NO. COA09-524

NORTH CAROLINA COURT OF APPEALS

Filed: 16 February 2010

STATE OF NORTH CAROLINA

v. Camden County
No. 06 CRS 50376

ELIZABETH K. KING

Appeal by defendant from judgment entered 16 October 2008 by Judge James E. Hardin, Jr. in Camden County Superior Court. Heard in the Court of Appeals 14 October 2009.

Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields, III, for the State.

William D. Spence for defendant-appellant.

HUNTER, JR., Robert N., Judge.

A jury convicted Elizabeth K. King ("defendant") of first-degree murder on 16 October 2008 for killing Robert Mansfield ("Bobby"). Defendant appeals, and claims that the trial court erred by: (1) denying her motion to dismiss at the close of all the evidence; (2) allowing one of the State's photographs into evidence; (3) admitting the testimony of an expert pathologist as to the cause of death; and (4) instructing the jury on the theory of "lying in wait." We find no prejudicial error.

I. BACKGROUND

A. Testimony of Events Surrounding the Murder

On 11 April 2006, Scott Daniel came home to see his mother, defendant, crying in the living room of their house. Defendant acted very distraught, and told Scott that Bobby had threatened to kill Scott and his half brother, Cameron. After defendant revealed this information, the following alternate sequence of events were offered at trial.

Scott's Testimony for the State

Defendant explained to Scott that Bobby was known as a violent person, and defendant said that Bobby "needs to get out of our lives[.]" Defendant and Bobby had been dating for about two years before Scott moved into defendant's home, and Scott was aware that Bobby and defendant used drugs together. At one point in the conversation, defendant asked Scott, "Do you think we'd go to hell if we took him out?" The discourse then escalated, and defendant suggested that Scott could hide in the trunk of her car, a Mercury Grand Marquis, so that he could jump out and attack Bobby.

After devising this plan, defendant and Scott prepared to leave the house. Defendant told Scott to get a bat, and she went to grab a knife. Scott grabbed some gloves, and a blanket was already in the car. Scott got into the Mercury, and started driving to Bobby's house. On the way, defendant called Bobby, and asked him over the speaker on her cellphone whether he wanted to get high with her. Scott drove past Bobby's house so that he could climb into the trunk of the car next to a trail. Once Scott was inside, defendant turned around, and went to Bobby's house.

Bobby and defendant began talking once Bobby got into the car. They both started getting high, and in the early morning hours of 12 April 2006, defendant parked the Mercury in a field on Hales Lake Road, Camden County, North Carolina. Defendant popped open the trunk of the car, and laid out a blanket for her and Bobby to lay on. After about ten or fifteen seconds, Scott jumped out with the baseball bat in his hand, and got in Bobby's face.

As Scott was confronting Bobby, defendant came from behind, and stabbed Bobby in the back with a knife. Defendant left the knife in Bobby, and told Scott to "[f]inish him off." Scott hit Bobby in the head with the bat, and Bobby stumbled over to the driver's side of the car. Bobby reached down and threw sand in Scott's eyes, and Scott became afraid that Bobby might escape. Scott then approached Bobby, and struck him in the head ten or fifteen times with the baseball bat. As Bobby was lying face down in the dirt, defendant came over and said, "Make sure he's dead." Scott kneeled down, took the knife out of Bobby's back, and proceeded to stab him several times while looking for movement. Bobby remained motionless during the stabbing.

Scott started covering up the evidence afterward, during which defendant became hysterical and started screaming. At some point, defendant composed herself, and wrapped the knife and the bat in the blanket. Since Scott and defendant were both nervous, they drove away without covering up their tire tracks. Defendant told Scott to drive to Bertie Bridge, where defendant threw the blanket

and murder weapons into the river. Scott and defendant cleaned the car the next morning.

Police first interviewed Scott on 7 July 2006, and Scott told the officers what defendant had told him to say: he didn't know anything about Bobby's murder, and he had been to a friend's house on 11 April 2006. On 30 August 2006, police arrested Scott in connection with the murder, and interviewed him again. During the second interview, Scott did not implicate defendant, and told police that he drove to Bobby's house only with the intent to scare him. On 22 October 2006, Scott gave a third statement to police, where he recounted the events detailed above incriminating defendant.

Defendant's Testimony

Defendant first met Bobby in a night club in Edenton, North Carolina, in 1975, and the two dated for several years before becoming engaged. The engagement was eventually broken off. However, when defendant moved back to Edenton in 2004, she contacted Bobby, and the two resumed their relationship.

On or about 8 April 2006, defendant went to visit Bobby in the afternoon. At that time, Bobby was living with his mother in Camden County, and Bobby invited defendant to come over while his mother was out of town spending time at the beach. Defendant decided to meet with Bobby, because she wished to end the relationship.

When defendant arrived at the house, Bobby was not in a good mood, and he became verbally aggressive. Bobby regularly abused

defendant verbally and physically, and she testified that Bobby "proceeded to say things that [she] had never heard him say before." Defendant claimed that Bobby made her go to a convenience store in order to cash her monthly child support check, because Bobby wanted to buy beer and drugs with the money. Upon arriving at the store, defendant made a scene, saying that she did not want to cash the check. The check was not cashed, and Bobby threw beer bottles at defendant once they reached the parking lot.

Bobby and defendant returned to Bobby's mother's house after going to the store. When they got inside, Bobby decided to eat a bowl of cereal. Defendant bumped into him as he was walking around with the bowl, and Bobby grabbed defendant and poured the cereal and milk over her head as he cursed at her. At some point during Bobby's assault, he said that "he was going to take the life of [defendant's] youngest child [Cameron]." Defendant was surprised by Bobby's threat, even though Bobby had talked about being aggressive toward other people prior to this statement. After Bobby made the threat, he grabbed defendant's hair, and threw her from one side of the room to the other several times. Defendant got loose, and tried to grab her belongings from the kitchen. Bobby threw her down again before she could leave, and he kicked her repeatedly as she laid on the floor curled in a ball. Defendant suffered a cracked tooth and whiplash from the incident.

Defendant eventually escaped to her car, and drove away from Bobby's house. Defendant stopped her car in an abandoned lot, and several police cars came up to her. The police escorted her to the

station, and defendant took out a domestic violence order against Bobby. Defendant called Scott to come to Elizabeth City, North Carolina, to bring her home. Scott drove over, and escorted defendant back to Edenton.

The next day, 9 April 2006, Bobby called defendant, and invited her over for a cookout. Bobby suggested that defendant could bring Cameron over, and defendant interpreted Bobby's invitation to be another threat toward Cameron's life.

On Monday, 10 April 2006, defendant visited Dr. Linda Abbott to have her neck examined. Defendant was in a lot of pain from her fight with Bobby the previous Saturday, and Dr. Abbott suggested that defendant see a chiropractor, Robbie Miller. Upon returning home, defendant talked to Scott about her relationship with Bobby, and told Scott that she had called Bobby earlier in the day. Bobby informed defendant over the phone that the domestic violence papers had not been served on him.

On 11 April 2006, Scott came to defendant after everyone else in the house had gone to bed. Defendant told Scott that she was scared, and defendant felt that the Camden Police Department was not following through with her domestic violence complaint. Defendant and Scott discussed going over to Bobby's to talk to him, but did not create a plan to harm him. Defendant hoped only to "put some fear in" Bobby so that he would leave her alone. Scott said that he wanted the relationship with Bobby to end.

Defendant and Scott discussed whether Scott should get a bat, but defendant did not order him to get one. While defendant

remained sitting at the kitchen table, Scott talked, grabbed a baseball bat, and took out a kitchen knife. Scott handed defendant the knife, and she took it to the car. Defendant placed the knife in the console area of the car, and Scott and defendant left the house to go confront Bobby.

As the car approached Bobby's house, defendant told Scott to get out of the car, because she was afraid that Bobby might become violent toward them if he saw Scott accompanying her. Defendant told Scott to get in the trunk, and she went and picked up Bobby. Defendant started driving, and Bobby told her where to go. Defendant did not tell Bobby she was coming over to do drugs with him.

As they drove, Bobby pulled out some drugs, and defendant pulled over the side of the road to take a drag off Bobby's pipe. Defendant drove a little further, and pulled into a field. Bobby and defendant got out of the car, and defendant popped open the trunk, because she was concerned about Scott being able to breathe. Defendant pulled a blanket out of the trunk, spread it on the ground, and told Bobby that she wanted to discuss some things. After defendant laid out the blanket, she turned to see Scott and Bobby facing one another.

Defendant noticed that Scott looked scared, and saw Bobby beginning to lunge at Scott. Scott said, "Help, mama," so defendant reached in the car window, took out the knife that she had moved to the passenger seat, and stabbed Bobby in the back. Bobby turned around to look at her, which scared defendant. Defendant ran away,

and when she turned around, she saw Scott hitting Bobby with the bat as he lay on the ground with the knife in his back.

After Scott finished hitting Bobby with the bat, Scott and defendant got in the car. Scott brought the bat with him to the front seat, and defendant told Scott that the knife was still in Bobby's back. Scott got out of the car, grabbed the knife, and stabbed Bobby a few more times.

When police came to interview defendant and Scott in connection with Bobby's murder, defendant told Scott to lie to the police.

B. Further State's Evidence

Bobby's body was found and reported to police on the morning of 12 April 2006. Special Agent Christopher Conway arrived at the crime scene, and took shoe and tire impression castings from the ground. Special Agent Conway noted a rounded indentation in the ground consistent with the end of a baseball bat. An examination of Bobby's body by Special Agent Conway showed that he was stabbed five times in his back and left shoulder, and that his skull was broken into small fragments with "several small pieces of tissue and matter" located around his head.

Dr. Pessinder and Dr. Lockmuller performed Bobby's autopsy. The autopsy was reviewed by Dr. M.F.G. Gilliland, an expert pathologist, who testified at trial that Bobby died as a result of "multiple blunt and sharp force injuries" to the head. Dr. Pessinder was not present at trial; however, Dr. Gilliland

testified that Dr. Lockmuller was in the courtroom during his testimony.

On 30 June 2006, Deputy Jay Winslow, a narcotics investigator with a drug task force working both Camden County and Pasquotank County, interviewed another one of defendant's sons, Eric Daniel. Deputy Winslow conducted the interview at defendant's home, and as he was leaving, noticed that defendant's Mercury Grand Marquis had Mastercraft Sensys 01 tires.

On 6 September 2006, Deputy Winslow executed a search warrant to take impressions of the tires on defendant's vehicle. The impressions taken at Hales Lake Road and from defendant's Grand Marquis were examined by Special Agent Karen Morrow, an agent in the latent evidence section of the State Bureau of Investigation. Special Agent Morrow prepared a report with her findings, and testified that the physical size and design of the impressions taken from defendant's car corresponded to the single tire impression taken at the crime scene.

C. Procedural History

On 23 October 2006, a grand jury indicted defendant on the charge of murder. Trial began on 13 October 2008; and on 16 October 2008, the jury found defendant guilty of first-degree murder on two theories: (1) lying in wait *and* (2) premeditation and deliberation. Defendant properly gave oral notice of appeal after being sentenced to life without parole. Defendant now appeals her conviction to this Court, and raises four issues: (1) whether the trial court erred in denying defendant's motion to dismiss at the close of all

the evidence; (2) whether the trial court properly allowed one of the State's photographs into evidence; (3) whether it was plain error to allow an expert pathologist to testify as to Bobby's cause of death, where the testifying pathologist did not conduct Bobby's autopsy; and (4) whether the trial court erred in instructing the jury on the theory of "lying in wait."

II. ANALYSIS

A. Motion to Dismiss

Defendant argues that the trial court erred by denying her motion to dismiss the charge of first-degree murder at the close of all the evidence, because the State offered evidence insufficient to: (1) satisfy each element of the crime, and (2) establish defendant as the perpetrator. We do not agree.

1. Standard of Review

This Court reviews the trial court's denial of a motion to dismiss at the close of all the evidence *de novo*. *State v. Davis*, __ N.C. App. __, __, 678 S.E.2d 385, 388, *disc. review allowed and appeal dismissed*, __ N.C. __, 685 S.E.2d 512 (2009). "Upon defendant's motion for dismissal, the question for th[is] Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence" means "that the evidence must be existing and real, not just seeming or imaginary." *Id.* at 99, 261 S.E.2d at 117. "Substantial evidence is evidence that a reasonable mind

might find adequate to support a conclusion." *State v. Hargrave*, ___ N.C. App. ___, ___, 680 S.E.2d 254, 261 (2009). Evidence in the record "is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]" *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

2. Elements of First-Degree Murder

The charge of first-degree murder includes any murder "perpetrated by means of . . . lying in wait . . . [or] any other kind of willful, deliberate, and premeditated killing[.]" N.C. Gen. Stat. § 14-17 (2009). "Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation; it is sufficient if the process of premeditation occurred at any point prior to the killing." *State v. Hunt*, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991). "Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* A murder is deemed deliberate and premeditated if committed "as part of a fixed design to kill, notwithstanding the fact that the defendant was angry or emotional at the time, unless such anger or emotion was strong enough to disturb the defendant's ability to reason." *Id.* (citing *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 338 (1986)).

Murder under a theory of lying in wait "refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim." *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979). "The assassin need not be concealed, nor need the victim be unaware of his presence." *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990). "'If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, *is not aware of his purpose to kill him*, the killing would constitute a murder perpetrated by lying in wait.'" *Id.* (emphasis added) (quoting *Allison*, 298 N.C. at 147, 257 S.E.2d at 425). *Leroux* and *Allison* hold "that a lying in wait killing requires some sort of ambush and surprise of the victim." *State v. Lynch*, 327 N.C. 210, 217, 393 S.E.2d 811, 815 (1990).

"'Under the doctrine of acting in concert when two or more persons act together in pursuance of a common plan or purpose, each is guilty of any crime committed by any other in pursuance of the common plan or purpose.'" *State v. Wilkerson*, 363 N.C. 382, 424, 683 S.E.2d 174, 200 (2009) (quoting *State v. Thomas*, 325 N.C. 583, 595, 386 S.E.2d 555, 561 (1989)).

3. Substantial Evidence

The State's evidence in the case *sub judice* included the testimony of Scott Daniel, who testified that defendant: (1) suggested that they should kill Bobby; (2) created a plan to kill Bobby, which included Scott hiding in the trunk of the car; (3)

ordered Scott to retrieve weapons; (4) brought the weapons to the car; (5) called Bobby prior to their arrival to see if he wanted to do drugs in order to get him into the car; (6) assisted in hiding Scott in the trunk of the car with a baseball bat in hand; (7) took Bobby to the middle of a field; (8) opened the trunk of the car for Scott to come out and surprise Bobby; (9) stabbed Bobby in the back with a knife; (10) helped dispose of the murder weapons, and cleaned up the car; and (11) told Scott to lie about his role in Bobby's death when police interviewed him.

The State also presented evidence that: (1) the tires on defendant's car were consistent with tire tracks left at the crime scene; and (2) Bobby was not in good health at the time the murder occurred, and the pain in his legs inhibited his mobility.

Under the doctrine of "acting in concert," the jury reasonably concluded that defendant murdered Bobby under the theory of lying in wait, because the State presented substantial evidence that Scott and defendant were acting "together in pursuance of a common plan or purpose[.]" *Wilkerson*, 363 N.C. at 424, 683 S.E.2d at 200. Though defendant offered evidence that she did not intend to harm Bobby and that she only stabbed Bobby to protect Scott, we must view the evidence "in the light most favorable to the State[.]" *Powell*, 299 N.C. at 99, 261 S.E.2d at 117. Since Scott's testimony and the corroborating forensic evidence offered at trial support the conclusion that defendant and Scott perpetrated the murder through "ambush and surprise," defendant's motion to dismiss the

charge of murder at the close of all the evidence was properly denied as to the theory of lying in wait.

With respect to the theory of premeditation and deliberation, Scott testified:

> A. Then I guess-- well after that basically that's whenever every-- the planning came in. She basically, you know, said, you know, she told me to go get a bat. She went to get a knife. And I guess I went to get some gloves and all that.
>
> . . . .
>
> Q. And you referred a moment ago in your testimony to planning. What was the plan, if there was one?
>
> A. I mean, it wasn't really thought out. I mean, she basically just said on the spur of the moment like maybe, you know, you could be in the trunk and then I could, you know, kick him in a designated spot. She basically made it sound like she could pop the trunk and I could get out and, you know--
>
> . . . .
>
> Q. Let me ask it this way, Mr. Daniel, what, if anything, did your mother say after stabbing Mr. Mansfield?
>
> A. "Finish him off."
>
> Q. Is that your best recollection of what she said?
>
> A. Yes, sir.
>
> Q. Now after you struck him several times with the bat, from your testimony, you have just told us, I think, at that point your mother came over to the car?
>
> A. Yes, sir.
>
> Q. And what did she say then?

> A. Basically to make sure he was dead and she was-- so I went over there and took a knife and stabbed him a couple of times to make sure he was, and of course he was.

At trial, defendant's own testimony showed that she arrived at Bobby's house with weapons and her son hidden in the trunk. She admitted that she opened the trunk for Scott in the field, and acknowledged that she stabbed Bobby in the back after letting Scott out. Scott's testimony in conjunction with these undisputed facts are sufficient for a reasonable mind to conclude that defendant had the specific intent to effectuate a "fixed design to kill[.]" *Hunt*, 330 N.C. at 427, 410 S.E.2d at 480; *State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985) (specific intent).

Defendant nevertheless contends that this case is similar to *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981), where our Supreme Court reversed a murder conviction based on premeditation and deliberation. The *Corn* Court noted in its decision:

> There is no evidence that defendant acted in accordance with a fixed design or that he had sufficient time to weigh the consequences of his actions. Defendant did not threaten Melton before the incident or exhibit any conduct which would indicate that he formed any intention to kill him prior to the incident in question. There was no significant history of arguments or ill will between the parties. Although defendant shot deceased several times, there is no evidence that any shots were fired after he fell or that defendant dealt any blows to the body once the shooting ended.
>
> All the evidence tends to show that defendant shot Melton after a quarrel, in a state of passion, without aforethought or calm consideration. Since the evidence is insufficient to show premeditation and deliberation, we find that the trial court

> erred in instructing the jury that they could find defendant guilty of first degree murder and defendant is awarded a new trial for a determination of whether or not defendant is guilty of second degree murder, voluntary manslaughter or not guilty.

Corn, 303 N.C. at 298, 278 S.E.2d at 224.

Here, Scott testified that defendant's intent to kill Bobby first arose in their home prior to leaving. Defendant and Bobby had a history of "ill will," and Scott testified that defendant told him several times during the killing to "finish" Bobby off. Unlike *Corn*, this evidence clearly shows that: (1) defendant had ample opportunity to change her course of action before stabbing Bobby in the back in an isolated field in the middle of the night, and (2) defendant was not overcome by a "state of passion."

Though defendant testified that she was only reacting to Bobby's "lunge" toward Scott in the early morning hours of 12 April 2006, the evidence in a light most favorable to the State nonetheless supports the charge of murder by premeditation and deliberation. Thus, denying defendant's motion to dismiss as to this theory was also properly denied. This assignment of error is overruled.

B. The State's Photograph

Defendant claims that the trial court improperly admitted a photograph into evidence showing a depression or hole in the ground where Bobby's head "was laying prior to the body being removed from the scene." We do not agree.

This Court reviews the admission of photographs into evidence for abuse of discretion. *State v. Early*, __ N.C. App. __, __, 670

S.E.2d 594, 599 (2009). An abuse of discretion arises where the trial court's "ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

Under Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.R. Evid. 403 (2009). "'Unfair prejudice' means an undue tendency to suggest a decision on an improper basis, usually an emotional one." *State v. Hennis*, 323 N.C. 279, 283, 372 S.E.2d 523, 526 (1988). "[P]hotographs of the victim's body may be used to illustrate testimony as to the cause of death," and "may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree[.]" *Id.* at 284, 372 S.E.2d at 526. "'Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury.'" *State v. Blakeney*, 352 N.C. 287, 309-10, 531 S.E.2d 799, 816 (2000) (quoting *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526).

At trial, defendant objected to the introduction of a photograph offered by the State during the testimony of Special Agent Conway, a crime scene search specialist, which showed a

depression left in the ground by Bobby's head after the body was removed from the crime scene. During a *voir dire* examination to determine whether to admit the photograph into evidence, the prosecution explained why the photograph was being offered.

> [T]he photograph is . . . illustrative of the force with which the decedent was apparently struck during the time of the fatal assault and therefore bears upon the nature and circumstances of his death and is illustrative of the nature and circumstances of his death where his body came to rest face down in the soil.

The State later called Scott Daniel as a witness, who testified that he was the one who struck Bobby in the head with a baseball bat while Bobby was lying on the ground.

After hearing arguments in the *voir dire* hearing, the trial court concluded that the photograph satisfied the balancing requirement of Rule 403, and found in part that the "photograph is evidence which has a tendency to make existence of a fact that is of consequence to the determination of this action more probable than not."

The foregoing shows that the trial court properly reasoned that the photograph was necessary to illustrate the cause of death in this case under Rule 403. *See Thompson*, 314 N.C. at 626, 336 S.E.2d at 82; *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526. Defendant adduces no evidence from the record demonstrating that the State was offering the evidence for some improper purpose, and the record otherwise demonstrates that the trial court did not abuse its discretion. This assignment of error is overruled.

C. Expert Testimony

Defendant contends that Dr. Gilliland's expert testimony concerning the cause of death, based on an autopsy report prepared by another medical doctor, violated his right to confrontation as guaranteed by the Sixth Amendment. The record is insufficient for this Court to determine whether admitting Dr. Gilliland's testimony was error under *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009), and more recently, under *State v. Mobley*, __ N.C. App. __, ___, 684 S.E.2d 508, 510 (2009). However, even assuming without deciding that the admission of the testimony was error, we conclude that the error was harmless and does not prejudice defendant.

1. Standard of Review

Defendant did not object to Dr. Gilliland's testimony at trial on any ground. As a general rule, constitutional questions not raised at trial are deemed waived on appeal. *State v. Mobley*, __ N.C. App. ___, ___, 684 S.E.2d 508, 510 (2009). However, since defendant has argued plain error in the alternative in this case, we apply this standard of review. *See id.*; *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (plain error review available as to the "admissibility of evidence").

Plain error requires a defendant to demonstrate either "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). A conviction may be overturned under the plain error rule where, after a review of the whole record, it is apparent that either: (1)

"the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done"; (2) "[the error] is grave error which amounts to a denial of a fundamental right of the accused"; (3) "the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial"; (4) "the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings"; or (5) "it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (quotation marks omitted) (approved in *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

2. *State v. Locklear*

In *Melendez-Diaz v. Massachusetts*, _ U.S. _, 174 L. Ed. 2d 314 (2009), the United States Supreme Court extended the holding of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), and held that several forensic analyses offered by the prosecution were inadmissible testimonial statements absent the defendant being given a prior opportunity to cross-examine the unavailable declarants.[1] *Melendez-Diaz*, __ U.S. at __, 174 L. Ed. 2d at 319, 321-22. The forensic analyses at issue in *Melendez-Diaz* were three

[1] This State's Supreme Court came to a similar conclusion 37 years before *Melendez-Diaz* in *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289 (1972) (death certificate stating cause of death held to be inadmissible hearsay under the Sixth Amendment, but admission of the certificate was harmless error since "average jury would not have found the evidence less persuasive had the conclusory evidence contained in the certified copy of the death certificate been excluded").

"certificates of analysis," prepared by non-testifying analysts, showing that substances seized by the police during an arrest were cocaine. *Id.* at __, 174 L. Ed. 2d at 320.

In *State v. Locklear*, our Supreme Court enlarged *Melendez-Diaz* to encompass more than the admission of testimonial documents. One of the issues in *Locklear* was whether the Confrontation Clause, as applied in *Melendez-Diaz*, barred expert testimony from a forensic pathologist, where the testifying pathologist offered opinions as to the decedent's identification and cause of death based on testimonial documents created by non-testifying experts. *Locklear*, 363 N.C. at 451, 681 S.E.2d at 304. The *Locklear* Court held that the Sixth Amendment barred the admission of both: (1) the forensic analyses of the non-testifying pathologists, and (2) the testimony of the forensic pathologist based on the inadmissible forensic analyses. *Id.* at 452, 681 S.E.2d at 305. The defendant in *Locklear* made a Sixth Amendment objection to both the admission of the expert testimony and underlying forensic analyses at trial. *Id.* at 451, 681 S.E.2d at 304. However, even though the *Locklear* Court concluded that the admission of this evidence was error, it found the error "harmless beyond a reasonable doubt" because "[t]he State presented copious evidence" that the defendant committed the murders alleged. *Id.* at 452, 681 S.E.2d at 305.

3. Plain Error Analysis

In this case, Dr. Gilliland testified as to Bobby's cause of death, and did not perform the autopsy or prepare the forensic analysis from which he drew his expert opinion. One of the

pathologists performing Bobby's autopsy, Dr. Lockmuller, was in the courtroom during Dr. Gilliland's testimony; however, the other participant in the autopsy, Dr. Pessinder, was in California at the time of trial.

This situation presents an interesting issue under *Melendez-Diaz* and *Locklear*: whether having one of the pathologists who prepared the autopsy report present in the courtroom audience is sufficient to satisfy the requirement of "availability" under the Confrontation Clause. *See Melendez-Diaz*, 557 U.S. at __, 174 L. Ed. 2d at 323 ("The text of the [Sixth] Amendment contemplates two classes of witnesses--those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter." (footnote omitted)); *Crawford*, 541 U.S. at 36, 60 n.9, 158 L. Ed. 2d 177, 198 n.9 ("The [Confrontation] Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.").[2]

Here, we are unable to answer this question, because the autopsy report is not contained in the record. Without the aid of the document in issue, it is not possible for this Court to determine which pathologist conducted which portion of the autopsy.

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[2] Jurisdictions addressing this issue appear to be split on the meaning of "availability" under *Crawford*. *Compare Starr v. State*, 604 S.E.2d 297 (Ga. Ct. App. 2004) (admission of taped interview of child rape victim did not violate Sixth Amendment, even though child did not testify and child was in courthouse available to testify at time tape shown); *with Bratton v. State*, 156 S.W.3d 689 (Tex. Crim. App. 2005) (admission of statements given to police by codefendants improperly admitted against defendant, even though codefendants were in courtroom at time the statements were read to jury).

Thus, we cannot determine whether Dr. Lockmuller's presence in the courtroom was sufficient to satisfy "availability" as it applies to the Confrontation Clause of the Sixth Amendment, and accordingly we decline to address this issue in this case.

However, even assuming *arguendo* that the admission of Dr. Gilliland's testimony was error, defendant cannot show that its admission prejudiced his conviction thereby satisfying the requisites of plain error.

As discussed, the State offered a plethora of testimony and forensic evidence at trial showing that defendant murdered Bobby by lying in wait and with premeditation and deliberation. Thus, as in *Locklear*, the record provides sufficient proof that defendant committed first-degree murder, and it is evident that "the erroneously admitted evidence regarding [Bobby's] cause of death . . . would not have influenced the jury's verdict." *Locklear*, 363 N.C. at 453, 681 S.E.2d at 305 (citing *State v. Watson*, 281 N.C. 221, 233, 188 S.E.2d 289, 296 (1972)).

Moreover, Dr. Gilliland testified that Bobby died from being bludgeoned in the head--the precise testimony offered by both Scott Daniel and defendant. Since the cause of Bobby's death was established by the persons responsible for his demise, defendant cannot show that the exclusion of Dr. Gilliland's testimony would have resulted in a different verdict, or that the admission of his expert opinion denied defendant a fair trial. *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779. As a result, reversal of defendant's

conviction is not warranted under a plain error standard of review. This assignment of error is overruled.

D. Jury Instructions

Defendant lastly argues the trial court erred by instructing the jury on the theory of lying in wait, because insufficient evidence was offered by the State supporting this theory. As discussed in section (II)(A)(3) *supra*, the jury properly found defendant guilty of first-degree murder under the theory of lying in wait and under the theory of premeditation and deliberation. Since defendant does not challenge the jury instruction of premeditation and deliberation, discussion of this assignment of error is unnecessary, because either theory of first-degree murder supports defendant's conviction. *See* N.C.G.S. § 14-17.

IV. CONCLUSION

Based on the foregoing, we find no prejudicial error in defendant's conviction.

No prejudicial error.

Judges ELMORE and STEELMAN concur.

Report per Rule 30(e).