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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-755

Filed: 2 June 2020

Mecklenburg County, Nos. 16 CRS 213353, 213354, 213355

STATE OF NORTH CAROLINA

v.

GERSON GUTIERREZ

Appeal by defendant from judgments entered 12 December 2018 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas H. Moore, for the State.

Kimberly P. Hoppin for defendant.

ARROWOOD, Judge.

Gerson Gutierrez (“defendant”) appeals from judgments entered upon his convictions for involuntary manslaughter, reckless driving to endanger, and misdemeanor hit and run. For the following reasons, we hold that defendant received a trial free from error.

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I. Background

This case involves a fatal hit and run collision in the Charlotte area. On 9 May 2016, defendant was charged with felony hit and run, reckless driving, and driving while license revoked. Defendant was subsequently charged with manslaughter on 19 June 2017.

Before trial, defendant filed a motion *in limine* to suppress a statement he made to Detective Andrew Oberer while he was in custody for questioning at the police station. Defendant argued that this statement was the product of questioning that violated his Fifth Amendment right to counsel because he requested the presence of his attorney before he made it. The trial court heard defendant's motion on 27 November 2018. At the hearing, the State introduced a video recording of Detective Oberer's questioning of defendant on the day of his arrest. After watching the recording and hearing supplementary testimony from Detective Oberer, the trial court denied defendant's motion by order entered 21 December 2018.

In its order, the trial court entered findings of fact to the following effect. At the outset of their interaction at the police station, Detective Oberer obtained written and oral confirmation from defendant that he understood his *Miranda* rights. Defendant then indicated that he wished to call his attorney. Neither detective in the room with defendant "initiated an interrogation of Defendant at that time." "Detective Oberer allowed Defendant to call his attorney several times from

Defendant's cellular telephone while in the interview room." "Defendant was advised by his attorney's staff that he was in court, but they would attempt to contact him and advise him to contact Defendant." Detective Oberer and defendant called back and again attempted to procure the presence of defendant's attorney. They "waited in the interview room for the attorney . . . to respond for approximately 35 minutes." "After this time, when it became apparent that Defendant's attorney would not be readily available, Detective Oberer asked the defendant, in light of this new situation, 'If your attorney is not available, are you wanting to talk to us?'" "Defendant responded to Detective Oberer's question (which was a yes or no question) by mumbling some sort of response for several seconds." "Detective Oberer testified that the last statement made by defendant at this time was, ' . . . that shit was just an accident.'"

Based on these findings, the trial court concluded as a matter of law that Detective Oberer's inquiry into defendant's willingness to answer questions without his attorney "did not appear to be nor was it intended to be an interrogation question" and "was not designed to elicit an incriminating response from Defendant." Therefore, Detective Oberer had not unlawfully interrogated defendant after he invoked his right to counsel in violation of his Fifth Amendment rights.

The jury phase of defendant's trial began on 28 November 2018. The evidence at trial tended to show the following facts. On 4 April 2016 at approximately 5 p.m.,

Dr. Charyle Pearson was driving down a thoroughfare in Charlotte when a green van “flew out” of a side street and collided with a motorcyclist travelling in the opposite direction. Dr. Pearson testified that the motorcyclist lost control and was projected into the path of her vehicle, which ran over him. Medical personnel identified the motorcyclist as Keith Ricks (“Mr. Ricks”) and pronounced him dead at the scene.

Another motorist, Jennifer Boyd (“Ms. Boyd”), also witnessed the fatal collision. She was travelling in the same direction as Dr. Pearson in an adjacent lane. Ms. Boyd testified that she slammed on her brakes to avoid the green van and sounded her horn. The driver of the van stopped for a moment and looked at Ms. Boyd, sped forward, and collided with Mr. Ricks. After the collision, the van continued without pause at a “high rate of speed.” Ms. Boyd gave chase in her vehicle in order to obtain the license plate number of the van, but ended her pursuit after her passenger Zyasia Williams (“Ms. Williams”) received a call from her boyfriend, an occupant of the van, who threatened to open fire on the pair if they continued their pursuit.

Ms. Boyd and Ms. Williams returned to the scene of the collision, where Ms. Boyd was interviewed by Officer Gideon John of the Charlotte-Mecklenburg Police Department. Because Ms. Williams was present and Ms. Boyd was intimidated by the threats made by her boyfriend, she told Officer John that she did not see the driver of the van. After Ms. Williams left the scene, Ms. Boyd told Detective Oberer

that she had seen the driver, whom she described as a Hispanic male of medium build, and provided Detective Oberer with a partial plate number for the van.

Armed with a partial plate number and a list of locally registered vehicles of the van's suspected color, make, and model, Detective Oberer eventually followed up on one such vehicle owned by Altavia Davis ("Ms. Davis"). Damage to the van's exterior matched collision debris found at the scene of the crime, such as a broken front plate fixture found in the roadway. Records for another vehicle registered to defendant were later found in the van.

At trial, Ms. Davis testified that she was asleep at the time of the accident, was unaware her van had been involved in a collision when the police arrived, and did not know who had borrowed it on 4 April 2016. She stated that the only other people that had access to her car keys were her son, her daughters, and defendant, the boyfriend of one of her daughters. She stated that defendant had borrowed her van on past occasions.

On 11 April 2016, an investigating officer met with Ms. Boyd and prepared a photographic lineup including defendant for her review. She identified defendant as the driver of the van involved in the collision on 4 April 2016. Detective Oberer then obtained warrants for defendant's arrest.

The investigating officers subsequently made contact with defendant's girlfriend, who claimed ignorance to his whereabouts, and admonished her against

helping him evade apprehension. Twenty-one days after the accident, on 25 April 2016, defendant and his girlfriend were found in a local hotel room registered under her name. Defendant was arrested for hit and run. His girlfriend was arrested for accessory after-the-fact. At trial, the State showed the jury the aforementioned portion of the video recording of defendant's police interrogation in which he said "[s]hit was just an accident."

In the later stages of the State's case-in-chief, Ms. Boyd was recalled as a witness after the trial court determined that defendant had opened the door to testimony regarding why Ms. Boyd ended her pursuit of the van. Ms. Boyd had been a hostile and recalcitrant witness for the duration of the trial. She was found in contempt of court and put in jail when she failed to appear per the trial court's material witness order. This was in part due to her fear of reprisal from defendant. Ms. Boyd testified that she could not remember matters to which she had testified mere days before on *voir dire*. Her claimed lack of memory resulted in part from an encounter with defendant and his family during a trial recess on a previous day that left her feeling intimidated.

In light of this situation, the trial court refused to allow defendant to cross examine Ms. Boyd concerning her mental health history. The court reasoned as follows:

I'm concerned at this point about any further examination
of this witness.

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....

She came really close to saying why she didn't recall things. She asked, 'Do you want me to tell you why I didn't recall things last week,' and you and I both, all of us know what she was going to say. She was going to say she was afraid of [defendant], what happened during lunch and all this other stuff that was corroborated by one of the bailiffs She seems to be wanting now to explain to the jury and the whole world why she'd been afraid and why she had to be arrested to come to court, why she was willing to be held in contempt and put in jail. She wants to now tell everybody, and it's going to take just the slightest provocation for her to do that and we're going to have a mistrial.

That's why I want to limit the testimony to where it is

....

I'm not going to allow it. I've already looked at the medical records. It's too extraneous

....

That type of questioning could have been asked on cross examination [of Ms. Boyd in the proceedings of the prior week]. . . . I'm not going to allow you to get into that, especially with the consideration of what's going on and the totality of the circumstances of what's going on in this trial, when the threats, the alleged threats that we heard about before on voir dire, with the allegations made by her mother and confirmed by the bailiff to some degree, . . . I'm not going to let you go any further.

On 12 December 2018, the jury found defendant guilty of involuntary manslaughter, misdemeanor hit and run, driving while license suspended, and

reckless driving. The trial court entered judgment upon these convictions, and defendant timely noted his appeal therefrom.

II. Discussion

On appeal, defendant argues that the trial court erred: (a) by admitting his statement made while in custody; (b) in its handling of Ms. Boyd's testimony; and (c) by instructing the jury on flight. We find no merit in these arguments and uphold defendant's convictions.

A. Statement Made in Custody

Defendant argues that the trial court erred in admitting the statement he made to Detective Oberer at the police station because doing so violated his Fifth Amendment right to counsel and was substantially more prejudicial than probative, in violation of N.C. Gen. Stat. § 8C-1, Rule 403 (2019). For the following reasons, we disagree.

1. Order Denying Motion to Suppress

Defendant first contends that the trial court erred in denying his motion to suppress the statement. Both parties agree that defendant was subject to custodial interrogation and had invoked his Fifth Amendment right to counsel, as conceived in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), at the time he made the statement. Defendant contends that Detective Oberer deliberately elicited the statement from him in violation of his asserted Fifth Amendment right to counsel.

The State maintains that the statement was voluntarily offered by defendant in an unforeseeable response to Detective Oberer's efforts to secure the presence of his attorney. We agree with the State and find no error in the trial court's order denying defendant's motion to suppress.

"The trial court's findings of fact after a hearing concerning the admissibility of a confession are conclusive and binding on this Court when supported by competent evidence. The trial court's conclusions of law, however, are reviewable *de novo*. Under this standard, the legal significance of the findings of fact made by the trial court is a question of law for this Court to decide." *State v. Dix*, 194 N.C. App. 151, 154-55, 669 S.E.2d 25, 27 (2008) (internal citations omitted).

"[D]uring a custodial interrogation, if the accused invokes his right to counsel, the interrogation must cease and cannot be resumed without an attorney being present '*unless the accused himself initiates further communication, exchanges, or conversations with the police.*'" *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (emphasis in original) (citations omitted) (quoting *Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 386 (1981)).

However, not every statement obtained by police from a person in custody is considered the product of interrogation. Interrogation is defined as either express questioning by law enforcement officers or conduct on the part of law enforcement officers which constitutes the functional equivalent of express questioning. The latter is satisfied by any words or actions on the part of the police (other than those normally attendant to arrest and

custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. However, because the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. Factors that are relevant to the determination of whether police should have known their conduct was likely to elicit an incriminating response include: (1) the intent of the police; (2) whether the practice is designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion.

State v. Fisher, 158 N.C. App. 133, 142-43, 580 S.E.2d 405, 413 (2003) (emphasis in original) (alterations, internal quotation marks, and citations omitted), *aff'd*, 358 N.C. 215, 593 S.E.2d 583 (2004).

Our review of the video recording of defendant's time in custody at the police station confirms that the trial court's findings of fact are supported by competent evidence. Detective Oberer read defendant his *Miranda* rights and defendant indicated that he understood them. Defendant then invoked his right to counsel by stating that he wished to speak with his attorney before proceeding with questioning. Thereafter, all of Detective Oberer's questions to defendant were clearly designed to determine the whereabouts and secure the presence of his attorney. Each of these questions was accompanied by a reiteration that defendant had a right to have his attorney present before questioning proceeded. Detective Oberer's remarks to the

effect that he could not wait all day for defendant's attorney are reasonably interpreted to indicate that he would leave and question defendant at a later time, once his attorney arrived. Defendant's understanding of this fact is revealed in the following exchange:

Detective Oberer: "If your attorney isn't available, are you wanting to talk to us or no?"

Defendant: "What option do I got if he don't come? 'Cuz I really don't want to be sitting in here, man. I'm ready to go already. Like damn, shit was an accident."

Detective Oberer: "You don't have to talk to us without your lawyer here."

Defendant: "I know."

Detective Oberer: "If you want to, we can, you know, it's up to you. We just can't be waiting around all day. I know you want to move on, so, we'll wait a few more minutes for [the assistant of defendant's attorney] to call back."

Thus, Detective Oberer's statements were not and could not reasonably be interpreted to elicit any foreseeable incriminating response from defendant, or indicate that questioning would proceed if defendant's attorney did not arrive soon. This conclusion is in line with our jurisprudence establishing that questions or statements relating to how or when questioning will proceed after the presence of a defendant's attorney is procured do not amount to deliberate elicitation of an incriminating response. *See, e.g., Fisher*, 158 N.C. App. at 143, 580 S.E.2d at 413-14. The trial court did not err in denying defendant's motion to suppress.

2. Admission under Rule 403

Defendant also argues that the trial court abused its discretion in admitting his statement at the police station because doing so violated Rule 403. This argument is without merit.

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” N.C. Gen. Stat. § 8C-1, Rule 403. “‘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. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (internal quotation marks and citation omitted.). “The trial court’s discretion to exclude or admit evidence under Rule 403 is broad, and this Court has observed that the trial court’s ruling should be reversed for abuse of discretion only when it can be shown to have been so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hunt*, 324 N.C. 343, 353, 378 S.E.2d 754, 760 (1989) (internal quotation marks and citation omitted).

Defendant argues that the trial court abused its discretion in admitting defendant’s statement because it was initially inclined to exclude the statement under Rule 403, then later admitted it after the State noted that both parties had mentioned the statement in their opening arguments. We disagree. Although the court recognized that there was some potential for prejudice, after hearing various

arguments from counsel and weighing the statement's potential prejudice against its probative value, the court ultimately determined that the statement was admissible under Rule 403. Based upon the following evidence and proceedings at trial, we cannot say that this ruling was "so arbitrary that it could not have been the result of a reasoned decision." *Id.*

Defendant denied any involvement in the automobile collision that killed Mr. Ricks. He used Ms. Boyd's prior statement to Officer John to impeach her later identification of him as the driver of the van. Ms. Boyd was the only eyewitness that testified to seeing the driver of the van. Thus, defendant's spontaneous statement opining that the collision was "an accident" holds probative value insofar as it tends to place him at the scene of the crime. In his argument on appeal, defendant fails to explain why the probative value of this statement is outweighed by any prejudice it engenders. The incriminating effect of defendant's admission does not substantially outweigh its probative value. The trial court did not abuse its discretion in so holding.

B. Testimony of Jennifer Boyd

Defendant next argues that the manner in which the trial court required Ms. Boyd to testify violated his right to due process under the Fifth and Fourteenth Amendments. Defendant has failed to preserve these challenges for appellate review

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by failure to object at trial. *See* N.C. Gen. Stat. § 15A-1446(a) (2019). We decline his invitation to invoke N.C.R. App. P. 2 (2020) to review these assignments of error.¹

Although our decision to deny review of these arguments is entirely discretionary, we note that defendant's own conduct at trial supports our decision. The actions of defendant and his family during trial caused Ms. Boyd's recalcitrance and precipitated the unconventional manner in which the trial court handled her testimony. Testimony from Ms. Boyd, her mother, and a bailiff presented in a *voir dire* hearing during trial tended to show that defendant and his family engaged in conduct that could be interpreted as efforts to intimidate Ms. Boyd.

During one trial recess, defendant and his family were seen following behind Ms. Boyd at some distance as she went to her car, and then sat near Ms. Boyd and her mother's table at a nearby restaurant. Defendant's mother approached close to their table with no apparent reason for doing so. On another occasion in the hallway outside the courtroom, defendant was seen making a gesture toward Ms. Boyd with a cellular telephone. Ms. Boyd believed that defendant had photographed her. This intimidating behavior caused Ms. Boyd's recalcitrance and prompted her threat to reveal this information to the jury. Thus, defendant's own conduct and that of his

¹ However, it bears mentioning that we are concerned with the trial court's treatment of Ms. Boyd during its admonitions against perjury and threats of finding her in contempt of court. The trial court's handling of Ms. Boyd came close to committing the same error our Supreme Court found to be a Fifth Amendment violation in *State v. Locklear*, 309 N.C. 428, 306 S.E.2d 774 (1983).

family and associates serves as an independent basis supporting our discretionary refusal to invoke Rule 2 to review the trial court's actions with respect to Ms. Boyd.

In his only argument on this subject that is preserved for our review, defendant argues that the trial court violated his Sixth Amendment right to confront an adverse witness by refusing to allow him to cross examine Ms. Boyd about her mental health history to impeach her eyewitness identification. We find no merit in this argument.

“The Confrontation Clause guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. ‘Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’” *State v. McNeil*, 350 N.C. 657, 677, 518 S.E.2d 486, 498 (1999) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 88 L. Ed. 2d 15, 19 (1985)). “[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” *Id.* at 677, 518 S.E.2d at 499 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 683 (1986)).

The trial court noted its concerns about harassment of Ms. Boyd, witness safety, and its belief that cross examination on the subject of Ms. Boyd's mental health history would be only marginally relevant to the credibility of her eyewitness identification of defendant. The trial court also worried that further questioning of the recalcitrant and uncooperative Ms. Boyd would risk her revealing defendant's allegedly intimidating behavior toward her during trial. The trial court determined that the risk of a mistrial resulting from the revelation of such information to the jury outweighed any relevance Ms. Boyd's limited mental health history years remote from trial would have had to impeach the credibility of her testimony. Defendant's offer of proof confirmed the trial court's inclination that cross examination on this topic would be only marginally productive for defendant. Ms. Boyd was completely uncooperative, other than acknowledging two one-day commitments to psychiatric institutions in 2013 and 2014 and mentioning offhand depression and bipolar disorder.

Therefore, the trial court acted within its discretion in preventing defendant from cross examining Ms. Boyd further on this subject, based upon its determination that this line of questioning would harass Ms. Boyd, risk the disclosure of other facts extremely prejudicial to defendant, and have only marginal relevance to Ms. Boyd's credibility. Also supportive of the trial court's discretionary ruling is the fact that

defendant's actions and those of his family appear to be the cause of Ms. Boyd's reluctance to testify or to remember the facts.

C. Instructing the Jury on Flight

Finally, defendant argues that the trial court erred by instructing the jury that any evidence that defendant fled the scene could be considered indicative of guilt. We find no merit in this argument.

“[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court.” *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). “A jury instruction on flight is proper where some evidence in the record reasonably supports the theory that defendant fled after commission of the crime charged. When there is some evidence, it is the duty of the jury to determine whether the facts and circumstances support the State's theory. The relevant inquiry is whether the evidence shows that defendant left the scene of the crime and took steps to avoid apprehension.” *State v. Shelly*, 181 N.C. App. 196, 208, 638 S.E.2d 516, 525 (2007) (alterations, internal quotation marks, and citations omitted).

In the instant case, ample evidence supports the State's theory that defendant fled the scene of the crime. All eyewitness accounts given at trial established that the van did not stop after colliding with Mr. Ricks. Rather, it immediately left the scene. Ms. Boyd's testimony and positive identification of defendant in a

photographic lineup tended to show that he was the driver of the van. Ms. Boyd testified that she initially pursued the van after witnessing the accident. However, she ended her pursuit because her passenger received a call from one of the van's occupants threatening to shoot them if they did not stop. Detective Oberer testified that, when he was searching for defendant, he met with defendant's girlfriend and warned her not to help him hide from the police.

Ten days later, Detective Oberer found defendant and his girlfriend in a local hotel room under her name. Defendant was arrested, and his girlfriend was arrested for accessory after-the-fact. Detective Oberer also noted that he had seen no indication, such as his driver's license information, suggesting that the hotel room was defendant's usual place of abode. This is some evidence that defendant left the scene of the accident and took subsequent steps to avoid apprehension. Therefore, the trial court did not err in instructing the jury on flight.

III. Conclusion

For the foregoing reasons, we uphold defendant's convictions.

NO ERROR.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).