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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-41

Filed 15 October 2024

New Hanover County, Nos. 20CRS2234 20CRS52785

STATE OF NORTH CAROLINA

v.

RAY ANTHONY SOUTHERS, SR.

Appeal by defendant from judgment entered 19 May 2023 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 2 October 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Zachary K. Dunn, for the State.

Appellate Defender's Office, by Glenn Gerding, and by Assistant Appellate Defender, Kathryn L. VandenBerg, for the defendant-appellant.

TYSON, Judge.

Ray Anthony Southers, Sr. (“Defendant”) appeals from judgment entered upon a jury’s guilty verdict for second-degree murder. Our review discerns no error.

I. Background

Defendant shot and killed Jody Lopez (“Lopez”) with a shotgun inside her

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apartment on 16 April 2020. Lopez was dating and living with Kevin Booker (“Booker”) at the time of her death at 1309 South 4th Street, Apartment C, in Wilmington, North Carolina. Apartment C is located across the hall from Apartment D. Defendant’s girlfriend, who he occasionally spent the night with, lived in Apartment D.

Defendant, Lopez, and Booker were friends, and they often spent time together in Apartment C. Defendant and Lopez had argued a few weeks before Lopez was killed. Lopez slapped Defendant’s face during the argument.

At around 10:30 p.m. on 15 April 2020, Booker came home and saw Defendant sitting on a cooler in the hallway between their apartments, drinking beer and polishing his shotgun. Booker entered Apartment C and located Lopez in the bedroom they shared together. Booker and Lopez had been arguing, but they were “trying to talk through it.” While in the apartment, Booker encountered two of their other friends, “Bob” and “Philly.” Bob lived in the apartment with Booker and Lopez. Philly was a homeless man who Bob, Booker, and Lopez permitted to sleep in their apartment.

After arguing with Lopez, Booker laid down on their bed, while Lopez laid down on a couch in their bedroom. Both Booker and Lopez had “smoked” together earlier in the day, but Booker testified neither he nor Lopez were intoxicated by the time they laid down to go to sleep.

Booker testified Defendant awakened him by knocking on the door. Booker

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yelled to Defendant, telling him to go away and to come back tomorrow. The door to the apartment was unlocked, and Defendant let himself in despite Booker's instruction. Booker testified he heard Defendant and Philly arguing about Defendant bringing a firearm into the apartment.

Upon hearing the argument, Lopez left the bedroom and entered the living room to yell at Defendant for bringing a gun into their apartment. Booker testified Lopez stumbled backwards into the bedroom, saying Defendant had hit her or pushed her.

Defendant entered the bedroom, holding the shotgun Booker had seen him cleaning in the hallway. Defendant testified he was holding the gun under his arm and pointing it toward the floor when it slipped and discharged. Defendant claims Booker was smoking crack cocaine at the time, and he was waiting for Booker to stop smoking so he could use the stem to smoke.

Booker testified Defendant had pointed the shotgun in Lopez's general direction and fired, striking Lopez. Booker described the look on Defendant's face as surprised, and "[l]ike a kid that just broke his mom's favorite piece of china in the kitchen."

Booker testified Defendant pointed the gun at Booker's chest after shooting Lopez. Booker told Defendant to leave the bedroom to allow Booker to call for help. Defendant placed the stock of the gun on the floor with the barrel facing the ceiling. He then picked up the gun, said he was going to turn himself in, and walked out of

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the apartment. Booker locked the bedroom door and called 911. Booker told the operator “a gun discharged accidentally.”

Wilmington Police Corporal Kyle Petrone (“Cpl. Petrone”) received a notification of shots fired at the apartment’s address. Cpl. Petrone and another officer, Officer Pearson, arrived on the scene a few minutes after midnight. Cpl. Petrone and Officer Pearson entered the apartment, where Cpl. Petrone observed Lopez and Booker on the bedroom floor. Lopez was visibly in distress and lying in a pool of her blood.

Another officer on the scene asked Booker who had shot Lopez. Booker blamed their neighbor across the hallway named “Ray.” Booker told the officer he thought the shooting was an accident. Lopez was transported to the hospital, where she died as a result of the gunshot wound.

Defendant left the apartment complex and was apprehended in a traffic stop. After he had been arrested and read his *Miranda* rights, Defendant initially denied any knowledge of the shooting.

At trial, the prosecution questioned Defendant about why he did not raise the defense of accident during his initial interview with police. Defendant stated he did not wish to speak with the police without an attorney being present.

Defendant filed a pre-trial notice asserting the defense of accident. The State filed a pre-trial motion *in limine* seeking to exclude all witness testimony offered to prove Defendant’s intent. The trial court did not allow Defendant to admit evidence

of Booker's statements during the 911 call or the body camera footage, wherein he stated "a gun discharged accidentally" and referred to the shooting as "an accident," nor did it permit Booker to testify to his opinion that the shooting was accidental. Booker was permitted to testify about his impression of Defendant, describing Defendant's surprised expression when the gun discharged.

Defendant requested, and the trial court provided, a jury instruction on accident and several of the lesser-included offenses of first-degree murder, including second-degree murder and involuntary manslaughter.

The jury found Defendant guilty of second-degree murder on the basis of "malice arising out of an act which is inherently dangerous to human life." The jury also found Defendant guilty of non-felonious breaking and entering and possession of a firearm by a felon, which Defendant's counsel conceded at oral argument he does not challenge on appeal. The jury acquitted Defendant of first-degree murder, first-degree kidnapping, and felonious breaking and entering.

Defendant was sentenced as a prior record level IV in the presumptive range to an active incarceration term of 238 months to 298 months for second-degree murder. Defendant was also sentenced to an active, consecutive term of 19 months to 32 months for non-felonious breaking and entering and possession of a firearm by a felon. Defendant timely appealed.

II. Jurisdiction

This court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1)

and 15A-1444(a) (2023).

III. Issues

Defendant presents three arguments on appeal. He argues the trial court prejudicially erred by excluding Booker's statements at the time of the shooting, when he asserted Defendant had accidentally shot Lopez. Defendant bases this claim on N.C. Rules of Evidence 701 and 803. N.C. Gen. Stat. § 8C-1, Rules 702 and 803 (2023).

Defendant next argues the trial court violated his constitutional right to remain silent when it allowed the State to question him during cross examination regarding his asserted failure to mention the shooting was accidental after leaving the scene and being stopped and denying involvement.

Defendant lastly argues the State misstated the law during its closing arguments and this misstatement was prejudicial.

IV. Exclusion of Evidence

Defendant argues the trial court erred when it excluded evidence of Booker's statements made at the time of the shooting, stating he believed Defendant had accidentally shot Lopez. Defendant bases this claim on N.C. Rules of Evidence 701 and 803. N.C. Gen. Stat. § 8C-1, Rules 702 and 803.

A. Standard of Review

Trial court rulings on motions *in limine* and admission of evidence are reviewed for an abuse of discretion. *State v. Ruof*, 296 N.C. 623, 628, 252 S.E.2d 720,

724 (1979). This Court may only find an abuse of discretion occurred, if the trial court’s “ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision.” *State v. Lloyd*, 354 N.C. 76, 98, 552 S.E.2d 596, 614 (2001) (citation, internal quotation marks, and alterations omitted).

An “evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial.” *State v. Jacobs*, 363 N.C. 815, 825, 689 S.E.2d 859, 865 (2010) (quoting *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009)). “The same rule applies to exclusion of evidence.” *Id.* at 825, 689 S.E.2d at 865.

“A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached[.]” N.C. Gen. Stat. § 15A-1443(a) (2023).

B. Lay Witness Opinion

A lay witness may not provide opinion testimony of a defendant’s state of mind or intent, as such testimony would require the witness to draw inferences and conclusions based upon perceived facts. *State v. Sanders*, 295 N.C. 361, 369, 245 S.E.2d 674, 681 (1978). The testifying lay witness is no better able to draw those inferences from the evidence or assess credibility than the members of the jury. *Id.*; *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978).

Rule 701 provides an exception to this rule and allows a non-expert witness to provide a testimonial opinion if it is “rationally based on the perception of the witness”

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and “helpful to a clear understanding of his testimony or the determination of a fact [at] issue.” N.C. Gen. Stat. § 8C-1, Rule 701.

The official commentary for Rule 701 explains the rule does not bar the common law exception allowing a “shorthand statement of fact”, when necessary, because testimony as to more primary facts was impossible or highly impractical. *Id.*; *State v. Williams*, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987).

This Court has long held that a witness may state the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of facts.

State v. Spaulding, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed.2d 1210 (1976) (citations and internal quotation marks omitted).

Notwithstanding the “shorthand statement of fact” exception, “a witness’s opinion of another person’s intention on a particular occasion is generally held to be inadmissible.” *State v. Sanders*, 295 N.C. 361, 369-70, 245 S.E.2d 674, 681 (1978) (citations omitted). While a lay witness may “inform the jury of the words, acts and demeanor” of the individuals they are testifying about, a lay witness is not “more qualified than the jury to conclude what the [observed individual] intended to do at that time.” *Id.* at 370, 245 S.E.2d at 681.

Here, after extensive arguments from both the State and Defendant and after

independently reviewing the case law, the trial court held:

[A]fter a thorough review of all the case law on the issue of evidentiary Rule 701, opinion testimony by a lay witness, shorthand statements of fact, the Court's ruling is that the witness statement referring to the incident as an accident is inadmissible as a witness cannot testify to the intent of the defendant; therefore, the witness in this case cannot testify that the shooting was an accident.

Any statements the witness made referring to the incident as an accident [are] inadmissible, including any statements to 911 or officers or any statements officers made repeating and referring to the witness's statement of accident. The witness cannot be cross-examined about any statements referring to the incident as an accident. The witness may, however, testify about anything the witness observed about the defendant during this incident.

The trial court did not abuse its discretion by prohibiting the witness to discuss Defendant's purported intent, while allowing the witness to describe everything they had observed during the incident. *Ruof*, 296 N.C. at 628, 252 S.E.2d at 724; *Sanders*, 295 N.C. at 370, 245 S.E.2d at 681.

C. Hearsay

Defendant argues, even if Booker's statements were not admissible under Rule 701, they should have been allowed and admitted as exceptions to hearsay. Rule 801 defines hearsay as "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) (2023).

"In general, hearsay evidence is not admissible." *State v. Rivera*, 350 N.C. 285, 288-89, 514 S.E.2d 720, 722 (1999) (citing *State v. Wilson*, 322 N.C. 117, 131-32, 367

S.E.2d 589, 598 (1988)).

Under North Carolina Rule of Evidence 803, statements qualifying as “excited utterances” may be admissible as an exception to the hearsay rule if the statement “relat[es] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” N.C. Gen. Stat. § 8C-1, Rule 803(2) (2023).

For a statement to qualify under this exception, “there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.” *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985). This Court has held 911 calls constitute excited utterances when made shortly after the shooting “and from the room in which the victim lay dying.” *State v. Wright*, 151 N.C. App. 493, 497, 566 S.E.2d 151, 154 (2002).

Booker made the 911 call within minutes after Defendant had shot Lopez. His 911 call was made both shortly after the shooting and while he was in the room with Lopez. His statement made to the 911 operator qualifies as an excited utterance. *Id.* at 497-98; 566 S.E.2d at 154-55.

Presuming, without deciding, the trial court erred in excluding this evidence, such exclusion did not prejudice Defendant. Other properly admitted evidence supported Defendant’s claim of accident, including Booker’s other testimony and Defendant’s trial testimony. The jury reviewed Defendant’s text messages from the night of the shooting asserting it was a mistake, and they heard Booker’s testimony

describing Defendant's surprised expression after the gun discharged.

The trial court instructed the jury on the defense of accident, as Defendant had requested. Defendant has failed to demonstrate the jury would have reached a different conclusion had the additional evidence been admitted. N.C. Gen. Stat. § 15A-1443(a); *State v. Colvin*, 297 N.C. 691, 694-95, 256 S.E.2d 689, 691-92 (1979) (holding defendant's "defense that he did not intend to shoot his wife was clearly before the jury" despite the erroneous exclusion of testimony by defendant because substantially similar evidence was later admitted). Defendant's argument is overruled.

We need not address Defendant's remaining arguments that the excluded evidence would have been admissible as corroborative evidence, impeachment evidence, or otherwise admissible under the present sense exception to hearsay, as we have held Booker's statements qualified as an excitement utterance and Defendant was not prejudiced by the exclusion of this evidence. N.C. Gen. Stat. § 15A-1443(a); *Colvin*, 297 N.C. at 694-95, 256 S.E.2d at 691-92. See *State v. Morgan*, 359 N.C. 131, 155, 604 S.E.2d 886, 901 (2004) (explaining "we need not address whether this statement was also admissible as an excited utterance" because the "statement was made sufficiently close to the event and was admissible as a present sense impression").

D. Inability to Present a Defense

Defendant argues "[b]ecause this evidence was a key part of [his] accident

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defense, its exclusion is constitutional error and prejudicial unless found harmless beyond a reasonable doubt.” *Crane v. Kentucky*, 476 U.S. 683, 690-91, 90 L. Ed. 2d 636, 645 (1986) (“In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor’s case encounter and ‘survive the crucible of meaningful adversarial testing.’” (citations omitted)).

“A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.” N.C. Gen. Stat. § 15A-1443(b). The burden falls on the State to prove the error was harmless. *Id.*

“It is well settled in this jurisdiction that no prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence.” *State v. Hageman*, 307 N.C. 1, 24, 296 S.E.2d 433, 446 (1982) (citing *State v. Matthews*, 299 N.C. 284, 261 S.E.2d 872 (1980); *State v. King*, 225 N.C. 236, 34 S.E.2d 3 (1945)).

Additionally, “[o]ne way for the appellate court to determine whether a constitutional error is harmless beyond a reasonable doubt is to ascertain whether there is other overwhelming evidence of the defendant’s guilt; if there is such overwhelming evidence, the error is not prejudicial.” *State v. Perez*, 182 N.C. App. 294, 297, 641 S.E.2d 844, 848 (2007) (citations omitted).

On appeal, the State argues evidence substantially similar to Booker’s

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statements about the shooting being an accident were presented to the jury at trial. The State entered text messages between Defendant and two individuals, which were both sent within roughly one hour of the shooting. Defendant texted someone identified in his phone as “Self*” the following message: “Yo, Big Bro, I f***ed up big time. I shot Jody. Took her arm off. I need help ASAP. No bullsh*t. Call Kev snitch b***h nig*a telling everything.” Defendant texted someone listed as “Lil Bro” the message “Yo, can’t do it. I just body a b***h. She alive. It was a mistake.”

Defendant also testified at trial regarding the conversation between himself and Booker:

So after the shot went off and I noticed she was hit, I said:
Oh, man, I didn’t mean to do it, and I told Kevin[.] I said[:]
Yo, I didn’t mean to do it, you know?

I went and sat down on the bed, on the edge of the bed, and
I put the shotgun down with the butt, with the stock of it,
going down, and I had it – it was leaning, and I said: Man,
I didn’t mean to do it.

So Wesley Clark, [known as “Philly”,] he comes in the room.
He was, like[:] Yo, was that that? What was that.

And I said: Man, I accidentally shot Jody [Lopez].

Kevin [Booker] said: Yeah. It was an accident. He didn’t
mean to do it, and he was, like[:] Ray, you need to go.

I was, like[:] No. I’m going to stay here.

I said: I’m going to stay here. I’m going to stay here, man.
I’m going to turn myself in.

Booker also testified Defendant had looked surprised when the shotgun

discharged. The inclusion of this testimony would allow the jury to infer his lack of intent and conclude the shooting was accidental, even without Booker's other statements.

Given the evidence admitted at trial to support Defendant's defense of accident, coupled with Defendant's admission that he shot Lopez and was wrong to carry a firearm into a small apartment, any error in the exclusion of Booker's testimony was harmless beyond a reasonable doubt. *See Perez*, 182 N.C. App. at 297-98, 641 S.E.2d at 848 (explaining "the outcome of the jury trial would have been the same had evidence . . . not been admitted because competent[,] overwhelming evidence of defendant's guilt existed" and the "defendant admitted that he shot and killed" the victim). Defendant's argument is overruled.

V. Defendant's Right to Silence

Defendant argues the trial court violated his constitutional right to remain silent when it allowed the State to cross-examine him at trial regarding his failure to assert the shooting was accidental upon arrest.

A. Standard of Review

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b). This Court will affirm the trial court's ruling if "there is no reasonable possibility that the violation might have contributed to the conviction." *State v. Shores*, 155 N.C. App. 342, 351-52, 573 S.E.2d

237, 242 (2002) (citation omitted).

B. Analysis

A defendant is guaranteed the right to remain silent under the Fifth Amendment. U.S. Const. amend. V. “We have consistently held that the State may not introduce evidence that a defendant exercised his Fifth Amendment right to remain silent.” *State v. Richardson*, 226 N.C. App. 292, 299, 741 S.E.2d 434, 440 (2013) (citations, internal quotation marks, and alterations omitted).

The prosecution may not use post-*Miranda* silence to impeach a defendant on cross-examination. *Doyle v. Ohio*, 426 U.S. 610, 619, 49 L. Ed. 2d 91, 98 (1976). “When the defendant chooses to speak *voluntarily* after receiving *Miranda* warnings, however, the rule in *Doyle* is not triggered.” *State v. Fair*, 354 N.C. 131, 156, 557 S.E.2d 500, 518 (2001) (citations omitted).

Cross-examining a criminal defendant about their decision to remain silent post-*Miranda* is improper if its purpose is to elicit meaning from the defendant’s decision to exercise his right to remain silent. *Id.* at 156, 557 S.E.2d at 518-19. Cross-examination of those statements is permissible if the purpose is to inquire about prior inconsistent statements made by the defendant. *Id.* (“Cross-examination can properly be made into why, if the defendant’s trial testimony regarding his alibi is true, he did not include in his earlier statement the relevant information disclosed at trial.” (citation omitted)). “[A] prior statement is considered inconsistent if it fails to mention a material circumstance presently testified to which would have been

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natural to mention in a prior statement.” *Id.* at 157, 557 S.E.2d at 519 (citation omitted).

In *State v. Fair*, a defendant was questioned at trial about why he did not provide information regarding his alibi and the identity of the “real killer” at the time of his arrest. *Id.* at 153-56, 557 S.E.2d at 517-18. The court held such a statement would naturally come up in an initial investigatory statement, and the defendant’s failure to mention it before trial, then subsequently disclose it at trial, was inconsistent and susceptible to cross-examination. *Id.* at 156-57, 557 S.E.2d at 518-19. The court reasoned that if defendant’s trial testimony regarding his alibi was true, the question could properly be made into why he did not disclose it in his earlier statements. *Id.*

The reasoning in *Fair* applies to this case. After Defendant had left the scene and was arrested at a motor vehicle stop and Mirandized, he proceeded to speak with law enforcement about what he had done that evening. During their conversation, Defendant denied involvement in the shooting and did not mention the shooting being accidental. If true, this information is of the kind that would have been natural to disclose. Like disclosure of an alibi, the defense of accident is highly relevant to determining Defendant’s intent and guilt.

Defendant freely chose to speak with law enforcement post-*Miranda*, and under this Court’s precedent, any inconsistent statements made in the initial investigation may be subject to cross-examination at trial. *Id.* Defendant has failed

to show the trial court erred by allowing the prosecution to question him on his failure to assert the shooting was accidental.

VI. Misstatement of the Law

Defendant argues the prosecution misstated the law in its closing arguments and the misstatement was prejudicial.

A. Standard of Review

Our Supreme Court in *State v. Jones* summarizes the standard of review our State's appellate courts apply to misstatements of the law in closing arguments:

The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (internal citations omitted).

B. Analysis

The Supreme Court of North Carolina has established “any prejudice resulting from a prosecutor’s misstatements of the law” is cured when the trial court gives proper jury instruction. *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007). Presuming the State erred in its closing statements, the jury instruction adequately

stated the law and advised the jury it could disregard the prosecution's misstatements.

Insufficient evidence tends to show the prosecution's closing statements were so "grossly improper" to conclude the trial court's failure to exclude them *sua sponte* would have affected the jury's decision. *Jones*, 355 N.C. at 133, 558 S.E.2d at 107. Defendant has failed to show the trial court erred "by failing to intervene *ex mero motu*" or how the Defendant was prejudiced by the trial court's failure to exclude the State's comments. *Id.*

VII. Conclusion

Defendant received a fair trial, free from prejudicial errors he preserved or argued. We discern no prejudicial error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Chief Judge DILLON and Judge GORE concur.

Report per Rule 30(e).