IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-438

No. COA21-517

Filed 21 June 2022

Greene County, Nos. 16CRS50236-37

STATE OF NORTH CAROLINA

v.

ERNEST MARIO ROACH, Defendant.

Appeal by defendant from judgments entered 11 March 2021 by Judge Imelda J. Pate in Greene County Superior Court. Heard in the Court of Appeals 8 February 2022.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. Mosteller, for the State-appellee.

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

GORE, Judge.

¶ 1 Defendant Ernest Mario Roach appeals from judgments entered upon jury verdicts finding him guilty of first degree murder and first degree sexual offense. On appeal, defendant contends his trial counsel provided ineffective assistance of counsel by not making a confrontation clause objection. We discern no error.

I. Factual and Procedural Background

¶ 2 On the evening of 30 April 2016, Jimmy McCotter and his wife, Eliza McCotter, were in their home located near Hookerton, North Carolina. That day was Ms. McCotter's birthday, and the couple spent the evening playing cards with their relative William Harper before Ms. McCotter went to bed around 9 p.m.

¶ 3 That same evening, defendant, Ellsworth Massey, III, and Tyrone Counsil, assembled at defendant's home in Greenville. Their initial plan was to rob a group of "Mexicans" they believed possessed a large amount of cash. Before they proceeded with that plan, they met with Stephen Thigpen, who they thought would know of lucrative places to rob.

¶ 4 Mr. Thigpen redirected their plan to robbing the McCotters' home, which Mr. Thigpen believed was owned by a young man in his early to mid-thirties, who ran all-night card games involving substantial cash wagers. Believing the McCotters' home would contain gambling proceeds, the four men decided to rob it.

¶ 5 At about 11 p.m., defendant and Mr. Massey knocked on the door of the McCotters' home. When Mr. McCotter unlocked the door and cracked it open, defendant and Mr. Massey rushed in while brandishing guns. Despite Mr. Massey immediately recognizing that, "it was nothing what [Mr. Thigpen] described," the two men demanded money, drugs, or guns. After Mr. McCotter replied he did not have any of those things, defendant went into the bedroom.

¶ 6 Shortly after entering the bedroom, defendant fatally shot Ms. McCotter in the

head at close range. Defendant then emerged from the bedroom and told Mr. Massey to "take [Mr. McCotter] back there in the room and let him see what I did to his wife." Defendant and Mr. Massey then ransacked the house looking for money and drugs. They also threatened to kill Mr. McCotter and Mr. Harper. Defendant and Mr. Massey ultimately left with about $3.75, Mr. McCotter's cellphone and truck key, and threatened to return to get the $200 they had demanded.

¶ 7 The four men then drove to another home in Hookerton where Mr. Thigpen claimed a woman and her brother lived and supposedly kept drugs and drug proceeds. Defendant and Mr. Massey also broke into this home through the front door.

¶ 8 The only person home was a frail woman, Sherlene Edwards. Defendant demanded money, while Mr. Massey searched the kitchen where Mr. Thigpen incorrectly claimed drugs and money would be found. When Ms. Edwards denied she had any money, defendant pistol-whipped her, pinched shut and removed the oxygen tube she was using, pushed her into the bedroom, and knocked her down.

¶ 9 Once inside the bedroom, defendant "put the gun up inside of" Ms. Edwards's vagina and put his mouth on her breast. Defendant continued to demand money from Ms. Edwards, and pistol-whip her, while stating "he done kill one, he gonna kill [Ms. Edwards] too." Defendant also demanded Ms. Edwards perform oral sex on him but was interrupted by the arrival of Ms. Edwards's son. Defendant and Mr. Massey fled and threatened to return.

¶ 10 After leaving the scene, defendant "bust[ed] out laughing" while describing his sexual assault of Ms. Edwards. The four men then switched to a different vehicle, concerned their first car had been spotted. Video surveillance at a gas station captured Mr. Council and Mr. Thigpen get out from this car. Defendant and Mr. Massey remained in the car at the suggestion of Mr. Council.

¶ 11 The four men then attempted to rob a third residence, but defendant and Mr. Massey did not make it into the house because of a dog guarding it. Defendant told the others he was unable to shoot the dog and proceed with the robbery because the magazine had fallen out of his handgun while pistol whipping Ms. Edwards.

¶ 12 The day after the home invasions, investigators from the North Carolina State Bureau of Investigation ("SBI") received reports implicating Mr. Council, Mr. Thigpen, Mr. Massey, and defendant in the crime spree. SBI investigators interviewed Mr. Council and Mr. Massey and determined there were consistent details implicating defendant. SBI and Sheriff's Office investigators went to defendant's residence in Greenville to execute a warrant for his arrest. After taking defendant into custody, investigators conducted a search of the residence and discovered a Hi-Point .40 caliber handgun and a Remington shotgun in an inoperative deep freezer on the back porch of defendant's home. The handgun was missing its magazine, and the magazine was not found during a search of defendant's home.

¶ 13 Investigators sent the handgun to the crime lab along with the bullet recovered

from Ms. McCotter's head. The bullet was badly deformed and no comparison to the handgun could be done. No analysis for DNA from body tissues or fluids on the handgun was performed.

¶ 14 A Greene County Grand Jury returned indictments on 24 April 2017 charging defendant with first degree murder and first degree forcible sexual offense. The State proceeded to trial during the 8 March 2021 Regular Criminal Session of the Greene County Superior Court, the Honorable Imelda J. Pate presiding.

¶ 15 At trial, Greene County Chief Deputy Sheriff Ryan Sasser testified he was called back to the murder scene two days after the crime because "[s]ome of the family members there had contacted us in regards to finding some shell casings that were there at the house," specifically in the bedroom where Ms. McCotter was killed. He further testified that he "believe[d] when [the family members] were cleaning up the crime scene area there, they were riffling through some of the clothing, and the shell casing fell out and fell out on the ground and they noticed it then." Deputy Sasser went on to identify the shell casing that he collected on 2 May 2016, specifically responding in the affirmative to the questions "did you collect that shell casing from [the McCotters'] home" and was it "the item you collected from the bedroom of Ms. McCotter." This shell casing was admitted as the State's Exhibit 12.

¶ 16 SBI Agent Jennifer Matherly subsequently testified that the State's Exhibit 12 was a .40 caliber shell casing, although it had been mistakenly marked on the

evidence bag as a .380 shell casing. The .40 caliber shell casing Deputy Sasser collected matched the .40 caliber handgun found in defendant's freezer.

¶ 17 Mr. Massey and Mr. Council both testified as witnesses for the State pursuant to plea agreements. Both were required to plead guilty to second degree murder with Mr. Massey agreeing to a sentence of 240 to 300 months of incarceration.

¶ 18 On 11 March 2021, the jury returned verdicts findings defendant guilty of both offenses. The trial court sentenced defendant to the mandatory sentence of life without parole for first degree murder, and to a consecutive sentence of 276 to 392 months of incarceration for first degree forcible sexual offense. Defendant gave notice of appeal in open court.

II. Discussion

¶ 19 On appeal, defendant argues he received ineffective assistance of counsel because his trial counsel failed to raise a Confrontation Clause objection when the State introduced hearsay evidence about the discovery of the .40 caliber shell casing found in the bedroom where Ms. McCotter was murdered. We disagree.

¶ 20 In a criminal proceeding, the defendant has a right to counsel. U.S. Const. amend. VI. "A defendant's right to counsel includes the right to effective assistance of counsel." *State v. Grooms*, 353 N.C. 50, 64, 540 S.E.2d 713, 722 (2000) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 25 L. Ed. 2d 763, 773 n.14 (1970)). "When a defendant attacks his conviction on the basis that counsel was ineffective,

he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citation omitted). To meet his burden, defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*: 1) deficient performance; and 2) prejudice. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984); *see Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248 ("[W]e expressly adopt the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution."). Deficient performance means trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial . . . ." *Id.*

¶ 21 Regarding the first prong of the *Strickland* test—deficient performance—"[c]ounsel is given wide latitude in matters of strategy," *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), and defendant has a heavy burden to overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694.

¶ 22 When evaluating the second prong of the *Strickland* test—prejudice—"[t]he fact that counsel made an error, even an unreasonable error, does not warrant

reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248.

¶ 23 In the case *sub judice*, defendant argues his trial attorney rendered deficient performance by failing to object to the State's inadmissible hearsay evidence about the discovery of a .40 caliber shell casing in the bedroom where Ms. McCotter was murdered, a violation of his right to confrontation. Defendant contends there is a reasonable probability the result of the proceeding would have been different had an objection been timely raised. We discern no violation of the Confrontation Clause in this case. Defendant fails to demonstrate deficient performance or prejudice.

¶ 24 The Confrontation Clause of the Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI; *see also* N.C. Const. art. I, § 23 ("In all criminal prosecutions, every person charged with crime has the right to . . . confront the accusers and witnesses with other testimony . . . ."). "The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citations omitted). However, this rule is not absolute.

¶ 25 The Confrontation Clause "does not bar the use of testimonial statements for

purposes other than establishing the truth of the matter asserted." *Crawford v. Washington*, 541 U.S. 36, 59 n.9, 158 L. Ed. 2d 177, 197 n.9 (2004). "Specifically, statements are not hearsay if they are made to explain the subsequent conduct of the person to whom the statement was directed." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (citation and quotation marks omitted). "Statements by non-testifying witnesses which may implicate the defendant in a crime are permissible when they are only used to explain the subsequent actions of the testifying witness." *State v. Rollins*, 226 N.C. App. 129, 139, 738 S.E.2d 440, 448 (2013). We review de novo whether defendant's right to confrontation was violated. *State v. Lowery*, 219 N.C. App. 151, 156, 723 S.E.2d 358, 362 (2012).

¶ 26 As a preliminary matter, defendant provides no reasoning or argument to support his assertion that his trial counsel's failure to object to the admission of the .40 caliber shell casing itself was deficient performance. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6).

¶ 27 Next, regarding Deputy Sasser's testimony about where and how the .40 caliber shell casing was found, the State elicited the following testimony from Deputy Sasser:

> [THE STATE]: Were you involved in this investigation in this case?

[DEPUTY SASSER]: I was.

[THE STATE]: Do you recall a time when you were called by a layperson back out to the McCotter residence to look and retrieve some evidence?

[DEPUTY SASSER]: I do.

[THE STATE]: Could you relate to the jury—tell the jury what that's about.

[DEPUTY SASSER]: We were called out, I believe it was a Monday after the initial investigation. It was late in the afternoon, I believe a little after 4:00 o'clock. Some of the family members there had contacted us in regards to finding some shell casings that were there at the house.

[THE STATE]: Had a shell casing been located in the bedroom?

[DEPUTY SASSER]: It had.

[THE STATE]: Where was it located?

[DEPUTY SASSER]: I believe when they were cleaning up the crime scene area there, they were riffling through some of the clothing, and the shell casing fell out on the ground and they noticed it then.

[THE STATE]: That would be the bedroom where Ms. McCotter was killed?

[DEPUTY SASSER]: That's correct.

. . .

[THE STATE]: And did you collect that shell casing from that home?

[DEPUTY SASSER]: That's correct.

> . . .
>
> [THE STATE]: Could you tell us, is that the item that you collected from the bedroom of Ms. McCotter?
>
> [DEPUTY SASSER]: Yes, sir.

¶ 28 Defendant exaggerates the scope of Deputy Sasser's testimony. Here, statements made by Ms. McCotter's family regarding where the .40 caliber shell casing was found were not offered for the truth of the matter asserted, or where the shell casing was found. Instead, these statements are offered to explain Deputy Sasser's subsequent actions during his investigation. Deputy Sasser's testimony established why he returned to the scene, and that he personally collected the shell casing from the bedroom. Defendant had an opportunity to cross-examine Deputy Sasser about collecting the shell casing. He did not do so. This comports with the requirements of the Confrontation Clause and was all that was required in this case.

¶ 29 We conclude that Deputy Sasser's testimony did not implicate the Confrontation Clause. Defendant cannot satisfy the first prong of the *Strickland* test, and thus, his argument is without merit. Assuming, *arguendo*, defendant established a violation of his right to confrontation and deficient performance by his trial counsel, he has not met his heavy burden of demonstrating a reasonable probability that the outcome at trial would be different had the testimony at issue been excluded.

III. Conclusion

¶ 30 For the foregoing reasons, we conclude that defendant received a fair trial free

from prejudicial error.

NO ERROR.

Judges HAMPSON and WOOD concur.

Report per Rule 30(e).