NO. COA11-238
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Forsyth County
No. 07 CRS 55743-44

REGINALD ROSS

Appeal by Defendant from judgments entered 5 August 2010 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 14 September 2011.

Attorney General Roy A. Cooper, by Special Deputy Attorney General David P. Brenskelle, for the State.

James N. Freeman, Jr., for Defendant.

BEASLEY, Judge.

Reginald Ross (Defendant) appeals pursuant to N.C. Gen. Stat. § 7A-27(b) from a final judgment. Defendant raises three issues on appeal: the trial court erred by (1) allowing testimony and expert opinions of an analyst who relied on the analysis of a non-testifying analyst; (2) denying Defendant's motion to dismiss; and (3) charging the jury on the kidnapping

charge. For the following reasons, we find no prejudicial error.

On 7 June 2007, Officer David Honeycutt (Officer Honeycutt) of the Winston-Salem Police Department was dispatched to the Treetop Apartments at about 8:30 p.m. in response to a 911 call placed by Ms. Tierra Shuler (Ms. Shuler). As Officer Honeycutt approached the apartment, he looked into the open door and observed Defendant and Ms. Shuler. Officer Honeycutt then entered the apartment and saw that Defendant had one arm around Ms. Shuler's waist and his other arm draped around her shoulder. Ms. Shuler appeared to be in distress and Officer Honeycutt asked Defendant to release her. Defendant did not comply. Subsequently, Officer Honeycutt approached Defendant and repeated his request to release Ms. Shuler. Ms. Shuler yelled, "[h]e's got a gun, he's got a gun, he's got a gun."

Officer Honeycutt drew his gun and alerted other officers that Defendant had a gun. As Officer Honeycutt backed away from Defendant, Defendant pointed the gun at Officer Honeycutt's head. As Officer Robert Starling (Officer Starling) entered the doorway of the apartment, he saw Defendant pointing the gun at Officer Honeycutt. Defendant fired at the officers at least twice, and shot Officer Starling. Officer Starling fled the apartment after being wounded, leaving Officer Honeycutt in the apartment with Defendant and Ms. Shuler. As Officer Honeycutt

backed out of the apartment, he fired at Defendant and both Defendant and Ms. Shuler fell to the ground. After exiting the apartment, Officer Honeycutt repeatedly commanded Defendant to drop the gun and release Ms. Shuler. Defendant refused and stated several times that he was not going back to jail. After several officers arrived on the scene, Defendant eventually released Ms. Shuler and surrendered to law enforcement officers.

On 28 April 2008, Defendant was indicted for first-degree kidnapping, attempted murder, assault inflicting serious injury on a law enforcement officer and assault with a firearm on a law enforcement officer. On 14 September 2009, Defendant was indicted, in two superseding indictments, for two counts of attempted murder, first-degree kidnapping, assault inflicting serious injury on a law enforcement officer, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a firearm on a law enforcement officer. On 5 August 2010, a jury found defendant guilty of all of the charges except the charge of attempted murder of Officer Starling and Defendant noted an appeal on the same day.

Defendant argues that the trial court erred by allowing an expert to testify about fired bullets and a revolver recovered at the scene. Defendant contends that the admission of this testimony violated his Sixth Amendment rights under the

Confrontation Clause. We must first address whether this issue was properly preserved for appellate review.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10 (a)(1). The State contends that Defendant did not preserve the constitutional argument because it was not expressly stated by defense counsel at trial. We disagree.

Although counsel did not expressly state the constitutional grounds, the specific grounds were apparent from the context. After *voir dire* defense counsel stated the following:

> Your Honor, I will lodge an objection simply because he was not the original analyst. I know he's given testimony about an examination that he made; however, it is clear from his testimony that he did not examine the weapons. So [sic] would object to him giving any testimony about the weapons themselves and their trigger pull capacity or anything of that nature. He said -- he did say that he microscopically examined projectiles, but he did not -- and he didn't test fire -- and for that reason, also, we would object to him giving any testimony. I understand he did give testimony about making an examination of the projectiles.
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> . . . .
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> First, I want to object to him testifying at all because he didn't do the test firing.

> Secondly, we'd specifically object to him giving any testimony about the trigger pull capacity or anything else about the weapons other than to -- if Your Honor allows him to give testimony about whether he believes that projectiles were fired from either of those two weapons.

In response to the defense's objections, the State asserted,

> I believe the objection is based upon the recent case of Melendez-Diaz. I know Your Honor is aware of the cases, North Carolina cases interpreting Melendez-Diaz and the rulings that, if the substitute analyst, for lack of a better word, has performed independent investigation with regard to the matters, that he or she will be allowed to testify with respect to the scientific investigations made.

After the presentation of arguments, the trial court stated, "I think there ought to be -- in absence of the jury, this agent conducted an independent analysis. And I understand the Defendant's objection. It's overruled."

Considering the context of Defendant's argument, including the State's, as well as the trial court's, understanding of Defendant's objection, we determine that Defendant's basis for objection was clear as Defendant objected pursuant to constitutional grounds as addressed in ***Melendez-Diaz v. Massachusetts***, ___ U.S. ___, 174 L. Ed. 2d 314 (2009)(holding that the admission of certificates by laboratory analysts violated petitioner's Sixth Amendment right to confront the witnesses against him). Because Defendant's basis for objection

was apparent, we hold that the constitutional issue was properly preserved for appellate review. We now address this issue on its merits.

> It is well-settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated. 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. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

State v. Tate, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007) (internal quotation marks and citations omitted).

Defendant contends that the trial court committed reversible error by allowing the testimony of ballistics expert, Special Agent Scott Jones (Agent Jones), as to the results of testing performed on the revolver and bullet fragments recovered at the scene because Agent Jones did not personally test the guns or the bullet fragments. The State argues that Agent Jones' testimony was constitutionally permissible peer review, performing an independent analysis of the projectiles fired from each weapon and the bullet fragments, and reached his own conclusions. We hold that whether or not Agent Jones' testimony was properly admitted, Defendant did not suffer prejudicial error and this assignment is overruled.

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004)). In *Melendez-Diaz,* the United States Supreme Court held that *Crawford* applied to forensic analysts' affidavits because the affidavits were testimonial evidence that were "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Melendez-Diaz*, __ U.S. at __, 174 L. Ed. 2d at 321 (internal quotation marks and 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) (2009). The State must prove the trial court's error was harmless. *Id.* "The presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." *State v. Morgan*, 359 N.C. 131, 156, 604 S.E.2d 886, 901 (2004) (internal quotation marks and citation omitted).[1]

[1] We are aware that our appellate courts have addressed the admission of testimony by analysts who conducted "peer review", "technical review" or some other similar review or analysis subsequent to initial testing of the evidence in question. *See State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009), *State v. Mobley*, 200 N.C. App. 570, 684

Notwithstanding the trial court's admission of testing performed by Agent Jones, who did not initially test the guns or bullet fragments, there is overwhelming evidence that Defendant committed the offenses for which he was convicted. Both Officers Honeycutt and Starling and other officers were involved in a standoff with Defendant as he held Ms. Shuler hostage. Defendant shot at the officers at least twice, wounding Officer Starling. It was only after repeated demands that Defendant released Ms. Shuler. Because there is substantial evidence that Defendant committed the aforementioned offenses, Defendant did not suffer prejudicial error.

Next, Defendant argues that the trial court erred in denying his motion to dismiss because the State failed to present sufficient evidence of premeditation, deliberation, and intent required for the charge of attempted first-degree murder. We disagree.

"The standard of review on appeal of the denial of a criminal defendant's motion to dismiss for insufficient evidence

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S.E.2d 508 (2009), *State v. Brewington*, __ N.C. App. __, 693 S.E.2d 182 (2010), *State v. Craven*, __ N.C. App. __, 696 S.E.2d 750 (2010), *State v. Williams*, __ N.C. App. __, 702 S.E.2d 233 (2010), *State v. Garnett*, __ N.C. App. __, 706 S.E.2d 280 (2011). We note that, as of the drafting of this opinion, the Supreme Court of North Carolina had granted temporary stays with respect to *Brewington, Craven*, and *Williams*. We also note that the Supreme Court of North Carolina recently allowed the State's petition in *State v. Brennan*, __ N.C. __, 708 S.E.2d 396 (2011) and *State v. Brewington*, __ N.C. App. __, 693 S.E.2d 182 (2010). It appears that complications in this area of the law will be addressed by the Supreme Court of North Carolina.

is whether the State has offered substantial evidence to show the defendant committed each element required to be convicted of the crime charged." *State v. Jackson*, 189 N.C. App. 747, 753, 659 S.E.2d 73, 77 (2008). "Substantial evidence is evidence that a reasonable mind might find adequate to support a conclusion." *State v. Hargrave,* 198 N.C. App. 579, 588, 680 S.E.2d 254, 261 (2009). "In conducting our analysis, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

The elements of attempted first-degree murder are "(1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the existence of malice, premeditation, and deliberation accompanying the act; and (4) a failure to complete the intended killing." *State v. Peoples,* 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000); N.C. Gen. Stat. § 14-17 (2009). "In the context of attempted first-degree murder, an intent to kill and the existence of malice, premeditation and deliberation may be inferred from the conduct and statements of the defendant before and after the incident, ill-will or previous difficulty between the parties, and evidence regarding the manner of the attempted killing." *Id.* at 118, 539 S.E.2d at 28.

Defendant was convicted of the attempted first-degree murder of Officer Honeycutt. The State's evidence showed that Officer Honeycutt backed away from Defendant once he was aware that Defendant was armed. As Officer Honeycutt backed away, Defendant pointed the gun at Officer Honeycutt's head and fired at least twice. Furthermore, Defendant repeatedly stated that he was not going back to jail. Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence of intent, premeditation, and malice.

Finally, Defendant contends that the trial court erred in charging the jury that the release of a victim in an area where officers had Defendant outnumbered with their guns drawn was not a safe place. We disagree.

N.C. Gen. Stat. § 14-39(b) (2009) states that:

> [t]here shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

Defendant correctly asserts that the legislature has not defined "safe place" and the determination of whether a victim was released to a safe place has been decided on a case-by-case

basis. *See State v. Corbett*, 168 N.C. App. 117, 121, 607 S.E.2d 281, 283 (2005). In this case, the trial court gave a jury instruction, in regards to "safe place", which quoted language from *State v. Heatwole*, 333 N.C. 156, 423 S.E.2d. 735 (2005) (*See also Corbett*, 168 N.C. App. at 121, 607 S.E.2d. at 283). Defendant argues that the facts of this case are distinguishable from *Heatwole* and *Corbett,* and the instruction as given represents an impermissible shift of the burden of proof.

In *Heatwole*, our Supreme Court concluded that,

> releasing a kidnap victim when the kidnapper is aware he is cornered and outnumbered by law enforcement officials is not "voluntary" and that sending her out into the focal point of their weapons is not a "safe place."

Heatwole, 333 N.C. at 161, 423 S.E.2d at 738. The Supreme Court determined that the defendant did not voluntarily release the victim. The defendant kidnapped his girlfriend and released her after killing two people and while ten officers with weapons drawn were surrounding the home. In *Corbett*, our Court rejected the defendant's argument that the jury instruction that included the language from *Heatwole* denied him the presumption of innocence. Our Court determined that the *Heatwole* instruction was proper though the defendant released the victim into the line of fire of just one officer. *Corbett*, 168 N.C. App. at 123, 607 S.E.2d at 284.

Here, Defendant released Ms. Shuler after firing at officers multiple times with several armed officers outside the door. Defendant knew he was outnumbered and had shot at and wounded a police officer before releasing Ms. Shuler. Accordingly, we find no relevant distinction from *Heatwole* and *Corbett*. Moreover,

> [t]he court's instruction did not conclude [that the victim] was released in an unsafe place. Rather, it provided that should the jury find the circumstances of the instruction as to the release of [the victim] to be in such place, such a release was not in a "safe place." At all times it was still upon the jury to find the facts of the circumstances surrounding the release beyond a reasonable doubt.

Corbett, 168 N.C. App. at 123, 607 S.E.2d at 284. Therefore, Defendant's final argument is without merit.

No prejudicial error.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).