NO. COA04-1022

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2006

THE STATE OF NORTH CAROLINA

v. Robeson County
Nos. 99 CRS 6455, 6456, 16563

DARRYL JAMAL FULLER

Appeal by defendant from judgments entered 19 November 2003 by Judge Gary L. Locklear in Robeson County Superior Court. Heard in the Court of Appeals 19 April 2005.

Attorney General Roy A. Cooper, III., by Assistant Attorney Generals Robert C. Montgomery and Amy C. Kunstling, for the State.

Marshall Dayan, for defendant-appellant.

JACKSON, Judge.

On the evening of 9 January 1999, Billy Hammond ("the victim") and his wife ("Mrs. Hammond") returned to their home after visiting their friend, Pete Lowery ("Lowery"). Around 8:15 p.m., Mrs. Hammond left their home to go to the store, and the victim tended to debris near the road that he and several others had set fire to earlier that day. While the victim tended to the burning debris near the road, a dark-colored car pulled up beside him with three black male passengers whom he did not know. They asked where Frank Salisbury lived, the victim told them the address, and the car

drove away. Several minutes later, the car returned, and a passenger got out of the car, robbed the victim of his wallet, shot the victim in the stomach, got back into the car, and drove away. When Mrs. Hammond returned from the store around 8:40 p.m., she saw the victim lying in the driveway. The victim told Mrs. Hammond that he had been shot by "three black boys." Mrs. Hammond called 9-1-1 and Lowery. After emergency services did not respond, Mrs. Hammond and Lowery took the victim to the hospital.

The transcripts indicate that Lieutenant Kenneth Sealey ("Lieutenant Sealey"), who was at the hospital on other matters, walked into the hospital room and witnessed Sergeant Billy Strickland ("Sergeant Strickland") talking to the victim. The victim appeared to be in severe pain. Lieutenant Sealey did not ask the victim any questions, although he heard the victim tell Sergeant Strickland details of the crime. The victim's last statement to Sargent Strickland was that he did not know the boys, and Sargent Strickland's conversation ceased due to the victim's condition. After spending thirty-three hours in the hospital, the victim died on 11 January 1999.

Detective Franklin Lovette of the Sheriff's Department searched the crime scene for shell casings, bullets, and bullet fragments. He took possession of the bullet fragment extracted during the victim's autopsy and he received a rifle on 1 April 1999 that was retrieved from a vacated mobile home on Lot 27 of the St. Pauls Mobile Home Park.

In March 1999, St. Pauls Police Department received an anonymous tip identifying Fuquan McMillian ("Fuquan") and Rufus McMillian ("Rufus") as individuals involved in the victim's death. That same month, three detectives went to defendant's home and asked defendant if he would accompany them to the police department for an interview. Detective Johnson elicited a statement from defendant ("the Affidavit"), and reduced defendant's statement to writing. Defendant stated in the Affidavit that on the day of the victim's murder, around 6:30 p.m., Fuquan, Rufus, and another man later identified as Lavon Haywood ("Haywood"), drove to defendant's mobile home in Lot 27 of the St. Pauls Mobile Home Park in Fuquan's black, four-door Oldsmobile. Fuquan entered defendant's residence and asked to borrow defendant's gun. Fuquan told defendant that they were "about to do something," and defendant said that he knew that Fuquan was talking about robbing someone. Defendant gave his gun and three or four bullets to Fuquan. Fuquan, Rufus, and Haywood left defendant's residence, and returned between 8:30 and 9:00 p.m. Fuquan returned defendant's gun, and told defendant he killed a man with the gun. Detective Johnson read the Affidavit to defendant and allowed defendant to correct the Affidavit. Defendant signed the Affidavit. Thereafter, Fuquan, Rufus, and Haywood were charged with murder and robbery.

Before the trial date for Fuquan, Rufus, or Haywood, a grand jury indicted defendant on one count of conspiracy to commit robbery with a dangerous weapon, one count of robbery with a dangerous weapon, and one count of murder. Defendant entered into

a Plea Agreement and Testimony Agreement (the "Agreement") in which he pled guilty to conspiracy to commit robbery with a dangerous weapon, in exchange for compliance with the Agreement.

Pursuant to defendant's Agreement, defendant testified at Rufus' trial. However, the transcript indicates that defendant did not testify according to his Affidavit. Consequently, on 11 April 2003, the trial court entered an order setting aside defendant's guilty plea and reinstated the original charges pursuant to the terms of the Agreement. Defendant was tried in Robeson County Superior Court from 17 November 2003 through 19 November 2003 for conspiracy to commit armed robbery, robbery with a dangerous weapon, and first degree murder. On 19 November 2003, a jury convicted defendant on all charges. The trial court sentenced defendant to life in prison without parole for first degree murder, consolidated the judgment for conspiracy, and sentenced him concurrently to a life sentence without parole.

On appeal, defendant assigns error to three issues: (1) the trial court erred in setting aside the Agreement and reinstating the original charges; (2) under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 155 L. Ed. 2d 177 (2004), the trial court erred in admitting testimony from Lieutenant Sealey and Agent Trochum; and (3) the trial court erred in failing to grant defendant's motion to dismiss due to insufficient evidence to support the indictment of first degree murder.

Defendant first contends the trial court erred in setting aside the plea agreement and reinstating the original charges

against him. We recognize that a defendant's ability to enter into a plea agreement is an essential part of our criminal justice system. *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 789 (1993) (citing *State v. Slade*, 291 N.C. 275, 277, 229 S.E.2d 921, 923 (1976)).

> [Plea bargaining] leads to prompt and largely final disposition of most criminal cases; [plea bargaining] avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Rodriguez, 111 N.C. App. at 144, 431 S.E.2d at 789 (quoting *Santobello v. New York*, 404 U.S. 257, 261, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427, 432 (1971)).

Although a plea bargain is executed in a criminal proceeding, the bargain between a defendant and the State still remains more of a contract in nature. *Rodriguez*, 111 N.C. App. at 144, 431 S.E.2d at 790 (citing *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985), *cert. denied,* 479 U.S. 835, 107 S. Ct. 131, 93 L. Ed. 2d 75 (1986)). This Court clearly has stated that "[a] plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain." *Id.* at 144, 431 S.E.2d at 790, s*ee Dixon v. State*, 8 N.C. App. 408, 416, 174 S.E.2d 683, 689 (1970). When the defendant and the State enter into a plea bargain, both the defendant and the State must be held accountable for upholding the

promises each made in the agreement. *Rodriguez*, 111 N.C. App. at 145, 431 S.E.2d at 790 ("[o]nce the prosecution makes a promise in exchange for a guilty plea, the right to due process and basic contract principles require strict adherence"); *State v. Fox*, 34 N.C. App. 576, 579, 239 S.E.2d 471, 473 (1977) ("Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge").

In the instant case, according to the Agreement, defendant was required to: (1) fully, voluntarily, and truthfully cooperate with the District Attorney's Office and all law enforcement agencies, both State and Federal; (2) disclose all information relating to activities of himself and others, including, but not limited to, Fuquan, Rufus, and Haywood; (3) testify to any matter as may be required before any grand jury, trial, re-trial, administrative hearing, or other court proceeding; and (4) not commit any further violations of State or Federal law whatsoever. The Agreement stated that "upon the violation of any of the terms of this agreement, then this entire agreement is null and void and said defendant will be subject to prosecution for any criminal violations."

At Rufus' trial, defendant contradicted the Affidavit and his own testimony on numerous occasions: (1) defendant testified that he was drunk when he made and signed the Affidavit, although defendant previously had assured the District Attorney's Office that his Affidavit was truthful; (2) defendant testified that he did not show Fuquan how to use the gun that killed the victim,

although, in the Affidavit and on cross examination, defendant stated he did show Fuquan how to use the gun; (3) defendant testified that he did not know what Fuquan was going to do with the gun, although in defendant's Affidavit and on cross examination, defendant testified that he knew Fuquan was going to rob someone; (4) defendant testified that he did not give Fuquan ammunition for the gun, but on cross examination, defendant testified that he did not know if he gave Fuquan ammunition for the gun, and in defendant's Affidavit, he stated he gave Fuquan three or four bullets; and (6) defendant testified that the day after the shooting, he heard Rufus say that he had shot someone in the side, however, on cross examination, defendant testified that the part of his statement to the police concerning his discussion with Rufus was a lie.

In addition to testimonial discrepancies, defendant testified that he sold crack cocaine near an elementary school on 14 June 2002, after defendant pled guilty on 5 March 2001 and before Rufus' trial on 30 July 2002, in violation of the Agreement.

As a consequence of defendant's inconsistent testimony and criminal behavior, the trial court correctly ordered that the Agreement be vacated and that defendant's original charges be reinstated. Defendant grossly failed to comply with the Agreement. Defendant's argument that he substantially complied with the plea agreement is without merit. Accordingly, this assignment of error is overruled.

Defendant further asserts that the trial court erred in admitting Lieutenant Sealey's testimony regarding the victim's fact rendition to Sergeant Strickland at the hospital because Lieutenant Sealey's testimony violates the protections of the Confrontation Clause and the principles established in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The Sixth Amendment right to confrontation provides, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Confrontation Clause acts to ensure "a procedural rather than a substantive guarantee." *Crawford*, 541 U.S. at 61, 124 S. Ct at 1370, 158 L. Ed. 2d at 199.

> It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Crawford, 541 U.S. at 61, 124 S. Ct. at 1370, 158 L. Ed. 2d at 199.

On appeal, this Court is to examine a defendant's allegation that his Sixth Amendment right to confrontation has been violated by determining: "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and (3) whether defendant had an opportunity to cross-examine the declarant." *State v. Clark*, 165 N.C. App. 279, 283, 598 S.E.2d 213, 217 (2004) (citing *Crawford*, 541 U.S. 36, 54, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 203 (2004)), *disc. rev. denied*, 358 N.C. 734, 601 S.E.2d 866, *appeal dismissed*, 359 N.C. 192, 607

S.E.2d 651 (2004). The United States Supreme Court has defined testimony as follows: "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364, 158 L. Ed. 2d at 192.

Consistent with *Crawford,* this Court determined that testimonial statements are those made under circumstances that would allow "an objective witness reasonably to believe that the statement would be available for use at a later trial[.]" *State v. Sutton*, 169 N.C. App. 90, 96, 609 S.E.2d 270, 275 (2005) (quoting *Crawford* at 52, 124 S. Ct. at 1364, 158 L. Ed. 2d at 193)(citation omitted), *disc. rev. denied*, 359 N.C. 642, 617 S.E.2d 658 (2005), *appeal dismissed*, 359 N.C. 642, 617 S.E.2d 659 (2005). Furthermore, testimonial statements include those "[s]tatements taken by police officers in the course of interrogations." *Id.* at 96, 609 S.E.2d at 275 (*quoting Crawford, Id.* at 52, 124 S. Ct. at 1364, 158 L. Ed. 2d at 193). *See also State v. Morgan*, 359 N.C. 131, 604 S.E.2d 886 (2004) (statements are testimonial when made in response to structured police questioning), *cert. denied*, ___ U.S. ___, 126 S. Ct. 47, 163 L. Ed. 2d 79 (2005); *State v. Clark*, 165 N.C. App. 279, 598 S.E.2d 213 (2004) (statements made by the declarant to the police at a field investigation were testimonial).

In *State v. Lewis*, 360 N.C. 1, 619 S.E.2d 830 (2005), our Supreme Court held that a trial court must consider two factors to determine whether statements made to the police constitute testimonial evidence: (1) the stage of the proceedings at which the

statement was made; and (2) the declarant's knowledge, expectation, or intent that his or her statement would be used at a subsequent trial. *Lewis*, 360 N.C. at 19-21; 619 S.E.2d at 842-43. The test is an objective one. *Id.*

With regard to the first factor, our Supreme Court distinguished between statements "made as a result of a patrol officer's preliminary questioning," which would "likely be nontestimonial," and statements "when police questioning shifts from mere preliminary fact-gathering to eliciting statements for use at a subsequent trial," when "any statements elicited [would be] testimonial in nature." *Id.* at 19-20, 619 S.E.2d at 842-43. With regard to the second factor, the Court held that the question is whether "considering the surrounding circumstances,...a reasonable person in the declarant's position would know or should have known his or her statements would be used at a subsequent trial." *Id.* at 21, 619 S.E.2d at 843.

In the case *sub judice*, the victim's statements were made during the initial police investigation and in response to Sargent Strickland's preliminary questioning. Moreover, because the victim was in the hospital emergency room, and was still in extreme pain from his gunshot wound, "a reasonable person in [the victim]'s position would [not] know or should [not] have known" that his statements would be used at trial. *Id.* at 21, 619 S.E.2d at 843. Therefore, the victim's statements were nontestimonial, and the protection afforded by the Confrontation Clause against testimonial

statements is not at issue. Accordingly, this assignment of error is overruled.

We now turn to whether Agent Trochum's testimony about Agent Santori's ballistics report violates the rule set forth in *Crawford*. Under *State v. Walker*, 172 N.C. App. 632, 613 S.E.2d 330 (2005), *disc. rev. denied*, 359 N.C. 856, 620 S.E.2d 196 (2005), this Court stated that "an exception to the new rule espoused in *Crawford* is a familiar one: 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." *Walker*, 172 N.C. App. 632, 613 S.E.2d at 333, citing *Crawford*, 541 U.S. at 59-60, 124 S. Ct. 1354, 158 L. Ed. 2d at 197-98. "Thus, where the evidence is admitted for, *inter alia*, corroboration or the basis of an expert's opinion, there is no constitutional infirmity." *Id.*, *see, e.g., State v. Baymon,* 336 N.C. 748, 759-60, 446 S.E.2d 1, 6-7 (1994). In *Walker*, this Court concluded that "the evidence was properly admissible for non-testimonial purposes both because it was corroborative and because it helped form the basis of an expert's opinion." *Walker*, 172 N.C. App. 632, 613 S.E.2d at 333.

The facts in *Walker* are facially analogous: an agent, qualified as an expert witness, testified that he independently analyzed the entirety of the ballistics evidence, including another agent's report, and concluded his expert opinion. *Walker*, 172 N.C. App. 632, 613 S.E.2d at 333.

Here, Agent Trochum qualified as an expert witness, and utilized Agent Santori's ballistics report to formulate his expert opinion. The ballistics report was non-testimonial because it was corroborative and helped form the basis of Agent Trochum's opinion. Therefore, in accordance with *Walker*, the protections afforded by the Confrontation Clause are not invoked. Accordingly, we overrule defendant's assignment of error.

Finally, we address defendant's contention that the trial court erred in failing to grant defendant's motion to dismiss due to insufficient evidence to support the indictment for first degree murder. Specifically, defendant contends that he cannot be convicted of first degree murder as an accessory before the fact when the principal was either convicted of a crime other than first degree murder or acquitted.

"To be an accessory before the fact, the defendant must have: (1) counseled, procured, commanded, encouraged, or aided the principal to murder the victim; (2) the principal must have murdered the victim; and (3) defendant must not have been present when the murder was committed." *State v. Wilson*, 338 N.C. 244, 253, 449 S.E.2d 391, 396 (1994). Under North Carolina law, the acquittal of a named principal at a separate trial requires acquittal of one charged as an accessory of that named principal. *See State v. Suites*, 109 N.C. App. 373, 378, 427 S.E.2d 318, 321-22 (1993) (pursuant to N.C. Gen. Stat. § 14-5.2, accessories before the fact are treated the same as principals, and the acquittal of the named principal is an acquittal of the accessory before the

fact), *disc. rev. denied*, 333 N.C. 794, 431 S.E.2d 29 (1993); *State v. Wilson*, 338 N.C. 244, 254, 449 S.E.2d 391, 397 (1994) (a person may not be convicted of accessory before the fact if the principal is acquitted).

Our Supreme Court has held that a defendant could be found guilty of first degree murder under a theory of accessory before the fact when the principals pled guilty to second degree murder in *Wilson*, 338 N.C. 244, 449 S.E.2d 391 (1994). The *Wilson* Court explained:

> [a] person may not be convicted of an offense such as accessory before the fact if all of the principals in the first-degree murder are acquitted (citation omitted). The primary difference between an accessory before the fact and a principal is that the former was not present at the scene of the crime when it was committed (citation omitted). Therefore, if the only principal is "acquitted" of first-degree murder but is found guilty of second-degree murder, the most an accessory before the fact could be convicted of is second-degree murder. In this case, the principals plea bargained for second-degree murder. The State maintains and we agree that a plea bargain is not the same as an acquittal...Because the principals here were not acquitted of first-degree murder, we find that this defendant can be found guilty of first-degree murder.

Id. at 254, 449 S.E.2d at 397.

In the instant case, defendant's indictment for conspiracy states that defendant "unlawfully, willfully and feloniously did conspire, agree and confederate with Fuquan McMillian, each with the other to commit the felony of Robbery With a Dangerous Weapon, against [the victim][.]" Fuquan was the only principal named in defendant's conspiracy indictment, and he pled guilty to second

degree murder. Defendant was properly convicted of first degree murder where the only named principal, Fuquan, pled guilty to conspiracy to commit robbery with a dangerous weapon, second degree murder, and robbery with a dangerous weapon, and was not acquitted of first degree murder. *See Wilson*, 338 N.C. 244, 449 S.E.2d 391 (1994) (plea bargain is not the same as acquittal). The trial court did not err when it denied defendant's motion to dismiss the first degree murder charge. Furthermore, as evidenced by the record on appeal, defendant's sufficiency of the evidence argument is without merit. Accordingly, this assignment of error is overruled.

NO ERROR.

Judges WYNN and BRYANT concur.

Report per Rule 30 (e).