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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-352

Filed: 19 January 2016

Wake County, Nos. 12 CRS 204986-87

STATE OF NORTH CAROLINA

v.

STEVEN MARCEL COOLEY

Appeal by Defendant from judgments entered 17 July 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 7 October 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Assistant Appellate Defender Paul M. Green for Defendant.*

STEPHENS, Judge.

*Factual Background*

Around 8:30 on the evening of 2 December 2011, a customer entered the M3 Tobacco Mart on Cavalry Drive in Raleigh and found the store's proprietor, Majid Mohram, lying behind the counter and dying of a gunshot wound to his chest. The customer called 911 and Mohram was rushed to the hospital, where he died without ever regaining consciousness. An autopsy revealed that the .32 caliber long plane

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bullet that killed him entered his chest approximately an inch and a half above his right nipple, cut his thoracic aorta, and perforated both his lungs.

Surveillance videos obtained by the Raleigh Police Department (“RPD”) during the subsequent investigation into Mohram’s death showed that around 8:25 p.m., two young African American men had rushed into the store. One of the men was armed with a silver revolver, which he pointed at Mohram as he approached the counter. The gunman wore a grey bandanna over his face, a flight jacket with a fur-lined hood pulled up to conceal his dreadlocks, blue jeans frayed at the bottom with a distinctive zigzag pattern stitched across the rear pockets, and a black and grey pair of shoes with white soles. When Mohram’s arm moved as if to push the gun away, the gunman pulled the trigger and fired a single shot. After Mohram fell to the floor, the gunman walked around the side of the counter while his associate leapt over the top. The two suspects tried and failed to open the cash register, then searched Mohram’s pockets and stole his cell phone and wallet before fleeing the store.

In the weeks that followed, RPD investigators analyzed fingerprints taken from the store’s counter, followed up on numerous tips from the public, and conducted interviews to eliminate potential suspects, but were unable to locate any eyewitnesses to Mohram’s murder or otherwise identify the gunman. The first major breakthrough in the investigation came on 9 January 2012, when RPD Detective Matthew Frey learned that officers from the Greenville Police Department (“GPD”) had arrested

four men the previous night for committing armed robbery at a Greenville Food Lion. Dariel Haddock, Demario Williams, Kwamane Everett, and Defendant Steven Marcel Cooley had been taken into custody after a GPD officer in an unmarked car saw them sprinting away from the Food Lion and eventually pulled over their vehicle. A subsequent search of the car revealed it contained two firearms, cash, multiple boxes of Food Lion gift cards, marijuana, and numerous articles of clothing including hooded sweatshirts, jackets, gloves, hats, and masks. In the trunk of the vehicle, officers found more clothing, several documents belonging to Cooley, and a pair of black and grey Zoo York-brand skate shoes with white soles. Frey had not been assigned to investigate Mohram's murder, and was instead investigating a recent string of armed robberies in Wake County, including one that had occurred at a Raleigh Food Lion on 2 January 2012. However, when he realized that the Greenville Food Lion armed robbery had followed a similar pattern—featuring multiple young African American males who masked their identities, brandished firearms, and jumped over service counters—Frey began to suspect a connection, especially after he discovered that two of the four suspects arrested in Greenville, Everett and Williams, had Wake County addresses.

On 13 January 2012, RPD investigators obtained a search warrant for a two-bedroom apartment that Williams and his brother Demarus shared in Knightdale, where they found documents identifying all four of the Greenville suspects and

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several of their associates, as well as evidence linked to recent armed robberies in both Greenville and Raleigh. The investigators also found evidence related to the M3 Tobacco Mart armed robbery and Mohram's murder. In one bedroom, they recovered five rounds of .32 caliber ammunition that appeared to match the bullet that killed Mohram. In the other bedroom, investigators recovered a pair of blue jeans that appeared to match those worn by the gunman in the surveillance video and, in a nearby closet, a bag containing 49 individually packaged baggies of marijuana and a black wallet containing Cooley's bank card, learner's permit, and social security card. Of the four suspects arrested in Greenville, Cooley was the only one with dreadlocks.

*Procedural History*

On 6 August 2012, Cooley was indicted by a Wake County grand jury on charges of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. During the jury trial that began on 7 July 2014 in Wake County Superior Court, the State introduced testimony from Haddock, Williams, and Everett, each of whom testified that it was Cooley who fired the shot that killed Mohram during the M3 Tobacco Mart armed robbery on 2 December 2011.

Haddock testified that he, Everett, and his cousins Demario and Demarus Williams had met in high school in Greenville and were also members of the Crips street gang's "Rollin' 60's" sub-set. Haddock testified further that although he first began robbing convenience stores in Greenville with his brother Kentrell Haddock

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and other Crips, he began to commit armed robberies in Wake County with Everett and the Williams brothers in the fall of 2011, shortly after Haddock moved into the Williams brothers' apartment in Knightdale. According to Haddock, the group focused its attention on convenience stores, gas stations, hotels, restaurants, and other businesses that appeared easy to get into and out of quickly and that kept large amounts of cash on hand with employees who were unlikely to put up any resistance. Haddock explained that the group started off slowly, initially waiting one or two weeks between robberies, and that it was typically his job to serve as the gunman while Everett would follow him into the store as back-up and one of the Williams brothers drove the getaway car. However, as time passed, the group grew bolder, their robberies increased in frequency to several per week, and more of their friends sought to participate in what seemed like an easy score. One of those friends was Cooley, a member of the Greenville Crips "Rollin' 40's" sub-set whom Haddock had met through mutual acquaintances in early 2011. By November, Cooley was regularly spending time in, and occasionally staying at, the Williams brothers' Knightdale apartment, where he kept clothing and personal items in one of the bedrooms.

On 2 December 2011, the group gathered at the Knightdale apartment and discussed committing a home invasion at a drug dealer's residence in south Raleigh. Haddock declined to participate, but Everett, Demario Williams, and Cooley—who was wearing a flight jacket with a fur-lined hood, blue jeans frayed at the bottom with

a distinctive zigzag pattern stitched across the rear pockets, and a black and grey pair of Zoo York shoes with white soles—left Knightdale shortly after sundown and proceeded to the site of their planned home invasion via South Saunders Street. When they arrived at their destination, they knocked on the door but left empty-handed when nobody answered. Everett would later testify that at that point, the plan was to drop him off at his girlfriend’s home, but as they drove north up Capital Boulevard, they passed the M3 Tobacco Mart and noticed “there wasn’t nobody, no cars or nothing in front of it, and so it looked easy enough to rob.” Everett stayed in the vehicle while Williams and Cooley got out, with Cooley carrying a chrome .32 Smith & Wesson revolver he had borrowed from Williams. The two men went inside the store for a short time, then came running back out, at which point Everett moved to the driver’s seat to facilitate their getaway. According to Everett, none of the group’s previous robberies had ever resulted in anybody getting shot, and he had not expected anything to change that night, so it was only after Williams stated that Cooley had “had to shoot the dude”—meaning Mohram—that he realized something had gone wrong inside the M3 Tobacco Mart.

At trial, Everett, Haddock, and Demario Williams each testified that later that night at the Williams brothers’ apartment, Cooley explained to the group that the reason he shot Mohram was because “the dude reached for the gun,” but that he had never intended to kill him and had tried to shoot him in the shoulder. Williams

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testified that after they learned of Mohram's death the next day, he threw away the jackets that Cooley and Everett had worn during the robbery, as well as Mohram's wallet, while Everett got rid of the gun. Williams testified that he had also planned to clean out the getaway car, but never got around to it. In the weeks that followed, the group committed several more armed robberies around Raleigh and Greenville, with Cooley allegedly participating in at least two of them, before they were caught and arrested while fleeing from the scene of the armed robbery at the Food Lion in Greenville on 8 January 2012.

While cross-examining Haddock, Everett, and Demario Williams, Cooley's trial counsel highlighted the fact that they each had received plea deals to lesser charges in exchange for their testimony against Cooley, who, he repeatedly suggested, made for an easy scapegoat because he belonged to a different sub-set of the Crips. Specifically, Cooley's counsel argued that Haddock, Everett, and Williams were pinning the blame on his client in order to protect Haddock's older brother Kentrell, who was also a member of the Crips, had allegedly been involved in at least some of the group's prior robberies, occasionally stayed at the Williams brothers' apartment, and—like both Cooley and the gunman shown in the surveillance video—wore his hair in dreadlocks. Cooley's counsel attempted to portray Kentrell Haddock as the leader of the group and emphasized inconsistencies between its members' testimony and their prior statements to investigators, with particular focus on statements by

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Everett and Williams which suggested Kentrell Haddock might have been at the Knightdale apartment on 2 December 2011.<sup>1</sup>

On 14 July 2014, at the beginning of the second week of trial, just before resting its case in chief, the State notified the court that it had obtained copies of three letters Cooley had written while in jail awaiting trial in an effort to coach potential witnesses regarding their testimony. The first letter, introduced as State's Exhibit 132, was addressed to Cooley's girlfriend, Latifa Lee, who would later be presented as an alibi witness for the defense. The other two letters, introduced as State's Exhibits 133 and 134, had been mailed by Lee at Cooley's behest to his brother, Walter Cooley, and his gang associate, Calvin King, who were both incarcerated at Foothills Correctional Institute and had also been listed as potential witnesses for the defense. When Cooley's counsel complained that he had not been provided these letters during discovery, the State explained that it had only received them the previous Friday

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<sup>1</sup> At trial, both Everett and Demario Williams denied that Kentrell Haddock had participated in the armed robbery at the M3 Tobacco Mart or even been in Wake County on the night of the murder. However, Cooley presented testimony from Demarus Williams, who stated that Kentrell Haddock had indeed been present at the Knightdale apartment that evening but also testified that he was not involved in the robbery and that it was Cooley who shot Mohram. During the State's rebuttal, Kentrell Haddock testified that he had been living primarily in Greenville during the fall of 2011, but acknowledged having gone to Raleigh to visit his friends for several days around Thanksgiving. However, Kentrell Haddock also testified—consistent with the testimony offered by his brother Dariel, Everett, and Demario Williams—that he returned to Greenville before the end of November and was staying there on 2 December 2011. The State also introduced rebuttal testimony from RPD Detective Christopher Lawrence, who conducted a cell tower location analysis of records from a Verizon flip phone that allegedly belonged to Kentrell Haddock which appeared to corroborate his testimony that he was in Greenville on the night of Mohram's murder.



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afternoon from the Wake County Sheriff's Office. The trial court ruled that the letters were admissible for impeachment purposes.

The next morning, Cooley's counsel again challenged the admissibility of the letters, arguing based on our Supreme Court's holding in *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003), that their admission would violate his client's Fourth Amendment rights unless the State could show that Cooley had notice that his correspondence was subject to inspection during his pretrial incarceration. During a subsequent *voir dire* examination held *in camera* to determine this constitutional issue, Wake County Sheriff's Office Assistant Director Sam Higdon explained that upon arrival, all new inmates are provided with an Inmate Handbook which explicitly states, in pertinent part, that "[a]ll incoming mail will be inspected for contraband. Non-privileged mail may be read by detention staff." Although Cooley's counsel argued that there was no evidence his client understood the meaning of the term "non-privileged," the trial court ruled that Cooley's jail mail fell within the parameters of the Wake County Sheriff's Office's institutional policy for maintaining order and safety and that Cooley's constitutional rights "were not impaired or violated by the review and examination of his outgoing mail to his girlfriend."

Cooley then called his girlfriend, Lee, to the stand as an alibi witness. She testified that on the night of Mohram's murder, Cooley had been with her at her

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mother's house in Winterville, where he had been staying since Thanksgiving while his sister was in town for a visit until 6 December 2011.<sup>2</sup> When asked for details about Cooley's activities around the time of Mohram's murder, Lee testified that on 1 December 2011, she and Cooley went to Walmart to purchase Christmas presents for their daughter and then went to McDonald's; on 2 December 2011, "nothing important that day happened, so it's kind of hard to say anything happened that day. I just know [Cooley] was [in Winterville];" and on 3 December 2011, she had an argument with Cooley about the recording artist Beyoncé. Lee testified further that she had never seen Cooley wear clothes like those the gunman wore in the M3 Tobacco Mart surveillance video and that Cooley's dreadlocks were longer and more evenly groomed than the gunman's dreadlocks, which appeared to be of varying lengths. Indeed, Lee testified that the gunman's dreadlocks looked more like Kentrell Haddock's dreadlocks than Cooley's.<sup>3</sup> Lee also testified that she never received any letter from Cooley instructing her how to testify during the trial.

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<sup>2</sup> Lee's mother, Patrice Jackson, had testified earlier during the trial that Cooley was the father of Lee's child, that he stayed at Jackson's home in Winterville from Thanksgiving 2011 until 6 December 2011, that she knew he was there on the night of the murder because she checked her daughter's room every morning before leaving for work, that she had never seen Cooley wear clothing similar to what the gunman wore in the M3 surveillance video, and that she believed Cooley's dreadlocks were longer and more evenly groomed than the gunman's dreadlocks as seen in the surveillance video. On cross-examination, Jackson testified that Cooley had been supporting Lee and Lee's daughter financially, that she was not in the same room as Cooley on 2 December 2011 and could not remember many details about that night, and that she was unaware Cooley had been charged with murder.

<sup>3</sup> Throughout the trial, Cooley's counsel asked various witnesses to compare his client's dreadlocks with the gunman's partially concealed dreadlocks in the surveillance video, which he contended were more consistent with Kentrell Haddock's dreadlocks than with Cooley's, and which Lee and her mother

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On cross-examination, Lee identified State's Exhibit 132 as a letter from Cooley but again testified that she had never received it. Lee also identified State's Exhibits 133 and 134 as letters that Cooley wrote while incarcerated and then mailed to Lee so that she could mail them to Foothills Correctional Institute where Cooley's brother Walter and his gang associate Calvin King were both incarcerated. Lee acknowledged that her actions violated Wake County jail and State Department of Correction procedures, but stated that she was only trying to help Cooley save money on postage stamps. Lee also admitted that her mail privileges at Foothills Correctional Institute had been revoked after she mailed Cooley's letters to King and Cooley's brother and put \$50 into both of their commissary accounts.

During the State's rebuttal, when prosecutors sought to introduce evidence regarding Cooley's letters to King and Cooley's brother, Cooley's counsel objected, arguing that the letters were highly prejudicial and that the State's failure to turn them over earlier in discovery amounted to "trial by ambush." The State countered that the letters were postmarked 31 May 2014, that prosecutors had only become aware of them at the beginning of July, and that they had turned them over to Cooley's counsel the previous morning when they discovered his letter to Lee, before Cooley had the opportunity to call either his brother or King as a witness. The trial

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testified were carefully maintained and always worn straight down Cooley's back. However, at the end of the trial, former RPD Detective Amanda Salmon testified that a police booking photo of Cooley taken in March 2012, introduced into evidence as State's Exhibit 139, showed Cooley with "multi-length dreads knotted and kind of pulled up to the top."

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court ruled that no discovery violation had occurred but nevertheless excluded the letter from Cooley to his brother Walter because Walter was never called as a witness. However, the court ruled Cooley's letter to Calvin King—who had already testified for the defense that he had never seen Cooley wearing the clothes the gunman in the surveillance video wore and suggested that the gunman's hairstyle looked more like Kentrell Haddock's dreadlocks than Cooley's—was admissible, explaining that “with respect to a witness that was called and was called after the defense was aware that the State had these letters in its possession, I think that the probative value is not outweighed by any undue prejudice.” Thereafter, portions of Cooley's letter to King were read to the jury. The State also presented rebuttal testimony from Margaret Bell, the Wake County Detention Center employee assigned to monitor outgoing mail, who explained how—pursuant to a request from the district attorney's office—she intercepted, scanned, and copied Cooley's letter to Lee. Bell also stated that to the best of her knowledge, the letter had subsequently been mailed. Over Cooley's objection, the trial court then allowed his letter to Lee to be read into evidence. The letter was written in question and answer format, as if to suggest to Lee how she should answer certain questions while testifying as Cooley's primary alibi witness at trial.

The next morning, on 16 July 2014, Cooley's counsel informed the court that he intended to subpoena several Wake County Detention Center and Sheriff's Office

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employees to confirm exactly what day Cooley's letter to Lee had been mailed. When the trial court pointed out that Lee herself had already testified she never received the letter, Cooley's counsel replied, "If there is an issue of whether [Lee's testimony] was coached, if she received it, obviously the argument is much stronger because [the letter] says do this, do this, do this. And then if she didn't receive it, then obviously [Lee's testimony is] much stronger alibi evidence." After the State argued the matter was immaterial and outside the scope of surrebuttal, the court noted that Cooley could have inquired into the matter earlier with witnesses who had already finished testifying. Cooley's counsel then withdrew his subpoena requests. In addition, Cooley's counsel proposed that Lee be allowed to testify again about other letters she had previously received from Cooley during his incarceration and the "big gap of time in the time when they are actually dated and the actual time that they were received and mailed," but the trial court denied this request, reasoning that the probative value of such testimony would be minimal and outweighed by the risk of confusing the jury.

Later that afternoon, the case was submitted to the jury, which returned a verdict convicting Cooley of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. On 17 July 2014, the trial court sentenced Cooley to life in prison without the possibility of parole for Mohram's murder. The court also imposed sentences of 60 to 84 months

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imprisonment for the robbery conviction and 20 to 36 months imprisonment for the conspiracy conviction, with those sentences to run consecutively to one another but concurrently with the life sentence. Cooley gave notice of appeal in open court.

On 25 July 2014, Cooley's counsel filed a motion for appropriate relief ("MAR") with the trial court pursuant to N.C. Gen. Stat. §§ 15A-1414 and 15A-1420. On 28 July 2014, Cooley's counsel filed an amendment to his MAR. In his MAR, Cooley alleged that he was prejudiced by several purported errors of law during the course of his trial. Of particular relevance to this appeal, Cooley argued that he should be granted a new trial, or alternatively, a post-conviction evidentiary hearing, based on "newly discovered evidence" that the letter in which Cooley sought to "coach" Lee about her testimony was not mailed by the Wake County Sheriff's Office until 15 July 2014 and was not received by Lee until 17 July 2014, after Cooley had already been convicted and sentenced. Specifically, Cooley contended that the fact the State had presented rebuttal testimony that the letter had already been mailed misled the jury into believing that Lee had read the letter before testifying, thereby destroying the credibility of Cooley's primary alibi witness.

The record for this appeal was filed on 27 March 2015. On 27 April 2015, the trial court entered an order denying Cooley's MAR. The trial court explained in its order that

whether the letter was received or not received by the alibi witness is not dispositive of the evidentiary ruling and its

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admissibility. The letter was authenticated as being written by [Cooley], and is probative of a guilty state of mind, and therefore admissible on that basis alone. Had it been received by the alibi witness, it may also have been admissible for other purposes, such as the non-hearsay purpose of the effect of the letter on the recipient, but regardless, the [c]ourt finds that the newly discovered evidence proffered by [Cooley] does not warrant a new trial.

On 12 May 2015, Cooley's appellate counsel filed his brief with this Court and also filed a new MAR pursuant to N.C. Gen. Stat. § 15A-1415(b)(3) & (c) and § 15A-1418(a), in which he erroneously contended that the trial court had not yet ruled on Cooley's original MAR.

In his new MAR, Cooley repeats his allegation that the envelope containing his letter to Lee, which was postmarked 15 July 2014, constituted "newly discovered evidence" and claims that testimony presented by the State that the letter had already been mailed "was materially false and misleading in that it conveyed to the jury there was a real possibility that the letter had been received by [Lee] and her testimony to the contrary was untrue." Cooley argues further that the State's failure to accurately disclose when the letter was mailed, and the trial court's refusal to allow him to present additional evidence on this point, violated his right to due process and entitled him to a new trial or, alternatively, a post-conviction evidentiary hearing. On 9 June 2015, Cooley filed a motion to amend the record on appeal to include the trial court's 27 April 2015 order denying his original MAR. On 30 June 2015, the State

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filed a memorandum in opposition to Cooley's new MAR, and the matter was referred to this panel by order entered 8 July 2015.

*Analysis*

*A. Cooley's MAR*

Before reaching the merits of Cooley's arguments on appeal, we first address his MARs. Cooley failed to timely appeal from the trial court's order denying the MAR he filed there, and we conclude that the MAR Cooley filed with this Court is wholly lacking in merit.

Section 15A-1448 of our General Statutes provides that the jurisdiction of the trial court is divested "when notice of appeal has been given and the period [for which the case remains open for the taking of an appeal] has expired." N.C. Gen. Stat. § 15A-1448(a)(3) (2013). When a defendant files an MAR with the trial court within 10 days after entry of judgment pursuant to section 15A-1414, "the case remains open for the taking of an appeal until the court has ruled on the motion." *Id.* at (a)(2); *see also* N.C. Gen. Stat. § 15A-1414(c) (2013) ("The motion may be made and acted upon in the trial court whether or not notice of appeal has been given."); *State v. Craver*, 70 N.C. App. 555, 560, 320 S.E.2d 431, 434 (1984) (relying on section 15A-1414(c) to hold that the trial court erred in denying the defendant's MAR when it concluded that "the superior court no longer had jurisdiction" once the defendant gave notice of appeal to this Court). The time for taking appeal from an MAR filed under section



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15A-1414 begins to run upon the trial court's entry of its order granting or denying the MAR, and the case remains open for taking an appeal until the expiration of the 14-day time limit provided in our Rules of Appellate Procedure. *See* N.C. Gen. Stat. § 15A-1448(a)(2); *see also* N.C.R. App. P. 4(a)(2). When a defendant fails to give proper notice of appeal from the trial court's denial of his MAR pursuant to section 15A-1414, this Court lacks jurisdiction to review the denial of the defendant's MAR. *See State v. Hagans*, 188 N.C. App. 799, 805-06, 656 S.E.2d 704, 708-09, *disc. review denied*, 362 N.C. 511, 668 S.E.2d 344 (2008).

In the present case, Cooley properly filed his MAR with the trial court under section 15A-1414 within ten days of its entry of judgment, which means that despite Cooley's timely notice of appeal to this Court, the trial court retained jurisdiction over his MAR until it entered its 27 April 2015 order denying the MAR. At that point, Cooley had 14 days—until 11 May 2015—to appeal from the trial court's order. Because Cooley failed to timely appeal the trial court's order denying his MAR, we lack jurisdiction to review that order.

We next address the MAR Cooley filed with this Court on 12 May 2015 pursuant to section 15A-1415(c). Section 15A-1415(c) provides that a defendant, at any time after the jury's verdict, may by MAR “raise the ground that evidence is available which was unknown or unavailable to [him] at the time of trial, which could not with due diligence have been discovered or made available at that time . . . , and

which has a direct and material bearing upon . . . [his] guilt or innocence.” N.C. Gen. Stat. § 15A-1415(c) (2013). However, our Supreme Court has made clear that in order to warrant a new trial, it must appear that the newly discovered evidence “is not merely cumulative or corroborative.” *State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) (citation omitted). Moreover, “[w]hen the information presented by the purported newly discovered evidence was known or available to the defendant at the time of trial, the evidence does not meet the requirements of [section] 15A-1415(c).” *Id.* at 537, 743 S.E.2d at 40 (citation omitted). Further, section 15A-1419 of our General Statutes provides that when the issue underlying a defendant’s MAR was previously determined on the merits upon a previous MAR, the court “shall deny the motion” unless the defendant can demonstrate good cause for excusing this ground for denial and show actual prejudice, or show that failure to consider his claim will result in a fundamental miscarriage of justice. N.C. Gen. Stat. § 15A-1419(a)(2), (b) (2013). For purposes of this statute, in a non-capital case, a fundamental miscarriage of justice results only if the defendant establishes that “more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense.” *Id.* at (e)(1).

Here, the gravamen of Cooley’s argument in his MAR to this Court is that the 15 July 2014 postmark on his letter to Lee constitutes “newly discovered evidence” that she did not receive the letter prior to testifying at his trial, and that if he had

been allowed to present additional evidence on this point, it “could have made a difference to the jury’s assessment of [Lee’s alibi] testimony.” There are several reasons why this argument fails. On the one hand, Cooley’s argument in his MAR to this Court is substantially similar to the argument the trial court rejected on the merits when it denied Cooley’s previous MAR. Cooley failed to appeal from the denial of that MAR, and his MAR to this Court does not make any specific argument that good cause exists to excuse this basis for denial or that a fundamental miscarriage of justice will result from not considering his claim anew. *See* N.C. Gen. Stat. § 15A-1419(a)(2), (b). On the other hand, we find Cooley’s argument that his letter to Lee constitutes “newly discovered evidence” wholly unpersuasive. Indeed, given that Lee testified that she never received the letter, which was introduced as evidence at trial, we find the letter’s 15 July 2014 postmark to be merely corroborative of Lee’s prior testimony. *See Rhodes*, 366 N.C. at 536-37, 743 S.E.2d at 39-40. Cooley’s counsel had an opportunity to cross-examine the State’s witness regarding her testimony that the letter had already been mailed but declined to do so, and—in light of the fact that the challenged testimony was offered by the last witness to testify on 15 July 2014, which was the same date that the letter was postmarked—we are unpersuaded by the bald assertion in Cooley’s MAR that this testimony was materially false. Accordingly, Cooley’s MAR is denied.

*B. Cooley’s letter to Calvin King*

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Cooley argues that the trial court erred by admitting in evidence his letter to his incarcerated gang associate, Calvin King, because it had no probative value and was highly prejudicial. We disagree.

Evidence is relevant if it has “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. Gen. Stat. § 8C-1, Rule 401 (2013). Generally, all relevant evidence is admissible, N.C. Gen. Stat. § 8C-1, Rule 402 (2013), but relevant evidence may nevertheless be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (2013).

“North Carolina courts have long held that membership in an organization may only be admitted if relevant to the defendant’s guilt,” and our prior cases make clear that “gang-related testimony tends to be prejudicial” when its only effect is “to depict a violent gang subculture of which the defendant was a part.” *State v. Hinton*, 226 N.C. App. 108, 113, 738 S.E.2d 241, 246 (2013) (citations, internal quotation marks, and brackets omitted). However, this Court has also recognized that “[g]enerally, evidence tending to show a defendant has attempted to induce a witness to testify falsely in his or her favor is relevant and admissible against the defendant.” *State v. Mebane*, 106 N.C. App. 516, 529, 418 S.E.2d 245, 253 (citation omitted), *appeal dismissed and disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992). This

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includes attempts to influence testimony by threats or intimidation. *State v. Smith*, 19 N.C. App. 158, 159, 198 S.E.2d 52, 53 (“Where a defendant threatens or otherwise intimidates a State’s witness in an effort to prevent such witness from testifying against [the] defendant, the fact of the threat or intimidation may be shown in evidence.”), *cert. denied*, 284 N.C. 123, 199 S.E.2d 662 (1973). “Such conduct indicates a consciousness on [the defendant’s] part that his cause cannot rest on its merits, and is in the nature of an admission that he is wrong in his contention before the court.” *State v. Minton*, 234 N.C. 716, 723, 68 S.E.2d 844, 849 (1952).

In the present case, the trial court allowed the following portions of Cooley’s letter to King to be read to the jury:

My [n \* \* \* \* \*] Rambo rat ass is supposed to have some [n \* \* \* \* \* s] following like him until you get Tifa the papers. He in a wheelchair, bro. I don’t know how he got in there, but it’s either he on crutches or in the wheelchair.

.....

Treble lined it up with a [n\* \* \* \* \*] named Marco that is supposed to be with the [n\* \* \* \* \*] Rambo, but I told [n\* \* \* \* \* s] to keep it hot if the [n\* \* \* \* \* s] still want to follow that [n\* \* \* \* \*] Rambo, they don’t want to believe that [n\* \* \* \* \*] is a rat, bro. The world is crazy inside and outside.

Cooley argues that this evidence had no probative value whatsoever, and was therefore irrelevant under Rule 401, because apart from its reference to “Rambo”—which Cooley concedes was an alias used by Demarus Williams—the letter is largely

unintelligible and there was no indication that it was ever delivered to King at Foothills Correctional Institute. Cooley argues further that the letter's primary effect was to unfairly prejudice him by casting him in a negative light, given the letter's use of gang-lingo, references to gang culture, and repetition of a highly offensive racial epithet. In support of this argument, Cooley relies on this Court's prior holdings in *Hinton*, 226 N.C. App. at 111-14, 738 S.E.2d at 245-47 (holding that the trial court committed plain error by allowing a police officer to testify extensively about gang activity in Elizabeth City and state that a red bandana recovered near the scene of the offense charged "was consistent with what the Bloods would wear" despite the fact that the offense was not committed in a known gang area and there was no evidence of any connection to gang activity) and *State v. Gayton*, 185 N.C. App. 122, 124-27, 648 S.E.2d 275, 277-79 (2007) (holding that the admission of evidence regarding the defendant's gang affiliation where "this information has nothing to do with [the] defendant trafficking cocaine by possession and carrying a concealed weapon" was erroneous under Rules 401 and 403 but was not so prejudicial as to warrant a new trial), as well as our Supreme Court's decisions in *In re Spivey*, 345 N.C. 404, 414, 480 S.E.2d 693, 698 (1997) (recognizing that the word [n \* \* \* \*] is an example of "insulting or fighting words—those by which their very utterance inflict injury or tend to incite an immediate breach of the peace" and rejecting the respondent district attorney's argument that his removal from office for his behavior,

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including use of this word, violated the First Amendment) and *State v. Moose*, 310 N.C. 482, 492, 313 S.E.2d 507, 515 (1984) (rejecting the defendant’s argument that the prosecutor’s reference to a murder victim as a “black man” was improper when the defendant’s “ignoble racial slur in referring to the victim as a ‘damn [n \* \* \* \* \*]’” raised an inference that the murder was racially motivated).

This argument is unavailing. On the one hand, we conclude that the letter—which was addressed to a witness who testified at trial on Cooley’s behalf, and refers to another witness as “a rat” while also detailing Cooley’s plans to “keep it hot” on those who continue to follow him—is relevant and admissible, regardless of whether King ever actually received it, to show Cooley’s “consciousness . . . that his cause cannot rest on its merits, and is in the nature of an admission that he is wrong in his contention before the court.” *Minton*, 234 N.C. at 723, 68 S.E.2d at 849. Moreover, as to the issue of prejudice, we find the present case readily distinguishable from *Hinton* and *Gayton*, insofar as in those cases, the proffered gang-related testimony was wholly unrelated to the State’s burden of proof or the underlying facts of the offense charged. Here, by contrast, although the portions of the letter read into evidence make no explicit references to gang activity, the issue of Cooley’s affiliation with the Crips—and the gang affiliations of several other witnesses, including Everett, the Haddock brothers, and the Williams brothers—was repeatedly raised by Cooley himself as a key prong of his defense strategy, and was additionally relevant in the

broader sense that Mohram's murder occurred during an armed robbery that was part of a series of armed robberies committed by the gang. We also reject Cooley's assertion that he was unfairly prejudiced by the letter's repetition of the word [n \* \* \* \* \*]. While we wholeheartedly agree with Cooley that this is a vile and offensive epithet, his reliance on *Spivey* and *Moose* is misplaced, as neither of those cases bears even the slightest resemblance to the facts or procedural posture of the present case, nor do their holdings support the proposition that the trial court errs by admitting a defendant's statement simply because it includes this word. In any event, we conclude that any unfair prejudice arising from Cooley's repetition of this word in his letter to King was far outweighed by the letter's probative value. We therefore hold that the trial court did not err by admitting Cooley's letter to King.

*C. Failure to arrest judgment for robbery with a dangerous weapon conviction*

Cooley argues that because the charge of first-degree murder was submitted to the jury based on a theory of felony murder, the trial court erred by failing to arrest judgment on his conviction for robbery with a dangerous weapon. This is essentially a double jeopardy argument and it must be dismissed because it has not been preserved for our review.

"When a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction." *State v. Millsaps*, 356 N.C. 556, 570, 572 S.E.2d 767, 770 (2002). "The



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common law doctrine of merger is a judicial tool to prevent the subsequent prosecution of a defendant for a lesser included offense once he has been acquitted or convicted of the greater.” *State v. Moore*, 34 N.C. App. 141, 142, 237 S.E.2d 339, 340 (1977). “It is primarily a device to prevent the defendant from being placed twice in jeopardy for the same offense.” *Id.* However, “[o]ur Supreme Court has held that the issue of double jeopardy cannot be raised for the first time on appeal.” *State v. Rawlings*, \_\_ N.C. App. \_\_, \_\_, 762 S.E.2d 909, 914, *disc. review denied*, 367 N.C. 803, 766 S.E.2d 627 (2014); *see also State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) (holding that the defendant waived his double jeopardy argument by failing to raise the issue at trial).

In the present case, Cooley failed to object when the trial court sentenced him to both life imprisonment without the possibility of parole for Mohram’s murder and a concurrent term of 60 to 84 months imprisonment for robbery with a dangerous weapon. Because Cooley did not properly raise this double jeopardy issue with a timely objection below to preserve it for our review, we conclude that it is not properly before us. Accordingly, this argument is dismissed.

NO ERROR in part; DISMISSED in part.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).