NO. COA11-994
NORTH CAROLINA COURT OF APPEALS

Filed: 7 August 2012

STATE OF NORTH CAROLINA

v. Catawba County
Nos. 09 CRS 5848-5855

EDWARDO WONG, II

Appeal by Defendant from judgments entered 8 November 2010 by Judge Nathaniel J. Poovey in Superior Court, Catawba County. Heard in the Court of Appeals 20 March 2012.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Kathryn L. VandenBerg for Defendant-Appellant.

McGEE, Judge.

Edwardo Wong, II (Defendant) was convicted of first-degree murder pursuant to the theories of malice, premeditation, and deliberation, and the felony murder rule on 14 October 2010. Defendant was also convicted of armed robbery; attempted first-degree murder; possession with intent to manufacture, sell, or deliver MDMA; possession with intent to manufacture, sell, or deliver marijuana; and three counts of possession of a firearm

by a felon. Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction. Defendant was also sentenced to 117 months to 150 months for armed robbery; 251 months to 311 months for attempted first-degree murder; 11 months to 14 months and 8 months to 10 months for the two drug charges; and 20 months to 24 months for the three firearms charges. Judgment was arrested in the last two firearms charges.

The evidence presented at trial tended to show that, on the evening of 17 June 2008, Trooper David Shawn Blanton, Jr. (Trooper Blanton) was patrolling Interstate 40 (I-40) in Haywood County. Defendant was driving a GMC pickup truck (the truck), towing a dolly with a Nissan Altima (the car) on it. At 10:11 p.m., Trooper Blanton used his computer to check the Georgia license plate on the truck being driven by Defendant. The computer response was "plate number entered does not exist." At 10:13 p.m., Trooper Blanton called highway patrol dispatch, where the computer operator checked the license plates in other databases and was unable to confirm valid registration. At 10:21 p.m., Trooper Blanton stopped Defendant on the right shoulder of I-40. The dash camera in Trooper Blanton's patrol car, and the body-microphone on Trooper Blanton's person,

provided the jury with the details of the stop. In addition, several drivers who were in traffic on I-40 witnessed the stop.

The dash camera in the patrol car showed Trooper Blanton approaching the right side of the truck and speaking with Defendant. Trooper Blanton asked Defendant to step out of the truck, and Trooper Blanton walked to the rear of the dolly to wait for Defendant. When Defendant was slow to emerge from the truck, Trooper Blanton "whistled" for Defendant, and moved to the right of the truck and patrol car, outside the view of the dash camera. Trooper Blanton questioned Defendant about the tags on both the truck and the car, and subsequently asked Defendant where he was travelling from.

Trooper Blanton told Defendant to have a seat in the patrol car, but said that he first needed to see whether Defendant had any weapons. Trooper Blanton instructed Defendant to hold his hands up, at which time Defendant questioned whether he was being arrested. Trooper Blanton told Defendant that he was conducting a "Terry Frisk." Defendant replied that Trooper Blanton had pulled him over for no reason. Trooper Blanton told Defendant that his license plate was registered to a different vehicle than the one to which it was attached, which was an arrestable, misdemeanor offense. The audio recording captured the following exchange between Trooper Blanton and Defendant:

Defendant: I don't want to have to sit [in] your car if I don't have to.

Trooper: All right. Fair enough. Turn around and put your hands behind your back. Now you have to. Come here.

Defendant: Hey, I got a gun on me right here. Right here.

Trooper: Stop, stop, stop. (3 gunshots are fired). Okay, okay, okay!

Defendant: I'll shoot you!

Trooper: Okay, take it, take it, take it man, take it . . . license, right here . . . look . . . Just don't shoot me, man. Please, I got a brand new kid. Please, man.

Defendant: Get your gun out.

Trooper: Go ahead, just don't shoot me again, okay? The license are right there. Take your license, take your license and go. Right here. Take them and go please, . . . please. Please. Okay? Just don't shoot me

. . . .

Defendant: How do you get the gun out?

Trooper: Right here, push it down. Push it down. Look . . . I can't do nothing.

Defendant: Take it out. Take it out. You got three seconds. One, two, three.

Trooper: Okay, here.

Defendant: Where's the cuffs at?

Trooper: Cuffs are right here. I can't get 'em out. I can't get 'em out (unintelligible) . . . .

> Defendant: Don't you f***ing move! . . . Where's the keys to your car at?

Defendant took Trooper Blanton's service handgun, a Sig Sauer P229, and threw Trooper Blanton's keys more than seventeen feet on the other side of the guard rail. After several seconds, the dash camera captured Defendant walking back to his truck and driving off on I-40.

India Brown and her father, Willard McNeill (McNeill), were traveling in McNeill's tractor trailer truck on I-40 at the time of the shooting. According to their testimony, Defendant pushed the trooper back and then drew a gun from under his shirt. Trooper Blanton attempted to shield his face with his hands. Several eyewitnesses testified that they heard the gunshots as Defendant fired three times, and they watched as Defendant patted down Trooper Blanton, apparently searching for something. Additional eyewitness testimony presented similar factual accounts of Defendant's actions before, during, and after the shooting.

A description of Defendant and Defendant's truck were broadcast over police radio. Detective Bruce Warren, who had been monitoring police radio traffic, spotted Defendant and followed him. Defendant fired his handgun at Detective Warren. Around 10:37 p.m., several law enforcement officers arrived and surrounded Defendant on a road off I-40, and arrested Defendant.

Defendant denied shooting Trooper Blanton but, after being arrested, made several spontaneous statements, including: "I guess my life's over[;]" "My life ended tonight[;]" and "Am I facing life?"

At the time of his arrest, Defendant was in possession of a Sig Sauer P229, with a North Carolina Highway Patrol Trooper emblem on it, which was Trooper Blanton's service weapon and had a value of $750.00. Defendant also had two additional semiautomatic handguns with him. A search of Defendant's truck revealed that Defendant possessed 316 grams of marijuana; 57 pills of MDMA (ecstasy); and drug paraphernalia including baggies, a spoon, digital scales, a hydraulic press; and 82 grams of various cutting agents for diluting ecstasy and powder drugs. Defendant also had $4,962.59 in cash and four cell phones.

Trooper Blanton was taken to Memorial Mission Hospital in Asheville, arriving at 10:55 p.m. A trauma team performed emergency surgery to stop internal bleeding but Trooper Blanton was pronounced dead at 11:47 p.m. His cause of death was multiple gunshot wounds.

I. Issues on Appeal

Defendant raises issues on appeal of whether: (1) emotional testimony deprived Defendant of a fair trial on the issue of

premeditation and deliberation; (2) prosecutorial misconduct occurred and prejudiced Defendant; and (3) Defendant's rights to silence and a jury trial were violated.

II. Emotional Testimony and Fair Trial

In his reply brief, Defendant contends that "[t]he evidence of felony-murder was equivocal[,] and the jury could have found reasonable doubt absent the improper emotional evidence." However, in his initial brief, Defendant argues only that the "irrelevant, emotional testimony offered by the State" and "erroneously" admitted by the trial court prejudiced his defense to first-degree murder *based on malice, premeditation, and deliberation*, and absent such testimony, the jury would have returned a different verdict. Defendant further contends that, under federal law, "the cumulative effect of the irrelevant and inflammatory evidence was prejudicial to such an extent as to render the jury unable to fairly decide this case, violating due process, and requiring a new trial."

Defendant was found guilty of first-degree murder under the felony murder rule and on the basis of malice, premeditation, and deliberation. Both of Defendant's arguments concern the charge of first-degree murder on the basis of malice, premeditation, and deliberation, and do not challenge his conviction under the felony murder rule.

N.C.R. App. P. 28(b)(6) provides that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6) (2011); *see also State v. Nolan*, __ N.C. App. __, __, 712 S.E.2d 279, 284 (2011). Defendant's attempt to argue the felony murder issue for the first time in his reply brief does not present that issue for appellate review. *See State v. Sullivan*, 202 N.C. App. 553, 554-55, 691 S.E.2d 417, 418-19 (2010); *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 707-08, 682 S.E.2d 726, 740 (2009) ("*See Oates v. N.C. Dep't of Corr.*, 114 N.C. App. 597, 600, 442 S.E.2d 542, 544 (1994) (holding that Court 'will not entertain what amounts to a new argument presented in th[e] reply brief'); *Golden Rule Ins. Co. v. Long*, 113 N.C. App. 187, 199, 439 S.E.2d 599, 606 (concluding appellant's reply brief could not 'resurrect' abandoned claim where appellant had not raised issue in initial brief and appellee's brief did not address issue), *appeal dismissed and disc. review denied*, 335 N.C. 555, 439 S.E.2d 145 (1993); *Animal Prot. Soc'y of Durham, Inc. v. State*, 95 N.C. App. 258, 269, 382 S.E.2d 801, 808 (1989) (declining to address constitutional argument first raised in reply brief because '[t]he reply brief [is] intended to be a vehicle for responding to matters raised

in the appellees' brief; it was not intended to be — and may not serve as — a means for raising entirely new matters')."").

Even if this Court found error as to issues related to first-degree murder on the basis of malice, premeditation, and deliberation, the conviction would still stand because the jury also convicted Defendant under the felony murder rule. *See State v. Brewington*, 195 N.C. App. 317, 320-21, 672 S.E.2d 94, 96-97 (2009). We need not determine any issues regarding the first-degree murder conviction on the basis of malice, premeditation, and deliberation since Defendant has abandoned his felony murder argument. Thus, the conviction for first-degree murder under the felony murder rule stands, and Defendant's remaining arguments with regard to the first-degree murder conviction based on malice, premeditation, and deliberation are moot.

Similarly, Defendant does not argue that his conviction for robbery with a dangerous weapon should have merged with his conviction for first-degree murder based upon the felony murder rule. *See State v. Rush*, 196 N.C. App. 307, 313-14, 674 S.E.2d 764, 770 (2009). Defendant has also abandoned this argument.

Even assuming *arguendo* that the felony murder issue had been properly preserved, we conclude that Defendant cannot show that he was prejudiced by any error.

> "A murder . . . committed in the perpetration or attempted perpetration of any . . . robbery . . . shall be deemed to be murder in the first degree. . . ." N.C.G.S. § 14-17. . . . . Under N.C.G.S. § 14-17, a killing is committed in the perpetration of armed robbery when there is no break in the chain of events between the taking of the victim's property and the force causing the victim's death, so that the taking and the homicide are part of the same series of events, forming one continuous transaction.

State v. Handy, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992).

> The essential elements of robbery with a dangerous weapon are "(1) the unlawful taking or attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened."

State v. Bellamy, 159 N.C. App. 143, 147, 582 S.E.2d 663, 667 (2003). "Neither the commission of armed robbery . . . nor the commission of felony murder based on armed robbery depends upon whether the intention to commit the taking of the victim's property was formed before or after the killing." *Handy*, 331 N.C. at 529, 419 S.E.2d at 552.

Defendant does not contest that he committed a homicide when he shot Trooper Blanton three times, ultimately killing him. Subsequent to shooting Trooper Blanton multiple times, Defendant took Trooper Blanton's handgun and left the scene of

the shooting with that handgun. Defendant did not take Trooper Blanton's keys or handcuffs, though he removed them from Trooper Blanton and threw the keys over the guardrail, apparently to keep Trooper Blanton from following him. Trooper Blanton's handgun was found in Defendant's possession at the time of Defendant's arrest, miles distant from where Defendant had shot Trooper Blanton. These undisputed facts are corroborated by the audio and video recordings obtained from the dash camera in Trooper Blanton's patrol car, testimony from eyewitnesses driving on I-40 at the time of the shooting, and testimony from police officers who apprehended Defendant. Given these uncontested facts, we hold that Defendant cannot show that he was prejudiced by error he contends was committed at trial. Defendant's argument is without merit.

III. Prosecutorial Misconduct and Prejudicial Error

Defendant contends that the State's persistent misconduct in name-calling and soliciting improper emotional testimony prejudiced the jury's ability to fairly decide this case. Defendant further argues that he was deprived of a fair trial under the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution. We disagree.

"Every person charged with a crime has an absolute right to a fair trial. By this it is meant that he is entitled to a trial before an impartial judge and an unprejudiced jury in keeping with substantive and procedural due process requirements of the Fourteenth Amendment." *State v. Britt*, 288 N.C. 699, 710, 220 S.E.2d 283, 290 (1975). "A defendant is entitled to a new trial when improper prosecutorial conduct prejudices the defendant, affecting his right to a fair trial. . . . However, where there is no reasonable possibility that the misconduct affected the outcome of the trial, there is no need for reversal." *State v. Walls*, 342 N.C. 1, 66, 463 S.E.2d 738, 773 (1995). "Improper argument at the guilt-innocence phase, while warranting condemnation and potential sanction by the trial court, may not be prejudicial where the evidence of defendant's guilt is virtually uncontested." *State v. Jones*, 355 N.C. 117, 134, 558 S.E.2d 97, 108 (2002).

> [Our Supreme Court] has held that when a trial court sustains an objection and issues curative instructions, these "actions cure any prejudice due to a jury's exposure to incompetent evidence from a witness. The same rule applies when the defendant contends that a question posed by the prosecutor was prejudicial."

State v. Rowsey, 343 N.C. 603, 628, 472 S.E.2d 903, 916 (1996) (citation omitted).

In the present case, Defendant argues that numerous errors were made during trial. Defendant first argues that, during cross-examination of Defendant's expert witness, the State referred to Defendant as "it" when referring to an incident where Defendant suffered head trauma as a child. Defense counsel objected, the trial court sustained the objection, and instructed the State to "[r]efer to [Defendant] from this point forward as 'Mr. Wong' or 'the defendant.'" It would appear that the State's use of the gender-neutral pronoun "it" was inadvertent and the result of also referring to Defendant as "the child," which is a gender-neutral term.

Second, Defendant argues that, in its closing argument, the State used the term "psycho" in reference to Defendant. Defense counsel objected to the use of "psycho" in the State's closing argument, and the trial court sustained the objection.

Finally, Defendant assigns error to the State's direct examination of Mrs. Michaela Blanton (Mrs. Blanton), where the State solicited Mrs. Blanton's reasons for wanting her husband's cell phone, and testimony concerning her infant son, who was hospitalized due to severe complications resulting from his premature birth. During ***voir dire*** of Mrs. Blanton, the trial court instructed the State and Mrs. Blanton that she could "testify that [she] had some important decisions to make, that

[the cell phone] had sentimental value to her, and she [] wanted to keep [the phone] because it meant something to her, it was a keepsake of her husband." However, the trial court instructed that Mrs. Blanton could not testify about "the [cell] phone helping her make a decision about whether to take her son off of life support[.]" On direct examination, the State asked several questions that were outside the parameters prescribed by the trial court. During direct examination of Mrs. Blanton, the State asked her the following:

> Q. Did you have any reason to want that phone back, Ms. Blanton?
>
> [DEFENSE]: Objection
>
> THE COURT: Overruled as to that question. That's a yes-or-no answer.
>
> A. Yes, I did.
>
> Q. And at that time in your life, were you still at the hospital for periods of time?
>
> [DEFENSE]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE]: And I'd ask the Court to instruct counsel.
>
> THE COURT: Mr. Brown [State], I gave you specific directions as to the questions that you could ask. That was not one of them.
>
> Q. Ms. Blanton, did you in fact get the phone back on some date after your request?
>
> A. I did. It was quite some time of making

> my requests and several requests that to have the phone placed back into my possession. And it eventually was. But like I said, there was some time after my requests had been made.
>
> Q. What value, if any, did the phone have for you at that time?
>
> [DEFENSE]: Objection.
>
> THE COURT: Sustained.
>
> Q. Can you tell the court and the jury why you wanted the phone back?
>
> [DEFENSE]: Objection.
>
> THE COURT: Sustained.

Defense counsel objected to these questions, and the trial court sustained the objections. Our Supreme Court "has held that when a trial court sustains an objection and issues curative instructions, these 'actions cure any prejudice due to a jury's exposure to incompetent evidence from a witness.' The same rule applies when the defendant contends that a question posed by the prosecutor was prejudicial." *Rowsey*, 343 N.C. at 628, 472 S.E.2d at 916 (citing *State v. Locke*, 333 N.C. 118, 124, 423 S.E.2d 467, 470 (1992) (citations omitted). We conclude that the trial court's prompt action in sustaining Defendant's objections was appropriate. We find no error.

Even assuming *arguendo* that these statements were error, the error was not prejudicial. "Cumulative errors lead to

reversal when 'taken as a whole' they 'deprived [the] defendant of his due process right to a fair trial free from prejudicial error.'" *State v. Wilkerson*, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009) (citing *State v. Canady*, 355 N.C. 242, 254, 559 S.E.2d 762, 768 (2002)). After a careful review of the record as a whole, and the overwhelming evidence of Defendant's guilt, we conclude that, even if error occurred, Defendant was not deprived of his due process right to a fair trial. Defendant's argument is without merit.

IV. Violation of Rights to Silence and a Fair Trial

Defendant contends that the jury, in its deliberations, was improperly allowed to consider that Defendant exercised his right to a jury trial and did not testify, in violation of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, § 23 of the N.C. Constitution. We disagree.

"Comment on an accused's failure to testify does not call for an automatic reversal but requires the court to determine if the error is harmless beyond a reasonable doubt." *State v. Reid*, 334 N.C. 551, 557, 434 S.E.2d 193, 198 (1993). Our Supreme Court has held that, when the State makes a constitutionally impermissible comment about a defendant's right not to testify, "the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper,

followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness." *Id.* at 556, 434 S.E.2d at 197.

> When the State directly comments on a defendant's failure to testify, the improper comment is not cured by subsequent inclusion in the jury charge of an instruction on a defendant's right not to testify . . . . [Our Supreme Court] ha[s] held that when the trial court fails to give a curative instruction to the jury concerning the prosecution's improper comment on a defendant's failure to testify, the prejudicial effect of such an uncured, improper reference mandates the granting of a new trial.

Id. (citations omitted).

In the present case, Defendant cites two specific instances where Defendant alleges that the State made improper comments at trial. The following colloquy occurred between Defendant's counsel and Officer Scott Sluder (Officer Sluder):

> Q. . . . . Have you been in court long enough to hear the fact that we don't dispute that [Defendant] was the person who shot Mr. Blanton --
>
> A. No.
>
> [STATE]: Objection as to the form, Your Honor.
>
> THE COURT: Overruled.
>
> Q. -- and that was the one that left the scene and went up Buckeye Cove Road? Had you heard that before?

A. No.

On redirect examination, the State asked Officer Sluder:

> Q. Have you heard that the defendant told you that he did all those things? Have you heard that the defendant in this court says that he shot him, that he drove up there?
>
> A. No.
>
> [DEFENSE COUNSEL]: Object to that, Your Honor.
>
> THE COURT: Overruled.
>
> Q. So that's what you've heard the lawyers saying? That's correct?
>
> A. Yes, sir.

After a careful review of the transcripts, we hold that defense counsel opened the door to the State's questions by asking a number of witnesses prior to, and including Officer Sluder, whether they knew that Defendant was the shooter or that Defendant caused Trooper Blanton's death. In several instances, defense counsel posed similar, and in some cases identical, questions to witnesses as those posed by the State: (1) defense counsel, on cross-examination, asked Dr. Terrance Burt, the emergency room doctor: "[D]o you understand that [Defendant] doesn't dispute the fact that the gunshots caused Trooper Blanton's death?"; (2) defense counsel, on cross-examination, asked William Sease, the paramedic who responded to the call: "[D]o you know that [Defendant] in this case is not disputing

that the gunshots that he fired caused the death of [Trooper Blanton[1]]?"; and (3) defense counsel asked Officer Sluder: "Have you been in court long enough to hear the fact that we don't dispute that [Defendant] was the person who shot Mr. Blanton?" In effect, defense counsel opened the door to similar questioning by the State. Accordingly, we find no error.

In addition, during its closing argument, the State emphasized four times that Defendant "won't admit" to the offense; is "still denying" what he said; and has "pled not guilty." Specifically, the State stated:

> [STATE]: Now, listen to what [Defendant] says next. He heard Officer Ryan say, "It's back there where he shot at the officer." He processed that information and then he came back to say, "I never said I shot the officer." Well, ladies and gentlemen, he's still denying. He's pled not guilty. And you heard it was similar to what he told Dr. Acheson on his tape when he was asking him about shooting guns. He won't admit to that either. And there's a reason for it, ladies and gentlemen. He knows what he's doing.
>
> [DEFENSE]: Objection.
>
> THE COURT: Sustained.
>
> . . .
>
> THE COURT: Members of the jury, do not consider the last statement of counsel during your deliberations.

[1] Defendant's counsel actually said "Mr. Wong," but clearly meant to say "Trooper Blanton."

> [STATE]: Again, listen to [Defendant] in this denial as well. "Where's the gun at?" "I don't know." He knows where the gun's at. He just left it up there in the truck. It is.
>
> When Dr. Acheson was talking to him about shots being fired in Florida and he didn't want to admit to those things, he denied it in the same fashion. That's what he denied and he's still denying it.
>
> [DEFENSE]: Object.
>
> . . .
>
> THE COURT: Members of the jury, the defendant in this case has pled not guilty to these charges, and he has that right. He has no burden of proof in this case. It is the State that bears the burden of proof to prove that he is guilty of these offenses beyond a reasonable doubt. The fact that the defendant has been charged with these crimes is no evidence of guilt. A charge is merely the mechanical or administrative way by which someone is brought to trial.

Citing *State v. Reid*, 334 N.C. 551, 434 S.E.2d 193 (1993), Defendant argues that "[s]ubsequent inclusion in the jury instruction of an instruction on a defendant's right not to testify does not cure the State's improper comments." In *Reid*, the defendant was charged with breaking or entering with intent to commit the felony of larceny. In its closing argument, the State said: "The defendant hasn't taken the stand in this case. He has that right. You're not to hold that against him. But ladies and gentlemen, we have to look at the other evidence to

look at intent in this case[.]" *Reid*, 334 N.C. at 554, 434 S.E.2d at 196. In *Reid*, defense counsel timely and properly objected to the State's direct reference to defendant's failure to testify, but the trial court did *not* sustain the objection and did *not* give the jury a curative instruction. *Id.* at 557, 434 S.E.2d at 197. Our Supreme Court reasoned:

> "By simply overruling defendant's objection to the prosecution's argument, the trial court impliedly sanctioned a clear violation of N.C.G.S. § 8-54. . . . [W]e find in the instant case that the trial court's failure to take the requisite curative measures at the time of the prosecution's improper comments or anytime thereafter constituted error violating defendant's constitutional and statutory rights."

Id. Our Supreme Court ultimately concluded that the error was prejudicial, finding that "we do not find the evidence against defendant in this case so overwhelming as to render any error on the part of the prosecution harmless beyond a reasonable doubt." *Id.*

In the present case, Defendant timely and properly objected twice to the improper comments made by the State in its closing argument. Unlike *Reid*, the trial court sustained the first objection and provided a curative instruction. After the second objection from defense counsel, the trial court engaged in a brief colloquy with the State and defense counsel outside the presence of the jury and subsequently provided a curative

instruction to the jury. Any error arising from the State's improper comments was timely and properly objected to by Defendant and sustained by the trial court. Moreover, the trial court properly provided a curative instruction to the jury after each objection. In light of Defendant's objections, which were sustained, and the curative instructions given by the trial court, along with the strength of the evidence presented by the State, we hold any error was harmless beyond a reasonable doubt.

No prejudicial error.

Judges GEER and MCCULLOUGH concur.

Report per Rule 30(e).