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NO. COA01-299

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 98 CRS 1810, 98 CRS 1857,
98 CRS 1858, 98 CRS 23022

RANDOLPH MORRISON,
Defendant.

Appeal by defendant from judgments entered 30 December 1998 by Judge James C. Spencer, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 30 January 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Ronald M. Marquette, for the State.

Ronald P. Butler and Mittie R. Smith, for defendant-appellant.

HUDSON, Judge.

Defendant appeals his convictions of one count of first degree felony murder, one count of assault with a deadly weapon inflicting serious injury, one count of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of first degree burglary. We find no prejudicial error.

On the evening of 26 January 1998, Defendant Randolph Morrison and his girlfriend, DeShawn Pratt, went to the Baxter Family's apartment. Ronald Wayne Baxter ("Wayne") and his wife, Brenda Baxter, lived with their four children: Stephan, Brian, Dana, and

Erica. Wayne and Brenda had gone to bed. Dana and Erica were in the living room doing their homework, and Stephan was in his bedroom with his girlfriend, Charmaine Bostic, and her baby. Brian was not home that night.

Stephan testified at trial that he heard a knock at the door and, when he opened the door, he saw Pratt there. He saw a gun pointed at him over the top of Pratt's head. Stephan grabbed Pratt, pulled her into the apartment, and closed and locked the door. Stephan and Pratt began wrestling in the living room. Stephan thought she was trying to reach for something at her hip, and he was trying to get whatever she was reaching for. Pratt was screaming. Stephan heard shots through the door.

Stephan let go of Pratt and ran into the bathroom. He heard more shooting and shortly thereafter, someone kicking in the bathroom door. He saw a gun come into the bathroom. Stephan grabbed the gun, which went off three or four times, hitting Stephan in the hand. Stephan let go, and then he saw Defendant come into the bathroom. Defendant fired the gun two or three more times, hitting Stephan in the arm and leg.

Brenda testified that she came out of her bedroom when she heard a commotion in the living room. She found her son struggling with a woman who was screaming and yelling unintelligibly. Soon thereafter, Brenda heard shooting and kicking at the door. She went back to her bedroom motioning to her daughters to come with her. She saw Charmaine grab her baby and hide in the closet in Stephan's bedroom. Brenda and Erica went into Brenda and Wayne's

bedroom, and Wayne closed and locked the bedroom door.

Brenda heard "nonstop" shooting while she was in the bedroom. She heard shots move through the house towards the bathroom. Seconds after she heard shots near the bathroom, someone began kicking at the bedroom door. Wayne told Brenda to get a baseball bat out of the closet. Just as Brenda was reaching into the closet to get the bat, someone kicked in the door, and she saw her husband fall as she heard a shot. She fell into the closet. She did not see the shooter, but she heard a male voice say, "You dead yet, nigger, you dead yet." Then she heard a few more shots and then a clicking sound. Brenda testified that there was "a distinct different sound in one of the shots." Brenda remained in the closet until she heard Charmaine's voice in the living room. When Brenda came out of the closet, she found her husband and daughter lying on the floor of the bedroom. Both appeared to be dead. She went into the living room and found Dana lying on the floor. Dana told her mother she had been shot.

Dana testified that when Defendant started shooting at the front door, she lay on the floor in the living room and put her head under a chair. After all the shooting seemed to have stopped, Dana looked out from under the chair and saw Defendant standing over her and pointing a gun at her. She testified that "I had my arms over my head, and then he pulled the trigger." Dana testified that after Defendant shot her, Defendant and Pratt ran out the front door of the apartment.

Wayne and Erica died, and Stephan and Dana were wounded. The

Chief Medical Examiner for the State testified that Wayne had been shot in the shoulder, and in the back of the head at close range, and that either shot would have been fatal. An expert in forensic firearms identification and examination testified that the bullet removed from Wayne's shoulder was a 9mm caliber, and the bullet removed from Wayne's head was a .22 caliber.

Defendant was apprehended and gave a statement to police, which was tape recorded and later transcribed. In his statement, Defendant admitted that he shot Stephan and meant to kill him. He stated that Pratt had a 9mm gun and he had a .22 revolver. He denied shooting anyone besides Stephan.

Defendant was convicted of first degree murder of Wayne, under the felony murder rule; assault with a deadly weapon inflicting serious injury on Dana; assault with a deadly weapon with the intent to kill inflicting serious injury on Stephan; and first degree burglary. Defendant was acquitted of the murder of Erica.

Defendant first argues that the trial court erred in admitting hearsay testimony of Kimberly Irvin, a laboratory technician with the High Point Police Department Crime Lab who obtained the bullet allegedly recovered from Stephan's body. Additionally, he argues that the court erred in admitting the bullet into evidence. Irvin testified for the State as follows:

Q. Ms. Irvin, let me hand you what I've marked for identification as State's Exhibit 34, ma'am, and ask if you can identify that.

A. Yes, I can.

Q. What is State's Exhibit 34?

A. This is a bullet collected from High Point Regional Emergency Room, which came out of Stephan Baxter.

Q. Okay. Did you take possession of that bullet?

A. Yes, I did.

Q. And is that what you also referred to earlier as a projectile?

A. Yes.

Q. What did you do with State's Exhibit 34 after you received it at High Point Regional Hospital?

A. I took it back to the lab and sealed it up, and turned it over to the property room.

After her testimony, the State moved for admission of the bullet into evidence, and the court admitted it without objection from Defendant. On cross-examination, Irvin admitted that she had not actually seen the bullet removed from Stephan's body. The following transpired:

Q. When you saw Mr. Stephan Baxter, did it appear to you that he had been injured?

A. I did not see Mr. Stephan Baxter that night.

Q. Oh, you did not?

A. No, I did not.

Q. Did you not testify you recovered a bullet from Mr. Baxter?

A. I collected the bullet from the High Point Regional Hospital. It was already in a container. I did not see Mr. Baxter. It was handed over to me.

Q. You didn't see the bullet go in the container?

A. The bullet was in the container when I got there.

Q. Who gave it to you?

A. Cynthia Parrish. She's--

Q. Where is she?

A. She is a nurse at the High Point Regional Hospital.

Q. Are you saying to us that you did not see the bullet go into the container?

[Counsel for the State]: Object. She answered that.

THE COURT: Well, that is asked and answered. She's answered.

[Defense Counsel]: I move to strike her testimony about recovering the bullet from Mr. Baxter at the hospital. She testified that she had received the bullet from Mr. Baxter.

[Counsel for the State]: Object to him testifying.

THE COURT: Your motion is denied.

[Defense Counsel]: Note my exception for the record, please.

Defendant argues on appeal that Irvin's testimony regarding the bullet was inadmissible hearsay. Additionally, he argues that the bullet should not have been admitted because the State failed to establish an adequate chain of custody. The State contends that Defendant has not preserved these issues for appellate review. Assuming *arguendo* that the court erred and that the Defendant preserved this issue for appeal, we fail to see how the admission of the bullet into evidence prejudiced Defendant. Indeed, Defendant has not argued that he was prejudiced.

To establish prejudice, a defendant has the burden of showing 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." N.C. Gen. Stat. § 15A-1443(a) (1999). Defendant here admitted in his statement to police that he shot Stephan. The State attempted at trial to establish that Erica had been shot by the same gun as Stephan, and consequently, that she was also shot by Defendant. Nevertheless, the jury convicted Defendant of shooting Stephan, but acquitted him of Erica's murder. We do not believe there is a reasonable possibility that, even if both the bullet and the testimony had been excluded, the result would have been different.

Defendant next argues that the trial court erred in admitting the testimony of Detective Kim Soban regarding the size and caliber of the bullet that was removed from Erica. Assuming *arguendo* that this was error, again, Defendant does not argue, and we fail to conclude, that he was prejudiced. The State elicited this testimony in order to show that Erica and Stephan were shot with the same gun, and, therefore, that both victims were shot by Defendant. Because Defendant admitted to shooting Stephan and was acquitted of shooting Erica, he was not prejudiced by this testimony.

Finally, Defendant argues that the trial court erred in allowing Brenda to testify that the voice of the shooter she heard in her bedroom was the same as the voice heard earlier at trial when the recording of Defendant's statement to police was played in

the courtroom. Defendant contends that allowing Brenda to testify in court that the voice on the tape was the voice of the perpetrator was unduly prejudicial, in violation of N.C. Rule of Evidence 403. While relevant evidence is generally admissible, see N.C. Gen. Stat. § 8C-1, Rule 402 (1999), Rule 403 provides that "[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. Gen. Stat. § 8C-1, Rule 403 (1999). "'Unfair prejudice,' as used in Rule 403, means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986) (internal quotation marks omitted).

Defendant argues that allowing Brenda to identify Defendant as the shooter based on the voice she heard on the tape and in the bedroom was unduly suggestive. Citing *State v. Henderson*, 285 N.C. 1, 203 S.E.2d 10 (1974), *judgment vacated in part on other grounds*, 428 U.S. 902, 49 L. Ed. 2d 1205 (1976), and *State v. Buckom*, 126 N.C. App. 368, 485 S.E.2d 319, *cert. denied*, 522 U.S. 973, 139 L. Ed. 2d 326 (1997), Defendant contends that what happened at trial here was analogous to an "unconstitutional show-up in which only one suspect's photo is shown to the victim and the suspect is not compared to others who may be of similar height, weight and other features and the victim then locks in on that particular suspect as

the only suspect." We disagree. There was evidence to show that only two people entered the Baxter apartment and shot the victims. In addition to Stephan's and Dana's testimony identifying Defendant as one of the shooters, Defendant admitted to police that he and Pratt were the perpetrators. Thus, in contrast to a "show-up" identification, the issue pertaining to identification here was not whether Defendant had any involvement in the crime. Rather, the issue was whether Defendant shot Wayne, and the voice identification was probative for that purpose. We do not believe the trial court abused its discretion in allowing Brenda to identify the voice on the tape as the voice of Wayne's shooter. Accordingly, we overrule this assignment of error.

No prejudicial error.

Judges WYNN and THOMAS concur.

Report per Rule 30(e).