NO. COA05-1281

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

STATE OF NORTH CAROLINA

v. Person County
Nos. 02 CRS 051491
DECARLOS MOSS 04 CRS 000145

Appeal by defendant from judgments entered 28 May 2004 by Judge Steve Balog in Person County Superior Court. Heard in the Court of Appeals 20 April 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields, III, for the State.

Nora Henry Hargrove for defendant appellant.

McCULLOUGH, Judge.

Decarlos Moss (defendant) appeals from conviction and judgment for first-degree murder, conspiracy to commit robbery with a dangerous weapon, and robbery with a dangerous weapon. We hold that he received a fair trial, free from prejudicial error.

Facts

The State's evidence tended to show the following: On 25 April 2002 defendant, his brother Antonio Moss, and friend Chase Parker were at the home of defendant's sister, Crystal. Defendant, Antonio and Chase were consuming alcohol. At some point, the three men took a pair of rifles, a Marlin and an Enfield, into Crystal's

backyard to fire the weapons. Defendant discharged the Marlin rifle, and Antonio discharged the Enfield. Antonio was burned slightly when the Enfield backfired.

Defendant commented about a pending child support case, and formulated a plan to rob a taxi driver to get the money to pay his child support. The men called for a taxi, which arrived at approximately 2:00 p.m. The taxi's driver, Harold Whitfield, pulled into Crystal's driveway, where he saw a pair of youths. Whitfield asked if anyone had called for a taxi. Defendant responded that no one had called for a taxi, and Whitfield left.

Antonio, Chase, and defendant then made calls to several people, attempting to convince someone to call another cab for them. Christian Tuck, Chase's girlfriend, ultimately placed a call to Burton Taxi. The house adjacent to the home of defendant's sister, Crystal, was given as the pick-up address.

Before the cab arrived, Antonio received a telephone call from a woman named Paige Garrett. Paige came to see Antonio shortly after 7:00 p.m., and they visited in her car for approximately fifty minutes.

While Antonio and Paige were talking, defendant and Chase continued to plan the robbery. Crystal's house was located at the end of a long dirt and gravel driveway that led through the woods. The house was not visible from the main road. Defendant and Chase planned to stop the taxi by blocking the driveway and to then demand money.

Paige and Antonio watched as defendant and Chase removed a Marlin rifle wrapped in a white sheet from the backseat of an old white car parked in the yard. Defendant and Chase, dressed in dark clothes and ski masks, walked down the hill to the driveway next door. They blocked the drive with a log, and waited for the taxi to arrive. The taxi made a wrong turn and drove away.

Defendant and Chase returned to Crystal's house and telephoned Chase's girlfriend. They instructed her to call for another cab and to be more specific with the directions. Defendant and Chase then went back outside, again placed a log across the driveway in order to detain the cab driver, and waited.

A taxi van arrived and stopped at the log. Chase attempted to break the passenger side window by throwing a rock at it, but the rock bounced off the window. Defendant ran up to the driver's side window and shattered it with the rifle. He then demanded money from the driver, Lila Burton McGhee. McGhee gave defendant her purse, and then put the van in reverse in an attempt to leave. The van struck defendant and knocked him to the ground. Defendant thereafter regained his footing and fired several shots into the back of the van, injuring McGhee. The van rolled to a stop, and defendant and Chase ran back to Crystal's house. Defendant hid the Marlin rifle in the stairwell leading to the basement.

Paige and Antonio testified that they both noticed a Burton Taxi pass by the house three times. After Paige left, Antonio went back to Crystal's house and went on the front porch to make a telephone call. While on the phone, Antonio heard shots fired

nearby. He went inside to speak to Crystal about the gunfire, and then heard several more shots. Moments later, defendant and Chase ran into the house. Both seemed out of breath, and neither of them answered questions about what had happened.

Defendant and Chase changed clothes, and defendant hid the clothes they had taken off in the bathroom. Defendant also retrieved the Marlin rifle from where he had hidden it in the stairwell, and hid it under the backseat of the old white car. Chase sat in the white car and examined the contents of McGhee's purse.

McGhee was found in the driveway by a pair of girls, whose mother ultimately contacted the authorities. Detective Dennis Allen arrived at the scene with Detective Mike Clayton and Sergeant Mitch Carr. McGhee told the officers she had been robbed by two masked men. Regrettably, McGhee subsequently died from the gunshot wounds.

The police investigated the area as emergency medical personal arrived to treat McGhee. They located several spent rifle cartridges near the van. With consent, the officers searched Crystal's house and found Chase hiding, at which point he was taken into custody.

The next morning, Antonio telephoned Detective Clayton and told him where the Marlin rifle had been hidden. According to Antonio, defendant had called him earlier that morning, asking him to dispose of the weapon. When police arrived, they found the rifle under the backseat of the old white car. Police also

discovered a purse on the roof of Crystal's house, with a business card from Burton's Taxi Company nearby.

Agent Thomas Trochum with the State Bureau of Investigation (SBI) tested the shell casings retrieved from the crime scene. Agent Trochum offered an opinion that the shell casings recovered from the scene had been chambered and extracted from the Marlin rifle recovered from the white car parked at Crystal's house.

Prior to trial, defendant sought to be declared incompetent. After conducting a hearing, the trial court determined that defendant was competent to stand trial.

At trial, defendant contended that Antonio was the perpetrator of the murder rather than defendant. Specifically, defendant pointed to the favorable plea agreement that Antonio received from the State for offering evidence against defendant and to Antonio's admission that he had told several lies to the police during the investigation of the case. The defense also relied upon the testimony of a defense investigator who testified that he had found another shell casing. The shell casing was never admitted in evidence because the investigator did not indicate where he found it.

A Person County jury convicted defendant of first-degree murder, conspiracy to commit robbery with a dangerous weapon, and robbery with a dangerous weapon, and the trial court entered judgment for each conviction. Defendant now appeals.

Legal Discussion

I.

By three separate arguments on appeal, defendant challenges the trial court's determination that he was competent to stand trial.

The relevant facts concerning defendant's competency hearing are as follows: Defendant made a pretrial motion to be declared incompetent to stand trial. At a hearing held on this motion, defendant presented evidence which tended to show that he was a mentally compromised individual and that he could not assist his attorneys with his defense. The State presented evidence which tended to show that defendant was competent, including, *inter alia*, the testimony of Dr. Karla de Beck, a forensic psychiatrist at Dorothea Dix Hospital, who offered an opinion that defendant was competent to proceed. Dr. de Beck testified that, in her opinion, defendant was malingering, and he was competent to stand trial. Dr. de Beck based her opinion on testing of defendant that she had done herself and on reports of another mental health expert who had tested defendant and had concluded that he was malingering.

Following the hearing, the trial court found that "defendant [was] able to understand the nature and the object of the proceedings against him, to comprehend his own situation in reference to the proceedings, and to assist in his defense in a rational and reasonable manner." The trial court concluded "defendant [was] capable of proceeding."

A.

Defendant first argues that he must receive a new trial based on the potential violation of his constitutional due process

rights, which he claims may have occurred because the trial court failed to explicitly state the burden of proof it applied to determine that he possessed the capacity to proceed to trial. According to defendant, this omission makes it impossible for this Court to determine whether the trial court applied a constitutional standard.

"[T]he criminal trial of an incompetent defendant violates [constitutional] due process [rights]." *Medina v. California*, 505 U.S. 437, 453, 120 L. Ed. 2d 353, 368, *reh'g denied*, 505 U.S. 1244, 120 L. Ed. 2d 946 (1992). In our state, a defendant's competency to stand trial is governed by N.C. Gen. Stat. § 15A-1001 (2005), which states:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

In accordance with this statute, the general test for determining incapacity to proceed is "whether a defendant has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed." *State v. Jackson*, 302 N.C. 101, 104, 273 S.E.2d 666, 669 (1981). However, a defendant need not be at the highest stage of mental alertness or ability to be considered competent in order to face trial. *State v. Avery*, 315 N.C. 1, 337

S.E.2d 786 (1985). In North Carolina, the defendant bears the burden of persuasion on his motion to be declared incompetent to proceed under N.C. Gen. Stat. § 15A-1001. *State v. Baker*, 312 N.C. 34, 43, 320 S.E.2d 670, 677 (1984).

The United States Supreme Court has held that a state may require that a defendant prove his incompetency by a preponderance of the evidence, as such a burden does not run contrary to due process concerns. *Medina v. California*, 505 U.S. 437, 120 L. Ed. 2d 353 (1992). A state may not, however, place a higher burden of persuasion upon a defendant seeking to be declared incompetent, such as clear and convincing evidence. *Cooper v. Oklahoma*, 517 U.S. 348, 134 L. Ed. 2d 498 (1996).

Significantly, in the instant case, the trial court did not resolve defendant's motion to be declared incompetent on the issue of whether defendant had satisfied his burden of persuasion. Rather, the trial court made findings which indicate that the court found the State's evidence, especially the testimony of Dr. de Beck, to be persuasive. Based on the State's evidence, the court made an affirmative finding that defendant was competent to proceed.

Given the manner in which the trial court resolved the issue of defendant's competency, we are able to discern that the trial court applied the appropriate burden of persuasion, *i.e.*, the preponderance of the evidence standard. Accordingly, there is no merit to defendant's argument that the trial court's determination

was potentially unconstitutionally vague as to the standard applied to determine that defendant was competent.

The corresponding assignment of error is overruled.

B.

Defendant also argues that the trial court committed plain error by allowing Dr. de Beck to testify during the competency hearing regarding the conclusions of another expert. Specifically, defendant argues this testimony violated his rights under the confrontation clause of the United States Constitution, as enunciated in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

By its terms, the Sixth Amendment right of a defendant to confront the witnesses against him only applies "[i]n all criminal prosecutions." U.S. Const. amend. VI. Accordingly, our Supreme Court has specifically noted that a competency determination "does not implicate [a] defendant's confrontation rights and does not have a substantial relation to his opportunity to defend." *State v. Davis*, 349 N.C. 1, 18, 506 S.E.2d 455, 464 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

Further, even assuming *arguendo* that Sixth Amendment confrontation rights apply to competency hearings, this Court has held that an expert witness may, without violating confrontation concerns, base her opinions on tests conducted by a non-testifying person because those tests are corroborative and . . . helped form the basis of the opinion. *See State v. Walker*, 170 N.C. App. 632, 685, 613 S.E.2d 330, 333, *disc. review denied*, 359 N.C. 856, 620

S.E.2d 196 (2005). We conclude that the challenged testimony of Dr. de Beck was admissible pursuant to this reasoning.

The corresponding assignment of error is overruled.

C.

Defendant also argues that the evidence he presented was compelling enough to warrant a ruling by the court that he was incompetent to proceed. The issue of competency is within the "trial court's discretion and, if supported by the evidence, it is conclusive on appeal." *State v. Wolfe*, 157 N.C. App. 22, 30, 577 S.E.2d 655, 661, *disc. review denied and appeal dismissed*, 357 N.C. 255, 583 S.E.2d 289 (2003). As the trial court's competency determination is supported by competent evidence in the record, its ruling must be affirmed.

The corresponding assignment of error is overruled.

II.

Defendant further contends that the trial court erred by overruling objections to certain statements made during the prosecutor's closing argument and by denying a motion for a mistrial based on these statements.

The circumstances surrounding the challenged remark by the prosecutor were as follows: At trial, defendant contended that Antonio was the perpetrator of the murder for which defendant was being tried. Further, the defense sought to show that the police had not investigated the case very carefully once they had a statement from Antonio which placed the blame upon defendant. A defense investigator had located a shell casing, which had

ultimately been submitted to the SBI; however, the trial court refused to admit this shell casing into evidence because the investigator did not testify concerning the location where he found the item. In its closing argument, the State suggested that the defense investigator had not provided information as to the location at which he found the shell casing, because it was found in the backyard of the home of defendant's sister where defendant and Antonio had been firing separate rifles together several hours before the murder. Specifically, the prosecutor said,

> Why is it that we didn't hear, well that shell casing that didn't get introduced into evidence but got sent to the lab; it was in the Enfield. Why didn't we hear where [the defense investigator] got that from? And I argue to you because [the investigator] found it in the backyard of the Crawford residence, where Antonio Moss shot it that afternoon.

The trial court overruled a defense objection to this statement, at which point the prosecutor continued, "So, we don't know where that shell casing came from, except it was produced by a defense private investigator, and was intended to take your attention away from the proofs that are reliable." This comment comprised approximately four sentences of the State's twenty-four-page closing argument.

A.

We first address whether the trial court erred by overruling defendant's objections to the prosecutor's argument.

"It is axiomatic that counsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn

from that evidence." *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160, (1996). "So long as the prosecutor's argument is 'consistent with the record and does not travel into the fields of conjecture or personal opinion,' it is not improper." *State v. Ali*, 329 N.C. 394, 411, 407 S.E.2d 183, 193 (1991) (citation omitted). "The scope of jury arguments is left largely to the control and discretion of the trial court[.]" *State v. Call*, 349 N.C. 382, 419, 508 S.E.2d 496, 519 (1998).

Accordingly, "[t]he standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). There is no abuse of discretion unless the ruling is so arbitrary that it "could not have been the result of a reasoned decision." *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996). "When applying the abuse of discretion standard to closing arguments, [we] first determine[] if the remarks were improper[;] . . . [n]ext, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106.

Given the facts and circumstances of the instant case, we conclude that the remarks at issue were not improper. The defense investigator testified that he found a shell casing which had not been found during a police investigation of the crime scene;

however, the investigator did not testify concerning the location at which he found this shell casing. The prosecutor was permitted to draw an inference that defendant had not provided information concerning where his investigator found the shell casing because such information would undermine the defense's theory of the case. Further, there was evidence that defendant and Antonio had been firing rifles at another location, the backyard of defendant's sister, and the prosecutor could permissibly infer that the shell casing had come from the backyard. Thus, the challenged prosecutorial remarks did not amount to mere conjecture or personal opinions such that the trial court was compelled to sustain defendant's objection. Further, even presuming that the remarks were speculative, we conclude that they did not prejudice the defendant given that the remarks amounted to only a few sentences in a lengthy closing argument, and there was considerable evidence of defendant's guilt.

The corresponding assignments of error are overruled.

B.

We next address whether the trial court erred by denying defendant's motion for a mistrial based on the challenged prosecutorial remarks.

"Whether to grant a motion for mistrial is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 36 (1995), *cert. denied*, 517 U.S. 1110, 134 L.

Ed. 2d 482 (1996), *cert. denied*, 348 N.C. 507, 510 S.E.2d 667 (1998). In the instant case, we conclude that the prosecution's statement did not amount to such a serious impropriety as to make it impossible for defendant to receive a fair and impartial verdict. Accordingly, we discern no abuse of discretion in the trial court's denial of defendant's motion for a mistrial.

The corresponding assignment of error is overruled.

III.

In his final argument on appeal, defendant challenges the short-form indictment which was used to charge him with first-degree murder. Defendant concedes that the North Carolina Supreme Court has held that short form indictments for first-degree murder meet the requirements of the United States and North Carolina Constitutions. *See, e.g., State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). The corresponding assignment of error is overruled.

No error.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).