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NO. COA11-20
NORTH CAROLINA COURT OF APPEALS

Filed: 20 September 2011

STATE OF NORTH CAROLINA

v.

Wake County
No. 08 CRS 86433

JORDAN GLENN PETERSON

Appeal by defendant from judgment entered 26 March 2010 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 18 August 2011.

Attorney General Roy Cooper, by Assistant Solicitor General John F. Maddrey, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

STEELMAN, Judge.

Where an unavailable witness's statement was not offered for the truth of the matter asserted, but rather to explain how the homicide investigation unfolded and how a suspect was subsequently identified and apprehended, no Confrontation Clause violation occurred. Where defense counsel consented to the jury reviewing certain trial exhibits during deliberations, the trial court did not violate N.C. Gen. Stat. § 15A-1233(b).

I. Factual and Procedural Background

The State presented evidence tending to establish the following facts at trial: Anthony Bowling (Bowling) was the leader of a gang known as the "Nine Trey" set of the Bloods. Other members of the gang included Jordan Peterson (defendant) and Erica Perry (Perry). In October 2008, Perry began to have a sexual relationship with Demetrice Devine (Devine), the leader of another gang known as "Gangster Killer Bloods." Thereafter, Perry spoke to defendant about "flipping sets," *i.e.*, leaving Nine Trey and joining Gangster Killer Bloods under Devine. Defendant stated that he was "not feeling his place" with Nine Trey and also agreed to "flip sets."

On the afternoon of 9 December 2008, defendant called Bowling and informed him of his decision to switch gangs. A heated argument ensued. Two days later, a meeting was set up between defendant and Bowling. At approximately 8:45 p.m. on 11 December 2008, Perry and defendant drove to Bowling's residence. They subsequently drove to Taco Bell, and Bowling stated that he was "not feeling what y'all doing [sic]" in reference to defendant and Perry leaving his gang and that he was "going to

stop [them] by any means necessary." Perry attempted to change the topic of conversation.

Approximately thirty minutes later, Perry dropped defendant and Bowling off in an area known as Thorton Commons. Bowling instructed Perry to return in ten minutes. When Perry returned, she observed defendant running towards her vehicle. Defendant entered the vehicle and stated that Bowling was with his cousin. Perry and defendant drove away. At approximately 10:00 p.m. or 11:00 p.m., Perry and defendant met Devine. Perry heard defendant tell Devine, "it's done."

The next day, 12 December 2008, at approximately 9:30 a.m., law enforcement and rescue personnel were dispatched to Thorton Commons where Bowling's body was found on a path by a man walking his dog. Bowling had been shot five times, including one fatal wound to the back of the head.

During the police investigation, Perry implicated defendant as the perpetrator of the murder. On 26 January 2009, defendant was indicted for first-degree murder. Defendant was tried non-capitally. On 26 March 2010, defendant was found guilty of first-degree murder and was sentenced to life imprisonment without parole.

Defendant appeals.

II. Constitutional Right to Confrontation

In his first argument, defendant contends that the trial court erred by admitting statements made to an investigating officer by Graciela Prosperi when she did not testify at trial and was not subject to cross-examination by defendant in violation of his constitutional right to confront witnesses against him. We disagree.

Graciela Prosperi (Prosperi) was not available to testify at trial because she had moved to Venezuela.¹ Defendant objected to the admission of her statement through Detective Amanda Salmon (Detective Salmon) under the Confrontation Clause of the Sixth Amendment as set forth in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004).

"The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citations omitted). However, "where evidence is admitted for a purpose other than the truth of the matter asserted, the protection afforded by the Confrontation Clause against testimonial

¹ Defense counsel did not contest the unavailability of this witness.

statements is not at issue." *State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333, *disc. review denied*, 359 N.C. 856, 620 S.E.2d 196 (2005).

At trial, the State argued that Prosperi's statement was "not truly offered for the truth of the matter asserted. What it's being used to -- offered as is to show the effect on the detectives to explain why the detectives went to Erica Perry. Why Erica Perry was important in this investigation." The trial court overruled defendant's objection and allowed Detective Salmon to testify as to Prosperi's statement.

Content of Statement

Detective Salmon testified that on 12 December 2008, she received information that occupants of the nearby apartment complex had heard shots fired the night before. Detective Salmon located and spoke with Prosperi, and obtained a cursory statement over the telephone. Prosperi agreed to meet with Detective Salmon to give her a more detailed account of what she had observed.

Prosperi's apartment was located on the second floor of a building directly across from the path where Bowling's body was found. At the time Detective Salmon spoke with Prosperi, police did not have any suspects for the murder of Bowling. Prosperi

told Detective Salmon that she had heard shots fired while she was on the telephone. Prosperi looked out the window and saw a man, dressed in a black jacket with a hood that covered his head, running towards a gold-colored motor vehicle. Prosperi could not see the man's face or the license plate on the vehicle. She was unable to identify the make or model of vehicle, but stated that it was mid-sized and had four doors. Prosperi described the man as young, or around 25 years old, with a height of 5'3" or 5'4" and "medium skinned."

Detective Salmon related this information to other officers involved with the investigation. Detective Salmon stated that this information was "extremely valuable" because of the description of the vehicle involved. This information allowed police to make a connection to Perry.

Detective Salmon testified that the vehicle description was "used afterward when we developed some suspect information to corroborate some of the information we had regarding those identified in this offense." On 13 December 2008 at approximately 2:00 a.m., the police located the vehicle at 4203 Brockton Drive while police were looking for Perry. The vehicle description was used to help find and apprehend Perry.

Admission of Prosperi's Statement at Trial

In *State v. Wiggins*, this Court addressed whether the trial court improperly admitted testimony regarding the statements made by an informant to a deputy sheriff in violation of defendants' constitutional right of confrontation. 185 N.C. App. 376, 383, 648 S.E.2d 865, 870-71, *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007). In *Wiggins*, the informant told the deputy that the defendants would be going to a hotel room the following day "to use and sell drugs" and gave a detailed description of: (1) where the defendants were staying; (2) the vehicle the defendants were driving; and (3) the defendants' physical appearance. *Id.* at 378-79, 648 S.E.2d at 868. This Court stated:

[W]e find no error in the admission of Deputy Duprey's testimony referencing the statements of the informant. The State specifically noted that the statements were not offered for their truth. Rather, the statements were offered to explain how the investigation of Defendants unfolded, why Defendants were under surveillance at the Quality Inn, and why Deputy Duprey followed the vehicle to the Quality Inn.

Id. at 383-84, 648 S.E.2d at 871. We held that because the challenged testimony was not offered for its truth, no *Crawford* violation occurred. *Id.* at 384, 648 S.E.2d at 871; *see also State v. Tate*, 187 N.C. App. 593, 601-02, 653 S.E.2d 892, 898 (2007) (holding that where testimony concerning the identity of

the defendant was not offered for the truth of the matter asserted, but rather to explain subsequent actions undertaken by police officers during the course of the investigation, there was no *Crawford* violation).

In the instant case, the statement from Prospero was not offered for the truth of the matter asserted, but rather was offered to explain how the homicide investigation unfolded and how Perry was subsequently identified and apprehended. Based upon our holdings in *Wiggins* and *Tate*, no *Crawford* violation occurred in the admission of Prospero's statement.

This argument is without merit.

III. Express Consent for Jury to Take
Trial Exhibits to Jury Room

In his second argument, defendant contends that the trial court erred by allowing certain trial exhibits to go to the jury deliberation room in violation of the statutory requirements set forth in N.C. Gen. Stat. § 15A-1233. We disagree.

N.C. Gen. Stat. § 15A-1233 provides, in part, that "[u]pon request by the jury and *with consent of all parties*, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." N.C. Gen. Stat. § 15A-1233(b) (2009) (emphasis added).

Defendant argues that "[t]he record does not show an affirmative consent from both parties to allowing the jury to take exhibits to the jury room." Contrary to defendant's assertion, the record reveals that defendant consented to allow the jury to review the trial exhibits at issue.

During deliberations, the jury requested that it be permitted to review certain evidence admitted as exhibits during trial, including an aerial view of the crime scene, a transcript of Detective Salmon's testimony, and photographs of Bowling's body as it was found by police. The trial court asked whether "the defense [had] any objection to State's Exhibits 1, 2, and 19, all being aerial photographs, all including the crime scene, going to the jury?" Defense counsel answered, "No objection to those, your Honor." The trial court next reviewed the photographs of the decedent, Bowling, and asked defendant "in response to request photos of the decedent at the crime scene as it was found by the CCBI agent, the State has handed up State's Exhibits 3, 4, 5, 14, 15, 18, 22, 21. Any objection to these exhibits going into the jury room?" Defense counsel again answered, "No objection to these, your Honor."

In open court and in the presence of the jury, the trial court reviewed the jury's requests, instructed the jury that the

photographs were admitted for illustrative purposes only, denied their request to review Detective Salmon's testimony, and permitted the jury to take the specified exhibits to the jury deliberation room. After the jury left the courtroom, the trial court asked, "Any objection, correction or addition to any statement made by the judge to the jury in response to these requests?" Defense counsel answered, "Not from the defense, your Honor."

In *State v. Rogers*, this Court addressed the issue of whether the trial court violated N.C. Gen. Stat. § 15A-1233(b) when it permitted two photographs of the alleged crime scene to go to the jury deliberation room. 52 N.C. App. 676, 687, 279 S.E.2d 881, 889 (1981). We held that the defendant "impliedly consented to this action when he failed to object to the jury's request to take the exhibits into the jury room." *Id.* at 688, 279 S.E.2d at 889.

In the instant case, defense counsel was asked on three different occasions by the trial court whether or not defendant objected to the jury reviewing the trial exhibits during deliberations. Defense counsel *expressly* stated on each occasion that defendant had no objection. By so doing, defense counsel gave consent to the jury reviewing the trial exhibits.

The trial court did not violate the statutory requirements of N.C. Gen. Stat. § 15A-1233(b).

This argument is without merit.

NO ERROR.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).