NO. COA09-1348

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

STATE OF NORTH CAROLINA

v. Wayne County
No. 06 CRS 56066-68

RODERICK MILES DAVIS, JR.

Appeal by defendant from judgment entered 24 March 2009 by Judge Paul G. Gessner in Wayne County Superior Court. Heard in the Court of Appeals 23 March 2010.

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

Reita P. Pendry, for Defendant-Appellant.

ERVIN, Judge.

Defendant Roderick Miles Davis, Jr., appeals from judgments sentencing him to two consecutive terms of life imprisonment in the custody of the North Carolina Department of Correction without parole based upon his convictions for the first-degree murders of James Lee Croom and Trasond Javoy Gerald and to two consecutive terms of a minimum of 64 months and a maximum of 86 months in the custody of the North Carolina Department of Correction, to be served concurrently with the life without parole sentences, based upon his convictions for discharging a weapon into an occupied dwelling. After careful consideration of the arguments advanced by

Defendant on appeal in light of the record and the applicable law, we conclude that Defendant received a fair trial, free from prejudicial error, and is not entitled to any relief on appeal.

I. Factual Background

A. Substantive Facts

1. State's Evidence

In August, 2006, Kim Davis lived in an apartment located about a block from Defendant's residence. Ms. Davis operated a "liquor house" in her apartment. Prior to 21 August 2006, Defendant had purchased drinks from Ms. Davis about ten or fifteen times. On 21 August 2006, Defendant entered her apartment. At that time, Defendant had a rifle "hanging on his shoulder" and told Ms. Davis he was "at war." An hour later, Ms. Davis heard that two men had been shot in the neighborhood.

Candy Young was fourteen years old in August, 2006. On the evening of 21 August 2006, Ms. Young saw a friend named Jaron Russell[1] sitting in the front seat of a car parked in front of Ms. Davis' "liquor house." Ms. Young had a brief conversation with Mr. Russell. According to Ms. Young, nothing was positioned on the seat near Mr. Russell. Ms. Young denied having told the prosecutor at an earlier time that she had seen something in the car with Mr. Russell. After a *voir dire* examination occasioned by the

[1] Mr. Russell was also charged with a number of offenses as a result of this incident. However, despite having filed a pretrial motion to join the cases against Defendant with the cases against Mr. Russell for trial, the State announced at the beginning of the trial that it only intended to proceed against Defendant at that time.

prosecutor's claim of surprise, the trial court allowed the State to question Ms. Young as "a hostile or unwilling witness." Based upon the trial court's ruling, the State impeached Ms. Young's in-court testimony by using a statement that Ms. Young had given to a law enforcement officer shortly after the shooting. In her statement, Ms. Young indicated that she had seen guns in the car in which Mr. Russell was sitting. When the "other boys" returned to the car and drove off, Ms. Young and her friends walked away. Shortly thereafter, Ms. Young heard shooting, at which point she turned and observed Defendant's car, which had "guns hanging out" of the windows. Ms. Young saw "gunfire" or "little red sparks" emanating from Defendant's car, but she did not see who was holding the guns or shooting. Ms. Young saw a boy who did not have anything in his hands riding away on a bicycle.

Catherine Braswell lived at 716-A Olivia Lane. After Ms. Braswell heard shooting on 21 August 2006, several bullets entered her apartment. Similarly, Mike Spruill lived in an apartment located at 714 Olivia Lane on 21 August 2006. Mr. Spruill also heard the shooting, and a number of bullets penetrated his apartment. Finally, Pamela Kornegay lived in an apartment at 903-A Hugh Street. Like Ms. Braswell and Mr. Spruill, Ms. Kornegay heard shooting on 21 August 2006, and observed that bullets had entered her residence.

Officer Thomas Collins of the Goldsboro Police Department was dispatched to the corner of Olivia and Hugh Streets on the night of 21 August 2006. At the time of his arrival, Officer Collins saw a

Dodge Stratus containing two people beside the road. Mr. Croom, who had been driving and who had suffered gunshot wounds to the head, was unresponsive. Although the passenger, Mr. Gerald, had sustained a gunshot wound to the head, he was "still trying to breathe" when Officer Collins arrived.[2]

Special Agent Pat Matthews of the State Bureau of Investigation participated in a search of Mr. Croom's car, the area around the car, several nearby apartments, and the area between two nearby houses. In examining Mr. Croom's vehicle, Special Agent Matthews observed that nine bullets had been fired into the trunk and the passenger compartment. In addition, Special Agent Matthews noticed that one gunshot had been fired from inside Mr. Croom's car. Special Agent Matthews recovered a .45 caliber shell casing and a .45 caliber semi-automatic pistol from the interior of Mr. Croom's vehicle. Emergency medical workers found another .45 caliber shell casing on one of the victims. A .40 caliber shell casing that had probably been fired from the .45 caliber pistol taken from Mr. Croom's vehicle was found on the street where the shooting occurred. Based upon her investigation, Special Agent Matthews determined that the gunfire had probably originated from the area between 801 and 803 Olivia Lane, at which point investigating officers recovered "numerous shell casings."

---

[2] Frankie Holmes (Mr. Holmes) was also in Mr. Croom's car at the time of the shooting. However, he escaped without injury. Another individual named Otavis Gerquel McKinnon (Mr. McKinnon) claimed to have been shot while walking in the area. Neither Mr. Holmes nor Mr. McKinnon testified at trial.

Special Agent Neal Morin of the State Bureau of Investigation tested Defendant's SKS rifle, a pistol found in Mr. Croom's car, and other ballistics evidence found in Mr. Croom's car and in nearby apartments. According to Special Agent Morin, two bullets were fired from inside Mr. Croom's car. Other shell casings and bullet fragments had been fired from Defendant's gun.

Two days after the shooting, Defendant came to the law enforcement center. When Investigative Officer Dale Foster told Defendant he was not under arrest, Defendant started crying and said "I shot those two guys." Defendant also told investigating officers where his rifle was hidden.

Officer Chris Outlaw of the Goldsboro Police Department responded to a report that there had been a shooting at Defendant's house on 20 August 2006. At the time that Officer Outlaw arrived, Defendant said that a friend, later identified as Mileek Oats (Mr. Oats), had been shot. Defendant gave a firearm that he had been holding to Officer Outlaw before taking Mr. Oats to the hospital. Subsequently, the gun was returned. On 23 August 2006, John Rea, a retired agent with the North Carolina State Bureau of Investigation, recovered an SKS rifle from the yard behind Defendant's father's house.

Dr. Maryanne Gaffney-Kraft performed an autopsy on Mr. Croom on 22 August 2006. In Dr. Gaffney-Kraft's opinion, Mr. Croom died from "multiple gunshot wounds." An autopsy of Mr. Gerald was performed in Dr. Gaffney-Kraft's presence by one of her associates, Dr. Clark. Based on her review of Dr. Clark's autopsy report, Dr.

Gaffney-Kraft opined that Mr. Gerald died from a gunshot wound to the head. None of the bullet wounds that caused the deaths of Mr. Croom and Mr. Gerald were inflicted at close range.

2. Defendant's Evidence

In August 2006, Defendant was 22 years old, had two young sons, and held a full-time job on Seymour Johnson Air Force Base. Defendant was a lifelong resident of Goldsboro, and had grown up in the same town as Mr. Croom and Mr. Gerald, and had not had any previous conflict with either of them. While Defendant had never belonged to a street gang, he was familiar with the local gangs. Defendant admitted shooting Mr. Croom and Mr. Gerald on 21 August 2006.

On 18 August 2006, Defendant bought an SKS rifle. In the early morning hours of Saturday 19 August 2006, Defendant was awakened by noise in his yard. When Defendant went outside carrying the rifle, he saw Jamie Oats and several other men. Jamie Oats told Defendant that he was involved in a conflict with Mr. Croom and certain other men who were associated with the "Jungle Boys" street gang. Before Jamie Oats could provide further explanation, shots were fired at Defendant, Jamie Oats, and others from two cars that were driven by the area. Defendant "got up and fired about five rounds at the car until shots went flying over [his] head and [then he] laid down on the ground again."

At around 3:00 p.m. on 19 August 2006, Defendant was in his yard when Jamie Oats drove up. As they were talking, a car traveled past. Defendant saw Mr. Gerald fire five rounds into his

yard. Defendant did not seek help from law enforcement officers because he was afraid of the "Jungle Boys." According to Defendant, the "Jungle Boys" were associated with a larger gang known as the "Bloods." Defendant asked a friend to talk to Mr. Croom and Mr. Gerald to let them know that he did not want to be involved in their conflict with Jamie Oats. Later that afternoon, Defendant saw a truck occupied by individuals wearing red bandanas, which was a sign of their allegiance to the Bloods, drive by.

After work on the afternoon of 20 August 2006, Defendant was at home talking with Mr. Oats, who was Jamie Oats' brother. Because of the prior gunfire, Defendant had started taking his gun with him when he was outside his house. A vehicle drove by, shots were fired, and Mr. Oats told Defendant that Mr. Croom had shot him in the foot. Defendant called 911. When a law enforcement officer arrived, Defendant gave the officer his gun and took Mr. Oats to the hospital.

After the shooting of Mr. Oats, Defendant was frightened and decided to sleep at his mother's house. As Defendant got into his car to go to his mother's residence, Mr. Croom drove by and fired several shots into Defendant's car. After this incident, Defendant was "[a] nervous wreck, scared to death, terrified." On the following day, Defendant talked to a human resources supervisor at work about the situation in his neighborhood. A friend told Defendant that afternoon that the Jungle Boys were pursuing the Oats brothers rather than Defendant.

On Monday, 21 August 2006, Defendant went home after finishing work. Defendant visited with Mr. Russell and several other friends before walking to the residence of another friend, where he drank beer and smoked marijuana. Defendant returned home around 6:30 p.m. and discovered that his friends were still in the yard.

At that point, Defendant drove to Ms. Davis' liquor house, with Mr. Russell in the front seat and three other men in the back. Although Defendant brought his gun with him, his passengers were unarmed as "far as [he] knew." At the liquor house, Defendant drank a "double shot" of liquor. Although he admitted telling Ms. Davis he was "at war," Defendant testified that he only meant that he was being shot at. Defendant drove to several other places in the neighborhood after leaving Ms. Davis' liquor house. Defendant denied that there were "guns hanging out" of his car.

At around 7:00 p.m., Defendant saw Mr. Croom drive slowly past, causing him to be afraid that someone would shoot at him. Defendant drove quickly back to his house. However, as Defendant pulled into his back yard, he heard a car driving into his front yard. Defendant grabbed his rifle, "took off running out of the yard," and did not stop for his car keys or cell phone because he was "scared to death." Defendant ran for a block or two prior to stopping at a corner "between two or three homes."

After Defendant stopped, he secured the clip on his firearm. When Defendant looked up, he saw that Mr. Croom had turned his car towards Defendant, "drawn his pistol," and pointed it at Defendant. Defendant "knew" that Mr. Croom was about to shoot, because he had

been "constantly" shooting in Defendant's direction and had missed Defendant "by inches" on the preceding day.

On direct examination, Defendant described the actual shooting as follows:

> Q.: . . . [W]ere you in fear for your life right then?
>
> A.: I knew something had to be done. I didn't think about it, just picked up – just held my gun and started shooting.
>
> . . . .
>
> Q.: And you're facing him with the gun pointed at you?
>
> A.: Yes, sir.
>
> Q.: Do you recall firing the gun?
>
> A.: Yes, sir.
>
> Q.: Do you know how many times you fired it?
>
> A.: No, sir.
>
> Q.: Did you – how do you fire that gun?
>
> A.: I just raised it up in his direction and started shooting.
>
> . . . .
>
> Q.: Why were you shooting?
>
> A.: I was scared to death. You know, I was scared they would kill me. So I had to do something.
>
> Q.: Did you feel that was necessary?
>
> A.: Yes, sir.

After Defendant shot at Mr. Croom's vehicle, he ran to his own car, threw his rifle in the back seat, and drove away without checking to see how many people were in Mr. Croom's car or whether

anyone was hurt. Upon learning that Mr. Croom and Mr. Gerald were dead, Defendant "felt bad." Defendant testified that, if he were put "in the exact situation" again, he would have "no choice" but to shoot to protect himself. Defendant left his gun in the yard behind his parents' house and hid for a day before turning himself in to law enforcement officers.

On cross-examination, Defendant testified that he shot at Mr. Croom's car because his "choice was to live or die." Defendant did not report the earlier shooting incidents to the police because he was "terrified to press charges" against those involved. After seeing a "burst of fire" from Mr. Croom's car, he "started shooting" at the vehicle, but did not know who else was in the car. On redirect examination, Defendant repeated that he had never been in a gang.

On 21 August 2006, William Battle was sitting on the porch of an apartment on Olivia Lane, which is located in the block where the shooting occurred. After hearing gunfire, Mr. Battle called 911 and walked towards Mr. Croom's car. Mr. Battle heard a discussion about a weapon and saw someone reach inside the car, retrieve a gun, and hand it to a boy who rode away on a bicycle.

Anna Edmundson was formerly employed as a Human Resources Officer at Seymour Johnson Air Force Base. On 21 August 2006, Defendant spoke with Ms. Edmundson about the situation in his neighborhood. Among other things, Defendant told Ms. Edmundson that people were trying to kill him and that, if they continued to

bother him, he would kill them. Ms. Edmundson described Defendant as upset, crying, and "shaking like a leaf on a tree."

Gwendolyn Arnold had been Defendant's supervisor at Seymour Johnson Air Force Base. According to Ms. Arnold, Defendant was a good worker, was truthful, and did not cause problems. Since Defendant was very upset on 21 August 2006, Ms. Arnold referred him to Ms. Edmundson.

3. State's Rebuttal Evidence

On rebuttal, Sergeant Teresa Cox of the Goldsboro Police Department testified that she was Defendant's aunt and that Defendant had not sought her help in connection with the problems he was experiencing. According to Sergeant Warren Baker of the Goldsboro Police Department, Defendant made an inculpatory statement while he was in pretrial confinement. Former Special Agent Elizabeth Patel of the State Bureau of Investigation testified that a gunshot residue test that she performed did not reveal the presence of any particles on Mr. Croom's hands, although the levels of barium and antimony that she detected were consistent with his having been in a car where a weapon had been fired.

B. Procedural History

On 23 August 2006, warrants for arrest charging Defendant with murdering Mr. Gerald, attempting to murder Mr. McKinnon, and murdering Mr. Croom were issued. On 7 April 2008, the Wayne County Grand Jury returned a bill of indictment charging Defendant with the murder of Mr. Croom, the murder of Mr. Gerald, the attempted murder of Mr. McKinnon, assaulting Mr. McKinnon with a deadly

weapon with the intent to kill and inflicting serious injury, the attempted murder of Mr. Holmes, assaulting Mr. Holmes with a deadly weapon with the intent to kill and inflicting serious injury, nine counts of discharging a weapon into an occupied vehicle, discharging a weapon into an occupied vehicle and inflicting serious injury on Mr. McKinnon, and three counts of discharging a weapon into an occupied building.

The cases against Defendant came on for trial before the trial court and a jury at the 16 March 2009 session of the Wayne County Superior Court. At the conclusion of the State's evidence, the trial court granted Defendant's motion to dismiss the two counts of attempted murder, the two counts of assault with a deadly weapon with the intent to kill inflicting serious injury, the count of discharging a weapon into an occupied vehicle inflicting serious injury on Mr. McKinnon, and one count of discharging a firearm into an occupied dwelling. At the conclusion of all of the evidence, the State voluntarily dismissed one count of shooting into an occupied vehicle. Following the arguments of counsel and the trial court's instructions to the jury, the jury returned verdicts convicting Defendant of the first-degree murder of Mr. Croom on the basis of the felony murder rule, using discharging a firearm into an occupied vehicle as the predicate felony, and malice, premeditation, and deliberation; the first-degree murder of Mr. Gerald on the basis of the felony murder rule, using discharging a firearm into an occupied vehicle as the predicate felony, and malice, premeditation, and deliberation; eight counts of

discharging a firearm into an occupied vehicle; and two counts of discharging a firearm into an occupied dwelling.

After accepting the jury's verdicts, the trial court convened a sentencing hearing and determined that Defendant should be sentenced as a Level I offender. As a result, the trial court imposed two consecutive sentences of life imprisonment in the custody of the North Carolina Department of Correction without parole in the two cases in which Defendant had been convicted of first-degree murder. In the two cases in which Defendant was convicted of discharging a firearm into an occupied dwelling, the trial court imposed consecutive sentences of a minimum of sixty-four months and a maximum of eighty-six months imprisonment in the custody of the North Carolina Department of Correction, with these sentences to be served concurrently with the life sentences imposed upon Defendant based upon his convictions for first-degree murder. Finally, the trial court consolidated Defendant's eight convictions for discharging a weapon into an occupied vehicle for judgment and sentenced Defendant to a minimum of sixty-four months and a maximum of eighty-six months imprisonment in the custody of the North Carolina Department of Correction; however, the trial court arrested judgment in connection with each of these convictions. Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

A. Admission of Ms. Young's Testimony

First, Defendant argues that the trial court erred by allowing Ms. Young to testify on the grounds that she was not a competent witness. This argument lacks merit.

Ms. Young was fourteen years old in August 2006. According to Ms. Young's trial testimony, she had seen Mr. Russell in Defendant's car before the shooting and had a brief conversation with him. Ms. Young did not recall seeing anything in the car in which Mr. Russell was sitting and denied having made a pretrial statement to the contrary. The prosecutor asked to question Ms. Young on *voir dire* in order to determine if she was an adverse witness for purposes of N.C. Gen. Stat. § 8C-1, Rule 611(c). On *voir dire*, Ms. Young testified that she was under subpoena, that she did not want to testify, and that she had been threatened and feared retribution.[3] Ms. Young acknowledged that she had the ability to read and write. When the prosecutor showed her an eight page handwritten document, Ms. Young admitted that her handwriting and signature appeared on each page and identified the document as a statement she had given to a law enforcement officer on 6 September 2006. Ms. Young said that reading the statement would not refresh her recollection, that she had a "bad memory," and that she did not remember stating that she had seen guns in the car near Mr. Russell. Although Defendant expressed concerns about the

[3] The threats which Ms. Young described did not come from Defendant. Instead, Ms. Young testified that her aunt had informed her that an unidentified man had said that it would be better if she did not testify.

"validity" of Ms. Young's testimony and argued that her testimony was, "on the whole," "incompetent," the trial court stated that:

> Well, based upon my review of the response that she's made to the questions that were offered, in addition to that the Court's opportunity to observe her as she has testified and responded to the questions that were asked by the State, and her body language, I am going to find that her responses were evasive, somewhat inconsistent, and that the State has shown that at this time that she is a hostile or unwilling witness. . . . [I]n my discretion, I am going to allow the State to treat her as a hostile, unwilling witness and ask leading questions.

After the announcement of this ruling, the trial court allowed Defendant to question Ms. Young concerning whether "the State should be allowed to treat her as a hostile witness and ask leading questions." While taking advantage of this opportunity, Defendant did not question Ms. Young about the difference between the truth and a lie, about her duty to tell the truth, or about other competence-related issues. After Defendant questioned Ms. Young, the trial court allowed Defendant's motion to exclude any testimony concerning the threats that had allegedly been made against Ms. Young while reaffirming its earlier ruling allowing the State to examine Ms. Young as a hostile witness.

Following Ms. Young's testimony, Defendant revisited the subject of her competence and argued that, "whether it's deceit, memory problems, [or] just flat out inability to understand what's going on here in the courtroom," Ms. Young was "incapable of expressing herself." As a result, Defendant requested the trial court to rule that Ms. Young was not competent to testify. In

refusing to change its ruling, the trial court reiterated that "Rule 601 does not apply." Since, in our view, the trial court's statement constituted a "square and direct" rejection of Defendant's challenge to Ms. Young's competence, we will proceed to address the merits of Defendant's argument.

According to N.C. Gen. Stat. § 8C-1, Rule 601(a) (2009), "[e]very person is competent to be a witness except as otherwise provided in these rules."

> A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood . . . or (2) incapable of understanding the duty of a witness to tell the truth.

N.C. Gen. Stat. § 8C-1, Rule 601(b) (2009). "Competency and credibility are not the same . . . . A person may be a competent witness and yet not a credible one." *State v. Buchanan*, 216 N.C. 34, 35, 3 S.E.2d 273, 274 (1939). The competence of a witness hinges upon "'the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide,'" with the trial court having to "'rely on [its] personal observation of the [witness'] demeanor and responses to inquiry on voir dire examination'" in making this determination. *State v. Ford*, 136 N.C. App. 634, 639, 525 S.E.2d 218, 221 (2000) (quoting *State v. Fearing*, 315 N.C. 167, 173-74, 337 S.E.2d 551, 554-55 (1985)). "The competency of a witness is a matter which rests in the sound discretion of the trial judge," so that, "'[a]bsent a showing that the ruling as to competency could

not have been the result of a reasoned decision, the ruling must stand on appeal.'" *Id.* at 639, 525 S.E.2d at 221-22 (quoting *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987); citing *State v. Andrews*, 131 N.C. App. 371, 373, 507 S.E.2d 305, 307 (1998)).

Ms. Young testified that, on the night of the shooting, she was visiting the Olivia Lane area with friends. Ms. Young identified her friends by their names and family relationships, described Mr. Russell as "like a brother to [her,]" and recalled seeing him in a car parked near Ms. Davis' liquor house. Ms. Young testified that it was "still light outside" when she stopped to talk to Mr. Russell. On *voir dire*, Ms. Young identified her signature on each of the pages of her statement and recognized that the presence of her signature indicated that she had made the statement. In addition, Ms. Young stated that she knew the difference between the truth and a lie and understood her duty to testify truthfully. As a result, Ms. Young's testimony establishes that she was able to express herself and understood what she was expected to do as a witness.

After carefully reviewing the record in light of the applicable legal standard, we conclude that the trial court did not abuse its discretion by allowing Ms. Young to testify. In arguing for a contrary result, Defendant notes that Ms. Young claimed to have a poor memory and contends that her testimony was contradictory and confusing. However, while "a witness who can remember nothing is not competent to testify, a weak or impaired memory goes not to the competency of the evidence, but rather the

weight to be accorded the testimony." *Hatcher v. Daniel Int'l Corp.*, 153 N.C. App. 776, 780, 571 S.E.2d 20, 22 (2002) (citing *State v. Witherspoon*, 210 N.C. 647, 188 S.E. 111 (1936)). Defendant does not contend that Ms. Young lacked the ability to express herself concerning the facts that she did recall or that she failed to understand her obligation to be truthful. In the absence of such testimony and in light of the other information contained in the record, the trial court's rejection of Defendant's competence challenge did not constitute an abuse of discretion.

Furthermore, "[a]ssuming . . . that admission of this testimony was error, we do not find that such error was prejudicial. Defendant is entitled to relief only if he can show a reasonable possibility that the outcome of the trial would have been different had the evidence been excluded." *State v. King*, 342 N.C. 357, 362, 464 S.E.2d 288, 292 (1995) (citing N.C. Gen. Stat. § 15A-1443(1) (1998)). Although Defendant argues that the trial court's ruling "allowed [the State] to introduce evidence" that Ms. Young previously told police she saw guns in and people firing from Defendant's car and that the person she saw leave the area of Mr. Croom's car on a bicycle after the shooting did not have a gun, Ms. Young's statement was used solely for the purpose of attacking her credibility instead of for a substantive purpose. In addition, Defendant's contention that Ms. Young's testimony that the passengers in his car were armed and fired undermined his self-defense claim is not persuasive since the conduct of Defendant's passengers had little, if anything, to do with whether Defendant

acted in self-defense and since all of the evidence showed that Defendant was not in his car at the time of the shooting. As a result, the trial court did not commit prejudicial error by allowing Ms. Young to testify.

B. Ms. Young's Prior Statement

Secondly, Defendant argues that the trial court erred by admitting Ms. Young's prior statement into evidence. According to Defendant, the trial court allowed the admission of Ms. Young's statement as a recorded recollection pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(5), despite the fact that the State never established the existence of the prerequisites for the admission of her statement for that purpose and that the admission of this statement prejudiced his chance for a more favorable outcome at trial. However, our review of the record establishes that Ms. Young's statement was not, in fact, offered or admitted into evidence for substantive purposes. For that reason, Defendant's challenge to the lawfulness of admitting the statement into evidence necessarily fails.

According to N.C. Gen. Stat. § 8C-1, Rule 607 (2009), "[t]he credibility of a witness may be attacked by any party, including the party calling him." As a result:

> where there is testimony that a witness fails to remember having made certain parts of a prior statement, denies having made certain parts of a prior statement, or contends that certain parts of the prior statement are false, . . . the witness [may] be impeached with the prior inconsistent statement.

State v. Riccard, 142 N.C. App. 298, 303, 542 S.E.2d 320, 323, *cert. denied*, 353 N.C. 530, 549 S.E.2d 864 (2001). "However, it is well settled that in such situations the prior inconsistent statements may only be used to impeach the witness' credibility; they may not be admitted as substantive evidence." *State v. Miller*, 330 N.C. 56, 63, 408 S.E.2d 846, 850 (1991) (citing *State v. Hunt*, 324 N.C. 343, 350, 378 S.E.2d 754, 758 (1989) (other citations omitted)).

In this case, the trial court allowed the prosecutor to impeach Ms. Young by questioning her about her earlier statement.[4] In its final instructions to the jury, the trial court stated that:

> When evidence has been received tending to show that, at an earlier time, a witness made a statement which may be consistent or may conflict with his testimony at this trial, you must not consider such an earlier statement as evidence of the truth of what was said at an earlier time because it was not made under oath at this trial. If you believe such an earlier statement was made and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this, together with all the other facts and circumstances bearing upon the witness's truthfulness, in deciding whether or not you will believe or disbelieve the witness's testimony at this trial.

Defendant has neither challenged the validity of this instruction nor argued that it did not provide adequate guidance to the jury concerning the limited purpose for which it was entitled to consider Ms. Young's statement. Since the record demonstrates that

---

[4] Contrary to Defendant's assertions, the trial court never stated that Ms. Young's statement was admitted for the purpose of refreshing her recollection. Instead, the only statement to that effect contained in the record was made by the prosecutor.

Ms. Young's statement was not admitted for substantive purposes and since the trial court properly instructed the jury concerning the proper use of Ms. Young's statement, we find that Defendant has not demonstrated the existence of any error relating to the admission of Ms. Young's statement. Furthermore, for the reasons set forth above, we also conclude that any error that the trial court may have committed in connection with the prosecutor's use of Ms. Young's statement did not prejudice Defendant, since the information in that statement was only tangentially related to the issue of whether Defendant acted in self-defense.

C. Sufficiency of the Evidence of Defendant's Guilt of First-Degree Murder

Next, Defendant contends that the trial court erred by denying his motion to dismiss the first-degree murder charges that had been lodged against him on the grounds that the evidence was insufficient to justify the submission of these charges to the jury. In essence, Defendant argues that the State failed to offer sufficient evidence to prove that he did not act in self-defense. We disagree.

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Scott, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. . . . If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. . . . [T]he defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence.

Id. at 596, 573 S.E.2d at 869 (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992); *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984); *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982)).

> The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:
>
> > (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm;and
> >
> > (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
> >
> > (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
> >
> > (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably

> appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.
>
> (citations omitted). The existence of these four elements gives the defendant a *perfect right of self-defense* and requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well.
>
> On the other hand, if defendant believed it was necessary to kill the deceased in order to save [him]self from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to [him] at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter. (citations omitted).

State v. Norris, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981). In the event that a defendant introduces evidence tending to show that he acted in self-defense, the State must prove beyond a reasonable doubt that he did not do so:

> "The State bears the burden of proving that defendant did not act in self-defense. To survive a motion to dismiss, the State must therefore present sufficient substantial evidence which, when taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that defendant did not act in self-defense."

State v. Ammons, 167 N.C. App. 721, 725, 606 S.E.2d 400, 403 (2005) (quoting *State v. Hamilton*, 77 N.C. App. 506, 513, 335 S.E.2d 506,

511 (1985), *disc. review denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

Defendant argues that he offered evidence that he killed Mr. Croom and Mr. Gerald in self-defense and that no eyewitness testimony contradicted his account of the shooting. However, the record contains substantial circumstantial evidence from which a reasonable jury might find that Defendant did not act in self defense, including evidence tending to show that:

> Defendant purchased an assault rifle on 18 August 2006, a date which preceded the first occasion on which he claimed to have been fired upon.
>
> Defendant did not report the shooting incidents to law enforcement officers or consult his aunt, an officer with the Goldsboro Police Department, for the purpose of requesting help with the neighborhood difficulties.
>
> Shortly before the shootings, Defendant told Ms. Davis he was "at war."
>
> After Defendant ran from his house, he stopped in a location that might be construed as a hiding place and readied his weapon for firing.
>
> Defendant fired fifteen times, while the available physical evidence only established that the occupants of Mr. Croom's car fired three shots.
>
> Ballistics evidence indicated that the shots fired from inside Mr. Croom's car were fired after Defendant had shot out the car windows.
>
> Gunshot residue testing failed to establish that Mr. Croom fired a gun at the time of the shooting.
>
> Defendant shot at Mr. Croom's car without knowing the number, identity or age of the passengers.

> Defendant's account of the shooting was contradicted by the positioning of the bullet holes in the windshield of Mr. Croom's vehicle, which indicated that Defendant fired while the car was still turning.
>
> Defendant fled after the shooting without checking to see if anyone was hurt.
>
> In his statement to Officer Foster, Defendant did not claim that he acted in self defense and stated, instead, that "I guess the car was coming around because I took out their" original gangster, which is a term that referred to a gang member or rival.

"Although the State's evidence must ultimately be strong enough to prove beyond a reasonable doubt that the defendant did not act in self-defense . . . [,] the State is entitled to have [the] question[] put before a jury if its own evidence supports reasonable inferences of malice, premeditation and deliberation." *State v. Laws*, 345 N.C. 585, 595, 481 S.E.2d 641,646 (1997). The evidence clearly permitted the jury to infer that Defendant did not act in self-defense. Thus, the trial court did not err by submitting the issue of Defendant's guilt of first-degree murder to the jury.

D. Sufficiency of Evidence of Firing into Occupied Vehicle or Occupied Dwelling

Fourth, Defendant contends that the trial court erred by failing to dismiss the charges of discharging a weapon into an occupied vehicle or occupied dwelling. According to Defendant, since self-defense is a defense to the crime of discharging a weapon into an occupied vehicle or occupied dwelling and since the State failed to demonstrate that he did not act in self-defense, the trial court erred by failing to dismiss the charges in

question. However, given that we have already concluded, for the reasons set forth above, that the record contained evidence tending to show that Defendant did not act in self-defense, we conclude that the trial court did not err by denying Defendant's motion to dismiss the charges of discharging a weapon into an occupied vehicle or occupied dwelling.

E. Testimony Regarding the Autopsy of Mr. Gerald

Fifth, Defendant contends that the trial court committed plain error by admitting Dr. Gaffney-Kraft's testimony concerning the autopsy performed on Mr. Gerald into evidence. At the same time that Dr. Gaffney-Kraft performed an autopsy on Mr. Croom, Dr. Clark did a post-mortem examination upon Mr. Gerald on an adjoining table. Although Dr. Clark did not testify at trial, Dr. Gaffney-Kraft opined that, based on her review of Dr. Clark's autopsy report and other items, Mr. Gerald died from a gunshot wound to the head. On appeal, Defendant argues that admission of Dr. Gaffney-Kraft's testimony concerning the autopsy performed upon Mr. Gerald "violated [his] rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution." We conclude that any error that may have resulted from the admission of this testimony was harmless beyond a reasonable doubt.

"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, 124 S. Ct. 1354, 1374 (2004)).

In *Locklear*, the Supreme Court stated that:

> [I]n the recent case of *Melendez-Diaz v. Massachusetts*, __ U.S. __, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009)[,] . . . [t]he Court determined that forensic analyses qualify as "testimonial" statements, and forensic analysts are "witnesses" to which the Confrontation Clause applies. The Court specifically referenced autopsy examinations as one such kind of forensic analyses. . . . Thus, when the State seeks to introduce forensic analyses, "[a]bsent a showing that the analysts [are] unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them[,]" such evidence is inadmissible under *Crawford*.

Id. at 452, 681 S.E.2d at 304-05 (citations omitted). As a result, the Supreme Court held in *Locklear* that the admission of evidence concerning an autopsy performed by a non-testifying expert "violated defendant's constitutional right to confront the witnesses against him." *Id.* at 452, 681 S.E.2d at 305. Despite that conclusion, however, the Supreme Court concluded that the erroneous admission of this evidence was harmless beyond a reasonable doubt in light of the totality of the evidence in the record relating to the victim's death. *Id.* at 453, 681 S.E.2d at 305; *see also* N.C. Gen. Stat. § 15A-1443(b) (2009) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless . . . it was harmless beyond a reasonable doubt.").

Defendant concedes that, because he did not object to Dr. Gaffney-Kraft's testimony concerning the autopsy of Mr. Gerald, he failed to preserve his challenge to its admissibility for purposes

of appellate review. N.C.R. App. P. 10(a)(1) (stating that, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). "However, the North Carolina Rules of Appellate Procedure allow review for 'plain error' in criminal cases even where the error is not preserved.'" *State v. Mobley*, __ N.C. App. __, __, 684 S.E.2d 508, 510 (2009), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010).

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] . . . amounts to a denial of a fundamental right of the accused,' or . . . where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings[.]'"

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)).

After correctly noting that guilt of first-degree murder requires proof that the defendant's actions caused the victim's death, *State v. Head*, 79 N.C. App. 1, 9, 338 S.E.2d 908, 912 (stating that, "[i]n homicide cases, as in all criminal cases, the State must show that a crime was committed and that defendant committed it") (citing *Earnhardt*, 307 N.C. 62, 296 S.E.2d 649

(1982), *disc. review denied*, 316 N.C. 736, 345 S.E.2d 395 (1986), Defendant argues that, without Dr. Gaffney-Kraft's testimony concerning the cause of Mr. Gerald's death, the State's evidence was not sufficient to support Defendant's first-degree murder conviction. In this case, however, the cause of Mr. Gerald's death was essentially undisputed. Defendant testified that, for several days before the shooting, Mr. Croom and Mr. Gerald had been firing weapons at him and other persons. For that reason, Defendant began carrying an assault rifle whenever he left his house. Defendant admitted firing at the car occupied by Mr. Croom and Mr. Gerald with his SKS rifle from a spot at which investigators found shell casings. Forensic testing performed on shell casings and bullet fragments collected from Mr. Croom's body, the interior of the car in which Mr. Croom and Mr. Gerald died, and the vicinity of the car established that many of the bullets retrieved by law enforcement officers were fired from Defendant's rifle. One of the first law enforcement officers to reach the scene testified that Mr. Gerald had sustained a severe gunshot wound to the head and that Mr. Croom was unresponsive. Tests showed that none of the bullet wounds suffered by the decedents had been inflicted at close range. Investigators observed blood spatters and tissue fragments inside Mr. Croom's car. Two days after the shooting, Defendant turned himself in to law enforcement authorities and confessed to having shot Mr. Croom and Mr. Gerald. Our review of the evidence indicates that, contrary to Defendant's assertion, the autopsy results described by Dr. Gaffney-Kraft were not the only proof that

Mr. Gerald died as the result of a gunshot fired by Defendant, that the additional evidence tending to show that Defendant killed Mr. Gerald was overwhelming, and that the admission of Dr. Gaffney-Kraft's testimony concerning the cause of Mr. Gerald's death did not affect the outcome of the trial. As a result, Defendant has failed to show that the trial court committed plain error by allowing Dr. Gaffney-Kraft to testify concerning the cause of Mr. Gerald's death.[5]

F. Denial of Defendant's Motion for Mistrial

The closing arguments of counsel were briefly interrupted by an outburst from a spectator. After the jury returned its verdicts and had been dismissed, Defendant moved for a mistrial based on this episode. On appeal, Defendant argues that the trial court erred by denying his motion. We disagree.

In his closing argument, defendant's trial counsel mentioned that Defendant had seen men wearing red bandanas, causing Defendant to associate them with the "Bloods." At this point, a woman in the courtroom audience, who was later identified as Mr. Gerald's sister, made a brief, profane outburst during which she said that she did not want her deceased brother maligned. The trial court immediately had Mr. Gerald's sister removed from the courtroom and

[5] Defendant also argues that the trial court committed plain error by admitting documentary exhibits associated with the autopsy performed upon Mr. Gerald, including Dr. Clark's autopsy report, photographs, and a diagram. We conclude, for the reasons discussed in the text concerning the admissibility of Dr. Gaffney-Kraft's testimony concerning the autopsy performed upon Mr. Gerald, that any error which the trial court may have committed by admitting this evidence did not prejudice Defendant or constitute plain error.

sent the jury from the courtroom as well.[6] In addition, the trial court asked if either party desired to make a motion or had any suggestions for how to proceed.

In response, the prosecutor commented that "what triggered this was perhaps an inadvertent lapse by defense counsel in bringing before the jury things that have not been presented in evidence," a remark which led to a discussion of whether defendant's trial counsel had mischaracterized certain evidence in his closing argument. Neither party commented upon the potential impact of the outburst on the jury, asked that the jury be polled, or requested that any instructions be given to the jury. When the jury returned to the courtroom, the trial court instructed it not to consider any "incidents or acts which occurred during these closing arguments" and to "put that out of your mind."

After defendant's trial counsel completed his argument, the trial court ordered a brief recess. Outside the presence of the jury, the trial court asked if there were any matters Defendant wanted it to address. On at least four occasions following closing arguments, the trial court made similar inquiries of both parties: during the charge conference, prior to sending the jury home at the end of the day, before resuming jury deliberations the next morning, and after polling the jury concerning its verdicts. On each occasion, Defendant responded in the negative. Only after the

---

[6] The trial court later found Mr. Gerald's sister in direct contempt of court and sentenced her to ten days in jail.

jury had been dismissed did Defendant unsuccessfully request a mistrial.

On appeal, Defendant argues that the trial court erred by failing to poll the jury "as to the effect of the outburst or whether the jury could be fair in light of the outburst." In addition, Defendant asserts that he was "powerless to ameliorate [Mr. Gerald's] sister's outburst" "by showing that [Mr. Gerald's] sister was not present at the scene of the shooting" or at any of the other interactions between Defendant and either Mr. Croom, Mr. Gerald, or both. Defendant is not entitled to any relief based upon these arguments because he failed to request the trial court to declare a mistrial in a timely manner.

"According to N.C. [Gen. Stat.] § 15A-1061, '[t]he judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.'" *State v. Nobles*, 350 N.C. 483, 511, 515 S.E.2d 885, 902 (1999). However, a "motion for a mistrial [] made after verdict . . . c[omes] too late." *State v. McKenna*, 289 N.C. 668, 689, 224 S.E.2d 537, 551 (1976), *death penalty vacated*, 429 U.S. 912, 50 L. Ed. 2d 278, 97 S. Ct. 301 (1976); *see also State v. Smith*, 138 N.C. App. 605, 609, 532 S.E.2d 235, 238 (2000) (stating that "[t]he State properly interject[ed] that a trial court may exercise its mistrial authority in a criminal matter only 'during the trial'"), *disc. review improvidently granted*, 353 N.C. 355, 543 S.E.2d 477 (2001);

State v. O'Neal, 67 N.C. App. 65, 68, 312 S.E.2d 493, 495 (1984) (stating that "the court may exercise its power under [N.C. Gen. Stat. §] 15A-1061 only 'during the trial[,]'" so that the trial court lacked the authority to declare a mistrial after the return of the jury's verdict). Since Defendant did not make his mistrial motion until after the jury had returned its verdict, undergone the polling process, and been dismissed, the trial court would have had no authority to grant Defendant's motion even if it had been inclined to do so. Having been afforded numerous opportunities to request additional corrective action in the aftermath of the outburst by Mr. Gerald's sister, Defendant is simply not entitled to refrain from acting until after the jury returned its verdict and then seek the declaration of a mistrial. As a result, we conclude that, since the trial court lacked the authority to grant Defendant's untimely mistrial motion, it did not err by denying that motion.

III. Conclusion

Thus, for the reasons discussed above, we conclude that Defendant's challenges to the trial court's judgments lack merit and that he had a fair trial that was free from prejudicial error. As a result, the trial court's judgments remain undisturbed.

NO ERROR.

Judges McGEE and GEER concur.

Report per Rule 30(e).