NO. COA06-565

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

STATE OF NORTH CAROLINA

v. Wake County
No. 02 CRS 105402

LOUIS EVERETTE MCLEAN,
Defendant.

Appeal by defendant from judgment entered 10 August 2005 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 7 December 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General A. Danielle Marquis, for the State.

J. Clark Fischer for defendant-appellant.

GEER, Judge.

Defendant Louis Everette McLean appeals from his conviction for first degree murder. The assumption underlying defendant's primary arguments on appeal is that circumstantial evidence is of a lesser quality and is entitled to less weight than direct evidence. As our Supreme Court has observed, "'the law does not distinguish between the weight given to direct and circumstantial evidence . . . .'" *State v. Berry*, 356 N.C. 490, 500, 573 S.E.2d 132, 140 (2002) (quoting *State v. Parker*, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002)). Indeed, "[a]s a great trial lawyer

once said, 'We better know there is a fire whence we see much smoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot.' Abraham Lincoln, Unsent Letter to J.R. Underwood and Henry Grider, October 26, 1864, reprinted in The Quotable Lawyer 323 (1986) (Schrager and Frost eds.)." *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992) (per curiam), *amended by* 1992 U.S. App. LEXIS 5024 (Mar. 24, 1992) (per curiam). Finding each of defendant's arguments unpersuasive, we hold that defendant received a trial free of prejudicial error.

Facts

The State's evidence at trial tended to show the following facts. Defendant was employed as a crew member with the City of Raleigh's public utilities department. Defendant did not get along with some of his co-workers, particularly Johnny Moore and Robert Saiz. In the words of one crew member, there was "bad blood between Robert and [defendant] and Johnny." Shortly after defendant began working for the utilities department in July 2002, defendant complained to a supervisor that he could not work with Johnny. The supervisor investigated defendant's complaints, but determined them to be baseless.

On 25 October 2002, the supervisor received a written letter from defendant in which he complained about Johnny and Robert together. As a result, the supervisor met with defendant, told him that his earlier complaints had been investigated and found baseless, and told defendant that he was the source of the problem

and not his co-workers. The supervisor also told defendant that he was going to be terminated and, therefore, would not complete his initial six-month term of probationary employment. Defendant was "hostile" and "loud" and "sounded angry" during this meeting. On a separate occasion, one of the utilities workers had overheard defendant remark: "If anybody make me lose [my job], and it's December, I'm going to get the money."

On 1 November 2002, defendant was on duty at the public utilities facility. That Friday was a scheduled payday for the crew members, and it was customary that some employees would immediately cash their checks and thus have a substantial amount of cash at the end of their shift. At approximately 11:30 p.m. that night, as the employees were nearing the end of their shift, two youths burst into the facility firing shots and demanding money. The robber with the gun was wearing a yellow shirt and was unmasked; the other youth was wearing a gray hooded shirt that obscured his face.

George Young and Robert Saiz made an effort to escape through the back door, with the gunman firing shots in their direction. Other crew members, however, including defendant and three co-workers, complied with the robbers' orders by lying down and handing over their wallets. After collecting the wallets, the robbers left through the front door. The gunman returned inside the building briefly, looked outside the back door, and then fled.

Once the robbers were gone, one of the crew members went out through the door where Saiz attempted his escape and found Saiz on

the ground "spitting up blood." Saiz ultimately died from a gunshot wound to his back.

The police were called and arrived at the scene within a few minutes. One of the officers used his K-9 dog to track possible scents or evidence left by the robbers. In a grassy area some distance from the facility, the K-9 dog discovered both a yellow shirt and a gray shirt. The gray shirt emitted a strong odor of gun powder. After finding these items, the dog continued to track and led the officer to nearby Timberlake Apartments.

The police learned that a resident of Timberlake Apartments was approached around midnight by two young men who asked to use his cell phone in order to call a cab. The resident refused to allow them to use his phone, but told them where they could find a pay phone. Also at around midnight, a cab driver responded to a call at Timberlake Apartments, picked up two young male passengers, and drove them to Garner, North Carolina, where they asked to be dropped off at a B.P. gas station. Another Timberlake resident discovered three wallets and a holster on the premises. The wallets were later identified as the property of defendant's co-workers. Defendant's wallet was never found.

Shortly after the incident at the facility, the police began their investigation by interviewing the workers who were present during the robbery. While being questioned at the police station within hours of the crime, defendant gave an initial statement in which he said that he had "never seen the [robbers] before" and offered that "[i]t definitely sounds inside to me." Defendant

claimed that, among other things, the wallet that he turned over to the robbers contained $550.00 in cash and his driver's license.

In the time leading up to the robbery, defendant's co-workers observed him talking on his cell phone, although they acknowledged that he commonly talked on the phone at work. During the initial investigation, the police requested that all the employees turn over their cell phones for inspection. Defendant, in response, took his cell phone and began deleting phone numbers from it. Cell phone records, however, were later obtained from defendant's service provider. These records revealed a series of nine phone calls between defendant's cell phone and public payphones in a shopping center that was only a 10 to 15 minute walk from the public utilities facility. The initial calls, which were dialed from defendant's phone, started at 10:17 p.m. The last phone call, from a payphone by a Kimbrell's store in the same shopping center, took place at 11:17 p.m. The workers' 911 call to the police came at 11:33 p.m.

During the investigation, two crew workers identified one of defendant's nephews, Dwight McLean, from a police-generated photographic lineup as the gunman on the night of the holdup. The resident of Timberlake Apartments and the cab driver who drove the youths to Garner also positively identified Dwight. DNA samples were collected from the discarded shirts found by the K-9 dog. Based on subsequent DNA analysis, it was determined that the predominant DNA profile on the yellow shirt matched Dwight McLean

and that the predominant DNA profile on the gray shirt matched defendant's other nephew, Willie McLean.

Cherrie McLean, who is defendant's niece and a cousin of Dwight and Willie McLean, testified at defendant's trial for the State pursuant to a plea agreement. Around 4 November 2002, a few days after the incident, Cherrie went to the apartment of Dwight's mother, Linda McLean Alomari, who lived in Garner up the street from a B.P. gas station. When she arrived at the apartment, detectives were there talking to Linda and other family members. After the detectives left, Willie McLean emerged from the back of the house. At the request of family members, Cherrie drove Willie to his cousin Travis' house because "that's where [defendant] wanted [him] at, wanted to meet [him] at." Cherrie and Travis then drove that same day to a grandmother's house in Four Oaks to pick up Dwight McLean. Once at the grandmother's house, Travis ordered Dwight to gather up all of his clothes so they could burn them to destroy any evidence. Upon returning to Travis' house, the group found defendant there waiting for them. At one point, defendant asked to use Cherrie's phone because defendant "was trying to call people to see where he could take Dwight and Willie." Defendant, Dwight, and Willie then left the house together in the same car. Cherrie and other family members went back to Garner.

On 7 November 2002, the police, armed with information that Dwight was the gunman, re-interviewed defendant and confronted him with Dwight's photograph. Defendant initially conceded that the shooter "did look like my nephew," but claimed that he was on bad

terms with Dwight, did not "deal with [his] nephew," and had not seen Dwight in three months. Shortly thereafter, defendant asked to speak with two more detectives and, once they arrived, fully admitted that he recognized Dwight as the shooter: "He was the one wearing the yellow shirt." Defendant then went on to admit that, despite not having his wallet, he rented a car the day after the robbery using a duplicate driver's license and paying cash.

The officers informed defendant that he was going to be charged in connection with the events at the public utilities facility. After learning this, and while alone in the interview room, defendant stood on a table, began removing ceiling tiles, and appeared to be trying to get up inside the ceiling. Several officers responded, entering the room and handcuffing defendant.

Following defendant's arrest, a search warrant was executed at his residence. The officers conducting the search discovered in defendant's bedroom a student identification card belonging to Dwight McLean and a red long-sleeved shirt of the same size and style as the yellow one that was found near the crime scene. A pay stub and notice of deposit were also recovered, which showed that defendant's paycheck was deposited directly on the day of the robbery. The police also searched a rental car defendant had rented at 11:52 a.m. on Saturday, 2 November 2002, the day after the robbery, by paying cash and using a duplicate driver's license. The duplicate license was recovered during the search of the rental car.

While defendant was in jail prior to his trial, he asked Cassandra Palmer, his girlfriend, to commit perjury by providing a false alibi for Dwight. When called as a witness in the criminal trial of Dwight McLean in October 2004, she falsely testified — under specific instructions from defendant — that she had seen Dwight on the night of the robbery at a party in Four Oaks. In defendant's trial, she admitted that she had lied in Dwight's trial in order to "help out" defendant and his nephew.

On 9 December 2002, defendant was indicted on one count of conspiracy to commit robbery with a dangerous weapon, three counts of robbery with a dangerous weapon, one count of attempted robbery with a dangerous weapon, and one count of murder. A superseding indictment was entered on 10 February 2003, reiterating the previous charges, but changing the murder indictment to first degree murder with aggravating circumstances. Following trial, the jury convicted defendant of one count of conspiracy to commit robbery with a firearm, three counts of robbery with a firearm, one count of attempted robbery with a firearm, and first degree murder in the perpetration of a felony. The superior court sentenced defendant to life imprisonment without parole for the murder conviction and continued judgment on the remaining counts. Defendant timely appealed to this Court.

I

Defendant's first contention on appeal is that the trial court erred in denying his motion to dismiss. In addressing a criminal defendant's motion to dismiss for insufficiency of the evidence,

the trial court must determine whether there is substantial evidence: (1) of each essential element of the offense charged and (2) of defendant's being the perpetrator of the offense. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* at 597, 573 S.E.2d at 869. The court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *Id.* at 596, 573 S.E.2d at 869.

Here, defendant's argument pertains only to whether the State presented sufficient evidence to implicate him as a perpetrator in the robbery scheme that resulted in Saiz' death. He contends that the State never presented any direct evidence of his participation in the scheme and at best "only proved that [defendant] might have planned with his nephews to commit the robbery that led to the tragic death of Robert Saiz." Defendant ignores, however, the fact that circumstantial evidence may be sufficient to carry a case to the jury:

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only permit a reasonable inference of the defendant's guilt of the crime charged in order for that charge to be properly submitted to the jury. Once the court determines that a reasonable inference of the defendant's guilt may be drawn from the circumstances, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. Courts making such determinations may resort to circumstantial evidence of motive, opportunity and capability

> to identify the accused as the perpetrator of the crime.

State v. Taylor, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994) (internal quotation marks and citations omitted).

The State's evidence showed that defendant had a motive to rob his co-workers: there was conflict between defendant and certain co-workers; defendant's supervisor sided with the co-workers and concluded defendant was the real problem; defendant was facing imminent termination as a result of his complaints; and defendant had stated an intent to "get" his money if he was fired. Given defendant's threat, the decision by defendant's nephews to rob the facility on a regular payday during the closing minutes of their uncle's shift gives rise to a reasonable inference that defendant's nephews had prior knowledge from defendant of the pay schedule and other information necessary to carry out the crime. Defendant himself told police that this was probably an "inside" job. Such an inference is also supported by Dwight's decision to carry out the robbery of his uncle's shift while unmasked. A jury could reasonably conclude that an individual would not rob his uncle's place of employment, without a disguise, unless that individual had some prior assurance that the uncle would not report him to the police.

The evidence also showed that defendant made repeated calls to — and received calls from — various public payphones located in a nearby shopping center, in the hour prior to the robbery. Later, when asked to turn over his phone to police, he was observed trying to delete the call records from the phone. Further, although

defendant claimed his wallet, containing cash and his driver's license, was stolen, defendant was able to rent a car the next day — a Saturday, when the Division of Motor Vehicles was closed — using a driver's license and cash. Indeed, defendant's wallet was the only wallet taken by the robbers that was not found.

In addition, the State offered evidence of defendant's refusal to identify his nephews as the robbers, his false denial of recent contact with his nephews, his orchestration of his family's efforts to hide his nephews, and his solicitation of perjury in Dwight's trial. The inference may be drawn that these acts were undertaken to minimize his own chances of being convicted of this crime. Finally, when he was ultimately arrested, defendant made an apparent attempt to escape from the police station via the space above the ceiling, a course of action that could be construed by the jury as a sign of guilt. *See State v. McDougald*, 336 N.C. 451, 459, 444 S.E.2d 211, 215 (1994) (explaining that "evidence of the defendant's escape was highly probative in that it tended to show the defendant's consciousness of his guilt").

While acknowledging much of the incriminating evidence that accumulated throughout the trial, defendant argues on appeal that there could be a variety innocent explanations for this evidence. For example, with respect to the cover-up efforts, defendant says that an "equally reasonable" explanation "was the understandable desire of a loving uncle to protect his kin." The law, however, imposes no requirement that the evidence rule out every hypothesis of innocence when a defendant moves for dismissal. *Taylor*, 337

N.C. at 604, 447 S.E.2d at 365. Rather, the evidence need only permit a reasonable inference of defendant's guilt. Viewing the evidence in the record as a whole, and in the light most favorable to the State, we conclude there was substantial evidence that defendant perpetrated the robbery scheme in concert with his nephews. Defendant's motion to dismiss was, therefore, properly denied.

II

Defendant next argues that the trial court improperly admitted hearsay statements attributed to Willie McLean under the excited utterance exception to the hearsay rule. *See* N.C. Gen. Stat. § 8C-1, Rule 803(2) (2005). On direct examination, Cherrie McLean, defendant's niece, testified as follows:

> Q. Ms. McLean, before the break you described that when you went over to your cousin Tony's house, Dwight and Willie McLean, they immediately came out of the house.
>
> A. Yes.
>
> Q. All right. You described that they were upset.
>
> A. Yes.
>
> Q. Would you fully describe how that manifested, how they explained to you that they were upset, how could you tell they were upset?
>
> A. Willie was doing a lot of arguing and Dwight was crying.
>
> Q. Okay. Did Willie appear to be angry?
>
> A. Yes.
>
> Q. And was he, as you say, talking junk, as you said?

A. Yes.

Q. All right. Immediately upon getting in your presence and before you asked him any questions, did Willie say something?

A. Yes.

Q. What did Willie say?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. You may say what you said Willie said.

THE WITNESS: He said that he wished he never did it because he felt like his uncle betrayed him and Dwight.

[PROSECUTOR]: And did he refer to a particular uncle?

A. Louis.

Q. Did he continue ranting or venting that way?

A. Yes.

Q. All right. Did he say anything else about Louis during this period of time while he was still angry and before you asked him anything?

A. No, he just kept repeating it.

Q. Do you recall whether or not that he said they should have never listened to Louis?

[DEFENSE COUNSEL]: Objection.

THE COURT: I'm going to allow that question. You may answer the question.

THE WITNESS: Yes.

We need not decide whether Willie's statement, as recited by Cherrie, fits within the excited utterance exception since, even assuming that this was inadmissible hearsay, we hold that any error was harmless. Defendant asserts no constitutional error, and,

therefore, he bears the burden of proving that, absent the purported error, "a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2005). *See also State v. Smith*, 351 N.C. 251, 264, 524 S.E.2d 28, 38 (explaining that "'[t]he erroneous admission of hearsay . . . is not always so prejudicial as to require a new trial'" (quoting *State v. Ramey*, 318 N.C. 457, 470, 349 S.E.2d 566, 574 (1986))), *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100, 121 S. Ct. 151 (2000).

Defendant's only argument with respect to prejudice is that, "[g]iven the lack of any non-circumstantial evidence linking [him] to the murder," the admission of Willie's statement was necessarily prejudicial. As we have discussed above, however, in connection with the motion to dismiss, the State presented a compelling and extensive body of circumstantial evidence implicating defendant in this crime. The absence of direct evidence of defendant's guilt does not make a trial error inherently prejudicial.

In short, we are not persuaded that there is a reasonable possibility that the exclusion of Willie's hearsay statement would have produced a different result at trial. The State presented ample evidence tying defendant to the robbery scheme, rendering harmless any error with respect to Willie's hearsay statement. Therefore, this assignment of error is overruled.

III

In his final assignment of error, defendant argues that his convictions must be reversed because the prosecutor, during the

closing arguments, made disparaging comments about defense counsel. Defendant asserts the prosecutor overstepped his bounds when he stated:

> [Defense counsel] made an opening statement to you that I can only term as generic. He told you absolutely nothing, because [defense counsel] is depending on his ingenuity to take the evidence that's before you now and fashion it in a way for you to allow this Defendant to escape justice. On the one hand he has this man standing up in the line of fire. Why would your nephew do that to you? At the same time he has him laying on the ground with his head in the sand, so that he doesn't know who it is. It can't be both ways, folks. There's one of three possibilities in this case. [Defense counsel] will be happy for you to grab either of the first two.

Defense counsel raised no objection to the prosecutor's remarks at trial, but now, on appeal, defendant contends that the prosecutor's remarks resemble those in *State v. Rivera*, 350 N.C. 285, 290-91, 514 S.E.2d 720, 723 (1999), in which the Supreme Court disapproved of a prosecutor's statement that defense counsel "'displayed one of the best poker faces . . . in the history of this courthouse.'"

It is a basic tenet of legal advocacy that lawyers should avoid commentary "tending to disparage the personality or performance of another" lawyer. *Id.* at 291, 514 S.E.2d at 723. Nonetheless, "[w]hen a defendant fails to object to the prosecutor's comments during closing arguments, 'only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally

spoken.'" *State v. Davis*, 353 N.C. 1, 31, 539 S.E.2d 243, 263 (2000) (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160, 117 S. Ct. 229 (1996)), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55, 122 S. Ct. 95 (2001).

Although the prosecutor's statements made reference to defense counsel, they were also a commentary on the evidence and on how this evidence could logically support only a finding of guilt. The quoted portion of the prosecutor's closing argument indicates that his purpose was to highlight the inconsistency of the defense's theories, suggesting, as a result, that neither was worthy of credit. Given this context, we cannot conclude that the prosecutor's remarks amounted to an "extreme impropriety." *See State v. Gaines*, 345 N.C. 647, 674-75, 483 S.E.2d 396, 412-13 (holding prosecutor's closing remarks were not grossly improper even though prosecutor suggested that defense counsel was trying to distort the evidence and was "making stuff up"), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177, 118 S. Ct. 248 (1997). This assignment of error is, therefore, overruled.

No error.

Judges LEVINSON and JACKSON concur.

Report per Rule 30(e).