NO. COA11-295
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v. Nash County
Nos. 08 CRS 057974-76

DARRELL MAURICE HICKS

Appeal by defendant from judgment entered 14 July 2010 by Judge Milton F. Fitch, Jr., in Nash County Superior Court. Heard in the Court of Appeals 12 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General David N. Kirkman, for the State.

M. Alexander Charns for defendant-appellant.

BRYANT, Judge.

Because the trial court did not abuse its discretion in refusing to answer the jury's question and because the prosecution's examination, though improper, did not have a probable impact on the outcome of the trial, defendant cannot establish plain error. Because defendant cannot establish prejudice from the alleged errors of trial counsel, he did not receive ineffective assistance of counsel.

On 8 September 2008, officers in the Nash County Sheriff's Department discovered the deceased body of Stanley Chi in his house located at 11390 Red Bud Road in Castalia. A state medical examiner estimated that Chi had been dead for two days. The cause of death was determined to be a single gunshot wound to the head. The wound was consistent with a .22 or .23 caliber projectile.

On 13 April 2009, defendant Darrell Maurice Hicks was indicted on charges of robbery with a dangerous weapon, first-degree murder, and first-degree burglary. A trial commenced on 12 July 2010 in Nash County Superior Court.

On 12 November 2008, the Nash County Sheriff's Department searched the home of Jermaine Drake. They discovered a computer monitor, hard drive, and fax machine matching the description of the items taken from Stanley Chi's house.

At trial, Drake testified that defendant shot and killed Chi. Drake testified that in September 2008, one night between 12:00 and 1:00 a.m., defendant came to Drake's house and said he wanted to go to a friend's house to drink some beer. The friend turned out to be Chi. The two entered Chi's house through a sheet hanging over a back doorway. Drake did not know Chi and had never before been to his house. Chi offered each of them a

beer, and they talked for a very short time. Then Drake and defendant each accepted another beer from Chi and left. Defendant and Drake went home. Forty-five minutes later, defendant wanted to go back to Chi's house. Again, they entered the house through the sheet covering the back doorway. Chi, lying prone on the sofa, said, "what's up Darrell." Defendant pulled out a sawed off .22 caliber rifle, "said, 'this is what's up[,]' and shot him." "[Defendant] looked at [Drake] with a terrified face and said, grab something[.]" Drake grabbed a computer monitor sitting beside the door. Defendant took Chi's wallet, the computer hard drive, and a fax machine.

Rashon Edwards, who had been incarcerated with defendant in the Franklin County jail also testified for the State. Edwards testified defendant disclosed details of a murder defendant committed in Castalia. Edwards' testimony was consistent with but totally independent of Drake's and no connection was ever established between Edwards and Drake.

At the conclusion of the evidence, the jury found defendant guilty of robbery with a dangerous weapon, first-degree burglary, and first-degree murder. The trial court entered judgment in accordance with the jury verdict. Defendant was sentenced to life in prison without parole for the crime of

first-degree murder, a term of 103 to 133 months for robbery with a dangerous weapon, and 103 to 133 months for first-degree burglary. All sentences were ordered to run consecutively. Defendant appeals.

On appeal, defendant raises the following issues: Did the trial court commit plain error by (I) failing to answer the jury's question on guilt by mere presence; and (II) allowing a witness to testify that defendant refused to give a statement to law enforcement. Also, (III) did defendant receive ineffective assistance of counsel.

I

Defendant contends that the trial court committed plain error by failing to answer the jury's question on guilt by mere presence or reinstructing the jury. We disagree.

"In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (citation omitted).

Under North Carolina General Statutes, section 15A-1234, "[a]fter the jury retires for deliberation, the judge may give appropriate additional instructions to: [r]espond to an inquiry of the jury made in open court . . . ." N.C. Gen. Stat. § 15A-1234(a)(1) (2009).

> [Further,] [w]e believe it important to note that the trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions.

State v. Prevette, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986).

Here, following an uncontested instruction on the charge of first-degree murder, the trial court read aloud the following question from the jury: "[I]s a person guilty of first degree murder if they witnessed a crime and did not pull the trigger?" When the trial court inquired as to whom the jury was referring, the foreperson responded with defendant's name. The trial court made the following statement: "Ladies and gentlemen, you have heard the evidence in this case, it is your duty and responsibility to recall and remember the evidence as it was presented. Are there other questions? . . . Then go back and continue deliberating." After the jury retired for further

deliberation, the trial court individually inquired of the prosecution and defendant about their reaction to the manner in which the trial court "handled that particular situation." Both the prosecution and defendant responded that they had no objection.

"First-degree murder is the unlawful killing of another human being with malice and with premeditation and deliberation." *State v. Stitt*, 201 N.C. App. 233, 247, 689 S.E.2d 539, 550 (2009) (citations omitted).

> The mere presence of a person at the scene of a crime at the time of its commission does not make him a principal in the second degree; and this is so even though he makes no effort to prevent the crime, or even though he may silently approve of the crime, or even though he may secretly intend to assist the perpetrator in the commission of the crime in case his aid becomes necessary to its consummation.

State v. Aycoth, 272 N.C. 48, 50-51, 157 S.E.2d 655, 657 (1967) (quoting *State v. Birchfield*, 235 N.C. 410, 413, 70 S.E. 2d 5, 7).

Viewing the record, there was no evidence presented that defendant merely observed the shooting of Stanley Chi. It is possible, based on the jury's question, that there may have been speculation as to whether Drake may have pulled the trigger and defendant "merely observed the shooting." However, there is no

evidence in the record to support such speculation. Therefore, because there was no basis in the evidence presented for the jury to make a determination that defendant was merely present, the trial court's failure to instruct the jury on the law regarding mere presence was not an abuse of discretion, much less plain error. Accordingly, defendant's argument is overruled.

II

Defendant argues that the trial court committed plain error by allowing a law enforcement officer to testify that defendant refused to give a statement to investigators. We disagree.

"In order to establish plain error [the] 'defendant must show that the error was so fundamental that it had a probable impact on the result reached by the jury.'" *State v. Davis*, 191 N.C. App. 535, 538, 664 S.E.2d 21, 23 (2008) (quoting *State v. Campbell*, 340 N.C. 612, 640, 460 S.E.2d 144, 159 (1995)).

"It is well established that a criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution." *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (citation omitted). "Whether the State may use

a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894 (2008).

> [A] defendant's pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial. [*Boston*, 191 N.C. App. at 649, 663 S.E.2d at 894 n.2]. A defendant's post-arrest, post-*Miranda* warnings silence, however, may not be used for any purpose. *Id.* at 648-49, 663 S.E.2d at 894. *See also* [*Doyle v. Ohio*, 426 U.S. 610, 619, 49 L. Ed. 2d 91, 98 (1976)] (holding that "use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment").

State v. Mendoza, ___ N.C. App. ___, ___, 698 S.E.2d 170, 174 (2010); *accord Jones v. Stotts*, 59 F.3d 143, 146 (7th Cir. 1995) ("it is the prosecutor's exploitation of a defendant's exercise of his right to silence which is prohibited.").

Here, during the State's case-in-chief Sergeant David Brake, of the Nash County Sheriff's Department, testified that between 8 September 2008 and 12 November 2008 twenty-to-thirty people were interviewed in the investigation of Chi's murder, but "we were just spinning our wheels getting nowhere." After

speaking to federal inmate Rashon Edwards, "we went to the residence at 100 Smooth Rider Road where Mr. Drake lived . . . ."

> We took Mr. Drake into custody, he came down to the sheriff's office and he did provide a voluntary statement. He was charged in the crime, and based on the information that we had received from the federal inmate, along with Mr. Drake detailing the crime, we obtained warrants for Mr. Hicks. Mr. Hicks was being incarcerated in the Franklin County Jail, on the 13th we went to the jail and picked him up and transported him to the sheriff's office. And upon arrival here, he invoked his rights and declined to - not to interview with us in this case.
>
> Q. Mr. Drake gave you a statement and Mr. Hicks did not give you a statement?
>
> A. Yes, sir, that's correct.

The sergeant's testimony does not indicate whether defendant had been read his Miranda warnings before being asked to make a statement in regard to the charges of first-degree murder, first-degree burglary, and robbery with a dangerous weapon, but regardless, the prosecution's examination exposed defendant's silence as an inference of guilt. And, while the prosecutor did not further exploit defendant's post-arrest silence, nevertheless, the above noted exchange may be in violation of defendant's Fifth Amendment rights. However, because defendant failed to object, we must determine only

whether the admission of the testimony amounted to plain error. *See Mendoza*, ___ N.C. App. ____, 698 S.E.2d 170.

The State presented evidence from the law enforcement officer that discovered Chi's body, the medical examiner, Edwards, Drake, and the law enforcement officer who subsequently charged defendant. Defendant called two witnesses: Stanley Chi's neighbor and a law enforcement officer who conducted interviews in the investigation of Chi's murder. No witness offered an alternative version to the events testified to by Edwards and Drake. As such, the evidence was consistent and overwhelmingly against defendant. Therefore, the prosecution's examination of Sergeant Brake, though in violation of our state and federal constitutions, did not amount to plain error. Accordingly, defendant's argument is overruled.

III

Lastly, defendant argues he received ineffective assistance of counsel when defense counsel (A) failed to object to the law enforcement officer's comment on defendant's silence when charged with the death of Stanley Chi and (B) again when counsel failed to move for the dismissal of the first-degree burglary charge. We disagree.

> The two-part test for ineffective assistance of counsel is the same under both the state

> and federal constitutions. *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). A defendant must first show that his defense counsel's performance was deficient and, second, that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052 (1984). Deficient performance may be established by showing that "counsel's representation 'fell below an objective standard of reasonableness.'" *Wiggins v. Smith*, 539 U.S. 510, 521, 156 L. Ed. 2d 471, 484, 123 S. Ct. 2527 (2003) (quoting *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 693). Generally, "to establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Wiggins*, 539 U.S. at 534, 156 L. Ed. 2d at 493 (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698).

State v. Thompson, 359 N.C. 77, 115, 604 S.E.2d 850, 876-77 (2004).

A

Defendant argues that he received ineffective assistance of counsel for defense counsel's failure to object to the prosecution's examination of Sergeant Brake, specifically, seeking testimony on defendant's silence upon being charged with first-degree murder, first-degree burglary, and robbery with a dangerous weapon. However, as discussed in issue *II*, the

evidence presented to the jury was consistent and overwhelmingly against defendant. On this point, defendant cannot maintain a reasonable probability that had counsel objected to the prosecutor's questions the results of the proceeding would have been different. *Id.*

B

Defendant also argues that he received ineffective assistance of counsel where defense counsel failed to move for a dismissal of the charge of first-degree burglary. Defendant argues that where the State failed to present evidence that defendant entered the victim's house by breaking or without consent there was insufficient evidence to submit the charge to the jury.

"A 'breaking' is any act of force, *however slight*, used to gain entrance through any usual or unusual place of ingress, whether open, partly open, or closed." *State v. Irons*, 189 N.C. App. 201, 205, 657 S.E.2d 733, 736 (2008) (emphasis added) (citing *State v. Jolly*, 297 N.C. 121, 128, 254 S.E.2d 1, 5-6 (1979)).

Here, the State presented evidence that the back entrance of Stanley Chi's house was covered by a sheet and that defendant entered Chi's house through the sheet covered doorway. No

evidence of record suggests defendant had permission to enter Chi's home a second time that night. In fact, all the evidence shows defendant shot Chi as he lie prone on his sofa.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence presented to submit to the jury the issue of whether defendant committed a breaking when he entered Stanley Chi's residence. *See State v. Fraley*, 202 N.C. App. 457, 462, 688 S.E.2d 778, 783 (2010) (when reviewing a trial court's denial of a motion to dismiss, "[t]he evidence 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 . . . ." (citing *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980))). Because the evidence was sufficient to submit the burglary offense to the jury, there is no likelihood a motion to dismiss would have been granted.

Defendant has failed to establish a reasonable probability that had defense counsel objected to the prosecution's examination of Sergeant Brake or made a motion to dismiss the burglary charge the outcome of the proceeding would have been different. Accordingly, defendant's arguments on these points

are overruled. Therefore, he is unable to establish ineffective assistance of counsel.

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).