NO. COA09-1703

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v. Robeson County
No. 07 CRS 53733

CLIFTON LEE STARLING

Appeal by defendant from judgment entered 25 August 2009 by Judge James G. Bell in Robeson County Superior Court. Heard in the Court of Appeals 26 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant.

STEELMAN, Judge.

While Sean Hunt's statement provided new or additional facts not elicited in his trial testimony, the statement reasonably followed the trial testimony's narrative and its admission was not plain error. The failure of defendant's trial counsel to object to Hunt's statement or to request a limiting instruction was not prejudicial. Defendant is not permitted to raise constitutional issues on appeal that were not preserved at trial. Dr. Butts' recitation of the autopsy findings by another doctor was not hearsay and was properly admitted as the basis of his independent analysis and opinions. Since defendant does not contest Dr. Butts'

opinions on appeal, he was not prejudiced by the failure of his trial counsel to object to Dr. Butts' testimony at trial.

I. Factual and Procedural Background

On the night of 10 June 2007, Clifton Lee Starling (defendant) drove with Andy Locklear (Andy) to a field where a large crowd had gathered for a dog fight. Danny Ray Freeman (Freeman) had already arrived and was arguing with another man when he said, "f all you all son of a --." Defendant began a heated exchange with Freeman, which quickly escalated into a fistfight. Freeman's brother, Jamie Simpson (Simpson), joined the fight but was restrained by a member of the crowd. Freeman got the better of defendant and released him after defendant repeatedly asked for mercy.

Once defendant got away from Freeman, Simpson heard him say, I'm going to "break me a pack of SOBs." Defendant then ran twenty to thirty yards to Andy's truck. Simpson heard someone say, "don't you go get you no gun," and the crowd began running in the opposite direction toward a wooded area.

Sean Hunt (Hunt) was running beside Freeman when he saw defendant retrieve a handgun from the truck and heard at least three gun shots. Hunt heard Freeman say "help me boys," but Hunt continued running until he reached his truck. After turning on his headlights, Hunt saw defendant and Freeman standing twenty feet apart. Defendant then shot at Freeman twice. Freeman fell to his knees with his hands up, and according to Hunt's pretrial statement, said, "don't kill me." Defendant, who was circling Freeman, said, "he should not have done him like that." People at

the scene yelled for defendant not to shoot Freeman. Once Freeman collapsed, defendant got in Daniel Locklear's (Daniel) truck, still holding the gun, and told Daniel to drive him home.

Defendant was arrested the next day, and on 14 January 2008, was indicted for first degree murder. On 25 August 2009, the jury found defendant guilty of first degree murder. Defendant was sentenced to life in prison without parole.

Defendant appeals.

II. Standard of Review

We review a trial court's decision to admit evidence for abuse of discretion. *State v. Williams*, 363 N.C. 689, 701, 686 S.E.2d 493, 501 (2009). We reverse for abuse of discretion only when "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Errors to which there was no objection at trial are reviewed for plain error only. Under plain error, defendant must prove "not only that there was error, but that absent the error, the jury probably would have reached a different result." *Id.* (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)). Plain error must be so fundamental, basic, and prejudicial that "justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

III. Admission of Sean Hunt's Statement

In his first argument, defendant contends that the trial court erred in admitting Sean Hunt's statement as corroborative evidence and committed plain error in failing to give the jury an instruction limiting their consideration of the evidence to whether it corroborated Hunt's testimony at trial. Defendant alternatively contends that his counsel was ineffective. We disagree.

A. Corroborative Evidence

Defendant objected to the admission of Hunt's statement on the basis that it contained noncorroborative hearsay and inadmissible character evidence. We review for abuse of discretion. *Williams*, 363 N.C. at 701, 686 S.E.2d at 501. Hunt's pretrial statement related that after hearing the second round of gun shots, Hunt yelled for defendant not to kill Freeman. Hunt's trial testimony indicated that at this time, "[Hunt] heard some guys hollering" for defendant to show mercy.

Hunt's pre-trial statement also included additional facts not elicited at trial. The statement related an exchange between Freeman and defendant following the second round of gun shots, after Freeman had fallen to his knees. In Hunt's statement, Freeman said, "[d]on't kill me," and defendant responded, "he should not have done him like that." Defendant argues that this exchange could be construed as evidence of defendant's premeditation and deliberation and that its admission was prejudicial.

Statements, which contain new or additional information, are admissible so long as the "narration of events substantially is similar to the witness' in-court testimony." *State v. Demos*, 148 N.C. App. 343, 348, 559 S.E.2d 17, 20 (2002) (quoting *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992), *cert. denied*, 355 N.C. 495, 564 S.E.2d 47 (2002)).

As in *Demos*, when an alleged threat was not included in the trial testimony, Hunt's statement was admissible because it reasonably followed the narrative of events. Hunt's trial testimony was that after the second shots, Freeman fell to his knees with his hands in the air. It is reasonable to infer from Hunt's testimony that Freeman begged for his life. Because Hunt's statement closely tracked his trial testimony, the trial court did not err in admitting Hunt's statement.

Defendant further argues that Hunt's statement was inadmissible character evidence because it included hearsay that defendant had been previously charged in a shooting. N.C. Gen Stat. § 8C-1, Rule 404(b) (2009) states in part that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person." Out-of-court statements that explain the declarant's subsequent conduct and are not offered to prove the truth of the matter asserted are admissible nonhearsay. *State v. Canady*, 355 N.C. 242, 248, 559 S.E.2d 762, 765 (2002). Hunt's statement was not introduced as character evidence, nor does it have that effect. Hunt's statement that "he knew that [defendant] had been charged with shooting someone in the past" explained

Hunt's fear of defendant and his desire to quickly run away from defendant.

This argument is without merit.

B. Corroborative Instruction

Defendant contends that the trial court committed plain error by (1) failing to include a limiting instruction in the jury charge, and (2) failing to give a limiting instruction at the time that Hunt's statement was admitted. We review a trial court's instructions for plain error when defendant neither requested a limiting instruction nor objected to the trial court's charge. *Demos*, 148 N.C. App. at 348, 559 S.E.2d at 21. Since Hunt's statement was admissible for a proper purpose, any instructional error was not so fundamental as to have a probable impact on the verdict and did not constitute plain error. *Id.* at 349, 559 S.E.2d at 21 (citing *State v. Sneeden*, 108 N.C. App. 506, 511, 424 S.E.2d 449, 452 (1993), *aff'd*, 336 N.C. 482, 444 S.E.2d 218 (1994)).

This argument is without merit.

C. Ineffective Assistance of Counsel

Defendant argues that his counsel was ineffective for failing to request a limiting instruction at the time Hunt's statement was offered or to object to the trial court's omission of a limiting instruction in its final jury charge. We disagree.

Our courts follow the *Strickland v. Washington*, 466 U.S. 688, 80 L. Ed. 2d 674 (1984), two-part test for ineffective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). The *Strickland* test requires appellant to first

show that counsel failed to conform to the reasonable standard of practice guaranteed by the Sixth Amendment. *Id.* at 562, 324 S.E.2d at 248. Second, appellant must demonstrate prejudice by showing that but for counsel's errors, there would have been a different result at trial. *Id.*; N.C. Gen. Stat. § 15A-1443(a) (2009).

We have held that Hunt's statement was admissible. Therefore, defendant cannot show resulting prejudice from its admission. We further note that even absent Hunt's pretrial statement, there was plenary evidence presented to the jury to support its findings of both premeditation and deliberation.

Hunt's trial testimony that defendant ran back to Andy's truck, retrieved a handgun, shot Freeman out of a running crowd, and pursued Freeman, shooting him twice more at a close range, demonstrated that defendant had sufficient time to premeditate and deliberate his actions. It is unlikely that any error by counsel in failing to request a limiting instruction at admission of Hunt's statement or at the final jury charge conference would have led to a different result at trial.

This argument is without merit.

IV. Prosecutor's Closing Remarks

In his second argument, defendant contends that the prosecutor's closing argument to the jury went outside the record and included unfounded personal beliefs or opinions. We disagree.

A. Standard of Review

We review the State's closing argument, which was not objected to at trial, for gross impropriety. *State v. Lawson*, 194 N.C. App.

267, 273-74, 669 S.E.2d 768, 773–74 (2008), *disc. review denied*, 363 N.C. 378, 679 S.E.2d 837 (2009). We review closing arguments, which were objected to at trial, under an abuse of discretion standard. *Id.* at 273, 669 S.E.2d at 772. A trial court may only be reversed for abuse of discretion when its ruling could not have been the result of a reasoned decision. *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996).

B. Sufficiency of Evidence

In his closing argument to the jury, the prosecutor stated that before the second round of shots, Freeman said, "haven't you shot me enough?" Addressing the jury, the prosecutor also said:

> [y]ou've heard the evidence. You've got to evaluate that based on your own common sense and experience in dealing with people every day. What makes sense to you?
>
> You've heard that there were a vast number of people at this supposed dog fight. How many of them come [sic] forward for this defendant? How many come [sic] forward and testify [sic] for him?
>
> The man that he rode to the dog fight with testified for the State. They came in and told you what they saw, what they heard out there. A lot of people were not willing to do that. They just did not want to get involved.

Defendant objected to both of these arguments at trial.

"[C]ounsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Jones*, 355 N.C. 117, 128–29, 558 S.E.2d 97, 105 (2002) (citations omitted). Counsel are prohibited from going outside the

record to argue facts that are not supported by the evidence. *State v. Williams*, 317 N.C. 474, 482, 346 S.E.2d 405, 411 (1986).

The prosecutor's argument that Freeman stated, "haven't you shot me enough?" is based upon a reasonable inference that Freeman begged for his life and thus did not go outside the record. *See State v. Raines*, 362 N.C. 1, 20-21, 653 S.E.2d 126, 138-39 (2007), *cert. denied*, ___ U.S. ___, 174 L. Ed. 2d 601 (2009).

Defendant further contends that the prosecutor's closing arguments addressed to the jury misrepresented that additional witnesses did not testify for the State because they "did not want to get involved." N.C. Gen. Stat. § 15A-1230 (2009) (arguments outside of the record are in error). The prosecutor's argument may be interpreted in several different ways.

This argument merely serves to reinforce the fact that all available evidence had been presented and that the jury must "evaluate that based on [their] own common sense and experience." The prosecutor's argument did not rise to the level of abuse nor did the prosecutor inject his personal experience. It is unlikely that but for these arguments, there would have been a different result at trial. N.C. Gen. Stat. § 1443(a). Thus, the argument did not prejudice the jury. While we question the appropriateness of the prosecutor's argument regarding witnesses who "did not want to get involved," we hold that the trial court's decision to overrule defendant's objection was not the result of an unreasoned decision.

This argument is without merit.

III. Admission of Dr. Butts' Testimony

In his third argument, defendant contends that it was plain error to admit Dr. Butts' testimony concerning Freeman's autopsy. Defendant contends that Dr. Butts' testimony violated the Sixth Amendment Confrontation Clause because Dr. Butts did not perform the autopsy and the State failed to show that the non-testifying pathologist was unavailable or that defendant had the opportunity to cross-examine that pathologist. Defendant further argues that the information concerning the location and nature of the wounds that Dr. Butts read from the pathologist's report was testimonial hearsay. In the alternative, defendant contends that his trial counsel was ineffective for failing to object to Dr. Butt's testimony. We disagree.

A. Dr. Butts' Testimony

Defendant made no constitutional objection to Dr. Butts' testimony at trial. Our Supreme Court has held that an "attempt to smuggle in new questions is not approved," *State v. Cumber*, 280 N.C. 127, 131-32 185 S.E.2d 141, 144 (1971) (quoting *State v. Grundler*, 251 N.C. 177, 111 S.E.2d 1 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960)). Thus, "the well established rule of appellate courts," holds that "we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon [at trial]." *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955). Because defendant raises his constitutional objections for the first time on appeal, these issues are not properly before this Court. *State v.*

Campbell, 359 N.C. 644, 670, 617 S.E.2d 1, 17 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006); *State v. Call*, 349 N.C. 382, 410-11, 508 S.E.2d 496, 514 (1998).

Even assuming *arguendo* that this argument was properly preserved for appellate review, Dr. Butts' testimony was not admitted in plain error.

Our courts have held that *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 174 L. Ed. 2d 314 (2009) and *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2009) apply to admission of forensic analyses. *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 305 (2009). Autopsy examinations are a kind of forensic analysis discussed by *Melendez-Diaz*. *Id.* "Thus, when the State seeks to introduce forensic analyses, '[a]bsent a showing that the analysts [are] unavailable to testify at trial and that [defendant] had a prior opportunity to cross-examine them' such evidence is inadmissible under *Crawford*." *Id.* (quoting *Melendez-Diaz*,___ U.S. at ___, 174 L. Ed. 2d at 321). However, "[w]ell-settled North Carolina case law allows an expert to testify to his or her own conclusions based on the testing of others in the field." *State v. Mobley*, ___ N.C. App. ___, ___, 684 S.E.2d 508, 511 (2009), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010).

The autopsy report was clearly testimonial evidence under *Locklear*. *Locklear*, 363 N.C. at 452, 681 S.E.2d at 305. Further, the record does not indicate that the State claimed that the non-testifying pathologist was unable to testify or that defendant had the opportunity to cross-examine her. The issue then becomes

whether Dr. Butts merely summarized the pathologist's report or expressed his own independent expert opinion based on the autopsy report. *Mobley*, ___ N.C. App. at ___, 684 S.E.2d at 510.

Defendant contends that Dr. Butts' testimony merely recited the location and nature of Freeman's wounds, which would be inadmissible under *Locklear*. *Locklear*, 363 N.C. at 452, 681 S.E.2d at 304-05. Defendant does not contest Dr. Butts' opinion that Freeman died of multiple gunshot wounds or his opinion that the most significant wound was the shot that entered Freeman's right posterior shoulder region and traveled forward and downward through his right lung, heart, and left lung.

"[E]vidence offered as the basis of an expert's opinion is not being offered for the truth of the matter asserted," and "evidence offered for purposes other than proof of the matter asserted [does] not violate the Confrontation Clause." *Mobley*, ___ N.C. App. at ___, 684 S.E.2d at 511-12. In *State v. Mobley*, the expert witness made a technical review of two tests performed by other investigators, a rape kit from the victim and a buccal swab from defendant. *Id.* at ___, 684 S.E.2d at 510-11. The testifying expert independently determined that the profile of the defendant matched the profile of the perpetrator from the rape kit. *Id.* This testimony did not implicate the Confrontation Clause because the reports used by the expert, "which would be testimonial on [their] own, [were] used as a basis for the opinion of an expert who independently reviewed and confirmed the results, and is therefore

not offered for the proof of the matter asserted." *Id.* at ___, 684 S.E.2d at 512.

Similar to *Mobley*, the autopsy evidence of the location and nature of the bullet wounds was offered as the basis of Dr. Butts' independent opinion, not as "the truth of the matter asserted." *Id.* During direct examination, Dr. Butts testified to the following:

> Q. Thank you, sir. Dr. Butts, do you have an opinion, sir, as to which wound caused the death of Mr. Freeman?
>
> A. I have an opinion as to which wound would be the most significant in that regard, yes.
>
> Q. And which one was that, sir?
>
> A. That was [sic] be the one that entered on the right shoulder area and passed back through the chest.
>
> Q. Based on your training and experience and education, do you have an opinion as to the cause of death of Mr. Freeman?
>
> A. Yes.
>
> Q. And what is that, sir?
>
> A. Mr. Freeman died of the gunshot wounds that he received.

The autopsy report stated that gun shot wound "E", which entered Freeman's right shoulder area, perforated the "right lateral 5th rib, right lateral 6th rib, middle lobe of right lung, lower lobe of right lung, pericardium, right atrium, intraventricular septum, mitral valve, left ventricle, upper lobe of left lung (peripheral), left hemidiaphragm and left anterior 7th rib." Dr. Butt's independent opinion that this was the most significant wound was

based on the report's raw data rather than a conclusion cited in the autopsy report. Dr. Butts' opinion that Freeman's cause of death was multiple gunshot wounds was a product of Dr. Butts' "training and experience and education," and as defendant concedes, is not at issue. Without the raw data of the location and nature of the wounds, Dr. Butts' conclusions have no basis. Because the autopsy report is the basis of Dr. Butts' independent analysis and opinion, Dr. Butts did not merely summarize the report and thus, his recitation of the location and nature of Freeman's wounds was admissible. *Mobley*, ___ N.C. App. at ___, 684 S.E.2d at 511.

Even assuming *arguendo* that Dr. Butts did summarize the autopsy report, we hold that his testimony did not prejudice defendant. Dr. Butts testified that it was his expert opinion that Freeman's cause of death was multiple gunshot wounds and that the most significant wound was the shot that entered Freeman's shoulder. Neither of these opinions is contested by defendant on appeal, thus the substance of Dr. Butts' testimony, the cause and nature of Freeman's death, is not at issue in this case and cannot be said to be dispositive of premeditation and deliberation as defendant asserts. Therefore, but for Dr. Butts' testimony, the jury would not have reached a different result. N.C. Gen. Stat. § 1443(a).

This argument is dismissed.

B. Ineffective Assistance of Counsel

Defendant contends that although counsel's failure to object to Dr. Butts' testimony did not singularly prejudice defendant, failure to do so was a breach of reasonable conduct.

Dr. Butts' expert opinions are not contested by defendant on appeal. Because defendant cannot find fault with Dr. Butts' opinions on appeal, we cannot hold that the failure of defendant's trial counsel to object to these opinions at trial prejudiced defendant.

This argument is without merit.

V. Cumulative Error

In his fourth argument, defendant contends that the separate errors discussed above cumulatively deprived defendant of due process. We disagree.

Errors that in isolation would not require a new trial, may accumulate to deprive defendant of due process rights. *Canady*, 355 N.C. at 253–54, 559 S.E.2d at 768 (holding that four errors in the admission of evidence prejudiced defendant's right to a fair trial). We hold that no error was committed at trial. Without error, this argument necessarily fails.

This argument is without merit.

VI. Indictment

In his fifth and final argument, defendant contends that the short-form murder indictment was invalid for failure to list all of the elements of first degree murder. We disagree.

Defendant acknowledges that our Supreme Court has ruled to the contrary, *State v. Hunt*, 357 N.C. 257, 274-75, 582 S.E.2d 593, 604-05 (2003), *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003), and makes this argument for preservation purposes.

This argument is without merit.

NO ERROR.

Judges STEPHENS and HUNTER, JR. concur.

Report per 30(e).