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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-572

Filed: 7 November 2017

Nash County, No. 14 CRS 50238-39

STATE OF NORTH CAROLINA

v.

DONTAIL BRINKLEY, Defendant.

Appeal by defendant from judgments entered on or about 11 September 2015 by Judge Marvin K. Blount, III, in Superior Court, Nash County. Heard in the Court of Appeals 30 November 2016.

*Attorney General Josh Stein, by Special Deputy Attorney General Daniel P. O'Brien, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.*

STROUD, Judge.

Defendant appeals judgments for first degree murder and assault with a deadly weapon with intent to kill. Because defendant's proffered evidence that another identified person had a motive to kill the victim and had threatened on the

very same date to have him killed that day, the trial court erred in excluding defendant's evidence as irrelevant. We conclude defendant should receive a new trial.

I. Background

On the evening of 5 January 2014, Mr. Omar Foster was shot outside of an apartment by someone in a white Chevrolet Tahoe, an SUV. Defendant was indicated for Mr. Foster's murder. At defendant's trial, the State presented a mostly circumstantial case with many witnesses but none whom directly and consistently linked defendant to the shooting of Mr. Foster. Unfortunately, due to the piecemeal nature of the circumstantial testimony, it is difficult to link the testimonies into any one narrative. The narrative below highlights the evidence in the light most favorable to the State. Mr. Milton Richardson, lived at the apartment where Mr. Foster was shot, and he testified that at least twice in the recent past, defendant had visited, giving a false name and looking into his apartment when he opened the door.

Ms. Yieshia Parker, Mr. Foster's girlfriend, testified she knew defendant because they "grew up in the same neighborhood." At the time of the shooting Ms. Parker told the police she did *not* see who shot Mr. Foster, and she did not know who shot him. During defendant's trial, Ms. Parker testified she saw defendant with a gun in the SUV and Mr. Foster told her just before he died that defendant shot him. Ms. Parker's original statements to police at the time of Mr. Foster's death were that

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she did not know who the assailant was, but her testimony at trial positively identified defendant.

A police officer who arrived at the scene of the crime testified that just before he died, Mr. Foster said defendant shot him and he knew it was defendant because he had “seen him around[.]” On cross-examination, the officer clarified Mr. Foster did not say he had *seen* defendant that night. Another police officer also testified Mr. Foster said defendant shot him; the officer asked how Mr. Foster knew it was defendant, and Mr. Foster said defendant “was the only one that drives a newer model, white-in-color Chevrolet Tahoe that looks like an RMPD K-9 patrol vehicle.” Mr. Foster also told the officer

he had a feeling that the incident was going to happen. And I said why did you have a feeling that [defendant] was going to shoot him and he said he just had a feeling. I then asked them if he had any disagreements with [defendant] or the people he hangs out with and Omar advised that he did not. I then asked him if [he] did anything to provoke any type of argument for any reason why [defendant] would want to hurt him, shoot him or anything like that and that’s when his responses started becoming very quick and all I got out of him out of that was no.

The police later found an SUV matching the description provided by eyewitnesses to the shooting; it belonged to defendant’s brother’s girlfriend. Defendant’s fingerprints were found both inside and outside of the SUV. No weapon was ever recovered.

After the State’s case-in-chief, defendant proffered evidence that was not admitted, and defendant challenges the trial court’s exclusion of that evidence. The

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first proffer was from Mr. Foster's friend, Ms. Shaunise Cabbagestalk, who stated that the day of Mr. Foster's death she saw him at a hotel. Two sisters were fighting because "one was messing with him and the other one was messing with him" and one woman told Mr. Foster "[b]efore he got to sleep, she was going to get one of her goons to lay him down."

Defendant also proffered the testimony of a police officer who had spoken with Ms. Cabbagestalk. The officer stated that Ms. Cabbagestalk had told him she and Mr. Foster were friends and through his investigation he discovered "Laquisha McNeal" was "supposed to have been in some kind of intimate relationship" with Mr. Foster, but Mr. Foster was also "having a relationship" with Laquisha's sister, Jalicia. When Jalicia found out both she and her sister were involved with Mr. Foster, she confronted her sister and Mr. Foster "with a bunch of her friends." Ms. Cabbagestalk had called the police because the altercation between the sisters "had become very violent[.]" Jalicia had also threatened to "get one of her goons to lay [Mr. Foster's] ass down before he went to sleep at night."

After the shooting, the police went to speak with Laquisha and noted she arrived in "a white in-color Jeep Grand Cherokee[.]" a white SUV. Laquisha and another individual provided the police with "bad [phone] numbers" and apparently the police did not talk to them again, since the officer's proffer on direct examination

ends there, simply noting Laquisha had proven “very difficult to find.”<sup>1</sup> The trial court did not allow defendant to present his proffered evidence on the basis of North Carolina Rule of Evidence 401. After extensive deliberations, the jury found defendant guilty.

In summary, the jury heard evidence that defendant had twice been to the apartment where Mr. Foster was shot and had given a false name; Mr. Foster believed defendant shot him based only on the vehicle the shooter was in; Ms. Parker testified by the time of trial that defendant shot Mr. Foster but her testimony contradicted her original statements; the shots came from a white SUV, and defendant’s fingerprints were found in a white SUV. Based upon the trial court’s exclusion of defendant’s proffered evidence as irrelevant under Rule 401, the jury did not hear evidence that the McNeal sisters were involved in a violent altercation involving Mr. Foster on the day of Mr. Foster’s death; Jalicia McNeal threatened to have defendant killed on the very day he died; and Laquisha McNeal was later seen in a white SUV and provided false contact information to the police.

## II. Excluded Evidence

Defendant argues on appeal that the trial court erred in excluding his proffered evidence that another person had threatened to kill Mr. Foster on the same night he was shot. Defendant argues that the trial court erred in excluding the

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<sup>1</sup> For reasons not apparent from the record, the police did not follow up on trying to find the McNeal sisters.

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evidence based on Rule 401 because the evidence that Jاليا had threatened to have Mr. Foster killed on the very day he was shot was, in fact, relevant. “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2015) (quotation marks omitted).

We review the trial court’s rulings as to relevance with great deference.

Although the trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court’s ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

*State v. Khouri*, 214 N.C. App. 389, 406, 716 S.E.2d 1, 12 (2011) (citation and quotation marks omitted).

The State directs us to *State v. McNeill*, wherein our Supreme Court stated that

where the evidence is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another’s guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant’s guilt.

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326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990). The State contends the proffered evidence fails the first prong “because it does not point directly to the guilt of some specific person[,]” “is not certain what the alleged threat might have meant[,]” and “does not point to anyone directly[.]” (Quotation marks omitted.) We find the State’s contentions to be without merit.

While the case law is extensive on the issue of the specificity of the person and the threat, such analysis is unnecessary as the State’s arguments make little sense given defendant’s proffered evidence. Defendant’s evidence specifically points to the guilt of Jalicia McNeal who made the threat. While Jalicia may not have named the specific person she would employ to kill defendant, that information is not required to make defendant’s proffered evidence relevant; she was a known individual and even if she had someone else kill Mr. Foster, she would be equally responsible for his murder. The State cites to no law that indicates that when an individual makes a threat to have someone killed, and that individual is actually killed on the same day, the threat must have included a specific statement of exactly who would kill the victim and how this would be done. On the specificity of the threat, the threat was clearly a threat to kill defendant that day; we can discern no other meaning from the statement that Jalicia would have her “goon” “lay [defendant] down” before he even went to sleep that night.

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On the second prong, the State simply argues that the proffered evidence “is not inconsistent with the defendant’s guilt.” (Quotation marks omitted.) The State then points out that defendant’s fingerprints were found in a vehicle matching the description of the one used in the crime. The State seems to argue that in order for the proffered evidence to be used it must somehow negate all of the State’s positive evidence linking defendant to the crime. This is simply not the standard nor is it a realistic one. Jalicia’s threat to have Mr. Foster killed is evidence inconsistent with defendant’s guilt.

Here, defendant proffered the testimony of Mr. Foster’s friend, Ms. Cabbagestalk, a woman who had no links to defendant and no motive to falsify her statement as she was the friend of the victim, Mr. Foster. Ms. Cabbagestalk witnessed the decedent breaking up a fight between two women he was romantically involved with and heard one woman threaten to have him killed on the very night of his murder. An officer corroborated that Ms. Cabbagestalk had told him about the altercation and upon further investigation he was able to identify the women and noted that Jalicia had driven with a group of friends to confront her sister and Mr. Foster; the confrontation ended in physical violence followed by a death threat. The officer also later saw Laquisha in a white SUV and noted that she gave him a bad phone number and did not want to be involved in the investigation.



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The proffered evidence has the “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” as it indicates someone else may have killed Mr. Foster. N.C. Gen. Stat. § 8C-1, Rule 401. Furthermore, the proffered evidence “point[s] directly to the guilt of some specific person,” Jاليا, and is “inconsistent with the defendant’s guilt” which again we note differs from contradicting every piece of the State’s evidence, a standard advocated by the State, but not required. *McNeill*, 326 N.C. at 721, 392 S.E.2d at 83. The trial court erred in ruling that defendant’s proffered evidence did not meet the low bar of relevancy. *See* N.C. Gen. Stat. § 8C-1, Rule 401; *Khoury*, 214 N.C. App. at 406, 716 S.E.2d at 12.

Thus, the remaining question is whether defendant was prejudiced by the exclusion of his proffered evidence.

When the trial court excludes evidence based on its relevancy, a defendant is entitled to a new trial only where the erroneous exclusion was prejudicial. A defendant is prejudiced by the trial court’s evidentiary error where there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. Defendant bears the burden of showing prejudice.

*State v. Miles*, 222 N.C. App. 593, 607, 730 S.E.2d 816, 827 (2012) (citations and quotation marks omitted), *aff’d per curiam*, 366 N.C. 503, 750 S.E.2d 833 (2013).

Here, after deliberating, the jury requested it be allowed to continue deliberations into the next day, which the trial court allowed. Upon returning the

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next day, the jury deliberated another two and a half hours before finding defendant guilty. The jury deliberated for a long time without even having heard defendant's evidence. The State offered no physical evidence linking defendant to the crime and no clear identification of defendant other than that he was sometimes seen in his brother's girlfriend's white SUV and Ms. Parker's trial testimony, which contradicted her statements to police at the time of his death. Defendant's proffered evidence tends to show that another person had a motive and a plan to kill Mr. Foster on the very same day. Ms. Cabbagestalk, a friend of the victim, independently reported the altercation and threat to the police and gave consistent testimony at trial. A police officer identified the woman who threatened Mr. Foster, Jalicia, and simply failed to follow up on any investigation of her or her sister who gave him an incorrect phone number -- a fact that would normally cause even more suspicion. We conclude that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.* Because we are granting defendant a new trial based upon the exclusion of his proffered evidence based upon relevancy, we need not consider his other arguments on appeal.

#### IV. Conclusion

We grant defendant a new trial, noting that any evidentiary rulings in the new trial will depend upon the evidence actually presented in that trial.

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NEW TRIAL.

Judges HUNTER and DAVIS concur.

Report per Rule 30(e).