NO. COA12-1441
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

STATE OF NORTH CAROLINA

v. Rowan County
Nos. 09 CRS 56355
09 CRS 56356

ROBERT DOUGLAS EARNHARDT,
Defendant.

Appeal by defendant from judgments entered 30 December 2011 by Judge Kevin M. Bridges in Rowan County Superior Court. Heard in the Court of Appeals 23 May 2013.

Attorney General Roy Cooper, by Special Deputy Attorney General K. D. Sturgis, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

GEER, Judge.

Defendant Robert Douglas Earnhardt appeals from his convictions of voluntary manslaughter and assault with a deadly weapon inflicting serious injury ("AWDWISI"). On appeal, defendant primarily argues that the trial court erred in barring defendant from cross-examining the alleged victim of the AWDWISI offense regarding her pending criminal charges and two

outstanding orders for arrest for failure to appear at hearings on those charges. Defendant contends that those matters were relevant to show the victim's incentive to testify favorably for the State. Assuming, without deciding, that the trial court erred in not permitting the requested cross-examination, we hold that any error was harmless beyond a reasonable doubt given the substantial other evidence showing the victim's bias against defendant, the impeaching cross-examination of the victim permitted by the trial court, and the weight of evidence of defendant's guilt.

Facts

The State's evidence tended to show the following facts. In September 2009, Patty and Billy Elmore lived at 165 Leisure Lane in Salisbury, North Carolina, together with defendant who is Patty's adult son. Billy was an alcoholic. On four or five occasions in late 2005 and early 2006, defendant told his then girlfriend that he "couldn't stand the way that [Billy] treated his mother and spoke to his mother, [and] that he would kill him one day when he could figure a way to get away with it." Similarly, several times in 2008, defendant got very upset in front of a different girlfriend because of how Billy beat and verbally abused Patty. Defendant told her that he "wish[ed] he could get a gun and shoot [Billy]."

In early September 2009, Billy, who wanted a divorce from Patty, left the Leisure Lane house and moved in with his son, Brian Maynor, and Brian's wife, Tiffany Maynor. However, Billy left his dog in an outdoor kennel at the Leisure Lane house.

On 16 September 2009, defendant told a neighbor that Billy had moved out and had stolen all of the furniture from the Leisure Lane house. Defendant told the neighbor that defendant "was going to call Billy and tell him that he was going to take a chain saw and saw the boat in half and ask Billy what half he wanted." Defendant also reported that Billy had "beat the crap out of Patty, beat her beyond recognition" and that defendant "was going to kill Billy" by shooting him. When, however, the neighbor next saw Patty after defendant made those statements, the neighbor saw no sign of any bruises or injuries on Patty's face.

On 17 September 2009, Tiffany drove Billy back to the Leisure Lane house to get Billy's dog. They arrived at about 8:00 p.m., and Billy got out with a bag of dog food and walked through the yard toward the dog. Tiffany heard yelling, so she got out of the Explorer to make sure Billy was all right. Patty met Tiffany in the yard, cursed at her, told her to leave, and then hit Tiffany with a chainsaw chain tied to a rope.

At that point, defendant, who was standing roughly 20 yards away from Patty and Tiffany, fired a 12-gauge shotgun loaded with buckshot. The buckshot struck Tiffany's left hand and forearm, and Tiffany got back in her Explorer. When Tiffany heard another gunshot, she drove to the nearby Tamarac Marina to get help.

After firing the shot that hit Tiffany, defendant quickly reloaded the 12-gauge shotgun with a Sabot slug shell. A sabot slug is a one-ounce piece of lead that is fired from a shotgun. The slug remains whole rather than breaking up and spraying like buckshot. Defendant, who was behind Billy, fired the slug into Billy's head. A neighbor of the Leisure Lane house heard both of defendant's shots and then heard defendant's brother scream, "Why did you shoot him? You didn't have to shoot him."

Officers with the Rowan County Sheriff's Office responded to 165 Leisure Lane, found Billy's body, and spoke to defendant who was sitting on a bench in the yard. Defendant told the responding officers that Tiffany and Billy attacked Patty in the yard. Defendant claimed that he came up behind Billy and Tiffany and fired a warning shot into a vacant lot and, if Tiffany was hit, it could have been by that shot. According to defendant, he then saw Billy raise a shotgun at Patty, and defendant shot Billy reflexively. Defendant reported that

Tiffany took the shotgun that Billy had pointed at Patty and fled with it. Defendant also showed Lieutenant Chad Moose of the Rowan County Sheriff's Office where defendant, Billy, and others were standing when the shootings occurred.

As Tiffany drove to Tamarac Marina, she lost lots of blood, was dizzy, and "felt like [she] was going in and out." Tiffany parked in front of the marina, ran inside, and was taken to a bathroom by people inside the marina to wait for an ambulance. Tiffany asked an acquaintance, Ashli Honeycutt, to get her cell phone from the Explorer. Ms. Honeycutt relayed the request to a responding firefighter who got a white bag from the marina, then retrieved the cell phone from the car, put it in the bag, and gave the bag to Ms. Honeycutt. The firefighter noticed nothing else in the vehicle.

At some point, a different firefighter and the owner of the marina roped off the Explorer with caution tape. Responding officers later further secured the Explorer. Officers searched the Explorer and did not find any guns.

Tiffany was taken to a hospital with nine broken bones in her hand and wrist. She was hospitalized for two weeks during which doctors "restructured [her] hand." Tiffany ultimately had six surgeries on her left hand, but still completely lost the use of that hand.

Sometime after midnight on the night of the shootings, defendant went to an ex-girlfriend's house, told her that there was a big argument, that he accidentally shot Tiffany while firing a warning shot, and that "he fired another shot to try to get Billy off the property and Billy walked right into the shot and he got shot in the head." Defendant was drinking while telling the story and was laughing and smiling "like it didn't even bother him."

On 18 September 2009, Detective Adam Loflin of the Rowan County Sheriff's Office met with Patty in order to document and photograph any injuries on her person. However, Detective Loflin did not observe any injuries on Patty. On 30 September 2009, at Lieutenant Moose's request, a dive team searched the water under the bridge over which Tiffany drove to get to the Tamarac Marina in order to find any gun she may have thrown over the bridge. The team found no gun.

Dr. Thomas Owens performed an autopsy on Billy and determined that Billy's death was caused by a shotgun wound to the head. Dr. Owens also observed a wound on the back of Billy's head, unrelated to the shotgun wound, which consisted of some blunt force trauma characteristics as well as cuts and scrapes. That wound would have been inflicted at about the same time as the shotgun wound. Additionally, Dr. Owens observed a

blunt force injury on Billy's back inflicted by a "rounded rod-like object" -- this third wound was also suffered at about the same time as the shotgun wound.

On 28 September 2009, defendant was indicted for first degree murder of Billy and AWDWISI for shooting Tiffany. Defendant and Patty both testified at trial and their testimony tended to show the following. During the summer of 2009, Billy repeatedly verbally and physically abused Patty and defendant by, among other things, threatening to shoot and kill them. According to defendant, Billy owned a 12-gauge pump shotgun and other guns.

Defendant's and Patty's testimony further tended to show that on 5 September 2009, defendant learned that Billy had thrown liquor into Patty's face, causing an infection, and when defendant confronted Billy about it two days later, Billy tried to hit defendant, causing defendant to punch Billy in the nose. On 8 September 2009, Billy was drunk and Billy, Brian Maynor, and Tiffany Maynor beat up defendant, giving defendant a "busted nose," a bloody lip, and knots on his head. Defendant ran from them, and Billy told defendant he was going to kill defendant when he got the chance. Defendant attempted to take out a warrant against Billy on 8 September 2009, but he was told that he could not do so because Billy had taken a warrant out on

defendant earlier that day and defendant had to first be served with that warrant before taking one out on Billy himself.

Following the 8 September 2009 attack, defendant and Patty moved into defendant's brother's house in an attempt to hide from Billy. While Patty and defendant were staying with defendant's brother, Billy called and said he knew where they were and then "described things in the yard that he would only know if he had be[en] there." This conversation made defendant nervous. From 9 September 2009 up until 17 September 2009, defendant called the Sheriff's Office daily regarding Billy.

On 12 September 2009, after four days, defendant and Patty moved back to the Leisure Lane house when Billy called Patty and told her he was moving out. However, Billy had taken all of Patty's and defendant's possessions from the house, and the words "'F you'" were written on a mirror and on an outer building. Defendant called the police, but was unable to file a police report for the missing items. On 15 September 2009, defendant was served with a summons regarding the warrant Billy had taken out against him, and on 16 September 2009, defendant took out warrants regarding the 8 September 2009 attack. Also on 16 September 2009, Patty took out a domestic violence protective order against Billy because she was "really scared."

That same day, Billy had the power cut off at the Leisure Lane house.

With respect to the night of the shooting, 17 September 2009, defendant testified that after Billy and Tiffany arrived, he went outside, took a shotgun from his brother, and told his brother to call 911. After Tiffany said Billy wanted to feed his dog, Patty and defendant told Billy and Tiffany to leave because there was a domestic violence protective order against Billy. Tiffany then said she was going to "whip [Patty's] butt" and started hitting Patty. Billy also approached Patty and started hitting her.

According to defendant, he then loaded the shotgun without knowing what type of shells he was using. Defendant aimed the shotgun across the street at a vacant lot and pulled the trigger to fire a warning shot, but the gun did not go off. Defendant, still aiming at the vacant lot, pulled the trigger a second time, and the shotgun fired. Defendant claimed he was aiming 15 or 20 feet away from Patty, Tiffany, and Billy, and the gun was either level to the ground or angled slightly downward when defendant fired this shot. He did not aim into the air because "it's a residential area," and "[p]ellets come down once you shoot them up."

Defendant testified that Billy kept hitting Patty despite the gunshot. Billy knocked Patty to the ground and then raised a shotgun up to shoot her. According to defendant, he thought Billy was about to kill Patty, so he fired a shot high in Billy's direction. He claimed that after Billy fell, Tiffany picked up Billy's gun, got back in the Explorer, and left. Defendant then sat and waited for law enforcement to arrive.

Patty testified that on the night of the shooting, when Tiffany began to hit her, Patty defended herself with a chainsaw chain attached to a rope -- a tool in the yard that defendant used in his tree cutting business. Tiffany ran back towards the Explorer, and Billy then began hitting Patty in the arms. Patty did not, however, attempt to defend herself against Billy with the chainsaw chain. After Billy threw Patty to the ground, Patty heard a gunshot, and Billy fell. Although defendant asked Patty if she had seen the gun Billy was holding, Patty never saw Billy with a gun.

Defendant also presented the testimony of two people who were standing outside the Tamarac Marina when Tiffany arrived. Neither person knew defendant. The two people testified that they saw a man walk up to Tiffany's unattended Explorer and remove something from the floorboard. The man placed the item

in a towel or a bag and then walked past them shielding the object from their view by holding it closely to his side.

The jury found defendant guilty of voluntary manslaughter and AWDWISI. In connection with the AWDWISI conviction, defendant pled guilty to the aggravating factor that the injury inflicted upon the victim was permanent and debilitating. The trial court sentenced defendant to a presumptive-range term of 64 to 86 months imprisonment for voluntary manslaughter and to a consecutive, aggravated-range term of 31 to 47 months imprisonment for AWDWISI. Defendant timely appealed to this Court.

I

Defendant first argues that the trial court violated defendant's Sixth Amendment right to confrontation under the United States Constitution by sustaining the State's objection to defendant's cross-examining Tiffany about criminal charges she had pending in Rowan County and about outstanding orders for her arrest ("OFAs") resulting from her failure to appear at hearings on those charges. Defendant contends these matters showed that Tiffany had an incentive to testify favorably for the Rowan County District Attorney's Office in defendant's trial in order to avoid being arrested pursuant to the OFAs and prosecuted on the pending charges.

The Sixth Amendment right to confrontation generally protects the right of a criminal defendant to cross-examine a State's witness about the existence of pending charges in the same prosecutorial district as the trial in order to show bias in favor of the State, since the jury may understand that pending charges may be used by the State as a "weapon to control the witness." *State v. Prevatte*, 346 N.C. 162, 164, 484 S.E.2d 377, 378 (1997). However, this right is limited by the rule that "cross-examination guaranteed by the Confrontation Clause is '[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation.'" *State v. McNeil*, 350 N.C. 657, 677, 518 S.E.2d 486, 499 (1999) (quoting *Davis v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 353, 94 S. Ct. 1105, 1110 (1974)).

During trial, defendant proffered to the court certified copies of documents showing that on 2 March 2011, Tiffany was arrested in Rowan County for driving while her license was revoked ("DWLR"), for displaying a revoked license, for driving with no insurance, and for using a fictitious registration plate. She failed to appear at court dates on 3 May 2011 and 6 September 2011, and an OFA was issued on each date.

During cross-examination on 12 December 2011, Tiffany testified that she met with the prosecutor in defendant's case

during "the first part of November" 2011 and that she and the prosecutor did not discuss any outstanding OFAs. Defense counsel presented Tiffany with defense exhibits 12 through 17 that defense counsel, in a hearing outside the presence of the jury, stated were certified copies of Tiffany's citations and OFAs.[1] The trial court sustained an objection to the following cross-examination question: "And those documents are reference [sic] to charges you have in Rowan County; is that correct?" The court further sustained objections to several additional questions regarding the pending charges, court dates, and OFAs.

In a hearing outside the presence of the jury, defense counsel argued that he should be allowed to cross-examine Tiffany on her failures to appear and the OFAs since they showed her disregard for the law and because the fact that she had not yet been served with the OFAs, despite having met with the prosecutor, suggested that Tiffany was receiving concessions from the State or had made a deal with the State. Defense counsel further contended that the outstanding OFAs constituted

[1]The record on appeal does not include defense exhibits 12 through 17. In his brief, defendant asserts that defense exhibits 12 through 17 "were not preserved for the record as marked. However, certified copies of documents concerning the referenced charges were later marked and preserved for appellate review as Defense Exhibits 29 and 30." Because of our disposition of defendant's argument on appeal, we may assume that defense exhibits 12 through 17, used by defense counsel during cross-examination, are the same documents constituting defense exhibits 29 and 30, which are included in the record.

"a weapon of control over [Tiffany] to testify the way that is preferable to the State." The prosecutor responded that the district attorney's office "does not serve orders for arrest in any case that [she was] aware of." The court sustained the State's objection to any reference to pending charges or OFAs, but permitted defendant to cross-examine Tiffany about prior convictions.

In a hearing during trial, but five days after Tiffany testified, defendant moved the admission into evidence of defense exhibits 29 and 30. Defendant repeated his arguments that the exhibits should be admitted so he could argue to the jury that Tiffany was biased in favor of the State. Defense counsel made the further argument that, given Tiffany's prior conviction level, she faced jail time for both the DWLR and driving with no insurance charges. The court ruled that its "original ruling stands" and sustained the State's objection to the evidence.

Even assuming, without deciding, that the trial court erred in sustaining the State's objection to defendant's attempts to cross-examine Tiffany about the pending charges and OFAs, we hold that any error was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2011).

In *State v. Hoffman*, 349 N.C. 167, 180-81, 505 S.E.2d 80, 88-89 (1998), our Supreme Court held that the trial court's error in excluding cross-examination of a State's witness regarding a pending criminal charge was harmless beyond a reasonable doubt. The witness in *Hoffman* was a relatively unimportant corroborating witness, and the defendant had thoroughly impeached the witness on cross-examination by eliciting that the witness had previously made a living "robbing drug dealers," that he had drug-related criminal convictions in multiple states, that he had roughly 30 convictions for DWLR, and that he had been convicted of giving fictitious information to an officer. *Id.* The witness further admitted that he had fired a sawed-off shotgun at a woman who insulted him, had stolen a ring from his father, and had made several prior inconsistent statements. *Id.* at 181, 505 S.E.2d at 89. This impeachment, combined with the State's substantial evidence of the defendant's guilt, resulted in the Court's concluding that any error in limiting the cross-examination was harmless beyond a reasonable doubt. *Id.*

Similarly, in *McNeil*, 350 N.C. at 680, 518 S.E.2d at 500, the Supreme Court also concluded that any error in barring the defendant from asking a State's witness about unresolved warrants was harmless beyond a reasonable doubt. The witness'

testimony was not critical to finding the defendant guilty because the witness testified during a capital sentencing hearing. In addition, the defendant "thoroughly impeached [the witness] regarding her prior inconsistent statements and prior convictions," and the witness admitted that she had initially lied to the police. *Id.*

In this case, Tiffany was not a minor witness, but her role in the pertinent events was such that even without any evidence of pending charges, a jury would understand that she had a strong incentive to testify against defendant and favorably for the State. Tiffany was a daughter-in-law of the alleged murder victim and was a victim herself: defendant shot Tiffany in the hand and forearm with a shotgun, leaving her with a painful and permanently debilitating injury. In addition, defendant presented evidence (1) that Tiffany participated in an attack on defendant on 8 September 2009, and defendant took out warrants as a result of the attack, (2) that Tiffany helped Billy remove defendant's property from the Leisure Lane house, and (3) that Tiffany attacked defendant's mother on the night of the shooting.

Moreover, defendant was able to further impeach Tiffany by asking her about her prior convictions for obstruction of justice, breaking and entering, using a "fictitious tag," and

obtaining property by false pretenses. In addition, Tiffany admitted that she had taken Klonopin, an anxiety medication, and Methadone, a drug she took as treatment for opiate addiction, prior to the shooting, an admission corroborated by an emergency room report stating she had "[b]enzos," marijuana, and opiates in her system when she was admitted after the shooting.

In addition, as in *Hoffman*, Tiffany's testimony was not critical to a finding of defendant's guilt. Defendant admitted shooting Tiffany and Billy, and his own evidence gave him a strong motive for killing Billy: Billy's continuous physical and verbal abuse of Patty and defendant throughout the summer of 2009; Billy, his son, and Tiffany's beating defendant on 8 September 2009; and Billy's stealing defendant's and Patty's property, including equipment for defendant's business, on 12 September 2009. While he claimed Tiffany was hit accidentally and he shot Billy in defense of his mother, defendant's mother testified that she did not see Billy with a gun and that Billy had used both hands to hit her. He could not, therefore, have been holding a shotgun in one of his hands, as defendant testified. In addition, although defendant testified that Tiffany picked up the shotgun and fled, his mother testified that Tiffany had run to her Explorer before defendant had shot Billy. Defendant's own evidence -- his mother's testimony --

was, therefore, inconsistent with his claim that he shot Billy because Billy was about to shoot Patty.

In addition, the State's evidence showed defendant made multiple statements to two different ex-girlfriends prior to the shooting that he either planned to or wished he could kill Billy. A neighbor similarly testified that the day before the shooting, defendant told her he was going to kill Billy. Further, a neighbor heard defendant's brother scream, after two shotgun blasts, "'Why did you shoot him? You didn't have to shoot him.'" Then, one of defendant's ex-girlfriends testified that after midnight on the night of the shooting, defendant came to her house and drank, laughed, and smiled, "like it didn't even bother him," while telling the story of the shootings.

In sum, while Tiffany was a central figure in the events and not a minor witness, her evidence was not critical to a finding that defendant was guilty. Defendant's own evidence was inconsistent with his defense and provided him with ample motive to kill Billy, while the State presented overwhelming evidence suggesting that defendant had intentionally killed Billy. In addition, defendant thoroughly impeached Tiffany by asking her about prior convictions and presenting evidence of her participation in the events that led up to the shooting.

The jury had before it compelling reasons to believe that Tiffany would have an incentive to testify favorably for the State even in the absence of questions about the pending charges and OFAs. We, therefore, hold that any error was harmless beyond a reasonable doubt. *See also State v. Reaves*, 132 N.C. App. 615, 621-22, 513 S.E.2d 562, 566 (1999) (holding court's error in not permitting cross-examination about State's witness' pending charges was harmless beyond a reasonable doubt since witness' testimony was merely cumulative given that testimony of other witnesses also established that defendant was a participant in shooting, that shooting caused damage inside and outside house, and that defendant had intent to kill).

II

Defendant next argues that the trial court erred by not allowing defendant to testify that Billy had bragged to defendant that Billy broke an ex-girlfriend's jaw. Defendant contends that "the evidence offered by the defense was not offered to show that Billy actually broke his girlfriend's jaw, but to show that Defendant's fear that Billy would hurt Patty was honest and reasonable" and that "[t]he evidence was particularly relevant because the alleged prior act was committed against Billy's romantic partner at the time."

"[E]vidence of specific acts of violence by the victim of which the defendant had knowledge" may be admissible as evidence "for the purpose of 'explaining and establishing defendant's reasonable apprehension' of the victim" when a defendant claims self-defense. *State v. Jordan*, 130 N.C. App. 236, 243, 502 S.E.2d 679, 683 (1998) (quoting *State v. Mize*, 19 N.C. App. 663, 665, 199 S.E.2d 729, 730 (1973)). "This logically extends to defense of others, which was defendant's justification in the case *sub judice*." *State v. Stone*, 73 N.C. App. 691, 694, 327 S.E.2d 644, 646-47 (1985).

Even assuming the trial court erred in excluding the evidence of Billy's boast, defendant had already presented testimony by both Patty and defendant that throughout the summer of 2009, Billy verbally and physically abused them. Defendant and Patty also testified that Billy made multiple threats to kill Patty and defendant with a shotgun in the summer of 2009, and defendant knew of these threats. Patty testified that on 5 September 2011, Billy threw liquor in her eyes, causing an infection, an incident about which defendant knew. Defendant and Patty both further testified that on 8 September 2009, Billy and others beat up defendant leaving him with head injuries.

Given all of this evidence of Billy's violence towards Patty and defendant during the summer of 2009, we cannot

conclude that, if defendant testified that Billy bragged about breaking an ex-girlfriend's jaw, then there is a reasonable possibility the jury would have reached a different verdict. *See State v. Caudle*, 58 N.C. App. 89, 92, 293 S.E.2d 205, 207 (1982) (holding second degree murder defendant was not prejudiced by any error in exclusion of defense witness' testimony that witness "once had to shoot the deceased to keep from being cut by him," since defendant testified "that he had heard that the deceased had been shot in a previous incident and presented evidence of the reputation of the deceased as being a violent and dangerous man"). The trial court did not, therefore, commit prejudicial error in excluding the evidence.

III

Defendant next points to the testimony of the two people -- Terry Settlemyer and Calvin Byerly -- who were at the Tamarac Marina when Tiffany arrived there. Defendant asserts that the trial court erred by sustaining the State's objection to Mr. Byerly's testimony that the man who retrieved an object from the Explorer was "hiding" the object from Mr. Byerly and Ms. Settlemyer.

Defendant argues that Mr. Byerly's testimony was permissible lay opinion under Rule 701 of the North Carolina Rules of Evidence because it was merely a shorthand statement of

fact. Our Supreme Court "'has long held that a witness may state the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons . . . derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of facts.'" *State v. Alexander*, 337 N.C. 182, 191, 446 S.E.2d 83, 88 (1994) (quoting *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975), *sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210, 96 S. Ct. 3210 (1976)). However, "a lay witness 'may not give his opinion of another person's intention on a particular occasion.'" *State v. Hurst*, 127 N.C. App. 54, 63, 487 S.E.2d 846, 853 (1997) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence*, § 129 (3d ed. 1988)).

Here, Mr. Byerly testified that he could not see what the man who retrieved an object from the Explorer was holding on the side of his leg because the man "was hiding it from us." By testifying that the man "was hiding" the object, Mr. Byerly improperly testified as to the man's intent in holding the object in a certain manner. The trial court, therefore, properly sustained the State's objection to the testimony. *See Id.* at 62, 63, 487 S.E.2d at 853 (holding testimony that defendant "'ain't really wanted to'" do something, but was

bullied into doing it, was properly excluded since it was "a statement of [the witness'] opinion that the defendant may not have originally intended to participate in the plan"). *See also State v. Sanders*, 295 N.C. 361, 369, 370, 245 S.E.2d 674, 680-81 (1978) (holding trial court properly excluded testimony of witnesses that "in their opinion, the officers went into the cell for the purpose of beating up defendant" because "it d[id] not appear that these witnesses were in any way more qualified than the jury to conclude what the officers intended to do at that time").

Defendant relies on *State v. Loren*, 302 N.C. 607, 276 S.E.2d 365 (1981), and *State v. Howard*, ___ N.C. App. ___, 715 S.E.2d 573, *disc. review denied*, 365 N.C. 368, 719 S.E.2d 44 (2011), as supporting his argument. However, in each of those cases, the witness testified regarding his own perception of what the other person was doing and not regarding what the other person actually intended. *See Loren*, 302 N.C. at 610, 276 S.E.2d at 367 (holding that lay opinion testimony that it "looked like" other person intended to hide something was admissible); *Howard*, ___ N.C. App. at ___, 715 S.E.2d at 578 (finding lay opinion testimony proper when witness testified that "it appeared" other person attempted to hide something). By contrast, Mr. Byerly testified directly that the man he saw

"was hiding" an object. Such testimony was improper since Mr. Byerly had no personal knowledge of what the man actually intended in holding the object as he did. *See Hurst*, 127 N.C. App. at 63, 487 S.E.2d at 853. Accordingly, we hold the trial court did not err in excluding Mr. Byerly's testimony.

IV

Defendant contends that the trial court erred in denying his motion to dismiss the AWDWISI charge for insufficient evidence that he intentionally shot Tiffany. "'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.'" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

N.C. Gen. Stat. § 14-32(b) (2011) provides that "[a]ny person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon." "'The elements of a charge under G.S. § 14-32(b) are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death.'" *State v. Ryder*, 196 N.C. App. 56, 66, 674 S.E.2d 805, 812 (2009) (quoting *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990)).

Defendant argues only that the State failed to present sufficient evidence to establish the element of assault. "An assault is 'an overt act or attempt, with force and violence, to do some immediate physical injury to the person of another, which *show of force or violence* must be sufficient to put a person of reasonable firmness in fear of immediate physical injury.'" *State v. Childers*, 154 N.C. App. 375, 382, 572 S.E.2d 207, 212 (2002) (quoting *State v. Haynesworth*, 146 N.C. App. 523, 529, 553 S.E.2d 103, 108 (2001)).

Here, when the evidence is viewed in the light most favorable to the State, defendant, standing 20 yards away, fired a shotgun loaded with buckshot sufficiently directed towards Tiffany to strike her hand and forearm. Although defendant denied aiming the shotgun at Tiffany, he admitted aiming it "straight across" in a direction 15 feet away from Tiffany -- he

shot level to the ground or slightly downward. Given that defendant was shooting buckshot, which, as the State showed, disperses outward as the pellets fly from the barrel and given defendant acknowledged that Tiffany could *not* have been shot by pellets bouncing off of a building or anything else, we hold that defendant's show of force was sufficient to put a person of reasonable firmness in fear of immediate physical injury. *Id.*

The trial court, therefore, properly denied the motion to dismiss the AWDWISI charge. *See State v. Newton*, 251 N.C. 151, 155, 110 S.E.2d 810, 813 (1959) ("Defendant's guilt does not depend upon whether, before firing his rifle, he took precise aim at the jeep or any occupant thereof. It is an assault, without regard to the aggressor's intention, to fire a gun at another or in the direction in which he is standing." (internal quotation marks omitted)); *State v. Starr*, 209 N.C. App. 106, 111-12, 703 S.E.2d 876, 880 (holding trial court properly denied motion to dismiss assault charge when defendant fired shots at door to send warning to people on other side and fired shot "in the direction of the firefighters" after they forced door open), *aff'd as modified on other grounds*, 365 N.C. 314, 718 S.E.2d 362 (2011); *Childers*, 154 N.C. App. at 382, 572 S.E.2d at 212 (holding, with respect to assault charge, that "[t]he State need not prove, as defendant contends, that he pointed a firearm at a

law enforcement officer; rather, the State need only prove that defendant put on a show of force or violence sufficient to put a person of reasonable firmness in fear of immediate physical injury").

V

With respect to the closing arguments, defendant contends that the trial court should have intervened *ex mero motu* during the State's closing argument. "'The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu.*'" *State v. Taylor*, 362 N.C. 514, 545, 669 S.E.2d 239, 265 (2008) (quoting *State v. McNeill*, 360 N.C. 231, 244, 624 S.E.2d 329, 338 (2006)). "'Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.'" *Id.* (quoting *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001)).

First, defendant contends that the State made a grossly improper closing argument when the prosecutor stated that

defendant initially told an officer at the scene he was only a few feet behind Billy when he shot him, but then changed his story for trial. The State argued to the jury:

> What did the defendant tell Lieutenant Moose on the scene? He said he was only a few feet behind Billy. Only a few feet behind Billy. But then he told you he was probably about 20 feet later on. If the defendant is only a few feet behind Billy, why wouldn't he have been able to see this shotgun? Again, we're not talking about a handgun, we're talking about a shotgun. The defendant said in his statement to Sergeant Owens that he couldn't see the shotgun because he was on Billy's left side and Billy was able to shield the shotgun on his right side while he and Tiffany were beating his mom with fists.

Lieutenant Moose testified that on the night of the shooting, he asked defendant to reenact the events leading up to the shooting, and defendant did so. At the scene, Lieutenant Moose asked defendant where he was standing and defendant "indicated" to Lieutenant Moose "a general area." When asked at trial where that general area was located, Lieutenant Moose testified, "It was -- once you cross into the yard, it's beyond the picnic table, *a few feet behind where the victim was lying* . . . ." (Emphasis added.)

Defendant contends that the State's argument was improper because, while the State asserted that defendant "said" he was only a few feet behind Billy, "[i]t was Lieutenant Moose himself

who characterized this distance as 'a few feet behind where the victim was lying.'" We disagree. A jury could reasonably infer from Lieutenant Moose's testimony that defendant had indicated to Lieutenant Moose that he was standing only a few feet behind Billy. Although defendant also points to Lieutenant Moose's testimony on voir dire that a "few feet" in his mind meant more than one and less than 100, and it could mean 12 feet, that testimony was not given before the jury. The State's argument was sufficiently supported by Lieutenant Moose's actual trial testimony and, therefore, the trial court did not err in failing to intervene.

Second, defendant contends that the State made a grossly improper assertion in its closing argument that Dr. Owens testified that the autopsy findings showed that defendant was two to five feet away when he shot Billy. The State argued in closing:

> Dr. Owens . . . said the injury to the head is consistent with the slug since he saw the one large hole because it came in, as he said, in one large mass. He said his opinion was that Billy was shot two to three feet, maybe at the five feet [sic] from the end of the barrel. So you can judge based on his expert opinion in viewing the shotgun how far away that would be. It's pretty close.

At trial, Dr. Owens testified that the wound to Billy's head was "consistent with a shotgun or a very high-powered

rifle." He further testified that, given the wound, he knew the projectile that entered Billy's head "came in as one large mass." Dr. Owens then testified:

> And depending on exactly what it was loaded with, *those pellets or slug or whatever is in that gun is still travelling as one unit and then spreads out later. That's going to be within a couple of feet. And by "a couple," I mean it could be anywhere from two or three up to as much as about five.* When you get beyond that in a shotgun that has pellets like buckshot or whatever, there's multiple little balls in there. They enter separately and make multiple holes at the entry point. *I do not have that, so this is going to be relatively close, within two to three feet, maybe as much as five.* But I don't know exactly, without having that weapon and having test-fired it and all that, to get any more accurate than that.
>
> Q. Are you able to form an opinion whether the injury sustained by [Billy] *would be consistent with being caused by a slug*?
>
> A. *That was a possibility initially, because I do have one large hole. And when it exits out, just because of the destructive nature, I can't tell if there was one object or multiple objects leaving his head. So it is consistent with a shotgun. The exact ammunition I don't know because I didn't recover any of the projectiles or pellets from that wound.*
>
> . . . .
>
> Q. And what, again, did you say about the exit wound or wounds that you observed as far as their location specifically?

> A. There is no single easily identifiable one exit wound. There are multiple fragments that when they reapproximate do not produce any single hole. And it's a very large hole -- again, 11 inches by -- I think it was about four inches high across the left side of the head.
>
> And, again, *that would speak to there being several projectiles like a buckshot or something in that that tried to exit and had begun to spread producing multiple closely arranged exits on that left side.* And, of course, that just sort of tore and became one big huge wound.

(Emphasis added.)

On cross-examination, in response to a question whether it is "difficult to positively say what the distance was when a slug is used in the shotgun," Dr. Owens testified:

> Beyond a couple of feet, yes. A slug is -- well, shotgun wounds, in general, are harder to estimate. But with a slug, you're looking at one big chunk of metal, not multiple pieces. So instead of being buckshot or bird shot where you got six, eight, ten or several hundred little bitty balls of lead, you got one big chunk. And as it comes out, it's going to travel as one big chunk. When it hits the body, especially with bone or something, it may start to break up, but there's not really going to be spread. Like if you back away, it's not going to spread out and get multiple holes. It's always one big chunk going in, so that distance becomes harder to estimate with a slug.

Dr. Owens further responded affirmatively to the question, "And if you were given the history that a slug was used to kill

[Billy], that certainly would affect your determination of the distance of the shot?" Defendant testified at trial that he was 20 feet away from Billy when he shot him.

Based on this testimony, defendant argues that "although Dr. Owens believed a slug could have caused the injury, his two-to-five-foot estimate of how far away the shotgun was from the wound was based on how much pellets spread as they leave the barrel." Defendant further contends that while Dr. Owens initially testified regarding "pellets or slug or whatever" that "spread[] out" after being fired from a shotgun, the remainder of Dr. Owens' testimony demonstrated that only pellets "spread[] out" after being fired.

Our review of the transcript reveals that defendants' argument accurately reflects Dr. Owens' testimony. Further, the State argued in closing that, based on the physical evidence, "Billy is hit with the slug that tears through the back of his head out the front. Tiffany's injury is consistent with the spent buck because she had all these holes in her arm."

Thus, as defendant contends, the State's argument that Billy was hit by the slug, made together with its argument that Billy was shot from a distance of two to five feet, improperly implied to the jury that Dr. Owens' distance estimate of two to

five feet applied even if the projectile that hit Billy was a slug. The State's argument was, accordingly, misleading.

Assuming, without deciding, that the argument was so grossly improper that it required *ex mero motu* intervention, the question remains whether any gross impropriety of the State's argument was prejudicial. *See State v. Sanders*, 201 N.C. App. 631, 640, 687 S.E.2d 531, 538 (2010) ("'To constitute reversible error: the prosecutor's remarks must be both improper and prejudicial.'" (quoting *State v. Nguyen*, 178 N.C. App. 447, 457, 632 S.E.2d 197, 204 (2006))). "'Improper remarks may be prejudicial either because of their individual stigma or because of the general tenor of the argument as a whole.'" *Id.* (quoting *Nguyen*, 178 N.C. App. at 457, 632 S.E.2d at 204).

Here, there was overwhelming evidence of defendant's guilt of voluntary manslaughter, the only conviction defendant contends was impacted by the improper closing argument. Defendant admitted at trial that he shot and killed Billy, and his only defense was that he did so to defend Patty. However, two of the State's witnesses testified that defendant told them in the years prior to the shooting that he would kill Billy when he could figure out how to get away with it or that he wanted to kill Billy because of the way Billy treated Patty. Defendant's

neighbor testified that the day before the shooting, defendant told her he was going to shoot and kill Billy.

While defendant claimed Billy was holding a shotgun directed at his mother, his mother testified that Billy was hitting her with both hands, and she saw no gun. Following the shootings, a neighbor heard defendant's brother scream, "Why did you shoot him? You didn't have to shoot him." Moreover, while defendant shot Tiffany with buckshot, he used a slug when shooting Billy -- a projectile much more likely to kill Billy.

Despite searching by law enforcement, no evidence of a gun held by Billy was ever found, and defendant's own evidence was inconsistent with his claim that Tiffany grabbed the gun and disposed of it. Defendant's mother's testimony indicated that at the time defendant shot Billy, Tiffany had already started running to the Explorer and was not in a position to pick up any gun. Finally, another witness testified that after midnight on the night of the shooting, defendant came to her house and laughed and smiled, "like it didn't even bother him," while telling her about the shootings.

Given the weight of evidence of defendant's guilt, defendant cannot show prejudice from the State's improper argument. *See State v. Rush*, 196 N.C. App. 307, 311, 674 S.E.2d 764, 768 (2009) (holding that, even assuming State's closing

argument was grossly improper, argument was not prejudicial since State presented "overwhelming evidence" of defendant's guilt and it was "unlikely that [prosecutor's] statements impacted the jury's verdict").

VI

Defendant's final argument is that the cumulative effect of the trial court's error in (1) failing to permit defendant to cross-examine Tiffany regarding any pending charges, (2) failing to permit defendant to testify that Billy bragged to defendant about breaking Billy's ex-girlfriend's jaw, and (3) excluding Mr. Byerly's testimony that the man who retrieved an object from the Explorer was hiding the object, deprived defendant of his due process right to a fair trial free from prejudicial error.

When reviewing any cumulative prejudice from multiple errors asserted by the defendant on appeal, the question for this Court is whether the errors, "taken as a whole, deprived defendant of his due process right to a fair trial free from prejudicial error." *State v. Canady*, 355 N.C. 242, 254, 559 S.E.2d 762, 768 (2002). We have already held that the trial court did not err in excluding Mr. Byerly's testimony that the man who retrieved an object from the Explorer was hiding the object. Thus, we review defendant's argument concerning

cumulative error only in regard to the other two issues argued by defendant.

Given the State's evidence, defendant's statements to the police, defendant's own evidence, together with the extensive evidence defendant was allowed to present to attack Tiffany's credibility and to show Billy's violence and abuse, we do not believe that the admission of evidence of Tiffany's pending charges and OFAs and of Billy's boast that he had broken a girlfriend's jaw could reasonably have resulted in the jury finding defendant not guilty rather than guilty of voluntary manslaughter and AWDWISI. *See Anthony*, 354 N.C. at 423, 555 S.E.2d at 589 ("In light of the great weight of evidence against defendant presented at trial, we hold that the combined effect of any erroneous evidentiary rulings was not prejudicial to defendant."). We, therefore, conclude defendant received a trial free from prejudicial error.

No error.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).