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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-64

Filed: 2 October 2018

Durham County, No. 15 CRS 1028-29, 52051

STATE OF NORTH CAROLINA

v.

DARRYL LAMAR BROOKS

Appeal by defendant from judgments entered 22 March 2017 by Judge Carl R. Fox in Durham County Superior Court. Heard in the Court of Appeals 6 September 2018.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.*

*Center for Death Penalty Litigation, by David Weiss, for defendant-appellant.*

TYSON, Judge.

Darryl Lamar Brooks (“Defendant”) appeals from judgments entered after a jury found him guilty of second-degree murder, felony death by vehicle, driving while license revoked, felony serious injury by vehicle, and careless and reckless driving. We hold any prejudice Defendant incurred was harmless beyond a reasonable doubt.

I. Background

On the evening of 11 March 2015, a car accident involving three cars occurred on a two-lane section of Fayetteville Road in Durham, North Carolina. Crash reconstruction and witnesses' testimony indicated Defendant was travelling southbound in a burgundy Chevrolet Camaro. The Camaro came up behind a Toyota Camry, went underneath the Camry, and turned right, which pushed the Camry into oncoming, northbound traffic, where it collided head-on with a Chevrolet Cavalier in that lane. The Camaro left the road, struck a sign and a tree, and came to rest in the ditch beside the roadway.

Andre Bond was walking out of his house on Fayetteville Road when he heard a crash and saw the Camaro go into the ditch. Bond ran to the car, and observed a "Latino or Mexican" man in the driver's seat and a black woman in the passenger seat. Bond testified the driver appeared to be intoxicated, based upon his slurred speech and "dizzy" manner. The driver kept telling the woman seated in the passenger seat to "shut up" when she tried to talk to Bond. Bond asked if the occupants were alright, and after they indicated they were, Bond went to assist the injured passengers in the other vehicles. Bond was unable to identify Defendant as the driver of the Camaro at trial.

Bond ran to another vehicle and assisted others in removing the two women from the vehicle and escorting them across the street. Bond then ran to the third

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vehicle, where he observed a woman in medical scrubs administering CPR to the man who had been ejected through the back window of the Camry and was lying in the road. This injured individual was later identified to be Kelwin Biggs. After being told Biggs had a light pulse, Bond assisted with administering CPR.

Durham Police Officer Charles Strickland was the first officer to arrive on the scene. He immediately went to assist with Biggs, and continued CPR until Emergency Medical Services (“EMS”) personnel arrived. Biggs was pronounced dead at the scene. A subsequent examination indicated his cause of death was blunt force trauma incurred in the crash.

Corporal Randall Packard arrived on the scene just after Officer Strickland and requested dispatch of additional emergency services and a crash reconstruction team. EMS transported the two women who were travelling in the Cavalier to Duke University Medical Center (“DUMC”) for treatment. Nyasia Clifton, the driver of the Cavalier, suffered extensive bruising and cuts to her face and took a month off from school to recuperate from her injuries. Katherine McKoy, Clifton’s passenger, suffered severe trauma to her hand and two broken feet. She remained in the hospital for several days, was unable to walk for about three months, and had difficulties with the functioning of her hand.

Corporal Packard’s attention was drawn to a black woman wearing a pink dress, presumed to be Gail Cole, who was yelling and acting in a “very animated”

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manner. When he approached her, Corporal Packard testified he “may have asked her something along the lines of, ‘What’s going on.’” The woman pointed toward the Camaro, stated she was a passenger in the car, Defendant had picked her up, she did not really know him, and that he had caused the accident. Cole moved out of state and did not testify at trial. Corporal Packard’s testimony of Cole’s statements at the scene was admitted, over defense counsel’s objections.

Corporal Packard looked to where the woman indicated and observed a “light-complexion black male,” who he identified as Defendant at trial, standing near the open driver’s side door of the Camaro. Corporal Packard believed Defendant looked nervous, and fearing Defendant might walk away, made contact. Corporal Packard asked if Defendant was injured, and Defendant indicated his knee was hurt. Officer Corinthian Powell walked toward them, and Corporal Packard instructed him to keep an eye on Defendant.

Officer Powell testified Defendant appeared to be disoriented, was unsteady on his feet, had “glossy” eyes, and ignored Officer Powell’s instructions to sit down. Defendant fell backwards and had difficulty standing up. After EMS began assisting Biggs, Officer Strickland walked over to relieve Officer Powell.

Officer Strickland observed Defendant kneeling on the ground in front of the driver’s side door of the Camaro, staring off into the woods. Officer Strickland observed an odor of alcohol on Defendant, and noticed his eyes were bloodshot.

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Defendant pulled himself into a standing position, stumbled backwards, and fell. EMS came over and began administering medical services.

Defendant was also transported to DUMC. He refused to tell the medical team whether he was the driver or the passenger of the Camaro. Defendant's blood and urine were taken for analysis. Defendant's urine tested positive for cocaine and opiates, and the same test indicated his blood alcohol level was .11.

After examining the scene, and hearing Defendant might be intoxicated, Investigator Howard Henry went to interview Defendant. Defendant told Investigator Henry that while he was inside the Camaro at the time of the accident, his cousin was the driver. Investigator Henry told Defendant there were witnesses stating he was the driver, including "the person that was in the car." Defendant stated they were wrong, and told Investigator Henry that he should not believe the passenger because she was on cocaine. Investigator Henry observed a strong odor of alcohol on Defendant and had a nurse draw blood for a chemical analysis. Subsequent analysis of the blood draw indicated both a blood alcohol concentration of .09 and the presence of morphine.

As part of the crash investigation, investigators learned the Camaro was registered to Defendant's father. Defendant had a previous impaired driving conviction. His license was revoked at the time of the crash. The Camaro's driver's

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side airbag was tested for DNA, and the seven spots of blood recovered therefrom matched Defendant's DNA.

Defendant was charged with second-degree murder, felony death by vehicle, driving while license revoked, felony serious injury by vehicle, and careless and reckless driving. The jury found Defendant guilty of all charges and also found two aggravating factors: (1) Defendant had knowingly created a great risk of death to more than one person, and (2) had violated probation in the ten-year period prior to the offense.

The trial court arrested judgment on the conviction for felony death by vehicle, and sentenced Defendant in the aggravated range to an active term of 305-378 months imprisonment for second-degree murder, followed by 28-43 months imprisonment for driving while license revoked, felony serious injury by vehicle, and careless and reckless driving. Defendant also pled guilty to unrelated larceny charges. Defendant timely appealed.

### II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

### III. Issues

Defendant argues the trial court erred by permitting an officer to offer the statements of Gail Cole before the jury in her absence, contrary to Defendant's Sixth

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Amendment right to confront witnesses. Defendant also argues the admission of the decedent's wife's testimony created additional prejudice.

#### IV. Standard of Review

Whether a defendant's right to confrontation has been violated is reviewed *de novo*. *State v. Jackson*, 216 N.C. App. 238, 241, 717 S.E.2d 35, 38 (2011) (citation omitted). "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless . . . it was harmless beyond a reasonable doubt." *State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 830 (2007) (quoting N.C. Gen. Stat. § 15A-1443(b) (2005)). "When the State fails to prove the error was harmless beyond a reasonable doubt, 'the violation is deemed prejudicial and a new trial is required.'" *State v. Glenn*, 220 N.C. App. 23, 25, 725 S.E.2d 58, 61 (2012) (quoting *State v. Rashidi*, 172 N.C. App. 628, 638, 617 S.E.2d 68, 75 (2005)).

#### V. Analysis

##### *A. Testimonial Statements*

"The Confrontation Clause of the Sixth Amendment prohibits admission of 'testimonial' statements of a witness who did not appear at trial unless: (1) the party is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the witness." *Glenn*, 220 N.C. App. at 25, 725 S.E.2d at 61 (citing *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 203 (2004)). The Supreme Court of the United States found testimonial statements were, "at a minimum . . . prior

testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations.” *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203.

Statements made during police interrogations were further considered and defined in *Davis v. Washington*, 547 U.S. 813, 165 L. Ed. 2d 224 (2006).

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They 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.

*Id.* at 822, 165 L. Ed. 2d at 237 (emphasis supplied) (footnote omitted). Courts must consider all relevant circumstances in making this determination. *Michigan v. Bryant*, 562 U.S. 344, 369, 179 L. Ed. 2d 93, 114 (2011). Factors for the courts to consider include:

(1) “the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred”; (2) *objective determination* of whether an ongoing emergency existed; (3) whether a threat remained to first responders and the public; (4) medical condition of declarant; (5) whether a nontestimonial encounter evolved into a testimonial one; and (6) the informality of the statement and circumstances surrounding the statement.

*Glenn*, 220 N.C. App. at 26, 725 S.E.2d at 61 (quoting *Bryant*, 562 U.S. at 360, 179 L. Ed. 2d at 108-109)(emphasis supplied).



The issue here is whether Cole's statements were testimonial. It is undisputed that she was unavailable. Cole was living in Florida at the time of the trial. Though she was subpoenaed as a material witness, she refused to return to testify for the State. Defendant was never given the opportunity for cross-examination of Cole's statements. *See id.* at 25, 725 S.E.2d at 61.

Corporal Packard testified his conversation with Cole occurred a few minutes after he had arrived upon the scene. He agreed Cole was not discussing an event that was presently happening. While there was still confusion at the scene, the crash had occurred some time before Cole's statements. The injured parties were being attended to by others. There was no ongoing threat to either the first responders or the victims. Considering all the relevant factors surrounding Cole's statements, her conversation with Corporal Packard was testimonial. *See id.* at 26, 725 S.E.2d at 61.

While Corporal Packard was not seeking information to help apprehend a suspect, Cole's intentions are also relevant. The Supreme Court has recognized a victim may have mixed motives in making statements to police. *See Bryant*, 562 U.S. at 368-69, 179 L. Ed. 2d at 114. The physical state of a victim can also impact her motivation behind her statements. *See id.*

In this case, Cole was not seeking medical treatment. She did not discuss any of her or Defendant's injuries with Corporal Packard. From the statements in the record, it is hard to imagine Cole intended her statements to do anything other than

to place blame on Defendant. Further, the Supreme Court has identified voluntary statements given to responding officers as subject to the mandates of the Confrontation Clause. *See id.* at 370, 179 L. Ed. 2d at 114 (citing *Davis*, 547 U.S. at 822-823, n. 1, 165 L. Ed. 2d at 224).

Cole gave her statement at the scene of the crash in a very informal type of encounter. However, when a victim's statements "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene . . . is immaterial." *Davis*, 547 U.S. at 832, 165 L. Ed. 2d at 243. In considering all the relevant factors surrounding Cole's statements to Corporal Packard, the primary purpose of the statement was to exculpate herself and identify Defendant as the driver and person who had caused the crash. Her refusal to return to North Carolina, testify, and be subject to cross-examination may support her motives.

*B. Harmless Error*

Because Cole's statements to Corporal Packard were testimonial and the trial court erred in admitting the statements, we now consider whether the error was harmless beyond a reasonable doubt. *Glenn*, 220 N.C. App. at 32, 725 S.E.2d at 65. It is the State's burden to prove the error was harmless beyond a reasonable doubt. *Id.* at 25, 725 S.E.2d at 61. "[T]he presence of overwhelming evidence of guilt may

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render error of constitutional dimension harmless beyond a reasonable doubt.” *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) (citation omitted).

Other evidence placing Defendant in the driver’s seat of the Camaro at the time of the crash, and tending to establish his guilt, is overwhelming. The Camaro was registered to Defendant’s father. Bond testified he saw a man seated in the driver’s seat, bent over the steering wheel, and a woman in the passenger’s seat immediately following the crash. Bond did not mention any other persons present inside the Camaro immediately after the crash, even though Defendant named his “cousin” as the driver. The blood splatter on the driver’s side airbag tested positive for Defendant’s DNA, and there was no other blood splatter from any other individuals present on the airbag.

Defendant was observed by several officers sitting or standing near the open driver’s side door after the accident. No witness testified to a third person being in or around the Camaro immediately following the crash, contrary to Defendant’s statements that his “cousin” was the driver and that the *passenger* should not be trusted because she was on cocaine at the time of the crash. During his statements to police officers, Defendant admitted being present in the Camaro.

While it was error for the trial court to admit Cole’s statements at trial without Defendant having the right to cross-examine her, the error was harmless beyond a

reasonable doubt in light of the other evidence presented. *See State v. Garcia*, 174 N.C. App. 498, 504-05, 621 S.E.2d 292, 297 (2005).

*C. Decedent's Wife's Testimony*

Defendant asserts the trial court erred when it allowed Mrs. Biggs to testify about the decedent Biggs' volunteer work over Defendant's objection. The disputed testimony consisted of the following:

[Prosecutor]. Do you know why he was on disability?

[Mrs. Biggs]. Yes.

[Prosecutor]. What for?

[Mrs. Biggs]. Bilateral knee surgeries and bilateral foot repair reconstruction.

[Prosecutor]. You heard when the doctor had said, the pathologist, about him being a big guy?

[Mrs. Biggs]. Yes.

[Prosecutor]. Do you know, is there any explanation for that?

[Mrs. Biggs]. No more than he was born 10 pounds at birth and so, no, he's just a big guy.

[Prosecutor]. Was he involved in fitness of any sort?

[Mrs. Biggs]. He was. Kids that didn't have a positive father figure were the kids that he enjoyed helping out. So most of those kids were African-American kids that sports was the only way to have a future. And so most of those kids were not as well as they should have been in school

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and so he would help with school and then he would help with the sport that they were interested in.

[Prosecutor]. How would he help them out?

[Defense Counsel]: Objection, Your Honor.

THE COURT: Overruled.

[Mrs. Biggs]. He would take them to the YMCA to work them out, make sure that we had a family YMCA card that we were able to add those kids on as needed. He would pick them up from school or meet them at the YMCA to work them out.

Prior to Mrs. Biggs' testimony, defense counsel had cross-examined the State's expert witness, who had conducted the external examination of Biggs and had determined his cause of death to be blunt force trauma, presumably caused by the crash. During cross-examination, defense counsel questioned the health of Biggs and raised the possibility that his death resulted from some other cause, besides the blunt force trauma he had suffered in the crash.

Defendant argues Mrs. Biggs' testimony was not relevant, and improperly inflamed the jury. However, Mrs. Biggs' testimony was relevant. It established that while Biggs was a large man, he was active and sought out opportunities to engage in physical activity. Such testimony makes it more probable that Biggs' cause of death was, in fact, the blunt force trauma he sustained in the crash. *See* N.C. Gen. Stat. § 8C-1, Rule 401 (2017). The mention of Biggs' work with students by his widow pertained to his physical health, responded to challenges raised by Defendant, and

was not unduly prejudicial to Defendant. *See State v. Davis*, 349 N.C. 1, 26-27, 506 S.E.2d 455, 468 (1998).

VI. Conclusion

Defendants are guaranteed the Sixth Amendment right to confront those who bear witness against them in court through the admission of testimonial statements. *Glenn*, 220 N.C. App. at 25, 725 S.E.2d at 61. It is the State's burden to prove the admission of such testimony was harmless beyond a reasonable doubt. *Id.*

Upon review of the record, it is arguable that the primary purpose of Cole's statements to the police was not to assist with an ongoing emergency, but to place blame upon Defendant, and was testimonial. However, because of the overwhelming evidence of Defendant's guilt presented at trial, the admission of Cole's statements was harmless beyond a reasonable doubt. *See Garcia*, 174 N.C. App. at 504-05, 621 S.E.2d at 297. Mrs. Biggs' testimony concerning the decedent was relevant and did not prejudice Defendant. Defendant's arguments are overruled. *It is so ordered.*

HARMLESS ERROR.

Judge INMAN concurs.

Judge BERGER concurs with a separate opinion.

Report per Rule 30(e).

BERGER, Judge, concurring in separate opinion.

I concur with the majority opinion, but would find the statements by Gail Cole (“Cole”) in the immediate aftermath of the accident were nontestimonial.

“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Davis v. Washington*, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006).

The existence of an emergency or the parties’ perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation.

*Michigan v. Bryant*, 562 U.S. 344, 370, 179 L. Ed. 2d 93, 115 (2011).

There was a perception of an ongoing emergency by Cole and Corporal Packard. There was a great deal of commotion at the scene because of the number of individuals injured and their need for medical attention. Corporal Packard testified that, shortly after arriving on scene and while he was trying to “determine how we’re going to set up the scene, [and] how many more units” were needed, he observed Cole. According to Corporal Packard, she was screaming and animated. Corporal Packard approached her and asked, “[w]hat’s going on?” While talking with her, Corporal

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*BERGER, J., concurring in separate opinion*

Packard observed that she was excited and “talking very fast” and in “an elevated tone.” At the time Cole made the statements, Defendant was still at the scene, but had not been apprehended or approached by law enforcement officers. Moreover, Cole’s statements were not the result of a formal interrogation.

Because the circumstances surrounding Cole’s statements to Corporal Packard suggest that they assisted in apprehending Defendant and were made while officers secured the scene, I would find the statements nontestimonial.