. The trial court allowed Defendant to make a proffer of Seaberry’s testimony in *voir dire*. Defense counsel argued this testimony was relevant and admissible under Rule 404(b) to show Seaberry’s “intent, his preparation, his knowledge, the absence of any kind of mistake . . . if nothing else a modus operandi.” The trial court disagreed and did not allow Defendant to question Seaberry about the specific details of the prior robberies.

During the *voir dire*, Defendant’s counsel primarily argued under Rule 404(b), which is discussed below. Defendant’s counsel did not specifically argue a violation of Defendant’s right to confront Seaberry under the Confrontation Clause at trial. On

appeal, Defendant primarily argues under the Confrontation Clause. Defendant cannot show the trial court abused its discretion under either basis to show error.

A. Confrontation Clause

1. Standard of Review

A defendant's "right of cross-examination is not absolute and may be limited in appropriate cases." *State v. Mason*, 315 N.C. 724, 730, 340 S.E.2d 430, 434 (1986) (citation omitted). "In general, we review a trial court's limitation on cross-examination for abuse of discretion. If the trial court errs in excluding witness testimony showing possible bias, thus violating the Confrontation Clause, the error is reviewed to determine whether it was harmless beyond a reasonable doubt." *State v. Bowman*, 372 N.C. 439, 444, 831 S.E.2d 316, 319 (2019) (citations omitted).

2. Analysis

Defendant cites our Supreme Court's recent opinion in *Bowman* to support his argument. In *Bowman*, our Supreme Court affirmed a decision by this Court, which found constitutional error in the restriction of a defendant's cross-examination of the State's sole eyewitness. *Id.* at 440, 831 S.E.2d at 317. The defendant's counsel in *Bowman* sought to cross-examine the eyewitness concerning pending charges against her, and any negotiations towards a potential plea bargain in her case, in an attempt to demonstrate possible bias in her testimony. *Id.* at 447, 831 S.E.2d at 321. "Recognizing that Malachi was the only witness to the crime and that she was facing

more than a decade in prison because of her pending drug charges, the State had a strong weapon to control Malachi.” *Id.* (citation, alterations, and internal quotation marks omitted).

Bowman is inapplicable to the case before us. Defendant here was not concerned with Seaberry’s “pending . . . charges,” but rather sought minutia concerning Seaberry’s admitted past conviction or incidents almost a decade before. *Id.* Defendant did not assert these incidents to show potential witness bias, but rather to show a possible modus operandi. The defendant in *Bowman* sought to explore the possibility of bias implicated by the State’s control over a potential, pending plea bargain with the testifying witness. Defendant here was not suggesting the State had “a strong weapon to control” Seaberry, as his trial on these charges had already concluded. *Id.*

We also note the Defendant’s argument, that Seaberry’s prior record tended to show a modus operandi of “supposedly always [being] around these things, but never quite involved” and then pleading guilty, is actually exculpatory for Seaberry shooting Pearsall. This argument of purported “modus operandi” does not appear to benefit Defendant’s case in any significant way.

Defendant failed to show the trial court’s limitation on Seaberry’s cross-examination violated the Confrontation Clause. *Id.* Defendant’s argument is overruled.

B. Rules of Evidence

Although Defendant primarily argues error under the Confrontation Clause, his argument also asserts the trial court abused its discretion in limiting his cross-examination of Seaberry, because the excluded testimony was admissible under Rules 404(b), 401, and 611.

1. Standards of Review

When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b).

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012).

A trial court's rulings on relevancy under Rule 401 "technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, [but] such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citation omitted).

"[A]lthough cross-examination is a matter of right, the scope of cross-examination [under Rule 611] is subject to appropriate control in the sound discretion of the court." *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990) (citations omitted).

2. Analysis

Rule 404(b) states,

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017).

Rule 404(b) is a “general rule of *inclusion* of relevant evidence of other crimes . . . subject to but *one exception* requiring its exclusion if its *only* probative value is to show that [a person] has the propensity or disposition to commit an offense of the nature of the crime charged.” *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54 (emphasis original). “To effectuate these important evidentiary safeguards, the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity.” *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted).

Defendant sought to cross-examine Seaberry about the facts underlying two prior incidents, one in 2003 and one in 2000. The 2003 incident was a “commotion” involving Seaberry, a couple of his friends, and a “group of guys” that met at a movie theatre in Raleigh, “and it all escalated.” Seaberry testified he was in the car, did not have the gun involved, and pled guilty to two counts of armed robbery from that incident.

The 2000 incident involved the theft of a scooter. Seaberry claimed “no gun was involved” in that incident, that he did not take the scooter, did not remember what happened to the scooter after it was taken, and “just happened to be there.”

Defendant’s counsel argued these incidents “kind of set up a pattern that this young man has, that he’s supposedly always around these things, but never quite involved, . . . I think it does set up a modus operandi for this gentleman.” The State argued these incidents were “remote in time,” at least “eight or more years” old, and “there isn’t a nexus as to specific acts of conduct” to match the facts surrounding Pearsall’s robbery and death.

The trial court agreed with State, ruling: “I do not think that they are so . . . similar in nature to this offense and this trial, they’re at least eight or nine years old, and I don’t think that they’re relevant, so therefore I’m not going to allow you to question this witness about the details of these offenses.” The trial court also noted, “as far as any evidence that he did it, he’s testified he admitted that he did, in fact, commit these crimes.”

Seaberry’s testimony about the underlying facts of these incidents supports the trial court’s findings. These two prior incidents were not similar in nature to Pearsall’s robbery and murder and were remote in time. These findings on lack of similarity and remote temporal proximity support the court’s conclusion to limit Defendant’s further cross-examination of Seaberry. Defendant has not carried his

burden to overturn the deference given to the trial court's discretion and its control over cross-examination. Defendant's argument is overruled.

VI. Best Evidence Rule

Defendant argues the trial court committed plain error by allowing the admission of evidence regarding the content of text messages in violation of the "best evidence rule." N.C. Gen. Stat. § 8C-1, Rule 1002, cmt. (2017). Defendant concedes his trial counsel did not object to the admission of this evidence and the issue is not preserved on appeal.

A. Standard of Review

This Court only reviews unpreserved instructional and evidentiary errors in criminal cases for plain error. *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018). To show plain error,

the defendant must show that a fundamental error occurred at trial. To show fundamental error, 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. Further, . . . because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

Id. (citations, alterations, and internal quotation marks omitted).

B. Analysis

Under the North Carolina Rules of Evidence, "every writing sought to be admitted must be properly authenticated . . . and must satisfy the requirements of

the ‘best evidence rule’ . . . or one of its exceptions.” *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 276, 354 S.E.2d 767, 771 (1987) (citations omitted); *see also* N.C. Gen. Stat. § 8C-1, Rules 901, 1002–03 (2017). The “best evidence rule” states that “[t]o prove the content of a writing . . . the original writing . . . is required, except as otherwise provided in these rules or by statute.” N.C. Gen. Stat. § 8C-1, Rule 1002.

At multiple points, Seaberry testified to the contents of the text messages between Defendant and himself that were sent before and after Pearsall’s murder. All of this evidence was elicited as testimony. From the record on appeal, it appears the only written document admitted into evidence and containing the content of these text messages was a transcript of Defendant’s testimony from Seaberry’s trial, in which he discussed the contents of these same text messages.

Whether the testimony about the contents of the text messages implicates the best evidence rule, or falls within the admission-of-a-party-opponent exception to the hearsay rule as the State argues, we need not decide in this case. Whether the trial court erred or not in admitting this evidence, under plain error review, Defendant must show prejudice “that seriously affects the fairness, integrity or public reputation of judicial proceedings” to prevail under plain error review. *Maddux*, 371 N.C. at 564, 819 S.E.2d at 371.

Defendant argues the contents of the text messages at issue were central to the jury’s verdict because the jury asked for “any phone records in evidence” in a note

to the court during its deliberations. The jury asked for several exhibits, of which the phone records were last in a list. The jury asked for “a copy of Mr. Seaberry’s testimony at first trial and also copies of all his police statements,” “any police statements from Tim Midgette,” and the “transcript of Tim’s testimony at first trial,” in addition to the phone records.

After reviewing the jury’s note, both Defendant’s counsel and the prosecutor agreed that no phone records were admitted into evidence. Rather than showing the text messages to be central to the jury’s deliberations, this note suggests the jury was primarily concerned with weighing the credibility of Seaberry’s testimony and his prior statements compared with Defendant’s testimony and prior statements. Defendant has not shown the requisite prejudice to prevail under plain error review for a new trial. His argument is overruled.

VII. Conclusion

Defendant’s motion to dismiss for insufficient evidence was properly denied. Multiple, inconsistent prior statements by Seaberry raised issues of credibility for the jury to resolve. These inconsistencies did not rise to the level of “inherently incredible” evidence such that the trial court, in the light most favorable to the State under Defendant’s motion to dismiss, had a duty to take the case from the jury. *See Miller*, 270 N.C. at 731, 154 S.E.2d at 905.

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The trial court's limitation of Defendant's cross-examination of Seaberry to exclude testimony concerning the facts underlying two previous robbery incidents did not implicate the Confrontation Clause. The trial court did not abuse its discretion or err in exercising its control over Seaberry's cross-examination in finding the incidents were factually dissimilar, remote in time, and not relevant.

Defendant has failed to demonstrate prejudice to show the trial court committed plain error in allowing testimony regarding the contents of text messages in violation of the best evidence rule. Defendant received a fair trial, free from prejudicial error he preserved or argued. We find no reversible error to award a new trial. *It is so ordered.*

NO PREJUDICIAL ERROR.

Judges MURPHY and YOUNG concur.

Report per Rule 30(e).