IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-976

Filed: 1 October 2019

Cabarrus County, Nos. 15 CRS 55742, 16 CRS 51886, 17 CRS 2000

STATE OF NORTH CAROLINA

v.

TERRELL DAVID THOMAS

Appeal by defendant from judgments entered 19 December 2017 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 5 June 2019.

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

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

DIETZ, Judge.

Defendant Terrell Thomas appeals his convictions for attempted first degree murder and a series of related violent felony charges. The charges stem from a shooting during an alleged robbery at a rest stop bathroom. The victim survived a gunshot wound in the back but was paralyzed.

We hold that the trial court properly permitted an investigating officer to testify that he charged Thomas with attempted murder and assault with intent to kill based on the officer's belief that the evidence—in particular, the close-range shooting from behind—signaled that the shooter "wanted to kill somebody." This testimony was permissible because it addressed the officer's observations of the crime scene, the course of the investigation, and the officer's decision to bring criminal charges; it was not speculation about Thomas's actual mental state.

Thomas also challenges certain testimony admitted under the co-conspirator exception to the hearsay rule. Much of Thomas's argument is waived because there was no objection at trial. With respect to the portion preserved for appellate review, the record supports the trial court's determination that the testimony was admissible. We therefore find no error in the trial court's judgments.

Facts and Procedural History

Greg McKee and his family were traveling along I-85 on the way home from a Thanksgiving visit with McKee's parents. The McKees stopped at a rest stop along the way and McKee went into the restroom. McKee's wife was outside when she noticed two men standing just outside the restroom building. She saw the two men look at her and her children, at one another, then look into the restroom building. One of the men motioned to the other by tapping him on the shoulder before both men

entered the restroom. Shortly after the men entered, McKee's family heard a loud bang followed by McKee screaming for help.

McKee's family rushed to the restroom and the two men emerged and ran away. McKee's family found him lying face down in the doorway of the men's restroom with a large puddle of blood under him. McKee had been shot in the back. He survived his wounds but the bullet was lodged in his vertebrae and irreparably damaged his spinal cord, leaving him a paraplegic.

Law enforcement later arrested Defendant Terrell Thomas and another man, Darren Manuel, for the shooting. The State charged Thomas with attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with dangerous weapon.

At trial, the State presented considerable evidence of Thomas's guilt, using surveillance footage, fingerprints from a water fountain at the rest stop, eyewitness testimony, cellular phone data, an audio recording of Thomas suggesting his involvement in the crime, and other evidence that tied Thomas to the crime. The State also presented testimony from Manuel's girlfriend that shortly before the crime, Manuel told her that he and Thomas were going four hours away to "get some money" and that Thomas "had something set up." Manuel's girlfriend understood this to mean the two men were preparing to commit a crime.

The jury convicted Thomas on all charges. The trial court sentenced Thomas to 207 to 261 months in prison for attempted first degree murder and consolidated the remaining convictions into a consecutive 77 to 105 month prison term. Thomas appealed.

Analysis

I. Lay opinion testimony of officer regarding intent to kill

Thomas first argues that the trial court erred by admitting certain testimony from Detective Jason Fetzer. Thomas contends that Detective Fetzer gave an impermissible opinion about Thomas's intent and mental state at the time of the alleged crime. We reject this argument.

"[W]hether a lay witness may testify as to an opinion is reviewed for abuse of discretion." *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Under Rule 701, "[i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701. "A lay witness must have a basis of personal knowledge for

his opinion." *State v. Givens*, 95 N.C. App. 72, 79, 381 S.E.2d 869, 873 (1989). Under Rule 701, "[c]ommon inferences derived from the appearance, condition, or mental or physical state of persons . . . are proper subjects of opinion testimony by non-experts." *State v. Hedgepeth*, 350 N.C. 776, 791, 517 S.E.2d 605, 614 (1999). Moreover, under Rule 704, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Gen. Stat. § 8C-1, Rule 704.

Here, the State asked Detective Fetzer "as you investigated this case and you've talked about your training, you're a sniper, what was significant to you about where Greg McKee was shot and the distance from where he was shot from?" Thomas immediately objected to this question, before Detective Fetzer could answer.

The transcript indicates that, after Thomas announced this objection, counsel approached the bench and the trial court conducted an off-the-record bench conference concerning the objection. The court then stated on the record that it overruled the objection, but Detective Fetzer did not answer the initial question. Instead, the State asked a new series of questions to "put it in context." In those questions, the State established that Detective Fetzer was "the one who actually makes the charges . . . the one who goes to the magistrate's office and issues out a warrant for what you think is appropriate."

After confirming with Detective Fetzer that he chose to charge Thomas with attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury, the State asked Detective Fetzer about his "decision to make those charges." After a brief series of questions establishing that the shooting took place at close range, the following exchange occurred:

> Q: From that distance, what does that tell you with shooting someone at that close range, what did that tell you based on your training and experience?
>
> A. That tells me he wanted to kill somebody.
>
> [DEFENSE COUNSEL]: Objection. Invades the province of the jury.
>
> THE COURT: Overruled.
>
> Q. You believe that that meant someone wanted to kill someone?
>
> A. Yes.
>
> Q. Why do you say that?
>
> A. You're talking about firing a caliber at center mass at somebody's back approximately 3 feet away. That's a kill shot.

Viewing this testimony in context, Detective Fetzer was describing his personal observations of the circumstances of the shooting in light of his law enforcement training. He used those observations to explain how he made the decision to bring the chosen criminal charges, which required intent. The challenged

testimony was based on Detective Fetzer's personal observations of the scene of the shooting, gathered from his investigation of the crime scene, and the admission of this testimony is consistent with past cases involving an officer's "personal observations at the scene and his investigative training background as a police officer." *State v. Howard*, 215 N.C. App. 318, 325, 715 S.E.2d 573, 578 (2011).

For example, in *Howard*, this Court upheld the admission of an officer's lay opinion testimony that "someone had tried to hide the items" because it "was based [the officer's] rational observation, and represented nothing more than an instantaneous conclusion he reached after observing the location of the merchandise." *Id.* at 325–26, 715 S.E.2d at 578. Similarly, in *State v. Ray*, we held that an officer's lay opinion that lacerations were not consistent with a traffic accident was admissible because it was "based on his personal observations at the scene and his investigative training background as a police officer." 149 N.C. App. 137, 145, 560 S.E.2d 211, 217 (2002), *aff'd,* 356 N.C. 665, 576 S.E.2d 327 (2003). And in *State v. McVay*, we rejected the defendant's argument that "the trial court erred by admitting lay opinion testimony of various law enforcement officers that defendant 'tried to kill' [the victim]" because "the testimony by the officers amounted to nothing more than shorthand statements of fact based on their knowledge and observations." 174 N.C. App. 335, 339, 620 S.E.2d 883, 885–86 (2005). We found that "the statements made by the officers do not implicate the guilt or mental state or intent of defendant, but

rather explain their perceptions and the impact of those perceptions on their actions." *Id.* at 339, 620 S.E.2d at 886.

This case is indistinguishable from *McVay* and other cases involving officers describing their observations and what those observations led them to believe about the commission of the crime. Importantly, Detective Fetzer did not testify that he *knew* the mental state of Thomas or anyone else; his testimony was about his personal observations and how those observations led him to bring charges involving intent to kill in this case. Accordingly, we hold that the trial court did not abuse its discretion in admitting the challenged testimony.

II. Admission of statements by co-conspirator

Thomas also argues that the trial court erred by admitting statements of Darren Manuel under the co-conspirator exception to the hearsay rule. Thomas argues that this exception was inapplicable because the challenged statements were not made during the course of and in furtherance of the conspiracy. Again, we reject this argument.

Rule 801 of the North Carolina Rules of Evidence provides an exception for otherwise inadmissible hearsay: "[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . a statement by a coconspirator of such party during the course and in furtherance of the conspiracy." N.C. Gen. Stat. § 8C-1, Rule 801(d)(E). For a statement to be admissible under this co-conspirator

exception, the State's evidence must establish: "(1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended." *State v. Lee*, 277 N.C. 205, 213, 176 S.E.2d 765, 769–70 (1970).

"Statements made by a co-conspirator to a third party who is not then a member of the conspiracy are considered to be 'in furtherance' of the conspiracy if they are designed to induce that party either to join the conspiracy or to act in a way that will assist it in accomplishing its objectives." *United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994). Likewise, statements or actions during or shortly after the conspiracy to conceal the crime are in furtherance of the conspiracy. *State v. Barnes*, 345 N.C. 184, 216–17, 481 S.E.2d 44, 61–62 (1997).

Thomas challenges the admission of statements made by Darren Manuel to his girlfriend Keyona Powell. Powell testified at trial that on the day McKee was shot, Manuel told her he was leaving and that he and Thomas "were going four hours away . . . [t]o go get some money," which she took to mean that they were going "[t]o go do something illegal." Powell further testified that Manuel told her that Thomas "had something set up." When Manuel returned to Powell's house later that night, Manuel told her, "I just shot somebody" and attempted to give Powell a firearm clip with bullets in it. According to Powell, Manuel "didn't go into details of what happened other than the fact that he said that the guy lunged at [Thomas] and he

panicked and shot him." Manuel told Powell that the shooting happened "[i]n the bathroom" at "a state trooper's place."

Thomas argues that there was insufficient evidence that Manuel's statements in the morning before the shooting were made during the course of and in furtherance of the conspiracy. We disagree. Manuel's statements to Powell indicated that Manuel and Thomas already had agreed to travel to the rest stop to commit the alleged crime. Those statements therefore occurred during the course of the conspiracy. Moreover, Manuel's statements to Powell were "in furtherance of the conspiracy" because they were designed to induce her "to act in a way that will assist it in accomplishing its objectives," by keeping Manuel and Thomas's plan a secret and preparing her to assist in the concealment of the crime after the fact. *Shores*, 33 F.3d at 444. Accordingly, the trial court properly determined that Manuel's statements were admissible under the co-conspirator exception to the hearsay rule.

Thomas also challenges Manuel's statements to Powell after he returned later that night. But unlike Powell's earlier testimony, Thomas did not object to this testimony when it occurred. Thomas also does not assert that the trial court's admission of this testimony was plain error. As a result, Thomas's challenge to the admission of Manuel's statements made after the shooting is not preserved for appellate review. *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845 (1995).

Conclusion

For the reasons discussed above, we find no error in the trial court's judgments.

NO ERROR.

Judges BERGER and HAMPSON concur.

Report per Rule 30(e).