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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-813

No. COA22-439

Filed 6 December 2022

Pitt County, Nos. 20 CRS 001084; 20 CRS 053675-76

STATE OF NORTH CAROLINA

v.

FREDERICK LEE BOWERS, Defendant.

Appeal by Defendant from judgment entered 10 August 2021 by Judge William D. Wolfe in Pitt County Superior Court. Heard in the Court of Appeals 18 October 2022.

Attorney General Josh H. Stein, by Assistant Attorney General Hunter E. Fritz, for the State.

Unti & Smith, PLLC, by Sharon L. Smith, for Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Frederick Lee Bowers appeals from the trial court's judgment entering a jury verdict finding him guilty of possession of a firearm by a convicted felon, assault with a deadly weapon, and simple assault. Defendant argues (1) the trial court erred when it permitted the State to question a deputy regarding prior statements made by a witness, and then admitted the witness's prior written

statement into evidence; and (2) Defense counsel deprived Defendant of his constitutional right to effective assistance of counsel by failing to object when the State questioned the deputy and failing to request a limiting instruction when the court admitted the written statement. We find no error.

I. Factual and Procedural Background

¶ 2 This case arises from a violent incident between family members, during which Defendant fired a gun. The evidence at trial tended to show as follows:

¶ 3 Sometime around 11:00 p.m. on 4 July 2020, Defendant and his nephew, Travon, arrived at the home of Defendant's father, Willard Acklin, to attend a family cookout. Defendant and Travon spoke to Acklin and Acklin became upset. Acklin asked Defendant and Travon to leave. Defendant and Travon became angry and a fight ensued between Defendant, Travon, and Acklin. Defendant and Travon punched Acklin five or six times and knocked him off the porch. Eventually, Defendant ran to his car and retrieved a handgun from inside the vehicle. Acklin, upon seeing the handgun, attempted to flee behind the house. Defendant fired the gun twice at Acklin. Tammy Lee, Defendant's aunt, called the police, but Defendant and Travon left Acklin's home before law enforcement arrived.

¶ 4 A deputy with the Pitt County Sheriff's Office responded to the scene. The deputy took statements from those present at the cookout, including a written statement from Defendant's sister, Latisha Dickens. Defendant was subsequently

arrested and indicted on charges of simple assault, assault with a deadly weapon, and possession of a firearm by a felon.

¶ 5 At trial, the State presented eyewitness testimony of Tammy Lee, Defendant's aunt who was present at the cookout, and Acklin. Dickens, Defendant's sister, then testified for Defendant. During direct examination, Dickens testified that she did not see Defendant with a gun, did not see Defendant shoot at Acklin, nor did she see Defendant do anything to try to kill Acklin. On cross-examination, the State asked Dickens if she had a conversation with the deputy on the night of the incident:

> [STATE:] All right, but did you tell the deputy that your brother ran and got a gun from the car?
>
> [DICKENS:] I don't remember saying that.
>
> [STATE:] You don't remember saying that? Did you also tell him that he chased you that day and shot two times?
>
> [DICKENS:] No.

The State also asked Dickens whether she gave a written statement to the deputy that night. Dickens admitted that she did give the deputy a written statement, but claimed that Lee wrote out the statement and that she did not read it before signing it:

> [STATE:] All right. Now, did you sign a statement about the incident?
>
> [DICKENS:] I signed the statement [Lee] had wrote.

> [STATE:] Did you review it before you put your name on it?
>
> [DICKENS:] I only went by what she told me it said.
>
> [STATE:] Did you read it?
>
> [DICKENS:] No.
>
> [STATE:] Can you read?
>
> [DICKENS:] Yes.
>
> [STATE:] And it's the statement that was written on that same day or later on that day; is that right?
>
> [DICKENS:] Later on that night.
>
> [STATE:] Okay. Well, if I showed that to you and let you review it would you take a moment and review it?
>
> [DICKENS:] Yes, sir.
>
> . . .
>
> [STATE:] Okay. And the second page it has your signature on it; correct?
>
> [DICKENS:] Yes.
>
> [STATE:] And that's Latisha Dickens?
>
> [DICKENS:] Yes.

¶ 6 The State later called the deputy to testify in rebuttal regarding Dickens's statements the evening of the incident and her prior written statement. The deputy informed the court:

> When I initially talked to [Dickens] at the scene, [she] said that her son and her brother got into an altercation with her father. She thought it looked like they were playing at first, hugging, whatnot, and then she went over there and tried to break it up. Once she realized that they weren't playing, she attempted to break it up. They fell off the porch and that's when she seen her brother run to the car and grab a gun.

The deputy testified that he included Dickens's statements in the police report he made about the incident, and the State moved to admit the deputy's report into evidence as State's Exhibit 7. Defendant's counsel objected to admission of the report, but the trial court overruled the objection. Defendant's counsel made no objection to the State's questioning of the deputy on rebuttal, nor did Defendant's counsel request a limiting instruction when State's Exhibit 7 was admitted into evidence.

¶ 7 After deliberations, the jury returned verdicts finding Defendant guilty of possession of a firearm by a convicted felon, guilty of assault with a deadly weapon, and guilty of simple assault. Defendant gave notice of appeal in open court.

II. Analysis

¶ 8 Defendant contends that he is entitled to a new trial because (1) the trial court committed plain error when it allowed the State to question the deputy regarding Dickens's prior, unsworn statements and (2) Defendant was deprived of his constitutional right to effective assistance of counsel. Each argument fails.

A. Questioning on Prior Statements

¶ 9 Defendant first argues that the trial court erred when it allowed the State to question the deputy on the prior statements of Dickens during its rebuttal. Defendant asserts that the State improperly used extrinsic testimony to impeach Dickens regarding matters collateral to Defendant's case. Defendant recognizes that his counsel made no objection to this line of questioning at trial, and therefore asks this Court to review for plain error.

¶ 10 The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted). "Under the plain error rule, [the] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d, 692, 697 (1993) (citation omitted). Because of this high standard, "[p]lain error review should be used sparingly, only in exceptional circumstances, to reverse criminal convictions on the basis of unpreserved error." *State v. Thompson*, 254 N.C. App. 220, 224, 801 S.E.2d 689, 693 (2017) (citation omitted).

¶ 11 Rule 607 of the North Carolina Rules of Evidence allows either party to

impeach the credibility of a testifying witness. N.C. R. Evid. 607. "Under certain circumstances a witness may be impeached by proof of prior conduct or statements which are inconsistent with the witness's testimony. Under [Rule 607], these prior inconsistent statements are admissible for the purpose of shedding light on a witness's credibility." *State v. Banks*, 210 N.C. App. 30, 39, 706 S.E.2d 807, 815 (2011) (citations and internal marks omitted).

> A witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony, but where such questions concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony.

State v. Williams, 322 N.C. 452, 455, 368 S.E.2d 624, 626 (1988) (citation omitted). "Generally speaking, 'material facts involve those matters which are pertinent and material to the pending inquiry,' while 'collateral' matters are those which are irrelevant or immaterial to the issues before the court." *State v. Riccard*, 142 N.C. App. 298, 302, 542 S.E.2d 320, 323 (2001) (citations omitted). "[O]ur Supreme Court [has] applied the longstanding rule against using extrinsic evidence to impeach a witness on collateral matters, to prohibit the introduction of the substance of a prior statement to impeach a witness's denial that he made the prior statement." *State v. Gabriel,* 207 N.C. App. 440, 447, 700 S.E.2d 127, 131 (2010) (citation omitted).

¶ 12 Here, we must determine whether the deputy's testimony regarding Dickens's

prior statements was inadmissible for impeachment purposes and, if so, whether the admission of such testimony constituted plain error. We first consider whether the prior statements of Dickens concerned only a collateral matter immaterial to the current trial. "Once a witness denies having made a prior inconsistent statement, the prior statement concerns only a collateral matter, i.e., whether the statement was ever made." *Banks*, 210 N.C. App. at 39, 706 S.E.2d at 815 (citation and internal quotation marks omitted). Essentially, the parties will not be allowed to cause a secondary trial and admit evidence to prove only whether the statement was ever made.

¶ 13 Our Court addressed this issue against a similar sets of facts in *State v. Riccard*, 142 N.C. App. 298, 542 S.E.2d 320 (2001). In *State v. Riccard*, two witnesses were called to testify about the events leading up to a robbery and assault allegedly perpetrated by the defendant. *Id.* at 300, 542 S.E.2d at 321–22. Each witness admitted that he had spoken with a detective following the incident and given a statement, but each witness attempted to reduce the credibility of his prior statement. *Id.* One witness insisted that he did not recall making portions of the prior statement. Both witnesses claimed that multiple parts of their prior statements were incorrect and repeated their prior testimony. *Id.* at 300–02, 542 S.E.2d at 321–22. The State then called the detective to the stand and had the detective testify to corroborate the witnesses' prior statements. *Id.* at 301, 542 S.E.2d at 322.

¶ 14 On appeal, the defendant "contend[ed] that the trial court committed reversible error by allowing the State to impeach [the witnesses] on a collateral matter with extrinsic evidence." *Id.* at 302, 542 S.E.2d at 322. The Court in *Riccard* surveyed our case law and stated the following rules: "Where the witness admits having made the prior statement, impeachment by that statement has been held to be permissible." *Id.* at 303, 542 S.E.2d at 323. "Likewise, where there is testimony that a witness fails to remember having made certain parts of a prior statement, denies having made certain parts of a prior statement, or contends that certain parts of the prior statement are false, our courts have allowed the witness to be impeached with the prior inconsistent statement." *Id.* The Court then held that the trial court did not err in admitting each witnesses' prior statements because, although the witnesses did contest certain parts of their prior statements, they each admitted making the statements to the detective. *Id.* at 304, 542 S.E.2d at 323.

¶ 15 In the present case, during Defendant's case-in-chief, Dickens testified that she did not recall Atkins yelling that Defendant had a gun and that she could not recall whether she told the deputy that Defendant retrieved a gun from his vehicle. The State then asked whether Dickens gave the deputy a written, signed statement, in which she wrote: "And then my brother (Defendant) went to car and grabbed a gun. . . ." Dickens insisted that she did not write nor even read the statement, but did admit that she signed it and gave the statement to the deputy. Dickens's attempts

to discredit her prior written statement are analogous to the witnesses' insistence in *Riccard* that parts of their prior statements were incorrect or that they could not remember making them. Regardless, both Dickens and the *Riccard* witnesses admitted to making their prior statements. We therefore reach the same result in this case as in *Riccard*.

¶ 16 Dickens's prior written statement concerned facts that were material to Defendant's case, and she never denied giving the signed statement to the deputy. It was therefore proper for the State to introduce the deputy's testimony, and State's Exhibit 7, to impeach Dickens's credibility. The trial court did not err, much less commit plain error, by allowing the State to question the deputy.

B. Ineffective Assistance of Counsel

¶ 17 Defendant next argues that his trial counsel deprived him of his constitutional right to effective assistance of counsel when trial counsel failed to object when the deputy testified about Dickens's prior statement and failed to request a limiting instruction when the trial court admitted State's Exhibit 7 into evidence.

¶ 18 "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 *de novo* review, the court considers the matters 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) (citations and internal quotation marks omitted).

¶ 19 "Under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 19 and 23 of the North Carolina Constitution, '[a] defendant's right to counsel includes the right to the effective assistance of counsel.'" *State v. Perry,* 254 N.C. App. 202, 207, 802 S.E.2d 566, 571 (2017) (citations omitted). The North Carolina Supreme Court has "expressly adopt[ed] the test set out in *Strickland v. Washington*, [466 U.S. 668 (1984),] as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution." *Id.* (quoting *State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985)). Under *Strickland v. Washington*, in order for a defendant to prove that they were denied effective assistance of counsel, they must prove two components:

> First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, and trial whose result in reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the results unreliable.

Strickland, 466 U.S. at 687.

¶ 20 "When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard

of reasonableness." *Braswell*, 312 N.C. at 561–62, 324 S.E.2d at 248 (citation omitted). In *State v. Weaver,* 306 N.C. 629, 295 S.E.2d 375 (1982), the North Carolina Supreme Court adopted the federal standard for ineffective assistance of counsel, noting that "[t]he courts have consistently required a stringent standard of proof on the question of whether an accused has been denied constitutionally effective representation." *Id.* (citation omitted).

¶ 21 The State cites to *State v. Braswell*, where the defendant argued that he was denied effective assistance of counsel because his counsel failed in (1) not vigorously opposing the introduction of the statements he made to the officers, (2) allowing voir dire questioning on a deputy's testimony to be held in the defendant's absence, and (3) not objecting to the introduction of or seeking a limiting instruction for three letters written by the defendant. *Id.* at 564–65, 324 S.E.2d at 249. Our Supreme Court concluded in *Braswell* that the evidence of the defendant's guilt was so overwhelming that "there [was] no reasonable probability that any of the alleged errors of [the] defendant's counsel affected the outcome of the trial." *Id.* at 563, 324 S.E.2d at 249. The Court also held that, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.*

¶ 22 The case before us presents a similar set of alleged errors as those in *Braswell*:

failing to object to a deputy's testimony and to request a limiting instruction on the admission of prior written statements. We also hold, here, that the State presented such overwhelming evidence supporting Defendant's guilt that there is no reasonable probability that Defendant's alleged errors materially affected the outcome of his trial.

¶ 23 During trial, the State presented evidence of what occurred on 4 July 2020 through testimony of two eyewitnesses during its case in chief, then cross-examined Dickens when she testified for Defendant. Lee testified that she saw the fight occur, heard two gun shots, called the police, and gave a statement to the deputy. Atkins testified regarding the cause of the altercation between himself, Travon, and Defendant, and what happened during their altercation. Atkins stated that he saw Defendant grab a gun from his vehicle and then attempted to flee as he heard two gun shots fired in his direction.

¶ 24 Any objection made to the deputy's testimony regarding Dickens's prior statement would not have affected the outcome of the trial because the trial court was likely to overrule such an objection, and would have been correct in doing so. It was not error for the trial court to allow the deputy to testify regarding Dickens's prior statement. We cannot say that Defendant's counsel's failure to request a limiting instruction would have reasonably affected the outcome of Defendant's trial. Even if the jury considered Dickens's prior statement as substantive evidence, the same

substantive evidence was submitted in the testimony of two other witnesses. Because we hold that there is no reasonable probability that Defendant's alleged errors, if true, affected the outcome of his trial, we "need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citation omitted). We therefore conclude that Defendant was afforded effective assistance of counsel.

III. Conclusion

¶ 25 We hold that the trial court properly admitted the prior inconsistent statements for impeachment purposes and that Defendant received effective assistance of counsel throughout his trial.

NO ERROR.

Judges INMAN and JACKSON concur.

Report per Rule 30(e).