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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 20-242

Filed: December 1, 2020

Wake County, Nos. 17 CRS 214884-86, 19 CRS 1832

STATE OF NORTH CAROLINA

v.

DIALLO DWAYNE DANIELS, Defendant.

Appeal by Defendant from judgment entered 20 September 2019 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 21 October 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas O. Lawton, III, for the State.

Marilyn G. Ozer for Defendant-Appellant.

INMAN, Judge.

This appeal arises from a late-night street confrontation between two groups of friends. Diallo Dwayne Daniels (“Defendant”) appeals from convictions for first-degree (felony) murder, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, and possession of a firearm by a felon. Defendant contends that: (1) the trial court improperly admitted testimony under the dying

declaration exception to the hearsay rule, and (2) there was a fatal variance between the indictment and the proof at trial as to the identity of the victim of the assault with a deadly weapon inflicting serious injury charge. After careful review, we hold Defendant has failed to demonstrate reversible error.

I. FACTS & PROCEDURE

The evidence at trial tends to show that late on the night of 1 August 2017, Defendant and three friends were hanging out together on Rose Lane, near Dacian Road, in Raleigh. Defendant and his friends noticed three men standing in an apartment complex parking lot. Those men—Juan Ramiro Reyes Reyes (“Reyes”), Angel Tabora-Andrade (“Tabora-Andrade”), and Candido Tellez-Toxqui (“Tellez-Toxqui”)—were drinking beers and visiting outside their work van.

Tellez-Toxqui walked away from his friends in the parking lot, headed for home, in the direction of Rose Lane. Defendant and his friends stopped him. Seeing this, Reyes and Tabora-Andrade walked to join Tellez-Toxqui and find out what was happening. Defendant then struck Tabora-Andrade in the head with his pistol or its holster, and fired multiple shots striking Tellez-Toxqui, Reyes, and Tabora-Andrade. Defendant and his friends fled the scene.

Tabora-Andrade’s mother, Alba Andrade (“Andrade”), law enforcement officers, and several others nearby arrived at the scene. Reyes was taken to the

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hospital and declared dead at 2 o'clock in the morning. Tellez-Toxqui was also taken to the hospital for emergency surgery and then to the critical care unit to recover.

On 25 September 2017, a Wake County grand jury indicted Defendant on one count of first-degree murder and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. Nearly two years later, the State obtained a superseding indictment on the first-degree murder charge and an additional indictment charging possession of a firearm by a felon was issued. Defendant's case came on for trial on 16 September 2019.

The arrest warrant and indictment named "Candido Tellez-Toxqui" as one of the assault victims. Tellez-Toxqui did not serve as a witness at trial, nor did the State introduce physical evidence to identify him such as an identification card or medical records. However, witnesses referred to one of the assault victims as "Candido Toxqui," "Candido Tellez," and simply "Candido." Defendant himself referred to the victim as "Candido" multiple times throughout his testimony. Defendant and an apartment resident also testified that Tellez-Toxqui was armed with a hammer, but police found no hammer at the scene of the shooting. Police found no other firearms at the scene.

Andrade testified at trial about what she witnessed from her apartment that night and her final interaction with Reyes. When Andrade began to testify about the

questions she posed to Reyes as he lay dying, Defendant objected. The trial court excused the jury and allowed *voir dire* of the witness.

Following *voir dire*, the trial court overruled defense counsel's objection and allowed Andrade's testimony under North Carolina Rule of Evidence 804(b)(2) (the "dying declaration exception") because the evidence showed that Reyes's death was imminent and he was being asked about matters "directly concerning the cause or circumstances" surrounding his death, mainly "did you know the people" and "did they rob you."

When the jurors returned to the courtroom, Andrade testified:

[PROSECUTOR]: When you went over to Ramiro and you asked him what had happened, what did he tell you?

[DEFENSE COUNSEL]: Objection, Your Honor.

[THE COURT]: Excuse me?

[DEFENSE COUNSEL]: Objection, Your Honor.

[THE COURT]: Okay. Same grounds?

[DEFENSE COUNSEL]: Yes, Your Honor.

[THE COURT]: All right. Overruled.

[ANDRADE]: I asked him, "What happened? What's happening? Who are these people?" I asked, "Had you seen them before?" And he just moved his head to say no. "Had you had any problems with them?" And he shook his head. I asked, "Do you think that they were trying to rob you?" And he moved his head like this (Indicating), and then he fainted. And I tried to—I tried to bring him to . . . And he

just grabbed my arm very strongly, and he wouldn't let me go And I said, "If you're worried about your kids, don't worry about them. I'm going to take care of them." And then he did like this. (Indicating.) I asked, "Do you trust me?" And then he moved his head again

On 19 September 2019, the jury found Defendant guilty of first-degree murder based on the felony of assault with a deadly weapon inflicting serious injury, one count of assault with a deadly weapon inflicting serious injury, one count of assault with a deadly weapon, and possession of a firearm by a felon. The trial court sentenced Defendant to life imprisonment without parole on the first-degree murder conviction, arrested judgment on the underlying felony, and consolidated judgment on possession of a firearm and assault with a deadly weapon, assigning Defendant to 12 to 24 months in prison on those convictions to run concurrently with the life sentence. Defendant's counsel gave oral notice of appeal.

II. ANALYSIS

A. *Dying Declaration Testimony*

In his first assignment of error, Defendant asserts the trial court improperly admitted Andrade's testimony concerning her final interactions with the murder victim under the dying declaration exception to the hearsay rule. We overrule this argument, because even assuming the trial court abused its discretion in admitting the evidence, Defendant cannot show that he was prejudiced.

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We review the “admission of evidence over objection [for] whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence.” *State v. Bodden*, 190 N.C. App. 505, 512, 661 S.E.2d 23, 27 (2008) (citing *State v. Bell*, 164 N.C. App. 83, 88, 594 S.E.2d 824, 827 (2004)). “The admissibility of [dying] declarations is a decision for the trial judge, and appellate review is limited to the narrow question of whether there is any evidence to show the prerequisites of admissibility.” *State v. Hamlette*, 302 N.C. 490, 496-97, 276 S.E.2d 338, 343 (1981). “Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.” *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (citing *State v. Campbell*, 133 N.C. App. 531, 540, 515 S.E.2d 732, 738 (1999), *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001)).

Defendant has not demonstrated that but for the admission of the dying declaration, the jury would have reached a different outcome. Defendant admitted to shooting Reyes, Tabora-Andrade, and Tellez-Toxqui. There was no evidence presented that Tellez-Toxqui, whom Defendant first confronted, was armed. Other than Defendant’s pistol, police recovered no weapons from the scene. Based on this and other undisputed evidence, we overrule Defendant’s assignment of error.

Defendant also asserts, for the first time on appeal, that Andrade’s testimony should have been excluded as unfairly prejudicial or misleading to the jury, whereas

at trial, counsel only opposed its admissibility as a dying declaration. Defendant has waived his objection to this testimony by failing to raise it at trial, so we will not consider his argument now.

B. Name Variance between Indictment and Evidence at Trial

In his second assignment of error, Defendant alleges the trial court improperly denied Defendant's motion to dismiss due to a fatal variance between the identity of one of the victims alleged in the indictment and the identity of the victim proven at trial, rendering the indictment facially invalid.

We review the trial court's denial of a motion to dismiss and the sufficiency of an indictment *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007); *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008). We consider the matter anew substituting our own judgment for that of the trial court, *State v. Williams*, 362 N.C. 57, 62, 669 S.E.2d 290, 294 (2008), viewing the evidence in the light most favorable to the State. *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987).

"Where an indictment charges the defendant with a crime against someone other than the *actual* victim, such a variance is fatal." *State v. Abraham*, 338 N.C. 315, 340, 451 S.E.2d 131, 144 (1994) (emphasis added) (citing *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967)). However, "our Courts have not found fatal variances where a discrepancy in the victim's name was inadvertent and the individual referred

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to in the indictment was the same person alleged to be the victim at trial.” *State v. Pender*, 243 N.C. App. 142, 150, 776 S.E.2d 352, 359 (2015) (holding no fatal variance where “there was no uncertainty that the identity of the alleged victim ‘Vera Alston’ was actually ‘Vera Pierson.’”).

This Court has held a variance “wholly immaterial” when the name of the individual listed in the indictment is “sufficiently similar” to the victim’s name introduced by evidence at trial and the defendant is “not surprised or placed at any disadvantage in preparing his defense.” *State v. Cameron*, 73 N.C. App. 89, 92, 325 S.E.2d 635, 637 (1985) (holding the name alleged in the indictment, “Mrs. Narest Phillips,” was sufficiently similar to the name revealed at trial, “Mrs. Ernest Phillips”). “[A] variance between the indictment and the proof at trial does not require reversal unless the defendant is prejudiced as a result.” *State v. Weaver*, 123 N.C. App. 276, 291, 473 S.E.2d 362, 371 (citation omitted), *cert. denied and disc. review denied*, 344 N.C. 636, 477 S.E.2d 53 (1996).

Defendant relies on two cases involving a name variance between the indictment and evidence at trial—*State v. Call*, 349 N.C. 382, 508 S.E.2d 496 (1998) and *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967). In *Bell*, the indictment named “Jean Rogers” as the victim of a robbery, but all the evidence at trial identified her as “Susan Rogers.” *Bell*, 270 N.C. at 29, 153 S.E.2d at 744 (emphasis added). Our Supreme Court held there was a fatal variance between the indictment and evidence.

Id. at 29, 153 S.E.2d at 745. The indictment in *Call* charged the defendant with assault with a deadly weapon with intent to kill inflicting serious injury against “Gabriel *Hernandez Gervacio*.” *Call*, 349 N.C. at 424, 508 S.E.2d. at 522 (emphasis added). Yet, the evidence presented at trial named the actual victim as “Gabriel *Gonzalez*.” *Id.* (emphasis added). Our Supreme Court arrested judgment on the assault charge and remanded the case based on the variance between the name on the indictment and the evidence at trial. *Id.* The cases Defendant cites are unlike this case because the actual name of the victims identified at those trials varied materially from the name listed in the indictment, noting an entirely different first or last name—“Susan” instead of “Jean” and “Hernandez Gervacio” instead of “Gonzalez.”

In this case, the indictment named “Candido Tellez-Toxqui” as the alleged victim of Defendant’s assault with a deadly weapon inflicting serious injury charge. Tellez-Toxqui did not serve as a witness, nor did the State introduce physical evidence to identify him. However, at trial, several eye witnesses, including law enforcement, identified this victim as “Candido,” “Candido Tellez,” or “Candido Toxqui.” Even Defendant himself identified one of the victims as “Candido” multiple times during his testimony.

Every one of the names used at trial was sufficiently similar to the victim’s full name used in the indictment, simply representing a shorthand version of his full

name, “Candido Tellez-Toxqui.” The victim alleged in the indictment was, in fact, the same person and actual victim revealed at trial. *See Pender*, 243 N.C. App. at 150, 776 S.E.2d at 359. Further, nothing in the record shows that the minor variance caused any confusion at trial or interfered with Defendant’s ability to defend himself. The name variance was wholly immaterial here, so we hold the trial court properly denied Defendant’s motion to dismiss. *See Cameron*, 73 N.C. at 92, 325 S.E.2d at 637.

III. CONCLUSION

Defendant has not demonstrated that he was prejudiced by the admission of one victim’s non-verbal statement as he lay dying. Nor has he convinced us that the difference in one victim’s name on the indictment was fatally at variance with the evidence presented at trial.

NO PREJUDICIAL ERROR.

Judges DILLON and YOUNG concur.

Report per Rule 30(e).