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NO. COA14-806
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

STATE OF NORTH CAROLINA

v.

Guilford County
Nos. 12 CRS 24794
12 CRS 70321

O'REYNOLD JAMAAR LENNON

Appeal by defendant from judgments entered 30 April 2014 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 19 November 2014.

Roy Cooper, Attorney General, by Brandon L. Truman, Assistant Attorney General, for the State.

Marilyn G. Ozer for defendant-appellant.

DAVIS, Judge.

O'Reynold Jamaar Lennon ("Defendant") appeals from his convictions for first-degree murder and conspiracy to commit first-degree burglary. On appeal, he contends that the trial court erred in (1) admitting evidence despite the State's failure to establish a valid chain of custody; (2) failing to intervene *ex mero motu* during the State's closing argument; and (3) allowing the State to ask a witness how he recognized

Defendant. 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: In August of 2005, Bryant Jordan ("Jordan") sold crack cocaine out of three "crack houses" he operated in Greensboro, North Carolina. On the night of 20 August 2005, Jordan was at one of these houses, which was located at 1233 Elmer Street. Brandon Greer ("Greer"), Marshall Smith ("Smith"), Jordan's girlfriend Wanda Moss ("Moss"), and Moss' two young children were visiting with Jordan at the house.

Around 11:00 p.m., someone knocked on Jordan's front door, and Jordan - assuming the visitor was there to purchase drugs - called out for the visitor to go around to the back door. Greer walked out the back door and encountered a man with a white t-shirt wrapped around his head who was holding a gun in his hand. Another man attacked Greer from behind, pistol-whipping him on the side of the head. Greer then fled the scene.

Hearing the scuffle outside, Jordan went to the back door where he encountered four men with t-shirts around their heads armed with guns. The men began firing their weapons and tried to force their way inside. Two of the men succeeded in running past Jordan into the house. Jordan returned fire with his .40 caliber pistol. In the ensuing gunfight, Jordan shot one of the

intruders in the hallway, wounding him. Smith was also shot in the head during the shootout and died as a result of his gunshot wound. The intruders ultimately fled.

Approximately 40 minutes later, at 11:41 p.m., a dark-colored Ford Taurus pulled up to the emergency room drop-off at Wake Forest University Baptist Medical Center ("the Hospital") in Winston-Salem, North Carolina. Four men, including Defendant, were in the Taurus. The front-seat passenger - later identified as Jibril Mohammed ("Mohammed") - had been shot and suffered from a bullet wound in his abdomen. Mohammed was placed on a stretcher wearing nothing but underwear and taken into the Hospital for emergency surgery. As Mohammed was being taken inside, the three other men then got back in the car and sped away, without identifying themselves or answering any of the questions asked of them by the paramedics. Less than two minutes elapsed from the time the Taurus pulled up to the Hospital until it sped away after dropping off Mohammed.

Officer William Burge ("Officer Burge") with the Winston-Salem Police Department ("WSPD") was dispatched at 11:49 p.m. to investigate the incident at the Hospital. Upon arrival, Officer Burge met with the charge nurse of the Hospital's emergency department, David Taylor ("Nurse Taylor"), in the emergency room and recovered from Nurse Taylor a pair of underwear bearing a red substance later identified as blood. In addition, Officer

Burge also met with Charles Cook ("Cook"), who worked as a security guard at the Hospital, and was given a "spent bullet" by Cook that had been found on the stretcher on which Mohammed had been lying.

Officer Burge packaged these items in a police evidence envelope used by the WSPD to store evidence and attached an evidence sticker to the envelope indicating a "report number, date, time seized, incident, [Officer Burge's] name and code number, location seized, and . . . description of the property within the envelope." He then sealed the envelope with "evidence tape" and placed a biohazard sticker on the envelope.

After leaving the Hospital, Defendant drove to the home of his girlfriend Lavonda Gibson ("Gibson") in Salisbury, North Carolina. He told Gibson that Mohammed had been shot and then used her phone to call Pamela Holmes ("Holmes"), Mohammed's girlfriend, and inform Holmes that Mohammed had been shot.

At 5:12 a.m. on the morning of 21 August 2005, Mohammed died as a result of his gunshot wound. That same morning, Detective Horace Bryant ("Detective Bryant") and Sergeant David Rose ("Sgt. Rose") with the WSPD were assigned to investigate the incident at the Hospital. After Mohammed's identity was determined, Detective Bryant ascertained that Holmes was Mohammed's girlfriend, so he and Sgt. Rose went to her residence in order to interview her. Holmes told Detective Bryant and

Sgt. Rose that the last time she had seen Mohammed was the previous afternoon when he had left their residence with Defendant. She also stated that the last time she had spoken with Mohammed was when he called her at 9:00 p.m. that same evening using Defendant's cellphone.

Holmes then told Detective Bryant and Sgt. Rose how she had received a call from Defendant on the morning of the interview informing her that Mohammed had been shot. After examining the caller ID feature on her phone, Detective Bryant determined that the call had been made from Gibson's phone number, so he and Sgt. Rose proceeded to Gibson's residence to continue their investigation.

Upon their arrival at Gibson's residence, Detective Bryant and Sgt. Rose found Defendant asleep inside. They informed Defendant and Gibson that Mohammed had died and asked Defendant and Gibson to accompany them to the Salisbury Police Department for an interview. Both Defendant and Gibson consented.

At 5:02 p.m., Defendant was interviewed by Detective Bryant and Sgt. Rose at the Salisbury Police Department. During the course of the interview, Defendant gave the following account of what had transpired on the evening of 20 August 2005: After picking up Mohammed at the residence of Mohammed and Holmes, Defendant drove with Mohammed to Winston-Salem to record music with a man named "Chee." They then stopped at a BP gas station

on Martin Luther King Drive in Winston-Salem. After parking, Mohammed got out of the car and walked toward the store. After losing sight of Mohammed, Defendant heard gunshots, and shortly thereafter, Defendant saw Mohammed limping back toward the car. Mohammed got into the front passenger seat and told Defendant that he had been shot. At that point, Defendant realized he needed to get Mohammed to a hospital.

Because he was unfamiliar with the area, Defendant found two nearby homeless men and had them get into the car so that they could direct him to a hospital. The two homeless men, Defendant, and Mohammed then drove to the Hospital at which point Defendant helped Mohammed onto a stretcher and then left the Hospital. He dropped the homeless men off at the BP station and ultimately drove to Gibson's house where he called Holmes to inform her that Mohammed had been shot.

For approximately four years, no arrests were made regarding the 20 August 2005 shooting of Smith at Jordan's home. In 2009, Detective Brian Pilcher ("Detective Pilcher") with the Greensboro Police Department ("GPD") was assigned to investigate the death of Smith as a "cold case for review" in conjunction with the GPD's receipt of a "cold case DNA grant." Through his investigation, Detective Pilcher formed a belief that Mohammed may have been involved in the shooting at Jordan's house, and sent DNA evidence obtained from the crime scene to be tested at

the North Carolina State Crime Laboratory and compared with DNA that had been obtained from the underwear given to Officer Burge at the Hospital.

Amanda Overman ("Overman"), a forensic analyst with the North Carolina State Crime Laboratory, compared blood samples taken from the underwear with blood samples obtained from the crime scene at Jordan's house the day after the shooting occurred. She determined that the DNA profiles obtained from both sources had come from the same individual.

On 11 February 2011, Detective Mike Matthews ("Detective Matthews") with the GPD interviewed Defendant about the shooting at Jordan's house given that Defendant had previously told officers that he was with Mohammed on the night of 20 August 2005. Defendant "stated [that] he was not in Greensboro that night and [that] he was with his friend Jibril Mohammed the entire night." When Detective Matthews asked Defendant "how he could explain Jibril's DNA . . . ending up at the scene of a homicide in Greensboro," Defendant responded that he "had no explanation." Defendant then repeated his prior account of how Mohammed had been shot at a BP station in Winston-Salem and that Defendant had thereafter dropped him off at the Hospital. Defendant was ultimately arrested on 2 March 2012 in connection with the death of Smith.

Jeremy Warren ("Warren"), a federal inmate who at the time of Defendant's arrest was incarcerated in the same prison as Jordan, read a newspaper article about Defendant being charged in connection with the shooting at Jordan's house. Warren reached out to Detective Pilcher through his cousin who told Detective Pilcher that Warren had information concerning the case. Detective Pilcher then interviewed Warren on 5 April 2012.

During the interview, Warren told Detective Pilcher that he had met with Defendant at a bar in Greensboro sometime in November or December of 2005 in order to enlist his help in carrying out a robbery. Warren stated that Defendant had refused to participate in the robbery and told Warren how Mohammed had died in the last robbery he had attempted. According to Warren, Defendant further said that after Mohammed had been shot, "they had dropped him off at the hospital, but he didn't make it." Defendant then proceeded to describe to Warren in detail the attempted robbery of Jordan's house.

On 10 December 2012, Defendant was indicted on charges of (1) conspiracy to commit first-degree burglary; (2) first-degree murder; (3) first-degree burglary; and (4) two counts of assault with a deadly weapon with intent to kill. A jury trial was held in Guilford County Superior Court on 22 April 2014.

At trial, the State introduced evidence through the testimony of Jennifer Dalmida ("Dalmida"), a records custodian for Verizon Wireless, that Defendant's cellphone was used to make a call from the Greensboro area on the night of 20 August 2005. The timestamp for the call corresponded with the timestamp on Holmes' caller ID indicating when she had received a call from Mohammed on Defendant's phone. Dalmida based her opinion that the call from Defendant's phone originated in Greensboro on the fact that the call had been relayed by cell towers in the Greensboro area. The State offered this evidence in order to place Defendant in Greensboro on the night of 20 August 2005 despite his assertions that he was never in Greensboro that day.

Defendant was convicted of all charges. The trial judge arrested judgment on the first-degree burglary and assault with a deadly weapon with intent to kill charges. Defendant was sentenced to life imprisonment without the possibility of parole. Defendant gave notice of appeal in open court.

Analysis

I. Chain of Custody

Defendant's first argument on appeal is that the trial court erred in admitting the DNA profile obtained from the underwear as well as the bullet found on Mohammed's stretcher at the Hospital. Defendant argues that the introduction of this

evidence violated Defendant's rights under the Confrontation Clause because the State failed to properly establish a chain of custody. Defendant further asserts that the challenged evidence was improperly admitted on hearsay grounds. Defendant contends that because of his "inability to cross-examine the individuals who first handled the [underwear and bullet]," an essential link in the chain of custody was lacking, which violated his constitutional rights. In making this argument, Defendant cites *Crawford v. Washington*, 541 U.S. 36, 158 L.E.2d 177 (2004), for the proposition that "[t]estimonial statements of a witness may be admitted only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant."

The United States Supreme Court specifically addressed in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 174 L.Ed.2d 314 (2009), the burden placed upon the State in establishing a chain of custody in light of its decision in *Crawford*:

[W]e do not hold . . . that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While . . . it is the obligation of the prosecution to establish the chain of custody, this does not mean that everyone who laid hands on the evidence must be called. . . . [G]aps in the chain of custody normally go to the weight of the evidence rather than its admissibility. It is up to the prosecution to decide what

steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live.

Id. at 311, n. 1, 174 L.Ed.2d at 320, n. 1 (internal citations and quotation marks omitted). Therefore, the Confrontation Clause is not triggered in this case simply because not every person who touched the underwear or the bullet testified at trial. Rather, as *Melendez-Diaz* makes clear, "gaps in the chain of custody normally go to the weight of the evidence rather than its admissibility." *Id.* (emphasis added).

This Court has held that

[i]n general, a trial judge has the discretion to decide whether enough evidence has been introduced to show that the item offered is the same as the one involved in the case. Although a defendant may point to gaps or flaws in the chain of custody or procedure, a showing that the evidence was tampered with or altered is generally required for a reversal of the trial court's decision to admit the evidence. Rather, concerns about the chain of custody of the material or the procedures used to test it go to the weight that should be accorded to [it].

State v. Hyman, 153 N.C. App. 396, 400, 570 S.E.2d 745, 748 (2002) (internal citations omitted), *cert. denied*, 357 N.C. 253, 583 S.E.2d 41 (2003).

"We review a trial court's decision to admit evidence over an objection concerning the chain of custody for an abuse of discretion." *State v. Hawk*, ___ N.C. App. ___, ___, 762 S.E.2d

883, 885 (2014). "An abuse of discretion only occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *State v. Barnes*, ___ N.C. App. ___, ___, 741 S.E.2d 457, 461 (citation and internal quotation marks omitted), *disc. review denied*, 367 N.C. 219, 747 S.E.2d 549 (2013).

In the present case, the only link in the chain of custody challenged by Defendant is the initial one – namely, the absence of witness testimony regarding the transfer of the underwear and the bullet from hospital personnel to Officer Burge. We find our discussion in *Hyman* instructive on this point. In *Hyman*, the defendant was convicted, among other charges, of delivery of cocaine to a minor child. *Hyman*, 153 N.C. App. at 397, 570 S.E.2d at 746. At trial, a urine test taken by the minor child was introduced into evidence, and the defendant objected on chain of custody and hearsay grounds. *Id.* at 400, 570 S.E.2d at 748. The defendant asserted on appeal that the trial court erred in admitting the urinalysis because there was no evidence showing that the urine test was the child's given that the State could not produce a witness who actually saw the child take the test. *Id.*

Thus, [the] defendant assert[ed] that even before any flaws in the chain of custody occurred, there was no valid sample that could be connected with the victim. [The] [d]efendant also attack[ed] various

differences between the procedure used by the hospital in this case and the procedures it would normally use for forensic testing, including the handling of the sample and how it was tested.

Id. In rejecting the defendant's argument, we held that

[i]n general, a trial judge has the discretion to decide whether enough evidence has been introduced to show that the item offered is the same as the one involved in the case. Although a defendant may point to gaps or flaws in the chain of custody or procedure, a showing that the evidence was tampered with or altered is generally required for a reversal of the trial court's decision to admit the evidence. Rather, concerns about the chain of custody of the material or the procedures used to test it go to the weight that should be accorded to the test results. The defense had ample opportunity to present those concerns to the jury in this case and did so at length.

Id. (internal citations omitted).

As in *Hyman*, the only link in the chain of custody being challenged is the initial one. Every remaining link was established. Moreover, there was no evidence presented suggesting that the items had been tampered with or altered. Therefore, we are satisfied that the trial court did not abuse its discretion in admitting the challenged items into evidence.

In a related argument, Defendant asserts that it was hearsay for Officer Burge to state that he had received the underwear from Taylor and the bullet from Cook. "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). The only “statement” challenged by Defendant was the statement by Officer Burge that he received the underwear and the bullet from the charge nurse and the security guard, respectively. Defendant concedes that “the court did not allow [Officer] Burge to testify [as] to what the unknown person said[.]” Accordingly, we fail to see how Officer Burge’s testimony that he received the bullet and the underwear from other persons constituted hearsay.¹ Defendant’s argument on this issue is therefore overruled.²

II. State’s Closing Argument

Defendant next argues that the trial court erred in failing to intervene *ex mero motu* in response to certain statements made by the State during its closing argument. We disagree.

The standard of review for assessing alleged improper closing arguments that fail to

¹ We also note that both Nurse Taylor and Cook, did, in fact, testify at trial.

² Defendant makes a brief reference in his appellate brief to a due process violation stemming from the admission of this evidence having occurred. However, he has failed to offer any meaningful argument with respect to that issue or cite any legal authority suggesting that the admission of the evidence at issue under these circumstances triggers due process concerns. Therefore, we do not address this argument.

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*. 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. Defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Jones, __ N.C. App. __, __, 752 S.E.2d 212, 215 (2013) (internal citations, quotation marks, and brackets omitted), *disc. review denied*, 367 N.C. 322, 755 S.E.2d 616 (2014).

It is well established that “[s]tatements made during closing arguments to the jury are to be viewed in the context in which the remarks are made and the overall factual circumstances to which they make reference. As a general proposition, counsel are allowed wide latitude in closing arguments, so that a prosecutor is entitled to argue all reasonable inferences drawn from the facts contained in the record.” *State v. Harris*, __ N.C. App. __, __, 763 S.E.2d 302, 311 (2014) (internal citations omitted).

“During closing argument an attorney may not express his personal belief as to the truth or falsity of the evidence.” *State v. Phillips*, 365 N.C. 103, 139, 711 S.E.2d 122, 147-48

(2011) (citation, internal quotation marks, and ellipses omitted), *cert. denied*, ___ U.S. ___, 182 L.Ed.2d 176 (2012). Our Supreme Court has nevertheless held that where opposing counsel does not object to such arguments, the statements must “pervert or contaminate the trial to such an extent as to render the proceedings fundamentally unfair.” *Id.* at 139, 711 S.E.2d at 148.

Defendant contends that the State’s closing argument was improper in that the prosecutor “1) . . . attempted to explain away gaps [in the evidence] by suggesting scenarios unsupported by the evidence; 2) . . . argued his opinion as to guilt; and 3) . . . incorrectly supported the credibility of the jailhouse snitch by arguing facts contrary to the evidence.” We address each of these arguments in turn.

Defendant first challenges the prosecutor’s attempt to explain why Defendant arrived at the hospital in a dark-colored Ford Taurus when other evidence showed that he left Mohammed’s residence in a blue Toyota Solara on 20 August 2005. Specifically, Defendant challenges the following statement by the prosecutor:

Now, there was something about him borrowing a Toyota Solara from Christina – Solara. The witnesses there at the E.R. say they thought it was a Ford Taurus. And it may well have been a Ford Taurus.

Because if you think about it, if Mr. Mohammed and the defendant had a car that they had driven up from Salisbury in, that the original plan was to come to Greensboro and meet up or otherwise get together with some other guys who are unidentified still, and do the robbery, and they knew that afterwards, they were gonna have to drive all the way back to Salisbury. And of course, doing a robbery like this, it's certainly conceivable that someone might have seen the vehicle that they were using to transport themselves to the location at Elmer Street where the robbery was gonna happen, that they might be seen and a description go out.

So it may have been a situation where they did not use the vehicle that they drove from Salisbury in, but left that at another location and then, you know, used a separate vehicle to transport themselves to the actual robbery.

And after Mr. Mohammed was shot, likely there wasn't any time to go back and get a Solara or do whatever else. It's just time to try to get him to the hospital and then ditch that car and use whatever - whatever vehicle that he borrowed from Christina to get back to Salisbury.

Evidence was introduced at trial tending to show that, by his own admission, Defendant dropped Mohammed off at the Hospital near midnight on 20 August 2005. Evidence was also presented that when he arrived at the hospital, he was in a dark-colored Ford Taurus. Admittedly, no evidence was offered to show that Defendant actually switched cars that day. However, even assuming, without deciding, that the inference made by the prosecutor was not supported by the evidence, we

fail to see how the prosecutor's statement had the effect of "pervert[ing] or contaminat[ing] the trial to such an extent as to render the proceedings fundamentally unfair." *Phillips*, 365 N.C. at 139, 711 S.E.2d at 148.

Defendant next challenges the prosecutor's statement that

[w]e have these guys actually coming to Greensboro and initiating the entry of the residence, guns blazing, and killing Mr. Smith. But clearly, they had agreed to come and do this.

Defendant argues that this statement constitutes an impermissible personal opinion on the part of the prosecutor as to Defendant's guilt. In making this statement, the prosecutor was attempting to establish the existence of one of the elements of conspiracy to commit first-degree burglary.

The prosecutor's statement was arguably based on a rational inference arising from the evidence presented at trial. Defendant was placed at Jordan's house on the night of the shooting based on the fact that Mohammed's DNA was found at the Elmer Street address coupled with Defendant's statement that he was with Mohammed the entire night before ultimately dropping him off at the Hospital. Moreover, Warren testified that Defendant had told him details about the attempted robbery of Jordan's house and how it had not gone according to plan. This evidence raised an inference that prior to the shooting Defendant had entered into an agreement to rob Jordan's house.

Moreover, we are not persuaded that this isolated statement in the context of the State's entire closing argument constituted prejudicial error rendering the entire proceedings fundamentally unfair.

Finally, Defendant challenges the following statements made by the prosecutor regarding Warren as an improper attempt to bolster Warren's credibility: (1) "But nevertheless, this isn't a situation where, you know, Mr. Jordan could fill in all the blanks and then Mr. Warren comes in and testifies, you know, about somebody that, you know, that he barely knows or doesn't know and just make something up"; and (2) "[s]o again, I contend to you that that - you can attribute a degree of credibility to what Mr. Warren told you."

"Our Supreme Court has recognized that while counsel may not personally vouch for the credibility of the State's witnesses or for his own credibility, counsel may give the jurors reasons why they should believe the State's evidence." *State v. Jordan*, 186 N.C. App. 576, 586, 651 S.E.2d 917, 923 (2007), *disc. review denied*, 362 N.C. 241, 660 S.E.2d 492 (2008). Moreover, although

attorneys may not express their personal opinions during closing arguments, we have held that prosecutors are allowed to argue that the State's witnesses are credible. *See, e.g., State v. Wiley*, 355 N.C. 592, 621-22, 565 S.E.2d 22, 43-44 (2002) (noting the difference between improperly vouching

for a State witness and giving the jury reasons to believe the State's evidence), *cert. denied*, 537 U.S. 1117, 154 L.Ed.2d 795 (2003).

State v. Augustine, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005) (internal citation omitted), *cert. denied*, 548 U.S. 925, 165 L.Ed.2d 988 (2006).

With regard to the first statement, Defendant essentially argues that because Jordan could have told Warren everything he needed to know about Defendant while they were in prison together, the prosecutor's statement was not convincing. However, the prosecutor's statement can be viewed simply as his attempt to argue one possible interpretation of the evidence by reasoning that there were details about the shooting that Warren provided to law enforcement officers that he was unlikely to have known just from speaking with Jordan. Therefore, while Defendant may disagree with the validity of this interpretation, we do not believe that the prosecutor's comments concerning Warren's testimony required intervention by the trial court *ex mero motu*.

Nor are we persuaded that the second statement concerning Warren challenged by Defendant required intervention by the trial court. In *Jordan*, the prosecutor made the following statements concerning the testimony of a sheriff: "We contend that the Sheriff is an honest man and he has told you what

happened. He's not trying to convict somebody for something they didn't do. He wouldn't want to do that. He is the elected Sheriff of this county.'" *Jordan*, 186 N.C. App. at 586, 651 S.E.2d at 923 (brackets omitted). On appeal, the defendant asserted that the trial court should have intervened *ex mero motu* in response to these comments by the prosecutor concerning the sheriff's credibility. We rejected this argument, holding that the prosecutor's comment was not so improper as to require *ex mero motu* intervention by the trial court. *Id.*; see also *State v. Bunning*, 338 N.C. 483, 489, 450 S.E.2d 462, 464 (1994) (holding that prosecutor's argument that law enforcement officer would not risk his professional reputation merely to convict defendant "was not so egregious as to require the court to intervene *ex mero motu*").

Therefore, we cannot conclude that the prosecutor's statements regarding the credibility of Warren resulted in prejudicial error because the trial court did not intervene *ex mero motu*. Accordingly, Defendant's argument with respect to this issue is overruled.

III. Testimony as to Identity of Defendant

Defendant's final argument is that the trial court erred in allowing the State to ask a witness how he recognized Defendant after the witness had previously indicated that he was unable to identify Defendant. Specifically, Defendant challenges the

following exchange between the prosecutor and Robert Fox ("Fox")
- one of the EMS employees who was present when Mohammed was
dropped off at the Hospital:

Q. Do you recognize the defendant?

A. Somewhat. I - you know, I can't really -
it's been nine years. So you know, there's
some vision of that, but I can't say yes or
no to that answer.

Q. Is he consistent with people you -

[Defendant's trial counsel]: Objection,
Your Honor.

THE COURT: Sustained.

Q. You say some - you recognize him
somewhat.

A. Yes, sir.

Q. If you recognized him somewhat, do you
recognize him as the driver or one of the
passengers?

[Defendant's trial counsel]: Objection.

THE COURT: Sustained.

Q. How do you recognize him?

[Defendant's trial counsel]: Objection,
Your Honor.

THE COURT: Overruled. Let him explain.

A. My memory, recollection of the nine years
ago, he seems like the body stature and the
hair of the guy that was standing beside me.
Had a gold tooth up front, I do remember
that, on the front of his teeth. Other than
that, that's all I remember.

Q. So similar stature.

A. Yes, sir.

Q. And was the person standing next to you the one that you described as having dreadlocks?

A. Yes, sir.

On appeal, Defendant contends that

[d]espite the testimony of one of the EMS workers that he could not identify the defendant as the driver, the prosecutor persisted by asking how he recognized the driver. As what the EMS remembered was that the driver was black, had a gold tooth and dreadlocks, this identification was little more than racial profiling and grossly prejudicial to the defendant.³

³ Defendant makes a brief reference to the fact that the above-quoted testimony was "grossly prejudicial" and should have been excluded pursuant to Rule 403 of the North Carolina Rules of Evidence. However, at trial, his general objection to this testimony did not invoke Rule 403 for the contention that the testimony's probative value was substantially outweighed by the danger of unfair prejudice to Defendant. N.C.R. Evid. 403. Therefore, the trial court was not afforded the opportunity to make a discretionary ruling as to its admissibility under Rule 403, and as a result, Defendant did not properly preserve this issue for appellate review. See *Russell v. Buchanan*, 129 N.C. App. 519, 521, 500 S.E.2d 728, 730 ("Defendants, for the first time on appeal, cite Rule 403 for the proposition that this evidence should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice. As defendants failed to make this argument at trial, they cannot swap horses between courts in order to get a better mount on appeal." (internal citations, quotation marks, and brackets omitted)), *disc. review denied*, 348 N.C. 501, 510 S.E.2d 655 (1998).

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C.R. Evid. 401. Rule 402 of the North Carolina Rules of Evidence states, in pertinent part, that “[e]vidence which is not relevant is not admissible.” N.C.R. Evid. 402. We have held that “[a]lthough a trial court’s rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to . . . Rule 403, such rulings are given great deference on appeal.” *State v. Clapp*, __ N.C. App. __, __, 761 S.E.2d 710, 718 (2014) (internal citations and quotation marks omitted).

We believe that the testimony sought to be elicited by the State was a proper avenue of inquiry and that the trial court did not err by allowing it. The State was seeking to explore the extent to which Fox recognized Defendant in response to Fox’s earlier testimony that he recognized Defendant “somewhat.” Therefore, the trial court did not err by allowing the admission of this testimony. However, even assuming *arguendo* that the admission of this testimony was erroneous, we are satisfied that any such error was not prejudicial.

Conclusion

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

NO PREJUDICIAL ERROR.

Judges ELMORE and ERVIN concur.

Report per Rule 30(e).