NO. COA12-290
NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2012

STATE OF NORTH CAROLINA

v. Guilford County
No. 09CRS083005

CHARLES ANTOINE MCKENZIE

Appeal by Defendant from judgment entered 29 July 2011 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 11 September 2012.

Attorney General Roy Cooper, by Special Deputy Attorney General I. Faison Hicks, for the State.

Parish & Cooke, by James R. Parish, for Defendant.

BEASLEY, Judge.

Defendant appeals from his conviction of first-degree murder in violation of N.C. Gen. Stat. § 14-17. For the reasons stated below, we find no error.

Edwin Cornelius was on his way to First Presbyterian Church in downtown Greensboro, North Carolina, on the morning of 9 November 2008 when he, and Jasmine Rowe who was out walking her dog, heard a moan and four pops that he identified as pistol

shots. Moments earlier, he witnessed two African-American men walking north on Elm Street in the direction of Red Mike's convenience store, located at 600 North Elm Street. One of the men was wearing a sweatshirt. The other man was wearing a black coat and a black hat with a bill. The man in the coat was on a cell phone. After hearing the shots, Mr. Cornelius turned toward Red Mike's and saw the man in the coat and hat run from the store as did Ms. Rowe. The suspect fled east on Fisher Avenue. Mr. Cornelius described the suspect to police as being 5'10" or 5'11" and weighing 180 to 190 pounds. Mr. Cornelius went to the store to investigate and met a doctor and his wife who were also on their way to church. The doctor said a man had been shot. The victim, Mohammed "Mike" Hassan Ali, the proprietor of Red Mike's, was taken to Moses Cone Hospital and later pronounced dead.

Later that evening around 4 p.m., Cass Catlett discovered a black fleece pullover in a trash can outside of her home on Magnolia Street in Fisher Park. Crime scene investigators and police officers also found a black jacket, a black hat, and a pair of sunglasses in Ms. Catlett's neighbors' trash can. A handgun was found inside the sleeve of the black jacket.

Subsequent forensic ballistics testing revealed that this handgun fired the bullets that were recovered at Red Mike's.

The following morning on 10 November 2008, Detective Mike Matthews received an anonymous phone call routed to him through Crime Stoppers. The caller said that he and his wife had been eating at Ganache, a restaurant in close proximity to Red Mike's, on the morning of the murder. The caller reported having seen a light-skinned African-American male suspiciously pacing back and forth on North Elm Street. The man was approximately 6'0" tall and heavyset with a gut. He was wearing a black jacket, a black cap with no writing, sunglasses, and black boots. A second man joined him, and they walked toward Red Mike's. This information led Detective Matthews to the Greensboro Inn, located in the vicinity of Red Mike's, from which direction the anonymous caller said that the suspect had come. Detective Matthews spoke with Lavonne Chambliss, a motel employee. After Detective Matthews described the suspect seen by the anonymous caller, Ms. Chambliss stated that the description fit Defendant, a regular customer at the inn. Ms. Chambliss indicated that the victim also used to stay at the inn and that Defendant and the victim knew one another.

Defendant went to the police station voluntarily on 6 January 2009 to retrieve his cell phone. Defendant told Detective Mike Terry that he had lost his cell phone on 1 November 2008 and did not get it back until 10 November 2008.

Prior to the introduction of DNA evidence at trial, Defendant filed a motion to suppress, arguing that the search warrant affidavit lacked probable cause and/or was sworn out in bad faith. This motion was denied. Defendant also objected to this evidence at trial.

Defendant did not testify. Defendant's mother testified that her son was at her apartment on the morning of the murder and that he did not leave her apartment until 10:20 a.m.

After the jury began its deliberations, Defendant requested the trial court's permission to submit an exhibit to the jury not admitted in evidence to show that the State had misinterpreted the Cricket cell phone records. Defendant's request was denied.

Defendant was found guilty of first-degree murder on 29 July 2011 and sentenced to life in prison without the possibility of parole. Defendant now appeals to this Court.

Defendant argues that the search warrant affidavit by Detective Terry lacked probable cause and was sworn out in bad faith. We disagree.

We review a denial of a motion to dismiss by determining "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). When the defendant does not challenge the trial court's findings of fact, "they are deemed to be supported by competent evidence and are binding on appeal." *Id.* at 168, 712 S.E.2d at 878. The trial court's conclusions of law, however, we review de novo. *Id.*

> The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty. The facts set forth in an affidavit for a search warrant must be such that a reasonably discreet and prudent person would rely upon them before they will be held to provide probable cause justifying the issuance of a search warrant. A determination of probable cause is grounded in practical considerations.

State v. Arrington, 311 N.C. 633, 636, 319 S.E.2d 254, 256-57 (1984)(citations omitted). There are additional considerations

when probable cause is based on information from an informant: "(1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police." *State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003), *aff'd per curiam*, 358 N.C. 135, 591 S.E.2d 518 (2004). Section 15A-978(a) of the General Statutes permits a defendant to challenge the truthfulness of the allegations forming the basis for probable cause to issue the search warrant. Our case law shows that "[i]t is elementary that the Fourth Amendment's requirement of a factual showing sufficient to constitute 'probable cause' anticipates a truthful showing of facts." *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997)(citing *Franks v. Delaware*, 438 U.S. 154, 164-65, 57 L.Ed.2d 667, 678 (1978)).

> "Truthful," as intended here, "does not mean . . . that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily." Rather, "truthful" in this context means "that the information put forth is believed or appropriately accepted by the affiant as true."

Id. (quoting *Franks*, 438 U.S. at 165, 57 L. Ed. 2d at 678)(internal citations and quotation marks omitted).

The description from the anonymous caller matched the items that police recovered near the scene. Ms. Chambliss identified Defendant from the description and informed police that Defendant knew the victim. Though the informant was anonymous and there is no evidence of the informant's past reliability or unreliability, police confirmed the informant's specific facts, which had not been released to the public at that time, when they recovered clothing items near the crime scene that matched the caller's description. Despite evidence that Ganache was not open that Sunday morning, the anonymous caller's information was "appropriately accepted by the affiant as true" in light of the other confirmatory facts. *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358. Based on Defendant's cell phone records and Mr. Bryant, Defendant's acquaintance's testimony, Defendant also knew about the murder shortly after it happened. Despite failing to investigate whether Ganache was open on Sundays before seeking the search warrant, the trial court did not err in concluding that the law enforcement officers formed probable cause to support its search warrant.

Defendant next argues that there was insufficient evidence that he was the perpetrator of the murder. We disagree and find ample evidence of his identity.

> On a defendant's motion for dismissal, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. What constitutes substantial evidence is a question of law for the court. . . . Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom.

State v. Olson, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citations omitted).

Defendant does not challenge the evidence as to the substantive elements of first-degree murder. He only challenges the element of identity as the perpetrator.

Though the State's case was circumstantial, the State's evidence tended to show ample evidence of Defendant as the perpetrator. Mr. Cornelius, Ms. Rowe, and the anonymous informant gave similar descriptions of an African-American man fleeing Red Mike's after the shooting as stated above. All three described an African-American man in a black coat and

black hat. Ms. Rowe and the anonymous caller described the suspect as a light-skinned African-American. Mr. Cornelius and the anonymous caller described a tall, heavy man. The anonymous caller observed the suspect wearing sunglasses. All three witnesses placed this suspect in the vicinity of Red Mike's store immediately after shots were fired. Ms. Rowe saw the suspect flee Red Mike's with a handgun after the shooting. Ms. Rowe and Mr. Cornelius reported that the suspect fled east on Fisher Avenue. Police recovered clothing matching the descriptions given by these three individuals in trash cans in the Fisher Park neighborhood, consistent with the direction in which the suspect fled. Defendant's DNA was found on the black coat, black hat, and sunglasses. The victim's DNA was also on some of the clothing items. The handgun found in the coat's sleeve was determined to be the murder weapon. Ms. Chambliss later provided police with Defendant's name based on the witnesses' physical descriptions. Defendant also knew the victim. Taking all inferences in favor of the State, we find more than sufficient evidence that Defendant was the perpetrator of the murder. This argument is without merit.

Defendant argues that the trial court erred by denying his request to publish an exhibit, which was not admitted into

evidence, to the jury after deliberations had begun. We find no abuse of discretion.

The standard of review for a motion to reopen the evidence is abuse of discretion. *State v. Shelton*, 53 N.C. App. 632, 648, 281 S.E.2d 684, 695 (1981). To disturb the trial court's ruling, we must find that there was "no rational basis" for the ruling. *State v. Mutakbbic*, 317 N.C. 264, 274, 345 S.E.2d 154, 159 (1986)(citation and internal quotation marks omitted).

As this Court has held before, there is no due process right or right of confrontation for a defendant to reopen his case. *Shelton*, 53 N.C. App. at 647-48, 281 S.E.2d at 695. The facts of *Mutakbbic* are directly on point. After deliberations began in *Mutakbbic*, the defendant moved the court to reopen the evidence to admit a Social Services report. *Mutakbbic,* 317 N.C. at 270, 345 S.E.2d at 156. The Supreme Court of North Carolina was not persuaded by the defendant's argument, stating, "First, no effort was made by defendant during trial to have the report introduced, although defendant knew then of its existence. Second, the evidentiary conflict defendant sought to resolve by introducing the document was relatively insignificant." *Id.* at 274, 345 S.E.2d at 159.

Here, Defendant knew about the exhibit that he argues interpreted the Cricket cell phone records and he failed to introduce it when the State had Ms. Lesane, a Cricket representative, on the stand. The report was relatively insignificant in light of the real issues in the case. At most, it might have shown that Defendant was telling Detective Terry the truth about having lost his cell phone before the victim was murdered. In light of all the evidence presented by the State of witnesses who saw Defendant at and leaving the crime scene, described his appearance and attire, and noted his associations with the motel clerk and victim, we find no abuse of discretion by the trial court.

Finally, Defendant argues that the short form indictment denied him due process. We disagree.

"In indictments for murder and manslaughter, . . . it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law[.]" N.C. Gen. Stat. § 15-144 (2011). "An indictment that complies with the requirements of N.C.G.S. § 15-144 will support a conviction of both first-degree and second-degree murder." *State v. Braxton*, 352 N.C. 158, 174, 531

S.E.2d 428, 437 (2000). The Supreme Court of North Carolina "has consistently held that indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions." *Id.*

The indictment in this case stated, "The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did of malice aforethought kill and murder Mohammed Hassan Ali." This indictment plainly meets the requirements of N. C. Gen. § 15-144. Defendant has not been deprived of due process of law.

For the reasons stated above, we find no error.

No Error.

Judges MCGEE and THIGPEN concur.

Report per Rule 30(e).