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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-448

Filed: 26 March 2019

Vance County, No. 14 CRS 50497

STATE OF NORTH CAROLINA

v.

ALAN JOSEPH GIBSON

Appeal by defendant from judgments entered 27 March 2017 by Judge Michael J. O’Foghludha in Vance County Superior Court. Heard in the Court of Appeals 15 January 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.*

*Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.*

BRYANT, Judge.

Because defendant Alan Joseph Gibson failed to preserve his sole argument on appeal, we dismiss this argument and, thus, defendant’s appeal.

On 24 March 2014, a Vance County grand jury indicted defendant on charges of first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and first-degree burglary stemming from the death of Montrell Alston

on 9 January 2009. The matter was brought on for trial in Vance County Superior Court during the 20 March 2017 criminal session before the Honorable Michael O’Foghludha, Judge presiding.

At trial, the evidence tended to show that on the evening of 8–9 January 2009 Montrell Lamar Alston (decedent) was residing at 687 Adams Street, with his cousin Robert Smith. The residence had two doors. The front door was barricaded by a couch. The rear door was reinforced with a dead bolt lock as well as metal brackets on the door frame to support the placement of a 2x4 plank across the doorway. Decedent was a drug dealer known for selling marijuana.

On the evening of 8–9 January 2009, decedent, Smith, and long-time friend Gary Bullock (Gary) were at the residence when decedent received a phone call from defendant. Decedent acknowledged that he was at home, and twenty minutes later, there was a knock at the rear door. Gary opened the door, and defendant entered. Decedent directed Smith to retrieve a set of scales stored in the gutter above the rear door; Gary went to another room. When Smith stepped out of the rear door, he observed two men wearing red hoods obscuring their faces. Smith was immediately shot and rendered unconscious. Smith testified that he did not recognize either man. Gary testified that when he heard gun shots, he ran to a bedroom and crawled under a couch. After a few minutes, he emerged to find decedent lying on the floor. Gary

immediately exited the residence, went to a nearby residence, and called 9-1-1. Other than decedent and Smith, the only other person that Gary recognized was defendant.

Smith was treated at a hospital in Chapel Hill and released the next day. Decedent died at the scene. The medical examiner's autopsy report reflected that decedent died of multiple gunshot wounds.

At trial, the State called Darius Benson, who was also charged with first-degree murder in the death of decedent. Benson testified that prior to 9 January 2017, he, defendant, Gus Hawkins, and Jemel Bullock (Jemel) met at a hotel and planned the robbery and murder of decedent.

Q. Prior to January 9th, was it -- was a plan or an agreement made to commit a homicide?

A. Yes, ma'am.

Benson testified that decedent was targeted because of an incident that had occurred between decedent and Jemel in the preceding weeks. The plan was for defendant to make a phone call to set up a drug deal with decedent, because decedent "wasn't cool" with anyone else.

A. [Defendant] would call and schedule a buy from [decedent]. And myself, [Jemel], Mr. Kingsberry, we were to carry out the robbery itself. . . . [I]t would look as if [defendant] had nothing to do with what was happening. And so Kingsberry and [Jemel] would come in and complete the robbery.

. . . .

They would give [defendant] a little time to be positioned in the house or, you know, to, I guess, give him enough time whether to see where he have -- may have made the buy first, before he moved in. And from the back door is where the robbery -- well, that was the entrance. The back door was kicked in. [Jemel] and Kingsberry went in.

Q. And was that the plan?

A. Yes, ma'am.

After the close of the State's evidence, defendant moved to dismiss the charges against him. The trial court denied the motion, and defendant called Jemel as a witness. However, when asked about the events on the night of 8–9 January 2009, Jemel invoked his Fifth Amendment right against self incrimination. The court concluded that Jemel was unavailable as a witness. Defendant moved to admit as an exhibit a transcript of Jemel's guilty plea given on 10 October 2016, during which Jemel pled guilty to robbery with a dangerous weapon in relation to the events at decedent's house on 9 January 2009. The State objected to admitting the *terms* of the plea agreement that Jemel had entered into with the State. Out of the presence of the jury, the trial court sustained the State's objection and ruled that the portion of the transcript admitted would only include Jemel's proffer of evidence following his guilty plea, not the terms of his plea agreement with the State. Defendant did not object or take exception to the trial court's ruling. In the presence of the jury, defendant published copies of the transcript of Jemel's proffer of evidence and then read the published transcript aloud for the record.

Per Jemel's proffer of evidence, given following his 10 October 2016 guilty plea for robbery with a dangerous weapon, Jemel had testified that he did not know decedent personally, but knew that he was a drug dealer. Days before 8 January 2009, Jemel had a conversation with Benson about robbing decedent. The plan was for Jemel to act as a lookout while Benson ran into decedent's home to commit the robbery. On the night of the robbery, Jemel and Benson met and walked to decedent's residence. At the residence, Jemel hid in bushes eight feet from decedent's rear door; he did not have a gun. When Jemel observed a man open the rear door of decedent's residence, Benson ran toward the rear door with a gun in hand. Jemel "heard a bunch of commotion, then a gunshot fire." Before he ran away, Jemel observed "the dude hanging in the screen door." During his proffer of evidence, Jemel was asked if he knew defendant, Gus Hawkins, or Travis Kingsberry. Jemel testified that he knew of them but did not know them personally, and he did not see them on the evening of 8–9 January 2009.

Question: . . . So that what you're saying is there was nobody else involved other than you and [Benson]?

Answer: Yes, ma'am.

After the close of all evidence, the jury returned verdicts finding defendant guilty of first-degree murder under the felony murder rule, assault with a deadly weapon inflicting serious injury, and first-degree burglary. In accordance with the jury verdict, the trial court sentenced defendant to life imprisonment without parole

for first-degree murder and 38 to 55 months for assault with a deadly weapon inflicting serious injury, to be served concurrently. The record on appeal before this Court does not contain a judgment for first-degree burglary. Defendant appeals.

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On appeal, defendant argues that the trial court erred by sustaining the State's objection to admitting evidence of the terms of Jemel Bullock's plea agreement with the State. We dismiss this argument for lack of preservation.

First, we note that defendant did not raise a challenge to the trial court's ruling to admit only Jemel's sworn proffer of evidence rather than his whole plea transcript, which included the terms of the plea agreement. Moreover, defendant has not asked that we review the trial court's ruling for plain error. Thus, defendant's argument is not properly preserved for our review. However, even if we did reach the merits, defendant's argument would be overruled.

Defendant argues that he is entitled to show a witness "has an interest in seeking favor from the State," i.e. bias. But more specifically, defendant contends that he should be allowed to examine a witness's potential for bias while the witness is testifying on defendant's behalf during direct examination.

There is a general premise that "the calling party vouches for the credibility of its witnesses, and presents the witness' testimony as being worthy of belief." *State v. Hedgepeth*, 66 N.C. App. 390, 399, 310 S.E.2d 920, 925 (1984) (citing *State v. Tilley*,

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239 N.C. 245, 79 S.E.2d 473 (1954)), *superseded by statute on other grounds as recognized in State v. Farrar*, No. COA00-1238, 2002 WL 416879, at \*5 (N.C. Ct. App. Mar. 19, 2002).

Defendant submitted the transcript of Jemel’s sworn proffer of evidence as a credible account of the events occurring during the evening of 8–9 January 2009. *See id.* The court published the transcript as an exhibit and instructed the jury that “[s]ince this testimony was given in open court under oath, you should consider this testimony the same as you would any other testimony that was given in open court before the jury.” There was little relevance in defendant seeking to show Jemel’s potential for bias after defendant vouched for Jemel’s credibility.

For the aforementioned reason, this argument is

DISMISSED.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).

Judge Davis concurred in this opinion prior to 25 March 2019.