IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-277

Filed: 1 December 2015

Franklin County, Nos. 09 CRS 52854, 14 CRS 51, 109

STATE OF NORTH CAROLINA

v.

WALTER EUGENE SPINKS

Appeal by defendant from judgment entered 2 April 2014 by Judge Alma L. Hinton in Franklin County Superior Court. Heard in the Court of Appeals 22 September 2015.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth N. Strickland, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

BRYANT, Judge.

Where the witness's testimony did not illustrate "the prosecutor's fallacy" and the prosecutor's comment during closing argument was within the allowable scope of argument, the trial court did not commit plain error. Where there was sufficient evidence for the jury to find that defendant did not shoot with an intent to kill, the trial court did not err in instructing the jury on the lesser included offense of assault with a deadly weapon inflicting serious injury.

On 8 March 2010, a grand jury convened in Franklin County indicted defendant Walter Eugene Spinks (aka "Walter Lee Spinks") on charges of attempted robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. On 21 January and 3 March 2014, respectively, defendant was indicted on charges of possession of a firearm by a felon and attaining violent habitual felon status. A trial commenced on 31 March 2014, the Honorable Alma L. Hinton, Judge presiding.

The evidence presented at trial tended to show the following. On 22 April 2009, William Larson Dollar attended a high stakes poker game hosted at a house located off of Highway 39 in Franklin County. There were "surveillance cameras all around the place." Early in the evening, on a video monitor, Dollar observed that another player, Michael Gracz, was being held on the front porch with a gun to his head. Dollar shouted out they were being robbed. Two assailants then kicked the door in and announced that it was a robbery. Dollar, who was carrying a "32 Colt" handgun, pointed his gun at one of the assailants. When the assailant, later identified as defendant, turned and pointed a "Glock 45" handgun at him, Dollar fired several shots and advanced toward defendant, who returned fire. After running out of bullets, Dollar ran outside but fell as he had sustained two gunshot wounds. Defendant came out of the house, jumped on top of Dollar, pointed a gun at him, and

said, "You're the M-F-er that shot me." A car, "a Mercedes or B-M-W [sic]" soon pulled up; defendant and the other assailant entered the vehicle, and drove away.

On 22 April 2009, Captain Gregory Strickland with the Franklin County Sheriff's Department responded to a report of an attempted robbery at a residence off of Highway 39. Captain Strickland testified that at the scene, law enforcement officers obtained a video surveillance recording containing images of the two assailants and a view of the attempted robbery.

In the early morning hours of 23 April 2009, defendant was treated for gunshot wounds at Central Carolina Hospital in Sanford. Defendant had sustained gunshot wounds to his chest and leg. Defendant reported that he had been driving home on Highway 87 when he stopped to urinate along the roadside and was shot after he exited his vehicle. Defendant said he could not identify who shot him.

On 3 December 2009, an arrest warrant was issued for defendant. While at defendant's residence in Sanford to serve the arrest warrant, a law enforcement officer observed a black 1992 500 SEL4S Mercedes-Benz, which matched Dollar's description of the car that was used to drive defendant and the other assailant away from the site of the 22 April shooting and attempted robbery.

At trial, a forensic scientist with the North Carolina Crime Laboratory testified that defendant's DNA profile matched a DNA sample retrieved from the scene of the attempted robbery.

Defendant did not to present any evidence.

The jury returned guilty verdicts against defendant on the charges of attempted robbery with a firearm, the lesser-included offense of assault with a deadly weapon inflicting serious injury, and possession of a firearm by a felon. Defendant pled guilty to attaining violent habitual felon status which, standing alone, exposed defendant to a maximum sentence of life in prison without parole. The court entered a consolidated judgment on the offenses of attempted robbery with a dangerous weapon; assault with a dangerous weapon inflicting serious injury; possession of a firearm by a felon; and attaining violent habitual felon status. The trial court sentenced defendant to a term of life imprisonment without parole. Defendant appeals.

On appeal, defendant argues that the trial court (I) committed plain error by admitting testimony regarding DNA evidence and (II) committed error by instructing the jury on the lesser-included offense of assault with a deadly weapon inflicting serious injury.

I

Defendant, acknowledging he made no objection at trial to the witness's statement or to the prosecutor's closing argument, now argues that the trial court committed plain error by allowing a witness to testify erroneously about the

statistical significance of DNA evidence and then failing to intervene *ex mero motu* when the prosecutor advanced the same theory during her closing argument. Specifically, defendant contends the State's witness erroneously equated the match probability that a DNA profile in evidence would match a random individual with the probability that defendant was the source of the DNA profile, a comparison defendant referred to as "the prosecutor's fallacy." Defendant asserts the witness's erroneous comparison was further perpetuated during the prosecutor's closing arguments, and therefore, he is entitled to a new trial. We disagree.

"One of the purposes of requiring parties to object and make motions before the trial court is so that the trial court has the opportunity to correct any errors." *State v. Dye*, 207 N.C. App. 473, 481, 700 S.E.2d 135, 140 (2010) (citing *Reep v. Beck*, 360 N.C. 34, 37, 619 S.E.2d 497, 499 (2005)); *see also State v. Jones*, 342 N.C. 523, 535–36, 467 S.E.2d 12, 20 (1996) ("Counsel claiming error has the duty of showing not only that the ruling was incorrect, but must also provide the trial court with a specific and timely opportunity to rule correctly." (citing *State v. Adcock*, 310 N.C. 1, 18, 310 S.E.2d 587, 597 (1984))).

> The trial judge is in a better position to weigh the significance of the pertinent factors than is an appellate tribunal. . . . The [United States Court of Appeals for the Ninth Circuit] said in *United States v. Page*, [302 F.2d 81, 84 (9th Cir.)]: "We sometimes tend to forget that the testimony of a witness, presented to us in a cold record, may make an impression upon us directly contrary to that which we would have received had we seen and heard that

witness."

State v. Little, 270 N.C. 234, 240, 154 S.E.2d 61, 66 (1967).

"In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4) (2015).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 335 (2012) (citations and quotations omitted).

Defendant asks us to review the testimony he now challenges for the first time on appeal as illustrating "the prosecutor's fallacy," and find that the witness's testimony was inaccurate.

> The prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample. *See* Nat. Research Council, Comm. on DNA Forensic Science, The Evaluation of Forensic DNA Evidence 133 (1996) ("Let P equal the probability of a match, given the evidence genotype. The fallacy is to say that P is also the probability that the DNA at the crime scene came from someone other than the defendant"). In other words, if a

> juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy. It is further error to equate source probability with probability of guilt, unless there is no explanation other than guilt for a person to be the source of crime-scene DNA. This faulty reasoning may result in an erroneous statement that, based on a random match probability of 1 in 10,000, there is a 0.01% chance the defendant is innocent or a 99.99% chance the defendant is guilty.

McDaniel v. Brown, 558 U.S. ___, ___, 175 L. Ed. 2d 582, 588 (2010) (per curiam).

Defendant also directs our attention to *State v. Ragland*, ___ N.C. App. ___, 739 S.E.2d 616 (2013), wherein this Court considered whether the admission of testimony which illustrated the prosecutor's fallacy amounted to plain error. The witness in *Ragland* worked in the State Crime Lab and testified before the jury as an expert. The witness testified that the State Crime Lab maintained a population database for North Carolina residents to aid in the determine of how frequently a subject DNA profile occurred in the North Carolina population. On this point, the witness gave the following testimony:

> Q. And how do you use this particular database in your case work?
>
> A. Like I said, if you have a match between a case, we need to know how popular or how common that profile is. . . . You calculate to see how common that profile is to that known standard. *And if it's over the*

> *world's population, then you know that there could be no one else other than that person in the world.*

Id. at ___, 739 S.E.2d at 624 (original emphasis). The witness went on to testify as follows:

> The probability of randomly selecting an unrelated individual with the DNA profile that matches the DNA profile obtained from the sperm fractions of the vaginal swabs and the sperm fractions from the cutting from the panties is greater than 1 trillion, which is more than the world's population for North Carolina Caucasian, Black, Lumbee Indian and Hispanic populations. *Meaning that anything over the world's population, like I said earlier, can be no one other than that person*.

Id. The *Ragland* Court reasoned that the testimony "erroneously [asserted] 'that the random match probability is the same as the probability that the defendant was not the source of the DNA sample.' " *Id.* at ___, 739 S.E.2d at 624 (quoting *McDaniel*, 558 U.S. at 128, 175 L. Ed. 2d at 588). However, the Court went on to consider the substantial remaining evidence in support of the defendant's convictions. Notably, the defendant did not dispute that the DNA evidence obtained from the victim and her clothes matched the defendant's DNA or that the probability of an unrelated individual with a DNA profile that matched the DNA profile obtained from the victim and her clothes was greater than 1 in a trillion. *Id.* at ___, 739 S.E.2d at 625. Thus, the *Ragland* Court held that the admission of the testimony relying on the prosecutor's fallacy did not amount to plain error.

Here, Tanisha Walker, a forensic scientist with the North Carolina Crime

Laboratory, was admitted to testify as an expert in the field of forensic DNA analysis. To provide context for the challenged testimony admitted on redirect examination, we include Walker's testimony on direct examination. Walker testified that the DNA profile obtained from swabbings taken from the front door handle and the storm door of the crime scene matched the DNA profile obtained from defendant.

> Q. And is there a way that you can attach some type of statistical significance to this match?
>
> A. Yes.
>
> Q. And can you tell us, as easy as you can in lay terms to understand, when you talk about a match and statistical analysis, would you tell the jury what that analysis would be?
>
> . . .
>
> A. Okay. The probability of randomly selecting an unrelated individual with a D-N-A profile that matches the D-N-A profile obtained from the swabbings from storm door above the handle interior . . . ; swabbings from the wall near the window . . . ; swabbings from the storm door under the window . . . ; and swabbings from the outside of the storm door . . . is one in greater than one trillion which is more than the world's population in the North Carolina Caucasian, Black, Lumbee Indian, and Hispanic populations.

Thereafter, defendant cross-examined Walker on the general process of DNA testing, but did not otherwise cross-examine Walker regarding the probability of a random person matching the DNA found at the crime scene. Notwithstanding,

defendant now asserts that Walker's testimony on re-direct examination promoted the prosecutor's fallacy.

> Q. Ms. Walker, it's your testimony that you compared a biologically known sample from Walter Eugene Spinks, and those swabs, and that was a trillion to one that it matched this defendant?
>
> A. That is correct.

Defendant also challenges assertions made during the prosecutor's closing argument.

> And then these samples from that residence, primarily from the door and the wall as the S-B-I agent [Walker] told you, were analyzed. They were analyzed through the D-N-A process. And these substances compared to the known sample of . . . defendant's blood matched . . . defendant. And what did Ms. Walker tell you, how it matched. She said it is a trillion to one that it matched . . . defendant. That's more people than there are on the planet, a trillion to one. It is him, folks. It puts him there.

During closing argument, the prosecutor restated Walker's calculated probability of a random DNA profile matching the DNA profile taken from the crime scene and argued that because the random match probability was one out of more people than are on the planet, defendant must be the source of the DNA profile found at the crime scene. Such a statement could be interpreted as stemming from the prosecutor's fallacy, i.e. that the probability that the DNA at the crime scene came from someone other than defendant is virtually impossible based on the random match probability. However, we must consider that the prosecutor's statement was made during closing argument, when a party is allowed to present her theory of the

case, and draw permissible inferences from the evidence presented at trial. *See* N.C. Gen. Stat. § 15A-1230(a) (2013) ("An attorney may . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue."); *State v. Matthews*, 358 N.C. 102, 112, 591 S.E.2d 535, 542 (2004) ("[Closing] argument . . . must: . . . (3) be premised on logical deductions . . . ; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial."); *cf. State v. Shope*, 128 N.C. App. 611, 613, 495 S.E.2d 409, 411 (1998) ("[C]ounsel may not, by argument, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." (citation and quotations omitted)).

Walker's trial testimony that it "was a trillion to one that [the specimen DNA profile] matched this defendant[,]" merely states the probability that the DNA profile found at the crime scene matched that of a random person in the general population (random match probability) and here, that random person was defendant. Walker's unchallenged testimony is not an illustration of the prosecutor's fallacy. Her testimony does not impermissibly conflate the random match probability of a specific DNA profile with the probability that someone other than defendant was the source of the DNA profile (source probability). *See McDaniel*, 558 U.S. at ___, 175 L. Ed. 2d at 588. Given that the evidence presented at trial was not inaccurate, there was no improper "prosecutor's fallacy" testimony. Therefore, the prosecutor's comment was

not beyond the latitude allowed during closing argument. Accordingly, we overrule defendant's argument.

II

Next, defendant argues that the trial court erred by granting the State's request for an instruction on the lesser-included offense of assault with a deadly weapon inflicting serious injury. Specifically, defendant contends that where he pointed a gun at another person and fired, an intent to kill may be inferred, and therefore, the trial court erred in submitting the offense of assault with a deadly weapon inflicting serious injury as a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury. We disagree.

> A lesser included offense instruction must be given if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense and acquit him of the greater.
>
> > The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Larry, 345 N.C. 497, 516–17, 481 S.E.2d 907, 918 (1997) (citations and quotations omitted).

"It is well-settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury

could find that defendant committed the lesser included offense." *State v. Porter*, 198 N.C. App. 183, 189, 679 S.E.2d 167, 171 (2009) (quoting *State v. Rhinehart*, 322 N.C. 53, 59, 366 S.E.2d 429, 432 (1988)) (quotations omitted). "The mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *State v. Friend*, 164 N.C. App. 430, 443, 596 S.E.2d 275, 284 (2004) (quoting *State v. Black*, 21 N.C. App. 640, 643–44, 205 S.E.2d 154, 156, *aff'd*, 286 N.C. 191, 209 S.E.2d 458 (1974)). "The defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. Cromartie*, 177 N.C. App. 73, 76, 627 S.E.2d 677, 680 (2006) (citation and quotations omitted).

Here, the evidence showed that when defendant entered the house located off of NC-39 South, he announced that he was there to commit a robbery. One of the guests, Dollar, then pointed a gun at defendant. When defendant turned and pointed a firearm at Dollar, Dollar fired at defendant.

> I came at him, probably a distance of six to eight feet, and he was up under a table and chairs. He was shooting at me and I was shooting at him.

Dollar further testified that after he was out of bullets, he ran outside. Outside, defendant jumped on top of Dollar and pointed at gun at him but did not shoot. When a vehicle pulled up, defendant and the other assailant left the scene.

Under the facts, defendant shot Dollar only after Dollar fired at him in the house and, after jumping on Dollar outside, did not shoot him again when he had the opportunity. Thus, a jury could reasonably find that defendant lacked the intent to kill. Therefore, the trial court did not err in granting the State's request to instruct the jury on the lesser-included offense of assault with a deadly weapon inflicting serious injury. Accordingly, we overrule defendant's argument.

NO ERROR.

Judges GEER and TYSON concur.

Report per Rule 30(e).