IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1102

Filed: 17 July 2018

New Hanover County, Nos. 15 CRS 53695-97

STATE OF NORTH CAROLINA

v.

MICHAEL ANTHONY MALLOY, JR., Defendant.

Appeal by Defendant from judgment entered 5 April 2017 by Judge Joshua W. Willey, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ryan F. Haigh, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Michael Anthony Malloy, Jr. ("Defendant") appeals from jury verdicts convicting him of first degree murder based on felony murder, attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, first degree burglary, and two counts of cruelty to animals. Following the verdicts, the trial court

sentenced Defendant to life imprisonment without parole. On appeal, Defendant contends the trial court committed reversible error in allowing, and failing to correct, misleading testimony. Specifically, Defendant contends the testimony infringed upon his constitutional right to a fair trial. Defendant also filed a petition for writ of *certiorari*, due to his failure to timely serve notice of appeal. Because Defendant fails to demonstrate his argument has any merit, we deny his petition for writ of *certiorari* and dismiss his appeal.

I. Factual and Procedural Background

On 1 June 2015, a New Hanover County Grand Jury indicted Defendant for first degree murder, attempted robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, assault with a deadly weapon with intent to kill or inflict serious injury, first degree burglary, two counts of cruelty to animals, and two counts of first degree kidnapping. On 3 January 2017, Defendant filed a notice of intent to use the defense of duress during trial. In his notice, Defendant stated he intended to offer evidence showing "Theio Manl[e]y ordered Defendant to accompany Manley into the residence of 412 Point View Court on or about May 4, 2015. Theio Manley placed Defendant in fear of death or serious bodily injury if Defendant refused to accompany Manley into the residence."

Regarding Defendant's intention to use the defense of duress, the State filed, on 23 March 2017, a motion *in limine*, requesting the trial court prohibit Defendant from referring to a duress defense during his opening statement.

On 27 March 2017, the trial court called Defendant's case for trial. The trial court first addressed the State's pretrial motion. The State contended Defendant would not be able to meet the minimum standards to receive an instruction on a duress defense. The State asserted, therefore, any mention of the defense would mislead or confuse the jury. Defendant stated he would not reference the defense in *voir dire* or his opening statement. The trial court ruled the State's motion was moot.

Thereafter, the State voluntarily dismissed the two counts of first degree kidnapping. The State and Defendant gave opening statements.[1]

The State called Hannah Gastwirth.[2] At the relevant times, Gastwirth and Yancey Edwards dated and lived together. The home in which they lived had entrances from both the front door and the garage. Edwards and Gastwirth also lived with a roommate, Josh Roydes, who stayed in one of the front bedrooms. Edwards and Gastwirth stayed in a bedroom in the back of the home.

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[1] The record on appeal does not contain the State's or Defendant's opening statements.

[2] The State also called Edwards's mother, an emergency telecommunication manager, Corporal Jason Spivey, detectives, crime scene investigators, deputies, forensic scientists, a forensic pathologist, and an orthopedic surgeon. This opinion provides only factual background pertinent to those charges for which the jury convicted Defendant. The testimony of all omitted witnesses is either substantially similar to other testimony provided in this opinion, or is not pertinent to the issues on appeal and is, therefore, excluded in the interest of brevity.

Edwards had two dogs, Max and Tojo. On 4 May 2015, Max laid on the bed with Edwards and Gastwirth. Tojo sat in the living room on the couch. That evening, Edwards and Gastwirth drank "a couple beers, and . . . play[ed] spades." Roydes and a friend, Emily Robinson, were also at Edwards's home. Edwards, Roydes, and Robinson all smoked marijuana. Robinson eventually left, and Edwards and Gastwirth went to their bedroom to watch a movie.

As the couple sat in bed watching a movie, Gastwirth heard the bedroom door open. Two men, both wearing bandanas, came into the bedroom. They shut the door behind them. One of the men, later identified as Theio Manley, carried a gun. Manley pointed the gun at Edwards and Gastwirth and one of the men told them to " 'Give [him] what you got.' Like, 'We're not playing around.' " Max, the dog in the bedroom, became upset. Edwards told Manley and Defendant, "Here's the money, take it and go." Neither of the two men touched the money.

During this confrontation, Roydes came towards the bedroom from the front of the home. Defendant left the bedroom and shut the door behind him. Defendant and Roydes fought in the living room. In the bedroom, Manley said, "I'm not kidding, give me what you got[.]"[3] Manley then opened the door again to look out toward the living room and locate Defendant. Manley remained in the bedroom during this time.

[3] Gastwirth also answered affirmatively when asked if Manley said, "Give me money, give me drugs[.]"

Edwards approached Manley and tried to take the gun away from his hand. Edwards also tried to shut the door in front of Manley.

Gastwirth heard gunshots, which she thought were from a pellet gun. Manley then left the bedroom, and Edwards followed behind him. Gastwirth remained in the bedroom, listening to the fight between Roydes and Defendant in the living room. As Edwards left the room, he said, "You shot my M-F dog with a pellet gun."

Gastwirth grabbed a golf club, left the bedroom, and joined Roydes in the living room. She tried to give the club to Roydes. Roydes had been shot in the arm and could not grasp the club. Gastwirth went back toward the bedroom. Gastwirth heard Max "yelp" and saw Manley leave through the dining room window. She did not see Defendant leave the home at any point. Gastwirth turned her attention to check on Edwards, who was on the kitchen floor. Gastwirth then called 911.

The State called Nicholas Lee, a deputy sheriff with the New Hanover County Sheriff's Office. On 4 May 2015, Deputy Lee responded to a call regarding a shooting on Point View Drive. When he arrived at the home, Deputy Lee saw Roydes standing in front of the home. After Roydes "flagg[ed]" Deputy Lee down, Deputy Lee saw Roydes's arm bleeding. The two spoke, and then Deputy Lee waited for assistance.

Deputy W. Baxley arrived. Deputies Lee and Baxley went in the home. Deputy Lee called out, and Gastwirth answered him from the kitchen. Deputy Lee went to

the kitchen, where he saw Gastwirth performing CPR on Edwards. Deputy Lee took over doing CPR until EMS arrived. EMS came and pronounced Edwards deceased.

Just inside the front door, Deputy Lee noticed an injured dog, Max. A paramedic picked up Max, put him in an ambulance, and took him to a veterinary hospital. Deputies Lee and Baxley escorted everyone else outside the home.

The State next called W. Baxley, a deputy with the New Hanover County Sheriff's Office. Deputy Baxley's testimony regarding the early morning hours of 4 May 2015 substantially matched Deputy Lee's testimony.

The State called Justin Varella, a detective with the New Hanover County Sheriff's Office. On 4 May 2015, Detective Varella, Detective John Scheckler, and Chief Deputy Sarvis went inside Edwards's home to look for any animals. They found a dog, Tojo, deceased and removed him from the home. The detectives and Chief Deputy then continued their investigation.

After concluding his investigation inside the home, Detective Varella looked for potential suspects in the case. Detectives canvassed the neighborhood and spoke with several neighbors. However, they were unable to develop any "concrete suspect information" from the neighborhood canvass.

During Detective Varella's investigation, Brent Hyatt left a voicemail with the police office stating he wanted to provide information. Hyatt voluntarily came to the detective division to provide a statement. Another detective, Detective Blissett, and

Chief Deputy Sarvis interviewed Hyatt. Subsequently, Detective Varella executed a search warrant on Hyatt's car and home. After the search, Hyatt agreed to return to the police station and provide further information. Based on this interview, Detective Varella suspected Manley and Defendant of the same charges as Hyatt.

Detective Varella obtained warrants for Defendant's, Hyatt's, and Manley's arrests. He served the warrant on Hyatt, and went to the sheriff's office to enter Defendant and Manley into the National Crime Information Center as "wanted[.]" The sheriff's office told Detective Varella that Defendant had already been taken into custody, as another officer arrested Defendant on 6 May 2015, pursuant to a warrant.[4]

After notification of Defendant's arrest, Detective Varella went to the detective division to question Defendant. There, he interviewed Defendant. The State offered videotape of Defendant's interview and transcript into evidence and played the videotape for the jury. The State previously played a relevant portion of the admitted recording for the jury.

The State asked Detective Varella to point to where exactly in the transcript Defendant told him Manley pointed a gun at Defendant. Detective Varella could not recall Defendant relaying at any point in the course of the interview an instance

[4] Testimony from Detective Varella does not indicate who notified him Defendant had been arrested, or who the arresting officer was.

where Manley pointed a gun at Defendant. During direct examination, the following discussion ensued:

> [THE STATE:] Now, Detective Varella, with the transcript from the interview that we watched yesterday, up there, can you point to us, to the jury, where Mr. Malloy tells you that Theio Manley pointed -- had a gun to him?
>
> [VARELLA:] Pointed a gun at Mr. Malloy?
>
> [THE STATE:] Yes.
>
> [VARELLA:] I can look through this if you would like me to, but to my recollection, I don't believe that will be in this transcript anywhere. I don't recall that being in the interview.
>
> [THE STATE:] You watched the video yesterday as well?
>
> [VARELLA:] Yes, I did.
>
> [THE STATE:] Do you remember him saying that to you?
>
> [VARELLA:] I do not.
>
> [THE STATE:] When was the first time you heard about Mr. Malloy having a gun pointed at him?
>
> [VARELLA:] Mr. Malloy having a gun pointed at him in the course of this incident, the first time that I heard that would have been in opening arguments at the trial that started earlier this week.

Regarding whether Manley pointed a gun at Defendant, Detective Varella testified:

> [THE STATE:] And so at that point he didn't tell you that Theio Manley had a gun pointed at him and forced him in

> the residence?
>
> [VARELLA:] No. He just stated that he went in the window first and that Mr. Manley said, "I'll watch."
>
> [THE STATE:] At any other point through the interview did you recall him telling you that Theio Manley had a gun pointed at him and forced him to go through the window of the home?
>
> [VARELLA:] I do not recall that, no.

Defendant did not object to this testimony.

The State rested. Defendant moved to dismiss all charges. The trial court denied Defendant's motion.

Defendant testified on his own behalf. On late 3 May 2015 or early 4 May 2015, Brent Hyatt, Theio Manley, and Defendant drove to the cul-de-sac of the street where Edwards lived. Defendant gave Manley his phone, so he could call someone to purchase marijuana. Manley got out of the car, while Defendant remained in the backseat. Hyatt then drove around the block with Defendant in the backseat of the car. Hyatt returned to pick up Manley. Manley returned to the vehicle and stated, "Yo, they about to leave." Manley said to wait until the lights were out because there was marijuana in the home. Defendant realized Manley wanted to steal the drugs.

Defendant told Manley he would not go with him inside the home. Manley pulled out a gun. Manley walked around the car, to Defendant's side, and demanded Defendant get out of the car. Defendant again told Manley he did not want to go inside the home. Manley pointed the gun at Defendant and told him to get out of the

car. Defendant feared Manley because he did not want Manley to shoot him. Defendant also feared Manley because Manley was "in gangs, and he had just got in trouble for shooting[.]" Defendant got out of the car and "did what [Manley] told [him to do]."

Once they arrived at the home, Manley told Defendant, "Go in. I'll watch." Defendant told Manley, again, he did not want to go inside the home. Manley became "aggressive" towards Defendant. Manley again pointed the gun at Defendant when he refused to enter the home. Defendant went in the home through the dining room window, with Manley following behind him. Manley saw marijuana on a table and put it in his pocket. Defendant thought this indicated they could leave the home. Defendant told Manley, "[L]et's go." Manley told Defendant "no" and nudged him with the gun. Manley then made Defendant walk toward Edward and Gastwirth's bedroom. Manley assured Defendant there was no one in the home.

Defendant approached the bedroom door. Edwards and Gastwirth were in bed. Defendant grabbed his shirt to cover his face and backed away from the doorway. He heard a dog growl as Manley pushed him. Manley then shot the dog.[5] Defendant continued to back up, and Manley demanded drugs and money from Gastwirth. Roydes approached Defendant and yelled, "You trying to rob my friend with a BB

[5] The testimony is not clear regarding which dog Manley shot at this point.

gun." Defendant tried to get away, but Roydes wrestled with him. During this fight with Roydes, Defendant heard a gunshot.

After another gunshot, both Defendant and Roydes stopped fighting. Defendant went to look around and then "everything went black." Defendant could no longer see or hear. Once Defendant's vision returned, he saw Manley and Edwards fighting over the gun. Defendant pushed Manley and Edwards away from him. He later told Detective Varella he "pushed on them and [his] hand touched the gun." As he turned to run, he saw Roydes with something metal in his hands. Roydes looked "like he was going to whack" Defendant. Defendant saw knives on the kitchen counter and "grabbed [one] and screamed." He then jumped out a window. Defendant did not know where Manley was when he left through the window.

Defendant ran away from the home until he saw Hyatt in the car. Defendant got in the car, and Hyatt took him to Defendant's grandmother's home. Defendant feared Manley knew "[Defendant] knew what [Manley] did."

Manley repeatedly called Defendant days after the incident. Defendant told Manley to "leave [him] alone." Defendant did not call the police about the incident because he "didn't want any trouble." Hyatt also called Defendant in the days after the incident. Defendant stayed at his girlfriend's home during this time. On 6 May 2015, police came to Defendant's girlfriend's home to arrest him.

Police arrested Defendant and brought him to the sheriff's office for questioning. Detective Varella interviewed Defendant at the station. Detective Varella told Defendant he was under arrest for first degree murder. Detective Varella read Defendant his *Miranda* rights. Defendant waived his rights and began speaking to Detective Varella.[6] During the course of the interview, Defendant did not tell Detective Varella about how Manley "got [Defendant] out of the car and all that[.]" Defendant did not know this testimony "made a difference." Defendant did not tell any detective during questioning about Manley pointing the gun at him.

On cross-examination, Defendant admitted he never heard of the term "duress" at the time he spoke to Detective Varella. Defendant stated at trial he did "[n]ot fully" understand the meaning of the term.

During a recess, the State notified Defendant and the trial court it intended to call Hyatt for rebuttal evidence. Defendant asserted this testimony constituted new substantive evidence, "as his testimony is going to address issues that did not come up during the defendant's case in chief, specifically statements, or lack of statements, made by the defendant who testified earlier today." Defendant stated it is a due process violation to allow the State, after resting its case, to reopen it and offer new substantive evidence. The trial court permitted the State to offer new evidence during rebuttal. The trial court allowed evidence which could have been offered

[6] Defendant did not explicitly testify he waived his *Miranda* rights. Defendant discussed the rights and said he did not want to remain silent.

during its case in chief, "to the extent that that new evidence would be testimony from Mr. Hyatt about the events on the day in question."

Defendant called Reverend Anthony Hicks to testify about Defendant's reputation for peacefulness.[7] Defendant rested.

In rebuttal, the State called Hyatt back to the stand. Hyatt stated at no point did he see Manley point a gun at Defendant. He further asserted he never heard Manley threaten Defendant.

The trial court dismissed the jury, and Defendant renewed his motion to dismiss all charges. The trial court denied Defendant's motion.

During the charge conference, Defendant requested an instruction on duress and coercion. Defendant also expressed concerns regarding Detective Varella's testimony. Defendant requested the jury instructions specify the advance notice given for Defendant's duress defense. Defendant did not want to impress upon the jury Defendant "ambush[ed]" the State with a duress defense. Defendant feared Detective Varella's confusion concerning Defendant's accusations would cause the jury to believe Defendant had not provided timely notice of his defense.

The State objected to this jury instruction. Both the State and Defendant agreed the statement by Detective Varella was true. Despite the State receiving timely notice of the duress defense prior to trial, Defendant asked for the instruction

[7] Defendant also called Gastwirth.

because of the testimony's possible "implication" for the jury. The State also asserted it first heard of the facts of coercion in Defendant's opening statements. The trial court and the State further discussed the matter:

> THE COURT: I don't know that I agree with you there. I mean, if you had not felt that the duress notice gave sufficient notice, you could have filed a motion and tried to get the Court to flesh it out for you.
>
> [THE STATE]: Uh-huh. I don't know that any Court would require the defendant to give the State a preview of what he's going to testify to, though.
>
> THE COURT: I don't know that they would. But that would be your option, was to try that.
>
> [THE STATE]: Right. I understand.
>
> THE COURT: I don't think it's appropriate, since he gave the statutory required notice. I think it's highly appropriate to talk about how he was interviewed, kept asking him to tell the truth, he never said anything about these things. That's very appropriate. But to say that we were shocked to learn the basis for it and didn't know anything about the basis till we got here, I don't know if that is appropriate.
>
> [THE STATE]: I understand.

The trial court decided on the pattern instruction.[8]

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[8] In the charge to the jury, the court stated:

> There is evidence in this case tending to show that the defendant acted only because of duress. The burden of proving duress is on the defendant. It need not be proved beyond a reasonable doubt, but only to your satisfaction. . . . Duress is not a defense to first degree murder based upon premeditation and deliberation.

The trial court instructed the jury on Defendant's defense and that there was evidence tending to show Defendant acted only because of duress. Additionally, the trial court instructed the jury to determine Defendant not guilty if he acted in reasonable fear of immediate death or serious bodily injury if he did not comply with Manley's demands. The trial court did not provide any further specifications regarding Detective Varella's testimony.

The jury found Defendant guilty of all counts. The trial court sentenced Defendant to life imprisonment without parole. Defendant filed a written notice of appeal on 13 April 2017.

II. Jurisdiction

On appeal, Defendant argues the State and the trial court erred in presenting and failing to correct false and misleading testimony from Detective Varella. Defendant claims these errors violate his constitutional right to a fair trial. We must first address whether our Court has jurisdiction.

Defendant concedes he failed to provide proper notice of appeal under Rule 4 of the Rules of Appellate Procedure. Rule 4 provides a defendant's notice of appeal in criminal cases may be taken by "(1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order . . . ." N.C. R. App. P. 4(a)(1)-(2) (2017). Here, Defendant filed written notice of appeal and

request for appointment of appellate counsel on 13 April 2017. However, Defendant failed to provide adequate certificate of service with his notice of appeal. Therefore, Defendant's notice of appeal is ineffective, under Rule 4.

Defendant seeks review through the issuance of a writ of *certiorari*. Under appropriate circumstances, this Court is permitted to issue a writ of *certiorari* to review the judgments of the trial court "when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C. R. App. P. 21(a)(1) (2017).

The petition for writ of *certiorari* must demonstrate merit or that some error was likely committed at the trial level. *See State v. Bishop*, ___ N.C. App. ___, ___, 805 S.E.2d 367, 369 (2017) (citation omitted); *State v. Rouson*, 226 N.C. App. 562, 563-64, 741 S.E.2d 470, 471 (2013) (citation omitted). A decision concerning whether to issue a writ is discretionary, and, thus, "the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause." *State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (citation omitted).

In deciding whether Defendant shows "good and sufficient cause" to grant his petition, we look to his argument on appeal. Defendant argues the State violated his constitutional right to a fair trial by introducing misleading testimony and failing to correct such testimony. However, because Defendant failed to preserve this issue for appellate review, this Court lacks jurisdiction, beyond the Rule 4 deficiency.

Our review of the record and arguments at trial show Defendant did not present a constitutional argument below regarding Detective Varella's testimony. Defendant raised a due process argument concerning the State's proffering of rebuttal evidence, but did not raise a due process argument regarding Detective Varella's testimony. It is well settled law in this State "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citation omitted). *See also State v. Wright*, 200 N.C. App. 578, 584, 685 S.E.2d 109, 114 (2009) (holding defendant failed to preserve his constitutional arguments for appellate review when he did not object to a witness's testimony on that basis). Accordingly, Defendant failed to preserve this argument for appellate review by not raising a due process objection or argument at trial to the now contested testimony.

Assuming *arguendo* Defendant preserved his constitutional issue for appeal, we would still conclude the trial court did not commit error. Defendant asserts Detective Varella's testimony provided the false impression that Defendant failed to provide the State with notice of a duress defense prior to trial. Defendant argues the State had an affirmative duty to correct this false impression.

The State's use of false or misleading testimony violates a defendant's constitutional right to due process. *Napue v. Illinois*, 360 U.S. 264, 265, 3 L. Ed. 2d 1217, 1219 (1959). In *Napue v. Illinois*, the United States Supreme Court addressed

the issue of whether "the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment to the Constitution of the United States." *Id.* at 265, 3 L. Ed. 2d at 1219. The Court held "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment" regardless of relevancy to a defendant's guilt or the credibility of the witness. *Id*. at 269, 3 L. Ed. 2d at 1221 (citations omitted). Similarly, this Court held the "[k]nowing use by the prosecution of materially false testimony violates a defendant's right to a fair trial." *State v. Morgan*, 60 N.C. App. 614, 622, 299 S.E.2d 823, 828 (1983).

In addition to the knowledge requirement, the United States Supreme Court established the standard of materiality under which the knowing use of perjured testimony requires a conviction to be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 349-50 (1976) (citation omitted). *See also Mooney v. Holohan*, 294 U.S. 103, 112, 79 L. Ed. 791, 794 (1935) (holding it is a requirement "that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is used as a means of depriving a defendant of liberty through a deliberate deception of court . . ."). Similarly, our Supreme Court adopted the United States Supreme

Court's test and held perjured testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *State v. Sanders*, 327 N.C. 319, 336, 395 S.E.2d 412, 424 (1990) (quotation marks and citation omitted). Consequently, "when a defendant shows that testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction, he is entitled to a new trial." *State v. Phillips*, 365 N.C. 103, 126, 711 S.E.2d 122, 140 (2011) (quotation marks, citation, and brackets omitted).

Here, Defendant admits Detective Varella's testimony is true. He fails to establish either the materiality of the testimony, or that the prosecution knew of its untruthfulness and intentionally used it to Defendant's prejudice. Further, Defendant fails to show Detective Varella's testimony misled the jury, thus affecting the outcome of Defendant's trial. *Sanders*, 327 N.C. at 336-37, 395 S.E.2d at 423-24 (concluding defendant failed to establish the materiality of the testimony or that the testimony could have reasonably affected the judgment of the jury despite the State conceding portions of a deputy's trial testimony were misleading). Because Defendant's argument lacks merit, there is no "good and sufficient cause" to grant his petition for writ of *certiorari*.

We conclude, even if Defendant filed proper notice of appeal, his appellate argument lacks merit. He failed to raise the constitutional issue below, thus not preserving the issue for appellate review. Additionally, the trial court and the State

did not violate his constitutional right to fair trial. Accordingly, in the exercise of our discretion, we deny his petition for writ of *certiorari*. Consequently, Defendant's appeal is dismissed.

III. Conclusion

Foer the foregoing reasons, we deny Defendant's petition for writ of *certiorari* and dismiss his appeal.

DISMISSED.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).