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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-672

Filed: 2 May 2017

Alamance County, No. 13 CRS 057989

STATE OF NORTH CAROLINA

v.

DEMARCUS LAMONT CATES

Appeal by defendant from judgment entered 9 November 2015 by Judge Michael J. O’Foghludha in Alamance County Superior Court. Heard in the Court of Appeals 25 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

CALABRIA, Judge.

Demarcus Lamont Cates (“defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of voluntary manslaughter. After careful review, we conclude that defendant received a fair trial free from error.

I. Background

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On 28 December 2013, Humberto Anzaldo (“Anzaldo”) visited the Otter Creek Mobile Home Park (“Otter Creek”) in Alamance County, North Carolina. That evening, he overheard his friend Humberto Reyes Flores, aka Leopoldo Reyes Villalobos (“Polo”), engaging in a heated argument with another man, Luis Perez (“Scrappy”). They were standing in front of unit 22, and Polo was screaming at Scrappy about losing “all that money.” It was not clear to Anzaldo what Scrappy had lost, but Polo said “that it was worth about \$150,000.” Anzaldo also overheard the men discuss kidnapping someone. Later, Anzaldo saw them leave Otter Creek with another man, Hector Lopez (“Lopez”).

The next morning, Polo instructed Anzaldo to meet him back at Otter Creek. After speaking outside “for a good little while,” they entered unit 22. Inside, Anzaldo saw a man whom he did not know sitting on the couch, blindfolded and tied up. He later learned that the man’s name was Ronald Royster (“Mr. Royster”). Anzaldo asked Polo, “[W]hat are you doing[?] This ain’t Mexico. You can’t do that here[,]” and Polo responded, “I got to do what I got to do.”

They went outside, and Anzaldo told Polo that he was leaving. Polo directed him to stay and said that they would leave “afterwards.” He did not explain further, but defendant and Mr. Royster’s son, Rontel Royster (“Rontel”), drove up soon thereafter. Anzaldo did not know either man, but he quickly discerned that “they were mad.” Scrappy exited unit 22, and he and Polo spoke briefly with defendant and

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Rontel. Either defendant or Rontel gave Polo a “fairly heavy” black box, which Polo handed to Scrappy. Then, Scrappy went inside unit 22 and retrieved Mr. Royster, his blindfold and ties removed.

As Mr. Royster got into the car, Anzaldo heard one of the men say, “F them, that’s what we came to get,” and then Polo and defendant “just start[ed] arguing and shoving each other.” The pair were “locking up,” and then Anzaldo started hearing “pretty consistent” gunshots “[r]ight there where [he] was at.” Anzaldo, Scrappy, and Lopez, who had also arrived at some point during the altercation, all ran away as “five or six” gunshots rang out. Anzaldo hid behind a nearby unit for two or three minutes. When he came out, he saw Polo on the ground. Polo died of multiple gunshot wounds to the head shortly thereafter.

The following day, the Alamance County Sheriff’s Office deployed K-9 units to search the woods behind Otter Creek. Fifty to seventy-five yards behind units 23 and 24, they discovered a black lock box containing approximately one kilogram of cocaine, which would have a street value ranging between \$35-40,000.

On 6 July 2015, a grand jury indicted defendant for second-degree murder and trafficking in cocaine by possession. Trial commenced in Alamance County Criminal Superior Court on 2 November 2015. At the close of the State’s evidence, defendant moved to dismiss both charges based on insufficiency of the evidence. The trial court dismissed the trafficking charge but denied defendant’s motion as to the murder

charge. Defendant did not present evidence but renewed his motion to dismiss, which the court again denied.

On 9 November 2015, the jury returned a verdict finding defendant guilty of voluntary manslaughter. The trial court sentenced defendant to 63 to 88 months in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

II. Defendant's Motion to Dismiss

Defendant first contends that the trial court erred by denying his motion to dismiss, because the State's evidence was insufficient to identify him as the shooter; however, defendant acknowledges that he "never specifically moved to dismiss the lesser-included offense of voluntary manslaughter." Accordingly, he waived appellate review of this issue. *See* N.C.R. App. P. 10(a)(1) (explaining that "[i]n 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"); *see also State v. Neville*, 202 N.C. App. 121, 124, 688 S.E.2d 76, 79 (concluding that the defendant who moved to dismiss the charge of first-degree murder but "neither moved to dismiss the charge of second-degree murder, nor argued to the trial court that there was insufficient evidence of any of the elements[.]" waived appellate review of that issue), *disc. review denied*, 364 N.C. 130, 696 S.E.2d 696 (2010).

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Although defendant asks this Court to review his unpreserved challenge pursuant to N.C.R. App. P. 2, we decline to do so. See N.C.R. App. P. 2 (providing that “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may . . . suspend or vary the requirements or provisions of” the North Carolina Rules of Appellate Procedure). Our “authority to invoke Rule 2 is discretionary, and this discretion should only be exercised in exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake.” *State v. Pender*, __ N.C. App. __, __, 776 S.E.2d 352, 358 (2015) (internal citations and quotation marks omitted). We do not believe, and defendant does not assert, that this case involves exceptional circumstances that would justify invoking N.C.R. App. P. 2.

In the alternative, defendant argues that his trial attorney rendered ineffective assistance of counsel by failing to preserve this sufficiency challenge. We disagree.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel’s performance was deficient and then that counsel’s deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel’s representation fell below an objective standard of reasonableness. 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.

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State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). “Counsel is given wide latitude in matters of strategy, and the burden to show that counsel’s performance fell short of the required standard is a heavy one for defendant to bear.” *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002).

Defendant, quoting *State v. Waddell*, 279 N.C. 442, 445, 183 S.E.2d 644, 646 (1971), contends that his trial counsel’s performance was deficient because “[a] motion to dismiss is in order when the prosecution fails to offer sufficient evidence the defendant committed the offense charged.” But *Waddell* did not address the issue of ineffective assistance of counsel; therefore, it does not control our analysis of defendant’s claim. *See id.* at 444, 183 S.E.2d at 646 (reviewing whether the trial court erred (1) “in refusing to allow the motion to quash the indictment because of a variance between the charge and the proof”; and (2) “in denying the motion for a mistrial because of an unknown party’s statement to [a] prospective juror”). Moreover, even if *Waddell* were on point, defendant’s argument remains untenable, because here, defendant’s counsel *did* move for dismissal of the charged offenses, and his motion was successful as to the trafficking charge. He also contended—as defendant attempts to assert on appeal—that there was insufficient evidence that defendant “was the gentleman that fired the shots that” killed Polo.

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In denying defendant's motion to dismiss the murder charge, the court explained, "I'm going to let it go to the jury on voluntary manslaughter. The real issue is, am I letting it go to the jury on murder." Defendant's counsel renewed his motion to dismiss at the close of all evidence but made the tactical decision to argue, in light of the court's prior ruling, that "this [wa]s a manslaughter matter":

[DEFENSE COUNSEL]: There's no indication [defendant] knew [Polo], seen him, talked to him, had any other relation with him. . . . [T]he shooting was an immediate heat of passion reaction to what was either, you know, a scuffle, a fight that we contend was instigated by [Polo], especially in regards to the location of the body and where it ended up.

That the fact that there was evidence presented that there was a weapon found right beside his hand, that shots had been fired, although an indiscriminate number and amount. Not from that gun but from other potentially other gun or guns. And all this resolved itself in an amazingly fast manner.

So I think it fits [voluntary manslaughter] almost to a T. Again, the killing occurs by a reason of sudden anger or heat of passion that temporarily removes reason and malice or premeditated, deliberated first degree murder or second degree murder where the defendant has an imperfect right to self-defense.

. . .

We would argue, Your Honor, that the State's theory of the shooting of the matter, very simply, is not supported by the evidence. This idea that there was movements across the parking lot that led to shot, stop, shot, stop, shot and then the shot to the top of the head that was some—in some way in excessive, you mean, to be killing shot when there's no

evidence, you know, that—where the evidence could be that the man was tumbling forward in the process of the multiple shots that came forward in a relatively rapid manner.

So we would contend that the perfect—that the appropriate charge would be for voluntary manslaughter.

Arguing for the lesser charge of voluntary manslaughter was clearly a strategic maneuver, and appellate courts generally decline to question counsel's professional judgment on such matters. *See Fletcher*, 354 N.C. at 482, 555 S.E.2d at 551; *see also Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 694 (1984) (“Judicial scrutiny of counsel's performance must be highly deferential.”).

Defendant has failed to carry his heavy burden of showing that his trial counsel's performance fell below an objective standard of reasonableness; therefore, his claim for ineffective assistance of counsel fails. *See Fletcher*, 354 N.C. at 482, 555 S.E.2d at 551.

III. Anzaldo's Testimony

Defendant next contends that the trial court erred by overruling his objection to Anzaldo's testimony during direct examination:

Q: Okay. Mr. Anzaldo, is there any doubt in your mind that that is the gentleman who shot your friend?

[DEFENSE COUNSEL]: Objection.

[ANZALDO]: No, that is him.

THE COURT: Overruled.

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Specifically, defendant asserts that “[b]ecause the State’s evidence of [defendant’s] identity as the shooter was otherwise weak, admission of Anzaldo’s unfounded speculation as to [defendant’s] guilt likely caused the jury to convict him and should result in a new trial.” We disagree.

We review the trial court’s admission of a lay witness’s opinion testimony for abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.” N.C. Gen. Stat. § 8C-1, Rule 602 (2015). “However, personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception.” *State v. Wilkerson*, 363 N.C. 382, 414, 683 S.E.2d 174, 194 (2009) (citation and quotation marks omitted), *cert. denied*, 559 U.S. 1074, 176 L. Ed. 2d 734 (2010). A lay witness may also testify to an opinion or inference that is “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701. Our Supreme Court has long held that under this Rule,

a witness may state the “instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.” Such statements are usually

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referred to as shorthand statements of facts.

State v. Braxton, 352 N.C. 158, 187, 531 S.E.2d 428, 445 (2000) (citations omitted) (concluding that a corrections officer's lay "testimony that the victim's screaming sounded like somebody fearing for his life and that the crime scene was worse than a hog killing represented instantaneous conclusions based on his observation of a variety of facts"), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001).

Here, the testimony that elicited defendant's objection was admissible as a shorthand statement of facts, pursuant to N.C. Gen. Stat. § 8C-1, Rule 701. As a lay witness, Anzaldo was permitted to offer his "instantaneous conclusions of the mind" regarding the state of the persons, things, and events that he personally perceived. *Braxton*, 352 N.C. at 187, 531 S.E.2d at 445. Although he stated that he never saw anybody, including defendant, with a gun, he also testified that he was "beside [defendant and Polo] whenever they started wrestling and then [he] heard gunshots." "These statements, while reflecting either poor memory or indistinct perception, are nonetheless competent and admissible because they were rationally based on the firsthand observation of the witness, rather than mere speculation or conjecture." *State v. Davis*, 77 N.C. App. 68, 73, 334 S.E.2d 509, 512 (1985). Any inconsistencies in Anzaldo's testimony were properly decided by the jury. *See State v. Bromfield*, 332 N.C. 24, 36, 418 S.E.2d 491, 497 (1992) (explaining that "contradictions in the evidence are for the finder of fact to resolve").

Accordingly, the trial court did not err in overruling defendant's objection to Anzaldo's testimony.

IV. Dr. Scott's Testimony

Defendant next challenges certain testimony of Associate Chief Medical Examiner Dr. Lauren Scott ("Dr. Scott"). Dr. Scott was present for "most of" the autopsy of Polo's body, but the "actual cutting" was performed by her colleague, Dr. Samuel D. Simmons ("Dr. Simmons"). Defendant did not object to the State's tender of Dr. Scott as an expert in forensic pathology, nor to the trial court's admission of the autopsy report prepared by Dr. Simmons. However, on appeal, defendant asserts that the trial court erroneously overruled his objection to Dr. Scott's testimony during cross-examination:

Q: Now, in regard to gunshot wound number – No. 2 on the – did you testify that you believed that that was a back to front trajectory?

A: Yes. In my opinion that was from back to front.

Q: And that's not – you don't agree then with Dr. Simmons' findings; is that correct?

A: That's correct. In Dr. Simmons' report he states that it travels from front to back. Since I did have a disagreement on this wound, I consulted with the other five doctors who are currently working at the Office of the Chief Medical Examiner. They all independently stated that they felt the –

[DEFENSE COUNSEL]: Well, objection.

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THE COURT: Overruled. Part of her opinion. Go ahead.

[DR. SCOTT]: They all independently stated that they felt that the wound traveled from back to front.

Defendant contends that Dr. Scott's statement regarding the opinions of "the other five doctors" was (1) inadmissible hearsay; and (2) a violation of the Confrontation Clause, *see* U.S. Const. amend. VI (providing, *inter alia*, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"). Should we conclude that his general objection was insufficient to preserve appellate review of these questions, *see* N.C.R. App. P. 10(a)(1), defendant asserts that "admission of Dr. Scott's testimony rose to the level of plain error."

Even assuming, *arguendo*, that defendant properly preserved review of these issues, they are meritless. It is well settled that an expert witness may "testify to his or her own conclusions based on the testing of others in the field[,] and "evidence offered as the basis of an expert's opinion is not being offered for the truth of the matter asserted." *State v. Mobley*, 200 N.C. App. 570, 575, 684 S.E.2d 508, 511 (2009) (citations omitted), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010). Accordingly, the admissibility of such evidence "does not depend on an exception to the hearsay rule, but on the limited purpose for which it is offered." *State v. Golphin*, 352 N.C. 364, 467-68, 533 S.E.2d 168, 235 (2000) (citations omitted) (upholding the trial court's admission of a report containing unidentified informants' statements

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that were “introduced, not for the truth of the matter asserted, but as nonhearsay evidence to support [the testifying expert’s] conclusions”), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Furthermore, “where evidence is admitted for a purpose other than the truth of the matter asserted, the protection afforded by the Confrontation Clause against testimonial statements is not at issue.” *State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333 (citation omitted), *disc. review denied*, 359 N.C. 856, 620 S.E.2d 196 (2005). “Thus, where the evidence is admitted for . . . the basis of an expert’s opinion, there is no constitutional infirmity.” *Id.* (citation omitted). This is because

it is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence. Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert’s opinion and to determine whether that opinion should be found credible. . . . [T]he expert must present an independent opinion obtained through his or her own analysis and not merely surrogate testimony parroting otherwise inadmissible statements.

State v. Ortiz-Zape, 367 N.C. 1, 8-9, 743 S.E.2d 156, 161-62 (2013) (internal citations and quotation marks omitted), *cert. denied*, __ U.S. __, 189 L. Ed. 2d 208 (2014); *see also State v. Craven*, 367 N.C. 51, 56, 744 S.E.2d 458, 461 (2013) (holding that the admission of lab reports authored by non-testifying agents violated the defendant’s

Sixth Amendment right to confrontation, where the testifying agent “did not offer—or even purport to offer—her own independent analysis or opinion,” but instead “merely parroted” the authoring agents’ conclusions).

Defendant contends that Dr. Scott’s statement about the non-testifying doctors’ opinions was inadmissible to establish the basis of her own opinion, because her previous testimony “made it clear” that she actually based her opinion upon the presence of “skin tags” surrounding the particular wound:

The tears that you are pointing to are skin tags is what we call them. They help us to determine which direction this gunshot wound traveled in. The skin tags generally point towards the weapon so in this case the skin tags are pointing towards the left of this diagram or towards the back of the decedent, which would indicate that the direction of travel of the gunshot wound was from back to front.

However, defendant cites no authority, and our research discloses none, to suggest that an expert witness may assert just one basis for his or her opinion. Moreover, this portion of testimony clearly indicates that Dr. Scott conducted her “own independent analysis” of the wound and was not merely “parroting” the conclusions of Dr. Simmons. *Id.*

For these reasons, the trial court did not err by overruling defendant’s objection to Dr. Scott’s testimony.

V. Sealed Employment Records

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Defendant transmitted to the Court certain employment records of three former Alamance County Sheriff's deputies who were involved in the initial investigation of this case. The State filed a pretrial motion for *in camera* review of these records in order to determine whether they were discoverable pursuant to N.C. Gen. Stat. § 15A-903 and the United States Supreme Court's holdings in *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104 (1972) and *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). Upon determining that "the matters disclosed involve personnel matters . . . [which] are not discoverable under 15A-903 *et seq.* and do not qualify as *Brady* material," the trial court ordered that the State's motion and supporting documents be sealed for appellate review. *See* N.C. Gen. Stat. § 15A-908(b). Defendant now asks that we "review the sealed records for any information that is favorable and material to his guilt or punishment and . . . remand the case for a new trial if [we] determine[] that he was denied access to evidence or information that was material and favorable to his defense."

In criminal prosecutions, the State must disclose to the accused any evidence that is favorable and "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218. While this rule applies equally to exculpatory and impeachment evidence, *see Giglio*, 405 U.S. at 154, 31 L. Ed. 2d at 108, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused

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that, if suppressed, would deprive the defendant of a fair trial[.]” *United States v. Bagley*, 473 U.S. 667, 675, 87 L. Ed. 2d 481, 489-90 (1985) (citation omitted). “The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.* at 682, 87 L. Ed. 2d at 494.

After reviewing the employment records in this case, we conclude that these documents were not subject to disclosure. As noted by the trial court, these personnel matters all occurred after the officers’ involvement in the instant case, and they are neither relevant to that investigation nor material to defendant’s guilt or punishment. *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218. We are satisfied that defendant was not deprived of a fair trial as a result of these records being sealed. *See Bagley*, 473 U.S. at 675, 87 L. Ed. 2d at 489-90.

VI. Conclusion

Although defendant twice moved to dismiss the indictment charge of second-degree murder, he failed to move for dismissal of the lesser-included offense of voluntary manslaughter; accordingly, he waived appellate review of that issue. The trial court properly overruled defendant’s objections to (1) Anzaldo’s opinion testimony, which was admissible under Rule 701 as a shorthand statement of facts, *see Braxton*, 352 N.C. at 187, 531 S.E.2d at 445; and (2) Dr. Scott’s statement

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regarding the opinions held by her non-testifying colleagues, which was admissible to establish the basis of her own expert opinion, *see Ortiz-Zape*, 367 N.C. at 8-9, 743 S.E.2d at 161-62. Finally, after conducting *in camera* review, we conclude that the Alamance County Sheriff's deputies' sealed employment records do not contain evidence that is favorable and material to defendant's guilt or punishment in this case. *See Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218.

For all of these reasons, we hold that defendant received a fair trial, free from error.

NO ERROR.

Judges McCULLOUGH and INMAN concur.

Report per Rule 30(e).

Judge Douglas McCullough concurred in this opinion prior to 24 April 2017.