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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-814

Filed: 18 July 2017

Cabarrus County, No. 14 CRS 52082

STATE OF NORTH CAROLINA

v.

WILLIE JAMES BOLDER

Appeal by defendant from judgment entered 18 November 2015 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 19 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas G. Vlahos, for the State.

Rudolph Widenhouse, by M. Gordon Widenhouse, Jr., for defendant-appellant.

CALABRIA, Judge.

Where defendant's proffered evidence of a third party's guilt was either irrelevant or ultimately included, the trial court did not err in excluding evidence. Where defendant's proffered evidence did not show that a murder victim feared that a third party would kill him, the trial court did not err in excluding it. Where defendant's motion to reopen jury selection was untimely and not based upon events

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which took place after jury selection was concluded, the trial court did not err in denying defendant's motion. Where the trial court issued a jury instruction which substantially addressed defendant's concerns, the trial court did not err in declining to issue defendant's specifically requested instruction. We find no error.

I. Factual and Procedural Background

On 21 April 2014, Kena Cooper ("Kena") received a phone call from Willie James Bolder ("defendant"), who needed a ride to Concord, North Carolina. Kena's brother drove defendant, and her son, Brian Cooper ("Brian") went with them. They departed sometime between 9:00-9:30 p.m., and returned between 3:00-3:30 a.m. When Kena asked what had happened, defendant informed her that he had shot someone inside of a house, through the window. Brian further testified that, at defendant's direction, his uncle had driven to a house, that defendant had disembarked wearing a ski mask, that Brian then heard six shots, and that defendant, upon returning to the vehicle, stated that he shot someone through a window.

Law enforcement officers responded to a 911 call concerning the gunshots, and arrived at the house, which was owned by Marcus Howard ("Marcus"). Inside the home, they found Arnold Bennett ("Bennett") on the floor, suffering from gunshot wounds to his thigh, abdomen, chest, arm, hands, and back. He was transported to a local hospital where he later died of the wounds.

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Defendant was charged with first-degree murder and discharging a firearm into occupied property. At trial, defendant alleged in his defense that it was not he, but Marcus' brother Antwan Howard ("Antwan") who shot Bennett. The jury returned a verdict finding defendant guilty of discharging a firearm into an occupied dwelling inflicting serious bodily injury, and of first-degree murder, based upon both premeditation and deliberation and the felony murder rule. The trial court sentenced defendant to life imprisonment without parole for first-degree murder, and a minimum of 96 months to a maximum of 128 months' imprisonment for discharging a weapon into occupied property, to be served consecutively in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. Exclusion of Evidence of Alternative Culprit

In his first argument, defendant contends that the trial court erred in excluding evidence tending to show that a third party committed the murder. We disagree.

A. Standard of Review

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Griffin*, 136 N.C.

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App. 531, 550, 525 S.E.2d 793, 806 (citations and quotation marks omitted), *appeal dismissed and disc. review denied*, 351 N.C. 644, 543 S.E.2d 877 (2000).

Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and quotation marks omitted).

"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), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

B. Analysis

At trial, defendant sought to introduce several pieces of evidence which he alleged tended to show that Antwan, not defendant, committed the murder. He further argued that he had "Sixth [A]mendment, Eighth Amendment and Fourteenth Amendment issues with any sort of exclusion" of this evidence. On appeal, he contends that the exclusion of this evidence was not only error, but a violation of his constitutional rights.

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When evidence is proffered to establish that a third party committed a crime, it cannot create mere conjecture; it must (1) point directly to the guilt of another, and (2) be inconsistent with defendant's guilt. Evidence showing that a third party had opportunity to commit a crime, yet not showing that the third party (rather than defendant) did so, is speculative, and thus not relevant. *State v. Watts*, 357 N.C. 366, 370-71, 584 S.E.2d 740, 745 (2003).

The first piece of evidence defendant sought to introduce was evidence that Marcus had discharged a firearm at Bennett during a prior argument in Antwan's presence. On 18 April 2014, Hermina Cannon ("Cannon") overheard a "rage argument[.]" and saw Antwan, Marcus, and Bennett arguing. Cannon testified that Marcus fired multiple gunshots at close range at Bennett, who simply stood there. Bennett later spoke to Cannon, saying, "Don't worry about it."

Defendant contends that this is evidence of hostility between Antwan and Bennett. The State correctly notes, however, that the alleged fact that Marcus fired a gun at Bennett has no relevance to whether Antwan killed Bennett. We hold, therefore, that the trial court did not err in excluding this irrelevant evidence.

The second piece of evidence defendant sought to introduce was the testimony of Andy Hattery ("Hattery") concerning the incident on 18 April 2014. Hattery was in his home when he heard multiple gunshots. He looked outside and saw two vehicles, a two-tone sedan and a dark SUV. Cannon testified that these descriptions

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matched the cars driven by Antwan and Marcus. Hattery saw two men outside of the sedan, but only saw their silhouettes, because it was dark and raining. On cross-examination, however, Hattery acknowledged that he had “no firsthand knowledge about whether or not Antwan Howard or anybody else shot and killed Arnold Bennett[.]” Again, this testimony has no relevance to whether, on 21 April 2014, Antwan shot Bennett, and we hold that the trial court did not err in excluding this irrelevant evidence.

The third piece of evidence defendant sought to introduce was the fact that Antwan was the initial suspect in the murder. The State correctly notes, however, that this evidence was not excluded at trial. At trial, defendant called Sergeant Brian Schiele (“Sgt. Schiele”), an officer with the Concord Police Department, to testify. On direct examination, defendant elicited testimony of Sgt. Schiele’s “evidence processing report,” which showed that he found Antwan’s fingerprints at the crime scene, and entered Antwan in the report as a suspect. This report was admitted into evidence without objection. Defendant was thus able to elicit both actual testimony and physical evidence showing that Antwan was a suspect. Inasmuch as this evidence was not excluded at trial, the trial court could not have erred in excluding it.

The final piece of evidence defendant sought to introduce consisted of phone calls and text messages sent from Bennett to Wraymel Weaks (“Weaks”). Weaks

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testified that, earlier in the day, he had been with Bennett, Antwan, and Marcus, all of whom were riding together; that “something had happened with Marcus’ black and white car[,]” namely an accident; that Bennett, who was in another car, left Antwan and Marcus behind; and that later, when Weaks spoke and texted with Bennett, Bennett acknowledged that Antwan and Marcus were angry that they had been left behind. Defendant contends that these communications demonstrated hostility between Bennett and Antwan, and Bennett’s fear that Antwan might kill him.

However, it is not clear that these communications demonstrated what defendant alleges. Weaks testified that he received text messages in reference to Bennett and Antwan fighting. Weaks testified that Bennett informed him that Antwan had threatened him. However, when Weaks responded, “Man, are you good?” Bennett replied, “Yeah.” Additionally, on cross-examination, Weaks reaffirmed that Bennett had informed him that “everything was good[.]” Weaks also informed law enforcement of Bennett’s statement after the murder. Ultimately, none of this evidence suggests that Bennett was afraid of Antwan. Nor were the communications admissible to show that Antwan had actually threatened Bennett. These communications had no relevance to the issue of whether Antwan murdered Bennett, and the trial court did not err in excluding this irrelevant evidence.

Defendant’s proffered evidence had to demonstrate that Antwan killed Bennett, and had to preclude defendant’s guilt. None of defendant’s proffered

evidence precluded his own guilt. None of it actually demonstrated that Antwan killed Bennett. Defendant's proffered evidence merely raised a conjecture of ill will. Whether we review this issue as exclusion of evidence for abuse of discretion or for constitutional error under a *de novo* standard of review, that mere conjecture does not point directly to Antwan's guilt, and thus does not mandate inclusion. We therefore hold that the trial court did not err in the exclusion of this evidence.

C. Harmless Error

We also observe that, even if we agreed with defendant that the challenged evidence should have been admitted, the effect of that evidence—even cumulatively—was harmless. An error in the admission or exclusion of evidence is harmless unless “there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached” at trial.¹ N.C. Gen. Stat. § 15A-1443.

Here, the State presented extensive testimony from two witnesses who said that defendant confessed to the crime. Brian Cooper testified that he and his uncle, William Cooper, drove defendant to Statesville and parked behind a supermarket

¹ Defendant repeatedly contends that if the trial court excluded this evidence in violation of the Rules of Evidence, that error also violated his rights under the Sixth and Fourteenth Amendments because it meant he was denied “a meaningful opportunity to present a complete defense.” Defendant presumably makes this argument in order to benefit from the more stringent harmless error standard that applies to constitutional violations—one that shifts the burden to the State to show the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b). Of course, every defendant in every case could make this argument and thus, if we accepted it, the ordinary harmless error standard would cease to apply in cases involving exclusion of the defendant's evidence. Our precedent does not permit us to do so. *See State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009).

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while defendant went to “scope” somebody’s house to see where that person was. Defendant returned fifteen to twenty minutes later and told William to drive closer to the person’s house. Defendant then went to the house carrying a gun. Brian heard six gunshots and saw defendant run back to the car wearing a ski mask that he threw out the window.

William then drove to a convenience store in Concord. At the convenience store, defendant acknowledged that he killed the victim and explained that he could not get a clear shot until the victim sat in a chair, allowing defendant a clear line of sight through the window. Kena Cooper testified that she spoke with defendant the day after the shooting and that he admitted that he went to the victim’s house and shot him through the window.

The State presented evidence corroborating these witnesses’ statements, including data from defendant’s cellphone that put his location in Statesville on the night of the murder and a surveillance video from a Concord convenience store showing defendant and Brian in the store at 12:18 a.m. that night, matching the timeline from the State’s witnesses. In light of this testimony and corroborating evidence, there is no reasonable possibility that the jury would have reached a different result had defendant’s evidence been admitted. Accordingly, any error in the exclusion of this evidence was harmless.

III. Exclusion of Hearsay

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In his second argument, defendant contends that the trial court erred in excluding hearsay statements by Bennett purportedly demonstrating that he feared that Antwan would kill him. We disagree.

A. Standard of Review

“The trial court’s determination as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal.” *State v. Castaneda*, 215 N.C. App. 144, 147, 715 S.E.2d 290, 293, *appeal dismissed and disc. review denied*, 365 N.C. 354, 718 S.E.2d 148 (2011).

B. Analysis

Defendant contends specifically that the text messages from Bennett to Weaks, in which Bennett ostensibly claimed that he feared that Antwan would kill him, were improperly and erroneously excluded by the trial court. Defendant contends that statements made by the deceased that he fears that a person will kill him are admissible exceptions to hearsay.

It is true that there exists in North Carolina law an exception to the hearsay rule with respect to certain statements of the deceased. Specifically, pursuant to Rule 803 of the North Carolina Rules of Evidence, certain statements are admissible exceptions to hearsay irrespective of the availability of a witness. Defendant sought to introduce these text messages pursuant to Rule 803(3), which provides an exception for expressions of the declarant’s state of mind, and Rule 803(24), which

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provides a blanket exception for probative statements if in the interests of justice. N.C.R. Evid. 803(3), 803(24). North Carolina case law recognizes that there is “a reasonable probability of truthfulness of statements made by a victim/declarant to a law enforcement officer shortly before the victim’s death which described ill will between the defendant and the victim and the victim’s fear of the defendant[,]” and thus that such statements constitute an exception to the hearsay rule. *State v. Alston*, 307 N.C. 321, 327, 298 S.E.2d 631, 637 (1983); *see also State v. Triplett*, 316 N.C. 1, 13, 340 S.E.2d 736, 743 (1986) (holding that statements “by the deceased regarding the defendant’s attacks and threats toward her” constituted an exception to the hearsay rule).

However, as discussed above, the text messages sent from Bennett to Weaks do not demonstrate a fear that Antwan would kill Bennett. At most, they demonstrate hostility between the two. Bennett’s lack of fear is further evidenced by Bennett’s presence in the home of Marcus on the day in question; Bennett came voluntarily for an Easter celebration, which would not suggest that he feared for his life. Weaks further testified that Bennett rode with Antwan and Marcus on the day in question, again not something that someone who feared for his life would do.

Because these text messages do not show that Bennett feared that Antwan would kill him, and did not otherwise implicate Antwan as Bennett’s killer, they were

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not relevant, and were not admissible. We hold therefore that the trial court did not err in excluding them.

IV. Reopening Jury Selection

In his third argument, defendant contends that the trial court erred in declining to reopen jury selection after the jury was impaneled. We disagree.

A. Standard of Review

“[W]e must defer to the trial court’s judgment as to whether the prospective juror could impartially follow the law.” *State v. Bowman*, 349 N.C. 459, 471, 509 S.E.2d 428, 436 (1998), *cert. denied*, 527 U.S. 1040, 144 L. Ed. 2d 802 (1999). “The ruling of the trial court will not be disturbed absent abuse of discretion.” *State v. Green*, 336 N.C. 142, 159, 443 S.E.2d 14, 24 (1994).

B. Analysis

Toward the end of jury selection, one of the prospective alternate jurors called was Merl Hamilton (“Hamilton”), a retired police chief. Hamilton stated that he had “hired most of the police officers involved in the case[,]” that he “would give their testimony more weight[,]” and that he had “very much confidence in them.” Based on these statements, Hamilton was excused for cause by the trial court, without objection. Jury selection continued thereafter, and upon the conclusion of jury selection, defendant expressed satisfaction with the jury. After the jury was impaneled, but before opening statements, defendant moved to reopen jury selection,

or in the alternative moved for a mistrial, citing Hamilton's statements. The trial court asked whether, "after [defense counsel] agreed to [the jury composition], and after I had the jury impaneled, has anything changed since then?" Defendant responded in the negative. The trial court further asked what, specifically, Hamilton said that was prejudicial, given that Hamilton said, "essentially, these are the people that I hired, these are the people that I trained; I think essentially [he] says, I know that they do good work, I have confidence in them[.]" Defendant responded that the issue was Hamilton's "personal vouching for the work ethic and work product of these officers specifically." The trial court then denied defendant's motion for a mistrial, denied the motion to reopen jury selection, and instead opted to give a curative instruction.

As a preliminary matter, we note that defendant's objection was untimely. Defendant did not object when Hamilton spoke; rather, it was the trial court which excused Hamilton. Likewise, defendant did not object prior to the impaneling of the jury. It was only after the court had recessed for lunch, reconvened, and addressed other pre-trial matters, that defendant finally raised his objection. This untimely objection, alone, might defeat his motion to reopen jury selection.

The motion to reopen jury selection is traditionally a remedy for issues arising after the jury has been impaneled, not before. For example, in *State v. Thomas*, 230 N.C. App. 127, 131, 748 S.E.2d 620, 623 (2013), after the jury had been impaneled, a

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juror informed the court that she had attended high school with a witness. That sort of issue, arising after the jury is impaneled, can be resolved by a motion to reopen jury selection. In the instant case, however, the issue with Hamilton did not arise *after* the jury was impaneled, but during jury selection; thus, the appropriate time to object was while jury selection was still open. Instead, defendant waited until jury selection had closed, and other business had been addressed, before belatedly raising this issue.

“In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]” N.C.R. App. P. 10(a)(1). We hold that defendant’s objection on this issue was untimely, and thus was not properly preserved for appeal.

V. Jury Instruction

In his fourth argument, defendant contends that the trial court erred in declining to issue a requested jury instruction. We disagree.

A. Standard of Review

“[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).

B. Analysis

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At trial, defendant requested that the jury be instructed to disregard Hamilton's statements. Defendant submitted in writing a proposed jury instruction. The trial court did not give defendant's proposed instruction, and defendant now contends that this was error.

We note, however, that the trial court issued a jury instruction prior to opening statements. In that instruction, the trial court admonished the jury to not consider outside information, to base its decision upon the admissible evidence and law, and, specifically, "not to consider statements made by the lawyers, *or potential jurors*, or jurors that are selected to hear this case during voir dire[.]" (Emphasis added.) Although this instruction did not mention Hamilton by name, it is clearly a curative instruction, designed to admonish the jury to not consider Hamilton's statements. Defendant received a curative instruction as he requested, but not one worded precisely as he wished.

Defendant cites *State v. Puckett*, 54 N.C. App. 576, 581, 284 S.E.2d 326, 329 (1981), for the principle that it is error to alter a requested jury instruction. However, *Puckett* is distinguishable from the instant case. In *Puckett*, the defendant requested an instruction on interested witnesses, and the trial court gave a more general instruction on credibility. In the instant case, defendant requested an instruction to disregard statements made by prospective jurors, and the trial court gave an

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instruction to disregard statements made by prospective jurors. Further, we have since held that:

The trial court is not required to charge the jury in the exact language requested by the defendant. *State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984). However, when a certain instruction is warranted, the trial court must give the requested instruction at least in substance. *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976). Determining whether a requested instruction was given in substance is undeniably a very subjective undertaking. Our appellate courts have been loath to find reversible error based on failure to give a requested jury instruction when in the court's opinion the "in substance" requirement has been fulfilled. *See, e.g., State v. Corn*, 307 N.C. 79, 86, 296 S.E.2d 261, 266 (1982); *State v. Silhan*, 302 N.C. 223, 252, 275 S.E.2d 450, 472 (1981); *State v. Rhinehart*, 68 N.C. App. 615, 618, 316 S.E.2d 118, 121 (1984); *State v. Smith*, 61 N.C. App. 52, 61, 300 S.E.2d 403, 409 (1983); *State v. Mebane*, 61 N.C. App. 316, 319, 300 S.E.2d 473, 476 (1983); *State v. Guy and State v. Yandle*, 54 N.C. App. 208, 213, 282 S.E.2d 560, 563 (1981), *cert. denied*, 304 N.C. 730, 288 S.E.2d 803 (1982).

State v. Carson, 80 N.C. App. 620, 625-26, 343 S.E.2d 275, 278-79 (1986).

It is clear that the substance of defendant's proposed instruction, that the jury be admonished to not consider statements made by potential jurors, is present in the instruction given by the trial court. And in fact, although the instruction given by the trial court removed direct references to Hamilton, it contained language which paralleled defendant's proposed instruction. We hold, therefore, that the trial court did not err in giving a curative instruction which varied insubstantially from defendant's proposed instruction.

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VI. Conclusion

We hold that the trial court did not err in excluding evidence of Antwan Howard's purported guilt. We further hold that the trial court did not err in denying defendant's motion to reopen jury selection, and did not err in issuing a curative instruction which varied insubstantially from defendant's proposed instruction.

NO ERROR.

Judge DIETZ concurs.

Judge MURPHY concurs in the result only.

Report per Rule 30(e).