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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-104

Filed 3 September 2024

Swain County, Nos. 21 CRS 387, 21 CRS 50326, 22 CRS 131

STATE OF NORTH CAROLINA

v.

JOSEPH DIAZ, Defendant.

Appeal by Defendant from judgment entered 9 June 2023 by Judge Craig Croom in Swain County Superior Court. Heard in the Court of Appeals 19 August 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Zach Padget, for the State.

Kaelyn N. Sweet for Defendant.

PER CURIAM.

Defendant Joseph Diaz was found guilty of resisting a public officer, felony breaking and entering, felony larceny after breaking and entering, felony possession of stolen goods and/or property, and trafficking by possession of more than four grams of opioids. Defendant appeals, contending the trial court violated his constitutional rights under the Confrontation Clause by admitting a certain statement by an

individual who did not testify. We conclude Defendant received a fair trial free of reversible error.

I. Background

Defendant was charged with the crimes reference above and with misdemeanor larceny arising from an event where Defendant broke into a home. At trial, the State sought to introduce statements by a Ms. Dixon about the incident through the testimony of Ms. Day. Defendant objected to the introduction of Ms. Dixon's statements. The trial court admitted the statements over Defendant's objection and concluded that Ms. Dixon's statements were nontestimonial and could be admitted through Ms. Day's testimony. A jury convicted Defendant guilty of all crimes charged except for misdemeanor larceny.

Defendant did not give proper notice of appeal, but he subsequently filed a petition for writ of *certiorari*. In our discretion, we grant Defendant's petition and review his arguments.

II. Analysis

Defendant contends that his constitutional rights under the Sixth Amendment were violated when the trial court admitted the hearsay statements from Ms. Dixon at trial. We review *de novo*. See *State v. Thorne*, 173 N.C. App. 393, 396, 618 S.E.2d 790, 793 (2005).

"Where testimonial evidence is at issue, it is only admissible based on a finding that the witness is unavailable for trial and that the defendant has had a prior

opportunity for cross-examination. Where non-testimonial evidence is involved, however, the ordinary rules of evidence apply in regards to admissibility.” *State v. Ferebee*, 177 N.C. App. 785, 788, 630 S.E.2d 460, 462 (2006) (citing *Crawford v. Washington*, 541 U.S. 36, 124, S. Ct. 1345, 158 L.E.2d 177 (2004)). “[Statements] 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). When statements are made to a private citizen, “the Sixth Amendment is not implicated as the statements were non-testimonial.” *State v. Calhoun*, 189 N.C. App. 166, 170, 657 S.E.2d 424, 427 (2008).

Here, the statements presented in court were made by one private citizen to another private citizen. Although Ms. Day was a social worker, she was not acting in her capacity as a social worker at the time she had the conversation with Ms. Dixon. Ms. Dixon’s statements to Ms. Day were made during a private conversation to determine whether Ms. Day was in danger, outside the presence of police, and before Defendant was arrested. Therefore, the statements were non-testimonial, and are not subject to the constitutional safeguards provided by the Sixth Amendment. *See, e.g., State v. Calhoun*, 189 N.C. App. at 170, 657 S.E.2d at 427 (2008) (“[T]he statement was made to . . . a private citizen. Thus, the Sixth Amendment is not implicated as the statements are non-testimonial.”).

III. Conclusion

We conclude that the statements made between Ms. Day and Ms. Dixon were non-testimonial and, therefore, their admission did not violate Defendant's Sixth Amendment right to confrontation.

NO ERROR.

Panel consisting of Chief Judge DILLON, Judges GORE and GRIFFIN.

Report per Rule 30(e).