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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-676

Filed 20 June 2023

Caswell County, Nos. 17CRS50575, 18CRS208-09

STATE OF NORTH CAROLINA

v.

ANDRE LAMAR KENNEDY

Appeal by Defendant from Judgments entered 30 September 2021 by Judge L. Todd Burke in Caswell County Superior Court. Heard in the Court of Appeals 21 March 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael Bulleri, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Andre Lamar Kennedy (Defendant) appeals from Judgments entered 30 September 2021 upon jury verdicts finding him guilty of Attempted First-Degree Murder, Robbery with a Dangerous Weapon, and Assault with a Deadly Weapon with

Intent to Kill Inflicting Serious Injury. The Record, including evidence presented at trial, tends to reflect the following:

On 14 August 2018, Defendant was indicted for Attempted First-Degree Murder, Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and First-Degree Kidnapping.

This matter came on for trial on 27 September 2021. The State called Victim to testify. Victim testified to the following:

On 8 November 2017, Victim used a cell phone application to contact another user who went by the name of “Drelo Dinero” (Dre). Victim and Dre exchanged messages on the application, discussing meeting in person to engage in sexual activities. Dre asked Victim to meet him in Burlington, North Carolina that same night. The two exchanged phone numbers and began communicating via text. Dre asked Victim to pick him and his nephew up from a Simmons Court address. When Victim arrived at the location, two men approached his vehicle. Victim identified Defendant as the man who got into the backseat of his vehicle and stated another man got into the front seat. The man in the front seat directed Victim to drive and gave Victim directions. The man in the front seat asked Victim for money, and when Victim told him he did not have any money, Victim stated he “was going home.” When Victim put the vehicle in reverse to turn around, he felt a gun pressed to the back of his head. Victim was shot in the back of the head by Defendant. Defendant and the

other man got out of the vehicle, opened the driver's door, and threw Victim on the highway. They patted him down and then drove away in his vehicle.

The State also presented testimony from Detective Vincent Corbett (Detective Corbett). Detective Corbett testified to his training and experience in the investigative process without objection. Detective Corbett testified in relevant part:

There are certain things that when a person may be saying things that are untruthful, they may give indicators: their body language, things with their eyes, if they start looking up. That's what they call "constructing thoughts," is they're not recalling memories. They're actually trying to construct something to say to you, they will look up. When they're looking down, most of time, they're recalling something from their memory.

The State then asked Detective Corbett about his observations during his interview with Defendant. Detective Corbett testified—again, without objection:

There were times when he was looking up. Especially at one point during the interview, when I asked him how long it had been since he had been in Burlington, he looks up. And that, to me, and my training, is an indicator that he was constructing memory.

. . . .

When I asked him – or when – I'm sorry. When I confronted him about [Victim] and what had happened to him, and him being shot, his demeanor up until that point, he was very talkative and cooperative. And at that point, there was a long pause. It's like his emotions started coming in. He appeared to be kind of, I guess, in a state of shock as to the reason that he was actually in that room because I don't think up until that point he realized what this was actually about, our interview.

The State also called Jayla and Jasmine Norman to testify, who were present at the Simmons Court address on the night in question. Jasmine testified she did not

remember what happened on the night in question; however, she recalled giving a verbal statement to Detective Corbett when the events were still fresh in her mind. Jayla also testified she recalled giving a verbal statement to Detective Corbett; however, she testified: “I don’t remember everything that we talked about. My main focus was them telling me my date to come into court, so that’s really what stuck with me during the conversation[.]”

The State later announced, outside of the presence of the jury, its intention to elicit testimony from Detective Corbett for the purpose of impeaching Jasmine and Jayla Norman. The trial court heard argument from both parties and announced its decision to allow Detective Corbett’s testimony as to Jayla and Jasmine’s prior statements. Defendant did not request a limiting instruction.

Detective Corbett testified as to what Jasmine and Jayla told him during his investigation. Specifically, Detective Corbett testified Jasmine told him the names of four individuals, one of which was Defendant, present at the Simmons Court address on the night in question and that all four individuals possessed firearms that night. Detective Corbett further testified Jayla told him Defendant and another man “left in a vehicle” and that Defendant was armed with a “tan, semi-automatic pistol.” At the close of the evidence, the trial court instructed the jury on the impeachment of witnesses consistent with the pattern jury instructions.

On 30 September 2021, the jury returned verdicts finding Defendant guilty of Attempted First-Degree Murder, Robbery with a Dangerous Weapon, and Assault

with a Deadly Weapon with Intent to Kill Inflicting Serious Injury. The jury found Defendant not guilty of First-Degree Kidnapping. Defendant was sentenced to 206 to 260 months of imprisonment for the Attempted First-Degree Murder conviction. The Robbery with a Dangerous Weapon and Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury convictions were consolidated into a second Judgment, sentencing Defendant to a consecutive 95 to 126 months of imprisonment. Defendant gave Notice of Appeal in open court.

Issues

The dispositive issues on appeal are whether the trial court: (I) committed plain error in admitting Detective Corbett’s testimony Defendant was “constructing a memory”; (II) committed plain error in admitting Detective Corbett’s testimony regarding his training and experience in the investigative process; and (III) erred in admitting Detective Corbett’s testimony regarding the out-of-court statements made by two other witnesses—Jayla and Jasmine Norman.

Analysis

I. Detective Corbett’s Testimony regarding Defendant’s Demeanor

Defendant first contends the trial court committed plain error in permitting Detective Corbett to testify he believed Defendant was “constructing a memory”. We disagree.

Our Supreme Court “has elected to review unpreserved issues for plain error when they involve . . . rulings on the admissibility of evidence.” *State v. Gregory*, 342

N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted); N.C.R. App. P. 10(a)(4) (2022). “Under the plain error rule, 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).

Opinion testimony is admissible so long as the opinion or testimony is “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701 (2021). Defendant is correct that as a general proposition, “when one witness vouches for the veracity of another witness, such testimony is an opinion which is not helpful to the jury’s determination of a fact in issue and is therefore excluded by Rule 701.” *State v. Daughtridge*, 248 N.C. App. 707, 716, 789 S.E.2d 667, 672 (2016) (alteration, citation, and quotation marks omitted). However, our Supreme Court has previously concluded a police officer’s opinion about a defendant’s demeanor is admissible under Rule 701 if it is: (1) “helpful to a clear understanding of [the officer’s] testimony” and (2) based on the officer’s “personal observations.” *State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997).

Here, Detective Corbett’s testimony about Defendant’s demeanor was based on his personal observations during his interrogation of Defendant. Detective Corbett testified he observed Defendant for indicators of truthfulness, observing Defendant appeared to be “constructing a memory” when he looked up after being asked “how

long it has been since he has been in Burlington.” Further, it is apparent from the context of Detective Corbett’s testimony on direct examination that he was simply explaining the steps he took in furtherance of his ongoing investigation. Specifically, Detective Corbett’s testimony provided context as to why he continued to conduct the interrogation as Defendant’s answers continued to change as his questioning continued. Thus, this testimony is both “helpful to a clear understanding of [Detective Corbett’s] testimony” and is based on Detective Corbett’s “personal observations” during his investigation. *Id.*; *see also* N.C. Gen. Stat. § 8C-1, Rule 701. Therefore, Detective Corbett’s testimony is admissible under N.C. Gen. Stat. § 8C-1, Rule 701. Consequently, the trial court did not commit plain error in admitting this testimony.

II. Detective Corbett’s Testimony as to his Training in the Investigative Process

Defendant also contends the trial court committed plain error in permitting Detective Corbett to testify as to his “ ‘training’ in how to determine whether ‘a person may be saying things that are untruthful.’ ” Defendant contends this was inappropriate expert testimony in violation of Rule 702. We disagree.

First, Detective Corbett was not testifying as an expert; the State never tendered him as such. Thus, as previously discussed, his opinion testimony is admissible so long as the opinion or testimony is “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or

the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701. Further, our Court has allowed an investigator’s testimony under Rule 701 “to assist the jury in understanding his investigative process and why he chose to continue investigating [the d]efendant[.]” *Daughtridge*, 248 N.C. App. at 717, 789 S.E.2d at 673. This Court reasoned “[s]uch testimony does not speak to the ultimate issue of Defendant’s guilt or innocence and was therefore admissible under Rule 701.” *Id.* (citing *State v. Houser*, 239 N.C. App. 410, 417, 768 S.E.2d 626, 631-32 (“[The officer] was not invading the province of the jury by commenting on the truthfulness of defendant’s statements and subsequent testimony. Rather, he was explaining the investigative process. . . . [S]tatements were rationally based on [the officer’s] experience as a detective and were helpful to the jury in understanding the investigative process in this case. . . . [W]e hold that the trial court’s admission of this testimony was not error, let alone plain error.”), *disc. rev. denied*, 368 N.C. 281, 775 S.E.2d 869 (2015)).

In the case *sub judice*, Detective Corbett testified as to his experience in interviewing suspects in general and how he conducts an interrogation. Specifically, on direct examination, Detective Corbett was asked to explain his training in interview techniques. Detective Corbett testified, without objection, to the techniques he was taught, including how to “gauge responses” and “look for cues” that may indicate an individual is being untruthful. Like the officers in *Daughtridge* and *Houser*, here, Detective Corbett was “explaining the investigative process” and his “statements were rationally based on [his] experience as a detective and were helpful

to the jury in understanding the investigative process[.]” *Houser*, 239 N.C. App. at 417, 768 S.E.2d at 632. Thus, Detective Corbett’s statements were admissible under N.C. Gen. Stat. § 8C-1, Rule 701. Therefore, the trial court did not err, let alone plainly err, in admitting this testimony.

III. Detective Corbett’s Testimony as to Jasmine and Jayla’s Out-of-Court Statements

Defendant also contends “the trial court erred in admitting hearsay about Jayla and Jasmine Norman’s purported out-of-court statements.” We disagree.

“‘Hearsay’ is 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) (2021). Generally, “[h]earsay is not admissible, except as provided by statute[.]” N.C. Gen. Stat. § 8C-1, Rule 802. However,

[u]nder certain circumstances a witness may be impeached by proof of prior conduct or statements which are inconsistent with the witness’s testimony. Inconsistent prior statements are admissible for the purpose of shedding light on a witness’s credibility. When the witness’s prior statement relates to material facts in the witness’s testimony, extrinsic evidence may be used to prove the prior inconsistent statement without calling the inconsistencies to the attention of the witness. Material facts involve those matters which are pertinent and material to the pending inquiry.

State v. Whitley, 311 N.C. 656, 663, 319 S.E.2d 584, 589 (1984) (citations omitted).

Further, “[w]here the witness admits having made the prior statement, impeachment

by that statement has been held to be permissible.” *State v. Riccard*, 142 N.C. App. 298, 303, 542 S.E.2d 320, 323 (2001).

Defendant contends Jayla and Jasmine’s out-of-court statements were inadmissible for any purpose. Again, we disagree. At trial, Jasmine testified she did not remember what happened on the night in question; however, she recalled giving a verbal statement to Detective Corbett when the events were still fresh in her mind. Jayla also testified she recalled giving a verbal statement to Detective Corbett; however, she testified: “I don’t remember everything that we talked about. My main focus was them telling me my date to come into court, so that’s really what stuck with me during the conversation[.]” The trial court subsequently allowed Detective Corbett to testify as to what Jasmine and Jayla told him during his investigation for impeachment purposes. Neither Jasmine nor Jayla denied making prior statements to Detective Corbett. Thus, as this Court previously explained in *Riccard*, “where there is testimony that a witness fails to remember having made certain parts of a prior statement . . . our courts have allowed the witness to be impeached with the prior inconsistent statement.” *Id.* Thus, the trial court did not err in allowing Detective Corbett’s testimony for impeachment purposes “to prove the prior inconsistent statement without calling the inconsistencies to the attention of the witness.” *Whitley*, 311 N.C. at 663, 319 S.E.2d at 589.

Further, “[t]he admission of evidence which is relevant and competent for a limited purpose will not be held error in the absence of a request by the defendant for

a limiting instruction.” *State v. Stager*, 329 N.C. 278, 309, 406 S.E.2d 876, 894 (1991) (citing *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988)). Here, the State asserted, outside of the presence of the jury, its intention to elicit testimony from Detective Corbett for the purpose of impeaching Jayla and Jasmine Norman as prior inconsistent statements. Although Defendant objected to this testimony, upon the trial court’s ruling, Defendant failed to request a limiting instruction at the time the evidence was admitted.¹ Thus, Defendant “is not entitled to have the trial court’s failure to give limiting instructions reviewed on appeal.” *Id.* at 310, 406 S.E.2d at 894. Therefore, we cannot conclude the trial court erred in admitting Detective Corbett’s statements regarding Jayla and Jasmine’s out-of-court statements. Consequently, we affirm the trial court’s Judgments.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant’s trial and affirm the trial court’s Judgments.

NO PLAIN ERROR IN PART, NO ERROR IN PART.

Chief Judge STROUD and Judge GORE concur.

Report per Rule 30(e).

¹ At the close of the evidence, the trial court properly instructed the jury on the impeachment of witnesses consistent with the pattern jury instructions.