

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-749

Filed: 6 October 2020

Edgecombe County, No. 16 CRS 50181

STATE OF NORTH CAROLINA

v.

MICHAEL SHARKEEM WILSON, Defendant.

Appeal by defendant from judgment entered 5 October 2018 by Judge Walter H. Godwin, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 13 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Stuart (Jeb) M. Saunders, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

YOUNG, Judge.

Where evidence of defendant's gang affiliation was admitted for the purpose of explaining how a witness knew him, and proper and timely limiting instructions were given, the trial court did not err in admitting the evidence. Where defendant failed

to preserve his objection to evidence of possession of an unrelated firearm, we decline to consider the issue on appeal. We find no prejudicial or cumulative error.

I. Factual and Procedural History

On 26 November 2015, Tony Battle (Battle) was celebrating Thanksgiving with family. He then drove to the home of a friend, Melvin Whitehead (Whitehead). He contacted a friend, Martellus Sanders (Sanders), about acquiring marijuana. Sanders, along with Michael Sharkeem Wilson (defendant), met Battle at Whitehead's house. In defendant's vehicle, driven by defendant, the three – defendant, Sanders, and Battle – drove to the Country Estates trailer park in Edgecombe County. The three drove toward the home of Quentin Allen (Allen), who had confirmed to them that he had marijuana to sell. Allen arrived home from work at roughly the same time that defendant, Sanders, and Battle arrived at his home, and while Allen's car was still running, the three emerged from their vehicle and approached him. Defendant approached the driver's side of the vehicle, and fired a shot through the window at Allen with a .40 caliber semi-automatic pistol. Immediately thereafter, Sanders fired several shots at the vehicle with a .38 caliber semi-automatic pistol. The vehicle, which had not reached a full stop before defendant fired, veered off the road and collided with a cable box.

Law enforcement arrived at the scene shortly before 10:30 pm. Allen was found unresponsive in his vehicle. He had no pulse. Officers found a bullet fragment on his

collarbone, three .38 caliber shells and one .40 caliber shell, and bullet holes in the car. An autopsy revealed that Allen's cause of death was gunshot wound to the neck.

The day after the shooting, officers encountered Battle and Sanders at the crime scene. They interviewed Battle multiple times, and subsequently arrested him for Allen's murder. Sanders was arrested the next day. While in jail, Battle gave a statement to officers, identifying defendant and Sanders as the shooters, but insisting that he was not present. He later admitted that he was present.

The Edgecombe County Grand Jury indicted defendant for first-degree murder and attempted robbery with a dangerous weapon. Defendant moved to sever the robbery and murder offenses, which the trial court granted.¹ The trial court joined defendant's murder charge with the charge against Sanders for trial. The trial on the murder charge proceeded, and the jury returned a verdict finding defendant guilty of the lesser included offense of second-degree murder. The trial court sentenced defendant to a minimum of 317 months and a maximum of 393 months, in the presumptive range, in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

II. Standard of Review

¹ The instant appeal concerns only the murder charge, not the robbery charge.

“Although the 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. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court’s ruling on relevancy pursuant to Rule 401 is not as deferential as the ‘abuse of discretion’ standard which applies to rulings made pursuant to Rule 403.” *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation and quotation marks omitted).

“Evidentiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial.” *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001).

III. Analysis

Defendant contends that the trial court erred in admitting evidence and testimony, and that the cumulative effect of this error was prejudicial.

A. Gang Affiliation

In his first argument, defendant contends that the trial court erred in admitting evidence that he was a high-ranking member of the Blood gang. We disagree.

STATE V. WILSON

Opinion of the Court

Prior to trial, defendant filed a motion *in limine* to preclude admission of any alleged gang affiliation, specifically defendant's alleged involvement in the "Blood" gang. The trial court addressed this motion at pre-trial hearing, and held that the evidence defendant sought to preclude was "relevant[.]" but that it would be "limited to the statements concerning how [defendant, Sanders, and Battle] knew each other and that a limited instruction shall be given at the conclusion or previously if possible at the conclusion of that evidence and in the final charge." The court thus denied the pre-trial motion.

Subsequently, at trial, the subject of the Blood gang was raised three times. First, during Battle's direct examination by the State, Battle mentioned that Sanders "was trying to get [him] to be Blood[.]" Defendant timely objected, and the trial court dismissed the jury. Defendant renewed his objection, and requested a limiting instruction to be given after Battle's testimony. The court then had the parties examine Battle on voir dire. After voir dire, Battle was permitted to testify regarding the Blood gang, and stated that he was not involved in the gang, but had expressed interest. He also testified that Sanders was a two-star general in the gang and defendant a four-star general. At the conclusion of Battle's testimony, the trial court, in accordance with defendant's request, gave a limiting instruction, stating that the evidence was received solely for the purpose of showing that Battle knew Sanders and defendant.

STATE V. WILSON

Opinion of the Court

The second time the subject was raised was during the testimony of Wilson Muse, a Lieutenant with the Edgecombe County Sheriff's Office (Lt. Muse). On direct examination by the State, Lt. Muse described his interview of Battle. Specifically, the State asked whether Lt. Muse had made any inquiry into gang affiliation. Lt. Muse responded that Battle claimed to have no gang affiliation, but that both Sanders and defendant were Bloods. Defendant raised no objection to this testimony. However, our Supreme Court has held that prior statements admitted for corroborative purposes may not be used as substantive evidence. *State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340 (2000). As Lt. Muse's testimony was merely a recitation of Battle's prior statements, introduced to corroborate them, defendant's failure to object to Lt. Muse's testimony did not waive his prior objection to Battle's testimony.

The third time the subject was raised was during the testimony of Leroy Shaw, a Lieutenant with the Edgecombe County Sheriff's Office (Lt. Shaw). Over objection, the State introduced phone calls made by Sanders from jail. Lt. Shaw testified that these calls mentioned a man named Trig, also known as Trigger Joe or Joseph Armstrong, "one of the highest ranking Blood gang leaders."

Subsequently, the trial court instructed the jury that evidence was received concerning gang affiliation, but that it was offered "for the sole purpose of showing how Tony Battle knew Michael Wilson." Accordingly, the court instructed the jury

STATE V. WILSON

Opinion of the Court

that it may consider the evidence “only for the limited purpose for which it was received.”

Defendant contends, despite the limiting instructions given, that it was reversible error to permit the jury to consider evidence of defendant’s possible gang affiliation. Defendant correctly notes that, generally speaking, evidence of gang affiliation is inadmissible. Indeed, this Court has held that “[e]vidence of gang membership is generally inadmissible unless it is relevant to the issue of guilt.” *State v. Privette*, 218 N.C. App. 459, 480, 721 S.E.2d 299, 314 (2012). That’s not to say such evidence is inadmissible *per se*, however. Where such evidence is relevant to the issue of a defendant’s guilt, and is not unfairly prejudicial, it is permissible to consider a defendant’s gang affiliation. *See State v. Freeman*, 313 N.C. 539, 548, 330 S.E.2d 465, 473 (1985) (“[w]e have already held that evidence of defendant’s membership in the Southern Cross [biker gang] was relevant and now hold that defendant was not unfairly prejudiced by its admission”). Similarly, where the evidence is introduced to serve a legitimate purpose other than showing a propensity for bad acts, it is admissible to consider gang affiliation. *See State v. Hightower*, 168 N.C. App. 661, 667, 609 S.E.2d 235, 239 (2005) (holding that evidence of gang affiliation demonstrated “evidence of defendant’s motive, as well as the reason for [an accomplice’s] involvement in the crime”).

STATE V. WILSON

Opinion of the Court

The question is what valid purpose, if any, the evidence of defendant's alleged gang affiliation served at trial. The State contends that it was relevant to show how Sanders and defendant knew one another, how Battle knew both, and why the three were present together at the murder of Allen. Defendant notes, however, that how Battle knew defendant is not relevant to the crime. Defendant argues, and we agree, that there was no evidence that the crime was gang-related, nor did gang affiliation establish an element of the offense charged.

Assuming *arguendo* that this evidence was not admissible to show gang membership or the criminal behavior commonly associated with such, however, defendant must still show that its admission prejudiced his defense. Defendant contends that this evidence was prejudicial because the entire case rested on Battle's testimony and credibility. However, even assuming this to be so, defendant fails to take into account the extensive limiting instructions given by the trial court. After Battle testified, the trial court – at defendant's request – gave a limiting instruction to the jury, precluding consideration of the evidence for any purpose except to explain how Battle knew defendant and Sanders. Likewise, in its charge to the jury, the trial court admonished that the evidence was to be considered only to explain how they knew one another. This Court has long held that, “[w]hen evidence is competent for one purpose but incompetent for another, it is admissible and the party it is offered against is entitled, upon request, to a limiting instruction[.]” and that “[t]he law

STATE V. WILSON

Opinion of the Court

presumes that the jury heeds limiting instructions that the trial judge gives regarding the evidence.” *State v. Shields*, 61 N.C. App. 462, 464, 300 S.E.2d 884, 886 (1983). When properly and timely given, “[l]imiting instructions mitigate the danger of unfair prejudice to the defendant.” *State v. Barnett*, 223 N.C. App. 450, 456, 734 S.E.2d 130, 135 (2012).

In the instant case, defendant is correct that evidence of his alleged gang affiliation was not admissible to show conformity with criminal behavior. However, the fact that Battle wished to join the Bloods, and that Sanders and defendant were members of the Bloods, is admissible to show how they all knew one another. *See Privette*, 218 N.C. App. at 481, 721 S.E.2d at 315 (holding that evidence showing the defendant’s rank in the Blood gang was relevant to “shed[] light on the relationship” between the defendant and another party). Accordingly, a limiting instruction was appropriate under the circumstances, and the trial court properly gave instructions both when Battle testified and prior to the jury’s consideration of a verdict. Those limiting instructions mitigated the danger of unfair prejudice to defendant. We therefore hold that defendant has failed to show that the introduction of this evidence prejudiced him, and therefore failed to demonstrate error.

B. Unrelated Firearm

In his second argument, defendant contends that the trial court erred in allowing officers to testify that a firearm unrelated to the crimes charged was found

STATE V. WILSON

Opinion of the Court

in defendant's vehicle. Because this issue was not properly preserved by objection, we decline to address it.

Prior to trial, defendant filed a motion *in limine* to prohibit the introduction of prior bad acts. Specifically, defendant noted that when officers arrested him on the above charges, they found a 9mm handgun in his vehicle, and charged him separately with possession of a firearm by a felon. That charge was pending as of the trial on defendant's murder charge, and defendant moved that it be excluded. At pre-trial hearing, the State indicated that it did not oppose the motion, which the trial court allowed.

Subsequently, the State called Kenneth Womack, a Deputy with the Mooresville Police Department (Dep. Womack), who had been working for the Edgecombe County Sheriff's Office at the time of the offense. Dep. Womack, who investigated the crime, was asked to describe the evidence he found at the scene. When the State asked him whether he found the gun used in the crime, he remarked that officers "found a handgun," which, when prompted by the State, he acknowledged was found "during the traffic stop in Mr. Wilson's vehicle." Defendant did not object to this testimony. It is undisputed that this referred to the unrelated 9mm handgun found in defendant's vehicle, not the firearms used during the crime.

Later, the State asked Lt. Muse about Dep. Womack's testimony, specifically whether officers found a gun in defendant's vehicle. At this point, defendant objected,

and the objection was sustained. The trial court dismissed the jury, and engaged in a colloquy with counsel. The State acknowledged that it “didn’t anticipate any of the officers bringing [the handgun] up,” but argued that when Dep. Womack testified, unsolicited and without objection, his testimony opened the door to the issue. Over defendant’s objection, the court ruled that the door had been opened and the evidence was admissible.

Defendant concedes that no objection was raised to Dep. Womack’s testimony. As such, this is unpreserved error, and we decline to consider it on appeal. *See* N.C.R. App. P. 10(a)(1) (“[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context”). While evidentiary issues may be reviewed for plain error if an appellant argues such, defendant has specifically declined to argue plain error, instead requesting “regular trial error review of this issue.” And while defendant further contends that, in the alternative, the admission of this evidence “amounted to trial error or plain error[,]” his argument on that subject is one of ordinary error, not of plain error. Indeed, our Supreme Court has held that when a defendant merely uses the words “plain error,” without specifically and distinctly contending the basis therefore, that defendant “has effectively failed to

argue plain error and has thereby waived appellate review.” *State v. Cummings*, 352 N.C. 600, 637, 536 S.E.2d 36, 61 (2000).

Our Courts have long held that, “[w]here evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.” *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995). By failing to object to Dep. Womack’s testimony, defendant lost both the benefit of his motion *in limine* and the benefit of his subsequent objection to Lt. Muse’s testimony. We decline to grant regular review of this unpreserved issue, and hold that defendant has waived it through failure to preserve his objection.

C. Cumulative Error

In his third argument, defendant contends that the cumulative effect of these errors prejudiced his defense and deprived him of a fair trial. Because we hold that defendant has failed to show prejudice with regard to the evidence of gang affiliation, and failed to preserve the issue of the unrelated firearm, we hold that defendant has failed to show sufficient error to rise to a level of cumulative error.

NO PREJUDICIAL ERROR.

Judges STROUD and DILLON concur.

Report per Rule 30(e).