IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-114

No. COA20-174

Filed 6 April 2021

Rowan County, Nos. 14CRS055711-12, 14CRS055730-31

STATE OF NORTH CAROLINA

v.

DARIUS O'BRYAN ABEL and JAMES MICHAEL ROBINSON, Defendants.

Appeal by Defendants from judgments entered 22 February 2019 by Judge Jeffery K. Carpenter in Rowan County Superior Court. Heard in the Court of Appeals 27 January 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ryan F. Haigh, for the State.

Lisa Miles for Defendant-Appellant Darius O'Bryan Abel.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for Defendant-Appellant James Michael Robinson.

INMAN, Judge.

¶ 1 Defendants Darius Abel ("Mr. Abel") and James Robinson ("Mr. Robinson," collectively with Mr. Abel, "Defendants") appeal from judgments entered after a jury found both of them guilty of first-degree murder. Mr. Abel argues: (1) the trial erred in denying his motions to suppress DNA and physical evidence obtained pursuant to

search warrants he contends were issued without probable cause; (2) the trial court committed prejudicial error in its instruction to the jury on flight; and (3) the prosecutor made prejudicial and grossly improper statements to the jury that warrant a new trial. Mr. Robinson echoes Mr. Abel's third argument and further argues that the trial court violated his constitutional confrontation rights when it precluded his counsel from fully cross-examining a witness. After careful review, we hold that Defendants have not shown prejudicial error warranting a new trial.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The record and evidence introduced at trial tend to show the following:

1. The Murders and Initial Investigation

¶ 3 At around 10:00 p.m. on 8 October 2014, three armed men in gorilla masks broke into the Spencer, North Carolina home of Antonio Walker ("Tony") through the front door. Tony was at home at the time with his nephew, James Walker, Jr. ("Junior"), his mother, Angela White ("Ms. White"), and his sister, Jasmine Walker ("Ms. Walker"). The masked men first encountered Junior, Ms. White, and Ms. Walker in the living room and ordered them to lie flat on the floor. The taller of the masked men stayed in the living room while the other two advanced down a hallway to Tony's room. Ms. Walker heard several gunshots and watched the two men return to the living room and head for the front door. As they attempted to exit, Junior grabbed his own gun and fired several shots at the intruders. One of the masked men

turned and beat Junior in the head with a gun and, at some point during the scuffle, one of them shot Junior. Tony wandered into the front room with a bullet wound to the torso as the masked men left the house. Ms. Walker called 9-1-1 while Ms. White tended to Tony and Junior, but both died from their injuries before emergency medical help arrived.

¶ 4 Law enforcement responded to the 9-1-1 call and found: (1) an iPhone dropped in Tony's house by one of the intruders; (2) a Hornady brand .45 caliber bullet in the bedroom where Tony was shot and wounded; (3) a Hornady brand .45 caliber shell casing in the living room where Junior was shot and killed; (4) a black durag in an adjacent vacant lot; and (5) a gorilla mask and Samsung cellphone in a nearby baseball field. Police also recovered two gloves on an adjoining city block the following day. Medical examiners later performed an autopsy on Tony and recovered several more bullets.

¶ 5 While police were occupied at the crime scene on the night of the murders, a neighbor observed two men walking into his driveway and carport. The neighbor spoke with both men, one approximately 6'1" and the other 5'8", who said that they were lost before breaking into a run down the road. The neighbor saw police nearby and reported the interaction.

¶ 6 Terrance Snider ("Mr. Snider"), a former Rowan County school teacher, saw a news report about the crimes and recalled that he had seen Mr. Abel, Mr. Robinson,

and an unknown third man trying on gorilla masks at a local Walmart on the night of the murders. He recognized Defendants as former students. Mr. Snider reported this information to Detective Nicholas Pacilio ("Det. Pacilio"), who was the lead investigator on the case.

¶ 7 Det. Pacilio followed up on Mr. Snider's report and met with a loss prevention manager at the Walmart. There, Det. Pacilio found gorilla masks identical to the one recovered at the crime scene and, with the help of the manager, confirmed in the store's point-of-sale system that three such masks were sold on the night of the murders. Det. Pacilio reviewed the store's surveillance footage from that night and watched three men purchase three gorilla masks. He positively identified one of the men as Mr. Abel, whom he recognized from a prior interaction. Det. Pacilio and the manager were able to confirm from store records that the credit card used to purchase one of the masks belonged to a man named Kenneth Abel ("Kenny")[1] and that Kenny had previously purchased a cellphone from the store.

¶ 8 Det. Pacilio continued his investigation by running Kenny's credit card history, learning that he had made a purchase at a local Lowe's earlier that same evening. Surveillance footage from the Lowe's showed three men buying zip-ties at a self-checkout station with Kenny's credit card. Det. Pacilio also discovered that Kenny

[1] Kenny testified at trial that he and Defendants are cousins.

had made a purchase at a Sheetz after the murders later that evening, and security camera footage from the gas station showed that Kenny was driving a Chevrolet Equinox registered to Sandra Michelle Abel, who had the same address as Mr. Abel.[2]

2. Search Warrants and Physical Evidence Recovered

¶ 9 Law enforcement officers, including Special Agent S.E. Holmes ("Agent Holmes") with the North Carolina State Bureau of Investigation, applied for and secured several search warrants in connection with the investigation of the murders. Those warrants allowed them to: (1) obtain DNA samples from Mr. Robinson, Mr. Abel, and Kenny; (2) search the Samsung phone found with the gorilla mask in the baseball field; (3) search Kenny's home; and (4) search the Chevrolet Equinox.

¶ 10 Agent Holmes also applied for and secured a warrant to search Mr. Abel's home at 227 W. Kerr Street in Salisbury. Agent Holmes' affidavit submitted in support of this search warrant application appears to be a verbatim copy of the affidavit submitted by Agent Holmes for a warrant to search Kenny's home.[3] The application, in apparent reference to Kenny's address, alleges in one sentence that that "the residence located at 702 Candlewick may contain evidence regarding the murder[s]."

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[2] Kenny testified at trial that Sandra Abel is Mr. Abel's mother and Kenny's aunt.

[3] Although the warrant to search Kenny's home does not appear in the record, counsel for Mr. Abel told the trial court at the pre-trial motions hearing that "they're cut and paste search warrants not only for these two search warrants [to obtain Mr. Abel's DNA and search his house], but also for search . . . warrants that involve . . . Mr. Kenny Abel."

But at the conclusion of the application, it identifies the residence to be searched as 227 W. Kerr Street.

¶ 11 Agent Holmes' affidavits stated that a "concerned citizen" tipped off police that two men had purchased masks at a retail store on the night of the murders and that Defendants and Kenny were identified from the store's surveillance footage, but it did not name Mr. Snider as the source of the tip or state that Det. Pacilio knew the name of the source. Nor did the affidavits mention that Det. Pacilio himself identified Mr. Abel on the Walmart surveillance tape.

¶ 12 A magistrate issued the search warrants and police searched Mr. Abel's home. The search uncovered a bag containing, among other things the following items: (1) a box of Hornady brand .45 cartridges; (2) a box of PMC brand .45 cartridges; (3) two partially loaded .45 magazines; (4) a two-magazine belt holder; (5) two digital scales; (6) a paddle holster; and (7) a weapon lock. Police also found gloves similar to those found near the crime scene. No gun was recovered from the home.

¶ 13 The DNA swabs collected from Mr. Abel, Mr. Robinson, and Kenny were compared with samples taken from various items recovered at the crime scene. The State Crime Lab's results showed: (1) Mr. Abel was the primary DNA contributor to the durag and was excluded from all other items; (2) Mr. Robinson was the predominant DNA contributor to one of the gloves and the gorilla mask found in the baseball field; (3) the outside of the glove linked to Mr. Robinson also tested positive

for Tony's blood; and (4) Kenny was the predominant DNA contributor to the iPhone left at the crime scene.

¶ 14 A forensic scientist from the State Crime Lab downloaded the available data from the Samsung phone found with the gorilla mask. An apparent "selfie" of Mr. Robinson, taken on the day of the crimes, was found on the phone and attached to a text message sent that same afternoon. The call and SMS logs also showed that the phone was last used at 10:11 p.m. that evening, shortly after the murders.

¶ 15 In the week following the murders, police executed their search warrant on Kenny's home. Kenny arrived while the search was underway and agreed to meet with SBI agents at the local sheriff's department. Kenny denied any involvement in the crimes. He was placed under arrest, met with his parents, and then gave a second statement in which he again denied his involvement.

¶ 16 Mr. Abel turned himself in to police the week following the shootings. Police arrested Mr. Robinson five days later.

¶ 17 Mr. Abel, Mr. Robinson, and Kenny were each indicted on two counts of first-degree murder.

¶ 18 Four years after the murders and before Defendants' trial, Kenny grew concerned that the private attorney his parents had hired to represent him was going to sue his parents for $50,000 if he proceeded to trial. Kenny met with his attorney and decided to sign an affidavit confessing to his involvement, naming Defendants as

the other two men in the gorilla masks and identifying Mr. Abel as Junior's killer. Kenny also told police that he and Defendants had used the Chevrolet Equinox, which belonged to Mr. Abel's mother, on the night of the crimes. He confirmed that he had stopped at the Sheetz in the vehicle after fleeing Tony's house. Kenny offered the affidavit to authorities and agreed to testify against Defendants to help secure a plea deal that consolidated his charges into a single active punishment of 254 to 317 months.

3. Pre-Trial Proceedings and Trial

¶ 19 Mr. Abel filed verified motions to suppress the DNA evidence and items recovered from his home on the ground that the warrants authorizing those searches were issued without a showing of probable cause and thus violated his rights under the United States and North Carolina Constitutions. The trial court heard Mr. Abel's motions and, after hearing evidence and arguments of counsel, denied them.

¶ 20 Defendants were tried jointly before a jury in February 2019.

¶ 21 During jury selection, the prosecutor relayed to jurors detailed information about himself and his family before beginning his examination of the venire. Defendants did not object to the prosecutor's statements.

¶ 22 Once the jury was selected, the prosecutor gave his opening statement, followed by Mr. Abel's counsel. Mr. Abel's attorney centered his opening statement on Kenny's credibility, forecasting that Kenny was not trustworthy and was only

testifying as part of a plea deal for a lesser sentence. He also posited that Kenny's testimony implicating Mr. Abel as the shooter would be contrary to the testimony of Ms. White, an eyewitness who would instead identify a man matching Kenny's description as the shooter.

¶ 23 The State introduced testimony from law enforcement officers, state crime lab analysts, and other witnesses. The State also introduced surveillance footage from Lowe's and Walmart showing Kenny and Defendants buying zip-ties and gorilla masks. The DNA analyses and objects seized from Mr. Abel's home were likewise introduced into evidence.[4] Det. Pacilio testified that he recognized Mr. Abel on the Walmart surveillance video when he first reviewed it, while Mr. Snider testified that he saw Defendants trying on masks.

¶ 24 Kenny testified that he and Defendants planned to rob Tony after learning that he was a drug dealer. They bought zip-ties and gorilla masks from Lowe's and Walmart to carry out the robbery. They then drove from Walmart to Mr. Abel's house to pick up gloves and met a fourth man, Larry Hairston ("Mr. Hairston"), who drove everyone to the crime scene in the Chevrolet Equinox. Kenny next testified that he and Defendants each carried a gun to Tony's house while Mr. Hairston parked the

[4] Mr. Abel's counsel objected to the introduction of each piece of evidence seized from his home before the jury; however, Mr. Abel's counsel did not object to testimony showing his DNA was the primary contributor to the durag.

Equinox on a nearby gravel road.

¶ 25 Kenny testified that the following occurred at Tony's home: Kenny and Defendants entered the house wearing gorilla masks and gloves. Kenny instructed two women and a bald man[5] standing in the living room to get down on the ground. Defendants walked down a hallway together, and Kenny heard gunshots from elsewhere in the house. Tony staggered into the living and collapsed with a gunshot wound to his torso. The bald man in the living room then managed to find a gun and shot at Kenny; Kenny responded by beating the bald man in the head repeatedly before Mr. Abel stepped in and shot the bald man. Kenny and Defendants then left the house with stolen drugs and money.

¶ 26 Kenny also testified that as he and Defendants walked back to the gravel road where Mr. Hairston was parked, Kenny realized he had dropped his phone at the crime scene. He and Mr. Abel went back to Tony's house to retrieve it but retreated when they saw police outside. When they returned to the gravel road, the Equinox, Mr. Robinson, and Mr. Hairston were gone. Kenny and Mr. Abel decided to walk back to Mr. Abel's residence, running into a man walking his dog on their way. The three men had a brief conversation before Kenny and Mr. Abel left. Mr. Abel disposed of his mask and gloves in a trashcan as they were walking and, a few hours later,

[5] Junior, one of the victims, was bald.

Kenny and Mr. Abel met Messrs. Robinson and Hairston at Mr. Abel's home. Kenny left the home in the Equinox, stopping at a Sheetz later that evening.

¶ 27 Ms. Walker, one of the survivors, gave a different account. She told the jury that her uncle, Junior, grabbed his gun and shot at the taller of the three intruders as the man was trying to leave. The taller man turned around, shot Junior in the thigh and chest, beat him in the head with his gun, shot him in the head, and then fired more shots at Tony before following the other two perpetrators out the front door.

¶ 28 Ms. White, the other survivor, testified consistent with Ms. Walker's version of events. She told the jury that, after hearing gunshots from down the hallway, she saw the two shorter of the three men attempt to leave while the taller man stayed behind. She next testified that Junior grabbed a gun and shot at the taller man. The taller man then jumped on Junior, beat him in the head with a gun, shot him, and fired additional shots at Tony and Junior before running from the home.

¶ 29 Mr. Robinson's counsel sought to cross-examine Kenny about his fear that his parents would have to pay $50,000 to his attorney if he went to trial at the time he entered his plea. The State objected based on Rule 403. Outside the presence of the jury, Kenny testified he was concerned "to a certain extent" about his legal representation when he signed the affidavit confessing to his role in the robbery. When asked whether the potential $50,000 exposure "cause[d] [him] to enter the

plea," Kenny testified that it "was on my mind" and "worried" him at the time. However, he also told the court that his issues with his counsel were resolved at the time he entered his plea, that he was truthful in his affidavit and testimony to the jury, that he would not change anything in his affidavit, that he entered the plea of his own free will, and that his concerns did not "overcome [his] will or what [he] wanted to do about entering that plea." The trial court sustained the State's objection but allowed Defendants "to ask in regards to . . . whether he was coerced into entering the thing. It's just the intricate details outside of that, that we're not getting into." Though Kenny did not testify before the jury concerning the $50,000, he did tell jurors that he was testifying pursuant to a plea deal that offered him a reduced sentence, that he had lied to police multiple times, and that he had been previously convicted of felony armed robbery, discharging a firearm in a public place, and using a firearm to commit a felony in Virginia.

¶ 30 After the presentation of evidence, counsel for the parties gave their closing arguments. Partway through his closing, the prosecutor solicited an answer from the jury to a rhetorical question. Moments later, a juror offered an unsolicited answer to another rhetorical question posed by the State. Defendants did not object. They did object to later statements by the prosecutor in his closing argument about Defendants' theory of innocence. The trial court sustained one of these objections but overruled the others.

¶ 31 Following closing arguments, the trial court gave its charge to the jury, which included an instruction on flight. Both Defendants were convicted on each count and sentenced to life imprisonment without parole. Defendants appeal.

II. ANALYSIS

¶ 32 This joint appeal presents the following questions: (1) whether the trial court erred in denying Mr. Abel's motion to suppress the evidence obtained from the search warrant executed on his home;[6] (2) whether the trial court erred in its instruction to the jury on flight; (3) whether the trial court erred in overruling counsels' objections to some statements by the prosecutor and in failing to intervene *ex mero motu* in response to others; and (4) whether the trial court erred in prohibiting Mr. Robinson's counsel from cross-examining Kenny concerning his parent's debt to his defense counsel at the time he negotiated and entered his plea. We address each argument in turn.

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[6] Mr. Abel also challenges the trial court's denial of his motion to suppress DNA evidence gathered as the result of a separate search warrant, but, because he failed to timely object to the admission of the DNA evidence before the jury and does not ascribe plain error to its admission, we limit our consideration to the motion to suppress the evidence seized from his home. *See State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000) (holding a defendant fails to preserve review of the introduction of evidence when no objection is lodged at the time of its admission before the jury). In any event, the affidavits submitted in the warrant applications for both the DNA swab and search of Mr. Abel's home contain identical material allegations and Mr. Abel's brief ascribes the same deficiencies to both. Assuming *arguendo* that Mr. Abel's challenge to the DNA warrant was preserved, our holding that the warrant application for the search of Mr. Abel's home was minimally sufficient to show probable cause applies with equal force to the DNA search warrant.

1. Mr. Abel's Motion to Suppress

¶ 33 Mr. Abel argues that the warrant authorizing the search of his home lacked probable cause and that the trial court erred in denying his motion to dismiss evidence gathered in the search.

¶ 34 We review a trial court's order denying a motion to suppress to "determin[e] whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "This Court reviews conclusions of law stemming from the denial of a motion to suppress *de novo*." *State v. Borders*, 236 N.C. App. 149, 157, 762 S.E.2d 490, 498 (2014).

¶ 35 The totality of the circumstances determines whether probable cause exists. *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 597 (2014). In the context of reviewing whether probable cause was shown to justify a search warrant, the totality of the circumstances must be determined from what is described in the warrant application and "information [that] is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official." N.C. Gen. Stat. § 15A-245(a) (2019). This means that:

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him,

> including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548 (1983)). Our Supreme Court has observed that "[t]his commonsense, practical inquiry is to be based upon the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Benters*, 367 N.C. at 665, 766 S.E.2d at 598 (citation and quotation marks omitted).

¶ 36 In considering the totality of the circumstances, a magistrate may "draw reasonable inferences from the material supplied to him by an application for a warrant." *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (citation omitted). Because of the factually specific nature of the analysis, "great deference should be paid a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258. "This deference, however, is not without limitation. A reviewing court has the duty to ensure that a magistrate does not abdicate his or her duty by 'mere[ly] ratif[ying] . . . the bare conclusions of [affiants].' " *Benters*, 367 N.C. at 665, 766 S.E.2d at 598 (quoting *Gates*, 462 U.S. at 239, 76 L. Ed. 2d at 549).

¶ 37 A magistrate's determination of probable cause does not withstand scrutiny when the "affidavits [supporting the warrant application] . . . are purely conclusory," *State v. Campbell*, 282 N.C. 125, 130, 191 S.E.2d 752, 756 (1972), and a court reviewing a "judicial officer's decision to issue the warrant . . . should consider only the information before the issuing officer." *State v. Brown*, 248 N.C. App. 72, 75, 787 S.E.2d 81, 85 (2016). If the information before the magistrate fails to establish probable cause and the magistrate issues the search warrant anyway, any evidence obtained from the search will be suppressed under the exclusionary rule. *See, e.g., State v. Garner*, 331 N.C. 491, 505, 417 S.E.2d 502, 510 (1992) ("[E]vidence seized in violation of the federal or state constitution must be suppressed.").

¶ 38 The warrant at issue here was supported by an affidavit providing the following information:

> A concerned citizen reported to the Police that he witnessed two black males trying on masks on October 8, 2014 at approximately 7:45 p.m. at a local retail store. The concerned citizen reported two of the individual's names due to a prior relationship. Police contacted the retail store and obtained video of three black males reported to be [Mr.] Abel, [Kenny], and [Mr. Robinson]. These three males can be seen purchasing masks. Retail store attendants reported that the males purchased gorilla masks bearing the same "upc" code[7] as the style collected near the crime

[7] A "Universal Product Code," or UPC, is "a combination of a bar code and numbers by which a scanner can identify a product and usually assign a price." *Universal Product Code*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/Universal%20Product%20Code (last visited March 19, 2021).

> scene. [Kenny] purchased his mask with a credit card. . . . The retail store reported having only sold one other gorilla mask outside of October 8, 2014 in the previous 12 days.

¶ 39 In ruling on Mr. Abel's motions to suppress, the trial court made oral findings of fact that tracked the statements in the affidavit before reciting the following conclusions of law:

> [B]ased on the facts enumerated, as taken from within the four corners of the search warrant, I conclude as a matter of law that there is probable cause to believe that a crime was committed *based largely upon the identification of the concerned citizen, not purported to be an anonymous source. I presume that the—the identity of the concerned citizen is known to the officers that interviewed him.* Based on the wording and the warrant itself, there is probable cause to believe that Darius O'Bryan Abel would have been one of the three persons that are purported to—to have committed the crime.

(emphasis added). Mr. Abel argues the trial court's presumption that the concerned citizen was known to police is unsupported by the information provided to the magistrate and, given that the trial court's probable cause was "based largely upon the identification of the concerned citizen," the motion to suppress should have been granted. Although we agree that the trial court erred in presuming the concerned citizen was a known and reliable source, we hold that the identification of Defendant from the surveillance video, as corroborated by other evidence described in the

affidavit, and other sworn allegations in the affidavit, all considered together, suffice to establish probable cause.

¶ 40 Nothing in the warrant application supports the trial court's presumption that the concerned citizen was known to police, and the State does not identify any such support in its brief. The affidavit provided to the magistrate included no information indicating that the "concerned citizen" was known to police. The trial court erred in presuming that the source was known to the police and in relying on that presumption to deny Mr. Abel's motion to suppress. This Court, like the trial court, is prohibited from considering information that, in hindsight, we know was available to police but was not presented to the magistrate who issued the search warrant.

¶ 41 This Court has repeatedly treated tips from unnamed "concerned citizens" as anonymous when the evidence presented in support of search warrant applications did not disclose whether the citizens were known to law enforcement. *See, e.g., State v. Hunt*, 150 N.C. App. 101, 103-04, 562 S.E.2d 597, 599-600 (2002) (describing an affiant's assertion that police "ha[ve] been receiving constant complaints from concerned citizens" in a warrant application as "complaints of concerned, anonymous citizens"); *State v. Brown*, 142 N.C. App. 332, 333-34, 542 S.E.2d 357, 357-58 (2001) (treating a 9-1-1 call from a "concerned citizen" as an anonymous tip). *But see State v. McCain*, 212 N.C. App. 157, 163-66, 713 S.E.2d 21, 26-28 (2011) (differentiating a tip from an unnamed concerned citizen from other anonymous tips because the police

officer stated in the warrant application that he met personally with the concerned citizen).

¶ 42 Our Supreme Court in *Benters* reiterated the rule that a tipster described in an entirely conclusory fashion will be treated as an anonymous source.[8] There, the officer who signed an affidavit and search warrant application attested that another officer met with "a confidential and reliable source" and received a tip about the location of a marijuana growing operation. *Benters*, 367 N.C. at 667, 766 S.E.2d at 559. The other officer, who actually met with the source, did not submit an affidavit. The Supreme Court reasoned that "[b]ecause the affidavit is based in part upon information received by [the other officer] from a source unknown to [the affiant], we must determine the reliability of the information by assessing whether the information came from an informant who was merely anonymous or one who could be classified as confidential and reliable." *Id.* at 665, 766 S.E.2d at 598 (citation omitted). It held that the tipster must be considered an anonymous source rather than as a confidential and reliable informant because "[t]he affidavit does not suggest

[8] This is in contrast to affidavits that disclose additional information about the concerned citizen, such as his or her name. *See, e.g., State v. Eason*, 328 N.C. 409, 419-20, 402 S.E.2d 809, 814 (1991) ("The fact that Hoffman *was named and identified . . . in the search warrant affidavit* provided the magistrate with enough information to permit him to determine that Hoffman was reliable." (emphasis added)). The record on appeal in this case includes an affidavit providing these necessary details, but that affidavit was not submitted in support of the application for a warrant to search Mr. Abel's home.

[the affiant] was acquainted with or knew anything about [the other officer's] source or could rely on anything other than [the other officer's] statement that the source was confidential and reliable." *Id.* at 668, 766 S.E.2d at 600 (citation omitted). The Supreme Court's holding in *Benters* followed *State v. Hughes*, 353 N.C. 200, 539 S.E.2d 625 (2000), which held that a non-testifying officer's "conclusory statement that the informant was confidential and reliable" to the testifying officer was insufficient to demonstrate the tipster was anything other than an anonymous informant under the totality of the circumstances. 353 N.C. at 204, 539 S.E.2d at 629.

¶ 43 In this case, Agent Holmes' affidavit did not name the "concerned citizen" and provided no information indicating that he or another officer knew the concerned citizen's identity. The trial court erred in considering the concerned citizen as anything other than an anonymous source. *See State v. Heath*, 73 N.C. App. 391, 396, 326 S.E.2d 640, 644 (1985) (holding a conclusory statement that a tip was given by unidentified "concerned citizens" was insufficient to "meet the standards for veracity and basis of knowledge"); *Benters*, 367 N.C. at 668, 766 S.E.2d at 600.

¶ 44 But Agent Holmes' affidavit in support of the warrant application contains more than just the "concerned citizen['s]" tip. The next line in the affidavit offers a second hearsay statement that "[p]olice contacted the retail store and obtained video of the three black males *reported to be* [Mr.] Abel, [Kenny] and [Mr.] Robinson."

(emphasis added). Even though the affidavit does not disclose who reported their identities or how Mr. Abel, Kenny, and Mr. Robinson were identified from the video, additional allegations in the affidavit corroborated Kenny's identification and thus allow a reasonable inference that the identification of Mr. Abel was reliable. *See, e.g., Gates*, 462 U.S. at 244, 76 L. Ed. 2d at 552 (reasoning that "it suffices for the practical, common-sense judgment called for in making a probable cause determination" to assume that if "an informant is right about some things, he is more probably right about other facts" as well (citation and quotation marks omitted)).

¶ 45 Specifically, and as found by the trial court, the affidavit provides that Kenny's credit card records showed he purchased his mask, which bore the same UPC code as the mask recovered near the crime scene, with a credit card that he had used and signed for in other transactions at the store. Thus, independent police investigation confirmed that the reported identification of Kenny in the surveillance video was accurate and linked him to the murders. Such corroborative evidence obtained by police may render an anonymous hearsay statement sufficiently reliable to support probable cause. *See State v. Hughes*, 353 N.C. 200, 205, 539 S.E.2d 625, 629 (2000) ("[A]lthough an anonymous tip by itself rarely demonstrate[s] the needed reliability, the tip combined with corroboration by the police could show indicia of reliability that would be sufficient to meet this burden."). Given that one of the hearsay identifications from the video was corroborated by law enforcement's review of

Kenny's credit card history and that history confirmed the purchase of a mask matching the kind used in the murders, we cannot say, under a common sense, non-technical review of the affidavit, that the magistrate improperly concluded there was probable cause connecting Mr. Abel to the crimes. *Gates*, 462 U.S. at 244, 76 L. Ed. 2d at 552.

¶ 46 We reach this holding not because the warrant application was unquestionably adequate, but because "[t]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded warrants." *Sinapi*, 359 N.C. at 398, 610 S.E.2d at 365 (citation and quotation marks omitted). The trial court commented that the warrant application "is not the most eloquent application that I have ever seen" and left "an exceptionally large amount of room for improvement." The trial court also cautioned, based on his own experience as a law enforcement officer, that his decision upholding this minimally sufficient affidavit should not serve as an invitation to draft similarly scant warrant applications in the future.[9] The trial

[9] The State argues that identifying information about the concerned citizen may have been omitted to protect the citizen's identity. That is certainly a reasonable precaution to take, and we note that police may obtain a valid search warrant even when the name of the citizen is omitted from the application if that identifying information is provided to and preserved by the magistrate. *See, e.g., State v. Hicks*, 60 N.C. App. 116, 120-21, 298 S.E.2d 180, 183 (1982) (holding a trial court properly considered a magistrate's notes showing the identity of an unnamed informant at a suppression hearing because "the magistrate made his notes . . . contemporaneously from information supplied by the affiant under oath, . . . the paper was not attached to the warrant in order to protect the identity of the informant, . . . the notes were kept in the magistrate's own office drawer, and . . . the paper was in the same condition as it was at the time of the issuance of the search warrant").

court's caution is well heeded given the fact-specific inquiries at play; that some minimal factual assertions suffice to establish probable cause under one totality of the circumstances does not mean they will establish probable cause under another.

¶ 47 Mr. Abel also contends that the warrant application fails to establish probable cause to believe that evidence of the crimes would be recovered in his home. We disagree. Agent Holmes' affidavit states that surviving victims told police that a trio of armed men in gorilla masks and gloves "took property from [the victims'] home." The affidavit detailed that only limited evidence was recovered; though it states one mask, two cell phones, and two gloves were found in and around the crime scene, nothing on the face of the warrant establishes that the murder weapon(s), stolen property, or other gloves and masks used in the crimes had been found. The affidavit later provides that, twenty days prior to the search warrant application, Mr. Abel gave his address as "227 W. Kerr Street, Salisbury NC" to his probation officers. The affidavit also states:

> Based on this affiant['s] training and experience it is known that persons can transfer evidence . . . . These items can be transferred or exchanged between people and places. Persons can both bring evidence to a place or scene and take evidence away from a place or scene. . . .
>
> Based on this affiant[']s training and experience, it is known that upon the purchase of items from retail stores[,] receipts, records, and or labels may be maintained by the purchaser. Purchase records regarding bank or credit card[s] may also be maintained by [the] purchaser.

> Based on this Affiant[']s training and experience it is known that numerous forms of evidence of a crime are often found through a search of a suspect's personal property which can be used to determine and clarify the facts surrounding a criminal act.
>
> This applicant has also found it common for persons involved in Burglary and Larcenies to maintain on hand amounts of U.S. Currency, financial instruments, and evidence of financial transactions relating to obtaining, transferring, secreting, or spending money made from selling or distributing the stolen items.
>
> The applicant has also found it common, through training and experience, for persons involved in Larcenies to have at their residence some of the property from said larcenies inside the residence and on the curtilage, outbuildings, storage buildings and vehicles surrounding the residence.
>
> This applicant has also found it common, through training and experience that persons involved in stolen goods often take, or cause to be made, photographs and/or video recordings of them, their associates, their property, and the stolen property. These photographs and/or video recordings are maintained in their possession.
>
> This applicant has also found it common, through training and experience that persons involved in stolen goods may sell this property and have receipts or other types of paperwork showing the location of where this property was sold or pawned. These persons may also use computer related devices that document stolen property.

¶ 48 As argued by the State, numerous federal courts have held that the judicial official issuing a warrant may, in the exercise of common sense, infer that a criminal who uses a firearm to carry out his misdeeds keeps evidence in his home. *See, e.g.,*

United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988) (holding it reasonable, in a case involving the attempted sale of an illegal firearm and silencer, to assume the gun and silencer were kept in the defendant's trailer even absent specific factual allegations in the application to that effect). It is well-established in North Carolina's precedents that assertions like those included in Agent Holmes' affidavit may be used to support a determination of probable cause. *See, e.g., State v. Bailey*, 374 N.C. 332, 339, 841 S.E.2d 277, 282 (2020) (describing reliance on an affiant's training and experience to establish a nexus between the place to be searched and criminal activity as a "well-settled principle[] of law"). Finally, given that the stolen items and several instrumentalities of the murders—including the murder weapon(s), two masks, and two pairs of gloves—had not been recovered at the time of the warrant application, it was reasonable, under the totality of the circumstances, for the magistrate to conclude that some evidence of the crimes could be located at the residence of someone who was suspected of carrying out the robbery and murders.

¶ 49 Mr. Abel nonetheless argues that the warrant application fails to establish a nexus to 227 W. Kerr Street because it states that "the above information has led the Affiant to believe that the residence located at 702 Candlewick may contain evidence regarding the murder[s.]" This error is not fatal to the search warrant. *See State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010) ("[S]tanding alone, an incorrect address on a search warrant will not invalidate the warrant where other

designations are sufficient to establish with reasonable certainty the premises." (citations, quotation marks, and original alterations omitted)). Considered as a whole, the affidavit supporting the search warrant application establishes that: (1) Mr. Abel was connected to the crimes; (2) he gave his probation officer his address as 227 W. Kerr Street; and (3) evidence of the crimes could be located at his home address based on Agent Holmes's training and experience. Agent Holmes concluded his affidavit with the "request[] that a warrant be issued . . . to search the property located at 227 West Kerr Street in Salisbury." While the affidavit does not explicitly state it "led the Affiant to believe that the residence located at [227 W. Kerr Street] may contain evidence regarding the murder[s]," a commonsense reading of the affidavit reveals such a belief on the part of Agent Holmes. Mr. Abel's argument is overruled.

2. The Flight Instruction

¶ 50 Mr. Able contends that because the State presented no evidence that he "took steps to avoid apprehension," *State v. Blakeney*, 352 N.C. 287, 314, 531 S.E.2d 799, 819 (2000) (citation and quotation marks omitted), the trial court erred in instructing the jury that it could consider evidence of his flight when determining his guilt. He further asserts that the trial court prejudicially erred in failing to instruct the jury that he denied fleeing. We disagree as to his first contention and hold he has waived review of the second.

¶ 51 Mr. Abel is correct that, in order to obtain a flight instruction, the State must show a defendant did more than depart the scene of the crime. *Id.* The State did offer such evidence in this case, as Kenny testified that: (1) he and Mr. Abel tried returning to the crime scene to recover the iPhone Kenny had dropped but decided to leave it behind when they saw police had already arrived; and (2) Mr. Abel tossed his gorilla mask and gloves in a trashcan as he walked from the crime scene back to his home. Because Kenny's testimony discloses acts taken by Mr. Abel "to avoid apprehension," *id.*, the trial court did not err in giving its instruction. "Where there is some evidence supporting the theory of the defendant's flight, the jury must decide whether the facts and circumstances support the State's contention that the defendant fled." *State v. Norwood*, 344 N.C. 511, 535, 476 S.E.2d 349, 360 (1996) (citation omitted).

¶ 52 Mr. Abel has waived review of his argument that the trial court should have given an additional instruction that he denied having fled. Mr. Abel's counsel did not ask the trial court to modify its instruction to include his denial of flight. Rule 10(a)(2) of the North Carolina Rules of Appellate Procedure provides that "[a] party may not make any portion of the jury charge *or omission therefrom* the basis of an issue presented on appeal unless the party objects thereto . . . , *stating distinctly that to which objection is made and the grounds of the objection*[.]" N.C. R. App. P. 10(a)(2) (2021) (emphasis added). Although unpreserved errors may be reviewed for plain

error on appeal, Mr. Abel has waived review of the issue because he has not "specifically and distinctly contended . . . plain error" in his brief. N.C. R. App. P. 10(a)(4) (2021). *See, e.g, State v. Shearin*, 170 N.C. App. 222, 231, 612 S.E.2d 371, 379 (2005) (holding a defendant waived review of his argument that the jury instruction was inconsistent with the theories in the indictment when he objected to the instruction on different grounds before the trial court and failed to assert plain error on appeal).

3. The Prosecutor's Statements to the Jury

¶ 53 Defendants argue that various statements by the prosecutor during jury selection and closing argument were so prejudicial as to require a new trial. Trial courts are afforded broad discretion in managing both jury selection and closing argument. *State v. Roache*, 358 N.C. 243, 270, 595 S.E.2d 381, 400 (2004); *State v. Cummings*, 361 N.C. 438, 465, 648 S.E.2d 788, 804 (2007). Prosecutors, too, "are given wide latitude in the scope of their [closing] argument." *State v. Flowers*, 347 N.C. 1, 36, 489 S.E.2d 391, 411 (1997). When a defendant fails to object to statements by counsel during jury selection or closing argument, we must determine whether the statements were "so grossly improper that the trial court should have intervened *ex mero motu*." *State v. Frye*, 341 N.C. 470, 491, 461 S.E.2d 664, 674 (1995) (applying the standard to jury selection); *see also State v. Rose*, 339 N.C. 172, 196, 451 S.E.2d 211, 225 (1994) (applying the same standard to closing argument). A defendant

asserting gross impropriety must show that "that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Pulley*, 180 N.C. App. 54, 68, 636 S.E.2d 231, 242 (2006) (citation and quotation marks omitted) (applying the standard to jury selection); *see also Rose*, 339 N.C. at 202, 451 S.E.2d at 229 (applying the same standard to closing arguments).

¶ 54 When a timely objection is lodged, we will reverse the trial court's ruling only if it "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Green*, 335 N.C. 142, 164, 443 S.E.2d 14, 27 (1994) (citation omitted) (applying the standard to jury selection); *see also State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (applying the same standard to closing arguments). Under this standard, we "first determine[] if the remarks were improper. . . . Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106 (citations omitted).

¶ 55 Defendants assert that the following statements by the prosecutor during jury selection were so grossly improper that the trial court should have intervened *ex mero motu*:

> [THE PROSECUTOR]: . . . [W]e appreciate the background information we've gotten from you already. To that end, I'm going to tell you a little bit about myself. My

> name is Paxton Butler.
>
> I'm the assistant district attorney, and I've done that for 21 years now. I work primarily over in Iredell in Alexander for the first half of my career, and did nothing but child sex cases over there for the most part. I came to Rowan some time ago.
>
> My wife is from Rowan County. She was born and raised here. She went to South Rowan High School, and we met in Chapel Hill in college.
>
> She works in Winston at this time. She's a vice president for a company. They do drug trials for the FDA. We have three kids; teenagers and one little girl who is not quite there yet, but keeps me busy. All three of them go to school here in Rowan County.
>
> We live out in the western part of the county, and we have for a couple of years now. Bill Kennerly hired me and brought me back to the—to the county some years ago, and I continue to work for Ms. Cook since she—she became our elected DA.
>
> That background information, hopefully, gives you a little bit of an idea about who I am, and it gives you a little bit of what to expect maybe. And that's, kind of, what we were looking for from each of you, is just kind of the background of who you are and where you come from. There may be some questions that we have to get a little bit more particular about in the next little bit.

¶ 56 Defendants rightly point out that, as cautioned by our Supreme Court, "[c]ounsel should not engage in efforts to indoctrinate, visit with or establish 'rapport' with jurors." *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980). The State does not argue the prosecutor's unnecessary autobiography was proper. But

even "obviously improper" statements do not require intervention *ex mero motu* unless they " 'infect[] the trial' so as to 'render[] the conviction fundamentally unfair.' " *State v. Waring*, 364 N.C. 443, 500, 701 S.E.2d 615, 651 (2010) (quoting *State v. Lemons*, 348 N.C. 335, 356, 501 S.E.2d 309, 322 (1998)). The prosecutor's gratuitous disclosures at issue here do not rise to that level.

¶ 57 We examine the prosecutor's statements in context. *Cf. State v. Jones*, 347 N.C. 193, 203, 491 S.E.2d 641, 647 (1997) ("In reviewing any jury *voir dire* questions, this Court examines the entire record of the *voir dire*, rather than isolated questions." (citation omitted)). His comments, at the opening stage of *voir dire*, were consistent with his stated intention of acclimating the jury to answering personal questions about their private lives truthfully, freely, and in detail. Given that neither of Defendants believed the comments were objectionable at the time, and in light of the broad discretion afforded to the trial court, *Roache*, 358 N.C. at 270, 595 S.E.2d at 400, we cannot say that the prosecutor's statements were grossly improper.

¶ 58 Defendants next assert that the following exchange between the prosecutor and the jury in closing arguments was grossly improper:

> [THE PROSECUTOR]: . . . This gray bag with all of this stuff in it, and it was pulled out, and moved, and—we saw what was inside of it. It was laid out there; right? Do you see the contents? Do you see all of that? What's missing from the picture, ladies and gentlemen? Tell me. Somebody look at it, and tell me what's missing from the picture?

> MULTIPLE JURORS: (Simultaneously reply.) Guns.
>
> [THE PROSECUTOR]: A gun. The gun is gone; ain't it? Why? Why? I imagine you-all have some guns in your home. I imagine you have all of this stuff that goes with it; right? If we randomly executed a search warrant at your house, we would find all of this stuff that's your's. But you know what we would find with it?
>
> JUROR FRANCIS: The gun.
>
> [THE PROSECUTOR] Your gun. Your gun. Why ain't his there? I think you know. That's an example of circumstantial evidence, ladies and gentlemen, and you saw some of that too. Congratulations.

¶ 59 The State concedes the exchange was improper. It was not, however, so grossly improper as to require intervention ex *mero motu* to disinfect the trial of fundamental unfairness.[10] "[O]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996). We must consider "the context in which the remarks were made, as well as their brevity relative to the closing argument as a whole." *State v. Taylor*, 362 N.C. 514, 537, 669 S.E.2d 239, 259 (2008) (citations and quotation

[10] Our holding, reached "only because of the demanding standard of review, should not be construed as an invitation to trial counsel to try the same thing again." *State v. Rogers*, 355 N.C. 420, 464, 562 S.E.2d 859, 886 (2002).

marks omitted). An improper statement that "was brief . . . [and] made in the context of a proper . . . argument" does not rise to the level of a grossly improper statement. *State v. Fletcher*, 354 N.C. 455, 485, 555 S.E.2d 534, 552 (2001).

¶ 60 While soliciting an answer from the jury is beyond the bounds of acceptable practice, the use of rhetorical questions is not in and of itself improper. *See, e.g., State v. Williams*, 350 N.C. 1, 25, 510 S.E.2d 626, 642 (1999) (holding a prosecutor's use of a rhetorical question "was well within the wide latitude afforded prosecutors in arguing contested cases"). The rhetorical questions here were relatively brief, and the intended effect was to draw the jury to a particular factual conclusion from the evidence—a purpose that is entirely consistent with closing arguments. *See, e.g.,* N.C. Gen. Stat. § 15A-1230(a) (2019) ("An attorney may, . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue."). The brevity and context of the exchange precludes a determination that the conduct was so grossly improper as to warrant intervention *ex mero motu*. *Taylor*, 362 N.C. at 537, 669 S.E.2d at 259.

¶ 61 Defendants also argue that the trial court erred in overruling their objections to the following portion of the State's closing argument:

> [THE PROSECUTOR]: . . . [I]t's simple in this respect; what you need to decide is were [Defendants] with Kenny Abel in the house that night.
>
> If they were, they're guilty of murder. Mr. Jordan

> practically admitted as much in his opening statement. Those two fellows—
>
> [ABEL'S COUNSEL]: Objection.
>
> [THE PROSECUTOR]: —whoever they were—
>
> [ABEL'S COUNSEL]: Objection.
>
> THE COURT: Sustained.
>
> [THE PROSECUTOR]: —are guilty of murder. They're just saying that it wasn't them. That we haven't proven that it was[] them. They're not even saying that it wasn't them. They're saying that we haven't proven—
>
> [ABEL'S COUNSEL]: Objection.
>
> [ROBINSON'S COUNSEL]: Objection.
>
> [THE PROSECUTOR]: —to you that it was[] them.
>
> THE COURT: Overruled.

Mr. Abel argues that the prosecutor improperly suggested his counsel had conceded guilt, both Defendants contend that the prosecutor misrepresented their defense, and Mr. Robinson posits that the prosecutor improperly commented on his decision not to testify.

¶ 62 As to Mr. Abel's first argument, it is apparent from the transcript that the trial court sustained his objection to any potential representation by the prosecutor that trial counsel had admitted any guilt. And a full reading of that exchange shows that the prosecutor was not commenting on any actual concession of guilt but was instead

merely reminding the jury of a statement Mr. Abel's own counsel made during his opening: "I'm not trying to defend and say the other two individuals, whoever they are, were not guilty of the crime." No impropriety is apparent from this section of the transcript when read in context. *Cf. State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41 (1994) ("[S]tatements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal.").

¶ 63 The second portion of the excerpt and the trial court's decision to overrule Defendants' objections also does not disclose an abuse of discretion. Mr. Robinson's contention that the prosecutor's remark, "[t]hey're not even saying that it wasn't them," was a comment on his decision not to testify is not supported by the transcript when read in context. The prosecutor's next sentence, "[t]hey're saying that we haven't proven . . . to you that it was[] them," makes it clear from the context that the prosecutor was referring only to the specific theory of innocence raised by the Defendants rather than any decision not to testify. *Cf. State v. Alston*, 341 N.C. 198, 247, 461 S.E.2d 687, 714 (1995) (holding no impropriety from comments that, "[w]hen read in context, . . . [did] not appear to be a comment on the defendant's failure to testify"). As for whether the prosecutor was misrepresenting that theory, it does not appear to have prejudiced Defendants, as the prosecutor accurately described it to the jury later on in his closing:

> [THE PROSECUTOR]: . . . Now, what the defense would

> have you believe is that somebody, two people, other than [Defendants] took masks, and gloves, and durags and went to that crime scene and did all of those bad things at the house . . . .

To the extent that this restatement by the prosecutor failed to cure any prior misstatement, Defendants themselves took advantage of the opportunity to further reiterate their theory of innocence in the closing arguments that followed:

> [MR. ROBINSON'S COUNSEL]: . . . The State didn't prove beyond all reasonable doubt as to who was with Kenny on October 8, 2014.
>
> We would contend James Michael Robinson was never at 611 Fifth Street; that James Michael Robinson is not five-foot-three; And that James Michael Robinson never shot, beat or fatally shot Junior. He never shot Angela—he never shot at Angela White or Jazmine Walker. He never fatally shot Tony Walker.
>
> . . . .
>
> [MR. ABEL'S COUNSEL]: . . . You may find that Kenny Abel was an accomplice in this case. Yeah, he was. He just wasn't the accomplice of Darius Abel.

In sum, it does not appear that the trial court abused its discretion in its treatment of Defendants' objections to this portion of the State's closing argument.

¶ 64 In addition to addressing each challenged statement individually, Defendants contend that the prosecutor's remarks had a cumulative prejudicial effect by inculcating a personal and overly familiar connection with the prosecution in the jury. We disagree. First, we reiterate our holding that none of the statements made in

closing argument to which the Defendants objected were prejudicial, and we therefore exclude them from consideration. Second, assuming *arguendo* that the prosecutor's improper recitation of his personal history during *voir dire* prejudiced Defendants to some degree, that portion of the proceedings occurred roughly three weeks prior to the prosecutor's brief but improper question-and-answer exchange at closing argument; any connection between comments made at these distinct stages was, in all likelihood, significantly attenuated due to this lengthy passage of time. Third, jurors were instructed to be impartial and to set aside any personal feelings towards the parties both before and after jury selection, and we presume the jury followed those directives. *See, e.g., State v. Nicholson*, 355 N.C. 1, 60, 558 S.E.2d 109, 148 (2002) ("We presume that jurors 'pay close attention to the particular language of the judge's instructions in a criminal case and that they undertake to understand, comprehend, and follow the instructions as given.' " (quoting *State v. Trull*, 349 N.C. 428, 455, 509 S.E.2d 178, 196 (1998))). Considering these temporally distant occurrences—neither of which garnered objections or are grossly improper—in the entire context of the trial proceedings, we hold that Defendants have failed to demonstrate any cumulative prejudice depriving them of a fair trial.

4. Cross-Examination of Kenny

¶ 65 Finally, Mr. Robinson argues that the trial court violated his right to effectively cross-examine Kenny under the Confrontation Clause when it prohibited Defendants

from asking Kenny about his fear that going to trial would cost his parents $50,000 in legal debt. The State disagrees and asserts that any error cannot be prejudicial because Kenny's "history of lies, his criminal history, and his potential motivation for giving untruthful testimony w[ere] presented to the jury via testimony and argument." We agree with the State and, assuming, *arguendo*, that the trial court did err, we hold that this error was harmless beyond a reasonable doubt under recent North Carolina Supreme Court case law and an examination of the trial transcript.

¶ 66 Limitations on cross-examination are reviewed for abuse of discretion. *State v. Bowman*, 372 N.C. 439, 444, 831 S.E.2d 316, 319-20 (2019). "If the trial court errs in excluding witness testimony showing possible bias, thus violating the Confrontation Clause, the error is reviewed to determine whether it was harmless beyond a reasonable doubt." *Id.* (citations omitted). The State bears the burden of demonstrating that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2019).

¶ 67 Our Supreme Court's decision in *Bowman* is instructive. There, a defendant on trial for murder sought to cross-examine the State's key witness, who was herself facing criminal charges, about whether she hoped to use her cooperation at trial to secure a more favorable plea agreement with the State. *Bowman*, 372 N.C. at 440, 831 S.E.2d at 317. That witness was critical to the State's case because "[t]here was no physical evidence linking defendant to the crime and no other witnesses who

placed him at the scene." *Id.* at 448, 831 S.E.2d at 322. The trial court prohibited cross-examination on whether the witness believed she would benefit from her testimony and the defendant appealed following his conviction; a majority of the panel on this Court held that the trial court committed reversible error, while a dissenting judge believed any error was harmless beyond a reasonable doubt. *Id.* The Supreme Court reviewed both questions and held that the defendant was entitled to a new trial. *Id.*

¶ 68 To determine whether the limitation erroneously imposed by the trial court was harmless beyond a reasonable doubt, the Supreme Court examined several prior decisions touching on the question, including *State v. Hoffman*, 349 N.C. 167, 505 S.E.2d 80 (1998), and *State v. McNeil*, 350 N.C. 657, 518 S.E.2d 486 (1999). In *Hoffman*, the Supreme Court held any error harmless because: (1) the witness in question was only a corroborating witness and the State did not rely heavily on his testimony, *Bowman*, 372 N.C. at 447, 831 S.E.2d at 322 (citing *Hoffman*, 349 N.C. at 180, 505 S.E.2d at 88); (2) the defendant was able to " 'thoroughly impeach[]' the witness regarding prior inconsistent statements and a lengthy history of past convictions[,]" *id.* (quoting *Hoffman*, 349 N.C. at 180, 505 S.E.2d at 88); and (3) there was other witness testimony and physical evidence connecting the defendant to the crime. *Id.* at 447-48, 831 S.E.2d at 322. Similarly, in *McNeil*, the Supreme Court held a restriction on a defendant's attempts at impeachment of a witness on cross-

examination was harmless beyond a reasonable doubt because, "as in *Hoffman*, [the] defendant here thoroughly impeached [the witness] regarding her prior inconsistent statements and prior convictions." 350 N.C. at 680, 518 S.E.2d at 500.

¶ 69 The *Bowman* court held that *Hoffman* and *McNeil* were distinguishable even though the defendant had an opportunity to impeach the witness's credibility by other means:

> [H]ere [the witness] was the key witness against defendant and was vital to the State's case due to the lack of other evidence against defendant. There was no physical evidence linking defendant to the crime and no other witnesses who placed him at the scene. While the State presented circumstantial evidence at trial, its case relied heavily on [the witness's] testimony. Therefore, it was crucial for defendant to demonstrate [the witness's] possible bias to the jury. The trial court erred by limiting the cross-examination of the State's principal witness when there was a lack of substantial evidence linking defendant to the crime and the error was not harmless beyond a reasonable doubt.

372 N.C. at 448, 831 S.E.2d at 322.

¶ 70 This case is much closer to *Hoffman* and *McNeil* than *Bowman*. As in *Hoffman* and *McNeil*, Defendants were able to thoroughly impeach Kenny by repeatedly calling into question his bias and credibility. For example, Kenny told the jury that he was testifying in exchange for a considerably lesser sentence than could otherwise be imposed, that he had lied to police repeatedly over the course of the investigation, and that he had been previously convicted of other felonies. Defendants' attacks on

Kenny's credibility continued in arguments to the jury; Defendants' counsel ably pointed out that Kenny's own description of events differed significantly from the testimony by innocent bystanders Mses. White and Walker. Defendants were therefore able, notwithstanding the trial court's limitation, to " 'thoroughly impeach[]' the witness regarding prior inconsistent statements and a lengthy history of past convictions." *Bowman* at 447, 831 S.E.2d at 322 (quoting *Hoffman*, 349 N.C. at 180, 505 S.E.2d at 88).

¶ 71 To be sure, *Bowman* makes clear that the ability to impeach a witness through other lines of inquiry does not demonstrate that any error is harmless beyond a reasonable doubt when that witness is "vital to the State's case due to the lack of other evidence against [a] defendant." *Id.* at 448, 831 S.E.2d at 322. However, as in *Hoffman*, significant additional physical evidence pointed to Mr. Robinson as a participant in the robbery and murder, including: (1) lab results showing Mr. Robinson's DNA as the primary contributor to the gorilla mask that was recovered in the nearby ballpark; (2) a cellphone—last used minutes after Tony and Junior were killed and found with that same mask—containing a purported "selfie" of Mr. Robinson taken on the day of the murders; and (3) lab results from the inside of a glove found near the crime scene—the outside of which was stained with blood matching Tony's DNA—showing that Mr. Robinson's DNA was the primary contributor. The State, seemingly acknowledging that Kenny lacked credibility,

expressly argued to the jury that this physical evidence was adequate to convict Mr. Robinson independent of Kenny's testimony. Thus, while Kenny was the only witness to identify Mr. Robinson as an accomplice, his relative untrustworthiness and the introduction of other physical evidence tying Mr. Robinson directly to the crimes meant the State did not treat his testimony as "vital" or rely on it as "heavily" as in *Bowman*. 372 N.C. at 448, 831 S.E.2d at 322. This case therefore tacks closer to *Hoffman* and *McNeil* and, consistent with those opinions, we hold that any error in restricting Mr. Robinson's cross-examination of Kenny was harmless beyond a reasonable doubt.

III. CONCLUSION

¶ 72 For the foregoing reasons, we hold that Defendants have failed to demonstrate prejudicial error.

NO PREJUDICIAL ERROR.

Judges COLLINS and GRIFFIN concur.

Report per Rule 30(e).