NO. COA14-705
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

STATE OF NORTH CAROLINA

v. Craven County
Nos. 87 CRS 3525, 4136

TIMOTHY ALBERT HARRIS

Appeal by defendant from order entered 29 August 2013 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 10 November 2014.

Attorney General Roy Cooper, by Assistant Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

ELMORE, Judge.

Defendant appeals from the denial of his motion for post-conviction DNA testing. We find no error.

On 24 September 1987, defendant was convicted by a jury of first-degree murder and robbery with a dangerous weapon. The State's evidence showed that defendant and an accomplice drove the victim to a vacant lot, beat him with a club and a rock,

took his wallet and other items, and dragged him into a wooded area. *State v. Harris*, 323 N.C. 112, 115-18, 371 S.E.2d 689, 692-93 (1988). The trial court sentenced defendant to life imprisonment plus a consecutive term of 40 years. Defendant appealed, and our Supreme Court found no error. *Id.* at 132, 371 S.E.2d at 701.

On 17 July 2013, defendant filed a *pro se* motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 (2013), requesting DNA testing of approximately thirteen items which were not previously subjected to testing. The trial court conducted a hearing on 29 August 2013 and summarily denied defendant's motion in an order entered on the same date. Defendant appeals.

Counsel appointed to represent defendant has been unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal and asks that this Court conduct its own review of the record for possible prejudicial error. Counsel has also shown to the satisfaction of this Court that she has complied with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985), by advising defendant of his

right to file written arguments with this Court and providing him with the documents necessary for him to do so.

Defendant has filed a *pro se* brief in which he claims: (1) that DNA testing would show that his skin cells and fingerprints were not on the murder weapons; (2) that his co-defendant committed the actual murder, but changed his story after taking a plea arrangement; (3) that he was denied a fair and impartial trial due to improper hearsay evidence, juror misconduct, and a lack of DNA testing; and (4) that he should have been convicted of and sentenced to a lesser included charge, namely second-degree murder.

Defendant's first argument on appeal is without merit. A defendant seeking relief under N.C. Gen. Stat. § 15A-269 must demonstrate that the evidence in question is "material to the defendant's defense." N.C. Gen. Stat. § 15A-269(a)(1). A defendant bears the burden of showing materiality. *State v. Gardner*, ___ N.C. App. ___, ___, 742 S.E.2d 352, 356 (2013). "[T]his burden requires more than the conclusory statement that the ability to conduct the requested DNA testing is material to the defendant's defense." *Id.* (citation and internal quotations omitted). "Favorable evidence is *material* if there is a reasonable probability that its disclosure to the defense would

result in a different outcome in the jury's deliberation." *State v. Hewson*, ___ N.C. App. ___, ___, 725 S.E.2d 53, 56 (2012) (emphasis in original) (citations and internal quotations omitted).

Here, defendant essentially argues that if the murder weapons were tested, biological evidence would not be found. This result, he argues, would show that his co-defendant committed the actual murder, thereby supporting his trial defense and exonerating defendant of first-degree murder. The jury, however, was instructed on the alternate theory of acting in concert. *See Harris*, 323 N.C. at 131, 371 S.E.2d at 700. Under this theory, "if two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof." *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) (citations and internal quotations omitted). Thus, even if the jury believed defendant, it was still free to convict him of first-degree murder under the theory of acting in concert. Moreover, even if the murder weapons failed to contain any biological

evidence, such a result still would not tend to prove or disprove defendant's defense. Accordingly, defendant has failed to show that any DNA testing would be material to his defense.

Defendant's remaining arguments are not properly before this Court. The scope of defendant's appeal is limited to the trial court's denial of his motion for DNA testing. *See* N.C. Gen. Stat. § 15A-270.1 (2013) ("The defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal."). Defendant's remaining arguments all pertain to purported error at his trial, and are therefore outside the scope of his current appeal. Accordingly, we decline to review defendant's remaining arguments.

In accordance with *Anders*, we have fully examined the record to determine whether any issues of arguable merit appear therefrom or whether the appeal is wholly frivolous. Because defendant has raised only issues which are meritless or which he is not entitled to raise on appeal from an order denying post-conviction DNA testing, we conclude the appeal is wholly frivolous. Furthermore, we have examined the record for possible prejudicial error and found none.

Affirmed.

Judges STEELMAN and DILLON concur.

Report per Rule 30(e).