NO. COA10-229

NORTH CAROLINA COURT OF APPEALS

Filed: 4 January 2011

STATE OF NORTH CAROLINA

v.

Gaston County
No. 07 CRS 13860
07 CRS 64643

SCOTT LAMAR PEARSON

Appeal by Defendant from judgment entered 21 September 2009 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 13 September 2010.

Attorney General Roy Cooper,, by Mary Carla Hollis, Assistant Attorney General, for the State.

Michael H. Casterline, for the Defendant.

ERVIN, Judge.

Defendant Scott Pearson appeals from a judgment sentencing him to life imprisonment without the possibility of parole in the custody of the North Carolina Department of Correction based upon his convictions for first degree murder and possession of a firearm by a convicted felon. On appeal, Defendant has advanced a number of challenges to his convictions, including claims that the record evidence did not support his first degree murder conviction, that the State relied on perjured testimony to secure his convictions, and that the trial court failed to adequately remedy alleged discovery violations by the State. After careful consideration of

Defendant's arguments in light of the record and the applicable law, we conclude that Defendant received a fair trial that was free from prejudicial error and that the trial court's judgment should remain undisturbed.

I. Factual Background

A. Substantive Facts

In 2003, Defendant was employed at Pearson Motor Sports, a company owned by his father, Mickey Pearson, that sold NASCAR memorabilia at automobile races. Pearson Motor Sports employees were divided into two teams in order to enable the company to cover multiple races at the same time, one of which was headed by Mickey Pearson and the other of which was headed by Defendant. In September 2003, Defendant's team consisted of Defendant, Robert Myers, and Dennis Hambleton.

On 18 September 2003, the team of which Defendant was a member returned to Belmont, North Carolina, where Defendant lived with his parents. At times when the team was in Belmont, Mr. Hambleton stayed in Defendant's house and Mr. Myers stayed in a travel trailer owned by Pearson Motor Sports that was parked on a nearby lot. On Saturday, 19 September 2003, Defendant; his girlfriend, Sherry Lassiter; and Mr. Hambleton spent the night at Defendant's house. On the following morning, Mr. Myers was not in the travel trailer. The last person known to have seen Mr. Myers alive was Mr. Hambleton, who had driven him to the travel trailer on the preceding evening.

On 9 October 2003, Mr. Myers' mother alerted the police that she had not heard from her son for several days. As a result of Mr. Myers' disappearance, Belmont Police Department Investigator Larry Schronce initiated a missing person investigation, during which he interviewed employees of Pearson Motor Sports and others who might have had contact with Mr. Myers. On 1 May 2004, Defendant's brother, Earnest Pearson, gave a statement to law enforcement officers in which he told them that Defendant had admitted to having killed Mr. Myers. Investigating officers searched the location mentioned during Defendant's conversation with Earnest Pearson in the hopes of locating Mr. Myers' body, without success.

On 23 May 2005, William Allison, a Gastonia resident, discovered human skeletal remains in the woods behind his house. By matching skull and jaw bones with dental x-rays, Dr. Deborah Radisch, Associate Chief Medical Examiner for North Carolina, was able to identify the skeleton as that of Mr. Myers. According to Dr. Radisch, Mr. Myers died as the result of a pair of gunshots, one to the back of the head and the other to the chest. After the discovery of Mr. Myers' remains, the investigation changed from a search for a missing person to the investigation of a homicide.

Investigating officers found a bullet and two shell casings near the remains of Mr. Myers' body. Sergeant Kevin McSwain of the Gastonia Police Department interviewed various people associated with Pearson Motor Sports and eventually received information concerning "a particular handgun that was reported . . . as being

sold to the defendant." By using the gun's serial number, investigating officers traced the ownership of the gun from the South Carolina police officer who originally purchased it through several other individuals to Defendant.

Anthony Walker, an officer with the Blacksburg, South Carolina, Police Department, and a former owner of the handgun in question, provided investigating officers with a cup of shell casings that he had picked up at the firing range where he used to practice with the gun. According to forensic testing, some of the shell casings that Officer Walker recovered from the firing range were fired from the same gun that fired the shell casings found at the crime scene.

B. Procedural History

On 20 August 2007, the Gaston County grand jury returned an indictment charging Defendant with murdering Mr. Myers. On 13 September 2007, a warrant for arrest charging Defendant with felonious possession of a firearm by a convicted felon was issued. On 13 November 2007, the Gaston County grand jury returned a bill of indictment charging Defendant with possession of a firearm by a convicted felon.

The cases against Defendant came on for trial before Judge Richard D. Boner at the 16 February 2009 criminal session of the Gaston County Superior Court. After the jury had been impaneled, two jurors determined that they could not render an impartial verdict because they recognized members of the audience, a

development that caused Judge Boner to declare a mistrial on 17 February 2009.

The charges against Defendant came on for trial before the trial court and a jury at the 14 September 2009 criminal session of the Gaston County Superior Court. On 21 September 2009, the jury returned verdicts convicting Defendant of first degree murder and possession of a firearm by a convicted felon. At the sentencing hearing, the trial court found that Defendant had six prior record points and should be sentenced as a Level III offender. As a result, the trial court consolidated Defendant's convictions for judgment and sentenced Defendant to life imprisonment without parole in the custody of the North Carolina Department of Correction based upon his conviction for first degree murder. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

A. Sufficiency of the Evidence

On appeal, Defendant first contends that the trial court erred by denying his motion to dismiss the first degree murder charge on the grounds that "the State presented little evidence about the actual circumstances of [Mr. Myers'] death, and no evidence that demonstrated intent, premeditation or deliberation on the part of" Defendant and that "the forensic evidence gathered after [Mr.] Meyers' body was found does not establish premeditation or deliberation." We do not find Defendant's arguments to be persuasive.

"When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. If substantial evidence exists to support each essential element of the crime charged and that defendant was the perpetrator, it is proper for the trial court to deny the motion." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004) (citing *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693, *cert. denied*, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986), and *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983)), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79, 126 S. Ct. 47 (2005). "Contradictions and discrepancies do not warrant dismissal of a case. They are for the jury to resolve. The trial judge must consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State." *State v. Spangler*, 314 N.C. 374, 383, 333 S.E.2d 722, 728 (1985) (citing *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982)).

"In order to convict a defendant of premeditated, first-degree murder, the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation. *See* [N.C. Gen. Stat. §] § 14-17 [(2009)]. While motive is often an important part of the State's evidence, '[m]otive is not an element of first-degree murder, nor is its absence a defense.'" *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007) (citing *State v. Hamby*, 276 N.C. 674, 678, 174 S.E.2d 385, 387 (1970), *judgment vacated in*

part on other grounds, 408 U.S. 937, 33 L. Ed. 2d 754, 92 S. Ct. 2862 (1972), and quoting *State v. Elliott*, 344 N.C. 242, 273, 475 S.E.2d 202, 216 (1996)), *cert. denied*, 552 U.S. 1271, 170 L. Ed.2d 377, 128 S. Ct. 1682 (2008).

Defendant does not dispute the sufficiency of the evidence to establish that Mr. Myers was the victim of a homicide or his identity as the perpetrator of that homicide. Instead, Defendant challenges the sufficiency of the evidence to establish that he acted with premeditation and deliberation. Although "[p]remeditation and deliberation, [which are] both processes of the mind, must generally be proven by circumstantial evidence," *State v. Smith*, 357 N.C. 604, 616, 588 S.E.2d 453, 461 (2003) (citing *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991)), *cert. denied*, 542 U.S. 941, 159 L. Ed. 2d 819, 124 S. Ct. 2915 (2004), the State did not need to rely exclusively on circumstantial evidence in order to show premeditation and deliberation in the present case, since the State introduced evidence that the Defendant admitted to having committed a premeditated murder.

At trial, Earnest Pearson testified that, several months after Mr. Myers' disappearance, Defendant called him up and said that "he had to talk about something." After he picked Earnest Pearson up, Defendant told his brother that he killed Mr. Myers because Mr. Myers "stole $2,500 from [his] dad's business." According to Earnest Pearson's testimony on direct examination:

> Q.: . . . What, if anything, did [Defendant] tell you . . . [about] how he killed Bobby Myers?
>
> A.: He said he did it in a bad section of town where a lot of drug activity was going on to make it look like a drug deal gone bad. And he made him take off all his clothes, and he shot him twice in the chest.

As a result, in the course of his comments to his brother, Defendant (1) admitted shooting Mr. Myers, (2) supplied a motive for the killing (Mr. Myers' alleged theft from Pearson Motor Sports), and (3) described his plan to divert suspicion away from himself by shooting Mr. Myers in a bad neighborhood and trying to make Mr. Myers' death appear to be the result of a failed drug deal. "Thus, there was evidence that defendant, by his own admission, planned in advance to kill [the victim] in order to gratify a desire for revenge, and carried out that fixed design." *State v. Biggs*, 292 N.C. 328, 338, 233 S.E.2d 512, 517 (1977). "The testimony of [Earnest Pearson], as to the confession made to him by the defendant, was sufficient in itself to warrant the jury in finding the fact of premeditation and deliberation, if they believed it, and if, after weighing the testimony, they inferred and found the fact therefrom." *State v. Lipscomb*, 134 N.C. 689, 694, 47 S.E. 44, 45 (1904). As a result, we conclude that Defendant's statement to Earnest Pearson provides sufficient proof of premeditation and deliberation to support Defendant's conviction for first degree murder.

Aside from Defendant's confession to Earnest Pearson, the record contains additional evidence tending to show that Defendant

killed Mr. Myers after premeditation and with deliberation. For example, several witnesses testified that, shortly before Mr. Myers disappeared, Defendant purchased a .40 caliber handgun. According to the forensic evidence introduced at Defendant's trial, a bullet found near Mr. Myers' body had been fired from this weapon. Similarly, the testimony of Dr. Radisch indicated that Mr. Myers had been shot in the back of the head. Although Defendant argues that the nature and extent of the wounds inflicted upon Mr. Myers do not show brutality or the use of grossly excessive force, the fact that one of Mr. Myers' wounds was to the back of his head permits an inference that the killer wanted to ensure that Mr. Myers did not survive. Thirdly, when Defendant and Ms. Lassiter went out for breakfast on Sunday, 20 September 2003, Defendant suggested that they wash her car, which Ms. Lassiter found "odd" in light of the fact that Defendant had "never cleaned it in three years." Ashley Savage, a former girlfriend of Mr. Myers', testified that, after the two of them broke up, Mr. Myers made repeated phone calls to her, causing her to ask Defendant to take Mr. Myers' cell phone away. After the weekend of 20 September 2003, Ms. Savage told Defendant that the phone calls had stopped; in response, Defendant told Ms. Savage that he had "taken care of it." These components of the record also suggest that Defendant acted with premeditation and deliberation. As a result, we conclude that the trial court did not err by denying Defendant's dismissal motion.

B. Alleged Use of "Perjured" Testimony

Secondly, Defendant contends that his convictions should be vacated on the grounds that "the State's witnesses contradicted each other on a material fact," an allegation which suggests to Defendant that the State "relied on perjured testimony" to secure his conviction. In advancing this argument, Defendant focuses on differences between the testimony of Kelly Moore and the testimony of Mark Cook concerning the transactions which led to Defendant's purchase of a .40 caliber Glock handgun. A careful review of the record demonstrates that Defendant is not entitled to relief on the basis of this argument.

According to the evidence presented by the State at trial, Officer Zeb Starnes of the Blacksburg, South Carolina, Police Department purchased a new .40 caliber Glock Model 27 handgun bearing Serial No. BXL964 in 1996. In 1997, Officer Starnes sold the Glock to Officer Anthony Walker, who kept it for about two years. Officer Walker, in turn, gave the Glock to Officer Cheryl Davidson Kumar of the Blacksburg Police Department while they were married. After their divorce, Officer Kumar sold the gun to Whitford's Pawn Shop in Gaffney, South Carolina. On 13 August 1999, Hilda Davis, the pawn shop's operator, purchased the Glock. On 4 February 2000, Ms. Davis sold the gun to Sergeant Michael Trabue of the Clover, South Carolina, Police Department. Subsequently, Sergeant Trabue sold the Glock to Mr. Moore, who ran a car lot in Gastonia. Although the evidence concerning ownership of the Glock was uncontested to this point, there were differences

in the testimony of the witnesses who described how the ownership of the Glock made its way from Mr. Moore to Defendant.

According to Ms. Lassiter, Defendant asked her to go to the residence occupied by Chris McGugan, another Pearson Motor Sports employee who worked on the team headed by Mickey Pearson, and his fiancé, Robin Lytton, on 18 September 2003 for the purpose of picking up a gun. At the time of her arrival, Mr. McGugan was not home. However, Ms. Lytton gave Ms. Lassiter the gun wrapped in a cloth. At the time that Ms. Lassiter delivered the gun to Defendant, he showed it to Mr. Myers and said, "Look, man, [at] my gun I got." Defendant told Ms. Lassiter, among other things, that the gun had belonged to a sheriff in South Carolina.

Similarly, Ms. Lytton testified that she lived with Mr. McGugan and his father, Richard Green, in September 2003. On the weekend of 19 September 2003, Mr. McGugan was working for Pearson Motor Sports at a race in California. According to Ms. Lytton, Mr. McGugan called from California and told her to retrieve a gun wrapped in cloth from beneath a dresser and to give it to either Defendant or his girlfriend. When Defendant's girlfriend came by shortly thereafter, Ms. Lytton gave her the gun wrapped in a tee shirt.

Mr. Green testified that he lived with Mr. McGugan and Ms. Lytton in September 2003. On a weekend when Mr. McGugan was out of town, Mr. Green's nephew, Mr. Cook, came to the house and gave Ms. Lytton a gun wrapped in a cloth.

Mr. McGugan testified that he was working at a race in California on the weekend of 19 September 2003. Although Mr. Cook had brought the .40 caliber Glock to his house and offered to sell it to him, Mr. McGugan did not want it. However, Mr. McGugan promised to tell other people that the Glock was available. While Mr. McGugan was in California, Mr. Cook brought the gun back to Mr. McGugan's house. At that point, Mr. McGugan told Ms. Lytton to give the gun to Ms. Lassiter, who was picking it up for Defendant. As a result, all of these witnesses testified that Mr. Cook brought the .40 caliber Glock to Mr. McGugan's house. In addition, except for Mr. Green, who did not know what happened to the gun after its arrival at Mr. McGugan's house, all of them testified that Defendant purchased the gun and that Ms. Lassiter picked it up at Mr. McGugan's house.

Defendant's appellate argument hinges upon certain discrepancies between the testimony of Mr. Cook and Mr. Moore. On the one hand, Mr. Cook testified that he worked for Mr. Moore at Mr. Moore's automobile sales lot in September 2003 and that Mr. Moore had a .40 caliber Glock handgun. Defendant and Ms. Lassiter came to the car lot and looked at the gun, after which Defendant told Mr. Moore that he wanted to buy it. Subsequently, Mr. Cook's cousin, Mr. McGugan, retrieved the gun from the car lot. Mr. Cook denied having purchased the Glock or taking it to Mr. McGugan's house. On the other hand, Mr. Moore testified that he previously owned a .40 caliber Glock. In September 2003, he sold the gun to Mr. Cook, who worked for him. Although Mr. Moore also testified

that he might have repurchased the gun from Mr. Cook, he was not certain that he had done so. More specifically, when asked on direct examination whether he had repurchased the gun, Mr. Moore testified that:

> Q.: . . . Have you ever repurchased that pistol?
>
> A.: That's a good question. I've been trying to figure it out. I believe I did.
>
> Q.: If you did, from whom did you repurchase it and when.
>
> A.: From Mark.
>
> Q.: When?
>
> A.: Probably not long after he bought it.
>
> Q.: Are you certain of that?
>
> A.: Pretty certain. It's been six years now, so I'm trying to –

Upon being asked whether he remembered selling the gun to someone other than Mr. Cook, Mr. Moore stated that he remembered "selling that gun to a gentleman" whose name he could "probably" find. On cross-examination, Mr. Moore acknowledged that he had never told investigating officers that he had repurchased the gun. Although Mr. Moore told investigating officers that he "had a memory of another person that [he] may have sold the gun to or a possibility of, and that was the extent of it," at the time of trial, Mr. Moore was "pretty sure" that he had sold the gun to someone after buying it back from Mr. Cook. Despite the fact that he denied having sold the gun to Defendant, Mr. Moore testified on cross-examination that:

> Q.: When did you remember that you had bought the gun back from Mr. Cook?
>
> A.: Probably sitting in [the police officers'] office it started to come back to me. Just maybe it[']s been a long time. Maybe the stress is keeping me from my memory of it. I don't know if that's what happened.

As a result, while Mr. Cook agreed with the other witnesses that Defendant bought the .40 caliber Glock, he denied having played the role of courier for the gun. On the other hand, Mr. Moore recalled selling the gun to Mr. Cook and remembered that he might have repurchased it from Mr. Cook or sold it to someone else, but was uncertain as to exactly what he had done. On appeal, Defendant asserts that "[o]ne of these witnesses was necessarily being untruthful with the jury" and that, under "the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§18, 19, 23, 24, and 27 of the North Carolina Constitution, [Defendant's] convictions must be reversed due to the elicitation of this false testimony." We are not able to accept Defendant's argument as valid.

"[A] conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959) (citations omitted). A conviction obtained through the use of perjured evidence must be set aside "'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *State v. Call*, 349

N.C. 382, 405, 508 S.E.2d 496, 511 (1998) (quoting *State v. Sanders*, 327 N.C. 319, 336, 395 S.E.2d 412, 424 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782, 111 S. Ct. 763 (1991) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 49 L. Ed. 2d 342, 349-50, 96 S. Ct. 2392 (1976)). "When a defendant shows that 'testimony was in fact false, material, and knowingly and intentionally used by the State to obtain his conviction,' he is entitled to a new trial." *Sanders*, 327 N.C. at 336, 395 S.E.2d at 423 (1990) (quoting *State v. Robbins*, 319 N.C. 465, 514, 356 S.E.2d 279, 308, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226, 108 S. Ct. 269 (1987)).

As a preliminary matter, we are unable to accept the validity of the factual premise underlying Defendant's argument, which is that the discrepancies between the testimony of Mr. Cook and Mr. Moore establish that one of them intentionally lied to the jury. The fact that Defendant was tried six years after Mr. Myers' disappearance raises the distinct possibility that the witnesses' memories may have simply faded; indeed, Mr. Moore essentially said as much on the witness stand. The mere existence of inconsistencies in the testimony of various State's witnesses, standing alone, does not establish that the prosecution presented perjured testimony. Thus, Defendant has not demonstrated that the State utilized false testimony in the course of its efforts to obtain a conviction.

Secondly, even if the testimony provided by either Mr. Moore or Mr. Cook can accurately be described as perjured, "[Defendant

has] failed to show that the State *knew* that either [witness'] testimony was false. Instead, the State offered both witnesses's testimony, and it was then for the jury to consider and resolve the inconsistencies." *State v. Galloway*, 145 N.C. App. 555, 560, 551 S.E.2d 525, 530 (2001) (citing *State v. Clark*, 138 N.C. App. 392, 397, 531 S.E.2d 482, 486 (2000), *cert. denied*, 353 N.C. 730, 551 S.E.2d 108 (2001) (emphasis in original)), *app. dismissed*, 356 N.C. 307, 570 S.E.2d 885 (2002). In the absence of a showing of the intentional presentation of false evidence by the State, Defendant has not established the existence of any right to appellate relief from his convictions.

Finally, the only issue implicated by the discrepancy between the testimony of Mr. Cook and Mr. Moore is the identity of the individual who actually delivered the .40 caliber Glock from Mr. Moore to Defendant. Mr. Cook, Ms. Lassiter, Ms. Lytton, and Mr. McGugan all testified that Defendant purchased the gun from Mr. Moore, although Mr. Cook recalled that Mr. McGugan picked the gun up from Mr. Moore's car lot while the others testified that Mr. Cook delivered the weapon from Mr. Moore's place of business to Mr. McGugan's house. Mr. Moore's testimony to the effect that, despite having sold the gun to Mr. Cook, he might have bought it back and might have sold it to someone else does not necessarily contradict the State's contention that he provided the gun to Defendant, since it is possible that he bought the gun back from Mr. Cook and sold it to Defendant. As a result, given the absence of any fundamental discrepancy between the testimony of Mr. Cook and the testimony of

Mr. Moore on the ultimate issue of whether the murder weapon ultimately wound up in Defendant's hands, we do not believe that the allegedly perjured testimony at issue here is sufficiently material under the standard outlined in *Call*, *Sanders*, and *Agurs* to support an award of relief.

Thus, for the reasons discussed above, we conclude that Defendant has failed to show that either Mr. Cook or Mr. Moore was intentionally lying, that the State knowingly used perjured testimony at Defendant's trial, or that the discrepancies in the testimony provided by Mr. Cook and Mr. Moore related to a material issue. As a result, Defendant is not entitled to relief on the basis of this claim.

C. Alleged Discovery Violation

After Officer Walker gave investigating officers a cup of shell casings that he had collected at a shooting range at which he had fired the alleged murder weapon, a State Bureau of Investigation ballistics expert tested a number of them in order to determine whether any of them matched the shell casings found near Mr. Myers' body. Although he did not mention having done so in his report, the firearms examiner eliminated certain shells that could not have matched the one found at the scene where Mr. Myers' remains were discovered before conducting a more detailed ballistics examination of the remaining casings. In light of this omission from the examiner's report and the fact that the discovery Defendant received prior to trial did not mention the extent to which Officer Walker collected "random" shells in assembling the

collection that he provided to investigating officers, Defendant argues that the trial court erred by "not suppressing evidence after the State failed to comply with discovery procedures and obscured exculpatory evidence.[1]" Once again, we conclude that Defendant's argument lacks merit.

As we have already noted, investigating officers found a .40 caliber projectile and two shell casings near Mr. Myers' remains. Subsequently, the investigating officers learned that Defendant had purchased a .40 caliber Glock handgun that had been previously owned by several individuals, including Officer Walker. Officer Walker testified that he had practiced with the gun at a semi-public firing range and that, after firing the weapon, he developed the practice of picking up the empty shell casings given that he reloaded his own ammunition. As a result of the fact that a number of people utilized this firing range in addition to himself, Officer Walker inevitably picked up shell casings on some occasions that had not been fired from his gun. Officer Walker gave Officer Starnes a cup full of these empty shell casings, which Officer Starnes turned over to investigating officers. Special Agent John Kaiser of the State Bureau of Investigation brought these shell casings to the State Bureau of Investigation lab for forensic testing, where Special Agent Neal Morin, who testified as a ballistics expert, examined them for the purpose of determining if

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[1] As we understand Defendant's argument, he predicates this claim on alleged violations of the discovery statutes rather than upon alleged violations of his state or federal constitutional rights. As a result, we will treat Defendant's argument as a state statutory, rather than a state or federal constitutional, claim.

any of the casings matched those found at the location where Mr. Myers' body was recovered. On direct examination, Special Agent Kaiser testified that:

> Q.: And did you turn [the cup of shell casings] over to the SBI lab for examination?
>
> A.: Yes, I did.
>
> Q.: And, if you know, what if anything, occurred . . . with that particular exhibit?
>
> A.: At the lab I met with Special Agent [] Morin. He did a preliminary examination to eliminate shell casings that he could tell right away were not of value to us. So he gave those to me and I brought them back to Detective McSwain. The portion that he retained for examination were later mailed back . . . and I returned those to Detective McSwain.

Similarly, Special Agent Morin testified on direct examination that:

> Q.: . . . Describe for the jury what type of examination you made of the [cup of shell casings] and what was your conclusion?
>
> A.: The request was to compare - initially all the cartridge cases in State's Exhibit 53 and 54 were all . . . brought to me in the laboratory. The request was to find out if any of those cartridge cases matched an item, a cartridge case that was found at the crime scene.
>
> I was able to sort out through the total number of cartridge cases that were brought in to these 46, and of those 46, 45 of those fired cartridge cases match or were fired from the same firearm as the cartridge case at the crime scene.

On cross-examination, Special Agent Morin described the preliminary screening that he performed on the cup of shell casings as follows:

> Q.: Agent Morin, when you received . . . State's Exhibit 53, how many shell casings were there in all?
>
> A.: There were over 200. . . .
>
> Q.: I don't believe your report references the preliminary examination, does it?
>
> A.: No, it does not. The preliminary examination was done, and then the items that were actually submitted for the official examination . . . were done after I had sorted through the 200-plus items.
>
> Q.: So there's approximately 160 .40 caliber shell casings that were collected and submitted to you that aren't from this weapon apparently.
>
> A.: That's correct. . . .

Finally, on redirect examination, Special Agent Morin reiterated that the purpose of the preliminary screening was to identify the shell casings that could not conceivably match those found at the location where Mr. Myers' remains were discovered and remove them from the group to be tested in more detail:

> Q.: So the shells in State's Exhibit 53 you eliminated because they did not match the known sample that was sent to you, is that correct?
>
> A.: That's correct.
>
> Q.: But the known sample did match 45 of the 46 in State's Exhibit 54, is that correct?
>
> A.: They matched 45 of the 46.

At trial, after learning that Officer Walker collected more shells than had been tested and that the preliminary screening conducted by Special Agent Morin had occurred, Defendant argued that the failure to include this information in the discovery that

he received prior to trial violated the applicable discovery statutes and moved that either the shell casings be suppressed or that a mistrial be declared. In response to the trial court's inquiry concerning the additional steps, if any, that he would have taken had he possessed this newly-acquired information at an earlier time, Defendant stated that he would have questioned Officer Walker more extensively concerning the manner in which the shell casings had been collected. Although the trial court did not suppress the evidence relating to the shell casings or declare a mistrial as Defendant requested, it did allow Defendant to conduct further cross-examination of Officer Walker. In addition, the State recalled Special Agents Kaiser and Morin, so that Defendant had an opportunity to cross-examine them further as well.

As a general proposition, "'[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. Patterson*, 335 N.C. 437, 455, 439 S.E.2d 578, 589 (1994) (quoting *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, 111 S. Ct. 977 (1991). The extent to which "a party has complied with discovery, . . . and what sanctions, if any, to impose are questions addressed to the sound discretion of the trial court." *State v. Heatwole*, 344 N.C. 1, 15, 473 S.E.2d 310, 317 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339, 117 S. Ct. 1259 (1997). "Prior to finding any sanctions appropriate, the court shall consider both the materiality of the subject matter and the totality of the

circumstances surrounding the alleged" discovery violation. N.C. Gen. Stat. § 910(b) (2009). "The trial court may be reversed for an abuse of discretion in [addressing alleged discovery violations] only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Carson*, 320 N.C. 328, 336, 357 S.E.2d 662, 667 (1987) (citation omitted).

In challenging the trial court's ruling on appeal, Defendant argues that "this omission [of information concerning the preliminary screening conducted by Special Agent Morin from] the discovery had concealed a critical flaw in the ballistic testing process," which was "that the collection of [more than] 200 shell casings - from which the 46 closely-examined shell casings were drawn - had been fired from several different weapons at a firing range used by many people." According to Defendant, "[h]ad the State revealed that the initial sample of 200+ casings had come from several weapons, the defense could have more thoroughly challenged the State's theory" that Defendant "could be linked to the gun used to kill [Mr.] Myers" on the grounds that, "[s]ince the . . . cup did not contain a controlled sample of casings, fired by a single, particular gun, but instead held casings from a number of guns used at the firing range," "the results of the testing [were] suspect." As a result, Defendant contends that the trial court erred by failing to impose more significant sanctions as a result of the State's alleged violation of its discovery obligations. We do not find this logic persuasive.

At trial, the State presented evidence that Defendant purchased a .40 caliber Glock handgun shortly before Mr. Myers disappeared; that Officer Walker, who had previously owned this gun, gave investigators a cup of shells he picked up at a firing range where he practiced with the Glock; that a .40 caliber shell casing was found near Mr. Myers' body; and that, of approximately 200 shell casings that Officer Walker collected at the firing range, 45 were determined to have been fired from the same weapon from which the casing found near Mr. Myers' body had been fired. The fact that a previous owner of the weapon had saved shells that he had collected after firing the alleged murder weapon, some of which matched one found near Mr. Myers' remains, is, of course, strong evidence that the firearm in question was used to kill Mr. Myers. After complaining that the State had violated the relevant discovery statutes by failing to disclose information concerning the manner in which Officer Walker collected the cup of shells and the fact that Special Agent Morin conducted a preliminary screening of the larger sample before performing more detailed testing, Defendant's trial counsel indicated that, had he been provided with this information in a timely manner, he could have more thoroughly explored the circumstances surrounding the initial collection and preliminary screening of these shell casings.

The trial court provided Defendant with exactly the opportunity that he requested by allowing his trial counsel to engage in additional cross-examination of Officer Walker and Special Agents Kaiser and Morin concerning the manner in which the

shell casings were collected and the nature of the preliminary screening that Special Agent Morin performed. In addition, we are simply unable to see how the fact that Officer Walker picked up shell casings at the firing range that were not fired from the Glock or that, prior to conducting forensic testing on the shell casings, Special Agent Morin discarded those casings that clearly did not match one found near Mr. Myers' remains substantially undercuts the probative force of the test results described by Special Agent Morin. Thus, in light of the trial court's decision to allow additional cross-examination of Office Walker and Special Agents Kaiser and Morin and the relatively low probative value that the allegedly undisclosed evidence possessed, we cannot conclude that the trial court abused its discretion in the way that it handled this discovery issue. As a result, Defendant is not entitled to appellate relief on the basis of the "discovery violation"[2] that he claims to have occurred in this case.

III. Conclusion

Thus, for the reasons discussed above, we conclude that none of Defendant's challenges to the trial court's judgment have merit. As a result, since Defendant had a fair trial that was free from reversible error, the trial court's judgments should remain undisturbed.

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[2] Having reached the conclusion that the omission of information concerning this preliminary screening did not prejudice Defendant in any way, we need not address the issue of the extent, if any, to which the omission of this information from the State Bureau of Investigation's ballistics report violated the State's obligations under the relevant discovery statutes.

NO ERROR.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).