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NO. COA10-526

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

STATE OF NORTH CAROLINA

v.

Henderson County
Nos. 05 CRS 56285-86

DENNIS LEE PATTON, JR.

Appeal by defendant from judgments entered 27 July 2009 by Judge Calvin E. Murphy in Henderson County Superior Court. Heard in the Court of Appeals 1 November 2010.

Roy Cooper, Attorney General, by John J. Aldridge, III, Special Deputy Attorney General, for the State.

Eric A. Bach for defendant-appellant.

MARTIN, Chief Judge.

Defendant Dennis Lee Patton, Jr. appeals from judgments entered upon jury verdicts finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury and breaking or entering. The trial court determined that defendant was a level IV offender, and sentenced him to a minimum term of 120 months and a maximum term of 153 months in the custody of the North Carolina Department of Correction. Defendant filed a timely notice of appeal.

The State presented the following evidence at defendant's trial. On 9 September 2005, Angela Martinez-Quintana ("Martinez")

was working at Affordable Insurance Company in Hendersonville, North Carolina. Around 11:30 a.m. that day, defendant and Tameika Smith stopped in so that Smith could make an insurance payment. Martinez noticed that defendant had "a black cloth over his head."

A short time later, although she had seen no one enter, Martinez heard the doorbell ring. She noticed that the back door of the office was partially open and saw "a shadow go by." As Martinez pulled the door, the top portion of which was glass, she saw a man, crouching down, turn around. The man pulled a handgun out of his pants pocket, and Martinez slammed the door and locked it near the bottom. She yelled to the assistant manager to hit the panic button or call 911. Because Martinez "had no where to run," she lay down in front of the door. The man pointed the gun at her and told her to open the door. Martinez said, "You know, you really don't want to do this. God is watching you." The man responded, "Open the door or I'm going to shoot you," and then shot her in the face. Martinez testified that the man was wearing a black hoodie, a ski mask with "medical tape or something taped across it," dark sunglasses, and what looked to be "the same . . . pants that Mr. Patton had on when he came into the office." The bullet fired at Martinez lodged in her lip and left a portion of its jacket embedded in her cheek. After surgical removal of the bullet, Martinez was left with no feeling in her bottom lip and scar tissue on the inside of her cheek. A bank bag containing approximately \$200.00 was discovered missing from Affordable Insurance.

After defendant was stopped for a traffic violation and arrested, an officer removed his shoes and noticed they were moist and had soil on them. The officer took one shoe back to the scene, and the tracking dog there trailed the scent to the area where a piece of pantyhose lay, and then trailed the scent to an area where another piece of pantyhose lay. From the track, it appeared that the suspect had gone in a circle, through a wet, swampy area.

Following defendant's arrest, Jill Appleby, a forensic biologist with the North Carolina State Bureau of Investigation ("SBI"), completed DNA analysis on the two black stockings and buccal swabs from defendant, and concluded that the DNA profiles matched. Karen Winningham, another forensic biologist with the SBI, signed a checklist indicating that she had reviewed Agent Appleby's report and concurred in the result. By 2008, Agent Appleby was no longer employed with the SBI. In November 2008, Agent Winningham collected two additional buccal swabs from defendant, performed a DNA extraction on them, and compared the DNA profile from the buccal swabs to the DNA profiles Agent Appleby obtained in 2006 from the stockings. She concluded that the DNA profiles matched.

Before trial, the State filed several motions in limine. One such motion requested that Agent Winningham be permitted to testify regarding the results of her DNA analysis, which included testimony concerning the DNA testing of the stockings conducted by Agent Appleby. In the motion, the State argued that *Melendez-Diaz* was satisfied by defendant's ability to cross-examine Agent Winningham

at trial. A related motion requested that the trial court enter an order prohibiting questioning or testimony concerning the legality of the first samples taken from defendant by Agent Appleby, arguing the "testimony is irrelevant to the DNA results, since a second suspect sample was obtained and used to obtain the results that will be introduced in the trial of this case." Immediately before trial, the court heard the State's motion requesting that Agent Winningham be permitted to testify, but reserved ruling on it until after a voir dire of Agent Winningham. Following a voir dire during trial, the trial court granted the motion.

Defendant contends the trial court's admission of Agent Winningham's testimony, based in part on the DNA tests conducted by Agent Appleby, violated his Sixth Amendment right to be confronted with the witnesses against him. We disagree.

"This Court reviews alleged violations of constitutional rights *de novo*." *State v. Brewington*, ___ N.C. App. ___, ___, 693 S.E.2d 182, 185-86 (2010). "Under the *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Id.* at ___, 693 S.E.2d at 186 (internal quotation marks omitted) (alteration in original).

"The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Melendez-Díaz v. Massachusetts*, ___ U.S. ___, ___, 174 L. Ed. 2d

314, 320 (2009) (citation omitted) (quoting U.S. Const. amend. VI). The Confrontation Clause "guarantees a defendant's right to confront those 'who bear testimony' against him." *Id.* at ____, 174 L. Ed. 2d at 320 (quoting *Crawford v. Washington*, 541 U.S. 36, 51, 158 L. Ed. 2d 177, 192 (2004)). "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.* at ____, 174 L. Ed. 2d at 320-21 (citing *Crawford*, 541 U.S. at 53-54, 158 L. Ed. 2d at 194).

In *Melendez-Díaz*, the United States Supreme Court held that certificates of analysis showing the results of forensic analysis admitted as "prima facie evidence of the composition, quality, and the net weight of the analyzed substance," *id.* at ____, 174 L. Ed. 2d at 321 (internal quotation marks omitted), were "within the core class of testimonial statements" described in *Crawford*. *Id.* at ____, 174 L. Ed. 2d at 321 (internal quotation marks omitted). Thus, "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." *Id.* at ____, 174 L. Ed. 2d at 322 (quoting *Crawford*, 541 U.S. at 53-54, 158 L. Ed. 2d at 194).

In *State v. Mobley*, this Court applied *Melendez-Díaz* to expert testimony concerning DNA testing. ____ N.C. App. ____, 684 S.E.2d 508 (2009), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010). In *Mobley*, the expert testified to "her own conclusions based on the testing of others in the field." ____ N.C. App. at

____, 684 S.E.2d at 511. That expert conducted a technical review of the other experts' tests, offered "her own expert opinion of the accuracy of the non-testifying experts' tests," and formed "her own expert opinion based on a comparison of the original data." *Id.* at ____, 684 S.E.2d at 511. This Court held that "the underlying report, which would be testimonial on its own, [wa]s used as a basis for the opinion of an expert who independently reviewed and confirmed the results[.]" *Id.* at ____, 684 S.E.2d at 512. Thus, the underlying report was "not offered for the proof of the matter asserted[.]" and the expert's testimony "did not violate the Confrontation Clause even in light of *Melendez-Díaz*." *Id.* at ____, 684 S.E.2d at 512; *cf. Brewington*, ____ N.C. App. at ____, 693 S.E.2d at 191-92 (discussing *Mobley*, and noting that unlike a forensic DNA analyst, who "must perform an independent analysis of raw data to form [his or her] expert opinion[.]" the expert's opinion in that case was not "independent of the substance of the testimonial document such that the information in the document [wa]s not being offered for the truth of the matter asserted").

Mobley is determinative here. At trial, Agent Winningham testified in detail to her technical review of Agent Appleby's work and the accuracy of Agent Appleby's results, and offered "her own expert opinion" that the DNA profiles obtained from the stockings matched the DNA profile Agent Winningham obtained from the buccal swabs of defendant. *Mobley*, ____ N.C. App. at ____, 684 S.E.2d at 511.

In fact, Agent Winningham had more involvement in the DNA testing in this case than the testifying expert had in *Mobley*. In *Mobley*, the testifying expert "looked . . . at the original data from [the non-testifying expert who performed the vaginal swab and] . . . the data from the buccal swab run by [another non-testifying expert,]" and concluded that the "profile obtained from the sperm cell fraction of the vaginal swab from [the victim] matche[d] the profile obtained from the buccal swab of [the defendant]." *Id.* at ____, 684 S.E.2d at 511. Here, after Agent Appleby left the SBI during the summer of 2008, Agent Winningham collected two additional buccal swabs from defendant, performed an extraction, and generated a DNA profile. Her conclusion was based on her comparison of the DNA profile she obtained from the buccal swabs in 2008 to the DNA profiles, obtained from Agent Appleby's testing in 2006, from the stockings.

In accord with our decision in *Mobley*, we hold that the portion of Agent Appleby's report that Agent Winningham used in forming her independent conclusion was "not offered for the proof of the matter asserted under North Carolina case law." *Id.* at ____, 684 S.E.2d at 512. Defendant's attempts to distinguish *Mobley* are wholly without merit. The trial court did not err in admitting Agent Winningham's testimony.

No error.

Judges McGee and Ervin concur.

Report per Rule 30(e).