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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-480

Filed: 21 February 2017

Beaufort County, No. 05 CRS 52742

STATE OF NORTH CAROLINA

v.

HENRY ARTHUR LITTLE

Appeal by defendant from order entered 13 November 2015 by Judge Wayland J. Sermons, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 11 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David L. Elliott, for the State.

Hollers & Atkinson, by Russell J. Hollers, III, for defendant-appellant.

ELMORE, Judge.

In 2006, defendant Henry Arthur Little was convicted for strangling “L.P.” and raping her at knifepoint. At trial, the State’s case relied in part on DNA test results matching defendant’s DNA profile with the sperm cells found in L.P.’s vaginal swabs. Nine years after his conviction, defendant filed an affidavit of actual innocence and moved for postconviction DNA testing under N.C. Gen. Stat. § 15A-269, seeking additional testing of certain DNA samples and “Touch DNA” testing of allegedly

untested items of evidence. The trial court entered an order denying his motion and finding that, based on the results of the previous DNA test performed, “there is no belief” the requested testing “would provide evidence to prove [defendant’s] innocen[ce],” and that defendant “fail[ed] to satisfy the prerequisites [of N.C. Gen. Stat. § 15A-269] for DNA testing and the appointment of counsel.”

Defendant appealed that order and now argues that the trial court erred by (1) applying an unduly high materiality-of-the-evidence standard and (2) concluding the requested testing would not generate evidence material to his claim of innocence. Because we conclude that defendant failed to satisfy N.C. Gen. Stat. § 15A-269(a)(1)’s materiality-of-the-evidence prerequisite, we hold that the trial court properly denied his motion for postconviction DNA testing and affirm its order.

I. Background

On 21 September 2006, a jury convicted defendant of first-degree rape and assault by strangulation against L.P. *See State v. Little*, 188 N.C. App. 152, 153, 654 S.E.2d 760, 761 (2008). The evidence at trial showed that, after a night of drinking alcohol and smoking crack cocaine, defendant choked L.P. into unconsciousness and raped her at knifepoint in his trailer during the early morning of 14 June 2005. *Id.* Once L.P. left defendant’s trailer, she asked a neighbor to call 911. Defendant told the responding officer “that [L.P.] was already bleeding when she showed up at his trailer and denied having sex with her.” *Id.* at 154, 654 S.E.2d at 762.

L.P. “was taken to a hospital and a nurse collected a rape kit.” *Id.* Analysis of L.P.’s vaginal swabs revealed the presence of sperm cells. DNA testing by the State Bureau of Investigation (“SBI”) Crime Lab revealed the following results:

The DNA profile obtained from the sperm fraction of the vaginal swabs . . . is CONSISTENT WITH A MIXTURE. The DNA profiles obtained from the known bloodstains of the victim, [L.P.], and suspect, [defendant] . . . cannot be excluded as contributors to the mixture[.]

“A computational biologist testified that it was 35 trillion times more likely” that the DNA profile of the sperm fraction “matched defendant[’s DNA profile] than any other person.” *Id.* Although L.P. acknowledged having consensual intercourse with another person, Mike Pearsall, approximately twenty-four hours before the rape, the results of the SBI’s DNA test revealed that Pearsall’s DNA profile “was not detected in [the] mixture.”

Defendant appealed his convictions to this Court. By opinion filed 15 January 2008, we held that defendant received a trial free from error. *Id.* at 157, 654 S.E.2d at 764.

On 31 May 2011, defendant filed an affidavit of actual innocence and a motion for postconviction DNA testing of “clothing of alleged,” “blood testing,” and “body fluids,” alleging that these items were either “not subjected to DNA testing” or could “now be subjected to newer and more accurate testing” Defendant also filed a motion to locate and preserve “[c]lothing” and “[b]ed-linen” allegedly obtained during

the investigation. By order entered 22 July 2011, the trial court denied these motions, finding that defendant failed to allege the existence of any specific untested item of biological evidence or DNA material in the State's possession and "failed to satisfy the prerequisites set forth [i]n N.C.G.S. § 15A-269 for DNA testing and the appointment of counsel." The record does not reflect defendant appealed this order.

On 8 September 2015, defendant filed the instant motions for postconviction DNA testing and to locate and preserve evidence, as well as an affidavit of actual innocence. Defendant sought additional testing of the DNA samples collected from defendant, Pearsall, and L.P. and alleged the existence of several untested items listed in the SBI Crime Lab report, including: L.P.'s jean shorts, L.P.'s cheek scrapings and pubic hair combings, a "[k]nown head hair sample," and defendant's pillowcase and bedsheets. Defendant also alleged the existence of the following items of evidence: "Wine bottle, beer bottle, cans, or drinking vessels"; "[c]rack cocaine pipe or cigarette butts used during the rape"; "[c]ondom used during the rape by Mike Pearsall"; and "other items used during rape that are not listed and would have DNA on the item from touching the items, talking or sneezing over the item, scratching, or coughing over this evidence[.]"

Defendant asserted the previous DNA testing performed by the SBI Crime Lab was "insufficient, botched, misleading, flawed, distorted, [or] tainted by SBI agents" and demanded "a more thorough and proper examination with the present day DNA

technology i.e. Polymerase chain reaction (PCR) and Short Tandem Repeat (STR) and now with the new technique known as ‘Touch DNA Testing’ that allows for the amplification and analysis of very minute amounts of cellular DNA material.” Defendant alleged this testing “could go a long way toward[] proving [his] innocence” and that “[t]he ability to conduct the requested DNA testing is material to [his] defense.”

By order entered 13 November 2015, the trial court denied defendant’s motion, noting that defendant previously filed a motion for DNA testing in 2011, which was denied, and finding that “based on the DNA test performed and the results of that testing there is no belief that the results if other items seized are tested by “Touch DNA” would provide evidence to prove innocen[ce]” and that “[d]efendant fail[ed] to satisfy the prerequisites” of “N.C.G.S. § 15A-269 for DNA testing and the appointment of counsel.” Defendant appeals.

II. Analysis

Defendant contends the trial court erred by denying his motion for postconviction DNA testing. We disagree.

The standard of review for a denial of a motion for postconviction DNA testing is analogous to the standard of review for a motion for appropriate relief. Findings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court’s conclusions of law are reviewed *de novo*. The defendant has the burden . . . of establishing the facts essential to his claim by a

preponderance of the evidence.

State v. Cox, __ N.C. App. __, __, 781 S.E.2d 865, 867 (2016) (citations, quotation marks, and brackets omitted).

Under N.C. Gen. Stat. § 15A-269(a) (2015), a defendant may make a motion for postconviction DNA testing

if the biological evidence meets all of the following conditions:

- (1) Is material to the defendant's defense.
- (2) Is related to the investigation or prosecution that resulted in the judgment.
- (3) Meets either of the following conditions:
 - a. It was not DNA tested previously.
 - b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

A defendant bears the burden of “mak[ing] the materiality showing required in N.C. Gen. Stat. § 15A-269(a)(1),” which is “a condition precedent to a trial court’s statutory authority to grant a motion under N.C.G.S. § 15A-269” *State v. Foster*, 222 N.C. App. 199, 204, 205, 729 S.E.2d 116, 120 (2012) (citation omitted). Evidence is “material” in this context “if there is a reasonable probability” that it “would result in a different outcome in the jury’s deliberation.” *State v. Hewson*, 220 N.C. App. 117,

122, 725 S.E.2d 53, 56 (2012) (citations omitted). “[A] mere conclusory statement is insufficient to establish materiality.” *State v. Collins*, 234 N.C. App. 398, 411, 761 S.E.2d 914, 922 (2014) (citing *Foster*, 222 N.C. App. at 205, 729 S.E.2d at 120).

In *Foster*, we held that the defendant’s conclusory statement in a postconviction motion for DNA testing that “the ability to conduct the requested DNA testing is material to [d]efendant’s defense” without explaining “how or why DNA testing would be material to his defense” was insufficient to satisfy N.C. Gen. Stat. § 15A-269’s materiality prerequisite. 222 N.C. App. at 205, 729 S.E.2d at 120; *see also State v. Gardner*, 227 N.C. App. 364, 369, 742 S.E.2d 352, 356 (2013) (“[W]here a motion brought under section 15A-269 provided no indication of how or why the requested DNA testing would be material to the petitioner’s defense, the motion was deficient and it was not error to deny the request for the DNA testing.” (citing *Foster*, 222 N.C. App. at 205, 729 S.E.2d at 120)).

In the instant motion for postconviction DNA testing, defendant alleged that the requested testing “could go a long way toward[] proving [his] innocence” and recited the same conclusory statement, “[t]he ability to conduct the requested DNA testing is material to the [d]efendant’s defense,” without articulating how or why this testing would be material to his claim of innocence. Under *Foster* and *Gardner*, defendant’s conclusory statements fail to satisfy N.C. Gen. Stat. § 15A-269’s materiality prerequisite and, therefore, fail to establish a condition precedent to the

trial court's authority to grant his motion for postconviction DNA testing. Therefore, the trial court did not err in denying defendant's motion.

Nonetheless, defendant advances a more robust materiality argument on appeal. In his brief, defendant asserts that the requested testing would be material to his defense that he did not have sex with L.P. for the following reasons:

If touch DNA testing revealed that [] Pearsall's DNA was on [L.P.'s] shorts and [defendant's] bed linens, it would be material to the defense that [] Pearsall had sex with [L.P.], not [defendant]. Likewise, if newer, more-accurate PCR/STR testing revealed the presence of [] Pearsall's DNA in the DNA mixture, it would be material to [defendant's] defense that he did not have sex with [L.P.] that early morning.

Assuming, *arguendo*, that defendant may properly raise this argument for the first time on appeal, it is meritless. Whether Pearsall's touch DNA is found on these items or whether newer testing detected Pearsall's DNA profile in the mixture neither would exculpate defendant nor weaken the State's case. This evidence neither would contradict nor undermine the test results revealing that L.P.'s vaginal swabs contained a DNA profile "35 trillion times more likely" to match defendant's DNA profile than anyone else. Furthermore, testing has already excluded Pearsall's DNA profile from L.P.'s vaginal swab, but even if it were detected, this evidence would be consistent with L.P.'s report that she had consensual sex with Pearsall twenty-four hours before the rape and would not be inconsistent with the State's theory that defendant raped L.P. Defendant has failed to demonstrate how the requested testing

would yield evidence generating a “reasonable probability” that it “would result in a different outcome in the jury’s deliberation.” *Hewson*, 220 N.C. App. at 122, 725 S.E.2d at 56 (citations omitted). Accordingly, we reject defendant’s argument.

Because we conclude that defendant failed to satisfy N.C. Gen. Stat. § 15A-269(a)(1)’s materiality prerequisite under the proper standard, we need not address his argument that the trial court applied an unduly high materiality standard. *See State v. Turner*, __ N.C. App. __, __, 768 S.E.2d 356, 359 (2015) (noting flawed reasoning in the trial court’s order but holding that “because the trial court reached the correct conclusion—that [d]efendant’s motion for DNA testing should be denied—we affirm its order”).

III. Conclusion

Defendant’s conclusory statements in his motion for postconviction DNA testing failed to satisfy N.C. Gen. Stat. § 15A-269(a)(1)’s materiality prerequisite. Therefore, the trial court properly denied his motion for postconviction DNA testing.

AFFIRMED.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).