NO. COA09-1247

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

STATE OF NORTH CAROLINA

v. Lincoln County
No. 06 CRS 52190

DONNIE SCOTT CARPENTER

Appeal by Defendant from judgment entered 19 March 2009 and order entered 18 May 2009 by Judge J. Gentry Caudill in Lincoln County Superior Court. Heard in the Court of Appeals 23 February 2010.

Attorney General Roy Cooper, by Roberta A. Ouellette, Assistant Attorney General, for the State.

Richard Croutharmel, for defendant.

ERVIN, Judge.

Defendant Donnie Carpenter appeals from a judgment entered by the trial court sentencing him to a term of eight to ten months imprisonment in the custody of the North Carolina Department of Correction upon a jury verdict convicting Defendant of possession of cocaine and Defendant's plea of guilty to resisting, delaying, or obstructing an officer. In addition, Defendant appeals from the denial of his motion for appropriate relief. After careful consideration of Defendant's arguments in light of the record and the applicable law, we conclude that Defendant received a fair

trial, free from prejudicial error; that the court did not err by denying Defendant's motion for appropriate relief; and that Defendant is not entitled to appellate relief.

I. Factual Background

A. Substantive Facts

At around 1:30 a.m. on 30 June 2006, Sergeant Jeremy Wilson[1] of the Lincolnton Police Department was dispatched to the vicinity of South High Street and Congress Street for the purpose of investigating an alleged assault. According to Sergeant Wilson, the area in question was residential in nature. At the time that he arrived at the place where the assault allegedly occurred, Sergeant Wilson used a "description of the possible suspects" to identify two suspects, one of whom was Defendant and the other of whom was Marvin Izzard. Sergeant Wilson did not see anyone else in the vicinity.

As Sergeant Wilson approached Defendant and Mr. Izzard, he explained the reason that he had "stopp[ed] them" and asked for identification. Defendant failed to produce any identification and gave Sergeant Wilson a false name. By the time that Sergeant Wilson obtained permission to search the men, other officers had arrived. As a result, Officer Dan Renn questioned Mr. Izzard while Sergeant Wilson searched Defendant.

---

[1] Although Sergeant Wilson was a patrol officer at the time of the incident in question, we will refer to him as "Sergeant Wilson" in this opinion in light of the fact that he had been promoted by the time of trial.

In the course of searching Defendant, Sergeant Wilson found a cigarette pack with a "bulge" that was "not consistent with cigarettes" in Defendant's back pocket. Although Sergeant Wilson looked inside the pack, he did not see any cigarettes. As Sergeant Wilson began examining the cigarette pack, Defendant ran. Sergeant Wilson and several other officers chased Defendant "through a yard, across a street, and down another street" before apprehending him. Officer Renn noticed that Sergeant Wilson put the cigarette pack in his pocket before giving chase to Defendant. As other officers chased Defendant, Lieutenant Randy Willis placed Mr. Izzard in a patrol vehicle.

After Sergeant Wilson returned to his patrol car, he noticed that the "bulge" was missing from the cigarette pack. Officer Renn "immediately went back to the area [where] Sergeant Wilson moved the pack from his hand to his pocket" and found a "baggie containing twenty-five rocks of what appeared to be crack cocaine." The baggie was found "in the direct line" of the chase and "no more than ten feet away" from the location at which Sergeant Wilson searched Defendant.

B. Procedural Facts

On 30 June 2006, a warrant for arrest was issued charging Defendant with possession of cocaine with the intent to sell or deliver. On 14 August 2006, the Lincoln County grand jury returned bills of indictment charging Defendant with possession of cocaine with the intent to sell or deliver and resisting, delaying, or obstructing an officer. The cases against Defendant came on for

trial at the 16 March 2009 criminal session of the Lincoln County Superior Court before the trial court and a jury.

Prior to trial, Defendant entered a plea of guilty to resisting, delaying, or obstructing an officer. At the close of the State's evidence, Defendant moved to dismiss the possession with intent to sell and deliver charge on the grounds that there was insufficient evidence that he actually or constructively possessed cocaine or that he intended to sell or deliver it. Following the denial of his dismissal motion, Defendant elected not to present any evidence. At the close of all the evidence, the trial court submitted the issue of whether Defendant was guilty of possession with intent to sell or deliver cocaine, guilty of possession of cocaine, or not guilty to the jury. The jury convicted Defendant of possession of cocaine.

At the sentencing hearing, Defendant stipulated that he had 13 prior record points and should be sentenced as a Level IV felony offender and a Level 3 misdemeanor offender. As a result, the trial court sentenced Defendant to a term of eight to ten months in the custody of the North Carolina Department of Correction for possession of cocaine and to a concurrent sentence of sixty days imprisonment for resisting an officer. On 19 March 2009, Defendant noted an appeal to this Court from the trial court's judgments.

On 30 March 2009, Defendant filed a motion for appropriate relief in which he requested the trial court to vacate his conviction and order a new trial based on alleged jury misconduct. On 16 April 2009, Defendant withdrew his notice of appeal pending

resolution of the issues raised in his motion for appropriate relief. After a hearing held on 11 May 2009, the trial court denied Defendant's motion for appropriate relief. In apt time, Defendant noted an appeal to this Court from the trial court's judgment and the trial court's order denying his motion for appropriate relief.

II. Analysis

A. Admission of Special Agent Icard's Drug Identification Testimony

First, Defendant argues that the trial court committed plain error by "allowing [Special Agent] Icard [of the State Bureau of Investigation] to testify as to the results of a chemical analysis conducted by [Special Agent] Casanova." Although Defendant does not contend that Special Agent Icard's testimony was inadmissible under the North Carolina Rules of Evidence, he does argue that admission of the disputed evidence violated his right to confront the witnesses against him guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution. We disagree.

Special Agent Icard testified for the State as an expert in forensic chemistry. In her trial testimony, Special Agent Icard described the procedures utilized by the State Bureau of Investigation for testing suspected narcotics and maintaining an appropriate chain of custody. In addition, Special Agent Icard provided information concerning the tests performed on the material found in the baggie retrieved by Officer Renn. As part of that process, Special Agent Icard testified that her testimony was based on tests performed by another agent:

> Q. Now, are there any markings that you can identify on . . . that envelope?
>
> A. Yes. I do recognize . . . BC for Brad Casanova[.]
>
> Q. And who is Mr. Casanova?
>
> A. He is a special agent and forensic chemist at the western laboratory.
>
> . . . .
>
> Q. So you are going to testify based on his analysis?
>
> A. I am.

Special Agent Icard stated that Special Agent Casanova identified the substance in the baggie retrieved by Officer Renn as "cocaine base." Moreover, Special Agent Icard testified concerning Agent Casanova's report. No objection was lodged to the admission of Special Agent Casanova's report into evidence or to any portion of Special Agent Icard's testimony.

As a result of Defendant's candid admission that he did not object to Special Agent Icard's trial testimony or the admission of Special Agent Casanova's report, our review is limited to examining the record for the presence of plain error:

> (1) In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.] . . . It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.
>
> . . . .
>
> (4) In criminal cases, an issue that was not preserved by objection noted at trial . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is

> specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(b)(1) and 10(b)(4). "We reverse for plain error only in the most exceptional cases, and only when we are convinced that the error was either a fundamental one resulting in a miscarriage of justice or one that would have altered the jury's verdict." *State v. Locklear*, 363 N.C. 438, 449, 681 S.E.2d 293, 303 (2009) (citing *State v. Garcell*, 363 N.C. 10, 35-36, 678 S.E.2d 618, 634 (2009); quoting *State v. Raines*, 367 N.C. 1, 16, 653 S.E.2d 126, 136 (2007)).

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004), and *State v. Lewis*, 361 N.C. 541, 545, 648 S.E.2d 824, 827 (2007)). Although the Supreme Court held in *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137, *cert. denied*, 549 U.S. 1021, 166 L. Ed. 2d 413 (2006), that forensic reports were not testimonial evidence subject to the strictures of the Confrontation Clause, the United States Supreme Court subsequently held in *Melendez-Diaz v. Massachusetts*, 557 U.S. __, 174 L. Ed. 2d 314 (2009), "that forensic analyses qualify as 'testimonial' statements, and [that] forensic analysts are 'witnesses' to which the Confrontation Clause applies." *Locklear*, 363 N.C. at 452, 681 S.E.2d at 304-05 (citing *Melendez-Diaz*, 557 U.S. at __, 174 L. Ed. 2d at 321). As a result, Defendant argues

that *Melendez-Diaz* "effectively overturned *Forte*" and that, because of this change in law, he is entitled to a full review of his challenge to the admissibility of the disputed evidence despite the absence of a contemporaneous objection. Thus, Defendant effectively urges us to hold that, as a matter of policy, the rule requiring a trial objection in order to preserve an issue for review should not be applied to situations where the law changes after the conclusion of the trial in which he was convicted. However, "[w]eighing these and other public policy considerations is the province of our General Assembly, not this Court." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008). Accordingly, we review only for plain error.

"Before we determine whether or not to engage in plain error analysis, we first must determine whether the admission of the testimony constitutes error" at all. *State v. Tate*, 187 N.C. App. 593, 600, 653 S.E.2d 892, 897 (2007) (citing *State v. Cummings*, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007), *cert denied*, 552 U.S. 1319, 170 L. Ed. 2d 760 (2008)). In making this determination, we must examine the United States Supreme Court's recent pronouncements concerning the Confrontation Clause.

As we have already noted, in *Melendez-Diaz*, the United States Supreme Court found that the results of forensic tests constitute "testimonial" evidence, so that the testimony of the analysts developing these test results must be presented at trial unless they are unavailable. *Locklear*, 363 N.C. at 452, 681 S.E.2d at 304-05 (citing *Melendez-Diaz*, 557 U.S. at __, 174 L. Ed. 2d at

321). For that reason, the Confrontation Clause generally requires that the analyst who performed the tests used to determine the identity of a questioned substance must appear before the jury and stand cross-examination. However, since "[t]he right to confrontation may . . . be waived," *Melendez-Diaz*, 557 U.S. at __ n.3, 174 L. Ed. 2d at 323 n3, the Supreme Court has upheld the constitutionality of certain formalized waiver rules. *Melendex-Diaz*, 557 U.S. at __, __ n.12, 174 L. Ed. 2d at 331, 331 n.12. In light of these fundamental principles, we must determine the extent to which admission of the challenged evidence was error.

On 16 January 2009, the State filed a "Notice of Intent to Use Evidence" specifying "cocaine" as the evidence that the State intended to offer. On the same date, the State filed a "Notice of Intention to Use Lab Report and Statements Concerning Chain of Custody" pursuant to North Carolina's notice-and-demand statute, which provides, in pertinent part, that:

> (g) Whenever matter is submitted to the North Carolina [SBI] Laboratory . . . if the matter is or contains a controlled substance, the report of that analysis certified to . . . by the person performing the analysis shall be admissible without further authentication and without the testimony of the analyst in all proceedings . . . as evidence of the identity, nature, and quantity of the matter analyzed. Provided, however, the provisions of this subsection may be utilized by the State only if:
>
> (1) The State notifies the defendant at least 15 business days before the proceeding at which the report would be used of its intention to introduce the report into evidence under this subsection and provides a

> copy of the report to the defendant, and
>
> (2) The defendant fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding that the defendant objects to the introduction of the report into evidence.
>
> If the defendant's attorney of record . . . fails to file a written objection as provided in this subsection, then the report may be admitted into evidence without the testimony of the analyst. . . .

N.C. Gen. Stat. § 90-95(g). Given that the State served its notice on 16 January 2009 and that Defendant was not tried until 19 March 2009, the State provided Defendant with more than the required fifteen days notice. Moreover, Defendant did not file an objection to the State's use of the evidence specified in this notice in a timely manner. As a result, Special Agent Casanova's report was admitted into evidence consistently with N.C. Gen. Stat. § 90-95(g).

In *State v. Steele*, __ N.C. App. __, 689 S.E.2d 155 (2010), this Court addressed the effect of a defendant's failure to respond to the State's notice of intent to introduce a lab report in light of a confrontation-based challenge to the admissibility of that report. In *Steele*, as in the present case, the defendant argued that admission of a report identifying a substance as cocaine, unaccompanied by testimony from the forensic analyst who actually tested the substance in question, violated his constitutional right to cross-examine the analyst. This Court agreed that, as a general rule, the Confrontation Clause of the Sixth Amendment bars

admission of testimonial evidence "'unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant.'" *Steele*, __ N.C. App. at __, 689 S.E.2d at 160 (quoting *Locklear*, 363 N.C. at 452, 681 S.E.2d at 304) (citing *Crawford*, 541 U.S. at 68, 158 L. Ed. 2d at 203, and *Lewis*, 361 N.C. at 545, 648 S.E.2d at 827), but noted that this right is subject to waiver:

> The United States Supreme Court has held, however, that "[t]he right to confrontation may . . . be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections." Regarding these procedural rules,
>
> > "[i]n their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. . . ."

Id. at __, 689 S.E.2d at 160-61 (quoting *Melendez-Diaz*, 557 U.S. at __ n.3, and __ n.12, 174 L. Ed. 2d at 323 n.3, and 331 n.12). As a result, this Court held that:

> There is no evidence that defendant objected to the admissibility of the lab report before trial, and defendant admits that he failed to object to the report at trial. Thus, defendant waived his right to confront the lab analyst under the Sixth Amendment.

I*d.* at __, 689 S.E.2d at 161 (citing *Melendez-Diaz*, 557 U.S. at __ n.3, 174 L. Ed. 2d at 323 n.3). *Steele* is indistinguishable from the present case on any meaningful basis. In this case, Defendant

does not acknowledge his failure to respond to the State's notice of intent or attempt to explain why his failure to respond does not constitute an effective waiver of his right to confront the analyst. As a result, we conclude that, by failing to lodge a timely objection to the State's notice of its intention to introduce Special Agent Casanova's lab report, Defendant "waived his right to confront the lab analyst under the Sixth Amendment." *Id.* Thus, the trial court did not err by admitting Special Agent Casanova's report into evidence.

In addition to introducing Special Agent Casanova's lab report, the State also offered Special Agent Icard's testimony for the purpose of establishing that the substance seized at the time of Defendant's arrest was cocaine. Special Agent Icard testified concerning the procedures utilized by the State Bureau of Investigation to preserve and test evidence; as we understand his brief, Defendant does not challenge the admissibility of such generalized testimony. In addition, Special Agent Icard testified about the contents of Special Agent Casanova's report, including a description of the tests that he performed and the results that he obtained based upon those tests. Although this testimony is subject to the strictures of the Confrontation Clause, Defendant has not argued that the admission of Special Agent Icard's testimony about the report, considered separately from admission of the report itself, amounted to plain error. In light of the fact that the report itself was admissible and the report contained the essence of the testing results to which Special Agent Icard

testified, we conclude that the trial court did not commit plain error by allowing Special Agent Icard to testify about the report prepared by Special Agent Casanova since the exclusion of her testimony would not have affected the outcome of Defendant's trial given the admission of Special Agent Casanova's report. *State v. Byers*, 175 N.C. App. 280, 289, 623 S.E.2d 357, 362, *disc. review denied*, 360 N.C. 485, 631 S.E.2d 135 (2006) (citing *State v. Pate*, 62 N.C. App. 137, 139, 302 S.E.2d 286, 288, *aff'd per curiam*, 309 N.C. 630, 308 S.E.2d 326 (1983), and *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984)) (stating that "where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost"). As a result, we conclude that the trial court did not err by admitting Special Agent Casanova's report or commit plain error by allowing Special Agent Icard to testify concerning his report.

B. Juror Misconduct

Secondly, Defendant argues that the trial court erred by denying his motion for appropriate relief. As we have already noted, Defendant filed a motion for appropriate relief on 30 March 2009, in which he requested the trial court to vacate his conviction and order a new trial. In his motion for appropriate relief, Defendant alleged that his trial counsel had been contacted by Linda Brown, a juror in Defendant's case, on 20 March 2009, and that Ms. Brown had alleged that misconduct had occurred during the jury's deliberations.

On 11 May 2009, the trial court conducted a hearing on Defendant's motion for appropriate relief. At that time, Defendant requested the court to order that an evidentiary hearing be held based on the assertions made in Ms. Brown's affidavit to the effect that:

> 3. First, during deliberations, jury members frequently referred to the comment by the prosecutor stating that the defendant had been charged with the reported robbery that had been committed just prior to the defendant's subject arrest for possession of rock cocaine. As you[2] know, and as the jury members were aware, the judge had sustained your objection to this comment by the prosecutor. At that time, the judge had instructed the jury to disregard this comment regarding the robbery. The first several times this comment was mentioned during the jury deliberations, it was followed by a juror protesting and citing the judge's instruction. However, the information continued to be brought up many times, usually in a comment similar to: "We know what he was doing out there at 1:30 a.m.; he had just committed that strong arm robbery with his friend that the police call came in about. . . ." Reference to this subject was occasionally coupled with a comment similar to: "Although we aren't supposed to know, we do know. . ." or "Okay it isn't official, but we know what he was doing in the area that night. . . ."
>
> [4]. There was a time when deliberations became quite heated and a very large, muscular male juror, about mid thirties stood up and aggressively pointed towards both me and juror #1 and said in a threatening manner and with an angry tone, "If this guy walks free and in any way harms my nine year old son, I'm going

[2] The second person references in Ms. Brown's affidavit were to Defendant's trial counsel.

to come knocking on your door, Lady!" This juror was looking directly at me, making eye contact, and pointing his finger towards me. While I sat in stunned silence, juror #1 answered, "What are you talking about, he's not charged with child molestation!" At that point the juror making the threat answered to the effect of "We all know what drug dealers do when they need money, and we know that this guy had just committed a strong arm robbery earlier that night, so we know he'll have no problem with breaking into and robbing from people's homes. So, I'm just saying that I'll know who to hold responsible, and if anything happens, you can count on finding me on your doorstep." As he made this threat, the male jurors seated close to him were nodding and smiling in agreement. This made me feel more intimidated than I already felt.

[5]. On at least 3 occasions I insisted that a speaking juror correct his or her language when referring to the defendant as "boy." I did state to the entire jury that this appeared to be a very racist jury and asked that everyone try to be objective and avoid the obvious racism in this jury room.

[6]. In summary, it was always my belief that the prosecution did not connect the drugs on the ground to this defendant beyond a reasonable doubt (i.e., the other suspect on the scene). From the first vote, both juror #1 and I continued to state this belief. Although from the beginning, the other jurors seemed influenced by and referred to the comment that the judge had stricken from the record and instructed us to ignore. And, finally, it was only after the threat by the angry juror that I agreed to consider a compromise verdict because I was fearful for my safety. The compromise was that although we did not agree that the possession charge had been proven, we would vote guilty on possession if, and only if, the charge of "intent" was agreed upon as "not guilty". We had been

> told by another juror that there would be a very long sentence if a guilty on "intent" was handed down, whereas possession would be only a few months.
>
> [7]. I am disappointed that I was so effectively intimidated by an angry juror and that I did not have a stronger sense of courage in response, and I regret that I failed to report the jury's failure to ignore the stricken comment immediately. In addition, I realize that racism is probably to be expected in any all white jury in the south, but I mention it because I was surprised in my fellow jurors and disappointed to find obvious racism in a jury room. However, more important than my personal failure and the failure of the jury is that Mr. Carpenter did not receive the "not guilty" verdict that he should have received and would have received had the jury disregarded the stricken comment as instructed by the judge and had the juror threat not occurred.

The trial court orally denied Defendant's motion for appropriate relief on 11 May 2009 and entered a written order denying Defendant's motion on 18 May 2009.

In its order denying Defendant's motion for appropriate relief, the trial court found as a fact that:

> 9. That there was no evidence presented of extraneous prejudicial information having been improperly brought to the jury's attention.
>
> 10. That the affidavit did not indicate that any information was brought to the attention of the jury in such a way that the defendant was denied a right to confront a witness against him.

Based upon these and other findings of fact, the trial court concluded as a matter of law:

1. That as a general rule after the jury has rendered a verdict and has been discharged, the Court will not receive the testimony of jurors to impeach their verdict. *State v. Carter*, 55 N.C. App. 192, 284 S.E.2d 733 (1981). The rule was codified by [N.C. Gen. Stat.] § 15A-1240.

2. That since [N.C. Gen. Stat.] § 15A-1240(c) is in derogation of the common law, it must be strictly construed. *State v. Froneberger*, 55 N.C. App. 148, 285 S.E.2d 119 (1981), *appeal dismissed*, 305 N.C. 397, 290 S.E.2d 367 (1982).

3. That the common law held affidavits of jurors are inadmissible for the purposes of impeaching the verdict except as they pertain to extraneous influences that may have affected the jury's decision. *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), *cert. denied*, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995). This provision was codified in [N.C. Gen. Stat.] § 8C-1, Rule 606, subsection (b).

4. "That once a juror leaves the courtroom after the verdict is returned and goes into the streets, despite her best efforts to shield herself, she still can be affected by improper outside influences. . . [.] In other words, once the jury is dispersed after rendering its verdict and later called back, it is not the same jury that rendered the verdict." *State v. Black*, 328 N.C. 191, 400 S.E.2d 398 (1991); *State v. Ley*, 2005 N.C. App. Lexis 2097; 619 S.E.2d 594, 2005 N.C. App. Lexis 2199 (N.C. Ct. App., Oct. 4, 2005).

Based upon these findings and conclusions, the trial court denied Defendant's motion for appropriate relief.

On appeal, Defendant asserts that the trial court erred by denying his motion for appropriate relief without conducting an evidentiary hearing. A careful review of the applicable law

establishes, however, that the trial court properly denied Defendant's motion for appropriate relief.

According to N.C. Gen. Stat. § 15A-1411 (2009), a defendant may seek relief from errors committed at trial by filing a motion for appropriate relief. Defendant's motion for appropriate relief was filed within ten days after the entry of judgment, but did not specify the statutory provision under which Defendant purported to proceed. In his motion for appropriate relief, Defendant sought a new trial for the sole reason that, "as a result of jury misconduct," his state and federal constitutional rights had been violated. Pursuant to N.C. Gen. Stat. § 15A-1414(b) (2009), "all errors [except those that may be raised in a motion for appropriate relief filed more than ten days after entry of judgment in accordance with N.C. Gen. Stat. § 15A-1415(b)] must be asserted within 10 days after entry of judgment." As a result, the claim asserted in Defendant's motion for appropriate relief was properly before the trial court, so we will proceed to address Defendant's challenge to the trial court's denial of his motion for appropriate relief on the merits.

According to N.C. Gen. Stat. § 15A-1240 (2009):

> (a) Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.
>
> . . . .
>
> (c) After the jury has dispersed, the testimony of a juror may be received

> to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:
>
> (1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or
>
> (2) Bribery, intimidation, or attempted bribery or intimidation of a juror.

In addition, N.C. Gen. Stat. § 8C-1, Rule 606(b) provides that:

> (b) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Neither of these statutory provisions, which we have held not to be in conflict, *State v. Lyles*, 94 N.C. App. 240, 246, 380 S.E.2d 390, 394 (1989) (stating that "the exceptions to the anti-impeachment rule listed in [N.C. Gen. Stat. §] 15A-1240 are designed to protect

the same interests as, and are entirely consistent with, the exceptions in N.C. Gen. Stat. § 8C-1, Rule 606(b)"), prescribes the circumstances under which an evidentiary hearing must be held in connection with the trial court's consideration of a motion for appropriate relief.

The procedure which a trial judge must follow in considering a motion for appropriate relief is spelled out in N.C. Gen. Stat. § 15A-1420(c) (2009), which provides, in pertinent part, that:

> (1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact. . . .
>
> . . . .
>
> (3) The court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law. . . .
>
> (4) If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact. . . .

A trial court's decision concerning whether to grant an evidentiary hearing in connection with its consideration of a motion for appropriate relief is reviewed for abuse of discretion. *State v. Crummy*, 107 N.C. App. 305, 319, 320, 420 S.E.2d 448, 456, *disc. review denied and appeal dismissed*, 337 N.C. 669, 424 S.E.2d 411

(1992). Defendant does not argue either that the trial court failed to comply with N.C. Gen. Stat. § 15A-1420 or that it abused its discretion in determining whether an evidentiary hearing should be conducted. Instead, Defendant's argument is focused on a contention that the trial court misapplied N.C. Gen. Stat. § 15A-1240 and N.C. Gen. Stat. § 8C-1, Rule 606, since the extent to which there is a factual issue that requires resolution through the mechanism of an evidentiary hearing hinges upon the admissibility of the information contained in Ms. Brown's affidavit.

According to well-established principles of appellate procedure, our review of trial court decisions is limited to analyzing the arguments advanced by the parties to the appeal under consideration by the Court. N.C.R. App. P. 28(b)(6) (stating that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned"). In his motion for appropriate relief, Defendant sought a new trial on the grounds that Ms. Brown had been intimidated by another juror. In addition to her interaction with that juror, Ms. Brown raised two other issues in her affidavit, the first being the jury's discussion of Defendant's involvement in the robbery which led to the presence of the law enforcement officers who arrested him and the second being Ms. Brown's perception that other jurors harbored racist sentiments based on their comments about Defendant. In his brief before this Court, however, the only issue that Defendant addresses involves the jury's consideration of extra-record information. As a result, we must necessarily limit our review of

the trial court's decision to the argument upon which Defendant actually relies and will not address Defendant's contentions of juror intimidation or juror racism.

As discussed above, N.C. Gen. Stat. § 15A-1240(c)(1) permits a juror to testify about matters "not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him." Similarly, N.C. Gen. Stat. § 8C-1, Rule 606(b) allows a juror to testify concerning "whether extraneous prejudicial information was improperly brought to the jury's attention." According to Defendant, Ms. Brown's affidavit indicates that the jury considered extraneous information during its deliberations and that this act of jury misconduct necessitates a new trial. We do not find Defendant's argument persuasive.

As a preliminary matter, Defendant notes that the trial court's findings of fact included statements that "there was no evidence presented of extraneous prejudicial information having been improperly brought to the jury's attention" and that Ms. Brown's "affidavit did not indicate that any information was brought to the attention of the jury in such a way that the defendant was denied a right to confront a witness against him." According to Defendant, the trial court "seems to be ruling that the law requires a two-fold consideration: (1) that the information be 'extraneous' and/or (2) that the information denies the defendant the right to confront a witness." In light of our holding in *Lyles*, 94 N.C. App. at 246, 380 S.E.2d at 394, we

conclude that the trial court adopted the correct analytical approach.

> The allowance by N.C.[Gen. Stat. §] 15A-1240(c) of testimony by a juror as to "[m]atters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him" comports with the requirement of the United States Constitution that a defendant be allowed to confront his accusers.

State v. Rosier, 322 N.C. 826, 831-32, 370 S.E.2d 359, 362 (1988) (citing *Parker v. Gladden*, 385 U.S. 363, 17 L. Ed. 2d 420 (1966)). As a result, in order to present a *prima facie* case that he was entitled to relief based on jury consideration of impermissible extraneous evidence sufficient to necessitate an evidentiary hearing, Defendant would, in fact, be required to submit admissible evidence tending to show both that the jury considered "extraneous information" and that its consideration of this information implicated Defendant's rights under the confrontation provisions of the federal and state constitutions.

"[E]xtraneous information within the meaning of [N.C. Gen. Stat. § 8C-1,] Rule 606 . . . is information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced in evidence. It does not include information which a juror has gained in his experience which does not deal with the defendant or the case being tried." *Id.* at 832, 370 S.E.2d at 363. In his motion for appropriate relief, Defendant, based on the information contained in Ms. Brown's affidavit, maintained that the jury improperly discussed

Defendant's involvement in an assault or robbery that was unrelated to the charged offense of possession of cocaine and that the information concerning this incident constituted "extraneous information" about which a juror is entitled to testify. A review of the trial transcript establishes, however, that the jury heard substantial testimony about this alleged crime and Defendant's possible involvement in its commission without objection. For example, Sergeant Wilson testified, without objection, that he was investigating an "assault," that he had a "description of the possible suspects," and that Defendant and Mr. Izzard matched the description he had been provided. Sergeant Wilson's unobjected-to testimony clearly supports an inference that Defendant was involved in the assault that resulted in the presence of law enforcement officers in the area in which Defendant was arrested. Similarly, Officer Renn testified on direct examination, without objection, that he was "investigating a reported assault in the area." When asked if Sergeant Wilson had detained Defendant and Mr. Izzard, Officer Renn replied:

> A.: After I gave a brief description of what they were wearing and what they appeared - he did find them.
>
> Q.: And did you go to his location at that point where he had detained them?
>
> A.: Once the victim was loaded into the ambulance I did, yes, sir.

Based upon this portion of Officer Renn's testimony, the jury knew that Defendant and Mr. Izzard were suspected of complicity in the assault and that the crime was sufficiently serious that the victim

needed to be transported by ambulance. Moreover, Officer Renn provided further testimony on direct examination about the assault or robbery that resulted in the presence of investigating officers in the area in which Defendant was eventually taken into custody.

> Q: And were those two individuals eventually charged with those?
>
> A: Yes, they were.
>
> [DEF. COUNSEL]: Objection.
>
> . . . .
>
> [COURT]: All right. Sustained. Do not consider the last answer of the witness.

During his cross-examination of Officer Renn, Defendant elicited additional testimony about arrests in the assault case:

> Q: And in fact Mr. Izzard was charged wasn't he?
>
> A: Not with this crime; he was charged in connection with the assault, yes.

On redirect, Officer Renn testified, again without objection, that:

> Q: Now, why were you in the area to start with?
>
> A: We had a report of a possible assault over a - it actually led into more like a strong armed robbery situation.
>
> Q: All right. And did the victim give you - or did the witnesses give you a description?
>
> A: They did.
>
> Q: And how did the defendant end up getting involved in this?
>
> A: Basically, I already made the information as far as the description of both individuals involved given by witnesses,

> as well as the victim. At that point I relayed it over the radio and that's when Sergeant Wilson located them on Child Street, which is probably about two hundred or three hundred yards from where the actual assault took place.

Officer Renn's testimony, which reiterated that Defendant and Mr. Izzard fit the description of the reported assailants and were found close to the place at which the crime occurred, further emphasized the likelihood that Defendant and Mr. Izzard had committed the reported robbery or assault. Finally, Defendant also failed to object to testimony from Lieutenant Willis concerning the incident:

> Q: Did you have an occasion to respond to an incident out on South High Street, near Congress Street?
>
> A: Yes, I did.
>
> Q: If you would tell the ladies and gentlemen of the jury what happened when you got to that area.
>
> A: We first had a call to go to a common law robbery or strong armed robbery. We responded to that[.] . . . Then we were given information by Officer Renn about a couple of suspects, briefly detailed. . . . I went to that area where these two people were.

As a result, the jury heard considerable testimony concerning Defendant's involvement in the "strong arm robbery" discussed in Ms. Brown's affidavit.

With the exception of one question, the testimony suggesting Defendant's involvement in a robbery or assault was offered for the jury's consideration without objection. For that reason, the jury was properly allowed to consider testimony that Defendant and Mr.

Izzard had been found in the area of the assault or robbery, that they were stopped in the vicinity of the area where the assault or robbery had occurred shortly after Sergeant Wilson received a description of the suspects, that they matched the description of the suspects, and that the incident was sufficiently serious to necessitate the summoning of an ambulance. The only fact added by the testimony of Officer Renn to which Defendant's objection was sustained and which the trial court instructed the jury to disregard was that Defendant had been formally charged with involvement in this assault or robbery. Based on a careful examination of Ms. Brown's affidavit, it is not clear that the jury actually discussed the fact that Defendant had been arrested, since there is no reference to his arrest in any portion of her affidavit except for a summary statement in the third paragraph of that document. Even if the jury did discuss the fact of Defendant's arrest, as distinguished from his involvement in the underlying incident, during its deliberations, Defendant fails to explain how the additional fact that Defendant was formally charged significantly increases the prejudicial impact of the testimony concerning Defendant's involvement in the alleged assault or robbery, all of which the jury was entitled to consider in deciding Defendant's fate.[3] Thus, information concerning Defendant's involvement in the alleged assault or robbery did not constitute

[3] Although Defendant repeatedly refers to Defendant's arrest for "robbery," there was no testimony about what Defendant was charged with or whether he was convicted of the offense with which he was charged.

"extraneous information" admissible pursuant to N.C. Gen. Stat. § 15A-1240(c) and N.C. Gen. Stat. § 8C-1, Rule 606.

In addition, we also conclude that the jury's discussion of Defendant's involvement in or arrest for the alleged assault or "strong arm robbery" did not implicate his confrontation rights. According to Ms. Brown's affidavit, the jury's consideration of Defendant's involvement in the separate assault or robbery consisted of speculation about matters such as the likelihood that a drug user would resort to robbery or the reason that Defendant was out at such a late hour. As discussed above, the general subject of Defendant's involvement in the alleged assault or robbery was properly before the jury. The speculation in which the jury engaged, which tended to focus on the assumption that, if Defendant had committed the separate assault or robbery, he probably was not a law-abiding individual, is based on "information which a juror has gained in his experience which does not deal with the defendant or the case being tried." *Rosier*, at 832, 370 S.E.2d at 363. The jury's discussion of "what drug dealers do when they need money" similarly is not a subject about which Officer Renn or any other witness would have properly been subject to cross-examination. As a result, the jury's discussion of whether individuals who commit "strong arm robberies" have a propensity to commit violent acts and the steps that drug dealers take to procure money did not implicate Defendant's confrontation rights.

Defendant urges this Court to consider a "hypothetical situation" in which a juror "was present on the scene the night of

Defendant's arrest" and shared information about what he or she saw with the members of the panel. According to Defendant, this "hypothetical situation is substantially similar [to] the actual facts of this case." We do not find Defendant's argument persuasive since, in an instance like that posited by Defendant, the jury would have been exposed to information derived from an external source. In this case, however, the testimony about Defendant's possible involvement in the alleged assault or robbery came from the witness stand rather than from any sort of external source. *See, e.g., State v. Lewis*, 188 N.C. App. 308, 654 S.E.2d 808 (2008) (awarding a new trial where deputy serving as a juror was told by a superior officer that defendant had failed a polygraph examination and urged to do the "right thing"); *State v. Hines*, 131 N.C. App. 457, 508 S.E.2d 310 (1998) (awarding a new trial where the jury was inadvertently provided with the prosecutor's notes); *Lyles*, 94 N.C. App. at 242, 380 S.E.2d at 392 (awarding a new trial where the jury tampered with an exhibit so as to reveal damaging information contradicting Defendant's alibi evidence). Thus, Defendant's hypothetical does not shed any light on the proper resolution of this case.

In summary, we conclude that (1) testimony about Defendant's involvement in the alleged robbery or assault was admitted without objection; (2) the only question to which Defendant objected involved an inquiry as to whether he had been charged in connection with the alleged robbery; (3) Defendant has failed to demonstrate why, given the copious evidence of his involvement in the robbery,

testimony that he was arrested on an unspecified charge relating to the alleged assault or robbery was sufficiently prejudicial, standing alone, to necessitate a new trial; and (4) the information contained in Ms. Brown's affidavit indicates that the jury's speculation about Defendant's involvement in the alleged assault or robbery did not relate to any subject about which Defendant might have cross-examined Officer Renn. Under that set of circumstances, an evidentiary hearing was not a necessary component of the trial court's consideration of Defendant's motion for appropriate relief. As a result, we conclude that the trial court did not err by denying Defendant's motion for appropriate relief.

III. Conclusion

For the reasons discussed above, we conclude that Defendant received a fair trial, free from prejudicial error, and that the trial court did not err by denying Defendant's motion for appropriate relief. Therefore, we further conclude that the trial court's judgment should remain undisturbed.

NO ERROR.

Judges McGEE and GEER concur.

Report per Rule 30(e).