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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1135

Filed: 5 June 2018

Mecklenburg County, Nos. 15CRS9033-34; 11913-15

STATE OF NORTH CAROLINA

v.

EDWARD SANCHEZ, Defendant.

Appeal by Defendant from judgments entered 4 April 2017 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Danielle Marquis Elder, for the State.

Appellate Defender Glenn G. Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant.

INMAN, Judge.

Defendant Edward Sanchez ("Defendant") appeals from four judgments entered after a jury found him guilty of four counts of first degree murder and one count of attempted first degree murder. Defendant argues that the trial court erred in failing to reopen *voir dire* examination of the jury before allowing the State to call

a co-defendant as a witness even though the co-defendant's name was misstated on the State's witness list. He also argues that his constitutional rights were violated when an expert witness was permitted to testify about his opinion of a victim's cause of death based in part on another expert's written opinion. After careful review, we hold that the Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL HISTORY

The State's evidence at trial tended to show that Defendant, along with two other people, planned to rob Rasool Harrell, a drug dealer who had been supplying Defendant with Xanax for recreational use. On 22 February 2015, Defendant and his accomplices met at the house of Defendant's father in Charlotte and traveled to a motel, where they had arranged to meet with Mr. Harrell, ostensibly to purchase more Xanax. Defendant was armed with a handgun. When Defendant and his associates arrived at the motel, they parked their car near Mr. Harrell's, and Defendant climbed into the backseat of Mr. Harrell's car. Mr. Harrell was seated in the driver's seat and another man, Zakee Allen, was seated in the front passenger seat. After a few minutes of conversation, Defendant began to shout and gunfire erupted from the back seat. Four or five shots were fired, and then Defendant exited the vehicle, dragged Harrell out onto the ground, and began bludgeoning him. As this was happening, one of Defendants' accomplices walked to Mr. Harrell's car and punched Mr. Allen several times through the open passenger side window. There

was another gunshot. Defendant entered an accomplice's car, fired another shot into Mr. Harrell's vehicle, and then he and his accomplices fled the scene. Defendant and his accomplices stole from Mr. Harrell's vehicle two guns, "a bunch of Xanax bars," and a small amount of cash from Messrs. Harrell and Allen. Mr. Harrell died at the scene. Mr. Allen was severely injured and remains paralyzed from the waist down.

On 23 February 2015, Defendant met with one of his accomplices, Emmanuel Rangel, and a mutual acquaintance from middle school, David Lopez ("Mr. Lopez"). The three plotted to drive to the Norris Avenue home of a known heroin dealer and rob him of his heroin.

The three men drove to the house on Norris Avenue. Mr. Lopez waited in Defendant's father's truck as Defendant and Mr. Rangel knocked on the front door. Defendant and Mr. Rangel were invited in and, shortly thereafter, Mr. Lopez heard over a half dozen gunshots. Mr. Lopez entered the home and began to carry luxury items out to the truck. While inside, Mr. Lopez observed three blood-spattered corpses. The bodies were later identified as those of Jonathan Alvarado, his girlfriend Mirjana Puhar, and Jusmar Gonzaga-Garcia. Autopsies revealed that Mr. Alvarado and Ms. Puhar had been beaten, and that all three had been shot.

On 24 February 2015, two days after the motel shooting, Defendant was apprehended in Harris County, Texas. He was extradited to North Carolina and Defendant was indicted on four first-degree murder charges, one attempted first-

degree murder charge, and one robbery charge; the robbery charge was later dismissed pre-trial.

Defendant's trial commenced on 20 March 2017. As required by statute, the State filed and served on Defendant its witness list at the start of the criminal session, which erroneously listed Mr. Lopez as "Daniel Lopez" rather than "David Lopez."

During jury selection, the prosecutor read from the witness list, including the misstatement of Mr. Lopez's first name, and asked if "anybody recognize[d] those names[.]" No one in the prospective jury answered in the affirmative. As new prospective jurors were seated, the prosecutor asked those individuals whether they recognized any names from the witness list; when one potential juror recognized one of the names, the prosecutor inquired further to confirm that the prospective juror did not, in fact, know the person in question. The prosecutor also mentioned Mr. Lopez by his proper full name several times during jury selection, including specifically asking whether the jury would "agree [to] listen to the testimony of . . . David Lopez and that you would examine [his] testimony with great care[,]" whether, "if you . . . believe [his] testimony in whole or in part, . . . you can treat it the same as you would any other believable evidence[,]" and if any members of the jury would "automatically write [Mr. Lopez's] testimony off as unbelievable just because [he is] also charged in the case[.]" The entire prospective jury responded in the affirmative

to the first two questions, and no juror responded affirmatively to the third. Newly-seated prospective jurors were asked these same questions and answered them similarly. Throughout the process, various jurors noted voluntarily or through specific questioning that they recognized several names mentioned during jury selection or persons seated in the courtroom, but none expressed any familiarity with either "Daniel Lopez" or "David Lopez."

When the State called Mr. Lopez as a witness, Defendant's counsel objected on the basis that his name was not on the witness list. The judge instructed the jury to leave the courtroom and heard arguments from counsel concerning the objection. After the parties informed the court that all pre-trial discovery referred to Mr. Lopez by his correct full name and counsel for the State asserted that "Daniel Lopez" was merely a typographical error on its witness list, Defendant's counsel made no further argument beyond stating "[h]e's not on the witness list and the State should not be allowed to call him[,]" and ultimately agreed to "leave it to the court's discretion." The trial court permitted Mr. Lopez to testify. No juror indicated knowing Mr. Lopez prior to, during, or following his testimony.

Also during the State's presentation of evidence, and over Defendant's objection, Medical Examiner Dr. Thomas Owens ("Dr. Owens") testified at trial that Mr. Harrell died as a result of three gunshot wounds to his back, which caused severe damage to his internal organs. Dr. Owens's opinion was based on his examination of

photographs, x-rays, and other documents, as well as an autopsy report written by his subordinate Dr. Dawn Lajoie ("Dr. Lajoie"). Dr. Owens neither performed nor attended the autopsy of Mr. Harrell.

After the close of all the evidence, the jury returned guilty verdicts on all five charges. Judge Levinson sentenced Defendant to 157 to 201 months in prison on the attempted first-degree murder conviction, to be followed by four consecutive life sentences without parole on the first-degree murder convictions. Defendant gave notice of appeal in open court.

II. ANALYSIS

A. Standards of Review

Defendant argues that the trial court erred in permitting Mr. Lopez to testify when his name was not included on the witness list filed by the State pursuant to N.C. Gen. Stat. § 15A-903(a)(3), a decision that we review for an abuse of discretion. *State v. Taylor*, 178 N.C. App. 395, 412, 632 S.E.2d 218, 230 (2006). Defendant's second argument that his rights under the Confrontation Clause were violated when Dr. Owens was allowed to testify asserts a purported constitutional error subject to *de novo* review. *State v. Ortiz-Zape*, 367 N.C. 1, 10, 743 S.E.2d 156, 162 (2013).

B. Allowing Testimony by Mr. Lopez

Section 15A-903(a)(3) requires that the prosecutor, pursuant to a court order, provide the defendant with a written list of the names of all witnesses whom the State

reasonably expects to call during the trial. N.C. Gen. Stat. § 15A-903(a)(3) (2017). The purpose of such a discovery law "is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990). When the State seeks to call a witness not on the proposed witness list, the court will determine whether the district attorney acted in bad faith and whether the defendant was prejudiced. *State v. Smith*, 291 N.C. 505, 523, 231 S.E.2d 663, 675 (1977). Consistent with the purposes of discovery, prejudice "under a statutory disclosure duty . . . result[s] from either surprise on a material issue or where the non-disclosure hampers the preparation and presentation of the defendant's case." *State v. Ginn*, 59 N.C. App. 363, 373, 296 S.E.2d 825, 832 (1982) (citation and internal quotation marks omitted). In other words, prejudice arises when "there exists a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Ramseur*, 226 N.C. App. 363, 368, 739 S.E.2d 599, 603 (2013) (citation and internal quotation marks omitted).

While courts often conduct a *voir dire* examination of the jury to inquire into the possibility of bad faith or prejudice, *State v. Brown*, 177 N.C. App. 177, 185, 628 S.E.2d 787, 792 (2006), the decision to do so rests in the trial court's discretion. *State v. Bond*, 345 N.C. 1, 19, 478 S.E.2d 163, 172 (1996). If the State is found to have committed a discovery violation, the choice of which curative action should be taken,

if any, is entrusted to the sound discretion of the court. N.C. Gen. Stat. § 15A-910 (2017); *State v. Alston*, 307 N.C. 321, 330, 298 S.E.2d 631, 639 (1983).

The record reveals no abuse of discretion by the trial court. Defendant objected to David Lopez testifying because "there's no David Lopez on the witness list." Outside the presence of the jury, the trial court questioned the prosecutor, who explained that the misspelling of Mr. Lopez's first name was a typographical error. The State informed the trial court that Mr. Lopez was a co-defendant,[1] that his correct name had been mentioned as a future witness several times during the course of jury selection and during opening statements, and that his identity, along with summaries of interviews conducted with him, had been disclosed to Defendant in the course of discovery. Defendant's counsel was silent during this inquiry, and stated that he was content to "leave [the issue] to the court's discretion." Defendant did not argue surprise, and the record discloses none; indeed, Defendant expressly declined to argue the issue in his briefing to this Court, and his trial counsel's vigorous and capable cross-examination of Mr. Lopez would belie any assertion to the contrary. The trial court did not abuse its discretion in declining to further dispel any concerns that the misspelling of Mr. Lopez's name was perpetrated in bad faith or prejudiced Defendant's ability to prepare for trial.

[1] Though Mr. Lopez was charged with murder in connection with the shooting at the Norris Avenue home along with Defendant, he was not tried in the same proceeding.

Additionally, the trial court's decision to proceed without reopening *voir dire* of the jury was not an abuse of discretion. *See Bond*, 345 N.C. at 19, 478 S.E.2d at 172. During jury selection, several prospective jurors, both prompted by questioning and of their own spontaneous volition, informed the trial court of potential connections to persons named during the jury selection process and individuals seated in the courtroom. It appears from these interactions and the questioning by counsel during the selection process that the jury understood the importance of informing the court of any relationships between the jurors and the participants in trial. Based on the jury's forthrightness, the fact that every juror stated they could fairly evaluate the testimony of Mr. Lopez when he was identified by his proper name elsewhere in the jury selection process, and the lack of any indication otherwise from the jury during and after Mr. Lopez's testimony, we cannot say that the trial court abused its discretion in declining to further question the jury by reopening *voir dire*.

Even if the trial court had discovered through *voir dire* that a juror knew Mr. Lopez, this alone would not have altered the result of the proceedings; the court could have further inquired as to the nature of the connection and either: (1) allowed the juror to serve notwithstanding the relationship, satisfied that it did not raise issues of impartiality; or (2) as Defendant recognizes in his brief, disqualified the juror and seated one of the three available alternates. Neither option, standing alone, leads to a reasonable possibility of a different result. Because there is no showing of bad faith

on the part of the prosecutor and no indication of prejudice, we hold there was no error.

C. Expert Testimony

Defendant next contends that the trial court violated Defendant's rights under the Confrontation Clause when, over trial counsel's objection, it permitted Dr. Owens to tell the jury his opinion of the cause of death of Mr. Harrell on the basis of an autopsy conducted by his subordinate, Dr. Lajoie. We reject this argument as contrary to precedent.

In *State v. Ortiz-Zape*, the North Carolina Supreme Court summarized the Supreme Court of the United States' Confrontation Clause jurisprudence while deciding whether a defendant's Confrontation Clause rights were violated when an expert witness gave her opinion that a substance was cocaine based upon testing performed by a non-testifying chemical analyst. 367 N.C. 1, 5-8, 743 S.E.2d 156, 159-162 (2013), *cert. denied* __ U.S. __, 189 L. Ed. 2d 208 (2014). In resolving the issue, the Supreme Court held that "admission of an expert's independent opinion based on otherwise inadmissible facts or data 'of a type reasonably relied upon by experts in a particular field' does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert." *Id.* at 9, 743 S.E.2d at 161 (quoting N.C. Gen. Stat. § 8C-1, Rule 703 (2011)). The Court "emphasize[d] that the expert must present an independent opinion obtained through his or her own analysis and

not merely 'surrogate testimony' parroting otherwise inadmissible statements." *Id.* at 9, 743 S.E.2d at 162 (quoting *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011)). Accordingly, this Court must determine whether the testimony objected to here was an independent opinion obtained through Dr. Owens's own analysis or merely surrogate testimony repeating out-of-court statements. *See State v. Craven*, 367 N.C. 51, 54–55, 744 S.E.2d 458, 460 (2013).

Here, Dr. Owens testified without objection about his own autopsies of Jonathan Alvarado, Mirjana Puhar, and Jusmar Gonzaga Garcia. The objected-to testimony, regarding the cause of death of Mr. Harrell, was based in large part on an autopsy report created by Dr. Lajoie. The autopsy report itself was inadmissible because Dr. Lajoie, who prepared it, was unavailable due to an undisclosed "medical incapacity."

On *voir dire*, Dr. Owens swore that he had reviewed Dr. Lajoie's autopsy report, "the evidence that was collected, the photographs that were taken that demonstrated the injuries, [and] the projectiles [that] were recovered." From these sources, he was able to apply his knowledge of anatomy and to form an opinion "separate and apart from Dr. Lajoie's notes" about Mr. Harrell's cause of death. Dr. Owens later confirmed that he had also examined x-rays and police reports in forming his opinion. From all these sources, Dr. Owens was able to describe to the jury the nature of the gunshot wounds suffered by Mr. Harrel: a grazing gunshot wound to

the face and three wounds to the upper right side of his back. Dr. Owens further explained that one of these wounds in the back, "the one that's furthest down from the top of the head . . . went through the aorta and [caused] significant hemorrhage and death." According to Dr. Owens's testimony, he reviewed the data generated in this case, as described herein, and formed an "opinion [that] the cause of death is one or more gunshot wounds to the body." Dr. Owens formed an independent opinion based on his analysis of data reasonably relied upon by experts in his field. In stating his opinion, Dr. Owens did not repeat any out-of-court statements by a non-testifying analyst. Accordingly, Dr. Owens was the person whom Defendant had the right to cross-examine, and his testimony stating his opinion did not violate Defendant's rights under the Confrontation Clause. *See State v. Brent*, 367 N.C. 73, 77, 743 S.E.2d 152, 155 (2013). Defendant's second argument is overruled.

III. CONCLUSION

The trial court did not abuse its discretion in permitting Mr. Lopez to testify even though his name was misspelled on the State's witness list disclosed pursuant to N.C. Gen. Stat. § 15A-903(a)(3) because there was no indication of bad faith or prejudice to Defendant. Nor did the trial court abuse its discretion in declining to re-open *voir dire* of the jury where there is no indication that the jury could not be impartial in evaluating Mr. Lopez's testimony and Defendant's case as a whole. Finally, Defendant's rights under the Confrontation Clause were not violated where

Dr. Owens testified as to his own opinions derived from sources reasonably relied upon by others in his field and Defendant had the opportunity to cross examine him. As a result, we hold Defendant's trial was free from error.

NO ERROR.

Judges HUNTER and DAVIS concur.

Report per Rule 30(e).