NO. COA09-1327

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

STATE OF NORTH CAROLINA

v.

LISA LOUISE GREENE,
Defendant.

Cabarrus County
Nos. 06 CRS 50169
06 CRS 50170
06 CRS 50171

Appeal by defendant from judgments entered 8 February 2008 by Judge W. Robert Bell in Cabarrus County Superior Court. Heard in the Court of Appeals 25 May 2010.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, Special Deputy Attorney General David J. Adinolfi, II, and Assistant Attorney General Charles E. Reece, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

HUNTER, Robert C., Judge.

Defendant Lisa Louise Greene appeals from her convictions of two counts of first degree murder under the felony murder rule, possession of marijuana up to a half ounce, and one count of possession of drug paraphernalia. After careful review, we find no prejudicial error.

Facts

The evidence at trial tended to establish the following facts: Daniel Macemore, age 10, and Addison Macemore, age 8, were killed

in a house fire on 10 January 2006. The children both lived with their mother, defendant, in Midland, North Carolina. Early that morning, defendant's neighbor awoke to the sound of barking dogs. Upon investigating what was disturbing them, the neighbor found defendant sitting in the grass across from her home. When she approached defendant, defendant asked for help and said that she had "hurt her ankle." Defendant asked the neighbor to call 911 because she had lost her phone. The neighbor called 911, reported the injury, and went out to defendant with the phone so that she could speak with the operator. As defendant was being handed the phone, she told her neighbor that her house was on fire, and her children were inside. At trial, the neighbor said that she was certain that when she first spoke with defendant she only told her that her ankle was hurt.

When the paramedics arrived at the scene, they observed defendant talking incoherently, half lying on the ground, and unable to indicate specifically where her house was located. When firefighters arrived, defendant did not mention that her children were in the house until asked. Once firefighters were able to enter the home, they discovered that both children were dead in one of the bedrooms. Firefighters testified that it was strange "like they didn't try to get out[.]" Firefighters also testified that normally "people will huddle together" when they are scared. However, the boy and girl were found in separate places in the room.

After defendant was informed that her children were dead, the defendant became hysterical. Witnesses at the scene observed that defendant would become more animated when more people were around, and it appeared that her hysteria was "contrived." Defendant was sent to the hospital and treated by Dr. Robert Chen. Dr. Chen testified that defendant "seemed upset, but she did not have any respiratory difficulties." Defendant's foot, which she claimed had been burned, only had minimal redness and was classified as a first degree burn, like sunburn. Dr. Chen testified that it was possible that the redness resulted from walking outside in the cold without shoes. Defendant was discharged from the hospital that evening.

Throughout the trial several witness testified that defendant did not want her children. The children's father testified that defendant was very upset when she got pregnant with Addison, "she did not want Addie." He testified that towards the end he had heard defendant calling his daughter a "little bitch" and his son, a "little bastard." Debbie Harkey, an acquaintance of defendant's, testified that defendant would humiliate her daughter while she played with other friends. Harkey testified that defendant stated that having kids was the biggest mistake she had ever made, and that she hated her kids. The owner of the hair salon defendant frequented testified that defendant was "very ugly" to her children and had said she wished she never had them. Many other witnesses, including other hairdressers at the hair salon, parents of children who were friends with Addison, both Addison and Daniel's teachers,

and members of defendant's biker club testified to similar behavior.

Detective Kevin Pfister, with the Cabarrus County Sheriff's Department, and SBI Special Agent Charles Ghent were the lead detectives on the case and first met with defendant while she was in the hospital. Detective Pfister informed defendant that they were investigating the fire and requested consent to search her home. Defendant gave consent and the detectives returned to the home where they found marijuana in defendant's bathroom. After searching defendant's trailer, the detectives went to speak with defendant at her sister's home. Defendant told the detectives that she had lit two candles in Addison's bedroom and put the kids to bed. She said that after she lit the candles she went to the living room, laid down, and awoke with the house on fire. Defendant then went to Addison's bedroom and grabbed the door knob which was very hot. Defendant stated that she had to use a blanket to open the door. When defendant entered she saw blankets burning in the room and told the children to get on the bed while she went for help. Defendant also told detectives that she tried to stomp the fire out with a nearby blanket.

While defendant was retelling her account of the fire, the detectives noticed that defendant had no burns on her hands from the door knob, and no injuries on her legs from where she claimed she had attempted to stomp out the fire. Detectives obtained the clothes that defendant had worn that night and found that the pants were not burned or singed.

In a second interview with the detectives at the police station, defendant told detectives that on the evening of the fire she gave herself, and each of her children, a "drowsy allergy pill." Later that night she went back to check on the children and "caught [a] blanket on fire." She went out of the room, closed the door, and dropped the blanket by a bookcase. Defendant said she left the blanket there and went back downstairs. Later she said that she saw a lot of smoke and fire and went back to the bookcase where she thinks she might have burned her foot. Defendant stated that she then grabbed her purse and went outside. Defendant was read her entire statement and given the opportunity to make revisions. Defendant made several changes and initialed each correction.

Later that day, out of concerns that defendant may not have given them the entire story, the detectives re-questioned defendant. Defendant confessed that she had not told the entire truth, and, in another written statement, defendant admitted to having set a blanket on fire while in the bedroom where the children were asleep. Defendant then left the room without trying to wake her children. Defendant then placed the burning blanket by the bottom two shelves of the bookcase outside of the children's room. Defendant laid down in a recliner in the living room for an unspecified amount of time and then she left the trailer.

Subsequent autopsies of the children showed that they both died of smoke inhalation and had diphenhydramine in their systems. Diphenhydramine is a common allergy drug. Experts for the State

testified at trial that the origin of the fire was the alcove where the bookcase had been and that most of the damage to the room where the children were found was in the form of heat damage. This was consistent with defendant's confession. The defense offered three experts that stated that the fire originated in the children's bedroom.

On 30 January 2008, the jury found defendant guilty on all charges and defendant was sentenced to life in prison without the possibility of parole.[1] Defendant timely appealed to this Court.

I. Motion to Suppress

Defendant assigns error to the trial court's denial of her motion to suppress her statements. In reviewing a trial court's order denying a motion to suppress, the court's findings of fact regarding "the admissibility of a defendant's statements are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). However, "a trial court's determination of the voluntariness of a defendant's statements 'is a question of law and is fully reviewable on appeal.'" *State v. Wilkerson*, 363 N.C. 382, 430, 683 S.E.2d 174, 203 (2009) (quoting *State v. Barden*, 356 N.C. 316, 339, 572 S.E.2d 108, 124 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Consequently, "[c]onclusions of law

[1]Defendant was also found guilty of arson; however, the judgment on that conviction, which served as the underlying felony for purposes of felony murder, was arrested.

regarding the admissibility of such statements are reviewed de novo." *Id.*

It is fundamental that "[v]oluntary confessions are admissible in evidence against the party making them; involuntary confessions are not." *State v. Livingston*, 202 N.C. 809, 810, 164 S.E. 337, 338 (1932). A confession is voluntary "[i]f, looking to the totality of the circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker[.]'" *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973)). Our Supreme Court has set out several non-exclusive factors to be considered in assessing whether a statement is voluntary: (1) the length of the interrogation; (2) the defendant's age and mental condition; (3) whether the defendant had been deprived of food or sleep; (4) whether the defendant was in custody; (5) whether the defendant was deceived; (6) whether the defendant was held incommunicado; (7) whether threats of violence were made against the defendant; (8) whether promises were made to obtain the confession; (9) whether the defendant's *Miranda* rights were violated; and (10) the defendant's familiarity with the criminal justice system. *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001). Because "voluntariness is determined in light of the totality of the circumstances surrounding the confession[,]" the "presence or absence of one or more of these factors is not

determinative." *State v. Barlow*, 330 N.C. 133, 140-41, 409 S.E.2d 906, 911 (1991).

Although defendant assigns error to several of the trial court's findings of fact on the basis that they are unsupported by the evidence, defendant does not challenge the sufficiency of the evidence on appeal. Defendant instead simply points to evidence that would allow different inferences to be drawn by the trial court. It is beyond the scope of appellate review, however, to re-weigh the evidence or revisit credibility determinations. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982). Consequently, the trial court's findings of fact in this case are binding on appeal.

These findings establish that Detective and Agent Ghent interviewed defendant while she was in the hospital on 10 January 2006. Detective Pfister and Agent Ghent believed that there were inconsistencies between defendant's 10 January 2006 statement regarding how the fire occurred and the physical evidence at the fire scene. On 13 January 2006, Detective Pfister and Agent Ghent "devised a plan using subterfuge to get [defendant] to come to the Sheriff's Office," telling defendant over the phone that "she needed to come to the Sheriff's Office to sign some paperwork so that they could turn her home back over to her custody." At the time Detective Pfister called defendant, he and Agent Ghent had decided that they were going to arrest defendant for arson and murder at the conclusion of their interview "unless [defendant] gave them a reason not to during their talk."

Defendant agreed to come down to the sheriff's office, arriving around noon with several family members, including her father. Detective Pfister met defendant and escorted her back to an interview room, while her family remained in another part of the office. Detective Pfister showed defendant the bathroom as well as some vending machines and asked her if she wanted anything to eat or drink. Detective Pfister also told defendant that "'if she needed to leave for any reason, not to hesitate.'" Agent Ghent joined them in the interview room.

Detective Pfister and Agent Ghent "began a rapport-building process" with defendant, but eventually starting asking her about inconsistencies between her 10 January 2006 statement and the evidence from the scene. On two different occasions, defendant got up and walked five to 10 feet down the hall toward the exit, saying "'Get my Daddy in here.'" On neither occasion did defendant ask for an attorney or anyone else.

During the interview, defendant had her cell phone with her and received several calls. She was not prevented from talking on her phone and she did not tell the callers that she needed assistance or indicate that she was being held against her will.

At approximately 2:48 p.m., defendant got up and said that she was leaving, that she did not want to talk anymore. Defendant said, "'I didn't kill my young'uns,'" and "'Get my Daddy in here[.]'" As defendant started walking down the hall, Detective Pfister and Agent Ghent attempted to re-engage her in conversation, but defendant continued walking away, saying, "'I'm not talking to

you anymore. I'll get my daddy. I'm leaving.'" Defendant was then arrested by sheriff's deputies, and Detective Pfister and Agent Ghent walked her back to the interview room unhandcuffed. As they were walking back to the interview room, defendant told Detective Pfister and Agent Ghent that she wanted to tell them "what really happened." Detective Pfister explained to defendant that now that she was under arrest, he could not talk to her unless he advised her of her *Miranda* rights and she waived them. Detective Pfister advised defendant of her *Miranda* rights and defendant did not ask for an attorney or assert her right to remain silent. Defendant waived her *Miranda* rights and asked Agent Ghent to write down her statement in his own handwriting. Agent Ghent began writing this statement at 3:29 p.m. and finished at 4:18 p.m. ("3:29 p.m. statement"). Defendant reviewed the statement, made corrections, initialed the corrections, and signed the written statement.

After signing the statement, defendant asked, "'Do you believe me now? I'm sorry I lied. I'm sorry you all had to work this and be away from your families.'" Detective Pfister and Agent Ghent then left the room, comparing the 3:29 p.m. statement with her 10 January 2006 statement and the evidence. They returned to the interview room around 4:45 p.m., explaining to defendant that her 3:29 p.m. statement did not "match up" with the time frame and physical evidence at the fire scene.

Defendant made a second statement at 5:27 p.m. ("5:27 p.m. statement"). She was not re-read her *Miranda* rights, and, as with

her 3:29 p.m. statement, Agent Ghent wrote out her statement for her. Agent Ghent finished writing out the statement at approximately 5:55 p.m. and defendant read the statement, made corrections, initialed the corrections, and signed the statement.

When defendant arrived at the sheriff's office and was separated from her family members, defendant's father called Cecil Jenkins, a licensed North Carolina attorney. Mr. Jenkins arrived at the jail and asked to see and speak with defendant. The jail staff told Mr. Jenkins that he would not be permitted to see or speak with defendant unless she asked to see or speak with him. Mr. Jenkins was also told that defendant had been arrested and charged with arson and the murder of her two children.

Based on its findings, the trial court concluded that "Defendant was placed in custody for the purposes of *Miranda* rights" when she was arrested at 2:48 p.m. on 13 January 2006; that "[s]he was advised of her *Miranda* rights immediately after being placed in custody and before any interrogation" occurred; that "Defendant voluntarily, knowingly and understandingly waived her *Miranda* rights"; and that, based on "the totality of the surrounding circumstances," defendant's 3:29 p.m. and 5:27 p.m. statements were given voluntary. Consequently, the trial court concluded that defendant's constitutional rights were not violated and denied her motion to suppress.

In arguing that the totality of the circumstances surrounding her statements indicate that they were involuntary, defendant asserts that: (1) Detective Pfister and Agent Ghent used

"subterfuge to get her to the Sheriff's Department"; (2) Agent Ghent promised to allow her to attend her children's funeral; (3) she was mentally impaired due to her ingestion of Ativan, an anti-anxiety and sedative medication; and (4) she was denied access to legal counsel.

With respect to the officer's use of "subterfuge," our Supreme Court has held that as a "general rule," although "deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible." *State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983). Here, the evidence at the suppression hearing, and the trial court's findings based on that evidence, indicates that the officers' deception — telling defendant that she needed to come down to the sheriff's office to fill out paperwork to release her home back to her — extended only to getting defendant to come to the sheriff's office. Defendant fails to point to any evidence suggesting that the officers used any deceptive practices, such as misrepresenting evidence or mischaracterizing the nature of the crime, that were calculated to obtain defendant's confession. *See State v. Barnes*, 154 N.C. App. 111, 115, 572 S.E.2d 165, 168 (2002) (rejecting defendant's argument that officer's unsubstantiated statement to defendant that his daughter was pregnant rendered his confession to attempted statutory rape involuntary as "[d]efendant was not tricked about the nature of the crime involved or possible punishment").

Defendant also argues that her statements were induced by Agent Ghent's assurance that he would not prevent her from going to her children's funeral. As reflected in the trial court's findings, Agent Ghent's testimony indicates that when defendant asked him whether she would be allowed to attend the funeral, he simply responded that it would not be him, but the magistrate who would prevent her from attending. For a promise to render a confession involuntary, it must be related to "relief from the criminal charge to which the confession relates, not to any merely collateral advantage." *State v. Pruitt*, 286 N.C. 442, 458, 212 S.E.2d 92, 102 (1975). Here, even assuming that Agent Ghent's statement that he would not prevent her from going to her children's funeral could be construed as a promise, it does not relate to the arson and murder charges about which defendant was being questioned. Moreover, "[p]romises or other statements indicating to an accused that he will receive some benefit if he confesses do not render his confession involuntary when made in response to a solicitation by the accused." *State v. Richardson*, 316 N.C. 594, 604, 342 S.E.2d 823, 831 (1986).

As for defendant's claim that she was under the influence of Ativan at the time she gave her statements, "[w]hile intoxication is a circumstance critical to the issue of voluntariness, intoxication at the time of a confession does not necessarily render it involuntary." *State v. McKoy*, 323 N.C. 1, 22, 372 S.E.2d 12, 23 (1988), *sentence vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). "[T]he fact that [the] defendant was

intoxicated at the time of his confession does not preclude the conclusion that [the] defendant's statements were freely and voluntarily given." *State v. Wilkerson*, 363 N.C. 382, 431, 683 S.E.2d 174, 204 (2009) (citation and quotation marks omitted) (second alteration in original). Rather, "[a]n inculpatory statement is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *Id.* (citation and quotation marks omitted).

Here, the trial court found that defendant "was not intoxicated or otherwise impaired." This finding is supported by Detective Pfister's and Agent Ghent's *voir dire* testimony indicating that defendant was "steady on her feet" throughout the interview on 13 January 2006; that her "speech [was] coherent"; and that she had "no difficulties at all" using her cell phone during the interview. This testimony is sufficient to support the trial court's determination that defendant was not impaired by her use of Ativan. Moreover, even if defendant were impaired, she points to absolutely no evidence on appeal suggesting that she was not conscious of the meaning of her words.

Defendant also points to the fact that officers continued to question her after Mr. Jenkins, the attorney hired by defendant's family, requested that they stop and that Mr. Jenkins was not allowed to be present during the questioning. The record indicates that defendant failed to assign error to any of the trial court's findings of fact or conclusions of law regarding this issue. This

specific argument is, therefore, not properly before this Court for appellate review. N.C. R. App. P. 10(a).

In any event, "a defendant's right to counsel is personal" and may be waived "although his attorney has instructed the investigating officers not to talk to him." *State v. Peterson*, 344 N.C. 172, 179, 472 S.E.2d 730, 733 (1996); *accord State v. Hyatt*, 355 N.C. 642, 658, 566 S.E.2d 61, 72 (2002) ("[A]n otherwise intelligent, knowing, and voluntary waiver of Fifth Amendment rights is unaffected by a suspect's lack of knowledge about his or her attorney's wishes or efforts."). Thus, the officer's refusal in this case to inform defendant of her attorney's attempts to communicate with her does not undermine the voluntariness of her waiver or statements.

In sum, considering the totality of the circumstances surrounding defendant's confessions, we conclude that the statements were voluntarily made. The trial court, consequently, properly denied defendant's motion to suppress.

II. Supplemental Reports to Death Certificates

Defendant next argues that the trial court erred by admitting supplemental reports attached to each child's death certificate indicating the "manner of death" as "homicide." Defendant contends that the admission of the unredacted reports violates her constitutional right to confrontation and that the error entitles her to a new trial.

At trial, the death certificates for both children were admitted into evidence. The certificates, signed by Medical

Examiner Hugh Hinson, indicate that at the time they were signed, the manner of death for each child was "pending." Attached to each death certificate is a supplemental report on the manner of death, signed by Dr. Deborah Radisch, showing the manner of death as "homicide." Dr. Radisch did not testify at trial. The trial court published the death certificates along with the supplemental reports to the jury.

As a threshold issue, we address the State's argument that defendant failed to object to the admission of the supplemental reports on confrontation grounds and, therefore, failed to preserve the issue for appellate review. An appellate court "is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court." *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985). Defendant appears to concede that she did not explicitly raise the issue at trial, but nonetheless argues that "[w]hen a witness does not testify, the defendant is *ipso facto* deprived of confrontation" and thus the trial court was "aware that a confrontation violation was at issue" with respect to the supplemental reports. Contrary to defendant's position, however, our appellate rules require a party to "stat[e] the specific grounds" underlying a request, objection, or motion in order to preserve an issue for appellate review. N.C. R. App. P. 10(b)(1).[2]

[2]Our Supreme Court adopted new rules of appellate procedure on 2 July 2009. The new rules became effective 1 October 2009 and apply to all appeals filed on or after that date. As defendant filed her notice of appeal with this Court on 8 February 2008, the newly adopted appellate rule do not govern this appeal.

The State further contends that "defendant also has waived plain error review by merely mentioning the plain error rule in passing as 'an empty assertion' without supporting argument or analysis of prejudicial impact." We believe, however, that defendant's assignment of plain error and her argument in her brief is sufficient to "meet the spirit or intent of the plain error rule." *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). Under plain error analysis, defendant bears the burden of demonstrating: "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause thus prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 158 L. Ed. 2d 177, 194 (2004); *accord State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) ("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.").

Defendant contends that "Dr. Radisch's opinions that the manner of death was homicide constituted testimonial evidence." The State concedes on appeal that the admission of the supplemental reports violated defendant's constitutional rights, making no argument in its brief that the admission was not erroneous. The supplemental report contained the "bare-bones statement," *Melendez-Diaz v. Massachusetts*, __ U.S. __, __, 174 L. Ed. 2d 314, 327 (2009), that the "manner of death" of each child was "homicide." As Dr. Radisch, the physician who signed the supplemental reports, did not testify at trial, defendant was unable to cross-examine her as to how she derived her opinion that the deaths were "homicide[s]." The State made no showing that Dr. Radisch was unavailable to testify or that defendant had a prior opportunity to cross-examine her. Consequently, the admission of Dr. Radisch's supplemental reports violated defendant's right to confrontation. *See also Mungo v. United States*, 987 A.2d 1145, 1154 (D.C. 2010) (concluding that admission of non-testifying medical examiner's autopsy records regarding cause of death in murder case violated defendant's Sixth Amendment rights).

Defendant contends that the error had a probable impact on the outcome of the trial as Dr. Radisch's opinion that the manner of death was homicide "not only went to the sole contested issue in the case, but impermissibly commented on guilt." The State counters that the error does not amount to plain error "in light of

the copious evidence that the manner of the children's death was homicide." We agree with the State and hold that while Dr. Radisch's opinion should not have been entered into evidence, the error does not amount to plain error.

Even though Dr. Radisch was not present to testify, the jury was informed, through the testimony of Dr. Thomas Owens, that the medical examiners had been contacted by law enforcement and told some of the details surrounding the investigation. At trial, Dr. Owens, who conducted the autopsy of Addison Macemore, testified that after an autopsy is complete and toxicology reports have been provided, he formulates a preliminary opinion regarding the person's cause of death, and, ultimately, he indicates on the death certificate his final opinion regarding the cause and manner of death. In Addison's case, Dr. Owens testified that he had determined that the cause of death was carbon monoxide poisoning and the manner of death was homicide. Dr. Owens admitted that he was aware of the circumstances surrounding the child's death. On cross-examination, defense counsel questioned Dr. Owens at length in an obvious attempt to establish that Dr. Owens' determination that the manner of death was homicide was based on information he had learned from law enforcement officers and not on the physical findings obtained during the autopsy. After the cross-examination was complete, defense counsel moved to strike Dr. Owens' testimony claiming that a discovery violation occurred because Dr. Owens' report did not indicate his opinion and his files did not indicate the basis of the opinion. The trial court ordered Dr. Owens to

bring his file to court the following Monday. It was subsequently determined that the State had not produced a document that indicated that Detective Pfister had informed the medical examiners that defendant had admitted she gave her children medication and set the fire that resulted in their deaths. Consequently, the trial court struck Dr. Owens' testimony that the manner of death was homicide and any testimony regarding Dr. Owens' conversations with investigators which may have formed the basis of his opinion regarding the manner of death.

Defense counsel then proceeded to cross-examine Dr. Owens again in the same manner as before, focusing on the fact that law enforcement had provided details of their investigation to the Medical Examiners' office. Although defendant was successful in striking Dr. Owens' testimony due to a discovery violation, defendant then proceeded to resubmit to the jury evidence that the Medical Examiners' office was apprised of the ongoing investigation.[3] Accordingly, the jury was aware that the medical examiners, including Dr. Radisch, may have formed their opinion that the children died as a result of a homicide, at least in part, because of the information they received from law enforcement. Therefore, Dr. Owens' testimony, which was elicited by defense counsel, served to lessen the prejudicial effect of the Sixth Amendment violation since it suggested to the jury that Dr.

[3]Defense counsel made it clear to the trial court that it sought to have this further cross examination entered into evidence.

Radisch's determination may not have been based strictly on her scientific findings.

Moreover, we do not believe that a different result would have occurred if Dr. Radisch's statement had not been entered given the other evidence presented that suggested defendant was guilty of the crimes charged. "Erroneous admission of evidence may be harmless where there is an abundance of other competent evidence to support the state's primary contentions[] or where there is overwhelming evidence of defendant's guilt. . . ." *State v. Weldon*, 314 N.C. 401, 411, 333 S.E.2d 701, 707 (1985) (internal citations omitted).

The evidence at trial tended to show that there was a high level of diphenhydramine, a common ingredient in allergy medication, in the children's blood stream at the time of their deaths. Defendant admitted to giving the children allergy medication that evening. Defendant confessed to police that on the night of the children's deaths, her blanket caught on fire when it came in contact with a candle she had lit in the children's bedroom. Defendant admitted that she then dropped the burning blanket at the base of the bookcase in the hall and then proceeded to lay down on a recliner as the fire spread in hopes that she would "go to sleep and not wake up." Defendant then left the trailer without attempting to rescue her children. Although there was contrary evidence, the State presented forensic evidence that supported the State's theory that the fire started at the base of the bookcase. Additionally, testimony provided by multiple friends and acquaintances of defendant indicated that defendant had a great

deal of animosity towards her children and was verbally abusive on a regular basis. Given the weight of the other evidence presented to the jury, we cannot say that the admission of the statement by Dr. Radisch in the death certificate "amount[ed] to a miscarriage of justice or . . . probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). Accordingly, we find no plain error in this case.[4]

III. Discovery

A. State's Compliance with Prior Discovery Order

Defendant argues that Superior Court Judge Christopher M. Collier improperly overruled a prior discovery order of Superior Court Judge W. Erwin Spainhour, allowing the State to introduce evidence of testing conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). Defendant contends that Judge Collier's failure to "enforce" Judge Spainhour's order entitles her to a new trial.

On 13 March 2006, defendant filed a motion requesting production of discovery regarding, among other things, experiments conducted by ATF to simulate the house fire. On 17 March 2006, the trial court granted defendant's motion for discovery and ordered the State to produce the ATF discovery by 23 March 2006. During pre-trial hearings held on 5 June 2006 and 24 August 2006, defense

[4]Since we have determined that the evidence should not have been admitted pursuant to the Confrontation Clause, we need not address defendant's remaining arguments regarding admissibility.

counsel notified the trial court that defendant had not received any of the ATF discovery from the State. When the ATF discovery still had not been produced by the time of a pre-trial hearing on 3 November 2006, Judge Spainhour entered an order on 29 January 2007 ordering the State to produce the discovery by 1 March 2007 or be precluded from using the evidence at trial.

During a 26 February 2007 hearing conducted by Judge Collier, the prosecutor told Judge Collier that the State expected to meet the 1 March 2007 deadline and produce all reports, test data, videos, and photographs from the ATF tests, as well as any expert opinion regarding the testing and the underlying basis for the opinion. Immediately prior to a hearing on 1 March 2007, the State produced three disks of raw test data, video, and photographs from the ATF testing. Although the initial discovery did not include a report from Dr. David Sheppard, the fire research engineer responsible for overseeing the tests performed at ATF's Fire Research Laboratory, Dr. Sheppard faxed a copy of his report to the prosecution during the 1 March 2007 hearing. In his report, Dr. Sheppard gave his opinion that the fire started in the trailer alcove and not in the bedroom.

Although defense counsel had not reviewed the discovery produced by the State on 1 March 2007, defense counsel nonetheless argued that the State had failed to comply with Judge Spainhour's order and should be prevented from using the evidence at trial. The State, on the other hand, argued that it had, in fact, complied with the order, producing everything it had received from ATF by

the 1 March 2007 deadline. After hearing arguments from counsel, Judge Collier deferred ruling on defendant's motion in order to review the discovery to determine whether the State had complied with the prior discovery order.

Also during the 1 March 2007 hearing, defense counsel moved for additional discovery, specifically requesting all "protocols," "copies of all software," "equipment maintenance and repair logs," "complete copies of all [ac]creditations and certifications held and maintained by the lab," and a "site visit."[5] Judge Collier deferred ruling on this motion as well.

After reviewing the discovery materials, Judge Collier held a hearing on 12 March 2007, where he denied defendant's motion to exclude the ATF evidence. With respect to defendant's motion for additional discovery, Judge Collier ordered the State to produce, among other things: (1) "copies of all protocols relied on by the [ATF]"; (2) "all computer electronic software use[d] in the investigation, analysis, simulation, or other testing by the ATF lab"; (3) "any and all equipment used in the investigation, analysis, [or] simulation . . . with respect to equipment unique and particular to forensic fire analysis . . . includ[ing] calibration records"; (4) "complete copies of all equipment maintenance repair logs related to any and all equipment used or relied on by the ATF lab . . . with respect to equipment unique and particular to forensic fire analysis"; (5) "complete cop[ies] of

---

[5]Defendant submitted a written request for this additional discovery on 23 February 2007.

any and all case files related to the Greene case" as maintained by the "local" ATF agent; and (6) the basis for Dr. Sheppard's opinion as stated in the 1 March 2007 fax.

Although defendant frames her argument on appeal as Judge Collier overruling Judge Spainhour's 29 January 2007 discovery order, review of the transcript indicates that Judge Collier determined that the State had complied with Judge Spainhour's order and thus denied defendant's motion to exclude the evidence. Consequently, the issue on appeal is not whether Judge Collier overruled Judge Spainhour's prior order; rather, the issue is whether Judge Collier erred in concluding that the State had produced "any and all statutory and constitutionally required discovery" by 1 March 2007.

"[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). "Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court." *State v. Tucker*, 329 N.C. 709, 716, 407 S.E.2d 805, 810 (1991). The "discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the state in its non-compliance with the discovery requirements." *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986).

N.C. Gen. Stat. § 15A-903 (2009) provides in pertinent part that, when engaging in discovery, the State is required to

> [m]ake available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

N.C. Gen. Stat. § 15A-903(a)(1).

Here, the State produced on 1 March 2007 the reports, video, and photographs from the ATF experiments. It appears from the record that Dr. Sheppard had not issued a final written report regarding his opinion of the experiment results; however, he did provide on 1 March 2007 a statement that it was his opinion that the fire started in the alcove, a result that was inconsistent with defendant's statement to investigating officers. The State provided to defense counsel the complete "file" it had in its possession concerning the ATF experiments and, therefore, complied with N.C. Gen. Stat. § 15A-903(a)(1). Judge Collier's ordering production of additional discovery pursuant to defendant's 23 February 2007 motion does not indicate a failure on the part of the State to meet the 1 March 2007 deadline. In sum, Judge Collier did not overturn Judge Spainhour's prior order; rather, Judge Collier properly determined that the State had complied with the order. Accordingly, Judge Collier did not err in denying defendant's motion to exclude the evidence related to the ATF experiments. *See*

State v. James, 182 N.C. App. 698, 701-03, 643 S.E.2d 34, 36-37 (2007) (holding that subsequent trial judge's admission of challenged evidence did not "effectively overrule" prior judge's discovery order as subsequent judge properly determined that State complied with deadline for disclosing evidence).

B. Witness Statements

Defendant next contends that the State failed to timely disclose certain witness statements as required by N.C. Gen. Stat. § 15A-903. Specifically, defendant points to several incidences in which "[t]he existence of incomplete witness statements" arose during trial: (1) when the prosecution questioned prospective jurors during *voir dire* regarding the "Double Door Nightclub"; (2) when a firefighter testified at trial that he had attended two meetings with the prosecution, but the firefighter's witness statement only mentioned one meeting; (3) when defendant's neighbor, Ms. Bell-Diss, testified that she had met twice with the prosecution, but only one meeting was mentioned in her statement; and (4) when the prosecution disclosed at the suppression hearing that defendant made the exculpatory statement, "I didn't kill my young'uns." Defendant argues that the trial court abused its discretion by "not find[ing] that discovery violations occurred and [by] impos[ing] no sanctions."

Assuming, without deciding that the State violated N.C. Gen. Stat. § 903(a)(1), defendant does not argue on appeal that the State acted in bad faith in failing to produce complete witness statements with respect to these particular witnesses. *See State*

v. Johnson, 136 N.C. App. 683, 692, 525 S.E.2d 830, 836 (2000) ("overrul[ing]" defendant's argument that trial court should have excluded statement by defendant as sanction for State's failure to timely disclose statement where "defendant . . . failed to show an abuse of discretion through bad faith by the State during discovery"). Nor has defendant explained how she was prejudiced by the State's alleged noncompliance. *See id.* ("[D]efendant must demonstrate he was prejudiced by the State's noncompliance and that, if the substance of the [discovery] had been provided earlier, the outcome of the trial would have differed."). Accordingly, we hold that defendant's argument is without merit.

C. Expert Arson Witnesses

Defendant's final discovery-related argument is that "the State's endorsement of four additional experts during trial constituted discovery violations." Defendant contends that the trial court abused its discretion by "not find[ing] that endorsement of these experts constituted discovery violations and [by] den[ying] motions to prohibit the witnesses from testifying, for a mistrial, for a continuance, and for a recess."

N.C. Gen. Stat. § 15A-903(a)(2) "governs the State's disclosure of expert witnesses and any reports made by such witnesses." *State v. Cook*, 362 N.C. 285, 291, 661 S.E.2d 874, 878 (2008). The statute requires the State to

> [g]ive notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert.

> The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. *The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court*.

N.C. Gen. Stat. § 15A-903(a)(2) (emphasis added). Once the State provides discovery, it is under a "continuing duty to provide discovery and disclosure." *State v. Blankenship*, 178 N.C. App. 351, 354, 631 S.E.2d 208, 210 (2006); N.C. Gen. Stat. § 15A-907 (2009).

On 13 March 2006, defendant filed a motion pursuant to N.C. Gen. Stat. § 15A-903 for discovery, requesting, among other things, that the State "[g]ive notice to [defendant] within a reasonable time prior to trial, of any expert witnesses that the State reasonably expects to call as a witness at trial." Prior to trial, the only experts designated by the State were SBI agent Renee Mullis, a certified arson investigator, and ATF fire engineer Dr. David Sheppard. During jury selection, the State told the trial court that it intended to call four additional expert witnesses: (1) Van Tuley, an ATF agent certified in fire investigation and explosives; (2) Dr. David Eagerton, South Carolina's Chief Toxicologist; (3) SBI Agent Kim Heffney; and (4) David Campbell, a private arson expert. Defendant objected to these experts testifying, arguing that they had not been disclosed prior to trial as required by N.C. Gen. Stat. § 15A-903(a)(2). The trial court ruled that the four experts would be permitted to testify at trial, and granted a two-day continuance at the end of the *voir dire*.

Ultimately, of the four additional witnesses, the State elected to call only Agent Tuley to testify at trial as an expert.

As our appellate courts have continued to "echo[]," the "'purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence *he cannot anticipate*.'" *Cook*, 362 N.C. at 294, 661 S.E.2d at 879 (quoting *State v. Murillo*, 349 N.C. 573, 585, 509 S.E.2d 752, 759 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999)). With respect to N.C. Gen. Stat. § 15A-903(a)(2)'s disclosure requirements, the Supreme Court has emphasized that

> [t]he language of N.C.G.S. § 15A-903(a)(2) is mandatory, providing that once voluntary discovery is initiated, the State "must" "[g]ive notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial." Each expert witness "shall prepare" and the State "shall furnish" a report of any examinations or tests conducted by the expert. The State "shall furnish" an expert's *curriculum vitae* and opinion "within a reasonable time prior to trial."

Cook, 362 N.C. at 294, 661 S.E.2d at 880 (quoting N.C. Gen. Stat. § 15A-903(a)(2)). No provision of the discovery statutes "provides exceptions under which the State can fail to comply with the discovery statutes and rely on defendant's educated guess as to what evidence the State will present." *Cook*, 362 N.C. at 294, 661 S.E.2d at 880.

As the plain language of N.C. Gen. Stat. § 15A-903(a)(2) "*requires* disclosure 'within a reasonable time *prior* to trial,'" *Cook*, 362 N.C. at 295, 661 S.E.2d at 880 (quoting N.C. Gen. Stat. § 15A-903(a)(2)) (emphasis added), the State violated the statute

by not notifying defendant until four weeks into her capital murder trial that it intended to call Agent Tuley, Agent Heffney, Dr. Eagerton, and Mr. Campbell as experts. Although the record is unclear as to whether the trial court made a determination as to whether the State violated N.C. Gen. Stat. § 15A-903(a)(2), the court did grant a two-day continuance. Thus, the issue is not whether the trial court erred in finding a discovery violation, but, rather, whether the trial court abused its discretion in granting a two-day continuance in lieu of the mistrial or three-week recess requested by defendant.

"The trial court has discretionary power under N.C.G.S. § 15A-910(a)(2) to '[g]rant a continuance or recess' if a party fails to comply with the discovery statutes." *State v. Cook*, 362 N.C. 285, 294, 661 S.E.2d 874, 880 (2008). Under the facts of this case, we conclude that the trial court did not abuse its discretion in granting a two-day continuance. The State designated Agent Tuley, Agent Heffney, Dr. Eagerton, and Mr. Campbell as expert witnesses after trial had begun; however, Agent Tuley was actually called to testify and defendant has not established that she was prejudiced in any way with regard to the other three witnesses, who never testified. Although, arguably, defendant had to prepare for all four witnesses, we see no abuse of discretion in the trial court's decision to allow a two-day continuance for defendant to prepare.

V. Impermissible Lay Testimony

Defendant next assigns error to the admission of the testimony of Captain Brian Smith, with the Kannapolis Volunteer Fire Department. Specifically, defendant challenges Captain Smith's testimony in response to the prosecutor's question on direct examination as to whether he saw anything "odd" at the scene of the fire or inconsistent with defendant's initial account of how the fire started. Defendant argues that Captain Smith was impermissibly allowed to give his opinion regarding "the point of origin of this fire, a matter requiring expertise . . . ." Because, defendant contends, Captain Smith was not, as he admitted during his testimony, a fire causation and origin expert, he should not have been permitted to give his opinion as to where the fire started. The State counters that Captain Smith was properly allowed to testify as a lay witness as his testimony was "in the form of inferences that were rationally based on his perceptions."

Rule 701 of the Rules of Evidence governs the admission of lay testimony, providing:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. R. Evid. 701. The trial court's admission of lay testimony is reviewed for an abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

Our Supreme Court has explained that "[a]lthough a lay witness is usually restricted to facts within his knowledge, if by reason of opportunities for observation he is in a position to judge of the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion." *State v. Lindley*, 286 N.C. 255, 257-58, 210 S.E.2d 207, 209 (1974) (internal citation and quotation marks omitted). Thus, "a lay witness may still testify to his opinions, which are rationally based on his perceptions and helpful to a clear understanding of his testimony of the determination of a fact in controversy." *State v. Friend*, 164 N.C. App. 430, 437, 596 S.E.2d 275, 281 (2004).

Contrary to defendant's argument, Captain Smith did not "testif[y] . . . that he could identify where this fire started from past experience." Instead, Captain Smith testified that fires "general[ly]" burn "up and out," that the area in which a fire starts is "usually normally hotter and more charred than areas away from the fire," and that at the scene of the fire in this case, "the heaviest charred area was in the alcove area and it seemed to be over the door where the kids' bedroom was." Captain Smith did not give his opinion that the fire in this case started in the alcove. Nor did he testify how the fire started or whether it was intentionally set. His testimony was based on his first-hand observations at the scene of the fire as one of the responding firefighters and was helpful to the jury in understanding the

course of the investigation. The trial court, therefore did not abuse its discretion in admitting Captain Smith's testimony.

VI. Prosecutorial Misconduct

In her final argument on appeal, defendant contends that she is entitled to a new trial due to "pervasive prosecutorial misconduct." Prosecuting attorneys "owe the duty to the State which they represent, the accused whom they prosecute, and the cause of justice which they serve to observe the rules of practice created by law to give those tried for crime the safeguards of a fair trial." *State v. Phillips*, 240 N.C. 516, 522, 82 S.E.2d 762, 766 (1954). Consequently, "when improper prosecutorial conduct prejudices the defendant, affecting his [or her] right to a fair trial," the defendant is entitled to a new trial. *State v. Walls*, 342 N.C. 1, 66, 463 S.E.2d 738, 773 (1995). "However, where there is no reasonable possibility that the misconduct affected the outcome of the trial, there is no need for a reversal." *State v. Walls*, 342 N.C. 1, 66, 463 S.E.2d 738, 773 (1995).

Defendant alleges that the prosecution: (1) "repeatedly misrepresented discovery orders when confronted with allegations of late discovery"; (2) "failed to perform [his] statutory and constitutional discovery duties"; (3) "misrepresented evidence about diphenhydramine in opening statement[s] and closing argument[s]"; (4) "asked questions which assumed facts never placed into evidence"; (5) "circumvented court rulings designed to prevent it from presenting irrelevant and highly prejudicial information to the jury"; (6) "accused Mr. Lentini of illegally working on this

case"; (7) "inflamed the passion of the jury by arguing that if the jury found that the fire was an accident, that meant Daniel Macemore was a murderer"; (8) "demeaned defense counsel in closing argument"; (9) "vouched for the credibility of its witnesses"; (10) "opined as to [defendant's] guilt"; and (11) "distorted [witness] testimony and was abusive during cross-examination[.]" Upon review of defendant's allegations of prosecutorial misconduct, we see no reasonable possibility that any such misconduct would have affected the outcome of this trial. Thus, we hold that defendant received a trial free of prejudicial error.

No Prejudicial Error.

Judges WYNN and CALABRIA concur in result.

Report per Rule 30(e).

Judge WYNN concurred in result in this opinion prior to 9 August 2010.