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NO. COA10-112

NORTH CAROLINA COURT OF APPEALS

Filed: 18 January 2011

STATE OF NORTH CAROLINA

v.

Cumberland County  
No. 07 CRS 1504

MARCUS RUDOLPH KEYS

Appeal by defendant from judgment entered 24 July 2009 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 1 September 2010.

*Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.*

*Irving Joyner, for defendant-appellant.*

CALABRIA, Judge.

Marcus Rudolph Keys ("defendant") appeals a judgment entered upon a jury verdict finding him guilty of first degree murder and conspiracy to commit first degree murder. We find no error.

#### I. BACKGROUND

In October 1997, Andre Hines ("Hines") was serving in the United States Army ("the Army") in Cumberland County. During his service, he met defendant, Mark Herd ("Herd"), and Robert Haulcy ("Haulcy") who was also known as "Kaos." After defendant, Haulcy, and Herd were discharged from the Army, they became members of the "Gangster Disciples," a street gang associated with the "Crips" and

the "Folk Nation." Haulcy was defendant's "right-hand man" in the gang. In order to join the Gangster Disciples, one had to be "beat in." Hines claimed he was a member of a street gang called "Nine Tre Gangster Crip."

On 8 November 1997, Herd went to Haulcy's mother's residence ("the residence") to help her move because she was relocating. On the way to the residence, Herd and Haulcy picked up Johnny McMillan ("McMillan"), who worked with defendant at the "Mingles" night club. Defendant rode to the residence with Hines in Hines' 1995 green Ford Escort ("Hines' vehicle"). When Herd and McMillan arrived at the residence, defendant and Hines were already present.

After Haulcy's mother vacated the residence to stay at a hotel, Herd, McMillan, Haulcy, Hines, and defendant were the only people who remained inside the residence. Defendant then asked Hines if he was ready to "cross over," which meant to switch gangs. Hines said "I guess so." Defendant and Haulcy then proceeded to beat Hines with their fists. Herd, and later McMillan, joined the two men in beating Hines.

During the beating, defendant removed his shirt and Herd observed that defendant was armed with a black semiautomatic handgun ("the gun") located in the front waistband of his pants. Defendant told McMillan to watch and see what happened to people who talk too much. Hines fell to the ground and defendant kicked him four or five more times. Defendant stated he did not like liars. He then removed the gun from his waistband and broke Hines'

arm by wrapping Hines' arm around his foot until his arm popped. Hines then stopped moving.

Following the beating, defendant and Haulcy placed Hines in the back seat of his own vehicle. Defendant ordered Herd and McMillan to clean up the blood in the residence. Herd and McMillan purchased bleach at a convenience store within walking distance of the residence, then returned to the residence and cleaned the bloody carpet with bleach.

Defendant and Haulcy drove away from the residence. Haulcy drove Herd's vehicle and defendant drove Hines' vehicle, with Hines in the back seat. Some time later that day, defendant and Haulcy returned to the residence in Herd's vehicle. Hines was not with them and Herd never saw Hines again. Defendant ordered Herd and McMillan not to repeat anything regarding the events that had occurred.

After defendant and Haulcy returned to the residence, defendant told Herd that while defendant was driving Hines' car, Hines woke up and began "crying like a baby" so defendant placed him in the trunk. Defendant ordered Herd and McMillan to remove their shirts and put them in a trash bag. He further ordered Herd and Haulcy to change their clothes and meet him later at a club.

In the meantime, a woman named Terry Boykin ("Boykin") drove up to the residence. As she exited her vehicle and approached the residence, she later recalled that she detected an odor of bleach. Boykin also observed defendant holding a black handgun. When Boykin saw the gun, she became uncomfortable and returned to her

vehicle. Defendant asked the other men what he should do with his gun. He then took the gun and wrapped it in a towel. After defendant placed the gun in a trash bag and placed the trash bag behind the front passenger seat in Boykin's vehicle, he then left with Boykin. After defendant left, Haulcy told Herd that both he and defendant shot Hines twice.

During the drive, Boykin noticed that defendant looked nervous. When she asked him to explain what happened, he said, "If you ever have to kill anybody, don't look them in their eyes," and then told her to watch the news. When defendant and Boykin arrived at Boykin's house, defendant asked Boykin to show him a place in her back yard where he could burn trash. Boykin showed defendant a metal trash barrel. Defendant also asked Boykin for kerosene or lighter fluid. Boykin gave defendant gasoline. Defendant used the gasoline to burn the clothes from the trash bag. Boykin then drove defendant to an apartment complex. Defendant exited the vehicle with the trash bag and the gun that was still wrapped in a towel. A few days later, Boykin watched a news story about a soldier's body that had been discovered near Fort Bragg.

On 8 November 1997, Sergeant Ray Woods ("Sergeant Woods") of the Cumberland County Sheriff's Department ("CCSD"), responded to a call directing him to Elliott Bridge Road after a hunter called the CCSD indicating that he heard shots and voices at around 5:00 p.m. At approximately 6:10 p.m., Sergeant P.V. Goodwin ("Sergeant Goodwin") of the CCSD was sent to Elliott Farm Road to photograph a crime scene. When Sergeant Goodwin arrived, she observed Hines'

vehicle parked at the end of a dirt path, a man's body hanging from the vehicle door, and a lot of blood. While at the scene, Sergeant Goodwin photographed evidence including four fired bullet casings from a Winchester nine millimeter Luger handgun. In addition, she discovered a fingerprint on the rear drivers' side passenger door frame of the car.

The vehicle was taken to the CCSD where it was examined for fingerprints. Subsequently, the fingerprints recovered from the examination of the vehicle matched known samples of fingerprints taken from defendant and Herd. An analysis from the State Bureau of Investigation's ("SBI") crime laboratory revealed that the four fired casing and bullet fragments had been fired from the same firearm.

An autopsy, performed on the body discovered hanging from the vehicle door on Elliott Bridge Road, revealed that the body was Hines'. Hines had lacerations on his head, abrasions on one hand, and four gunshot wounds to the chin and head. Hines died as a result of a gunshot wound to the head.

Defendant was arrested and indicted on charges of first degree murder and conspiracy to commit first degree murder. Defendant's case was heard before the 13 July and 20 July 2009 sessions of Cumberland County Superior Court. On 24 July 2009, the jury returned a verdict finding defendant guilty of both charges. The trial court entered judgment, sentencing defendant to a term of life imprisonment without parole in the custody of the North Carolina Department of Correction. Defendant appeals.

II. HEARSAY

Defendant argues that the trial court committed reversible error in allowing the State to introduce prejudicial hearsay evidence regarding an out-of-court statement made by a non-testifying third party which implicated defendant in a person's death.

As an initial matter, defendant objected to the admission of the statement and the trial court overruled the objection. The court's response suggests the objection may have been simultaneous. Nevertheless, defendant's argument is without merit.

The law is well established regarding the admissibility of statements by co-conspirators. A statement by one conspirator made during the course and in furtherance of the conspiracy is admissible against his co-conspirators. N.C.G.S. § 8C-1, Rule 801(d)(E) (1988). However, for the acts or statements of a conspirator to be admissible as evidence against his co-conspirators, there must be a showing that "(1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended." *E.g., State v. Tilley*, 292 N.C. 132, 138, 232 S.E.2d 433, 438 (1977); *State v. Lee*, 277 N.C. 205, 213, 176 S.E.2d 765, 769-70 (1970). Moreover, the State's evidence must establish "a *prima facie* case of the conspiracy independently of the statements sought to be admitted." *State v. Nichols*, 321 N.C. 616, 630, 365 S.E.2d 561, 570 (1988); *Tilley*, 292 N.C. at 138, 232 S.E.2d at 438.

*State v. Mahaley*, 332 N.C. 583, 593-94, 423 S.E.2d 58, 64 (1992).

In the instant case, the State questioned Herd, one of the co-conspirators, as follows:

- Q [the State]: When you and Kaos, Mr. Haulcy, left, how did you all leave?
- A [Herd]: In my truck.
- Q: And who was driving?
- A: I was.
- Q: Where were you going?
- A: To the hotel where his mother was at to get him some clothes.
- Q: On the way to the hotel . . . what, if anything, did Mr. Haulcy, Kaos, say to you about what had happened?
- A: He said he shot [Hines] twice and [defendant] shot him twice.
- [Counsel for defendant]: Objection.
- The Court: Objection overruled. Go ahead.
- A: He said he shot him twice and [defendant] shot him twice.

According to the State's evidence, defendant, Herd, Haulcy and McMillan agreed to beat Hines. After the beating, defendant instructed Herd and McMillan to clean up the blood in the residence. Defendant and Haulcy drove away from the residence. Haulcy drove Herd's vehicle and defendant drove Hines' vehicle, with Hines in the back seat. Some time later that day, defendant and Haulcy returned to the residence in Herd's vehicle. Hines was not with them and Herd never saw Hines again. Therefore, the State established "a *prima facie* case of the conspiracy independently of the declarations sought to be admitted." *Nichols*, 321 N.C. at 630, 365 S.E.2d at 570.

While the conspiracy continued, defendant ordered Herd and McMillan not to repeat anything regarding the events that had occurred. After defendant left the scene to dispose of the bloody clothing and the gun, Haulcy told Herd that he shot Hines twice and defendant also shot him twice. Haulcy made this statement while he and Herd were traveling to a hotel to retrieve clothes for Haulcy

to replace the ones he disposed of in the trash bag, and before defendant disposed of the trash bag containing the bloody clothes and the gun.

Furthermore, when Haulcy and Herd arrived at the hotel, Haulcy changed clothes, and then he and Herd traveled to Herd's house. When they arrived at Herd's house, Herd changed clothes and put on a bullet-proof vest because "the way [defendant] said it when he said better not nobody else say nothing, I didn't know if I was going to be the next person or what might happen to me." Therefore, the evidence shows that defendant, Haulcy, and Herd were co-conspirators. Furthermore, the evidence shows that Haulcy's statement, that he shot Hines twice and defendant also shot him twice, was made after the conspiracy was formed and before it ended. The State's evidence shows that defendant, Herd, Haulcy and McMillan were engaged in behavior designed to cover up their crimes. Therefore, the statement by Haulcy was admissible under N.C. Gen. Stat. § 8C-1, Rule 801(d)(E) (2008), and the trial court properly overruled defendant's objection. Defendant's assignment of error is overruled.

### III. CROSS-EXAMINATION

Defendant argues that the trial court violated his rights under the Confrontation Clause of the United States Constitution when it prevented defendant's counsel from fully cross-examining the State's witness. More specifically, defendant argues that the jury should have been allowed to consider: (1) "Herd's statements regarding [a] polygraph" and (2) a statement taken by a witness



from Hines "which would have demonstrated that Hines did not say that he was scared of [defendant]." We disagree.

A. Standard of Review

"It is well-settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated. *State v. Thorne*, 173 N.C. App. 393, 396, 618 S.E.2d 790, 793 (2005).

B. Statement Regarding Polygraph

At trial, defendant's counsel told the trial court, out of the presence of the jury:

In Mr. Herd's first tape recorded statement to the police - excuse me, to the [CCSD] in February of 2007, while the detective is interviewing Mr. Herd, Mr. Herd interjects, Hey, I think I took a polygraph on this years ago. [The detective] says, No, you didn't. Then [Herd] says, Yes, I did. Then [the detective] says, No, you didn't take this.

Defendant's counsel argued to the trial court that he should be permitted to ask Herd about the polygraph exam because "it goes to honesty or dishonesty" and "[i]t's also Sixth Amendment confrontation and it's also state confrontation." The trial court refused to allow defendant to reference the polygraph exam.

Our Supreme Court has held that evidence in a criminal trial relating to a polygraph test is inadmissible. *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983). Therefore, the trial court properly denied defendant's request to ask Herd about his statements regarding a polygraph exam, and defendant's assignment of error is overruled.

B. Hines' Statement

At trial, Lane Clopper ("Agent Clopper"), a special agent with the Army Criminal Investigation Division, testified for the State. Agent Clopper testified that he interviewed Hines regarding an investigation into stolen checks. When the State asked Agent Clopper what Hines told him regarding the investigation, defendant objected. The trial court excused the jury and then conducted a *voir dire* examination of Agent Clopper.

On *voir dire*, Agent Clopper testified that Hines told him he was scared of defendant. On *voir dire* cross-examination, defendant showed Agent Clopper an exhibit marked as Defendant's *voir dire* #3, also marked Defendant's Exhibit #18 ("Exhibit 18"), which was an unsigned statement from Hines, taken by Agent Clopper. Defendant asked Agent Clopper if there was anything in Exhibit 18 stating that Hines said he was scared of defendant. Agent Clopper replied in the negative. The State then informed the trial court that it would not ask Agent Clopper about the statement that Hines feared defendant.

After the trial court brought the jury back to the courtroom, defendant cross-examined Agent Clopper and asked him to examine Exhibit 18. Defendant asked Agent Clopper if he had seen Exhibit 18, who wrote it, and its contents. However, defendant did not ask Agent Clopper about Hines' statement that he feared defendant. Subsequently, defendant moved to enter Exhibit 18 into evidence and have it published to the jury, contending that it showed Hines'

state of mind. The State objected on hearsay grounds, and the trial court denied defendant's motion to admit Exhibit 18.

In his brief, defendant argues that "the right to a full and robust cross examination of a witness is absolute and mandated by Article I, Sections 19 and 23" of our Constitution. Defendant further states that "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (quoting *Davis v. Alaska*, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 1110 (1974)).

However, an examination of the transcript reveals that defendant did not raise a constitutional issue at trial regarding Hines' statement to Agent Clopper. Therefore, defendant argues a constitutional issue for the first time on appeal regarding Hines' statement. However, constitutional issues not raised at trial will not be addressed on appeal. *State v. Mitchell*, 317 N.C. 661, 670, 346 S.E.2d 458, 463 (1986). Since defendant failed to raise the constitutional issue before the trial court, this issue has not been preserved for our review. Therefore, defendant's assignment of error is dismissed.

#### IV. CONCLUSION

Defendant received a fair trial free from error.

No error.

Judges McGEE and GEER concur.

Report per Rule 30(e).