**NO. COA19-1055** **TWENTY-SEVEN-A DISTRICT**

**NORTH CAROLINA COURT OF APPEALS**

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| | | |
|---|---|---|
| **STATE OF NORTH CAROLINA** | **)** | |
| | **)** | |
| **v.** | **)** | **From Gaston** |
| | **)** | |
| **MARK BRADLEY CARVER** | **)** | |

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**REPLY BRIEF FOR THE STATE**
**(APPELLANT)**

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## ARGUMENT

## I. THE TRIAL COURT ERRED BY GRANTING THE MAR.

### A. Ineffective Assistance of Counsel

Defendant argues the challenged findings are supported by evidence. With regard to the finding that counsel failed to obtain any information about Defendant's health related issues, Defendant points to evidence that counsel did not obtain his medical records or interview his psychiatrist. With regard to the finding that counsel failed to interview any family members, Defendant notes the testimony of seven of his family members and friends. With regard to the finding that counsel failed to investigate, educate themselves, or become familiar with DNA evidence, Defendant insists counsel lacked the ability to assess Ostrowski's opinion. (Def.'s Br. pp. 30-31, 35)

Defendant fails to identify evidence supporting the findings. Indeed, he recognizes that counsel was aware of his carpal tunnel diagnosis and alleged disability. He acknowledges the evidence that counsel talked with family members – apparently others than those who testified at the MAR hearing. He agrees that counsel got at least rudimentary instruction in DNA science from Ostrowski. The trial court erred therefore in finding that counsel failed to obtain *any information* about health related issues, to interview *any family*

*members*, or to investigate DNA evidence.

With regard to the trial court's finding of deficient performance, Defendant maintains that it was "counsel's duty to perform due diligence and assess whether Ostrowski was appropriate for the case." He complains that counsel never "consulted with any other expert." Defendant concludes that counsel "lacked the ability to assess Ostrowski's opinion," and should have pursued a strategy of challenging the DNA evidence. (Def.'s Br. pp. 35-36)

Defendant failed to establish deficient performance. As Ratchford said, Ostrowski was recommended, and Ratchford relied on Ostrowski's expertise. (T pp. 1111, 1238) Defendant cites no authority for the proposition that counsel is required to shop around for a more favorable expert opinion. Cases cited with approval by our Supreme Court indicate otherwise. See State v. Frogge, 359 N.C. 228, 243, 607 S.E.2d 627, 636 (2005); United States v. Roane, 378 F.3d 382, 409 (4th Cir. 2004) ("under no mandate to second-guess [expert's] report."), cert. denied, 546 U.S. 810, 163 L. Ed. 2d 43 (2005).

As for prejudice, Defendant contends that the findings and conclusions establish that counsel's failure to investigate was prejudicial. He does not contradict the State's observation that the trial court made no findings or conclusions on prejudice. Rather, Defendant invites this Court to make its own determination based on: (1) his physical disability, (2) his intellectual

limitations, and (3) the “inconclusive” DNA test results. (Def.’s Br. pp. 38-40)

Defendant apparently agrees with the State that a showing of prejudice is required. He does not directly respond to the argument that the trial court acted under a misapprehension of law in finding ineffective assistance of counsel absent a showing of prejudice. Asking this Court to address prejudice in the first instance, Defendant repeats his claims of deficient performance and insists that a different strategy might have produced a different outcome.

With regard to Defendant’s alleged disability, counsel testified that his demonstrated ability – to drive, hunt, fish – defied the diagnosis. (T p. 1096) Counsel explained why they declined to take on the burden of showing that Defendant was physically unable to commit the crime. (T pp. 1070-71, 1264-66) This strategy might have been unsuccessful, but it was not unreasonable.

With regard to Defendant’s alleged intellectual limitations, counsel had “absolutely no question” as to his competency. (T p. 1092) Counsel recognized that introducing the video-taped interrogation would reinforce the fact that Defendant had identified the victim’s height and weight. (T pp. 1058, 1228) This strategy might have been unsuccessful, but it was not unreasonable.

As for the DNA evidence, counsel relied on the expertise of Ostrowski. Ostrowski agreed with the conclusions of the State’s DNA expert. (T p. 1256) Noureddine’s contrary opinion – that the test results were inconclusive – was

simply not available to counsel at the time of Defendant's trial.

**B. Newly Discovered Evidence**

Defendant agrees that newly discovered evidence must have existed at the time of trial. He contends the newly discovered evidence here is not Noureddine's report, but "advances in DNA mixture interpretation." According to Defendant, "the trial court's findings established that the SBI Crime Lab's failure to adopt advances in DNA mixture interpretation was evidence" that was in existence at the time of trial. (Def.'s Br. p. 42-43)

For at least five of the seven factors, however, the trial court identified Noreddine's report (DE 54) as satisfying the conditions that must be satisfied by newly discovered evidence. It is true that for two of the seven factors the trial court did not – indeed, could not – explicitly find that Noreddine's report satisfied the conditions. (R p. 174) But that does not warrant Defendant's belated attempt to change the terms of the trial court's analysis. In any event, it is not "advances in DNA mixture interpretation," but Noureddine's report – documenting his opinion that the DNA tests were inconclusive – that Defendant claims could have affected the result at trial. (Def.'s Br. p. 40)

Defendant argues the trial court correctly found that the State did not present evidence which contradicted Noureddine's opinion. (Def.'s Br. p. 44) But DeHaan testified she disagreed with Noureddine's opinion. (T p. 1484)

Defendant does not explain how this evidence was not contradictory.

As for the fourth factor, Defendant says the SBI Crime Lab recognized the invalidity of the interpretation methods used in his case when it adopted the SWGDAM guidelines. He insists that counsel could not have discovered the 2013 shift in methods before his 2011 trial. (Def.'s Br. pp. 45-46)

The record does not support Defendant's assertion that the SBI Crime Lab repudiated its prior interpretation methods. On the contrary, DeHaan testified that advances in science do not make prior tests invalid. (T p. 1493) It is true that counsel could not have "discovered" an event in 2011 that did not occur until 2013, but then evidence not in existence at the time of trial is not newly discovered evidence. As Defendant's argument demonstrates, the seven-factor test cannot be satisfied without moving the target.

Defendant opposes retesting the DNA evidence, claiming the evidence "simply needs to be correctly interpreted." (Def.'s Br. p. 46) He fails however to show that the evidence was not correctly interpreted by the State's experts. Noureddine himself conceded that the SWGDAM guidelines are not intended to be applied retroactively. (T p. 882)

## II. THE TRIAL COURT DID NOT ERR BY REJECTING DEFENDANT'S BRADY AND NAPUE CLAIMS.

Defendant argues the trial court erred by rejecting his claims that the

State suppressed evidence and presented false testimony. (Def.'s Br. p. 47)

**A. Defendant failed to show a Brady violation.**

The suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material to guilt or punishment. State v. Tirado, 358 N.C. 551, 589, 599 S.E.2d 515, 540 (2004) (quoting Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963)), cert. denied, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). To prevail under Brady, a defendant must first show the evidence was "actually suppressed." State v. Kilpatrick, 343 N.C. 466, 471, 471 S.E.2d 624, 627 (1996). The defendant must also show "the evidence was favorable, material, and would have affected the outcome of the trial." State v. Elliott, 360 N.C. 400, 415, 628 S.E.2d 735, 746, cert. denied, 549 U.S. 1000, 166 L. Ed. 2d 378 (2006).

"Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence." State v. Williams, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008). Evidence is material only if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. Tirado, 358 N.C. at 589, 599 S.E.2d at 540. Inadmissible evidence is not material. State v. Allen, 222 N.C. App. 707 n.7, 724, 731 S.E.2d 510, 522 n.7, appeal dismissed, disc. review denied, 366 N.C. 415, 737 S.E.2d 377 (2012), cert. denied, 569 U.S. 952, 185 L. Ed. 2d 876 (2013).

In State v. Berry, 356 N.C. 490, 573 S.E.2d 132 (2002), the defendant was charged with the murder of one Margaret Fetter. Id. at 494, 573 S.E.2d at 137. During pretrial discovery, the prosecutor provided a statement from Jon Malonee that he had stabbed a woman. Id. at 516, 573 S.E.2d at 149. The defendant later argued the prosecutor had failed timely to reveal that Michael Walker had told police that Malonee told him that he (Malonee) had stabbed a woman. Id. at 515, 573 S.E.2d at 148. Our Supreme Court found no Brady violation. Id. at 517, 573 S.E.2d at 150. It noted that the defendant was provided Malonee's own statement, and the defendant was thus "aware of the substance of this statement." Id. Further, Malonee's statement was not inconsistent with the defendant's participation in the murder. Id.

In his MAR, Defendant claimed the State withheld evidence in violation of Brady. He said Angel Beatty told police she saw a black male running up the hill from the direction of the Water's Edge neighborhood, wet with water or sweat, and carrying a book bag. He said Mount Holly Police Officer Scott Wright had also encountered a black male carrying something near the scene. Defendant said there was no indication in the file that police gave this information to the defense. He claimed "testimony from Ms. Beatty and Officer Wright would have impacted the jury's decision." (R pp. 117-18)

At the MAR hearing, Angel Beatty testified that she told police she had

seen a black male running up a hill from the direction of the Water's Edge, wet with water or sweat, and carrying a book bag. (T p. 746) Officer Wright testified that he saw a black male walking quickly down the road near the scene carrying a laptop case. (T p. 776) The prosecutor noted the evidence was the subject of a pretrial motion in limine, and "would not have come in." Wright's statement, she said, was provided in discovery. (T p. 782; R p. 262)

The trial court rejected the Brady claim. (R p. 172) "If there is a motion in limine," it said, "that would prevent the Defense from going down this path, proceeding that way, the Defense would have been limited." (T p. 783)

The trial court did not err by rejecting the Brady claim. Firstly, Defendant failed to show the evidence was actually suppressed. Trial counsel apparently never testified that they did not receive Angel Beatty's statement. Further, as in Berry, the prosecutor provided the substance of the statement by turning over Officer Wright's account. Secondly, Defendant failed to show the evidence is favorable. That a black male was seen carrying something near the crime scene is not inconsistent with Defendant's participation in Yarmolenko's murder. See Berry, 356 N.C. at 517, 573 S.E.2d at 150.

Most importantly, Defendant failed to show the evidence is material. As the prosecutor said, such evidence was the subject of a motion in limine. (COA11-1382 R p. 7; 03/13/11 T p. 4) The evidence was inadmissible at trial,

and therefore its omission could not have affected the verdict.

**B. Defendant failed to show a Napue violation.**

"'[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.'" State v. Williams, 341 N.C. 1, 16, 459 S.E.2d 208, 217 (1995) (quoting Napue v. Illinois, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 1221 (1959)), cert. denied, 516 U.S. 1128, 133 L. Ed. 2d 870 (1996). Under the applicable standard of materiality, the knowing use of perjured testimony requires a conviction to be set aside if there is any reasonable likelihood that the false testimony affected the verdict. State v. Sanders, 327 N.C. 319, 336, 395 S.E.2d 412, 424 (1990), cert. denied, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991).

"[T]here is [however] no prohibition against a prosecutor placing inconsistencies before a jury." State v. Edwards, 89 N.C. App. 529, 531, 366 S.E.2d 520, 522 (1988). "Minor variations in testimony are insufficient to establish that a witness is perjuring himself[.]" State v. Robbins, 319 N.C. 465, 514, 356 S.E.2d 279, 308, cert. denied, 484 U.S. 918, 98 L. Ed. 2d 226 (1987); see also State v. McDowell, 310 N.C. 61, 68, 310 S.E.2d 301, 306 (1984) (witness gave various descriptions of her assailant), cert. denied, 476 U.S. 1164, 90 L. Ed. 2d 732 (1986); State v. Boykin, 298 N.C. 687, 694, 259 S.E.2d 883, 888 (1979) (different descriptions of decedent's behavior), cert. denied, 446 U.S.

911, 64 L. Ed. 2d 264 (1980). "[I]t is for the jury to determine the weight, if any, to be given to testimony where alleged inconsistencies are before the jury." Robbins, 319 N.C. at 514, 356 S.E.2d at 308; see also State v. Rowsey, 343 N.C. 603, 617, 472 S.E.2d 903, 910 (1996) (witness' prior guilty plea and trial testimony), cert. denied, 519 U.S. 1151, 137 L. Ed. 2d 221 (1997); Sanders, 327 N.C. at 337, 395 S.E.2d at 424 (testifying witness contradicted officer's account). Further, that other uncalled witnesses may contradict trial testimony does not establish perjury. McDowell, 310 N.C. at 68, 310 S.E.2d at 306.

In his MAR, Defendant claimed the State misrepresented evidence and knowingly presented false evidence. He said the prosecutor's assertion in closing – that "[n]obody's DNA other than IRA was found on the cord" – was contradicted by lab reports.[1] (R p. 116) He claimed that Workman's trial testimony – that he was not able to compare fingerprints from Yarmolenko's car to any known samples – was contradicted by Workman's testimony at the MAR hearing. (R pp. 157-58) He claimed that Detective Addis and Terry's testimony at trial – that the fishing spot was within hearing distance of where Yarmolenko's body was found – was contradicted by John Beatty's testimony

[1] Closing arguments were not recorded. (03/2011 T p. 359) Defendant relied on a document alleged to be a draft of the State's closing argument. (R p. 651)

at the MAR hearing. (R pp. 158-59) And he claimed that Detective Terry's trial testimony – that Yarmolenko's body was wet – was "belied" by the fact that no police report contained this information. (R p. 159) The trial court rejected the claims that the State misrepresented evidence. (R p. 172) The trial court did not err by rejecting Defendant's Napue claims.

*Closing argument.* To the extent Defendant complained about the prosecutor's closing argument, he failed to show the State knowingly elicited false testimony. Indeed, the arguments of counsel are not evidence, as the trial court here instructed the jury. (03/18/2011 T p. 358) Even assuming the prosecutor made the remark attributed to him, the argument represents a reasonable inference from the evidence that, of the available DNA samples, only Yarmolenko could not be excluded as a contributor. (03/17/2011 T p. 287)

*Detective Workman's testimony.* At trial, Detective Workman testified that he lifted fingerprints from Yarmolenko's car, but none had enough ridge detail to be used for comparison purposes. (03/16/2011 T p. 225-26) He said police had no idea whose fingerprints were on the car. (03/16/2011 T p. 243) At the MAR hearing, Detective Workman testified that he was not able to make any comparisons, by which he meant no individuals were identified through comparing the fingerprints to known samples. (04/05/2019 T p. 570) He acknowledged that comparisons were made to Defendant's fingerprints, but he

maintained that no identification was made. (04/05/2019 T p. 573)

Defendant failed to show the State knowingly elicited false testimony from Detective Workman. To be sure, it appears that when Detective Workman said none of the fingerprints could be used for comparison purposes, he meant no comparison was successful in identifying a suspect. His testimony was consistent in that regard and Defendant failed to show the testimony was false. To the extent Detective Workman contradicted himself about whether any comparison could be made, Defendant failed to show the contradiction was material. See Williams, 341 N.C. at 16, 459 S.E.2d at 217.

*Hearing distance.* At trial, Detectives Addis testified that he and Detective Terry returned to the scene "in the days following the discovery" of Yarmolenko's body. When Detective Addis stood at Defendant's fishing spot and Detective Terry stood at the top of the embankment, they could hear each other talking in a normal tone of voice. (03/16/2011 T pp. 104-05, 140-41) At the MAR hearing, James Beatty testified that he met his brother and the prosecutor at the river. When John Beatty stood at Defendant's fishing spot and James Beatty stood where Yarmolenko's car was found, they could not understand one another hollering back and forth. (04/05/2019 T pp. 709-10) Yarmolenko's car was found at the bottom of the embankment at the river's edge. (03/16/2011 T pp. 95-96) James Beatty did not remember when this

meeting at the riverbank happened. (04/05/2019 T pp. 738-39)

Defendant failed to show the State presented false testimony regarding the hearing distance. That Detective Addis could hear Detective Terry speaking from *the top of the embankment* is not inconsistent with James Beatty's testimony that his brother could not understand him speaking from *the bottom of the embankment*. Further, James Beatty did not testify at trial, and any inconsistency between his statement and the officers' trial testimony does not establish perjury. See McDowell, 310 N.C. at 68, 310 S.E.2d at 306.

*That Yarmolenko's body was wet.* At trial, Detective Terry testified that Yarmolenko's body, clothes, and hair were wet. (03/16/2011 T p. 118) At the MAR hearing, Detective Terry acknowledged that this observation, which he made at the scene, was not documented in his police report. (T p. 463) Defendant failed to show the State presented false testimony Yarmolenko's body was wet. Indeed, has pointed to no evidence to the contrary.

In his brief, Defendant identifies yet another alleged Napue violation: that the State knowingly misrepresented to the jury that he was motivated to kill Yarmolenko because she took pictures of him. (Def.'s Br. p. 50) It does not appear this claim was raised and ruled upon below, and it is therefore not before this Court for review. See State v. Moore, 185 N.C. App. 257, 263, 648 S.E.2d 288, 293 (2007). In any event, as stated above, the arguments of counsel

are not evidence. Defendant fails to identify any Napue violation.

## III. THE TRIAL COURT DID NOT ERR BY REJECTING DEFENDANT'S CLAIM OF ACTUAL INNOCENCE.

Defendant argues the trial court erred by holding that it lacked legal authority to rule on his actual innocence claim. (Def.'s Br. p. 52)

Section 15A-1415(b) lists "the only grounds" which may be raised by MAR more than ten days after judgment. N.C.G.S. § 15A-1415(b) (2019). These include, among other things, that the conviction was obtained in violation of the constitution; they do not include actual innocence. Id. Indeed, "[a] claim of factual innocence . . . does not constitute a motion for appropriate relief[.]" N.C.G.S. § 15A-1411(d) (2019). "[A] trial court has no authority to grant a request for relief from a criminal conviction based upon a request made more than ten days after the entry of judgment unless the defendant's request falls within one of the eight categories specified in [Section] 15A-1415(b)." State v. Harwood, 228 N.C. App. 478, 484, 746 S.E.2d 445, 450 (2013); accord State v. Howard, 247 N.C. App. 193, 204, 783 S.E.2d 786, 794 (2016) (new trial not authorized for favorable DNA test results).

In his MAR, Defendant raised a claim of actual innocence. He alleged that he did not murder Yarmolenko, and that "[t]he entirety of the 'evidence' against him has been disproven." (R p. 47) The trial court found it did not have

the legal authority to declare a defendant actually innocent. (R p. 172)

The trial court did not err by rejecting Defendant's claim of actual innocence. Such a claim is not cognizable by MAR filed more than ten days after entry of judgment. See N.C.G.S. § 15A-1415(b). Hence, the trial court lacked authority to award relief on the basis of the claim. The trial court therefore did not err by concluding it had no authority to declare Defendant actually innocent. See Harwood, 228 N.C. App. at 484, 746 S.E.2d at 450.

Defendant argues the trial court had legal authority to declare him factually innocent under the plain language of Section 15A-1417. Noting that Section 15A-1417 permits a trial court to refer factual innocence claims to the Innocence Inquiry Commission, he claims that to interpret Section 15A-1417 as requiring referral "could lead to absurd consequences and violate a fundamental rule of statutory construction." Defendant concludes the trial court erred by rejecting his claim of actual innocence. (Def.'s Br. p. 52-54)

Defendant fails to show the trial court erred by rejecting his claim. Indeed, he fails to locate actual innocence among the "only grounds" that may be asserted by MAR filed more than ten days after judgment. It may be true that Section 15A-1417 does not require referral of such claims, but it does not follow that the trial court is authorized to award relief on the basis of a claim not recognized by Section 15A-1415(b). Defendant consequently fails to show

the trial court erred by rejecting his claim of actual innocence.

Defendant also fails to explain how the trial court's order awarding him a new trial could be upheld on the basis of his actual innocence claim. To be sure, an appellee is permitted to present alternative grounds to affirm the order or judgment from which appeal has been taken. N.C. R. App. P. 28(c). But a finding of actual innocence would seem to justify dismissal of charges, not a new trial. Cf. N.C.G.S. § 15A-1469(h) (2019). To the extent Defendant alleges error in the award of a new trial the State concurs in that assessment.

## CONCLUSION

WHEREFORE, the State respectfully requests that this Court reverse the trial court's 12 June 2019 order awarding Defendant a new trial.

Electronically submitted this the 13th day of August, 2020.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing REPLY BRIEF FOR THE STATE upon the DEFENDANT by emailing a PDF version of same, addressed to his ATTORNEY OF RECORD as follows

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Electronically submitted this the 13th day of August, 2020.

Electronically Submitted
Joseph L. Hyde
Assistant Attorney General