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NO. COA01-480

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v. Rowan County
No. 98 CRS 9725

VINCENT LONNIE ELLIS

Appeal by defendant from judgment entered 15 April 1999 by Judge Michael E. Helms in Rowan County Superior Court. Heard in the Court of Appeals 13 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey R. Edwards, for the State.

R. Marshall Bickett, Jr., for defendant-appellant.

TYSON, Judge.

I. Facts

On 2 July 1998, Brian Keith Walker ("victim") was found dead behind the wheel of a car which had crashed into a mobile home in Salisbury, North Carolina. Officer Rodney Mahaley ("Mahaley") arrived at the scene and found the victim with a gunshot wound on his right side. Judy Cohen ("Cohen") was found seated in the passenger side of the car.

Officer M.A. Dummett later arrived on the scene and learned that the suspect was hiding out nearby in the Lafayette Street Apartments. The suspect, Vincent Lonnie Ellis ("defendant"),

eventually came out of the apartment and surrendered to police. The police searched the apartment where defendant was hiding and discovered two weapons: a .38 caliber pistol and .357 magnum revolver. Forensics evidence showed that the bullet which killed the victim came from the .357 magnum revolver recovered from the apartment.

While in custody, defendant gave a written statement that the couple in the car bought drugs from him earlier in the day and had given him counterfeit money. When the victim attempted to give him more counterfeit money, defendant demanded the drugs back but the victim started to drive away. Defendant stated that he pulled the .357 magnum revolver from his waistband and shot at the car. After watching the car crash into the mobile home, defendant ran to the apartments and hid the gun.

Antwan Howard ("Howard") testified, for the State, that on the night of the murder he heard a gunshot and a car crash. Howard also stated that, immediately after the crash, he saw the defendant and that defendant told him that he shot the victim because the "dude tried to ride off with some dope." Howard then testified that while he was incarcerated for robbery, defendant came to him several times and asked him to testify that the victim had tried to run over the defendant with the car or that defendant had been wrestling with the victim for control of the gun when it went off.

Mahaley testified that Cohen told him on the night of the shooting that she and the victim pulled up in front of a mobile home to see a guy named "Tyrone" about a bracelet that had been

traded earlier for crack. Cohen stated that a black male came out and told them Tyrone was inside, went back inside the mobile home, and then came back out and told them to give him the money. Cohen told Mahaley that she handed the black male some money and that the individual then backed up and shot the victim.

Defendant testified that he never asked Howard to lie for him and that Howard approached him, asking if there was anything he could do for him. Defendant also testified that, during the drug deal, the victim had pulled a gun on him, that he took the gun away from the victim, and fired a shot in order to avoid being dragged by the car.

The trial court instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter. The jury found defendant guilty of first-degree murder and discharging a firearm into occupied property. The trial court arrested judgment on the firearm charge and sentenced defendant to life imprisonment without parole. Defendant appeals. We hold that there was no error in the trial.

II. Issues

The issues presented are whether: (1) the trial court erred in admitting the jail house statements of defendant to Antwan Howard, (2) the trial court erred in admitting out of court statements made by Judy Cohen, and (3) the trial court erred by instructing the jury on voluntary manslaughter.

III. Jail House Statements

Howard was incarcerated in the Rowan County jail, along with

defendant, on charges of robbery. The State had already subpoenaed Howard to testify regarding statements defendant made on the night of the murder. The State was first informed about defendant's jail house statements twenty minutes before Howard was scheduled to testify and furnished these statements to defendant.

Defendant entered a "formal" objection during recess as to the testimony of Howard on the grounds that he did not receive a copy of the statements made by defendant to Howard until the morning of trial. On appeal, defendant argues that Howard was an agent of the State, that Howard initiated the conversations, and that Howard's testimony regarding his statements violated his Sixth Amendment right to counsel.

Our Supreme Court has held that "[a] motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the [movant] fails to further object to that evidence at the time it is offered at trial." *Martin v. Benson*, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (1998) (quoting *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46 (1995)). Defendant did not object at trial to the testimony. Defendant has failed to properly preserve this issue for appellate review. N.C.R. App. P. 10(b)(1) (1999). Additionally, defendant raises for the first time on appeal his argument that Howard's testimony violated his Sixth Amendment right to counsel. We decline to address defendant's claim. This Court will not consider this constitutional argument raised for the first time on appeal. *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 519 (1988).

We further note that defendant failed to present any evidence that Howard was acting as an agent for the State or that the State or Howard deliberately elicited incriminating information from him. *See State v. Taylor*, 332 N.C. 372, 382-83, 420 S.E.2d 414, 420 (1992) (there was no evidence that the witness testifying to defendant's incriminating statements was deliberately placed in the defendant's cell in order to elicit information); *Kuhlmann v. Wilson*, 477 U.S. 436, 459, 91 L. Ed. 2d. 364, 384-85 (1986) ("defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks."). This assignment of error is dismissed.

IV. Hearsay Statements

The defendant also argues that the trial court erred by allowing the State's rebuttal witness to testify about statements made to him by Judy Cohen regarding the defendant's production of the gun and the shooting of the victim. The defendant contends that the hearsay testimony was inadmissible under Rule 804(b)(5) of the North Carolina Rules of Evidence because: (1) there was insufficient evidence as to whether the witness was unavailable, and (2) the statements did not have the required "circumstantial guarantees of trustworthiness" as required by Rule 804(b)(5).

In this case, the State offered the statements Cohen made to Mahaley at the scene within thirty minutes after the shooting. The State sought to introduce these statements pursuant to Rule 804 of the North Carolina Rules of Evidence as rebuttal testimony after

defendant repudiated his earlier written statement given to police during his testimony.

Rule 804(a) provides an exception allowing the admission of hearsay evidence when the declarant is unavailable. "Unavailability of a witness" includes situations in which the declarant:

> Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

N.C. Gen. Stat. § 8C-1, Rule 804(a)(5) (1999). The "catch-all" exception of Rule 804(b) provides that if the declarant is unavailable to testify, then a statement that is not specifically covered by subsections (b)(1) through (b)(4) of the rule but which has "equivalent circumstantial guarantees of trustworthiness," is admissible:

> if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (1999).

Officer Rory Collins ("Collins") testified that he attempted to call Cohen at the last number she had called from after the prosecution had issued a subpoena. Collins also testified that he checked with the North Carolina Department of Correction, that he checked the Mecklenburg County jail and Rowan County jail, and was

unable to find Cohen before trial. Defendant did not contest the unavailability of Cohen at trial. The trial court found that the State had used all reasonable means to locate Cohen.

Once the trial judge determines that the declarant is unavailable, he must proceed with the six-part inquiry prescribed by our Supreme Court in order to determine if the statement is admissible under Rule 804(b)(5). *See State v. Triplett*, 316 N.C. 1, 8-9, 340 S.E.2d 736, 741 (1986). After finding that the declarant is unavailable to testify, the trial court must make the following determinations: (1) "that the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars," (2) that the statement is not covered by the four exceptions expressly listed in Rule 804(b), (3) that the statement has "equivalent circumstantial guarantee[s] of trustworthiness" as the four listed exceptions, (4) "that the proffered statement is offered as evidence of a material fact," (5) that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts," and (6) that admission of the statement will best serve the "general purposes" of the rules of evidence and "the interests of justice." *Id.* at 9, 340 S.E.2d at 741 (internal quotation marks omitted).

The trial court found and defendant concedes that he received the notice as required by Rule 804(b)(5). The trial court agreed with the State's argument and found that: (1) Cohen's statements did not fall within the four exceptions provided under Rule 804(b),

(2) that they were trustworthy since they were substantially similar to the written statement given by the defendant, and (3) that they went to a material fact as to whether the defendant produced the gun before shooting the victim. The trial court concluded that admission of Cohen's hearsay statements "meets the purpose of the rule."

We conclude that the trial court made the requisite findings set forth under *Triplett* and that the hearsay statements of Cohen were admissible under Rule 804(b)(5). This assignment of error is overruled.

V. Jury Instructions

Defendant contends that the trial court erred in charging the jury on voluntary manslaughter and argues that the evidence did not support such an instruction.

The record reflects that defendant: (1) requested an instruction on manslaughter and (2) failed to object to the instruction after the jury charge. We hold that defendant has not preserved this issue for review, *see State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 321 (2000) (citing N.C.R. App. P. 10(b)(2) (1999)), and that any error in the jury charge was invited error and not subject to review, *see State v. Cagle,* 346 N.C. 497, 509, 488 S.E.2d 535, 544 (1997) (citing *State v. Harris*, 338 N.C. 129, 150, 449 S.E.2d 371, 380, *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995)). This assignment of error is dismissed.

No error.

Judges WYNN and McGEE concur.

Report per Rule 30(e).