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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1323

Filed: 15 November 2016

Mecklenburg County, Nos. 13 CRS 218339-40

STATE OF NORTH CAROLINA

v.

DEMARCUS MARTEL MELVIN

Appeal by defendant from judgments entered 13 April 2015 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 May 2016.

Roy Cooper, Attorney General, by Amar Majmundar, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by David W. Andrews, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Judge.

Demarcus Martel Melvin (“Defendant”) appeals from his convictions for first-degree murder and possession of a firearm by a felon. On appeal, he contends that the trial court committed plain error by admitting inadmissible hearsay evidence. After careful review, we conclude that Defendant received a fair trial free from plain error.

Factual Background

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The State presented evidence at trial tending to establish the following facts: On the evening of 3 May 2013, Murad Hailey and Altasia Massenburg picked up Defendant, who was 23 years old, in Hailey's car in order for Defendant to purchase alcohol for them in Charlotte, North Carolina. When they arrived at a liquor store, Hailey witnessed Defendant place a pistol on the backseat of the car before going inside and buying the alcohol.

The three of them later drove to a nearby gas station. Terrence Mingo, who was also present at the gas station and had been driven there by his friend Tony Clark, recognized Hailey and went over to greet him. Mingo approached Hailey's car and noticed Defendant inside. Mingo and Defendant, who were on bad terms, started yelling at each other. As Mingo was walking away, Defendant got out of the car and ran toward Mingo as if they were about to fight. Clark got out of his SUV and said to Defendant, "[H]old up . . . what are you doing?"

Defendant asked whether Clark and Mingo were going to "jump" him. Clark replied "no" but told Mingo and Defendant that "you all can fight if you need to fight now" Instead, Defendant returned to Hailey's car.

During the altercation, Hailey had gone into the store to make a purchase. When he came out, he noticed that Defendant was "[s]till heated from the argument." Defendant told Hailey that his conflict with Mingo was "getting old."

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The two groups then went their separate ways. Clark drove Mingo to his grandmother's house (where Mingo lived with her) on Old Meadow Road. Meanwhile, while in the car with Hailey and Massenburg as they left the gas station, Defendant told them that Mingo "only could be going one place, I know where he live[s]." Defendant also stated that "if I see [Mingo], I'm going to air him out." Hailey understood the phrase "air out" to be slang for "shoot."

Hailey then called his friend Aubrie Randolph and told him about the incident at the gas station. Randolph and three other individuals — Sinae Tesfay, Tafari Samuel, and Winston Bethel — met Defendant, Hailey, and Massenburg in a parking lot next to the gas station where the altercation had occurred earlier that evening. Defendant climbed into Tesfay's car (a silver Chevrolet Impala with tinted windows), Samuel got into Hailey's car, and both groups left the parking lot. When the cars pulled up to each other at a nearby stop sign, Defendant asked Samuel if he wanted to "put in some work[.]" Samuel agreed and climbed into Tesfay's car to join Defendant. Hailey and Massenburg then went to Bethel's house, which was approximately five minutes away, while Defendant, Samuel, Bethel, Tesfay, and Randolph went to the home of Mingo's grandmother to find Mingo.

After arriving at his grandmother's house following the incident with Defendant, Mingo told his grandmother that he had just gotten into an altercation with a man at a gas station who had displayed a gun. Mingo also told her that the

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man had gotten out of his car and made a motion with his hand as if he was pointing a gun at him. Mingo's grandmother discussed the incident with him and then warned him, "[Y]ou be very careful, grandson." Mingo then told her he was going across the street to watch a basketball game at a friend's house. He took her cordless house phone with him.

Upon noticing a gray Impala with tinted windows that was driving back and forth in front of his grandmother's house, Mingo called 911 to request that a police officer be dispatched to investigate. When asked by the 911 dispatcher what was happening, Mingo responded that he had gotten into a "situation" earlier that evening. At that point, Tesfay's Impala pulled up to the curb near Mingo's grandmother's house, and Defendant and several others climbed out. On the 911 recording, an increasingly panicked Mingo could be heard saying, "[W]hat up, how you gonna do it? . . . What, y'all going to shoot me right here? You going to shoot me right here? Cousin, cousin, listen. Nah, nah, cousin listen, please cousin, cousin, please son, cousin, look, nah, please, yo my nigga, yo my nigga, my nigga—" Several loud "bangs" then rang out, and Mingo stopped talking. The dispatcher said "hello" twice, but there was no response and the call ended. Paramedics later arrived on the scene and took Mingo to a hospital for treatment, but he died the following day from a gunshot wound to his chest.

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After the shooting, Defendant arrived at Bethel's house about 10 to 15 minutes after Hailey and Massenburg had gotten there. When Hailey asked Defendant what had just happened, Defendant said he "busted on him," which Hailey understood to have meant that Defendant "shot him." Massenburg overheard Hailey ask Defendant what had happened, and she testified that Defendant replied that he "boomed him" or "dumped on him," which she understood to have meant "shot him."

On 20 May 2013, Defendant was indicted on charges of first-degree murder and possession of a firearm by a felon. A jury trial was held in Mecklenburg County Superior Court beginning on 6 April 2015 before the Honorable Forrest D. Bridges.

Among the witnesses called by the State at trial were Clark, Hailey, Massenburg, and Samuel. Near the beginning of his testimony, Samuel denied any knowledge of what had transpired after he — along with Defendant, Tesfay, Randolph, and Bethel — arrived at Old Meadow Road and Defendant and several others got out of the car. The prosecutor then questioned Samuel about various statements he had made during a pre-trial interview in which he incriminated Defendant in the murder, including a statement that he was "100% sure" that Defendant was the "gunman." The entire interview transcript was eventually admitted into evidence without objection.

The State also presented the testimony of Imset El, one of Defendant's co-workers, who testified that approximately one year before Mingo's death, Defendant

and El saw Mingo at a store and Defendant told El that he wanted to kill Mingo. El also stated that when he spoke to Defendant after Mingo was murdered, Defendant said that Mingo “got what he deserved.”

The jury found Defendant guilty on both charges, and the trial court sentenced him to life imprisonment without parole for the murder conviction and 14 to 26 months for the possession of a firearm by a felon conviction. Defendant gave oral notice of appeal in open court.

Analysis

On appeal, Defendant argues that the trial court erred by admitting into evidence the hearsay statements made by Samuel during his pre-trial interview identifying Defendant as the person who shot Mingo. Defendant concedes that because he failed to raise this issue below, our review of his argument is limited to plain error.

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. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

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Defendant argues that Samuel's pre-trial statements could not have been properly admitted as corroborative evidence because they greatly exceeded Samuel's trial testimony in terms of incriminating Defendant. In response to Defendant's argument, the State does not attempt to defend the statements at issue as corroborative evidence but rather asserts that they were properly used either to refresh Samuel's recollection or, in the alternative, to impeach his inconsistent testimony at trial.

However, even assuming, without deciding, that the trial court erred in admitting Samuel's pre-trial statements, we are satisfied that any such error did not rise to the level of plain error due to the overwhelming evidence of Defendant's guilt. First, the State offered testimony showing that Defendant had a motive to kill Mingo. Hailey and Massenburg testified that there had been a history of conflict between Mingo and Defendant. El testified that Defendant had previously stated that he wanted to kill Mingo. And both Hailey and Clark related the tense confrontation between Defendant and Mingo that occurred at the gas station shortly before the shooting.

Second, Defendant had the means to commit the crime as evidenced by Hailey's testimony that he saw Defendant with a pistol earlier in the evening. Moreover, Mingo's grandmother testified that Mingo told her that the man with whom he had the altercation at the gas station appeared to have been brandishing a gun.

Third, on the evening of the murder Defendant expressed to others an intent to harm Mingo. Hailey testified that Defendant told him shortly before the shooting that if he saw Mingo, he would “air him out,” which — in Defendant’s parlance — meant shooting Mingo.

Fourth, the State presented evidence showing that Defendant had gotten out of the vehicle to confront Mingo just before Mingo was shot. Finally, when asked following the murder about what had just occurred, Defendant stated that he “busted on him,” “boomed him,” or “dumped on him” — all euphemisms for shooting someone. It is clear from the context that Defendant was referring to shooting Mingo. Defendant also later remarked to El that Mingo deserved to get killed.¹

Based on all of this evidence, we are unable to conclude that the admission of Samuel’s pre-trial statements “had a probable impact on the jury’s finding that the defendant was guilty.” *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation and quotation marks omitted). Therefore, Defendant has failed to demonstrate plain error.

Conclusion

¹ We reject Defendant’s argument that the slang shown to have been used by him was too ambiguous to constitute evidence of his guilt. Hailey and Massenburg explicitly testified about the meaning of the slang terms that Defendant used. *See, e.g., State v. Holden*, 321 N.C. 125, 144, 362 S.E.2d 513, 526 (1987) (allowing witness to testify that “getting some” was slang for “having sex,” as it “was an explanation of a slang term which may not have been familiar to some jurors, but was familiar to [the witness]”); *State v. Brockett*, 185 N.C. App. 18, 31, 647 S.E.2d 628, 638 (allowing testimony as to meaning of various slang terms used by defendant, including fact that to “smack” meant to “pistol whip” in the particular context in which the expression was used), *disc. review denied*, 361 N.C. 697, 654 S.E.2d 483-84 (2007).

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

NO PLAIN ERROR.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).