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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-388

Filed 05 July 2023

Onslow County, Nos. 16CRS057559, 17CRS058110-11

STATE OF NORTH CAROLINA

v.

STEVEN JARREL MCCARTY

Appeal by Defendant from judgments entered 7 October 2021 by Judge Tiffany Peguise-Powers in Onslow County Superior Court. Heard in the Court of Appeals 8 March 2023.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Danielle Marquis Elder, for the State-Appellee.

Law Office of Lisa Miles, by Lisa Miles, for Defendant-Appellant.

COLLINS, Judge.

Defendant Steven Jarrel McCarty appeals from judgments entered upon jury verdicts of guilty of two counts of first-degree murder and one count of burning personal property. Defendant argues that the trial court erred by denying his motion to dismiss the murder charges for insufficient evidence. Defendant also argues that the trial court committed plain error by allowing inadmissible victim impact evidence

and character evidence or, in the alternative, that his trial counsel was ineffective for failing to object to inadmissible evidence. We find no error in the trial court's denial of Defendant's motion to dismiss, no plain error in the admission of the challenged evidence, and no ineffective assistance of counsel.

I. Background

Brothers DeAndre Gilbert, 19, and Tyler Gilbert 16, were shot to death on 14 May 2016 in the Maple Hill area. Their dead bodies were found on 18 May 2016 in a heavily wooded trash dump site; the car they were driving was found within a few miles, completely burned.

Two weeks before the brothers were shot, DeAndre had purchased a gun from Connie Cox. The gun originally belonged to Kino Hawkins. Kino testified that he had given the gun, a black Ruger SR9 with a silver handle, to Keion Everett, who gave it to Quinton Moore, who gave it to Connie on 3 May 2016. The next day, Connie sold the gun to DeAndre.

Kino called several people in an attempt to get the gun back, including Defendant, "[b]ecause the only time I met Dre they was together [s]o I figured they hung together[.]" Defendant told Kino that "he will holler at his homeboy" and "that he will get it back for me."

Cell phone records show a call from Defendant to Kino on 12 May 2016 and then a text message from Defendant to Kino the next day, 13 May 2016, stating "Aye look. I'm gonna get it. Word on blood you will have it." Also on 13 May 2016, Montrell

Batson saw DeAndre with a chrome 9-millimeter gun, and overheard Defendant asking DeAndre to give him the gun. DeAndre refused to give it to him.

Later that night, Defendant and Marquis Kent arrived at DeAndre and Tyler's home, where they lived with their brother and mother, Christine Dubose. Family and friends were gathered at the home to celebrate DeAndre's nineteenth birthday. DeAndre's girlfriend, Kelsi Batchelor, and close friend, Fred White, were at the party.

The next day, 14 May 2016, DeAndre and Tyler borrowed their mother's car, a black 2013 Hyundai hatchback sedan, dropped Kelsi off at work around 1:30 p.m., and drove to pick up Fred. Together, the three of them went to Keyon Kent's home in Southwest to smoke marijuana.

Phone records indicate several communications between Defendant and DeAndre earlier that day, including a text message at 12:55 p.m. from DeAndre to Defendant that stated, "I'm just letting you know I don't have time for the fuckery. So, if you plan on saying some dumb shit bout my nina." An hour later, Defendant texted DeAndre, "Could you meet me in the west[?]" DeAndre responded, "yes." Defendant texted back, "Aye look I got a lick who thinking he is buying guns." ¹

DeAndre then texted Defendant, "W y a [,]" meaning where are you at? Defendant responded, "Maple Hill[.]" DeAndre texted, "So how was I meeting you in the west?" Defendant responded, "to hit the lick." DeAndre texted that he was going

¹ Agent Michael Sutton with the Federal Bureau of Investigation testified that the phrase to "hit a lick" references some sort of robbery.

to be at Keyon's residence.

An hour and a half later, Defendant texted DeAndre the location to meet, "Gurganus Road[.]" Fourteen minutes later, at 3:54 p.m., Defendant texted DeAndre, "Don't bring Fred, I got him on the next one." At 4:15 p.m., Defendant texted DeAndre, "If the car packed, I am dub that shit cuz I told you." Telephone communication between them ceased at 4:18 p.m.

Fred testified that while at Keyon's residence, DeAndre got a call from Defendant telling DeAndre and Tyler to meet him in Maple Hill and not to bring Fred. DeAndre and Tyler left Fred at Keyon's, telling him to "sit this one back" and promising to come back and get him.

Ms. DuBose called Tyler shortly after 4:00 p.m. to tell him that she needed the car so she could be at the pharmacy by 6:00 p.m.; he told her that he was on his way, and was about 20 minutes away. She sent Tyler a text message about 30 minutes later. She got a text in response that said, "I'm on my way," but "it was spelled out, and not abbreviations like he would normally text me[.]"

At 4:42 p.m., DeAndre spoke to Kelsi on the phone and told her he was going to meet Defendant in Maple Hill. She told DeAndre that that was a bad idea and tried to dissuade him from going.

After the 4:42 p.m. phone call, no one had any further phone or text communication with DeAndre or Tyler. Thirty-three phone calls were exchanged between Defendant and DeAndre between 12 May 2016 and 14 May 2016, but none

were exchanged after 4:18 p.m. on 14 May 2016.

At 5:05 p.m., Defendant texted Marquis, “I just squeeze” and “You dumb ass [expletive.]” Another text stated, “my nerves bad[.]”

Ms. Dubose had continued to try and contact DeAndre and Tyler. At around 7 p.m., Ms. Dubose called Fred, who told her that he had been trying to get in touch with DeAndre and Tyler. Ms. Dubose told him their phones were going straight to voicemail. She asked him, “Where did the boys go?” Fred told her that they went to go meet up with Defendant in Maple Hill. When she asked Fred why he didn’t go with them, Fred told her that Defendant told DeAndre “to leave him behind. That there wasn’t enough room in the car[.]” Fred was still at Keyon’s with no ride home.

At 8:11 p.m., Defendant sent a text to 919-538-6127, “Old boy still with you[?]” Defendant got a response, “Yeah, he waiting on Dre and them to come get him.” Defendant replied, “Get him a ride. I give you the money, and I got your bitch for you. It’s over. Let’s get it.”

Kino received phone calls from Defendant around 9:00 p.m. about meeting to buy his gun back. Defendant told Kino that he had the gun and they arranged to meet in Maple Hill. Kino arrived first and then Defendant pulled up in a four-door sedan. Defendant got out of his car and got into Kino’s truck. Kino gave Defendant \$100 and Defendant gave Kino the gun. When Kino looked at the serial number, he knew it was his gun. “It was a Ruger SR9. . . . It was silver with a black handle.” Kino identified the gun at trial from photographs of DeAndre holding the gun when

he had it. Kino sold the gun a few days later.

Ms. Dubose reported to law enforcement that her sons were missing and that they had left Keyon's home to meet Defendant in Maple Hill. Investigators used cell site location records² to determine where Defendant's phone had been at the time of its last communication with DeAndre's cell phone. Investigators used these coordinates to conduct a search of the Maple Hill area on 18 May 2016. They located the dead bodies of DeAndre and Tyler down a heavily wooded, dirt road off Hardy Graham Road, which runs between William Gurganus Road and Webbtown Road.

Down the dirt road, investigators came to a clearing with a trash dumpsite and found DeAndre's body on the opposite side of the road, fifteen to twenty feet into the woods. His naked body was covered by a multicolored blanket. A seamstress tape measure was tied around the body at the waist in a knot. From its positioning, it appeared the body had been dragged and dumped in that area.

Crime Scene Investigator Lieutenant Evans noted DeAndre's face bore evidence of insect infestation, the early stages of decomposition of the body. DeAndre's body showed no defensive wounds, only a single gunshot wound to the neck behind his ear, from a medium caliber weapon. The bullet left no exit wound.

² Cell phone records introduced included GPS cell site location data, determined from switch information of the date and time of a call, as well as call logs and text data for the date range 12 May through 17 May 2016 from several cell phone subscribers including: Defendant; DeAndre Gilbert; Tyler Gilbert; Kino Hawkins; Marquis Kent; Fred White; and Kelsi Batchelor. These records were published to the jury.

Investigators located Tyler's body further down the dirt road, floating in a ditch of water. His body too showed no defensive wounds, only a single gunshot wound to the face, in the right cheek area.

Investigators located Ms. Dubose's 2013 Hyundai Accent hatchback burned beyond recognition two to three miles away, off Maple Hill School road, near the intersection of Webbtown and Wooten Road,³ in a clearing at the back of a wood line. The vehicle was later identified by its structure as well as the Hyundai emblem and license plate which were preserved after falling off the vehicle during the fire. Otherwise, the vehicle was completely burned, and only the metal shell of the car remained, such that no origin of the fire could be determined.

From his observation of the burned vegetation around the vehicle and the extent of damage to the vehicle, Lt. Evans opined that the fire had been extremely large and would have generated a lot of heat.

Although Lt. Evans detected the odor of gasoline at the scene, soil samples were insufficient to identify an accelerant, owing to the saturated ground which had received one half inch of rainwater over many days.

Ms. Dubose identified the tape measure tied around DeAndre's body as one she used as a certified nursing assistant to measure children at the clinic where she worked. It had been left in her car.

³ Hardy Graham Road becomes Wooten Road in Pender County.

The projectile removed from DeAndre's head during autopsy was determined to be 9-millimeter ammunition fired from a medium caliber weapon but could not be compared to a firearm since no firearm was recovered.

Surveillance video from the Scotchman, a nearby gas station, captured Defendant purchasing gasoline in a small red gas can at 1:25 a.m. on 15 May 2016, along with his friend Marquis and Kierra Johnson who had driven them there in his white Camry. Defendant left the Scotchman in Kierra's vehicle, heading in the direction of Maple Hill School Road. Kierra testified that he drove down William Gurganus Road, then down Hardy Graham Road, and dropped off Defendant and Marquis at a curve in the road at John Pickett Road. At that time, Defendant's face was not burned.

Cell site location data confirmed that DeAndre and Tyler had been together when they left the area of Keyon's residence and traveled to Maple Hill. From 4:00 p.m. to 5:53 p.m., Defendant's phone was in the vicinity of where the brother's bodies and the burned car were later found. Marquis's phone was not; from 4:02 p.m. to 5:42 p.m., Marquis's phone was in an area in Jacksonville, including Keyon's house. Cell site records also placed Defendant in Maple Hill near the Scotchman store in the early morning hours of 15 May 2016.

Defendant's cousin, Latasha James, saw Defendant on 16 May 2016, when he showed up at her mother's home, seeking help for extensive burns he had suffered to his face. She noted that his face was "badly burned" and the burns, which covered a

large portion of his face, looked fresh. Latasha's mother asked Defendant how he had burned his face, and he told her that he had been playing with fire. Her mother's home, at 221 John Picket Road in Maple Hill, is located in between the areas where the brother's bodies and the burned car were located.

Ms. Andrea Robinson testified that she saw Defendant with burns on his face when he came to her house with Marquis. Ms. Robinson overheard Defendant state that whatever happened to DeAndre and Tyler was "over some money or something" and the reason his "face was burned up" was because he "tried to go back and burn the bodies." She recalled that his statement about the two boys getting killed "involved a gun" and that she heard him state that "he shot the two boys and went back to burn the bodies."

Defendant called Fred the Sunday after DeAndre and Tyler went missing, claiming he never got up with DeAndre and Tyler and stating that he had "nothing to do with what happened to them."

When Defendant was arrested on 21 May 2016, seven days after the murders, Defendant's face was still observably burned, mostly on the right side of the tip of his nose and over the left eye and right ear. Colonel Chris Thomas with the Onslow County Sheriff's Office observed the burns to Defendant's face and opined that these injuries were consistent with a fire flash to the face.

Forensic pathologist Dr. Karen Kelly determined that the observed rate of decomposition of the bodies was consistent with their deaths occurring on 14 May

2016 and being left outside in the elements until discovery on 18 May 2016. In Dr. Kelly's opinion, DeAndre died as result of a penetrating gunshot wound, which left no exit hole. Based on the bullet trajectory, Dr. Kelly determined that DeAndre was shot from behind, with a bullet trajectory from back to front, right to left, and downward.

Tyler had been shot in the right cheek with an exit wound to his back left neck. The bullet trajectory was from front to back, from right to left, and downward. His body showed evidence of immersion changes to the head and feet, which was consistent with the body being found in water, but no water entered his lungs, indicating he was dead before he became submerged in water.

Defendant was charged on 21 May 2016 with burning personal property. He was charged on 27 December 2017 with two counts of first-degree murder. After a jury trial, Defendant was found guilty on all charges. He was sentenced to two consecutive prison terms of life without the possibility of parole for the murders and a consecutive prison term of eight to eleven months for burning personal property. Defendant gave notice of appeal in open court.

II. Discussion

A. Motion to Dismiss

Defendant argues that the trial court erred by denying his motion to dismiss the murder charges. Defendant "concede[s] that the State's evidence implicating [Defendant] in burning personal property was sufficient to go to the jury" but that

“there was little to no evidence that he took part in either of the killings.”

The standard of review for the denial of a motion to dismiss is de novo. *State v. Stroud*, 252 N.C. App. 200, 208, 797 S.E.2d 34, 41 (2017) (citation omitted). In reviewing the trial court’s ruling, this Court “must evaluate the evidence in the light most favorable to the State, and all contradictions in the evidence must be resolved in its favor.” *Id.* at 209, 797 S.E.2d at 41 (citation omitted).

“If the trial court finds substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.” *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (citation omitted). “Ultimately, the question for the court is whether a reasonable inference of defendant’s guilt may be drawn from the circumstances.” *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998) (citation omitted). If, however, the evidence presented at trial is “sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.” *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229-30 (2000) (citation omitted).

In order to survive a motion to dismiss a charge of premeditated first-degree murder, the State must present sufficient evidence that the defendant was the perpetrator of “(1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation.” *State v. Peterson*,

361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007) (citing N.C. Gen. Stat. § 14-17).

In this case, the evidence taken in the light most favorable to the State shows the following: DeAndre had purchased a gun that had belonged to Kino. Defendant was determined to get the gun from DeAndre and sell it back to Kino. In the days leading up to the murders, Defendant told Kino he would get his gun back to him. The day before the murders, Defendant texted Kino, “Aye look. I’m gonna get it. Word on blood you will have it.” That same day, Defendant was overheard asking DeAndre to give him the gun, but DeAndre refused.

The next day, Defendant lured DeAndre and Tyler to the Maple Hill area. Defendant’s text messages directed DeAndre and Tyler to come alone to Maple Hill, to Gurganus Road, in the vicinity where their bodies were later located. Thirty-three phone calls were exchanged between Defendant and DeAndre between 12 May 2016 and 14 May 2016, but all communication between them ceased after 4:18 p.m. on 14 May 2016. Cell site location data placed Defendant in the vicinity of where the bodies were located, during the period of time when the murders likely occurred.

Thereafter, knowing that DeAndre and Tyler would not be back to pick up Fred, Defendant texted someone, “Get him a ride. I give you the money, and I got your bitch for you. It’s over. Let’s get it.” An hour after that, Defendant contacted Kino to tell him that he had the gun back. Later that night, Defendant met Kino and sold the gun back to him.

Within hours of this sale, Defendant was seen on surveillance video buying

gasoline at a gas station in the vicinity of where the car was burned on the night it was burned, and cell site data placed him in the location of the burned car that night. The next day, Defendant was observed with burns on his face. Defendant was heard later admitting that he had “shot the two boys and went back to burn the bodies.”

Viewed in the light most favorable to the State, this evidence was sufficient to establish Defendant as the perpetrator of the murders of DeAndre and Tyler. Thus, the trial court did not err by denying Defendant’s motion to dismiss.

B. Challenged Evidence

Defendant next argues that the trial court plainly erred by admitting victim impact evidence and improper character evidence. Alternatively, Defendant argues that counsel was ineffective in failing to move to exclude or limit the challenged evidence.

“For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). “To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty.” *Id.* (citations and quotation marks omitted).

To bring a successful ineffective assistance of counsel claim,

First, the defendant must show that counsel’s performance

was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The Supreme Court, further elaborating on the prejudice prong, explained that “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

Evidence of the impact of a crime upon the victim or victim’s family, such as physical, psychological, or emotional injury, “is usually irrelevant during the guilt-innocence phase of a trial and must be excluded.” *State v. Graham*, 186 N.C. App. 182, 190, 650 S.E.2d 639, 645 (2007) (citation omitted). A notable exception to this general rule is “victim impact evidence which tends to show the context or circumstances of the crime itself, even if it also shows the effect of the crime on the victim and his family” *Id.* at 191, 650 S.E.2d at 646 (citation omitted).

Subject to certain exceptions, character evidence is generally not admissible for proving a person acted in conformity therewith on a particular occasion. N.C. Gen. Stat. § 8C-1, Rule 404(a) (2021). Evidence is not admissible where the only

probative value of such evidence “is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990) (emphasis omitted).

At trial, the Ms. Dubose testified about conversations she had had with Defendant, who would come talk to her at her back porch, whereby she learned that Defendant had been on probation and was not allowed to live at her apartment complex. Ms. Dubose also testified about her relationship with her sons, her actions immediately after learning that her sons had been fatally shot, the support she received from her family and friends, and the funeral that was held for her sons in Connecticut. She further testified that losing her sons is her “worst nightmare” and “[i]t’s something that I’ll never get over” and that “[i]t’s caused me a lot of anxiety and depression.”

Kelsi testified that Defendant had allegedly cut off his electronic monitoring device, was homeless, and had no friends. Kelsi also testified that DeAndre’s death has “affected her mentally [and] physically[.]”

Even assuming *arguendo* that the challenged evidence was admitted in error, in light of other evidence against Defendant, Defendant cannot show that “absent the error, the jury probably would have reached a different verdict.” *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335. We, therefore, find no plain error.

Furthermore, even assuming *arguendo* that defense counsel’s performance was deficient because counsel failed to object to the evidence Defendant now challenges,

in light of other evidence against Defendant, Defendant cannot show there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. We, therefore, find no ineffective assistance of counsel.

III. Conclusion

For the reasons stated, we find no error in the trial court's denial of Defendant's motion to dismiss, no plain error in the admission of the challenged evidence, and no ineffective assistance of counsel.

NO ERROR; NO PLAIN ERROR; NO INEFFECTIVE ASSISTANCE OF COUNSEL.

Judges GRIFFIN and STADING concur.

Report per Rule 30(e).