NO. COA11-1578
NORTH CAROLINA COURT OF APPEALS

Filed: 18 September 2012

STATE OF NORTH CAROLINA

v. Cumberland County
No. 09 CRS 61249

WALTER ALEXANDER LOVE

Appeal by defendant from judgment entered 29 April 2011 by Judge Robert F. Floyd in Cumberland County Superior Court. Heard in the Court of Appeals 7 June 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General Gerald K. Robbins, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

CALABRIA, Judge.

Walter Alexander Love ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of second-degree murder. We find no error in part and no prejudicial error in part.

I. Background

On 29 June 2008, a fight occurred at a house located at 723 Wilma Street in Fayetteville, North Carolina in an area known for drug activity and liquor sales. The house was a non-tax paid liquor house known by law enforcement as a "shot house." During the fight, defendant's aunt, Deborah Jones ("Jones") was struck in the face. She claimed the person who hit her with a pistol was the manager of the "shot house," James Wilkins ("Wilkins"). Wilkins was arrested for assault on a female, but posted bond and was released.

The next day, when Wilkins was in the process of closing down the "shot house," Marion Sadler ("Sadler") arrived. Wilkins informed Sadler that the "shot house" was closed and the two of them stood in the street talking. Wilkins heard shots fired in the vicinity of Paulio Wilkerson's ("Wilkerson") home located up the street from the "shot house." The shooting stopped then started again. When the shooting resumed, Sadler was shot. He died as a result of a gunshot wound to the chest. The bullets and shell casings found in the area were identified as .40 and .38 caliber.

When officers from the Fayetteville Police Department ("FPD") arrived, Wilkins identified four young men as potential suspects of the shooting. Defendant was not included as one of

the men initially identified by Wilkins. The four men were questioned by officers at the FPD, and their hands were tested for gunshot residue, however none of them were arrested at that time. On the night of the shooting, Willie Smith ("Smith"), a resident of Wilma Street, told officers that he had heard between ten and twelve shots and that it sounded as though there were two individuals doing the shooting. However, he did not identify any individuals. This information was relayed to Sergeant Gary Womble ("Sergeant Womble") of FPD. Sergeant Womble indicated that Smith was "elusive" and he was unable to establish contact with Smith.

Sergeant Womble interviewed Wilkins on 2 July. Although Wilkins told him that defendant was present during the fight where Jones was struck, he did not identify defendant as one of the individuals responsible for the shooting. Wilkins denied seeing anyone fire a gun. What he did see, when he looked down the street on the night of the shooting, was a person wearing a white t-shirt who had long dreadlocks.

Subsequently, FPD received four anonymous tips. Two of the four tips reported that Wilkerson possessed and fired a gun. During his investigation, Sergeant Womble received information that a man named David Hewitt ("Hewitt") claimed that defendant

and Devon Gales ("Gales") were responsible for the shooting. However, when Sergeant Womble interviewed Hewitt, Hewitt indicated that after the shooting he observed Gales and a man known as "Black" running from the area. Hewitt said he thought Black lived on Jasper Street. Hewitt indicated that as Gales and Black were running, Black told Hewitt, "you ain't see [sic] us." Black was the nickname of another man in the community, Keith Grady ("Grady"), who lived on Jasper Street.

When Sergeant Womble interviewed Wilkins again on 8 July, Wilkins said he believed Gales and defendant shot Sadler. On 9 July, Sergeant Womble interviewed Riccardo Wallace, one of the young men initially detained after the shooting. Wallace said Wilkerson and Gales shot Sadler and described one of them as having dreadlocks and wearing a LeBron James basketball jersey. Based on Wallace's interview, Wilkerson was arrested the next day. On 11 July, Tacara Davis ("Davis"), Wilkerson's girlfriend and the mother of his child, initially told Sergeant Womble that Gales and defendant shot Sadler. However, Davis admitted she was inside her home when the shooting occurred, and that she did not see defendant or Gales fire a gun.

On 15 July, Gales was arrested for the shooting. When Sergeant Womble interviewed Hewitt again on 17 July, Hewitt

viewed a photographic lineup. At that time, Hewitt identified defendant as the man he knew as "Black." Grady was not identified as the man Hewitt knew as Black. In December 2008, during a vehicle pursuit, FPD recovered a .40 caliber handgun that matched the handgun that was fired when Sadler was shot. Someone riding in the vehicle was close friends with one of defendant's relatives. However, Sergeant Womble testified that defendant's fingerprints were not found on any of the handguns, bullets, or shell casings tested.

At the request of Wilkerson's lawyers, more than one year after Sadler was shot, Smith spoke with detectives. Smith indicated that he saw Gales and defendant aim at Wilkins, but hit Sadler instead. He "was certain that it was a retaliation shooting for what Wilkins did to [Jones] the day before." While Smith did indicate that Wilkerson fired a gun the night Sadler was shot, he said that Wilkerson only fired his gun into the air after the shooting.

Subsequently, after Wilkerson was released, defendant was charged with first-degree murder, attempted first-degree murder, and felonious conspiracy to commit first-degree murder. The jury returned verdicts finding defendant guilty of second-degree murder but not guilty of attempted first-degree murder or

conspiracy to commit first-degree murder as to Wilkins. Defendant was sentenced to a minimum of 189 to a maximum of 236 months in the North Carolina Department of Correction. Defendant appeals.

II. Statement of Co-Conspirator

Defendant alleges that the trial court erred by admitting Davis's testimony regarding an out-of-court statement Gales made to her because it was inadmissible hearsay. We agree, however we find the error was not prejudicial.

"When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, ___ N.C. App. ___, ___, 706 S.E.2d 790, 797 (2011). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). Generally, hearsay evidence is inadmissible. *State v. Valentine*, 357 N.C. 512, 515, 591 S.E.2d 846, 851 (2003). "An assertion of one other than the presently testifying witness is hearsay and inadmissible if offered for the truth of the matter asserted." *State v. Sibley*, 140 N.C. App. 584, 587-88, 537 S.E.2d 835, 838 (2000) (citations omitted).

In the instant case, Davis testified about a conversation she had with Gales after Wilkerson's arrest. The statement pertained to Wilkerson's involvement in the shooting. Davis indicated that she spoke to Gales on Wilma Street:

> [The State]: And what did you all talk about?
>
> [Davis]: He was just like [Wilkerson] has to stay strong. I said, well, is there something I'm missing; did he do it. He was, like, no, he didn't have nothing to do with it.
>
> [The State]: So, [Gales] ----
>
> [Defense Counsel]: Objection as to the conversation between [Wilkerson] and ----
>
> [The State]: He's an alleged co-conspirator, Your Honor; and, according to her, it was a time before he was arrested and talked to law enforcement; and, he's talking to her, not law enforcement. So, we would contend it's a statement of a co-conspirator that does come in under the hearsay exception ----
>
> [Defense counsel]: Conspiracy to do what? There's no allegation that we were involved in a conspiracy to obstruct justice or a crime or anything.
>
> [The State]: There's an ongoing conspiracy ----
>
> [The court]: Overruled.
>
> [The State]: ---- to first-degree murder

Although the State questioned Davis, Gales was not a

witness who testified at trial. Therefore, the State elicited Gales' out-of-court statement through Davis' testimony. Furthermore, Gales' statement was offered "to prove the truth of the matter asserted," that Gales told Davis that Wilkerson was not involved in the shooting. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). Although Davis' statement at trial was hearsay, because she repeated her conversation with Gales, who was not testifying at trial, the statement may still be admissible at trial if it falls within an exception to the hearsay rule. *See* N.C. Gen. Stat. § 8C-1, Rule 801(d) (2011).

"A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . a statement by a coconspirator of such party during the course and in furtherance of the conspiracy." N.C. Gen. Stat. § 8C-1, Rule 801(d)(E) (2011). The State must show 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." *Valentine*, 357 N.C. at 521, 591 S.E.2d at 854 (citations omitted).

The State "must establish a *prima facie* case of conspiracy, without reliance on the statement at issue." *Id.* (citations omitted). In making its *prima facie* case, "the State is granted

wide latitude, and the evidence is viewed in a light most favorable to the State." *Id.* (citations omitted). "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Privette*, __ N.C. App. ___, ___, 721 S.E.2d 299, 313 (2012), *disc. review denied*, __ N.C. ___, 724 S.E.2d 532 (2012) (citation omitted).

In the instant case, in the light most favorable to the State, the State presented some evidence of a conspiracy. The State's evidence established a motive for the shooting because the night before the shooting, Wilkins assaulted Jones, defendant and Gales' aunt. In addition, some evidence was presented that defendant and Gales shot Sadler. While Davis did not see defendant shoot Sadler, she testified that prior to the shooting, she heard defendant say, "let's just get to it" and that shortly thereafter she heard shots fired. Smith testified that he was standing outside talking to defendant when he saw Gales walking down a path, started firing a .45 or .9 and then defendant fired a .38. Additionally, Hewitt testified that after Sadler was shot, he saw both Gales and defendant running away from Wilma Street and that defendant told Hewitt "you ain't see [sic] us." In the light most favorable to the State, the

State provided sufficient evidence to establish a *prima facie* case of a conspiracy between defendant and Gales to shoot Wilkins in retaliation for Jones' injuries. *See Valentine*, 357 N.C. at 521, 591 S.E.2d at 854 (citations omitted).

However, to be admissible as a statement of a co-conspirator, the statement must be made "during the course and in furtherance of the conspiracy." N.C. Gen. Stat. § 8C-1, Rule 801(d)(E) (2011). A declaration made after the termination of the conspiracy is not admissible against other members of the conspiracy. *State v. Littlejohn*, 264 N.C. 571, 573, 142 S.E.2d 132, 134 (1965). A conspiracy can be terminated by "the achievement of its purpose or by the failure to achieve it." *Id.* "Success or failure or abandonment terminates a conspiracy." *State v. Mettrick*, 54 N.C. App. 1, 13, 283 S.E.2d 139, 147 (1981). Furthermore, the declaration must be made "*in furtherance of the common design* [to] be introduced in evidence against the other members" of the conspiracy. *State v. Wells*, 219 N.C. 354, 356, 13 S.E.2d 613, 614 (1941) (citation omitted). When a declaration was "merely narrative as to what [had] been done or [would] be done" this Court has held that the statement was "incompetent, and should not be admitted except as against the defendant making them, or in whose presence they are made."

Id. (citation omitted).

According to the State's theory, Gales and defendant conspired to shoot Wilkins on 30 June 2008. A shooting occurred, but Sadler, not Wilkins was shot. Assuming the State's theory was correct, the conspiracy between Gales and defendant ended when they failed to complete the purpose of the conspiracy, which was to shoot Wilkins. *See Mettrick*, 54 N.C. App. at 13, 283 S.E.2d at 147. The conversation between Davis and Gales occurred at least 10 days after the shooting. Since Gales' statement to Davis occurred after the shooting, it was not made during the course of a conspiracy. *See State v. Marlow*, 334 N.C. 273, 282-83, 432 S.E.2d 275, 280 (1993) (where the Court held that the trial court erred in admitting testimony regarding a conversation the day after a murder because the conversation occurred after the termination of the conspiracy, and therefore not during its course).

The statement of a co-conspirator must also occur in furtherance of the conspiracy. N.C. Gen. Stat. § 8C-1, Rule 801(d)(E) (2011). Gales' statement indicated that Wilkerson needed to stay strong and that Wilkerson had nothing to do with the shooting. There was no indication that Gales' statement regarding Wilkerson furthered a conspiracy with defendant.

Therefore, the State failed to show how Gales' statement to Davis regarding Wilkerson was in furtherance of a conspiracy between Gales and defendant.

Although the State offered some evidence of a conspiracy, it failed to show that Gales' statement was made during the course of or in furtherance of the alleged conspiracy between Gales and defendant. The trial court erred in admitting Davis' testimony concerning Gales' statement.

While we conclude that the trial court erred in admitting Gales' statement, the defendant must also show that he was prejudiced by Davis' testimony. Erroneous admission of evidence is prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2011); *see Marlow*, 334 N.C. at 283, 432 S.E.2d at 280 (where the Court held that while admission of a co-conspirator statement was error, the defendant was not prejudiced because the evidence against him was "overwhelming").

In the instant case, the evidence at trial indicated that witnesses gave varying reports of the identity of the second shooter. Some evidence was presented that defendant shot

Sadler. However, there was also evidence that Wilkerson shot Sadler. Defendant claims that the admission of Gales' statement was prejudicial because according to the defense's theory, Gales' accomplice was Wilkerson, not defendant. Therefore, any evidence tending to exculpate Wilkerson would tend to implicate defendant. We disagree.

There was no physical evidence linking either defendant or Wilkerson to Sadler's death, only witness testimony. Both Wilkins and Davis testified that defendant and Gales shot Sadler. Davis saw defendant in possession of a gun prior to the shooting and heard him say, "let's just get to it." Hewitt testified at trial that he saw defendant running from the area of the shooting. Furthermore, Smith testified that he saw defendant fire towards the "shot house" on the night in question.

There was some evidence that inculpated Wilkerson, including Sergeant Womble's testimony regarding evidence he received indicating that Wilkerson shot Sadler. However, Sergeant Womble ultimately released Wilkerson and arrested defendant. Furthermore, Wallace, who identified Wilkerson as one of the shooters, moved to Washington sometime prior to the trial and did not testify.

We find that it was unlikely that the hearsay testimony affected the jury. Since defendant was not prejudiced by Davis' testimony, we find no prejudicial error.

III. Lie Detector Test

Defendant contends that the trial court erred by denying his motion for a mistrial after Smith testified that he was given a lie detector test. We disagree.

The decision to grant a motion for mistrial rests in the "sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *State v. Wood*, 168 N.C. App. 581, 583, 608 S.E.2d 368, 370 (2005). This Court has recognized that "because polygraph results are inherently unreliable, such evidence is inadmissible in any criminal or civil trial." *State v. Willis*, 109 N.C. App. 184, 192, 426 S.E.2d 471, 476 (1993). However, "not every reference to a polygraph test will necessarily result in prejudicial error." *State v. Sanders*, 201 N.C. App. 631, 638, 687 S.E.2d 531, 536 (2010), *disc. rev. denied*, 363 N.C. 858, 695 S.E.2d 106 (2010). "It is well-settled that where the trial court withdraws incompetent evidence and instructs the jury not to consider that evidence, any prejudice is ordinarily cured." *State v. Davis*,

130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

In *State v. Montgomery*, a witness testified during cross-examination that he took a polygraph. 291 N.C. 235, 243, 229 S.E.2d 904, 909 (1976). The defendant immediately moved to strike the testimony and moved for a mistrial. *Id*. The trial court allowed the motion to strike and told the jury not to consider the witness's statement, but the trial court denied the motion for a mistrial. *Id*. The Court found there was no prejudicial error where the witness testified on cross-examination and "[t]here was no evidence before the jury as to the nature of the test, the questions propounded, the answers given or the *result* of the test" and when the trial court immediately granted defendant's motion to strike and instructed the jury that they were not to consider the evidence. *Id.* at 244, 229 S.E.2d at 909.

In the instant case, Smith testified about submitting to a lie detector test during cross-examination:

> [Defense Counsel]: And, in fact, Sergeant Womble's not the only person you gave a statement to in July of 2009, is he?
>
> [Smith]: No. I gave a statement to [Wilkerson] – lawyers.
>
> [Defense Counsel]: Well, you gave – you gave a statement to Sergeant Hart with the [FPD], didn't you?

> [Smith]: Sergeant Hart?
>
> [Defense Counsel]: A female police officer.
>
> [Smith]: The only statement I got - gave was through a lie detector test.
>
> > [Defense Counsel]: Objection. Motion to strike. I ask for a mistrial.

The trial court immediately granted defendant's motion to strike and instructed the jury that "[t]hat response is not to be considered by you as evidence."

In the instant case, Smith's statement regarding the lie detector test during cross-examination was similar to the testimony of the witness in *Montgomery*. In both cases, the statements were unintentionally elicited by the defense. Furthermore, there was no evidence before the jury regarding the nature of the test, the answers that were given or the results of the test. Therefore, since the trial court granted defendant's motion to strike and instructed the jury not to consider the response as evidence, the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

Defendant alleges that by mentioning the lie detector test, the jury would infer that Smith "passed" since Wilkerson was released and defendant was arrested. However, the results of the test were never mentioned, and more importantly the trial court

presumably cured any prejudice by immediately ordering the jury to disregard the statement regarding the test. *Davis*, 130 N.C. App. at 679, 505 S.E.2d at 141.

Defendant cites *State v. Moose* contending that he should be granted a new trial. 115 N.C. App. 707, 446 S.E.2d 112 (1994). A new trial was granted in *Moose* because the prosecutor asked questions about the polygraph after being warned twice that he was not to mention it without consulting the judge. *Id.* at 709-10, 446 S.E.2d at 113. However, the instant case is distinguishable. Here the State did not elicit testimony regarding a lie detector test. In fact, Smith was instructed twice *by the prosecutor* that he was not to mention the test. Therefore, the holding from *Moose* is not applicable and we find no error.

IV. Hearsay

Defendant alleges the trial court erred by admitting several hearsay statements from Davis and Wilkins. We agree that some of the testimony was inadmissible. However, we find that any error was not prejudicial.

Initially, we note that the State's brief does not address the admissibility of any of Davis' or Wilkins' statements. The State does not take the position that these statements were not

hearsay, nor does the State allege that the statements fall within an exclusion or exception to the hearsay rule. Rather, the State believes that Davis' inconsistent testimony goes to the weight of her testimony, not its admissibility. Ultimately, the State concludes that defendant failed to meet his burden of proving that the trial court's admission of Davis' and Wilkins' statements was plain error and therefore the defendant's argument should be overruled.

"The trial court's determination as to whether an out-of-court statement constitutes hearsay is reviewed de novo on appeal." *State v. Castaneda*, ___ N.C. App. ___, ___, 715 S.E.2d 290, 293, *appeal dismissed and disc. review denied*, 365 N.C. 354, 718 S.E.2d 148 (2011). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). Generally, hearsay evidence is inadmissible. *Valentine*, 357 N.C. at 515, 591 S.E.2d at 851. Once a statement qualifies as hearsay, it is inadmissible unless it is allowed by statute or an applicable exception. *See* N.C. Gen. Stat. § 8C-1, Rule 802-804 (2011).

Our statutes indicate that "[a] witness may not testify to

a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." N.C. Gen. Stat. § 8C-1, Rule 602 (2011). Testimony which is "mere speculation is inadmissible." *State v. Elkins*, __ N.C. App. __, __, 707 S.E.2d 744, 750 (2011) (citation omitted). "Personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." *State v. Wright*, 151 N.C. App. 493, 495, 566 S.E.2d 151, 153 (2002) (brackets and citations omitted).

A. Davis' Testimony

Davis testified for the State at trial. Davis was a resident on Wilma Street at the time Sadler was shot, however she had no personal knowledge of the shooters' identities because once she heard gunshots, she went inside her home during the shooting. Defendant contends that several portions of Davis' testimony were inadmissible.

The State elicited testimony from Davis about statements defendant made prior to the shooting:

> [The State]: Before the shooting or after the shooting, did you tell [Sergeant Womble] what [defendant] said?

[Davis]: I told him that they were outside arguing and [defendant] was like let's just ----

> [Defense Counsel]: Objection, Your Honor.
>
> [The court]: Basis?
>
> [Defense Counsel]: Hearsay. We object.
>
> [The court]: The objection's overruled.

[The State]: What did [defendant] say?

[The court]: You may answer, ma'am.

[Davis]: I heard him arguing, saying – they were all out there arguing.

[The State]: What did you hear ----

[Davis]: I heard him say let's just get to it. They were all out there arguing, but I didn't see him shoot. I never saw him shoot.

[The State]: You heard him say, before shooting, let's get to it, yes or no?

[Davis]: Correct.

> [Defense Counsel]: Objection to the characterization, Your Honor, or to the leading.
>
> [The court]: Sustained.

[The State]: Before you heard the shooting, did you hear him make that state[ment]?

[Davis]: I believe so. This has happened

so long ago, I really don't know.

> [Defense Counsel]: Motion to strike the entire line, Your Honor.
>
> [The Court]: Overruled.

The admitted statement was hearsay because the declarant, defendant, did not testify at trial and the State elicited the statement through Davis' testimony. Furthermore, the statement was offered "to prove the truth of the matter asserted," that prior to the shooting defendant said "let's just get to it." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). However, the statement is admissible if it falls within an exception to the hearsay rule. *See* N.C. Gen. Stat. § 8C-1, Rule 803-804 (2011).

Pursuant to "the state of mind exception to the hearsay rule, '[e]vidence tending to show a presently existing state of mind is admissible if the state of mind sought to be proved is relevant and the prejudicial effect of the evidence does not outweigh its probative value.'" *State v. East*, 345 N.C. 535, 549, 481 S.E.2d 652, 662 (1997) (internal quotations and citations omitted). "When intent is directly in issue, a declarant's statements, 'relative to his then existing intention[,] are admitted without question.'" *Id.* at 549, 481 S.E.2d at 662 (citations omitted). In *State v. Bryant*, the Court held that the "defendant's statement to his sister that he

was going to meet two guys to buy stolen merchandise was admissible ... as a statement of his then-existing intent to engage in a future act." 337 N.C. 298, 310, 446 S.E.2d 71, 78 (1994).

In the instant case, Davis' testimony that prior to the shooting defendant said "let's just get to it" shows defendant's intent to engage in a future act. The context of the statement indicated that defendant, Gales, Wilkerson and others were in Wilkerson's front yard, several houses away from the "shot house." Davis observed both defendant and Gales had guns in their possession. As the men stood in the front yard, Davis heard defendant's statement. Davis did not see Gales or defendant fire a gun. While the statement does not indicate what defendant was referring to when he said he wanted to "get to it," the statement does indicate that defendant intended to engage in a future act. The statement was relevant to show defendant's actions on the day of the shooting. Defendant's statement, "let's just get to it" was admissible as an exception to the hearsay rule under N.C. Gen. Stat. § 8C-1, Rule 803(3) and therefore the trial court did not err in admitting the statement.

The State also questioned Davis about whether she told

Sergeant Womble that Gales told her to "stick to the script."

She replied:

> [Davis]: I told him so many things.
>
> [The State]: Would you listen to my question, please, Ms. Davis. Did you tell him, in July of 2008, along with the other things that you told him, that that night, after the shooting ----
>
> [Davis]: After the shooting, yes, [Gales] called ----
>
> [The State]: Did [Gales] call you and ----
>
> [Davis]: Yes.
>
> [The State]: ---- tell you to stick to the script----
>
> [Davis]: No, not that night, no.
>
> [The State]: When did he call you ----
>
> [Davis]: This was when [Sergeant] Womble, apparently, was making his appearances in the neighborhood to talk with people. He said I went downtown and talked to the detective. Well, he had never went downtown, but what he told [Wilkerson] was I went downtown and talked to the detective, and they're -- just -- you know what I'm saying -- stick with the story, you know ----
>
> [The State]: And didn't ----
>
> [Davis]: ---- and he was like I got your back and everything.
>
> [The State]: Did he tell you to stick with the script?
>
> [Davis]: No. He was referring to [Wilkerson].

> [The State]: So, he told [Wilkerson] to stick to the script?
>
> [Davis]: The story, yes, I guess -- but he wasn't there or whatever.

The admitted statement was hearsay because the declarant, Gales, did not testify at trial and the State elicited the statement through Davis' testimony. Furthermore, the statement was offered "to prove the truth of the matter asserted," that after the shooting Gales indicated that there was some "script" that Wilkerson needed to adhere to when interacting with the detectives. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c) (2011). The State cites no exception, and we can find none, to indicate Davis' statement that Gales told her Wilkerson should "stick with the script" was admissible hearsay. Therefore, this statement should have been excluded.

Davis testified on direct examination that she told Sergeant Womble that "[Wilkerson] was not shooting, but [Gales] and [defendant] were the ones that were shooting." In that same line of questioning, Davis indicated that she also told Sergeant Womble that she did not actually see Gales and defendant shoot Sadler, but rather saw them with guns, and that she did not see Wilkerson shoot a gun, but heard that he shot one into the air. While defendant is correct that this testimony is certainly

inconsistent and that Davis has no personal knowledge of the shooters' identities, the only portion of the testimony that was hearsay was Davis' statement that she did not see Wilkerson shoot a gun, but that she heard that he shot a gun into the air. Davis was allowed to testify to Wilkerson's actions as if they were based on her personal knowledge, yet she had only heard that information from a third party who was not testifying at trial. The statement was offered to prove that Wilkerson was not one of the shooters, because he had only fired a gun into the air, not towards the "shot house." Davis' testimony concerning Wilkerson's activities on the night of the shooting should have been excluded.

Davis further testified during direct examination regarding statements she made to Sergeant Womble regarding information she had obtained from the neighborhood about the identity of the shooters. Davis testified that she told Detective Womble that she saw Gales and defendant go through the path by the fence, but then said, "I didn't see them, no, but that's what I heard. . . . That's what I told him 'cause that's what I heard." In addition, Davis testified that she repeatedly told Sergeant Womble, he had "the wrong man. I was like I hear that [defendant] had something to do with it too[.]"

Initially, we note that Davis had no personal knowledge about the accuracy of these statements. She admitted that she did not see Gales and defendant "go through the path by the fence" and that she "heard" rather than knew that defendant was involved in the shooting. While "[p]ersonal knowledge is not an absolute" and "may consist of what the witness thinks he knows from personal perception," *Wright*, 151 N.C. App. at 495, 566 S.E.2d at 153, there was no evidence presented, in the instant case, that Davis perceived the events she testified about.

Furthermore, defendant is correct that these statements were hearsay. The declarants of these statements were unnamed sources that made these statements to Davis, rather than witnesses testifying at the trial or hearing. In addition, the statements were offered for the truth of the matter asserted, that Gales and defendant were the perpetrators who ran away after the shooting and that defendant was involved in the shooting. The State did not contend at trial, or on appeal, that these statements were offered for any other value other than the truth of the statements. The State cites no exception, and we can find none, that would indicate Davis' statements regarding what she "heard" in the neighborhood were admissible hearsay.

On cross-examination, over defense objection, Davis was permitted to testify, "I did try to get some witnesses, but some of the people didn't want to go to court[.]" For hearsay purposes, a "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." N.C. Gen. Stat. § 8C-1, Rule 801(a) (2011). The fact that some people did not want to attend court is not an oral or written assertion by these unnamed individuals. There is no suggestion in the transcript that the act of not wanting to go to court was intended by the declarants as an assertion. Davis did not mention anyone actually telling her that they did not want to testify. This statement expressed Davis' opinion on others' feelings, not necessarily what they had said to her. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2011); ***Elkins***, __ N.C. App. at ___, 707 S.E.2d at 750 ("'a lay witness may testify as to his or her opinion, provided the opinion is rationally based upon his or her perception and is helpful to the jury's understanding of the testimony' or the determination of a fact in issue" (citation omitted)). Therefore, Davis' statement does not qualify as hearsay and was properly admitted at trial.

Finally, Davis was allowed to testify during cross-

examination about incidents that occurred subsequent to Wilkerson's release. Defendant read a post made by Davis on the social networking site, MySpace, in October 2009:

> Can't stand mother-f---ers that don't got no damn sense; how the f--- you going be a snitch in District Court, no indictment, no plea, nothing; the damn DA don't even got a case; free my nigga, [Gales], ND, only he knows what's going down; the same mother-f---ers scream and snitch ain't got heart to wear no f---ing charge; here it is, real as it get, release papers, yeah, unsufficient evidence;

Defendant also pointed out that Davis posted a copy of the dismissal of Wilkerson's charges on her MySpace page. On redirect examination, the State questioned Davis about why she posted the statement. Davis responded:

> Someone pulled out a gun on [Wilkerson] that night [a month prior to the post] which led to someone else getting shot, and that's when people were calling my phone, writing on MySpace that he was a snitch and that -- as far as me writing the DA part, I wasn't talking about the DA. I was talking about [Sergeant] Womble didn't have a case because he -- and I was saying that [Wilkerson] wasn't a snitch because he didn't get indicted, and he couldn't have been a snitch. He didn't have to take a plea, and he couldn't have been the snitch because it stayed in District Court; and, I copied the release papers and put them on there to prove that he was not a snitch; that's why he got released, because the newspaper, when he got out, said that he was released, that he cooperated with the police; and, they had

> -- like, everywhere on the streets, people wanted to kill him for that. So, I posted that on my page to say that he was released due to insufficient evidence, 'cause that's what that paper says.

On appeal, defendant contends Davis' testimony was error because she described the incident where someone pulled a gun on Wilkerson, that unidentified people called Wilkerson "a snitch," that when Wilkerson was released, the newspaper said he was cooperative with law enforcement and that the dismissal indicated Wilkerson was released for insufficient evidence.

"A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443 (c) (2011). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001). When a defendant elicits a statement on cross-examination, the admission of the statement, if error, is invited error. *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007). After "one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant

had it been offered initially." *State v. Brown*, 64 N.C. App. 637, 645, 308 S.E.2d 346, 351 (1983).

In the instant case, defendant introduced Davis' MySpace post into evidence. Defendant read the post which included references to several of the topics defendant claims should have been excluded, including the discussion of a "snitch" and that there was insufficient evidence against Wilkerson. After reading the post, defendant also pointed out that Wilkerson's charges were dismissed. Since defendant introduced this information into evidence, any error is invited error and is waived for appellate review. Furthermore, while some of the statements Davis made on redirect were not introduced by defendant, they were offered as an explanation of her MySpace post and were therefore admissible. *See id.* The trial court did not err in admitting these statements.

B. Wilkins' Testimony

Wilkins' testimony at trial also included a statement that defendant contends was "supposed eyewitness testimony ... merely disguised [as] hearsay." The testimony was as follows:

> [The State]: Did you ever see anybody doing the shooting?
>
> [Wilkins]: I saw two people – one – like everybody say, he was in the wood – he wasn't in the woods. He was the one on the

side of the house, and my friend saw him with the - that's why I was surprised you all didn't subpoena him.

[The State]: Who is that?

[Wilkins]: Pete Todd.

[The State]: Pete Todd?

[Wilkins]: [Nodding head in the affirmative.] He had came around from the girl house, around the back of the other house. He was standing on the side of the building. [Gales] was in the woods, but - he wasn't - he wasn't in the woods. He was beside the house.

[The State]: So, you're saying [Gales] was in the woods; and, when you're saying he, who are you talking about beside the house?

[Wilkins]: [Defendant]

[The State]: And, when you heard these shots, did you actually see who was doing the shooting?

[Wilkins]: No, I didn't, 'cause I - once [Sadler] said he got shot, I ducked behind my truck, then I saw them running through the woods and came out that way there [pointing]; and, all four of them - some of them split - that's why I told him there were four that I saw walking, those are the four I saw coming in the woods.

...

[Defense Counsel]: Okay. All right. Did you see who was shooting?

[Wilkins]: I saw [Gales]. He was next to the wood fence.

[Defense Counsel]: All right.

[Wilkins]: I didn't see him, but somebody else saw him.

[Defense Counsel]: Okay.

[Wilkins]: He the one that ran from behind the house.

> [Defense Counsel]: Objection, Your Honor. Motion to strike. He's saying he didn't see him, somebody else said they saw him.
>
> [The State]: He asked the question.
>
> [The court]: It's overruled at this point. Let me see counsel up here.
>
> [Following bench conference, which was attended by counsel for both sides and the Court, and which was held out of the hearing of any jurors and the defendant, counsel for both sides resumed their respective seats in the courtroom.]

[Defense Counsel]: You said you saw [Gales] shoot?

[Wilkins]: Pardon?

[Defense Counsel]: You said you saw [Gales] shooting, right?

[Wilkins]: Uh-huh [nodding head in the affirmative.]

[Defense Counsel]: But you didn't see [defendant] shoot?

[Wilkins]: I saw him behind the house. I

> didn't see him shoot. He was behind the house with a white T-shirt on ----
>
> ...
>
> [Defense Counsel]: Okay; but, you didn't see him shooting?
>
> [Wilkins] No.
>
> [Defense Counsel]: Okay.
>
> [Wilkins]: But my friend saw him shooting. He was ----
>
> [Defense Counsel]: Objection, Your Honor.
>
> [The court]: All right. Sustained.

The trial court also granted defendant's motion to strike Wilkins' last statement.

The State elicited statements from Wilkins that his friend, Pete Todd ("Todd"), saw defendant during the shooting. As Todd did not testify at trial, and the statement was offered to prove that defendant was present during the shooting, the statement was hearsay. The State cites no exception, and we can find none, that would indicate Wilkins' statement about what his friend saw was admissible hearsay. Therefore, the trial court erred in overruling defendant's objection and allowing Wilkins to testify about information that he had no personal knowledge of based on statements made to Wilkins by a non-testifying witness.

C. Prejudice

While we agree with defendant that the trial court erred by admitting several of Davis' and Wilkins' statements, defendant must also show that he was prejudiced by these errors.

Although defendant focuses on plain error review in his brief, some of the statements were objected to at trial. "Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893 (2001).

In a criminal case, when a party fails to object to an issue at trial and the issue "is not deemed preserved by rule or law without any such action [it] nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4) (2012); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Plain error arises when the

error is "'so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

In the instant case, there was strong evidence presented that defendant shot Sadler, including the fact that Jones was Gales' and defendant's aunt, but was not related to Wilkerson. Smith, a resident of the neighborhood for twenty years, testified that he saw defendant fire at least four shots. Davis testified that, prior to the shooting, she saw defendant with a gun and heard him say, "let's just get to it." Furthermore, Hewitt heard the shots and subsequently saw Gales and defendant coming from Wilma Street. Defendant told Hewitt, "you ain't see [sic] us." Based on this evidence, we find that even if the errors in question had not occurred, under either standard of review, the jury would not have reached a different verdict.

V. Conclusion

The trial court erred by admitting Gales' statement that Wilkerson did not shoot Sadler since the statement was

inadmissible hearsay, however, it is unlikely the statement prejudiced defendant. The trial court did not err by denying defendant's motion for mistrial. While several statements made at trial were hearsay, and therefore inadmissible, it is unlikely that the statements prejudiced defendant. Therefore, we find no prejudicial error.

No error in part, no prejudicial error in part.

Judges STROUD and McCULLOUGH concur.

Report per Rule 30(e).