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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-730

No. COA22-221

Filed 1 November 2022

Halifax County, Nos. 16 CRS 50797, 50799

STATE OF NORTH CAROLINA

v.

DONTRAIL LLOYD

Appeal by defendant from judgments entered 12 August 2021 by Judge Eula E. Reid in Halifax County Superior Court. Heard in the Court of Appeals 5 October 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

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

ARROWOOD, Judge.

¶ 1 Dontrail Lloyd ("defendant") appeals from judgments entered upon his convictions for first-degree murder, felonious breaking and entering, and injury to real property. Defendant argues on appeal that he was subjected to ineffective assistance of counsel and that the trial court erred by giving a jury instruction on flight. For the following reasons, we find no error.

I. Background

¶ 2 On 5 July 2016, a Halifax County Grand Jury indicted defendant on one count each of first-degree murder, first-degree burglary, injury to real property, and possession of a stolen firearm. Defendant was also charged contemporaneously with one count of assault on a government official and one count of resisting, delaying, or obstructing a public officer. Defendant's cases came on for trial at the 9 August 2021 Criminal Session of Halifax County Superior Court, Judge Reid presiding. The possession of a stolen firearm charge was dismissed following trial. The evidence presented at trial tended to show the following:

¶ 3 Around 4:00 a.m. on 11 March 2016, Shyun Battle ("Shyun") was waiting for Jemar Battle ("Battle"), the victim in this case, for a ride to Johnnie Dickens's ("Johnnie") house so they could carpool to work, as they did each day. Shyun was "sitting on [his] front porch listening to music" when he heard defendant come "running past [his] house." Defendant "pointed a gun" at him, but put the gun down when he realized Shyun was someone he knew. According to Shyun, defendant appeared "scared . . . [and was] acting like somebody was after him[.]" Defendant asked if he could get a ride, and Shyun responded stating that "[Battle] probably would give him a ride . . . to Johnnie's house[.]" Battle arrived shortly after and agreed to give defendant a ride.

¶ 4 Defendant continued to possess the gun when they entered Battle's vehicle, and he proceeded to check the third row of Battle's car "to make sure ain't nobody back there." Defendant asked, "the doors are on lock [sic]?" Shyun responded "[yes], we're good." Shyun pressed the unlock button, defendant opened the door temporarily, and when he closed it, "the doors locked again." Then defendant "grabbed the gun" and asked Battle and Shyun, "why you all keep locking me in the car?" Once again, Shyun unlocked the door and "[defendant] just went off after that." Battle stopped the car to let defendant out, but "when [defendant] opens the door" he realizes they are not at Johnnie's house yet, so he demanded they keep driving.

¶ 5 As they continue driving, Shyun texted his cousin defendant's name "[to] at least [tell] somebody what's happening." Shyun testified that, while they were all still in the car, defendant "started shooting [Battle]" and "shot maybe four or five times." All three men then jumped out of the car. After firing the first four shots, "[defendant] ran across the field, but as he was running, he was still shooting back at [Battle and Shyun]."

¶ 6 Shyun then ran to Johnnie's house and told him "Oonk shot [Battle]." Johnnie and Shyun called the Scotland Neck Police Department, but after having trouble being understood over the phone, they decided to go to the police station instead. They were told backup was needed before they could go investigate the scene. Shyun stayed at the police station and Johnnie left to go be with Battle. Johnnie returned

to find "[Battle] laying on the side of the road on his hands and knees." Battle told Johnnie, "call my mama . . . I've been shot."

¶ 7 After receiving a call from dispatch about a possible shooting victim, Sergeant Cody Dickens ("Sergeant Dickens") of the Halifax County Sheriff's Office arrived on scene. Sergeant Dickens found Battle "crouched over in the middle of the road [with] . . . [h]is shirt . . . pulled up to the top of his neck[.]" Sergeant Dickens asked Battle what happened, and "he . . . stated somebody had shot him[.]" While Battle was "gasp[ing] for air," Johnnie said, "Oonk . . . shot him." Sergeant Dickens testified that he was already familiar with the nickname "Oonk" being associated with defendant from prior patrols in the Scotland Neck area. Sergeant Dickens then "looked to [Battle]," and asked him directly, "did Oonk shoot you?" Battle responded in the affirmative, and Sergeant Dickens asked who "Oonk" was. Battle replied, "Lloyd, Lloyd, shot me."

¶ 8 While still at the scene, Sergeant Dickens received another dispatch call about a possible attempted breaking and entering. Sergeant Dickens stayed with Battle while other deputies responded to the call. However, Sergeant Dickens was able "to see a light at a house where the deputies responded" across an open field.

¶ 9 Witnesses Katie and Bobby testified that they were sleeping when they were woken up to "something . . . knocking on the house." Their home had a screened-in front porch and defendant entered onto the porch and "kicked the door" and

attempted to "bust [through] the door" to their bedroom. Unaware of what was causing the knocking, Katie told Bobby "[g]et the gun." Bobby called out to defendant and asked "what . . . you doing out there?" Bobby opened the wooden door and fired one shot through the screen door. Defendant then "jumped right through the screen" and Katie heard something "[fall] on the ground." They found a black and red pistol and a black and red sneaker left behind by defendant.

¶ 10 Lieutenant Daniel Hundley ("Lieutenant Hundley") of the Roanoke Rapids Police Department, along with other officers, found defendant "crawling out from behind a shed or stable" when they arrived on scene. Lieutenant Hundley testified that defendant did not surrender peacefully. After a brief struggle between the officers and defendant, defendant was subsequently arrested and taken into custody.

¶ 11 Following trial, the jury returned a guilty verdict for first-degree murder and a guilty verdict for felonious breaking and entering and injury to real property. Defendant was sentenced to life in prison without parole for first-degree murder and received a consolidated sentence of 8 to 19 months for the convictions of breaking and entering and injury to real property. Defendant gave notice of appeal in open court.

II. Discussion

¶ 12 Defendant argues on appeal that he was deprived of his constitutional right to effective assistance of counsel when defense counsel failed to object to the "testimonial hearsay evidence" of Battle identifying defendant as the individual who shot him.

Defendant also contends it was error for the trial court to give a jury instruction on flight. We find no error.

A. Ineffective Assistance of Counsel

¶ 13 "A defendant's right to counsel includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citation omitted). To successfully assert an ineffective assistance of counsel claim, defendant has the burden of illustrating that counsel's conduct "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984). Thus, defendant has the burden of satisfying the two-prong test set out in *Strickland v. Washington*: (1) "[he] must show that counsel's performance was deficient" and (2) "but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248-49; quoting *Strickland v. Washington*, 466 U.S. at 694, 80 L. Ed. 2d at 698. In evaluating defendant's ineffective assistance of counsel claim, we presume counsel "acted in the exercise of reasonable professional judgment" and we must "avoid the temptation to second-guess the actions of trial counsel[.]" *State v. Gainey*, 355 N.C. 73, 112-13, 558 S.E.2d 463, 488 (2002), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2008).

¶ 14 Defendant contends he was subject to ineffective assistance of counsel when defense counsel failed to object to Sergeant Dickens's testimony. Specifically, defendant asserts the inclusion of Sergeant Dickens's testimony of Battle identifying

defendant as the shooter violated his right to confrontation under the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). Defendant argues he was prejudiced by the inclusion of this testimony as it was inadmissible hearsay to allow Sergeant Dickens's testimony as defendant lacked the opportunity to cross-examine Battle. "Because we find that there was no Confrontation Clause violation in this case, even were defense counsel to have objected, defendant is unable to establish deficient performance, much less prejudice." *State v. Calhoun*, 189 N.C. App. 166, 169, 657 S.E.2d 424, 426 (2008), *appeal dismissed*, *disc. review denied*, 666 S.E.2d 651 (2008).

¶ 15 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2021). While hearsay is usually inadmissible at trial, our Rules of Evidence provide for some exceptions that allow the admission of hearsay testimony when a declarant is unavailable. N.C. Gen. Stat. § 8C-1, Rule 804(b). Rule 804(b)(2) provides that an out-of-court statement of an unavailable witness is admissible when it is "[a] statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death." N.C. Gen. Stat. § 8C-1, Rule 804(b)(2). In other words, a "dying declaration" is an exception to the general ban on hearsay. *State v. Sharpe*, 344 N.C. 190, 193-94, 473 S.E.2d 3, 5 (1996).

¶ 16 Defendant does not cite any case law to support why the dying declaration exception to the hearsay rule should not apply here, but instead relies on the principle set forth in *Crawford v. Washington*, that out-of-court statements that are testimonial are barred, under the Confrontation Clause, unless defendant had prior opportunity for cross-examination. 541 U.S. 36, 50, 53-54, 158 L. Ed. 2d 177, 194 (2004). However, this Court has previously held that a "special exception" to the Confrontation Clause exists when the out-of-court statement is a "dying declaration." *Calhoun*, 189 N.C. App. at 170, 657 S.E.2d at 427 (internal quotation marks omitted); *See State v. Bodden*, 190 N.C. App. 505, 515, 661 S.E.2d 23, 28 (2008), *appeal dismissed*, *disc. review denied*, 363 N.C. 131 (2008), *cert. denied*, 558 U.S. 865, 175 L. Ed. 2d 111 (2009).

¶ 17 "The requirements for a dying declaration are: (1) at the time the declarant made the statements, the declarant was in actual danger of death; (2) declarant had full apprehension of the danger; (3) death occurred; and (4) declarant, if living, would be a competent witness[.]" *Bodden*, 190 N.C. App. at 512, 661 S.E.2d at 28 (citation omitted).

¶ 18 In the instant case, Battle had sustained three gunshot wounds when he gave his statement to Sergeant Dickens identifying defendant as the shooter; "one in the chest . . . another one in [his] back . . . and the third gunshot wound just went across the surface of his chest." Battle was also found "crouched over in the middle of the

road . . . gasping for air." Furthermore, the forensic pathologist testified that Battle died "as a result of multiple gunshot wounds." As shown by his request that Johnnie call his mother it is clear that Battle was in apprehension of the danger. Thus, Battle's statement met the requirements of a dying declaration; defendant's argument is overruled.

B. Jury Instruction on Flight

¶ 19 Defendant next contends the trial court erred when, over defense counsel's objection, it instructed the jury on flight because there was insufficient evidence he took steps to avoid apprehension. We disagree.

¶ 20 We review challenges to jury instructions *de novo*. *State v. Harvell*, 236 N.C. App. 404, 410, 762 S.E.2d 659, 664 (2014), *disc. review denied*, 368 N.C. 296 (2015). "Under a *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation and quotation marks omitted).

¶ 21 "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and . . . an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974) (citation omitted). Thus, "a trial judge should not give instructions to the jury which are not supported by the evidence

produced at trial." *Id.* (citing *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449 (1970)). Our Supreme Court has previously stated:

> [A]n instruction on flight is justified if there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged. Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.

State v. Blackeney, 352 N.C. 287, 314, 531 S.E.2d 799, 819 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001) (quotation marks and citations omitted).

¶ 22 Defendant argues a jury instruction on flight was improper as "the actions he took increased the likelihood of his apprehension[.]" This reasoning is immaterial to our analysis; "[r]egardless of the reason for the flight, the relevant inquiry is whether there is evidence that defendant left the scene of the murder and took steps to avoid apprehension." *State v. Norwood*, 344 N.C. 511, 534, 476 S.E.2d 349, 359-60 (1996), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997) (citation, brackets, and quotation marks omitted).

¶ 23 The State presented evidence that defendant fled across an open field and to Katie and Bobby's home after the shooting, and "was still shooting. . . ." Then defendant attempted to break into their home. Furthermore, defendant did not surrender peacefully, but "a brief struggle" ensued as he "resisted arrest" from multiple officers. Additionally, forensics proved the gun found at their home was not

the weapon defendant used to shoot Battle. *State v. Huey*, 243 N.C. App. 446, 454-55, 777 S.E.2d 303, 308 (2015), *rev'd on other grounds*, 370 N.C. 174, 804 S.E.2d 464 (2017) (finding the jury instruction on flight proper where defendant fled the scene and gun was never recovered). This evidence was reasonably sufficient to support the State's request for a jury instruction on flight. Defendant's contention is overruled.

III. Conclusion

¶ 24 For the foregoing reasons, we find defendant received a fair trial free from error.

NO ERROR.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).