NO. COA14-601
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v. Mecklenburg County
No. 09 CRS 240639

WARREN JAE AVERY

Appeal by defendant from judgment entered 16 September 2013 by Judge Yvonne Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 October 2014.

Roy Cooper, Attorney General, by Steven M. Arbogast, Special Deputy Attorney General, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

DAVIS, Judge.

Warren Jae Avery ("Defendant") appeals from his convictions of first-degree murder and conspiracy to commit first-degree murder. On appeal, he contends that the trial court erred in (1) denying his motion to suppress; and (2) allowing testimony from a witness for the State in violation of his rights under the Confrontation Clause. After careful review, we conclude

that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: Defendant, Marco Davis ("Davis" a/k/a "Danger"), Kierra Thompson ("Thompson"), Antonio Dade ("Dade" a/k/a "Tre"), and Latia Landy ("Landy") were all members of the "74" gang, also known as the "Gangster Disciples" — a subset of the "Folks" gang. Davis was the leader of the gang, which was organized in a hierarchical structure based on rank.

Palo Childress ("Childress" a/k/a "Suicide") was a member of the "Rolling Sixties" — a subset of the "Crips" gang. Childress was initially on good terms with the members of the Gangster Disciples, including Defendant. However, over time Davis and Dade began to distrust Childress because "[he] was talking too much" and was "telling [the gang's] secrets."

Several weeks prior to 9 August 2009, Defendant, Thompson, Dade, Davis, and Landy met at a bus stop on Beatties Ford Road in Charlotte, North Carolina to discuss Childress. Davis told the group that Childress "had to go."

On 9 August 2009 around 12:00 p.m., Jasen Buchanan ("Buchanan"), who was friends with members of the Gangster Disciples but was not himself a member of the gang, was watching television at his house with Defendant, Davis, and Childress.

After several hours passed, all four men went to the home of their friend "Big Unc" to visit with him. While at Big Unc's residence, Davis pulled Defendant off to the side, handed Defendant his .38 caliber pistol, and informed Defendant that Defendant "was going to be the one to kill Suicide."

All four men then went to Davis' and Dade's apartment to play cards. Several other members of the Gangster Disciples were present at the apartment, including Thompson and Landy.

After they had been playing cards for a while, Davis and Defendant left the apartment with Childress under the pretext of procuring Childress a gun. The three of them began walking down a path off of Jennie Linn Road. After a few minutes had passed, Davis looked back at Defendant, which Defendant interpreted as "a signal for me . . . to kill Suicide." After walking a little further down the path, Defendant proceeded to pull out the gun given to him by Davis and shot Childress in the back of the head. Childress died as a result of the gunshot wound.

Defendant and Davis then returned to Davis' apartment, and Defendant changed into his work clothes and went to work. After Defendant left, Davis told Thompson that she could gain rank within the gang if she would go with him, Dade, and Landy to "get money out of [Childress'] pockets." After walking to where Childress' body was located, Davis, Dade, and Landy illuminated Childress' body with the screens of their cell phones, and

Thompson proceeded to retrieve the contents of Childress' pockets. The group then left the body where they had found it and returned to Davis' apartment.

A gang meeting called by Davis was held a few days after the death of Childress. At the meeting, Defendant was promoted to a higher rank within the gang, and he discussed how he had killed Childress. Thompson was also promoted for going "through [Childress'] pockets."

Detective Miguel Santiago ("Detective Santiago") with the Charlotte-Mecklenburg Police Department's ("CMPD") Homicide Unit was assigned as the lead detective in the investigation of Childress' murder. During the course of his investigation, Detective Santiago determined that a connection existed between Defendant, Davis, and Childress. Detective Santiago ultimately determined that Defendant was a potential suspect in the death of Childress.

Detectives Henry McSwain ("Detective McSwain") and Timothy Purdy ("Detective Purdy") with the CMPD assisted Detective Santiago with his investigation into the murder of Childress. Upon obtaining information that Defendant was employed at a Walmart on Albermarle Road, Detectives McSwain and Purdy drove there at approximately 9:30 p.m. on 19 August 2009 in an attempt to locate him. Upon arrival, the detectives met with the assistant manager and inquired whether Defendant was there. The

assistant manager told the detectives that Defendant was working that day and had them wait in an office while he located Defendant.

After several minutes, Defendant walked into the office. Detective Purdy informed Defendant that he and Detective McSwain were detectives with the CMPD. Detective Purdy then asked Defendant whether he would be willing to accompany them to the Law Enforcement Center (the "LEC") to answer some questions. Detective Purdy told Defendant he could give Defendant a ride there in his car. Detective Purdy also made it clear to Defendant that afterwards he would take Defendant back to work.

Defendant agreed, and he and the detectives went out to the parking lot and got into Detective Purdy's car. Defendant was not searched before getting into the car, opened the car door himself, and got into the vehicle without assistance. Defendant was not handcuffed or restrained in any way.

Upon arrival at the LEC, Defendant was taken to the second floor where the interview rooms are located. He was placed in one of the interview rooms with the door shut but left unlocked. Defendant was not searched prior to being placed in the interview room and was not restrained in any way. Defendant waited in the interview room for approximately three hours while Detective Santiago was interviewing other members of the Gangster Disciples, who were also at the LEC in nearby interview

rooms. Detective McSwain checked on Defendant while he was waiting, offering Defendant a cigarette and a beverage and inquiring whether he wanted to use the restroom.

At approximately 1:30 a.m., Detective Santiago and Detective Terry Brandon ("Detective Brandon") entered the interview room. Detective Brandon informed Defendant that he was not in custody, that he was free to leave at any time, and that he would be immediately transported back to work upon his request. Defendant acknowledged that he understood. The detectives proceeded to interview Defendant, and during the interview, he confessed to the murder of Childress. At the conclusion of the interview, Detective Santiago placed Defendant under arrest.

On 13 August 2012, Defendant was indicted on one count of first-degree murder and one count of conspiracy to commit first-degree murder. A pre-trial hearing was held in Mecklenburg County Superior Court on 27 August 2012 during which Defendant moved to suppress evidence of his confession to the murder. After the trial court denied Defendant's motion to suppress, Defendant's trial counsel moved to withdraw from his representation of Defendant and the trial court granted the motion, ordering that the case be continued and that substitute counsel be appointed for Defendant. A jury trial was held on 9

September 2013 before the Honorable Yvonne Mims Evans in Mecklenburg County Superior Court.

At trial, the State called Thompson as a witness. During her testimony, the State inquired about the conversation at the bus stop several weeks before the murder during which Davis had stated to members of the Gangster Disciples that Childress "had to go." Defendant's counsel objected on hearsay and Confrontation Clause grounds based on the fact that Davis did not testify at trial, but the objection was overruled.

Defendant's attorney also objected when the State asked Thompson about the statements made by Davis in relation to Thompson retrieving the contents of Childress' pockets. After conducting a *voir dire* hearing, the trial court overruled Defendant's objection and permitted Thompson to testify as to this matter.

The State also introduced into evidence the transcript of a recorded telephone conversation that Defendant had with his sister from prison. The transcript showed that during the conversation Defendant admitted to his sister that he was the one who had shot Childress and that Childress' murder had been planned in advance.

The jury convicted Defendant of both charges, and the trial court sentenced him to life in prison without the possibility of parole for the first-degree murder of Childress. In addition,

Defendant was sentenced to 140-177 months for conspiracy to commit first-degree murder. This sentence was ordered to run consecutive to the first-degree murder sentence. Defendant gave notice of appeal in open court.

Analysis

I. Motion to Suppress

Defendant first argues that the trial court erred in denying his motion to suppress evidence of his confession to the murder of Childress. Specifically, Defendant asserts that (1) he was in custody at the time he confessed but was not advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966) prior to making the confession; and (2) his confession was not voluntary in that it was induced by threats and promises made by Detectives Santiago and Brandon. We disagree.

Initially, we note that Defendant does not challenge any of the trial court's findings of fact concerning his motion to suppress. Instead, he limits his argument to the trial court's conclusions of law that he was not in custody when he confessed and that his confession was voluntary.

> It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. In addition, findings of fact to which

> defendant failed to assign error are binding on appeal. Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task is to determine whether the trial court's conclusions of law are supported by the findings. The trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Johnson, __ N.C. App. __, __, 737 S.E.2d 442, 445 (citation omitted), *appeal dismissed*, 366 N.C. 566, 738 S.E.2d 395 (2013).

The trial court made the following pertinent oral findings of fact and conclusions of law concerning Defendant's motion to suppress:

> THE COURT: . . . I conclude that under the test which I'll characterize as generally one of the totality of the circumstances as it would appear objectively to the participants, I do not believe that the necessity to give Miranda warnings attached because I would not find under these circumstances, that is, the totality of the circumstances, that his freedom of actions was curtailed to a degree associated with a formal arrest.
>
> Beyond that, I would also conclude that his confession was voluntary, and looking at the voluntariness, I know that there are several factors, but what I would focus on predominantly would be whether there was any improper inducement to him. I believe that the statements that were made to him of the nature that essentially that the officers would let the DA know of his cooperation, he had the opportunity to live a good life, as to — that he would feel better if he told the truth, that sort of thing, did not amount to an impermissible promise or

inducement to the defendant of such a specific nature that the — the coercive [sic] or render his confession involuntary.

Now, in making that general conclusion, for the record, I'll make the following findings of fact:

. . . .

Officers Purdy and McSwain asked [Defendant] if he would be willing to come to the law enforcement center so that the officers would speak to him. They did not indicate to him what it was they wished to talk about. The defendant did not inquire at that time what it was;

The defendant — the officers told the defendant that they would take him to the law enforcement center and after they were done would bring him back to his place of employment. They then went out to the officer's police car, which was in the parking lot of the WalMart. It was an unmarked police car. The defendant got into the car. He was not restrained. He was not searched. He then went with Officers Purdy and McSwain to the law enforcement center, arriving shortly after 10:00 p.m. He was to be interviewed by Detectives Brandon and Santiago. They were there at the law enforcement center. At that time they were interviewing other potential witnesses and/or persons of interest or potentially suspects in the murder of Palo Childress;

The defendant was put into one of the interview rooms at the law enforcement center. He was, again, not put under any restraint. While it might be a bit of a stretch to say that one objectively would have felt free to just get up and leave given the physical layout. He certainly was not told that he had to be there and was not told that he could not leave, and the door was, according to the testimony of the

officers, unlocked;

There was a delay of approximately three hours before he was interviewed by Detectives Brandon and Santiago. During that time one of the other detectives asked him if he wanted — I believe wanted a cigarette or a beverage or something to that effect. Again, he was not told he had to stay there or he was under arrest;

Sometime after 1:30 in the morning, he was interviewed by Detectives Brandon and Santiago. That interview lasted, I believe, until sometime around 3:30. That morning he was told at least twice that — he was told that he was not under arrest and that he was free to go. He was told that before they started interviewing the defendant. He was also told that again as reflected in the interview transcript of the formal interview that was recorded towards the end of the interview;

At no time did the defendant ask such questions as to whether he was under arrest. He did not ask for a lawyer. He essentially did not ask for anything that was denied. He appeared to be unimpaired in the sense that there was no indication he'd been drinking or under the influence of any impairing substance. I noted from the recorded interview that he appeared to be articulate, well-spoken, exhibited an attitude of cooperation with the interviewing detectives. He appeared to understand the questions;

The delay of three hours was not intended, to use the vernacular, chill out the defendant. It was because they were — the detectives were interviewing other participants in this incident. The interview room was typical of the interview rooms at the law enforcement center. While the defendant was seated in the hall, there was no one guarding or blocking the entrance

to the room, nothing to indicate to anyone objectively that his leaving the room was being curtailed in any way;

There were statements and techniques or interrogation techniques used during the interview which appeared to be typical of police interview tactics, that is, to put the defendant at ease, to ingratiate themselves with the defendant, to give him encouragement to speak to the detectives freely. I don't regard those general interrogation techniques as coercive;

He was — well, based upon those findings of fact, I would conclude as a matter of law that under the test of the totality of the circumstances, the necessity to give the Miranda rights did not attach because the defendant's freedom of action was not curtailed to the degree associated with harassment and would not appear to an objective observer that his freedom was curtailed at no [sic] time. The factors, according to that conclusion, are that at no time was he prior to the formal arrest after he had made a full statement was he searched, was he put under any kind of restraint, and he had been told that he would be brought back to his place of business and again was not given the Miranda warnings. I don't believe that — or I would conclude that they were not required under the circumstances.

I further conclude that none of the statements made to the defendant either singularly or viewed under the totality of the circumstances test were coercive either in the sense of being threatened or in the sense of promising the defendant or making an improper inducement to him of a promise of leniency if he did confess. They amounted to truthful statements, that if he did make a full statement, his cooperation would be conveyed to the district attorney, but that there was no distress or trauma or

> implied promise of leniency.
>
> I further conclude that the defendant was — well, appeared to be unimpaired, of normal intelligence, appeared to understand the implications of making the statement that he did make to the detectives and should not be considered to be under any special disability that would require any immediate remediation to what I think would be the ordinary objective circumstances test.
>
> So based upon those findings of fact and conclusions of law, I conclude that the statement made on August 19, 2009, by the defendant did not have any constitutional infirmity attachment [sic] to it and should not be suppressed and I order it not be suppressed.

A. In-Custody Interrogation

Defendant asserts that he was in custody at the time of the 19 August 2009 interrogation during which he confessed to killing Childress. He contends that because he was in custody, the failure of the detectives to advise him of his *Miranda* rights rendered his confession inadmissible.

> Both the United States Supreme Court and this Court have held that *Miranda* applies only in the situation where a defendant is subject to custodial interrogation. The proper inquiry for determining whether a person is "in custody" for purposes of *Miranda* is based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

State v. Barden, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002) (internal citations and quotation marks omitted), *cert. denied*, 538 U.S. 1040, 155 L.Ed.2d 1074 (2003).

Furthermore, "[t]he extent to which Defendant [is] in custody for *Miranda* purposes depends on the objective circumstances surrounding his interactions with law enforcement officers, not on the subjective views harbored by Defendant. As a result, the ultimate issue before [the trial court] and before us on appeal is whether a reasonable person in Defendant's position would have believed that he was under arrest or was restrained in such a way as to necessitate the provision of *Miranda* warnings." *State v. Clark*, 211 N.C. App. 60, 68, 714 S.E.2d 754, 760 (2011) (internal citations, quotation marks, brackets, and ellipses omitted), *disc. review denied*, 365 N.C. 556, 722 S.E.2d 595 (2012).

Our Supreme Court has held that

> no single factor is necessarily controlling when we consider whether an individual is in custody for *Miranda* purposes . . . . This Court has considered such factors as whether a suspect is told he or she is free to leave, whether the suspect is handcuffed, whether the suspect is in the presence of uniformed officers, and the nature of any security around the suspect.

State v. Waring, 364 N.C. 443, 471, 701 S.E.2d 615, 633 (2010) (internal citations and quotation marks omitted), *cert. denied*, __ U.S. __, 181 L.Ed.2d 53 (2011). In addition,

> police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L.Ed.2d 714, 719 (1977); *see also State v. Gaines*, 345 N.C. at 662, 483 S.E.2d at 405. Although [the] defendant cites an instance where the door to one of the interview rooms was closed, no single factor is necessarily controlling when we consider the totality of the circumstances. *See, e.g.*, *State v. Bone*, 354 N.C. 1, 11, 550 S.E.2d 482, 489 (2001) ("[W]e have noted that an individual's voluntary agreement to accompany law enforcement officers to a place customarily used for interrogation does not constitute an arrest."), *cert. denied*, 535 U.S. 940, 152 L.Ed.2d 231 (2002); *State v. Daughtry*, 340 N.C. 488, 504–07, 459 S.E.2d 747, 754–56 (1995) (the defendant held not to be in custody when the defendant agreed to accompany the police to the station for questioning; was told that he was not under arrest and could leave at any time; was not handcuffed or restrained; and was questioned at the police station by officers, who at one point closed the door for privacy), *cert. denied*, 516 U.S. 1079, 133 L.Ed.2d 739 (1996); *State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993) (the defendant held not to be in custody when he was escorted to police station bathroom, was told he could leave at any time, and was in presence of officers at all times).

Barden, 356 N.C. at 338, 572 S.E.2d at 124.

In *Waring*, the defendant — a potential suspect in a murder investigation — was located by a police officer walking on the street near his residence and was told that he was being

detained until detectives arrived. He was also told by the officer that he was not under arrest. *Waring*, 364 N.C. at 457, 701 S.E.2d at 625.

> When he was again advised by the detectives upon their arrival that he was not under arrest, defendant voluntarily agreed to accompany them to the police station, affirmatively telling them he was "anxious" to talk with them and answer their questions. Defendant was never restrained from the time of his initial encounter with [the detectives] until the door of the investigation room was locked after defendant admitted stabbing the victim. . . . [The] defendant was frequently left alone in the interview room with the door unlocked and no guard posted. Throughout the interview he was given several bathroom breaks and was offered food and drink.

Id. at 471, 701 S.E.2d at 633-34. Our Supreme Court held that "[u]nder these circumstances, we agree with the trial court that defendant was not formally arrested or otherwise subjected to the restraint on his freedom of movement associated with a formal arrest." *Id.*

In the present case, it is undisputed that (1) Detectives Purdy and McSwain asked Defendant to accompany them to the LEC and informed him that they would bring him back to work after the interview; (2) Defendant was not restrained and was not searched before voluntarily getting into the front passenger seat of Detective Purdy's car; (3) upon arrival at the LEC, Defendant was put in an interview room and was not placed under

any restraints; (4) the door was closed but it remained unlocked and was not guarded or blocked and there was "nothing to indicate objectively that his leaving the room was being curtailed in any way"; (5) Detective McSwain checked on Defendant during the time period during which he was waiting in the interview room and offered him a cigarette and a beverage; (6) when Detectives Santiago and Brandon came into the interview room around 1:30 a.m., Defendant was told at least twice that he was not under arrest and that he was free to go; (7) Defendant never asked whether he was under arrest, asked for a lawyer, or made any other request that was denied; (8) there was no indication that Defendant had been drinking or that he was under the influence of any impairing substance; and (9) Defendant appeared to understand the questions being asked of him.

We are satisfied that the trial court's unchallenged findings of fact support its conclusion that Defendant was not in custody at the time of his confession. As such, no *Miranda* warnings were required to be given.

B. Voluntariness of Confession

Defendant next contends that his confession must be suppressed because it was involuntarily induced by means of threats and promises made to him by Detectives Santiago and Brandon. Specifically, he asserts that the detectives told him that (1) several other people had informed them that he was

involved in the killing of Childress; (2) he could help himself by talking to them; (3) they already knew many of the details surrounding the murder; and (4) they would inform the district attorney that he had provided assistance to them.

> A statement is admissible if it was given voluntarily and understandingly. The determination of whether defendant's statements are voluntary is a question of law and is fully reviewable on appeal. The appropriate test is one in which the court looks at the totality of the circumstances of the case in determining whether the confession was voluntary. Factors that are considered include whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Barden, 356 N.C. at 339, 572 S.E.2d at 124-25 (internal citations and quotation marks omitted). "The presence or absence of one or more of these factors is not determinative." *State v. Barlow*, 330 N.C. 133, 141, 409 S.E.2d 906, 911 (1991).

Our Supreme Court has made clear that "[a]dmonitions by officers to a suspect to tell the truth, standing alone, do not render a confession inadmissible." *State v. McCullers*, 341 N.C. 19, 27, 460 S.E.2d 163, 168 (1995) (citation omitted). Instead, "[t]he proper determination is whether the confession at issue was the product of improperly induced hope or fear. . . . [A]n

improper inducement must promise relief from the criminal charge to which the confession relates, and not merely provide the defendant with a collateral advantage." *State v. Cooper*, 219 N.C. App. 390, 392, 723 S.E.2d 780, 782 (internal citations, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 366 N.C. 222, 726 S.E.2d 851 (2012).

In the present case, Detectives Santiago and Brandon told Defendant that he could help himself by telling the truth. However, they did not expressly promise him relief from any potential charges he might face.

Defendant relies heavily on *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975), and *State v. Stevenson*, 212 N.C. 648, 194 S.E. 81 (1937), in support of his contention that his confession was involuntarily coerced through threats and deception. *See Pruitt*, 286 N.C. at 458, 212 S.E.2d at 102 (holding that confession was involuntary where the "officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around'"; and that "'it would simply be harder on [the defendant] if he didn't go ahead and cooperate'"); *Stevenson*, 212 N.C. at 649, 194 S.E. at 81 (holding that confession was impermissibly coerced and inadmissible where the officer told defendant "[t]here is no use you beginning to tell a lie to me this morning, I have already

got too much evidence to convict you" coupled with defendant's assertion "that his sole purpose in signing the confession was that he was in fear of being lynched"). In distinguishing *Pruitt* and *Stevenson*, our Supreme Court held in *McCullers* that

> [i]n the present case, . . . the trial court found, based on competent evidence, that "[n]o law enforcement official made any threats or promises or created any coercive atmosphere near defendant." Unlike the situations in *Pruitt* and *Stevenson*, the detective did not accuse defendant of lying, but rather informed defendant of the crime with which he might be charged and urged him to tell the truth and think about what would be better for him.

McCullers, 341 N.C. at 28, 460 S.E.2d at 168.

Similarly, here, Defendant was neither promised any relief from potential charges against him, nor coerced with any threats, nor accused of lying. Rather, he was simply urged to tell the truth. Moreover, the fact that the detectives informed Defendant that they were going to discuss his interview with the district attorney's office does not render his confession involuntary. It is well settled that "our Courts have held that it is acceptable to tell the accused that his cooperation will be made known to the district attorney." *State v. Maniego*, 163 N.C. App. 676, 682-83, 594 S.E.2d 242, 246, *appeal dismissed and disc. review denied*, 358 N.C. 737, 602 S.E.2d 369 (2004).

Therefore, Defendant has failed to demonstrate that his confession was involuntary. Defendant's argument on this issue

is therefore overruled.

II. Hearsay and Confrontation Clause

Defendant's final argument on appeal is that certain testimony elicited from Thompson by the State constituted impermissible hearsay and violated his rights under the Confrontation Clause. Specifically, Defendant asserts that allowing Thompson to testify about Davis' instructions to her concerning her retrieving the contents of Childress' pockets in order to gain rank within the gang constituted inadmissible hearsay as it was offered for the truth of the matter asserted as to the type of activity that would merit promotion within the gang — thereby raising the inference that Defendant's promotion to a higher rank was a result of his killing Childress. In addition, Defendant contends that allowing Thompson to testify concerning Davis' statement made several weeks before the murder that Childress "had to go" also was inadmissible hearsay and, in addition, violated Defendant's rights under the Confrontation Clause.

> When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts: Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. In other words, an error under the United States Constitution will be held harmless if the jury verdict would have been the same absent the error.

> Under both the federal and state harmless error standards, the government bears the burden of showing that no prejudice resulted from the challenged federal constitutional error. But if the error relates to a right not arising under the United States Constitution, North Carolina harmless error review requires the defendant to bear the burden of showing prejudice. In such cases the defendant must show 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.

State v. Lawrence, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012) (internal citations, quotation marks, and brackets omitted).

Thompson testified that "[Davis] asked me did I want to get some rank" and that "I was told that the way to get my rank was to get money out of [Childress'] pockets." Defendant objected to this testimony on hearsay grounds, and the trial court overruled Defendant's objections, finding that the statements were nonhearsay.

"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." *State v. Carroll*, 356 N.C. 526, 542, 573 S.E.2d 899, 910 (2002) (citation and internal quotation marks omitted), *cert. denied*, 539 U.S. 949, 156 L.Ed.2d 640 (2003). "Hearsay is not admissible except as provided by statute or the Rules of Evidence." *State v. Hinnant*, 351 N.C. 277, 283, 523 S.E.2d 663, 667 (2000).

However, "out-of-court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay. This Court has held that statements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as nonhearsay evidence." *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998) (internal citations and quotation marks omitted).

We are satisfied that Thompson's testimony regarding Davis' statements to her about gaining rank within the gang constituted nonhearsay as the statements were not offered for the truth of the matter asserted. Rather, her testimony about these statements explained the basis for her actions in locating Childress' body and taking items from his clothing.

Defendant also objected to the following testimony concerning Davis' statement that Childress "had to go" several weeks before he was killed:

> Q. Let me draw your attention to a couple weeks
> before August 9th. Was there a conversation at all regarding Palo at that point?
>
> A. Yes, ma'am.
>
> Q. Where did that take place?
>
> A. It was on Beatties Ford Road at a bus stop.
>
> Q. Who was present for that conversation?

> A. It was me, Antonio, Marco, Baby Boss. I'm not sure if April was there, but if she was —
>
> Q. And when you say Marco, are you referring to Danger?
>
> A. Danger.
>
> Q. Was there someone kind of leading that conversation?
>
> A. Danger and Tre. They were pretty much together with the conversation.
>
> Q. And did you hear Danger say something about Palo?
>
> A. Yes.
>
> Q. What did he say?
>
> MR. GSELL: Objection, your Honor. Calls for hearsay.

During the ensuing *voir dire* hearing, Defendant also lodged an objection to this line of questioning on Confrontation Clause grounds. The trial court overruled Defendant's objections and thereafter allowed Thompson to testify as follows:

> Q. What is it that Danger said about Palo?
>
> A. He said that he had to go.
>
> Q. What did you take that to mean? What did you understand that to mean?
>
> A. That he had to be killed.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused

shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The Confrontation Clause prohibits the admission of "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 158 L.Ed.2d 177, 194 (2004).

However, our Supreme Court has held that evidence admitted as nonhearsay does not trigger the protection of the Confrontation Clause. *See State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 ("[A]dmission of nonhearsay raises no Confrontation Clause concerns." (citation and internal quotation marks omitted)), *cert. denied*, 537 U.S. 896, 154 L.Ed.2d 165 (2002).

Even assuming, without deciding, that the admission of this testimony was erroneous, we believe any such error was harmless beyond a reasonable doubt. The remaining evidence offered against Defendant at trial was overwhelming. The jury heard (1) a recorded interview with Detectives Santiago and Brandon in which Defendant voluntarily confessed to the premeditated killing of Childress and the existence of a conspiracy to kill Childress; (2) a recorded phone conversation between Defendant and his sister in which he admitted to having committed the murder; and (3) testimony by Detective Santiago — which was not

objected to by Defendant at trial — about an interview he conducted with Thompson which tended to show that at the gang meeting shortly after Childress' death Defendant bragged about having killed Childress.

As such, any error in the admission of the challenged testimony was harmless beyond a reasonable doubt. *See State v. Hartley*, 212 N.C. App. 1, 14-15, 710 S.E.2d 385, 397 ("We fail to see how . . . testimony [admitted in violation of the Confrontation Clause] affected the outcome of this case where the overwhelming evidence established that defendant killed the victims, and, by his own confession, the manner in which he killed them. . . . Assuming [this] testimony violated defendant's Confrontation Clause rights, it was harmless beyond a reasonable doubt."), *disc. review denied*, 365 N.C. 339, 717 S.E.2d 383 (2011).

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges HUNTER, Robert C., and DILLON concur.

Report per Rule 30(e).