NO. COA09-1706

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

STATE OF NORTH CAROLINA

v. Davie County
No. 08 CRS 50863

KEVIN LOUIS ROBERTSON, II,
Defendant.

Appeal by defendant from judgment entered 26 May 2009 by Judge Tanya T. Wallace in Davie County Superior Court. Heard in the Court of Appeals 27 May 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Mark A. Davis, for the State.

Megerian & Wells, by Franklin E. Wells, Jr., for defendant-appellant.

GEER, Judge.

Defendant Kevin Louis Robertson, II appeals his conviction for first degree murder, contending the trial court improperly admitted an autopsy report and accompanying expert testimony in violation of *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004). The report was prepared by an expert who did not testify at trial. Instead, a forensic pathologist who had not performed the autopsy testified based on the autopsy report, the autopsy photographs, and other documents. We need not decide whether the evidence violated *Crawford* because the remaining

evidence in the record establishes beyond a reasonable doubt that the jury would have reached the same verdict even in the absence of the challenged evidence.

Facts

At trial, the State's evidence tended to show the following. On 6 May 2008, Tabitha Fairly was riding her bicycle in Davie County with her fiancé, Tracy Eugene Fortune. They stopped to rest on the side of Milling Road, but, as they were resting, a big, blue car pulled up and stopped close to the edge of the road. The man driving the car, later identified by Fairly as defendant, said to Fortune, "This will make you sleep better." Defendant then shot Fortune multiple times. According to Fairly, Fortune had his back turned to defendant when he was shot. When Fortune fell to the ground, defendant drove away. As Fairly was tending to Fortune, defendant came back, rolled down his window, and told Fairly he would kill her if she told anyone what happened. Fortune later died from his injuries.

At approximately 6:45 that evening, Wayne Stoneman, the Assistant Police Chief for the Town of Mocksville, found Fortune lying on the side of Milling Road. Stoneman and other officers who arrived at the scene found three empty .22 caliber Remington shell casings at the intersection of Milling Road and Carolina Avenue adjacent to where the shooting had occurred.

Major Ken Hunter was notified that a suspect might be located at 1017 Milling Road. When he arrived at the residence, he saw a blue Lincoln Continental parked behind the residence in front of an

outbuilding. He observed defendant going in and out of the outbuilding. Hunter asked defendant if he was Kevin Robertson, and defendant said "no." When asked again, defendant responded that his name was "Kevin." After Hunter advised defendant of his *Miranda* rights, defendant told Hunter that the blue Lincoln was his car. He claimed that he had been mowing his grass all afternoon and had only left once to get gas.

Officers observed two .22 caliber shell casings inside the vehicle that appeared to be the same caliber, size, and color as the shell casings found earlier at the scene of the crime. The officers obtained a search warrant for defendant's car and residence. During the search, the officers found four additional .22 caliber shell casings in front of the outbuilding to the rear of where defendant's vehicle was parked. When Hunter informed defendant that shell casings had been found in his car, defendant accused the officers of planting them.

Hunter interviewed defendant at the Mocksville Police Department. After being read his *Miranda* rights, defendant said that he had been mowing grass all afternoon. He had only gone out to get gas and to go to a Burger King. Defendant denied going anywhere else. During the interview, when Hunter asked defendant why he shot Tracy Fortune, defendant smiled and looked down at the floor. When Hunter also asked defendant where he could retrieve the gun, defendant again smiled and looked at his hands.

Defendant was then taken to the Davie County Detention Center to go before a magistrate. After an arrest warrant was sworn out

against defendant and defendant was read the warrant, defendant asked Officer Stuart Shore what "aforethought" meant. Shore told him that it "meant that he planned to shoot." Defendant responded, "[T]his was not premeditated. It was over money." Hunter had defendant advised of his *Miranda* rights again. Defendant said he had a dispute with Fortune over $250.00 that Fortune owed him. Defendant told Hunter that after going to the store, the gas station, and the Burger King, he had passed Fortune on the side of the road. He turned around, got a rifle out of his trunk, and showed it to Fortune. Fortune tried to take the gun away, and in the struggle, the first shot fired. Defendant admitted that the rest of the shots "were all him." He stated that all of the shots had been fired from inside the car and that he had not meant to shoot that many times. Defendant told Hunter that he dropped the rifle into the woods on Elisha Creek Road. Following the oral statement, defendant gave a formal, written statement. The next day, officers went to the area defendant had described and, following defendant's instructions, found the gun.

Defendant was indicted for first degree murder. At trial, Special Agent Concita Simmons of the State Bureau of Investigation ("SBI") testified that she examined Fortune's body and performed a gunshot residue test on his hands. She found two spent Remington shell casings on the right side of the back seat of the blue Lincoln, which had been taken from defendant's house to the police station garage. She also took gunshot residue lifts from the interior of the car.

Special Agent Charles McClelland of the SBI testified as an expert in forensic chemistry. He testified that his review of the gunshot residue tests performed on defendant's hands revealed the presence of gunshot residue particles. The sample from the interior of the car was also positive for gunshot residue. As for the gunshot residue test performed on Fortune's body, he found a single particle that was characteristic of gunshot residue. He testified that if someone had grabbed the end of a gun barrel and the gun went off, he would expect to "find a lot of gunshot residue, what I would call significant."

Special Agent Stephanie Barnhouse of the SBI testified as an expert in firearms identification and testified that she found nine holes in the back of Fortune's shirt, seven of which were consistent with the passage of a bullet. She found four holes in the front, three of which were consistent with the passage of a bullet. She found no evidence of either a contact wound or a close range gunshot. She confirmed that all the shell casings found at the scene and inside defendant's car were fired from defendant's rifle.

Dr. Patrick Lantz testified as an expert in forensic pathology. He did not participate in the autopsy or prepare the autopsy report on Fortune. The autopsy was performed by Dr. Ellen Riemer who had since moved to South Carolina and, at the time of trial, was caring for her father. Dr. Lantz testified that he had reviewed the autopsy report, as well as the death certificate, the Davie County medical examiner's report, autopsy photos, and

radiographs of the body. He testified that based on all of this information, he believed Fortune was killed by multiple gunshot wounds to the back and right arm.

Defendant presented no evidence. The jury convicted defendant of first degree murder, and he was sentenced to life in prison without the possibility of parole. Defendant timely appealed to this Court.

Discussion

Defendant's sole contention on appeal is that the trial court violated the Confrontation Clause in admitting the autopsy report and Dr. Lantz's testimony about Dr. Riemer's opinions. "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*, 541 U.S. at 68, 158 L. Ed. 2d at 203, 124 S. Ct. at 1374).

In *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, ___, 174 L. Ed. 2d 314, 321-22, 129 S. Ct. 2527, 2532 (2009), the Supreme Court held that "certificates of analysis" — sworn affidavits by forensic analysts presented to show that the substance obtained from the defendant was in fact cocaine — qualified as testimonial statements to which the Confrontation Clause applies. The Court explained that "[t]he 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Id.* at ___, 174 L. Ed. 2d at 321, 129 S. Ct. at

2532 (quoting *Davis v. Washington*, 547 U.S. 813, 830, 165 L. Ed. 2d 224, 242, 126 S. Ct. 2266, 2278 (2006)).

In *Locklear*, 363 N.C. at 452, 681 S.E.2d at 305, "the State sought to introduce evidence of forensic analyses performed by a forensic pathologist and a forensic dentist who did not testify." Instead of calling the experts who performed the analyses, the State had another medical examiner testify, even though he had not performed the autopsy or compared the dental records to the skeletal remains. *Id.* at 451, 681 S.E.2d at 304. The Court pointed out that the State failed to show that either of the forensic analysts who performed the analyses were unavailable to testify or that defendant had been given a prior opportunity to cross-examine them. *Id.* at 452, 681 S.E.2d at 305. The Court concluded that the admission of the medical examiner's testimony about the analysts' opinions "violated defendant's constitutional right to confront the witnesses against him, and the trial court therefore erred in overruling defendant's objections." *Id.*

Defendant contends that Dr. Lantz' testimony was substantially similar to that found inadmissible in *Locklear*. We need not resolve this issue because the State has established that any error in admitting this evidence was harmless beyond a reasonable doubt. *See* 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 the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was

harmless."). In *Locklear*, 363 N.C. at 453, 681 S.E.2d at 305, the Supreme Court likewise concluded that the improper admission of the medical examiner's testimony was harmless beyond a reasonable doubt, explaining that the erroneously admitted evidence was not critical to the State's case and "would not have influenced the jury's verdict[,]" because "[t]he State presented copious evidence that defendant killed [the victim] . . . ." *Id.*

In this case, there is no dispute that defendant killed Fortune. The question at trial was essentially the degree of defendant's culpability. Defendant contended that the first shot occurred when Fortune grabbed his gun, suggesting no premeditation, while the State contended that defendant shot Fortune four times in the back. Defendant argues that Dr. Lantz' testimony was critical because he put before the jury Dr. Reimer's opinion that Fortune's death was the result of gunshot wounds to the back and arm and that there were no contact wounds or any indication that the gun was within a few inches of the body.

The record, however, contains substantial evidence apart from the testimony of Dr. Lantz that defendant acted with premeditation and that the events did not occur in the manner suggested by defendant. Defendant's own confession provided the motive — he admitted that he was upset that Fortune owed him $250.00. He told the police that he had a rifle in the trunk of his car, and when he saw Fortune on the side of the road, he got out of his car, retrieved the rifle from the trunk, got back in, and drove back to where Fortune was standing with Fairly. It is unchallenged that

because the rifle had a manual safety, the safety would have had to have been manually disengaged before defendant pointed the gun at Fortune. Defendant admitted, consistent with Fairly's testimony and the gunshot residue analysis, shooting multiple shots at Fortune from inside the car — he never exited the car. It is undisputed that Fortune was unarmed and did nothing to provoke defendant.

Although defendant claimed the first shot occurred when Fortune grabbed the muzzle of the gun, he admitted that the remaining shots were "all him." The firearms expert explained that defendant's rifle was not an automatic. Defendant was required to pull the trigger for each gunshot. It is undisputed that Fortune had at least four gunshot wounds. Officers, however, collected three casings at the scene and two from inside defendant's car that all matched the rifle used to shoot Fortune. Even under defendant's version, he purposefully pulled the trigger four times when shooting at Fortune.

In addition, the State presented Fairly's eyewitness testimony that defendant drove up to them; that Fortune had his back to defendant; that defendant said to Fortune, "This will make you sleep better"; and that defendant then shot Fortune multiple times in the back. Fairly further testified that after the shooting, defendant came back and threatened to kill her if she told anyone what had happened.

Defendant primarily argues that Fairly's credibility was questionable because Fairly was a special education student, was

mentally challenged, and did not recall everything that she had told the officers when interviewed after the shooting a year earlier. Fairly's testimony, however, was consistent with the physical evidence and, in many respects, was corroborated by defendant's own statement. There was no suggestion that her statements had ever wavered regarding the fact that defendant shot Fortune in the back.

With respect to the forensic evidence, Special Agent McClelland testified that he found only a single particle of gunshot residue on Fortune. On direct examination, he explained that if Fortune had been grabbing the muzzle of the rifle when it went off, he would have expected "to find a lot of gunshot residue, what I would call significant." On cross-examination, he reconfirmed that if a person was grabbing the muzzle end of the rifle when it went off — as defendant claimed Fortune did — "you would have a lot more gun residue on you." Special Agent Barnhouse, the firearms expert, testified further that, based on her examination of Fortune's shirt, she saw no evidence of either a contact wound or a close-range gunshot. Defendant offered no contrary evidence.

The State, in its closing argument, did not dwell on Dr. Lantz' testimony, but rather focused much more heavily on the above evidence. Defendant's counsel spent much of his closing argument attempting to undermine the credibility of that evidence, arguing at length that the officers had conducted an inadequate investigation, that they had belatedly and inadequately interviewed

Fairly, and that defendant's statements were not voluntary and were obtained in violation of the law requiring videotaped and recorded statements.

We hold, given these circumstances and counsel's arguments, that any error in admitting Dr. Lantz' testimony and the autopsy report was harmless beyond a reasonable doubt. There was no dispute that defendant's multiple gunshots killed Fortune. Other evidence — both eyewitness and forensic — indicated that Fortune was shot in the back, and there was no evidence of contact or close-range shots. We do not believe that there is any reasonable doubt that the jury would have convicted defendant of first degree murder even in the absence of Dr. Lantz' testimony and the autopsy report. *See State v. Galindo*, ___ N.C. App. ___, ___, 683 S.E.2d 785, 788-89 (2009) (holding admission of results of chemical analysis of substance seized from defendant was harmless where other evidence would allow reasonable jury to find defendant guilty of trafficking).

No error.

Judges JACKSON and BEASLEY concur.

Report per Rule 30(e).