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NO. COA10-33

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

STATE OF NORTH CAROLINA

v.

Iredell County  
No. 08 CRS 050388

WILLIAM ANTHONY MCCLELLAND

Appeal by Defendant from judgment and commitment dated 6 March 2009 by Judge Kevin M. Bridges in Iredell County Superior Court. Heard in the Court of Appeals 18 August 2010.

*Attorney General Roy Cooper, by Special Deputy Attorney General Robert M. Curran, for the State.*

*Glover & Petersen, P.A., by Ann B. Petersen and James R. Glover, for Defendant.*

STEPHENS, Judge.

#### *Facts*

On 4 February 2008, Defendant William Anthony McClelland was indicted for the murder of Allen<sup>1</sup> Ramsey. Defendant was tried before a jury at the 24 February 2009 Criminal Session of Superior Court, Iredell County. The evidence presented at trial tended to show that, on the evening of 12 January 2008, Defendant shot and

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<sup>1</sup>In the transcript, the victim's name is spelled as "Alan." In his brief, Defendant alternately refers to the victim as "Allen" and "Alan." However, the indictment, the application for the search warrant of Defendant and his property, and the search warrant all refer to the victim as "Allen."

killed Ramsey at the residence of Leon Rivers, a witness for the State in this case. The State and Defendant presented conflicting evidence of the events leading up to Ramsey's death.

The evidence presented by the State tended to show that Defendant and the victim engaged in a dispute over \$10.00, which the victim was charging Defendant for the victim's satellite television box repair services. The State's version of the night's events tended to show that this dispute angered Defendant and ultimately provoked Defendant to shoot the victim.

The evidence presented by Defendant tended to show that Defendant shot the victim because Defendant apprehended that the victim, a much larger man with a history of making threats to Defendant, was about to attack Defendant.

The subject matter of this appeal arises from the testimony given by Leon Rivers. At trial, Rivers testified that after the victim told Defendant that the victim would fix the satellite box and that Defendant could retrieve the box from the victim's house, Defendant became angry and demanded to be given his money back. Because Defendant was getting loud and was drunk and angry, Rivers and his wife offered to give Defendant the \$10.00 if Defendant would leave. Rivers testified that Defendant got up to leave, walked toward the door, then pulled out a gun. Rivers said the gun misfired once, and Defendant fired the gun again at the victim. Rivers testified that after Defendant fired the gun a third time, Rivers tackled Defendant. Following a struggle, Defendant walked outside, threatened the victim once more, and drove away, according

to Rivers' testimony. Rivers testified that after Defendant left, Rivers' wife called 911 while Rivers tended to the victim, who had been shot by Defendant.

Prior to trial, Rivers was indicted as an habitual felon in Catawba County and pled guilty to that charge in November 2008. However, defense counsel became aware that although Rivers' sentencing was initially set for 3 February 2009, the sentencing had been postponed until after Rivers testified at Defendant's trial. Based on this information, and on defense counsel's suspicion that the State had at least consented to the postponement, defense counsel filed a 5 January 2009 "Motion to Require State to Reveal Any Agreement Entered into Between State and Any Prosecution Witness That Could Conceivably Influence His Testimony."

On 19 February 2009, less than a week before the trial, the court heard arguments on the pretrial motions filed by the parties. During the colloquy on Defendant's above-referenced motion, Assistant District Attorney Parker ("ADA Parker"), the prosecutor in this case, admitted that he had directed Rivers to tell Rivers' attorney in Catawba County to contact ADA Parker. Although ADA Parker conceded that in the conversation between ADA Parker and Rivers' attorney, ADA Parker asked if Rivers' attorney could arrange for Rivers to "not come to court dressed in prison garb," ADA Parker adamantly asserted that there had been no agreement between Rivers and the State regarding Rivers' testimony.

When defense counsel made it clear that, regardless of ADA Parker's protestations, defense counsel intended to cross-examine Rivers about any potential agreements between Rivers and the State, the State made an oral motion *in limine* "to preclude [defense counsel] from being able to question [Rivers] about the fact his case was continued in Catawba County."

During the colloquy on the State's motion *in limine*, defense counsel argued that

[w]hether [Rivers is] in prison garb or not, I don't see how it would have modified what he would have testified to. But I believe he's been given some, to me, Judge, if you have an opportunity to stay out of prison for an additional five months, which is what he has, then it might influence his testimony. And just to the extent that you were -- obviously I can cross-examine him about the fact that he has entered a plea of guilty. And he's awaiting sentencing, Judge, and perhaps I can, you know, can limit it to that.

After hearing arguments, the trial judge granted the State's motion *in limine* in part, allowing defense counsel to question Rivers "about the plea itself" and "any events directly related to the entry of that plea[,] " but precluding defense counsel from asking Rivers

[a]bout why he is dressed in the manner that he will be dressed when he comes to court and [defense counsel] can only question him about the plea he entered and the fact that he's awaiting sentencing.

At trial, during the State's direct examination of Rivers, ADA Parker questioned Rivers about conversations that took place between Rivers, ADA Parker, and Rivers' attorney. On cross-examination, defense counsel questioned Rivers about the timing of

his guilty plea and sentencing, and about his motive for asking his lawyer to have his sentencing continued.

After the presentation of evidence, the trial court submitted to the jury potential verdicts of first- and second-degree murder and voluntary manslaughter based on imperfect self-defense. On 6 March 2009, the jury returned a verdict finding Defendant guilty of second-degree murder. Defendant was sentenced to 251 to 311 months imprisonment. From the judgment and sentence, Defendant appeals.

#### *Discussion*

This appeal centers on the trial court's grant of the State's motion *in limine*, which precluded defense counsel from cross-examining Leon Rivers "[a]bout why he is dressed in the manner that he will be dressed when he comes to court[.]"

Defendant's sole argument on appeal is that the trial court's grant of the State's motion limiting Defendant's cross-examination of Rivers was constitutional error because it denied Defendant his right of effective cross-examination arising under the Confrontation Clause of the Sixth Amendment to the United States Constitution and under Article I, Section 23 of the North Carolina Constitution.

However, based on our review of the transcript of arguments on the State's motion, we conclude that defense counsel failed to raise this or any other constitutional question in his opposition to the State's motion. Therefore, "in conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such

question was raised and passed upon in the court below." *State v. Jones*, 242 N.C. 563, 564, 89 S.E.2d 129, 130 (1955) (citing *In re Parker*, 209 N.C. 693, 184 S.E. 532 (1936)).

Further, had the constitutional argument been properly raised by Defendant and then passed upon by the trial court, we would still decline to address the merits of the argument because the trial court's grant of the State's motion *in limine* may not properly be made the subject of this appeal.

As this Court has previously stated, "a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence." *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). "Rulings on these motions . . . are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial and thus an objection to an order granting or denying the motion 'is insufficient to preserve for appeal the question of the admissibility of the evidence.'" *T&T Dev. Co. v. Southern Nat'l Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49 (quoting *Conaway*, 339 N.C. at 521, 453 S.E.2d at 845-46), *disc. rev. denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). "A party objecting to an order granting or denying a motion *in limine*, in order to preserve the evidentiary issue for appeal, is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted)." *Id.*

*State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998).<sup>2</sup>

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<sup>2</sup>In 2003, the legislature amended North Carolina Rule of Evidence 103 in an attempt to eliminate the need to object again at trial in order to preserve the trial court's rulings on motions *in limine* for appellate review. See 2003 N.C. Sess. Laws ch. 101, § 1.

In this case, defense counsel did not attempt to introduce evidence of an agreement between the two prosecutors and failed to attempt to question Rivers about any effect his delayed sentencing may have had on his testimony, even after the State questioned Rivers on direct examination about his conversations with ADA Parker. Because defense counsel failed to attempt introduction at trial of any evidence precluded by the trial court's preliminary ruling, no reviewable evidentiary ruling was made by the court at the trial. Therefore, the issue of whether the granting of the State's motion *in limine* was error is not before this Court on appeal. *See id.*

Nonetheless, had the question made its way before this Court, we are not convinced that the trial court's decision to limit the cross-examination of Rivers was error. Further, this Court could not reasonably conclude that Defendant was prejudiced in any way by the trial court's ruling, based on the fact that the relevant information was before the jury as a result of the State's direct

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In *State v. Oglesby*, 361 N.C. 550, 648 S.E.2d 819 (2007), our Supreme Court concluded that the legislature's efforts created "a direct conflict" between Rule 103 and North Carolina Rule of Appellate Procedure 10(b)(1), "which this Court has consistently interpreted to provide that a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal[.]" *Id.* at 554, 648 S.E.2d at 821. Holding that Rule 103 "must fail" to the extent it conflicts with Rule 10(b)(1), the Court reiterated the well-established requirement that a party must renew his objection at *trial* to preserve the admissibility of evidence for appellate review. *Id.* In line with our Supreme Court's decision in *Oglesby*, this Court has since recognized the continuing viability of the Supreme Court's recitation of the law in *Hill. Telerent Leasing Corp. v. Boaziz*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 686 S.E.2d 520, 523 (2009) (quoting *Hill*, 347 N.C. at 293, 493 S.E.2d at 274).

examination of Rivers. Not only did Rivers testify to the fact that his habitual felon sentencing had been continued prior to Defendant's trial, Rivers also testified on direct examination by the State to the circumstances surrounding ADA Parker's conversation with Rivers' attorney, as excerpted below:

- Q. What was your original court date for that habitual felon?  
A. February 3rd.  
Q. February 3rd?  
A. Yes, sir.  
Q. And do you recall what happened on February 3rd that you didn't go to jail on that date?  
A. Well, I talked to my lawyer and asked him, you know, if he could get my case laid over until I could have some -- handle these -- what problems I had at home.  
Q. And you did that so -- at my request, did you not? Talk to your lawyer?  
A. I just told my lawyer, hey, I need some time to, you know, to handle this murder case that happened at my house. And I would like to be, you know, there to work with the State.  
Q. While you were in your lawyer's office, did your lawyer's office -- did your lawyer call someone?  
A. He voluntarily called you.  
Q. He called me?  
A. Yes, sir.  
Q. And after he spoke to me, your case was put off, wasn't it?  
A. Yes, sir.

Accordingly, even assuming *arguendo* that Defendant's only argument on appeal does address an issue properly preserved for appellate review, we would not find the trial court's ruling to be error. Clearly, the substance of the discussions among Rivers, his attorney, and ADA Parker was put in evidence before the jury



despite the trial court's ruling that examination of Rivers on the matter would be limited.

Because Defendant failed to argue any other assignments of error in his brief, the remainder of those assignments of error are taken as abandoned. N.C. R. App. P. 28(b)(6) (2009). Because Defendant failed to properly raise any issues for review by this Court, Defendant's appeal is

DISMISSED.

Judges STEELMAN and HUNTER, JR. concur.

Report per Rule 30(e).