NO. COA01-414

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Robeson County
No. 97 CRS 11369, 11371

TYRONE JEFFERSON ROBINSON

Appeal by defendant from judgment entered 2 June 2000 by Judge James Floyd Ammons, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 30 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Bowen, Berry and Powers, PLLC, by Sue Genrich Berry, for the defendant.

BIGGS, Judge.

Tyrone Robinson (defendant) appeals his conviction of first degree murder of Eugene McLaughlin (McLaughlin). For the reasons that follow, we find no prejudicial error.

The relevant facts are as follows: On the evening of 30 May 1997, the murder victim, McLaughlin, was driving around rural Robeson County, North Carolina, accompanied by two friends, Ronnie Lee McBryde (McBryde) and Halbert Rogers (Rogers). McLaughlin wanted to buy drugs. The men ran into Sylvia Morgan (Morgan), a friend of McLaughlin's, who arranged for McLaughlin to drugs from defendant. Morgan knew McLaughlin as "Flutie," and defendant as

Tyrone, or "T-Bone." She directed McLaughlin, McBryde, and Rogers to a nearby wooded area known as "the hole," where the drug sale was to take place. McLaughlin was riding in the front passenger seat.

Trial testimony differed sharply regarding what transpired at "the hole." McBryde testified that two armed men approached the car and demanded money, and that one man fired several shots into the front passenger seat where McLaughlin sat, before stealing the money. Roger's testimony essentially reiterated that of McBryde. Neither McBryde nor Rogers identified the defendant as the man who shot McLaughlin during the incident.

Morgan, on the other hand, testified that she saw defendant approach the car on McLaughlin's side and stick his head in the window. McLaughlin and defendant began "tugging of war with the money," and then she heard defendant shoot into the car.

Defendant testified that he told Morgan to have the men meet him at "the hole," where he kept his illegal drugs hidden. Defendant retrieved a quantity of crack cocaine from his hiding place, and approached the car in which McLaughlin was riding. He recognized McLaughlin, who was an acquaintance, and noticed the two other men in the car. Defendant leaned into the car, and showed McLaughlin the crack cocaine. He and McLaughlin argued about the amount in each bag, and after a brief discussion, McLaughlin "tried to snatch" defendant's drugs into the car. As McLaughlin and defendant struggled over the bag of drugs, the car started rolling away. Defendant shouted repeatedly for the car to stop, and then

fired several warning shots into the car, because he was afraid the car would injure him. He did not intend to hit anyone, and was "shocked" to learn the next day that McLaughlin had died.

After the shooting, McBryde and Rogers drove McLaughlin to the hospital. McLaughlin's aunt, Sarah Newton (Newton), saw McLaughlin at the hospital that night, and he told her he had been shot by "T-Bone from Lumber Bridge." The next day McLaughlin was released from the hospital into Newton's custody. However, his condition worsened on the drive home from the hospital, and Newton returned to the emergency room. Shortly thereafter, McLaughlin died. The following day, an autopsy revealed that McLaughlin had received three gunshot wounds and that his death was caused by an embolism in his lungs.

In May, 2000, three years after the shooting, defendant was tried for the first-degree capital murder of McLaughlin, and for armed robbery of McLaughlin, McBryde, and Rogers. The jury convicted defendant of first-degree murder, under the felony murder rule, based on defendant's armed robbery of McLaughlin. Defendant was acquitted of the other two robberies. Defendant was sentenced to life in prison without parole; the trial court arrested judgment in the armed robbery conviction. Defendant appeals from this conviction and sentence.

We note first that defendant presented nineteen assignments of error in the Record on Appeal. Those assignments of error that have not been supported with argument or authority are deemed abandoned. N.C.R. App. P. 28(b)(5); *State v. Beane*, 146 N.C. App.

220, 552 S.E.2d 193 (2001). Moreover, we have fully examined the remaining assignments of error, and find them to have no merit. However, due to the substantial interests involved, we address them.

I.

We first address defendant's argument that the trial court erred by denying his motion to have McLaughlin's body exhumed, in order to perform a second autopsy. We disagree.

Exhumation is governed by N.C.G.S. § 130A-390 (1999), Exhumations, which provides that the trial court may order a body exhumed "upon showing of sufficient cause." Defendant contends that without a second autopsy he was unable to present a complete defense. Specifically, he argues that exhumation is necessary to determine whether the embolism that killed McLaughlin originated at the site of one of the gunshot wounds inflicted by defendant, or at the site of an unrelated gunshot wound that McLaughlin sustained six weeks earlier.

At trial, testimony of four medical experts, including three forensic pathologists, was presented to the jury. The State's experts testified that the 30 May 1997 gunshot wounds either caused, or contributed to the formation of, a fatal embolism. On the other hand, defendant's expert testified that the clot likely came from an earlier gunshot wound, and that it was improbable that the recent gunshot wounds inflicted by the defendant could have precipitated the formation of a blood clot. Each side was given ample opportunity to present this evidence of proximate cause and

to cross-examine the opposing experts. Specifically, on the issue of whether the body should be exhumed and a second autopsy performed, even though defendant's expert, Lantz, supported the exhumation, he conceded that such exhumation might not be conclusive. Additionally, the State's expert, Thompson, testified that such exhumation could be futile.

We conclude that the defendant was able to fully develop his theory, that an unrelated gunshot wound had been the site of the embolism. Any conflicts in the testimony of the experts was to be resolved by the jury. Moreover, the State's position was that even if the blood clot came from the older gunshot wound, "the combination of all the gunshot wounds together" was "the problem." Therefore, even if it were possible to determine the origin of the embolism this long after McLaughlin's death, the parties' positions at trial would remain essentially unchanged. We conclude that the trial court properly concluded that sufficient cause was not shown to order that McLaughlin's body be exhumed, and, thus, that the trial court did not abuse its discretion in its denial of defendant's motion. Accordingly, this assignment of error is overruled.

II.

Defendant's next six assignments of error concern evidentiary rulings by the trial court.

He argues first that the trial court erred in admitting McBryde's testimony that "the guy" who stuck his head into the passenger area of the car, near McLaughlin, had demanded money.

Defendant contends that because McBryde could not identify "the guy," his testimony is inadmissible hearsay. We disagree.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c). Unless allowed by statute or an applicable exception, hearsay statements are inadmissible. N.C.R. Evid. 802. One such exception to the hearsay rule is found in N.C.R. Evid. 801(d)(A), which allows the admission into evidence of a party's own statement introduced against him at trial. *See State v. White*, 131 N.C. App. 734, 509 S.E.2d 462 (1998) (defendant's statement that "he sold drugs to make ends meet" held admissible as statement of party opponent).

In the instant case, defendant's identity was not an issue. Indeed, defendant testified that he was the individual who stuck his head in the car and who asked for money. The only factual issue regarding defendant's demand for money was whether the demand was made as part of a drug sale, or in the course of an armed robbery. Regardless, defendant's own testimony identified him as the person who leaned into the car and asked for money. Therefore, McBryde's testimony to this effect was admissible as the statement of the defendant, a "party opponent."

Moreover, defendant failed to object to later testimony by Rogers, eliciting essentially the same information: that a man leaned into the front passenger area of the car, where McLaughlin was sitting, and demanded money. By failing to object, defendant

waived his earlier objection to the subject testimony. "[A]ny error by the trial court in sustaining the State's objections was cured when the evidence sought to be admitted was subsequently admitted without objection." *State v. Rinck*, 303 N.C. 551, 572, 280 S.E.2d 912, 927 (1981). This assignment of error is overruled.

Defendant next argues that the trial court erred in overruling his objection to Rogers' testimony that, when McLaughlin saw defendant arrive at "the hole" and briefly duck into nearby bushes, McLaughlin said "Why did they stop there? Something ain't right."

The defendant argues that this testimony is inadmissible hearsay. The State, on the other hand, argues that the testimony is not hearsay, because it is not offered to prove the truth of the matter asserted (that "something ain't right"), but, instead, was a statement of present sense impression. Under N.C.R. Evid. 803(1), a witness may testify to "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

We conclude that it is unnecessary for us to determine whether the statement was admissible. Even assuming, *arguendo*, that the statement was hearsay, its admission was not prejudicial to defendant. "In order to show prejudice necessary for a new trial, a defendant alleging error must show '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.' N.C. Gen.Stat. § 15A- 1443(a) (1999)." *State v. Goodman*, __ N.C. App. __, __, 560 S.E.2d 196, 201 (2002). In

the instant case, defendant has not demonstrated prejudice from the introduction of the alleged hearsay statement, and we can discern none. This assignment of error is overruled.

Defendant argues next that the trial court erred by admitting Morgan's testimony, that the defendant was known locally by the nickname "T-Bone." He contends that this testimony was inadmissible hearsay. We disagree.

"The name a person is called is a fact, and in this case the witness was testifying to such a fact within his own knowledge." *State v. Barnett*, 41 N.C. App. 171, 174, 254 S.E.2d 199, 201 (1979) (upholding admission of testimony by a witness that defendant was known as "Spook"). We conclude that Morgan's testimony that she knew defendant as "T-Bone" was not hearsay. Accordingly, this assignment of error is overruled.

Defendant argues next that the trial court erred in its admission of Newton's testimony, that McLaughlin told her he was shot by "T-Bone from Lumber Bridge." We disagree.

Defendant contends that Newton's testimony was inadmissible hearsay, offered to prove the fact asserted (that "T-Bone from Lumber Bridge" shot McLaughlin). The State, on the other hand, argues that McLaughlin's statement was admissible under N.C.R. Evid. 803(2), which provides that statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" are not barred from admission by the hearsay rule, "even though the declarant is available as a witness."

We again conclude that assuming, *arguendo*, that McLaughlin's statement was not admissible, defendant has failed to show any prejudice from its admission. There was no question as to the identity of the person who shot McLaughlin; defendant testified that it was him. Therefore, the fact that McLaughlin identified defendant to his aunt is not prejudicial. Accordingly, this assignment of error is overruled.

Defendant argues next that the trial court erred by sustaining the State's objection to questions that defendant posed to Lantz regarding what he hoped to learn from a second autopsy. We find no error.

Lantz testified on *voir dire* that a second autopsy 'might' reveal certain features of the embolism, that 'could' suggest a pattern of causation. We conclude that the subject testimony was speculative, rather than being based upon the witness's own observations. Consequently, the trial court did not err by excluding it. *See State v. Bowen*, 139 N.C. App. 18, 533 S.E.2d 248 (2000) (court properly excluded physician's speculative testimony).

Moreover, Lantz was able to offer substantially the same testimony later in the trial. On redirect, he summarized what he hoped to gain from a second autopsy, with no objection. "The exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import, or the evidence is thereafter admitted, or the party offering the evidence has the full benefit of the fact sought to be established thereby

by other evidence." *State v. Edmondson*, 283 N.C. 533, 538-39, 196 S.E.2d 505, 508 (1973). Accordingly, this assignment of error is overruled.

The defendant next assigns error to the trial court's denial of his motion to call the Robeson County Clerk of Court as a witness, to elicit testimony about the fee paid to one of the State's expert witnesses. We find no error.

On cross-examination, the State questioned Lantz about his fee, without objection. Lantz's testimony established that, because his fee is remitted to the university where he works, he received no personal profit from his court appearance. Defendant later tried to introduce testimony by the clerk of court about the comparable fee paid to Sporn, the medical witness who testified for the State. The trial court refused to allow testimony on this "collateral issue," and noted that defendant had neither questioned Sporn about his fee, nor objected to the State's questioning of Lantz.

Relevant evidence is "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.R. Evid. 401. In the instant case, the proffered testimony concerning fees paid to a witness would not have tended to prove the existence of any fact that is of consequence to the determination of the murder charge for which defendant was prosecuted. Nor was it necessary to rebut prior impeachment of Lantz, because the questioning of Lantz failed to

reveal bias or personal profit. We conclude that the proposed testimony was collateral, rather than directly relevant.

Further, 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.R. Evid. 403. "The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court." *State v. Alston*, 341 N.C. 198, 237, 461 S.E.2d 687, 708 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). We conclude that the trial court did not abuse its discretion in excluding the proffered testimony and, consequently, overrule this assignment of error.

III.

Defendant's next two assignments of error address the trial court's charge to the jury. Defendant first argues that the trial court erroneously instructed the jury on the issue of proximate cause.

The trial court's charge on proximate cause was taken from the North Carolina Pattern Jury Instructions, and included "Footnote 7" from the instruction. Defendant challenges the inclusion of the footnote, which states:

> [the jury must find that] the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred. The defendant's act need not have been the only cause, nor the last cause or nearest cause, it is sufficient if it concurred with some other cause acting at a

> time which in combination with it proximately caused the death of the victim.

This instruction is an accurate statement of the law. "There can be more than one proximate cause, but criminal responsibility arises as long as the act complained of caused or directly contributed to the death." *State v. Lane,* 115 N.C. App. 25, 29, 444 S.E.2d 233, 236, *dis. review denied*, 337 N.C. 804, 449 S.E.2d 753 (1994) (defendant's actions were a proximate cause of death, even if immediate cause was police negligence; Court holds that "defendant's assault started a series of events culminating in [victim's] death, and therefore, constituted a proximate cause of his death"). Defendant acknowledges that this instruction has been approved in appellate cases, but urges this Court to "review this broad language," and argues that the instruction was error when defendant "was denied the opportunity, through a second autopsy, to develop evidence on the issue of proximate cause." As discussed above, this Court concludes that defendant was not deprived of an opportunity to present evidence of proximate cause. Further, the challenged instruction was appropriate on the facts of this case, where the evidence showed that McLaughlin's pre-existing gunshot wound may have contributed to his death, in combination with the gunshot wounds inflicted by defendant. This assignment of error is overruled.

Defendant also assigns error to the trial court's denial of his request for an instruction on identification of defendant as perpetrator of crime. This argument is without merit. Identity was not an issue in this trial. The defendant testified that he

was the one who leaned into the car and fired several shots. The only significant difference between his testimony, and that of the State's witnesses, was in regard to the *motive* for defendant's firing the gun, not the identity of the shooter. Further, although the trial court did not charge the jury precisely as requested by defendant, the court's instructions sufficiently informed the jury that they needed to find that defendant performed the acts in question. This assignment of error is overruled.

IV.

Defendant argues next that the trial court erred by sustaining the State's objection to a statement in defendant's closing argument.

Defendant argued to the jury that the State's witnesses were not credible. At one point, after defense counsel stated: "The State stipulated that's what Mr. Rogers told the officer"; the prosecutor stated: "I'd object to the state stipulating to anything, Your Honor." The trial court sustained this objection, although the written statement at issue had in fact been admitted pursuant to stipulation.

The trial court exercises its discretion in control and supervision of closing arguments of counsel. *State v. Clark*, 128 N.C. App. 87, 493 S.E.2d 770 (1997), *cert. denied*, 348 N.C. 285, 501 S.E.2d 913 (1998). This Court has held "[r]eview of a trial court's rulings on objections to the jury arguments of counsel is deferential. . . . Ordinarily we do not review the exercise of the trial judge's discretion in controlling jury arguments. . . ."

State v. Riley, 137 N.C. App. 403, 411, 528 S.E.2d 590, 595, *disc. review denied*, 352 N.C. 596, 545 S.E.2d 217 (2000) (citations omitted). The State argues that the defendant's argument suggested to the jury that the State had stipulated to defendant's theory that their witnesses were not credible, rather than to the introduction of the statement, and thus that the trial court ruled correctly. Defendant contends that the trial court abused its discretion in sustaining the State's objection, but does not explain the basis for this contention, nor offer any suggestion as to how the sustaining of this objection prejudiced the defendant. We conclude that the trial court did not abuse its discretion, and, accordingly, overrule this assignment of error.

V.

Defendant's final argument is that the trial court erred by overruling defendant's objection to the court's providing the jury with written copies of its instructions on first degree murder, second degree murder, and manslaughter.

The defendant has cited no appellate or statutory authority in support of his position, and, thus, this issue may be deemed abandoned. N.C.R. App. P. 28(b)(5) (providing that "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned[]"); *State v. Burroughs*, __ N.C. App. __, 556 S.E.2d 339 (2001). Further, the trial court has the inherent authority to submit written instructions to the jury, in its discretion. *State v. Moore*, 339 N.C. 456, 451 S.E.2d 232 (1994)

(trial court has authority to provide the jury with written instructions upon request). "A trial court has inherent authority, in its discretion, to submit its instructions on the law to the jury in writing." *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992) (error for trial court to refuse to give jury written copy of instructions when based on trial court's mistaken belief that it lacked discretion to do so). This assignment of error is overruled.

For the reasons discussed above, we conclude that the defendant had a fair trial, free of prejudicial error.

No error.

Judges WALKER and MCGEE concur.

Report per Rule 30(e).