

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-399

Filed: 21 January 2020

Transylvania County, Nos. 17CRS050321; 17CRS050371-72

STATE OF NORTH CAROLINA

v.

PRINCETON DAJON THOMAS, Defendant.

Appeal by defendant from judgments entered 26 October 2018 by Judge R. Gregory Horne in Transylvania County Superior Court. Heard in the Court of Appeals 16 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Rana Badwan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for defendant-appellant.

BERGER, Judge.

After a bench trial, Princeton Dajon Thomas (“Defendant”) was found guilty of second-degree burglary, conspiracy to commit second-degree burglary, and cruelty to animals. He received a suspended sentence for his convictions and was placed on supervised probation. Defendant appeals, arguing his Sixth Amendment right to

confront a witness against him was violated when the trial court admitted a 911 audio recording and 911 event report into evidence. He further contends admission of the 911 audio recording and event report was inadmissible hearsay. We find no error.

Factual and Procedural Background

The State's evidence at trial tended to show that on December 25, 2016, Shelby Laughter ("Laughter"), her boyfriend Brandon Magwood ("Magwood"), Defendant, and an unidentified male decided to purchase cocaine. Magwood called Keith Saunders ("Saunders") to purchase the cocaine. After speaking with Saunders, Magwood informed the group Saunders was not home, and they decided to steal the cocaine from Saunders' home. When they arrived at Saunders' home in Brevard Trailer Park, Defendant, Magwood, and the unidentified male got out of the car, and Laughter drove away.

Laughter was on the phone with Magwood the entire time, and she heard two gunshots. Magwood told Laughter to meet them at a parking lot. When she got to the parking lot, all three males were present. A member of the group stated that he may have dropped his gun at Saunders' home. Magwood and the unidentified male got out of the car and returned to Saunders' home to look for the weapon.

Officer Rick Harbin ("Officer Harbin") of the Brevard Police Department approached the vehicle while Defendant and Laughter were waiting. According to Officer Harbin, he approached the vehicle because dispatch had previously advised

STATE V. THOMAS

Opinion of the Court

that a suspicious vehicle had been reported in Brevard Trailer Park. When Officer Harbin made contact with Defendant and Laughter, Defendant was in the driver's seat and Laughter was in the passenger seat. Officer Harbin informed the two that their car matched a suspicious vehicle that had been reported in the area.

Defendant informed Officer Harbin that he was looking for a person named Brandon. After checking Defendant's license, registration, and insurance, Officer Harbin noted nothing significant and left. Defendant and Laughter subsequently picked up Magwood and the unidentified male on the side of the road near Brevard Trailer Park. Defendant then dropped-off Laughter and Magwood at their apartment.

At 3:00 a.m. that morning, Officer Harbin responded to a breaking and entering call at Brevard Trailer Park. Officer Harbin and Lieutenant Danny Britt ("Lieutenant Britt") arrived on scene and found Saunders outside. When Officer Harbin entered the residence, he observed a dead puppy in the kitchen, bloody footprints, and that the sliding glass door to the porch was open. Officer Harbin testified that "the place was trashed." Lieutenant Britt testified that a window in the end of the home was open, the screen from the sliding glass door was off, and a television was leaning up against the kitchen counter. Both officers testified they did not find anyone after sweeping the home.

During trial, the State moved to introduce two 911 event reports and a 911 audio recording. The reports noted two calls received by the Transylvania County Emergency Department on December 25, 2016. The first event report described the call type as “Suspicious Vehicle/Person” in Brevard Trailer Park, and the second event report described the call type as “Breaking and Entering” in Brevard Trailer Park. The audio recording included a conversation between a 911 dispatcher and Saunders on the same night. Defense counsel objected to the introduction of the reports and the audio recording on hearsay and Sixth Amendment confrontation grounds. The trial court admitted both under the business records exception to hearsay. Defendant did not present evidence.

The trial court found Defendant not guilty of larceny. He was found guilty of second-degree burglary, conspiracy to commit second-degree burglary, and felony cruelty to animals, and he was placed on supervised probation. Defendant appeals.

Analysis

I. Sixth Amendment Right to Confront Witnesses

Defendant first argues his Sixth Amendment right to confront and cross-examine witnesses was violated when the trial court admitted into evidence the 911 audio recording of the call between the dispatcher and Saunders. Specifically, Defendant contends the statements in the audio recording were not made during an

ongoing emergency and that the State failed to show that Saunders was unavailable to testify. We disagree.

“The standard of review for alleged violations of constitutional rights is *de novo*.” *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). “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. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal citation and quotation marks omitted).

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).

State v. McKiver, 369 N.C. 652, 655, 799 S.E.2d 851, 854 (2017). “Our Court has held that evaluating whether a defendant’s right to confrontation has been violated is a three-step process. We must determine: (1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant.” *State v. Allen*, 171 N.C. App. 71, 74-75, 614 S.E.2d 361, 364-65 (2005) (internal quotation marks and citation omitted).

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). “A 911 call . . . and at least 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.” *Id.* (alterations in original).

“Courts should look to all of the relevant circumstances and objectively evaluate the statements and actions of all participants, including the parties’ perception that an emergency is ongoing.” *McKiver*, 369 N.C. at 656, 799 S.E.2d at 854-55 (*purgandum*). In looking to all of the relevant circumstances, factors a court may consider include, “whether a threat remained to first responders and the public” and “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 omitted).

In the present case, the challenged 911 audio recording admitted into evidence included the following exchange between the 911 dispatcher and Saunders:

Dispatcher: 911.

Saunders: I’d like to report a break in.

Dispatcher: You’d like to report what?

STATE V. THOMAS

Opinion of the Court

Saunders: A break in in my house.

Dispatcher: What's your address? . . . Stay on the line . . .
I'll transfer you to the Brevard Police Department.

(Dispatcher attempted to transfer call to police department, but over a minute later, dispatcher was unsuccessful.)

Dispatcher: Sir, did you notice, is anyone still there? Or you just went home and found it broken into to?

Saunders: My backdoor is wide-open and the window in the bathroom is open.

Dispatcher: What's your name sir?

Saunders: Saunders. . . .

Dispatcher: Ok sir we'll have an officer down there in a minute sir.

When looking at all the relevant circumstances, the purpose of the call was to obtain police assistance. The dispatcher's statements were made an in attempt to elicit information to determine whether emergency assistance needed to be rendered. The statements by Saunders were merely an informal response which described the need for police assistance. Saunders' statements were not designed to establish a past fact "*but to describe current circumstances* requiring police assistance." *State v. Hewson*, 182 N.C. App. 197, 206, 642 S.E.2d 459, 467 (2007) (citation and quotation marks omitted) (emphasis added). The conversation did not, as cautioned by this Court, begin as a conversation to elicit information needed to render emergency

assistance and subsequently become inadmissible by delving into the establishment of past facts. *Id.* at 206-07, 642 S.E.2d at 467. When viewing the exchange objectively, the primary purpose of the statements was to enable law enforcement to respond to a break-in.

Furthermore, an ongoing threat to law enforcement and the public existed. Officer Harbin had received dispatches concerning suspicious activity in Brevard Trailer Park within a short time period that evening. When Officer Harbin and Lieutenant Britt arrived at Saunders' home, they encountered Saunders outside. After speaking with him, Officer Harbin and Lieutenant Britt un-holstered their firearms and entered the home to conduct a sweep for potential suspects. The precautions taken by law enforcement demonstrate that they believed a suspect could still be in the home, and that the suspect continued to pose a threat to Saunders, the public, and/or law enforcement. *See State v. Miller*, ___ N.C. ___, ___, 814 S.E.2d 93, 100 (2018) (determining the victim's challenged statements were nontestimonial in nature because they were made during the course of an ongoing emergency and "the information that [the victim] provided to Officer Kato led to Officer Kato's decision to enter the apartment to ensure that defendant, whose current location was unknown, had departed and no longer posed a threat to [the victim's] safety. In light of that fact, the extrajudicial statements that [the victim] made to Officer Kato served more than an information-gathering purpose.").

Because Saunders' statements to the 911 dispatcher were nontestimonial, we need not address Saunders' unavailability and whether Defendant had a prior opportunity to cross-examine Saunders. *McKiver*, 369 N.C. at 655, 799 S.E.2d at 854 ("The Confrontation Clause does not . . . apply to nontestimonial statements."); *see State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004) ("Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

Because the statements at issue were nontestimonial, the trial court did not err when it admitted the 911 audio recording and event report into evidence.

II. Evidentiary Rulings

Alternatively, Defendant contends Saunders' statements within the second 911 event report and 911 audio recording were hearsay within hearsay and, therefore, inadmissible. Specifically, Defendant contends the trial court erred when it did not "differentiate between the records of the call and the statements contained therein when ruling on [defense counsel's] numerous hearsay objections to the statements."

"When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Rollins*, 226 N.C. App. 129, 133, 738 S.E.2d 440, 445 (2013) (citation and quotation marks omitted). Hearsay is defined 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(c) (2017). Double hearsay is defined as “hearsay included within hearsay.” *See* N.C. Gen. Stat. § 8C-1, Rule 805 (2017). “Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.” N.C. Gen. Stat. § 8C-1, Rule 805. Hearsay is “inadmissible except as provided by statute or the rules of evidence.” *State v. Thomas*, 119 N.C. App. 708, 711, 460 S.E.2d 349, 351 (1995) (citation and quotation marks omitted).

Rule 803 of the North Carolina Rules of Evidence establishes exceptions to the general exclusion of hearsay evidence. N.C. Gen. Stat. § 8C-1, Rule 803 (2017). Under Rule 803, the availability of the declarant is immaterial. N.C. Gen. Stat. § 8C-1, Rule 803. Both the “records of regularly conducted activity” exception, commonly known as the business records exception, and “present sense impression” exception fall under Rule 803. N.C. Gen. Stat. § 8C-1, Rule 803(1), (6). The trial court admitted the event report and audio recording under the business records exception to hearsay.

Defendant contends that Saunders’ statements in the 911 event report and audio recording qualify as “double hearsay” and do not fall within a recognized hearsay exception. Even assuming *arguendo* that Defendant is correct, as explained below, an “erroneous admission of hearsay evidence does not always require a new trial.” *State v. Sisk*, 123 N.C. App. 361, 369, 473 S.E.2d 348, 354 (1996) (explaining

a new trial is required if the erroneous admission of evidence was prejudicial); *see* N.C. Gen. Stat. § 15A-1443.

III. Bench Trial Verdict and Sufficiency of the Evidence

On appeal, Defendant contends the erroneous admission of hearsay resulted in Defendant's conviction for second-degree burglary. Defendant specifically contends the admission of Saunders' statements in the 911 event report and audio recording was prejudicial because, without Saunders' statements reporting a break-in, there was insufficient evidence that a breaking or entering occurred. Thus, Defendant challenges the sufficiency of the evidence to support the trial court's verdict.

The standard of appellate review for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary.

State v. Mastor, 243 N.C. App. 476, 480, 777 S.E.2d 516, 519 (2015) (citation and quotation marks omitted). "The rule is that a trial judge sitting without a jury is presumed to have considered only the competent, admissible evidence and to have disregarded any inadmissible evidence that may have been admitted." *State v. Thompson*, ___ N.C. App. ___, ___, 792 S.E.2d 177, 184 (2016) (*purgandum*); *State v. Jones*, ___ N.C. App. ___, ___, 789 S.E.2d 651, 656 (2016) (The "trial court is presumed to disregard incompetent evidence in making its decisions as a finder of fact."). "The

trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*." *Mastor*, 243 N.C. App. at 481, 777 S.E.2d at 519 (citation and quotation marks omitted).

"We review the trial court's ruling on the motion to dismiss for insufficiency of the evidence *de novo*." *State v. Cheeks*, ___ N.C. App. ___, ___, 833 S.E.2d 660, 672 (2019).

A trial court, on a motion to dismiss for insufficient evidence, "must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citation omitted). . . . "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Olson*, 330 N.C. at 564, 411 S.E.2d at 595 (citation omitted).

State v. Glisson, ___ N.C. App. ___, ___, 796 S.E.2d 124, 127-28 (2017).

Here, at the close of the State's evidence, Defendant moved to dismiss all the charges "based on there being a lack of substantial evidence for each and every element of each charge." *See id.* at ___, 796 S.E.2d at 127 ("[A] general motion to dismiss for insufficiency of the evidence preserves all issues regarding the insufficiency of the evidence, even those issues not specifically argued before the trial court."). Therefore, we may consider Defendant's challenge to the sufficiency of the evidence regarding his second-degree burglary conviction.

"Second degree burglary is the unlawful breaking and entering of an unoccupied dwelling in the nighttime with the intent to commit a felony therein."

STATE V. THOMAS

Opinion of the Court

State v. McCoy, 79 N.C. App. 273, 274, 339 S.E.2d 419, 420 (1986); N.C. Gen. Stat. § 14-51 (2017). “[S]econd degree burglary requires proof of both a breaking and an entering.” *McCoy*, 79 N.C. App. at 274, 339 S.E.2d at 420. Because Defendant only challenges the sufficiency of the evidence regarding breaking and entering, we limit our review to those two elements.

“A breaking in the law of burglary constitutes any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed.” *State v. Jolly*, 297 N.C. 121, 127-28, 254 S.E.2d 1, 5-6 (1979) (internal citation and quotation marks omitted). “Entry through an open window or door does not constitute a breaking although the mere pushing or pulling of an unlocked door does.” *State v. Styles*, 93 N.C. App. 596, 602, 379 S.E.2d 255, 260 (1989) (citing *McCoy*, 79 N.C. App. at 275, 339 S.E.2d at 421). “A removal of the screen or a raising of the window would constitute a breaking within the meaning of the law.” *State v. Simpson*, 299 N.C. 335, 347, 261 S.E.2d 818, 825 (1980); *State v. Bumgarner*, 147 N.C. App. 409, 414, 556 S.E.2d 324, 329 (2001) (showing a window was open and the window screen was out of place may be sufficient evidence of a breaking). Similarly, showing “one corner of a window screen was removed . . . is sufficient to constitute a breaking.” *State v. Goodman*, 71 N.C. App. 343, 345, 322 S.E.2d 408, 410 (1984).

In reaching its verdict, the trial court stated the following in open court:

All right. As we were – as you were beginning your arguments I had reviewed my notes, took careful notes, reviewed my notes as we were in that 15-minute break. And as the arguments began I wrote in the margin of my paper “circumstantial.” And I’m reminded that I tell jurors each time that circumstantial and direct evidence, that no distinction is made in the law, nor is greater weight given to one or the other. As well as the acting in concert instruction.

This case comes down to, in the essence, Ms. Laughter’s credibility. And I found – I found her testimony to be credible.

Because “a trial judge sitting without a jury is presumed to have considered only the competent, admissible evidence and to have disregarded any inadmissible evidence that may have been admitted,” *Thompson*, ___ N.C. App. at ___, 792 S.E.2d at 184 (citation and quotation marks omitted), even if the 911 audio recording and event report were erroneously admitted, Defendant cannot show prejudice.

In order to overcome this presumption, a defendant must show “facts tending to rebut this presumption.” *Jones*, ___ N.C. App. at ___, 789 S.E.2d at 656 (“Because trial judges are presumed to ignore inadmissible evidence when they serve as the finder of fact in a bench trial, no prejudice exists simply by virtue of the fact that such evidence was made known to them absent a showing by the defendant of facts tending to rebut this presumption.”). “We do not make assumptions of error where none is shown.” *State v. Jones*, ___ N.C. App. ___, ___, 816 S.E.2d 921, 925 (2018), *appeal dismissed, review denied*, ___ N.C. ___, 831 S.E.2d 90 (2019); *see In re Hartsock*, 158 N.C. App. 287, 290, 580 S.E.2d 395, 398 (2003) (rejecting juvenile’s argument “that

when an objection to the evidence is made and overruled, the judge has thereby determined the evidence competent and may be presumed to have considered it” and determining juvenile “failed to demonstrate the incompetent evidence was not disregarded and was prejudicial”). Here, Defendant has failed to make such a showing. The trial court’s findings indicate it relied on both direct and circumstantial evidence in reaching a verdict and its findings are supported by competent evidence.

At trial, when Laughter was asked how Defendant, Magwood, and the unidentified male entered Saunders’ home, she replied, “I know for a fact a broken window and maybe a sliding glass door.” Additionally, the facts before the trial court showed that, when Officer Britt and Harbin arrived at Saunders home, the screen on the sliding glass door was removed; the sliding glass door was open; and the window in the back of the home was open and “had a blind on it that appeared like it had been opened.” This was sufficient evidence for the trial court to conclude that a breaking had occurred. Even if, *arguendo*, the trial court did erroneously consider as evidence Saunders’ statements within the 911 event report and audio recording, such consideration was not prejudicial because the aforementioned facts show a breaking had occurred.

Furthermore, there was sufficient evidence Defendant entered Saunders’ home. “[A]n entry is accomplished by inserting into the place broken the hand, the foot, or any instrument with which it is intended to commit a felony.” *Bumgarner*,

147 N.C. App. at 415, 556 S.E.2d at 329. Here, the State offered testimony from Laughter describing the night of the incident. Laughter testified that Defendant, Magwood, and the unidentified male decided to steal the cocaine from Saunders' home after Magwood verified Saunders was not home. She further testified she dropped them off and remained on the phone while they entered Saunders' home. Therefore, there was sufficient evidence that an entry of Saunders' home with the intent to commit a larceny therein had taken place.

Because there was sufficient evidence of a breaking and entering into Saunders' unoccupied home in the nighttime with the intent to commit a felony therein, the trial court did not err in finding Defendant guilty of second-degree burglary.

Conclusion

For the reasons stated herein, we find no error.

NO ERROR.

Judges STROUD and DILLON concur.

Report per Rule 30(e).