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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-268

Filed: 19 May 2020

Lenoir County, No. 15CRS051795

STATE OF NORTH CAROLINA

v.

JOHNNY SANDERS, Defendant.

Appeal by Defendant from judgments entered 24 January 2018 by Judge Charles H. Henry in Lenoir County Superior Court. Heard in the Court of Appeals 4 March 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Peter A. Regulski, for the State.*

*Glover & Petersen, P.A., by James R. Glover, for Defendant-Appellant.*

DILLON, Judge.

Defendant Johnny Sanders appeals from the trial court's judgments entered upon his convictions for first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. We conclude Defendant received a fair trial free from error.

I. Background

STATE V. SANDERS

*Opinion of the Court*

On 19 July 2015, Jack Davis, Jr., was robbed and murdered in Kinston. He was found alive by his girlfriend on the floor of his home in a pool of blood. A .22 rifle and large flashlight were found lying next to the victim. Medical personnel arrived and determined that the victim was still breathing. The victim was transported to the hospital where he died from his injuries. The medical examiner determined that the victim died from blunt force head trauma.

Evidence was discovered tending to show that the victim's death resulted from an alleged conspiracy by Defendant and five other individuals to rob the victim.

In February 2017, Defendant was indicted for first-degree murder, armed robbery, and conspiracy to commit armed robbery.

Ten months later, in December 2017, Phoenix Hannibal, one of the Defendant's co-conspirators who had also been indicted, wrote a statement describing the plan to rob the victim, which resulted in the victim's death. The statement implicated Defendant and the other co-conspirators:

Dear [Assistant District Attorney:]

12/29/17

I swear this to be the complete truth. I was not completely truthful in my previous statements! Reason being I was scared and I have children aged 2, 5 & 6. But what I am telling you now is the truth!

...

I first started thinking of robbing [the victim] shortly after I met him. I spoke about this to [one of the co-conspirators]. Nothing ever came of this. Later I talked about it with [Defendant and the other co-conspirators]. I told them I could not participate because [the victim] knew me and my

car and he had cameras. . . . As it turned out on July 19, 2015 [Defendant and the other co-conspirators] showed up at my house. We talked about the robbery, it was decided I would drive [Defendant and another co-conspirator and the others would travel in a separate car.]

...

The boys were going to rob him. After the first car left with [three co-conspirators] a couple minutes later I left with [Defendant] and [the other co-conspirator]. On the way over there I heard the boys talking – and I heard one of them say – ([Defendant]) “its going to be quick and easy, whatever happens happens” or words to that effect. I dropped them off past [the victim’s] house.

...

[Defendant] helped beat [the victim.]

...

/s/ [Ms.] Hannibal

Ms. Hannibal’s attorney used this statement as the basis for her plea agreement with the State under which she agreed to testify truthfully against all co-defendants and plead guilty to second-degree murder.

A few weeks later, Defendant’s jury trial was held. Ms. Hannibal testified for the State as per her plea agreement. However, when asked if she had talked to Defendant in July 2015 about a plan to rob the victim, she answered in the negative, contrary to her written statement. She testified that she drove Defendant and others to the victim’s house where they were merely going to hang out.

The prosecutor then presented Ms. Hannibal with her earlier written statement, which had been admitted into evidence. The prosecutor asked her if the statement was the basis of her plea deal and if it refreshed her recollection of what

happened before asking to be heard outside the presence of the jury. The prosecutor requested that Ms. Hannibal consult with her attorney because he “can’t let her get up [t]here and perjure herself.”

The prosecutor also mentioned to Ms. Hannibal’s attorney that he would put Ms. Hannibal in prison for life<sup>1</sup> if she did not comply with her plea agreement.<sup>2</sup> Defendant’s attorney asked Ms. Hannibal on cross-examination whether she heard this statement from the prosecution, to which Ms. Hannibal replied, “Yes, Sir.” However, Defendant’s attorney did not ask Ms. Hannibal whether the prosecutor’s statement to her attorney influenced her testimony or made her feel threatened to change her story. Defendant’s counsel also did not seek a ruling on the State’s alleged threat or raise a constitutional argument to the trial court.

The jury found Defendant guilty of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant timely appealed.

## II. Analysis

Defendant argues that his convictions should be reversed because the prosecutor allegedly threatened a trial witness, namely Ms. Hannibal, to alter her

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<sup>1</sup> The punishment for first-degree murder is life imprisonment without the possibility of parole. N.C. Gen. Stat. § 14-17(a) (2015).

<sup>2</sup> This comment does not appear in the transcript.

testimony. Specifically, Defendant argues that the State violated his due process right to put on a defense. We disagree.

Our Supreme Court has stated that “[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). Also, our Supreme Court has held that failure to argue plain error waives plain error review. *State v. Braxton*, 352 N.C. 158, 196, 531 S.E.2d 428, 450-51 (2000).

Here, Defendant did not present this constitutional argument to the trial court. Further, though Defendant failed to preserve any argument concerning the prosecutor’s “threat” and any influence it may have had on Ms. Hannibal’s testimony, Defendant’s brief does not specifically and distinctly argue that any action by the trial court amounted to plain error. Defendant simply argues, without preservation of the issue, that his convictions should be reversed because of an alleged threat made by the prosecutor to a trial witness.

### III. Conclusion

We conclude that Defendant received a fair trial, free from reversible error.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

Report per Rule 30(e).