No. COA23-239 DISTRICT SEVEN B

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
	)	Wilson County
v.	)	
	)	
SHONTEZ BARNES	)	

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BRIEF OF SHONTEZ BARNES

DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. WHETHER THE TRIAL COURT PLAINLY ERRED BY NOT PERFORMING ITS GATEKEEPING FUNCTION UNDER RULE 702 AND PERMITTING TESTIMONY FROM FIREARMS EXAMINER JESSICA PAPPAS THAT IS THE SUBJECT OF JUDICIAL AND SCIENTIFIC CRITICISM?

II. WHETHER THE TRIAL COURT ERRONEOUSLY FAILED TO INTERVENE EX MERO MOTU IN THE STATE'S CLOSING ARGUMENT WHEN THE PROSECUTOR IMPERMISSIBLY CRITICIZED MR. BARNES'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS TO PLEAD NOT GUILTY AND BE TRIED BY A JURY?

STATEMENT OF THE CASE

This case was tried during 9 May 2022 Criminal Session of Wilson County Superior Court, the Honorable William D. Wolfe, presiding, on two counts of first degree murder and one count of possession of a firearm by a felon.[1] (R pp 2-4) Mr. Barnes was found guilty of all charges. (R pp 59-61) On 12 May 2022, the trial court sentenced Mr. Barnes to two terms of life imprisonment without parole and consolidated the judgment for possession of a firearm by a felon with the judgment imposing the second life term. (R pp 62-65; T p 831) Mr. Barnes gave notice of appeal in open court. (T p 832)

[1] The record on appeal is cited as "R p ." The transcript of the trial is cited as "T p ."

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Ms. Barnes appeals of right. N.C.G.S. §§ 7A-27(b), 15A-1444(a).

STATEMENT OF THE FACTS

On 1 September 2018, Elliot Barnes and Nikita Mix attended Ms. Mix's child's birthday party and later walked back to 717 Black Creek Road, an apartment complex colloquially called the "School Yard," so that Elliot could sell her and other friends cocaine. (T pp 212, 242-44, 253)

When they arrived at the School Yard, there were a lot of people present, including three or four individuals waiting to see Elliot. (T p 252) Shontez Barnes ("Mr. Barnes") was also present at the School Yard at that time. (T p 253) Three men bought drugs from Elliot and left the premises. (T pp 256-57)

Mr. Barnes asked to speak with Elliot, though Ms. Mix could not hear what they were discussing. (T pp 245, 256) Ms. Mix testified Mr. Barnes was wearing shorts, but no shirt, and that he had on gloves with the fingers cut out. (T p 259) She did not see a gun anywhere on Mr. Barnes. (T p 259)

Mr. Barnes and Elliot went into an apartment different from the one Elliot stayed in with his mother, Patricia Barnes, which was apartment C. (T pp 224, 231, 245-46, 256) Ms. Mix told Elliot not to go inside. (T p 256) Ms. Mix heard multiple gunshots but she did not know where the shooting occurred. (T p 258)

Ekeya Jackson, Elliot's girlfriend at the time, testified she was at her grandmother's house on the night in question when she saw a person ride a bike into the School Yard and then heard shots and ran inside the home. (T pp

272, 277) Ms. Jackson did not know who was on the bike, but her sister told her it was Mr. Barnes. (T p 309) Ms. Jackson testified there was a two-to-three-minute pause between the shots. (T p 306)

Video (State's Exhibit 3B) from a nearby convenience store, Midway, purportedly showed Mr. Barnes with a bike and Elliot Barnes at 9:41 pm, and the bike was later found on the backside of the School Yard. (T pp 715, 723) Detective Justin Godwin, who was not on the scene that night, testified that flashes of light shown in State's Exhibit 3A, surveillance footage from nearby Genaro's Auto Repair Shop, at 9:58:08 were "consistent with a muzzle flash" and that the flash he saw at 9:59:00 was also a "muzzle flash." (T pp 332, 725-26)

After hearing the shots, Ms. Mix saw Elliot run out of his mother's apartment and fall off the porch. (T pp 246-47) Patricia Barnes also heard the shots and testified they came from apartment D. (T p 217) She did not see who shot Elliot, but she saw Mr. Barnes standing in the door of apartment D holding a gun and she saw a black glove. (T p 218)

Patricia Barnes did not know what kind of gun it was, but described it as having a silver barrel and brown handle. (T p 219) Witnesses testified they saw Mr. Barnes wearing black gloves prior to the shooting, though some described the gloves as covering Mr. Barnes's fingers while others said they only partially covered his fingers. (T pp 259, 311)

As Ms. Mix was leaving the School Yard, she saw Redmond Barnes's body on the front steps of the apartment to her far left, which was the far right apartment when facing the School Yard from the street. (T pp 248-49, 415) Redmond had been shot in the head and was dead. (T pp 248-449, 415) Ms. Mix did not witness the shooting of Redmond. (T p 249)

Wilson Police Department personnel were dispatched to the School Yard for gunshots. (T pp 212, 395, 407) Officer William Weaver was the first officer on the scene at the School Yard, arriving around 10 pm. (T p 336) It was dark, loud, and people were panicking. (T pp 376-77, 79) Officer Weaver went to the side of the building where he saw Ms. Barnes and Ms. Mix attending to Elliot. (T pp 213, 219, 242, 247, 339) Elliot had been shot and killed. (T pp 213, 216, 230)

Wilson Police Sergeant William Hitchcock described the situation as having two crime scenes: one on the right side of the building where Redmond's body was found and one on the left side of the building where Elliot was located. (T p 416)

As Officer Weaver tended to Elliot, other officers continued to descend on the scene, a crowd continued to gather, and Weaver saw Mr. Barnes lying flat on the roof of 717 Black Creek Road. (T pp 340, 341-43, 432) Officer Weaver shined his flashlight on Mr. Barnes and Mr. Barnes began jumping around;

Weaver announced the developments over police radio. (T pp 343-44) Mr. Barnes was moving from one side of the roof to the other. (T p 410)

Officer Weaver had his gun out and shouted for Mr. Barnes to show his hands, though he never saw Mr. Barnes with a gun. (T pp 341, 345, 355) Officer Ochoa arrived with Captain Hitchcock and Officer Collier, along with other officers. (T p 395) It was a chaotic scene. (T pp 383, 435) Ochoa observed Mr. Barnes on the roof with a silver handgun. (T p 396)

Police commanded Mr. Barnes to drop the gun and he did so after the third command (T p 397) Mr. Barnes then threw the gun off the roof. (T pp 398, 410) Sergeant Hitchcock picked up the gun, a Taurus .38 revolver, and put it in his trunk. (T pp 411, 523, 526) There were six fired .38 cartridge casings in the gun. (T pp 524, 526)

During the autopsy, two bullets were removed from the left side of Elliot's chest; Elliot had been shot in the chest. (T pp 480, 510) There were no other gunshot wounds, nor was any gunpowder or stippling found on Elliot's body. (T pp 490, 510) Redmond also suffered two gunshot wounds: one to the right side of his head and the other on his right arm. (T p 492)

Mr. Barnes and the police negotiated his descent from the roof. (T p 436) Captain Kendra Howell was the main person talking to Mr. Barnes. (T p 417) Mr. Barnes was cooperative. (T p 473) Mr. Barnes was on the roof for about one hour before coming down after his mother arrived on scene. (T pp 417, 419)

Police found a stocking cap, dollar bill, and a glove on the roof. (T p 536) Mr. Barnes was cuffed and taken to the hospital where he declined treatment, and then transported to the Wilson Police Department. (T pp 449-50)

At the police station, police interviewed Mr. Barnes and completed a gunshot residue (GSR) kit on his hands. (T p 450) While at the station, Mr. Barnes made odd comments, such as "thou shalt not shed innocent blood," "they were not innocent," "he was tricked by the devil," something about "burning the like of fire," and also stated that he made a mistake and was set up (T pp 451, 466) Mr. Barnes never specified what the mistake was or who set him up. (T p 451) Earlier at the scene, Officer Weaver said Mr. Barnes was on PCP or something of that nature. (T p 437)

Forensic scientist Michael Gurdziel testified that GSR analysis was performed at the State Crime Lab on GSR samples from Mr. Barnes's hands and from the black glove found on the roof. (T p 622) GSR particles were found on the black glove; none were found on Mr. Barnes's hands. (T pp 626, 631)

When the GSR particles got on the glove could not be determined—it could have been earlier that day or from weeks or months prior. (T p 630) Gurdziel also testified that GSR particles may be found on items that touch other objects that have GSR on them. (T p 629)

DNA samples were collected from the Taurus firearm and from inside the glove found on the roof. (T pp 562, 639, 641) Presumptive testing on the

firearm yielded a positive result indicating two contributors: the major contributor matched Mr. Barnes's DNA profile and the minor contributor could not be conclusively interpreted due to insufficient genetic data. (T p 640) Elliot and Redmond Barnes were excluded as contributors to the DNA profile. (T p 640)

Presumptive testing on the inside of the glove produced a mixture of three contributors: the major contributor was consistent with Mr. Barnes's DNA profile; Elliot and Redmond Barnes were excluded as contributors; and while additional genetic data was detected, it was insufficient for interpretation. (T p 643)

Confirmatory DNA testing was not performed on any of the items. (T p 663) April Perry, a forensic biology analyst, testified that with more than one person's DNA on the gun, it could not be determined who touched the item first or last. (T pp 665-66) Ms. Perry also testified that it could not be determined when Mr. Barnes's DNA got on an item, asserting "I don't have a time stamp for the DNA." (T p 668)

Jessica Pappas was accepted to testify as an expert in forensic firearm examinations. (T p 686) Pappas explained that her discipline of forensic firearms identifications "has as its primary concern the determination as to whether a bullet or cartridge case was fired by a particular firearm." (T pp 686-

87) Such identifications are possible, Pappas testified, because of microscopic characteristics, toolmarks. (T p 687)

When asked by the State what characteristics she tests for when determining whether a particular bullet was fired by a specific gun, Pappas explained there were three types of characteristics: (1) class characteristics; (2) individual characteristics; and (3) microscopic characteristics. (T pp 688-89)

Pappas examined the gun in this case and test fired it. (T pp 690-91) Pappas also examined the two different types of bullets (one had a lead core with a jacket copper material on the outside and the others were just lead) submitted to her as evidence from the case. (T p 692) Two of the bullets (State's Exhibit 55) were those removed from the left side of Elliot Barnes. (T p 696) Pappas also examined another bullet, along with a separate lead fragment, which collectively constituted State's Exhibit 56, that were removed from Redmond Barnes. (T p 700)

Pappas compared her test fired bullets from the firearm in this case to State's Exhibit 55 using a comparison microscope where she could look at them side-by-side. (T pp 697-98) Pappas testified that she found "sufficient agreement between State's Exhibit 55 bullets to the test fired bullets from the firearm." (T p 698) As a result, Pappas made a cast of the inside of the firearm's barrel to examine the nature of the markings therein and to further aid in her comparison. (T p 698)

Pappas concluded that with respect to State's Exhibit 55 (the bullets from Elliot Barnes), those bullets "could have been fired by the firearm submitted or another firearm manufactured with the same tool that was in the same approximate state of wear." (T pp 698-99) That is, the markings she "saw were in agreement with the firearm, but [she] couldn't tell whether it was this firearm or another firearm manufactured in the same, at the same time with the same tool." (T p 699)

Pappas performed "very similar testing" for the two items in State's Exhibit 56, the bullet and lead fragment from Redmond Barnes. (T p 700) Due to obscured rifling characteristics, she was not able to determine whether the fragment was fired from the gun in this case, State's Exhibit 4A. (T p 701) However, Pappas testified she determined it was .38 caliber class and that it could be fired from State's Exhibit 4A. (T p 702)

As for the bullet extracted from Redmond Barnes, Pappas testified she determined the class and caliber and found them "to be in agreement with the class characteristics of the submitted firearm," which prompted her to do a microscopic comparison. (T p 703)

Pappas found "originally the bullet was inconclusive to the test fires in the firearm," which led her to compare the bullet with other projectiles that were submitted as evidence to her. Based on that comparison, Pappas testified she "was able to find sufficient agreement between the evidence." (T p 704)

Pappas explained to the jury this meant that she "linked the evidence bullets together and I knew the conclusion of those bullets to the firearm so I was able to conclude that the bullet was also either fired by the firearm submitted or by another firearm made with the same tool in the same state of wear." (T p 704)

Pappas characterized her conclusion with respect to the bullet extracted from Redmond Barnes as a "conservative result," namely that "it could have been this firearm or another firearm made with the same tool." (T p 704) In closing argument, the prosecutor argued to the jury that Pappas's testimony meant "basically this is the gun." (T p 790)

ARGUMENT

I. THE TRIAL COURT PLAINLY ERRED BY NOT PERFORMING ITS GATEKEEPING FUNCTION UNDER RULE 702 AND PERMITTING TESTIMONY FROM FIREARMS EXAMINER JESSICA PAPPAS THAT IS THE SUBJECT OF JUDICIAL AND SCIENTIFIC CRITICISM.

A. Standard of Review

This Court has held that "an unpreserved challenge to the performance of a trial court's gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review in North Carolina state courts." *State v. Hunt*, 250 N.C. App. 238, 246 (2016). Plain error is error that had a probable impact on the verdict. *State v. Lawrence*, 365 N.C. 506, 518 (2012). *See also* N.C. R. App. P. 10(a)(4).

B. Trial Courts Must Determine the Reliability of Expert Testimony Under Rule 702 in Performing their Gatekeeping Function.

Rule of Evidence 702 permits expert testimony based on "scientific, technical, or other specialized knowledge" that is helpful to the trier of fact from individuals qualified by "knowledge, skill, experience, training, or education." Additionally, the expert testimony is only admissible if "all of the following" apply:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

By including these criteria in Rule 702, the General Assembly aligned the North Carolina Rules of Evidence with the Federal Rules of Evidence and adopted the standard for expert testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *See State v. McGrady*, 368 N.C. 880, 888 (2016). *Daubert* and its progeny "established 'exacting standards of reliability' for the admission of expert testimony." *Id.* at 885.

Therefore, trial courts "must now perform a more rigorous gatekeeping function when determining the admissibility of opinion testimony by expert witnesses than was the case under the prior version of Rule 702." *State v. Daughtridge*, 248 N.C. App. 707, 722 (2016). Determining whether "expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a)." *McGrady*, 368 N.C. at 892.

In performing its gatekeeping role, trial courts have discretion to choose "the manner of testing expert reliability." *Hunt*, 250 N.C. App. at 245. "'In its discretion, the trial court should use those factors that it believes will best help it determine whether the testimony is reliable in the three ways described in the text of Rule 702(a)(1) to (a)(3).'" *State v. Miller*, 275 N.C. App.

843, 848 (2020), *disc. review denied*, 377 N.C. 211 (2021) (quoting *McGrady*, 368 N.C. at 890). However, trial courts do not have "discretion to abandon the gatekeeping function." *Hunt*, 250 N.C. App. at 245.

In *Miller*, this Court found the trial court did not abuse its discretion and satisfied Rule 702's three-prong test in deciding to admit the expert opinion testimony of the State's firearms examiner. 275 N.C. App. at 849-50. There, the trial court's decision to allow the expert's testimony about her ballistics comparison and identification was based on the expert's response to "extensive foundational and *voir dire* questioning." *Id*. at 849. Further, the "trial court understood that some scholars have questioned the reliability of this sort of testimony, and the court weighed that against [the witness's] explanation of her principles and methods and her testimony about why she believed them to be reliable." *Id*.

Similarly, in *State v. Lance*, this Court held that the trial court properly admitted expert testimony from a fire and arson investigator under Rule 702 after hearing "extensive *voir dire*" testimony from the expert about his credentials, experience, and his methods of analysis both generally and as applied in that case. 277 N.C. App. 627, 634-35 (2021), *disc. review denied*, 868 S.E.2d 864 (2022).

This Court noted the expert's "*voir dire* testimony covered all three prongs of the Rule 702 reliability test, describing in detail the facts and data

he collected in conducting his investigation, the principles and methods he applied in accordance with his training and the guidelines for his profession, and the way he applied those principles and methods to the facts of this case to reach his conclusion" about the cause of the fire. *Id*. at 635.

Following the *voir dire*, the trial court issued a ruling "that, 'under the three prong reliability test,' it would allow [the expert] to testify about his conclusion that he had excluded other causes of the fire "with the exception of an incendiary causation" and that "he can say he excluded other things." *Id.* The court noted, "I want it very clear that he just basically couldn't exclude that by his scientific means, not that means that's what happened." *Id*.

This Court held, "in light of the trial record, stated reasoning, and the court's express pronouncement that it considered the three reliability factors in Rule 702," that the trial court's ruling was not an abuse of discretion. *Id*.

Likewise, in *State v. Turner*, this Court held the trial court did not abuse its discretion in permitting expert firearms testimony where the trial court ruled, after a "lengthy *voir dire*" in which the expert's methods were subject to inquiry and cross-examination, that the expert could testify about a specific subject matter. 273 N.C. App. 701, 707-08 (2020), *disc. review denied*, 376 N.C. 901 (2021).

C. The Trial Court Erred in Failing to Conduct Any Reliability Analysis Under Rule 702 Prior to Allowing Jessica Pappas to Testify About Her Firearms Examinations Methods and Conclusions.

In this case, Pappas was tendered by the State and accepted by the trial court, without objection from the defense, as an expert witness in forensic firearms examinations. (T p 686) Prior to being accepted as an expert witness, Pappas testified about her employment experience, education and training, the fact that she published a paper in the journal for the Association of Firearm and Toolmark Examiners on *Daubert* and toolmark examination, and that she had conducted thousands, if not tens of thousands, of ballistics comparisons. (T pp 683-86)

Unquestionably, such testimony was relevant to the trial court's determination about whether Pappas was "qualified as an expert by knowledge, skill, experience, training, or education" under Rule 702(a). However, that determination is only one part of Rule 702(a)'s three-part equation: relevance, qualifications, and reliability. *McGrady*, 368 N.C. at 889 ("Rule 702(a) has three main parts, and expert testimony *must* satisfy each to be admissible.")

Pappa's testimony about her experience and qualifications had no bearing on the three-pronged reliability test, which is a separate and mandatory determination the trial court must make before admitting the

proposed expert testimony. *Id*. at 892 ("Whatever the type of expert testimony, the trial court *must* assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3)") (emphasis added).

Neither prior to nor after Pappas's qualification as an expert in forensic firearms examinations was there any evidence concerning whether Pappas's testimony was based on sufficient facts or data, whether her principles and methods were scientifically reliable, or whether Pappas reliably applied such principles or methods to this case. *See* Rule 702(a)(1)-(3). The fact that another examiner peer-reviewed Pappas's conclusions by doing the same comparison again did not cure this error as it shed no light on the reliability of any underlying principles and methods involved. (T p 705)

As such, there was no evidentiary basis on which the trial court could make a reasoned decision about whether Pappas's testimony satisfied the three-pronged reliability test to be admissible under Rule 702. *Contrast Turner*, 273 N.C. App. at 707-08. Therefore, the trial court's decision to admit Pappas's testimony could not be the result of a reasoned decision and constituted an erroneous abuse of discretion. *See generally State v. Curlee*, 251 N.C. App. 249, 259 (2016) ("A trial court does not reach a reasoned decision, and thus abuses its discretion, when its findings of fact are not supported by competent evidence.") *See also Cabarrus Cnty. Dep't of Hum. Servs. obo*

Morgan v. Morgan, 260 N.C. App. 126 *3 (2018) (unpublished) ("Where the trial court bases its determination on no evidence, this constitutes an abuse of discretion.")

D. The Trial Court's Failure to Perform its Gatekeeping Function Constituted Plain Error.

In failing to ensure Pappas's testimony satisfied the reliability requirements of Rule 702(a), the trial court allowed Pappas to provide testimony that has come under judicial scrutiny for not being scientifically reliable. In doing so, the trial court committed plain error.

The State's case in the matter *sub judice* was entirely circumstantial—there were no eyewitnesses to the shootings themselves. While circumstantial evidence is given the same weight as direct, the circumstantial nature of the State's evidence is relevant to this prejudice analysis because connecting the bullets extracted from Elliot Barnes and Redmond Barnes to the gun the State alleged Mr. Barnes fired was essential to the State's case.

The State had evidence that Mr. Barnes's DNA, among others, was on the gun in question. But as Pappas testified, the bullets extracted from Elliot and Redmond Barnes could have been fired from different caliber weapons. (T pp 702, 703, 709-10) Therefore, it was vital to the State's case to have Pappas then link those extracted bullets to the gun in this case.

Pappas testified that she found "sufficient agreement" between the bullets recovered from Elliot Barnes and her test fire bullets and that she found "sufficient agreement" between the bullets extracted from Redmond Barnes and the other submitted projectiles. (T pp 698, 704) Pappas further testified that the bullets extracted from Elliot Barnes "could have been fired by the firearm submitted or another firearm manufactured with the same tool that was in the same approximate state of wear." (T pp 698-99)

With respect to the bullets recovered from Redmond Barnes, Pappas testified the bullet was "inconclusive to the test fires in the firearm." (T p 704) However, Pappas then compared the bullet from Redmond (State's Ex. 57A) to the other bullets submitted as evidence and "was able to find sufficient agreement between the evidence." (T p 704) Because she made that finding, and since she "knew the conclusion of those bullets to the firearm," Pappas was then able to make the further inference that the bullet from Redmond Barnes "was also either fired by the firearm submitted or by another firearm with the same tool in the same state of wear." (T p 704) Notwithstanding the multiple inferences involved, Pappas characterized this as a "conservative result." (T p 704)

Even though Pappas qualified her stated conclusion as a "conservative result," the implication was not—as the prosecutor expressly argued to the jury

in closing argument, Pappas's testimony meant "basically this is the gun." (T p 790)

Such testimony has come under increasing judicial scrutiny as courts have questioned—and found lacking—the scientific reliability of the methods underpinning the firearms and toolmark identification, such as those testified to in this case. *See Toolmark-Comparison Testimony: A Report To The Texas Forensic Science Commission*, The Yale Law School Forensic Science Standards Practicum, 3-11 (2 May 2022) (reciting cases where firearms identification testimony was judicially limited or excluded).[2]

For example, Pappas testified that she reached her conclusions based on a method involving her analysis and findings of "sufficient agreement," which has been specifically criticized by courts. *See People v. Ross*, 129 N.Y.S.3d 629, 634 (N.Y. Sup. Ct. 2020) (noting multiple courts have pointed out the circular reasoning of such testimony—"an identification can be made upon sufficient agreement, and agreement is sufficient when an identification can be made.") (citing *United States v. Taylor*, 663 F. Supp.2d. 1170, 1177 (D. N.M. 2009) and *United States v. Monteiro,* 407 F. Supp.2d 351 (D. Mass. 2006)). *See also United*

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[2] Available at https://deliverypdf.ssrn.com/delivery.php?ID=286116065002006093069013078105020097023057071055063005125107118022119102005086098014107106052111061028034089094111077024102027102070004033004124013001094084076084035046073090117091112081023102026006103127117093103029097120012070070079100126091031&EXT=pdf&INDEX=TRUE

States v. Ashburn, 88 F. Supp. 3d 239, 249 (E.D.N.Y. 2015) (finding fault with forensic toolmark examinations because it is "at bottom a subjective inquiry" and "determining whether a match demonstrates 'sufficient agreement' is dependent on the training and experience of the examiner, not any specific scientific protocol, nor does the methodology 'consider, let alone address, questions regarding variability, reliability, repeatability, or the number of correlations needed to achieve a given degree of confidence.'")

Further, testimony from firearms examiners that reflect expressions of certainty about their toolmark or identification analysis have been criticized and deemed inadmissible by courts across the country. *See Toolmark-Comparison Testimony: A Report To The Texas Forensic Science Commission* at 7 (reciting cases prohibiting same-source expressions or expressions of certainty from toolmark and firearms expert witnesses).

For example, in *United States v. Hunt*, the government's expert was prohibited from testifying "the probability the ammunition charged in Counts Eight and Nine were fired in different firearms is so small it is negligible." 464 F. Supp. 3d 1252, 1262 (W.D. Okla. 2020), *aff'd*, 63 F.4th 1229 (10th Cir. 2023) *See also United States v. Adams*, 444 F. Supp.3d 1248 (D. Or. 2020) (excluding all evidence related to expert's methodology or conclusions as to whether the shell casings matched the gun because the principle of sufficient agreement

did not satisfy *Daubert* and were not the product of a quantifiable, replicable scientific inquiry).

Pappas's testimony that the bullet from Elliot Barnes "could have been fired by the firearm submitted or another firearm manufactured with the same tool that was in the same approximate state of wear" is materially indistinguishable from the expressions of certainty deemed inadmissible in other aforementioned cases. The same is even more true for Pappas's conclusion with respect to the bullet from Redmond Barnes, in which Pappas strengthened her conclusion from it "*could* have been fired" to it "*was* also either fired by the firearm submitted or by another firearm with the same tool in the same state of wear." (T p 704)

If there was any doubt in the jury's mind about how far down Pappas narrowed the range of possible firearms that could have fired the fatal bullets, the prosecutor made it abundantly clear in closing argument: Pappas's testimony meant "basically this is the gun." (T p 790) This compounded the prejudice flowing from the erroneous admission of Pappas's testimony.

To be clear, courts have not found all firearms and toolmark examination expert opinion testimony inadmissible. Instead, courts have increasingly restricted the scope of what such experts can say, reigning in unqualified assertions of certainty given the lack of proof concerning the scientific reliability or rigor of their analysis. *See Toolmark-Comparison Testimony: A*

Report To The Texas Forensic Science Commission at 3 (quoting *United States v. Harris,* 502 F. Supp.3d 28, 44 (D.D.C. 2020) ("[l]imitations restricting the degree of certainty that may be expressed on firearm and toolmark expert testimony are not uncommon.")

In sum, the trial court's failure to subject Pappas's testimony to the reliability requirements of Rule 702 resulted in the admission of impermissible and highly prejudicial evidence—with the imprimatur of science—that purported to make the essential evidentiary connection in this case, namely: that the fatal bullets which struck Elliot and Redmond Barnes came from the gun the State alleged Mr. Barnes fired. *See State v. Helms,* 348 N.C. 578, 583 (1998) (observing the "heightened credence juries tend to give scientific evidence").

Because the trial court's error had a probable impact on the verdict, it constituted plain error. This Court should grant Mr. Barnes a new trial.

II. THE TRIAL COURT ERRONEOUSLY FAILED TO INTERVENE *EX MERO MOTU* IN THE STATE'S CLOSING ARGUMENT WHEN THE PROSECUTOR IMPERMISSIBLY CRITICIZED MR. BARNES'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS TO PLEAD NOT GUILTY AND BE TRIED BY A JURY.

A. Standard of Review

"The standard of review for assessing alleged improper closing arguments that fail to 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*." *State v. Jones*, 355 N.C. 117, 133 (2002).

B. The Prosecutor's Impermissible Comment on Mr. Barnes's Sixth Amendment Right to a Jury Trial Rendered His Conviction Fundamentally Unfair.

Prosecutors are given wide latitude in the scope of their closing arguments, but not unlimited license. *Jones*, 355 N.C. at 128-129. As ministers of justice, prosecutors have a duty to conduct themselves "'under proper restraint and avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled,' and it is as much their 'duty to refrain from improper methods calculated to bring about a wrongful conviction as it is to use every legitimate means to bring about a just one.'" *State v. Britt*, 288 N.C. 699, 711 (1975) (internal citations omitted);

N.C. State Bar Rev'd Rules of Prof'l Conduct R. 3.4, Comment 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict or to uphold a conviction.") Thus, though a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States,* 295 U.S. 78, 88 (1935).

Prosecutors are also prohibited from commenting on or criticizing a defendant's exercise of their right to a trial by jury, or their decision to plead not guilty, during arguments to the jury. *State v. Larry*, 345 N.C. 497, 524 (1997). A "prosecutor's reference to a defendant's failure to plead guilty is a violation of the defendant's constitutional right to a jury trial." *State v. Kemmerlin*, 356 N.C. 446, 482 (2002). Argument "complaining a criminal defendant has failed to plead guilty and thereby put the State to its burden of proof" is likewise impermissible. *State v. Thompson*, 118 N.C. App. 33, 41 (1995).

In *Thompson*, the prosecutor argued that the defendant was "'hiding behind the law'" and "'sticking the law in somebody's eye.'" *Id.* at 42. This Court asserted both comments "may only be interpreted as referring directly either to defendant's exercise of his right to a jury trial or to his failure to testify, or indeed to both." *Id.* While holding these comments were impermissible, this Court held such error was harmless given the

"substantial, cumulative and compelling" evidence against the defendant. *Id.* at 43. Indeed, in *Thompson*, three separate witnesses "provided a detailed description of defendant's actions in striking the two victims with his automobile" — the assault in question. *Id.*

More recently, in *State v. Goins*, the State conceded on appeal that the following argument from the prosecutor during closing argument improperly infringed on the defendant's right to plead not guilty:

> [You m]ight ask why would [defendant] plead not guilty? I contend to you that the defendant is just continuing to do what he's done all along, *refuse to take responsibility for any of his actions*. That's what he does. He believes the rules do not apply to him.
>
> ...
> [*Defendant's] not taking responsibility today*. There's nothing magical about a not guilty plea to attempted murder. He's got to admit to all the other charges. You see them all on video. The only thing that's not on video is what's in his head. He also knows that those other charges carry less time. There's the magic.

377 N.C. 475, 477-78 (2021) (emphasis added).

While our Supreme Court held the prosecutor's argument in this regard was improper, the Court found the defendant was not prejudiced by the error where the bulk of the prosecutor's closing argument was proper, the trial court instructed on the presumption of innocence and the State's burden of proof, and the evidence of defendant's guilt was "essentially uncontroverted." *Id.* at 479-80.

In the instant case, the prosecutor impermissibly asserted during his closing argument:

> Ladies and gentlemen, this is a very simple, straightforward case. If you're confused on why you're here listening to a trial, that's great, because you've been paying attention. *Why are we here? Because he doesn't want to take responsibility for what he did*. He got caught red handed and now we're pointing the finger at everybody else.

(T p 793) (emphasis added).

Such argument from the prosecution constituted an impermissible comment on and criticism of Mr. Barnes's exercise of his constitutional right to a trial by jury. Indeed, the prosecutor's argument that the reason for the trial was because Mr. Barnes would not "take responsibility for what he did" is indistinguishable from the improper closing argument in *Goins* about refusing responsibility. This Court should find, as our Supreme Court did in *Goins*, that such argument is an impermissible comment on Mr. Barnes's constitutional right to a trial by jury.

The trial court's failure to intervene in the prosecutor's improper closing argument comments prejudiced Mr. Barnes and rendered the conviction fundamentally unfair, requiring a new trial.

The State's evidence against Mr. Barnes was neither "substantial, cumulative and compelling," *Thompson*, 118 N.C. App. at 43, nor "essentially

uncontroverted." *Goins*, 377 N.C. at 480. There were no eyewitnesses to the shootings in question. *Contrast Thompson*.

The State's forensic evidence was not exclusive to Mr. Barnes. Presumptive testing on the firearm yielded a positive result indicating a major and a minor contributor: the major contributor matched Mr. Barnes's DNA profile, but the minor contributor could not be conclusively interpreted. (T p 640) Presumptive testing on the inside of the glove produced a mixture of three contributors, one of which was a match to Mr. Barnes's DNA profile, while there were still others that could not be adequately tested. (T p 643) Confirmatory testing was not performed. (T p 663) The timing of whose DNA was on the gun first or when it was placed there was indeterminable. (T p 666-68) The shorts Mr. Barnes was wearing on the night in question were not tested for the presence of gunshot residue. (T p 756)

Furthermore, the State did not establish that the bullets extracted from Elliot Barnes and Redmond Barnes were exclusive to the .38 caliber gun Mr. Barnes threw down from the roof; Pappas testified a .38, .357 or 9 mm could all fire the .38 caliber bullets recovered during the autopsies. (T pp 702, 703, 709-10)

Additionally, the State's closing contained other impermissible arguments, unlike in *Goins*. For instance, as argued above, the prosecutor's argument represented that Pappas's conclusions and testimony concerning her

firearms examination meant "basically this is the gun," when that unqualified conclusion was not supported by proper evidence. (T p 790)

In sum, the prosecutor's argument commenting on and criticizing Mr. Barnes's exercise of his constitutional right to a trial by jury warranted *sua sponte* intervention by the trial court. The absence of such intervention prejudiced Mr. Barnes and tainted his right to a fair trial. This Court should accordingly afford Mr. Barnes a new trial.

CONCLUSION

Mr. Barnes was sentenced to two life sentences without the possibility of parole. Short of execution, the State could impose no greater punishment. Justice requires that such punishment only be imposed following a trial in which expert evidence is properly vetted as reliable and respect for Mr. Barnes's constitutional right to a trial by trial is not criticized.

This Court should grant Mr. Barnes a new trial.

Respectfully submitted, this the 19th day of May, 2023.

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CERTIFICATE OF COMPLIANCE WITH N.C. R. App. P. 28

I hereby certify that Brief of Defendant-Appellant is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure as it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8750 words as indicated by the word-processing program used to prepare this brief.

This the 19th day of May, 2023.

By Electronic Submission:
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original of Brief of Defendant-Appellant has been filed, pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of Brief of Defendant-Appellant has been served on Mr. Brian D. Rabinovitz, Special Deputy Attorney General, by electronic means by e-mailing it to brabinovitz@ncdoj.gov.

This the 19th day of May, 2023.

By Electronic Submission:
Warren D. Hynson
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ATTORNEY FOR SHONTEZ BARNES

No. COA23-239 DISTRICT SEVEN B

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA	)	
	)	
	)	Wilson County
v.	)	
	)	
SHONTEZ BARNES	)	

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APPENDIX

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Cabarrus Cnty. Dep't of Hum. Servs. obo Morgan v. Morgan, 260 N.C. App. 126 (2018) (unpublished)

260 N.C.App. 126
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
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.
Court of Appeals of North Carolina.

CABARRUS COUNTY DEPARTMENT OF HUMAN SERVICES, OBO Denesha S. MORGAN, Plaintiff v. Daniel J. MORGAN, Defendant

No. COA17-487
|
Filed: June 19, 2018

Appeal by defendant from order entered 16 November 2016 by Judge William G. Hamby, Jr. in Cabarrus County District Court. Heard in the Court of Appeals 10 January 2018. Cabarrus County, No. 13 CVD 2783, IV-D 7647841

Attorneys and Law Firms

No plaintiff-appellee brief filed.

Leslie Rawls, Charlotte, for defendant-appellant.

Opinion

CALABRIA, Judge.

***1** Daniel J. Morgan ("defendant") appeals from the trial court's order withholding his income for the purpose of paying off child support arrears. After careful review, we reverse and remand.

I. Factual and Procedural Background

On 18 September 2013, Denesha Smith Morgan ("the mother") filed a complaint against defendant asserting claims for child custody and child support; divorce from bed and board; postseparation support and alimony; equitable distribution; and injunctive relief to preclude defendant from disposing of marital property. On 25 November 2013, defendant filed an answer and counterclaim for equitable distribution. On 4 September 2015, the trial court entered a permanent custody order awarding legal and physical custody of the minor children to the mother and declining to order visitation between the minor children and defendant. On 4 April 2016, the trial court entered a permanent child support order requiring defendant to pay ongoing child support in the amount of $1,325.35 per month; arrears of $2,156.57 in the amount of $100.00 per month until paid in full; and reimbursement for health insurance. The trial court further ordered that "[t]he issue of [d]efendant's reimbursement to the [mother] for unreimbursed counseling expenses shall remain open."

On 12 July 2016, Cabarrus County Department of Human Services ("DHS") filed a motion to intervene alleging that the mother had applied for child support assistance, authorizing DHS to join as a plaintiff to collect child support on her behalf. Pursuant to this arrangement, DHS moved that child support payments be paid directly to DHS, and thereafter be disbursed to the mother. DHS further noted that defendant had incurred additional arrears since the order was entered, and provided an affidavit of arrears from the mother for support. DHS sought to subject defendant "to all administrative or judicial enforcement remedies available to the [mother] as prescribed by state and federal law in a title IV-D case[,]" *inter alia*, immediate income withholding.

On 6 October 2016, defendant filed a motion pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, seeking relief from the 4 April 2016 child support order. Defendant alleged that the trial court miscalculated both his monthly child support obligation and his total arrearage. According to defendant, his monthly child support obligation should have been $1,314.68, and he actually owed $1,602.85 in arrears. Defendant further alleged that his Health Savings Account paid for "medical expenses relating to counseling and other services[,]" and therefore, the issue of "unreimbursed counseling expenses" should "no longer remain open[.]"

On 25 October 2016, the trial court entered an order on DHS's motion to intervene. The trial court concluded that intervention was proper, and accordingly allowed the motion. The trial court further noted that defendant's Rule 60 motion was not properly served on DHS. Therefore, the court continued defendant's Rule 60 motion and determined that

any outstanding issues from DHS's motion to intervene would be addressed after defendant's Rule 60 motion was heard.

***2** On 16 November 2016, following a hearing on defendant's Rule 60 motion and DHS's remaining arguments, the trial court entered an order redirecting payments and establishing arrears. The trial court found that, as of 30 September 2016, defendant had accrued additional arrearages. The trial court concluded that the 4 April 2016 "order for child support and arrears was not entered by mistake, inadvertence, surprise, or excusable neglect, nor pursuant to fraud, misrepresentation or other misconduct of an adverse party, nor any other reason justifying relief[,]" and therefore denied defendant's Rule 60 motion. The trial court ordered, *inter alia*: that all child support payments "shall be withheld from Defendant's income wages or other sources of disposable income" and transmitted to DHS for disbursement to the mother; that these payments "shall be collected by immediate income withholding pursuant to N.C. Gen. Stat. § 110-136.4(b) ... from any payer of disposable income"; and that defendant "shall be subject to income withholding of any unemployment compensation benefits ... pursuant to N.C. Gen. Stat. § 110-136.2(f)." The court also specifically ordered defendant to "be subject to all administrative or judicial enforcement remedies available to the plaintiff as prescribed by State and Federal law in a title IV-D case[.]"

From the 16 November 2016 order, defendant appeals.

II. Subject Matter Jurisdiction

On appeal, defendant first argues that the trial court lacked subject-matter jurisdiction to enter the order because DHS failed to verify its motion, as required by N.C. Gen. Stat. § 110-136. We disagree.

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

Pursuant to N.C. Gen. Stat. § 110-136, a party seeking a wage garnishment order to enforce a child support obligation must file a verified motion to that effect. N.C. Gen. Stat. § 110-136(b) (2017). This motion, "along with a motion to join the alleged employer as a third-party garnishee[,]" must be served on both the responsible parent and the alleged employer. *Id*.

Defendant contends that DHS's failure to verify its motion to intervene and to establish arrears was a fatal defect that divested the trial court of subject-matter jurisdiction to rule on the motion. Although DHS cites no specific statute as authority for its motion, it does not appear to have been made pursuant to N.C. Gen. Stat. § 110-136(b). DHS does not seek to join any alleged employer, nor was the motion served upon one. Similarly, the trial court's order is not a garnishment order pursuant to N.C. Gen. Stat. § 110-136, because the employer was not a party in this case.

Rather, the trial court was explicitly acting pursuant to N.C. Gen. Stat. § 110-136.4(b), which requires the trial court to order immediate income withholding anytime the court enters a new or modified child support order in a title IV-D case. In *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995), this Court held that "the statutory provisions for mandatory income withholding in IV-D cases apply with equal force to orders for current support and to orders directing payment of arrearage." *Id.* at 31, 453 S.E.2d at 538. Because the trial court was statutorily required to enter the income withholding order, no verified motion was required of any party. *Compare* N.C. Gen. Stat. § 110-136(b) (providing that an interested party "*may* move the court for an order of garnishment. *The motion shall be verified* ...." (emphases added)) *with* N.C. Gen. Stat. § 110-136.4(b) ("When a new or modified child support order is entered, the district court judge *shall*, after hearing evidence regarding the obligor's disposable income, place the obligor under an order for immediate income withholding." (emphasis added)). This argument is overruled.

III. Findings of Fact

Defendant next argues that the trial court erred by making findings of fact without taking evidence. We agree.

A. Standard of Review

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

***3** "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason ... [or] upon a showing that [the court's ruling] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Where the trial court bases its determination on no evidence, this constitutes an abuse of discretion. *See State v. Thompson*, —— N.C. App. ——, ——, 801 S.E.2d 689, 695 (2017) (holding that the trial court abused its discretion by determining "that the offense involved criminal street gang activity even though there was no evidence presented at trial supporting the trial judge's decision").

B. Analysis

On 12 July 2016, DHS moved to intervene. On 6 October 2016, defendant filed his Rule 60 motion for relief. When the trial court held a hearing on 10 October 2016, defendant's testimony was the only evidence presented; DHS offered no evidence with respect to its motions. In fact, during direct examination, the trial court explicitly stated that "[w]e're not talking about garnishment ... we're talking about whether the Department is—is allowed to be a party to the case."

In its 25 October 2016 order, the trial court allowed DHS to intervene, continued defendant's Rule 60 motion, and ordered that "[a]ny remaining, open issues from the Department's motion shall be addressed after the Rule 60 motion is heard." At the subsequent hearing, however, DHS presented no evidence. The only testimony or arguments presented were brought by defendant, regarding his Rule 60 motion. It is clear, then, that the only evidence presented by DHS in this matter, was its motion, which was not verified, and the attached affidavit of arrears.

The trial court's order with regard to DHS's motion for income withholding was extensive and detailed. Nevertheless, there is no evidence in the record, other than a single affidavit of arrears, to support any of the trial court's findings. We hold therefore that the trial court abused its discretion. We reverse the order with respect to DHS's motions, and remand this matter to the trial court. Upon remand, the trial court will conduct a hearing and consider evidence, and will enter findings and conclusions thereupon.

IV. Conclusion

DHS's failure to verify its motion to intervene and establish arrears did not deprive the trial court of subject-matter jurisdiction to enter its order. However, since no evidence was presented at either hearing to support DHS's motion, the trial court's findings of fact are not supported by competent evidence. Therefore, we reverse the order and remand to the trial court for further proceedings. Although defendant raises additional issues on appeal, we need not address those arguments.

REVERSED AND REMANDED.

Report per Rule 30(e).

Judges ZACHARY and ARROWOOD concur.

All Citations

260 N.C.App. 126, 814 S.E.2d 920 (Table), 2018 WL 3028921