Appendix

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

TIFFANY LEIGH MARION

From N.C. Court of Appeals
(20-729 13-200)
From Swain
(08CRS935-40)

O R D E R

Upon consideration of the petition filed on the 7th of February 2022 by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 15th of June 2022."

Ervin, J., recused

s/ Berger, J.
For the Court

Earls, J., dissenting. In my view defendant's equal protection claim is cognizable and colorable. This is a novel and complex issue not previously addressed by this Court, and defendant is sentenced to life without parole. The allegations demonstrating racially disparate treatment raise the strong possibility that a serious miscarriage of justice has occurred in this case. Accordingly, I would allow the petition as to Issue 1.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of June 2022.

Grant E. Buckner
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Ms. Lauren E. Miller, Attorney at Law, For Marion, Tiffany Leigh - (By Email)
Ms. Mary Carla Babb, Special Deputy Attorney General, For State of North Carolina - (By Email)
Hon. Ashley Hornsby Welch, District Attorney
Hon. Misti Jones, Clerk
West Publishing - (By Email)
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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-21

No. COA20-729

Filed 4 January 2022

Swain County, No. 08 CRS 935-36; 938-40

STATE OF NORTH CAROLINA,

v.

TIFFANY LEIGH MARION, Defendant.

Appeal by Defendant from order entered 23 July 2019 by Judge Marvin P. Pope, Jr. in Swain County Superior Court. Heard in the Court of Appeals 7 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary Carla Babb, for the State.

N.C. Prisoner Legal Services, Inc., by Lauren E. Miller, for Defendant-Appellant.

WOOD, Judge.

¶ 1 Defendant Tiffany Marion ("Defendant") appeals from an order denying her motion for appropriate relief ("MAR"). On appeal, Defendant contends the trial court erred in denying her MAR wherein she alleged the State violated her right to equal protection under the law and in denying Defendant complete discovery of emails between prosecutors. After careful review of the record and applicable law, we affirm

the order of the trial court denying Defendant's MAR.

I. Factual and Procedural Background

¶ 2 This case returns to the Court for a second time. *See State v. Marion*, 233 N.C. App. 195, 756 S.E.2d 61 (2014) ("*Marion I*"). On August 4, 2008, Defendant[1] "was smoking . . . [and] taking ecstasy" with Jeffrey Miles ("Miles"), Jason Johnson ("Johnson"), Jada McCutcheon ("McCutcheon"), and a boy known as "Freak."[2] Prior to August 2008, Defendant knew McCutcheon but did not know Miles, Johnson, or Freak. After some time "riding around" in Johnson's ex-girlfriend's van ("Johnson's van"), Miles suggested the group go to a casino. Defendant had never been to a casino before, but "thought it would be fun." Thereafter, at approximately 1:00 or 2:00 a.m. on August 5, 2008, the group traveled to a casino located in Cherokee, North Carolina. Because Johnson, McCutcheon, and Freak were under 21 years of age—the mandatory age requirement for entry—only Defendant and Miles entered the casino floor to gamble. After they finished gambling, Defendant and Miles reserved a room for three nights.

¶ 3 The casino hotel room had "one big bed," that Defendant and Miles slept in while they stayed in Cherokee. During their stay, Defendant and Miles engaged in

[1] In 2008, Defendant was twenty-five years old.

[2] Defendant, Miles, Johnson, McCutcheon, and Freak were all African American individuals. McCutcheon and Johnson were in a romantic relationship at the time.

sexual intercourse and Miles represented himself as Defendant's boyfriend. McCutcheon, Johnson, and Freak reserved a room in a hotel across the street. Throughout the day on August 5, 2008, the group took ecstasy and smoked marijuana.

¶ 4 Throughout August 6 and 7, 2008, Defendant did not gamble but stayed in the room where she and the others watched television and took drugs. At one point on August 7, 2008, Miles, Johnson, and Freak went to a nearby Wal-Mart, while Defendant and McCutcheon stayed in the casino's hotel room. While at Wal-Mart, Miles, Johnson, and Freak met local residents Dean Mangold ("Mangold") and Mark Goolsby ("Goolsby"). Both Mangold and Goolsby were white males.

¶ 5 After meeting Mangold and Goolsby, Miles began talking about "wanting to sell his AR-15 he had." Mangold, Goolsby, Miles, Johnson, and Freak then went to several locations to obtain beer and to sell the firearm. However, they could not find a purchaser. After some time of attempting to sell the firearm, Miles, Johnson, Mangold, Goolsby, and Freak returned to the casino hotel room, where they took ecstasy and smoked marijuana. While in the hotel room, Miles, Johnson, Goolsby and Mangold discussed trying to sell Miles' firearm and where they could purchase additional marijuana. Defendant did not engage in the conversation regarding the sale of Miles' firearm. Later that evening, Mangold suggested to Miles they could sell a firearm to a man named Scott Wiggins ("Wiggins"). Mangold also stated that

Wiggins could provide them with more drugs. Thereafter, everyone except Freak got into Johnson's van to go to Wiggins' residence.

¶ 6 Because Miles was driving and was unfamiliar with the area, Mangold provided directions. While on their way to Wiggins' residence, Mangold explained that he used to live with Wiggins and that Wiggins owed him money. In response, Johnson stated, "We'll take care of it." Upon arriving at Wiggins' residence, Mangold told Miles to park the vehicle some distance from the driveway to avoid any cameras. The group parked the van by a nearby logging road at the bottom of a hill next to Wiggins' residence. As the group exited the van, Miles armed himself with a loaded shotgun, and Johnson armed himself with an AR-15.

¶ 7 After obtaining their firearms, Johnson asked if everyone was going to walk up to Wiggins' house. At the time, Wiggins resided with Michael Heath Compton ("Compton"). Goolsby and Defendant stayed in or near the van. Goolsby testified he remained in the van because he feared the others were going to rob Wiggins and "want[ed] no part of it." The rest of the group walked up the hill to Wiggins' house.

¶ 8 Upon arriving at Wiggins' residence

> Johnson kicked in the door of the residence and proceeded to hold Wiggins and [Compton] . . . at gunpoint while the others began gathering valuables. While the group was searching for valuables, another person, Timothy Dale Waldroup ("Waldroup"), drove up to the house and was escorted into the residence at gunpoint. Miles shot Wiggins, Compton, and Waldroup during the course of the

burglary, and only Waldroup survived.

Marion, 233 N.C. App. at 197, 756 S.E.2d at 64.

¶ 9 Mangold walked partially up the driveway but returned to the van five to ten minutes later, where he told Defendant and Goolsby that the others were killing people. In response, Goolsby stated, "I'm gone" and fled on foot into the neighboring woods. Mangold asked Defendant if she would like to join them, but she declined. Thereafter, Mangold ran into the woods with Goolsby.

¶ 10 After Mangold and Goolsby ran into the woods, Defendant walked up the hill toward Wiggins' residence. Defendant testified she did so "to see where everybody was." Once she got to the bottom of Wiggins' driveway, Defendant saw Johnson sitting in a dark colored pickup truck. Defendant asked Johnson where McCutcheon was, and he responded that McCutcheon and Miles were still in the residence. When Defendant looked past Johnson toward the house, she observed McCutcheon in the driveway, looking into another vehicle. Defendant shouted for the others to hurry up before returning to the van.

¶ 11 After the killings, Miles, McCutcheon, and Defendant returned to the casino hotel in Johnson's van. They picked up Freak before meeting Johnson, who was driving Wiggins' white pickup truck, at a nearby parking lot. Once they rendezvoused with Johnson, Freak and Miles began "talking [sic] stuff from the back to the truck and putting it in the van." While doing so, Miles stated he needed to return to

Georgia because he was getting evicted and he "need[ed] to help his wife out with that situation." Thereafter, Defendant and Miles traveled to Georgia in Wiggins' truck, while Johnson, McCutcheon, and Freak returned to Georgia in Johnson's vehicle.

¶ 12 Once in Georgia, Defendant gathered McCutcheon's things and put them in Wiggins' truck. Specifically, Defendant testified she helped Miles and McCutcheon move into their friend's apartment. Once McCutcheon returned to Georgia, she "showed [Defendant] a dog. She said, [m]y boyfriend got me this." The dog McCutcheon brought to Georgia belonged to Compton and was found in the apartment with Defendant when she was arrested.

¶ 13 Shortly after the group returned to Georgia, North Carolina State Bureau of Investigation ("SBI") agents arrived at the apartment in which McCutcheon was residing. Although Defendant did not reside in the apartment, she had been staying there since the group returned from North Carolina. Defendant told the SBI that she did not know what happened in North Carolina. After Defendant was interviewed, SBI agents interviewed McCutcheon, who confessed they had shot and killed Scott Wiggins and Michael Heath Compton.

¶ 14 On August 18, 2008, Defendant was indicted for two counts of first-degree murder, one count of attempted murder, one count of first-degree burglary, two counts of robbery with a dangerous weapon, and three counts of first-degree

kidnapping. Defendant was also indicted in the alternative as an accessory after the fact to all charges. On December 28, 2010, Miles and Johnson, the undisputed shooters, entered plea agreements with the State for first-degree murder and received sentences of life without parole. Mangold entered a plea for second-degree murder in August 2011. In February 2012, Goolsby, who was indicted on the same charges as Defendant was offered a plea agreement to second-degree murder in exchange for testifying against Defendant. However, the State withdrew the plea offer to Goolsby before Defendant's trial began. Defendant never received a plea offer.[3]

¶ 15 Defendant's trial began on February 27, 2012. A jury convicted Defendant of two counts of felony murder under a theory of acting in concert, attempted felony murder, first-degree burglary, and two counts of robbery with a dangerous weapon. After Goolsby testified in Defendant's trial, he entered a plea to accessory after the fact to second-degree murder. Defendant timely filed her notice of appeal on March 22, 2012. Thereafter, this Court vacated Defendant's conviction for attempted felony murder and remanded the case to arrest judgment on one of Defendant's felony convictions under the merger doctrine. *See Marion*, 233 N.C. App. at 201,756 S.E.2d at 67.

¶ 16 In November 2015, Defendant filed a MAR in superior court, arguing her

[3] McCutcheon committed suicide while housed in the county jail.

convictions and sentences violated her right to due process of law "because the State's decision to prosecute her for first-degree murder was unconstitutionally based on race." Defendant also filed a motion for discovery and a motion to stay the decision on the MAR pending completion of discovery. The trial court entered an order requiring the State to provide post-conviction discovery in March 2016.

¶ 17 Defendant filed additional motions in April 2017, including a motion to produce any standards, policies, practice, or criteria employed by the District Attorney's Office to guide decision making; motion to compel production and *in camera* review of emails for case-related emails exchanged by prosecutors using personal email accounts; and a motion to produce any plea offer made by the State to Defendant. Defendant filed an amendment to her MAR on April 21, 2017, adding additional arguments for ineffective assistance of trial counsel and arguments under the Eighth Amendment to the United States Constitution. On May 22, 2017, the trial court denied Defendant's motions to compel the State to produce any plea offer made by the State to Defendant and any standards, policies, practices, or criteria the District Attorney's Office employed to guide decision making; and deferred ruling on Defendant's motion to compel prosecutorial emails until the evidentiary hearing.

¶ 18 The evidentiary hearing on the MAR occurred in December 2017. At the conclusion of the hearing, Defendant renewed her motion to compel production and *in camera* review of emails. The court allowed Defendant's motion for *in camera*

review of prosecutorial emails on December 22, 2017.

¶ 19 On January 5, 2018, Defendant filed a second MAR amendment to clarify that the equal protection claim applied to all members of the District Attorney's Office responsible for the charging decisions, determination of any plea offers, and disposition of the cases.

¶ 20 On August 6, 2018, the trial court informed the parties that it had conducted the requested *in camera* review of prosecutorial emails and entered a summary chart of the emails submitted. The court denied defense counsel's request for copies of the emails. Counsel filed a motion to reconsider, but the trial court denied that motion in January 2019. The court entered its orders denying Defendant's MAR and motion for additional discovery on July 23, 2019. On appeal of the trial court's denial of her MAR, Defendant challenges the following findings of fact:

> 8. Dr. Eric Howard testified as an expert on implicit bias and techniques to reduce the effect of implicit bias on decision making. ADA Jim Moore and ADA Ashley Welch testified they were familiar with implicit bias and techniques to reduce the effect of implicit bias on decision making. ADA Moore and ADA Welch both attended district attorney conferences when this topic was discussed. In addition ADA Welch participated and presented in a conference on these issues in 2017.
>
> . . .
>
> 9. The State did not offer any plea to Defendant . . ., which was less than life without parole. The Court does not find any merit to . . . Defendant's claim of implicit bias based

> upon the decision of the District Attorney's office not to offer Defendant Marion a plea to lesser offenses(s). This Court specifically finds that implicit bias did not occur to . . . Defendant . . . in the preparation and trial of these matters.
>
> . . .
>
> 12. Defendant['s] . . . testimony at trial in a recorded telephone call with her mother from the Swain County detention facility contradicted her assertion of innocence when she testified that she had knowledge of the robbery but not of the murder(s). In addition, Defendant returned to Georgia from North Carolina in a stolen van with stolen items and a dog in the van which all came from the scene of the crimes.
>
> . . .
>
> 25. . . . Defendant . . . was prosecuted under the statutory and case law concerning felony murder. Defendant . . . has failed to establish a discriminatory effect or pattern, either racially or in selective prosecution, in the manner in which she was prosecuted for first degree murder, specifically in the manner in which her other co-defendants were prosecuted or the manner in which the unrelated defendants in murder cases from 1994 to 2013 were dealt. The failure of the State of North Carolina to offer Defendant . . . a plea arrangement is not based upon racial discrimination. . . .
>
> 26. Reasons given by the State of North Carolina for not offering Defendant . . . a plea arrangement were not pretextual but were supported by valid concerns discovered during the investigation of the facts of the entire case.

In its conclusions of law, the trial court included,

> 6. Defendant . . . failed to prove that similar[ly] situated individuals belonging to a different racial group received

> more favorable treatment by establishing that the State had no legitimate non-pretextual reason for refusing to offer Defendant . . . a plea to less than a life sentence when her similarly situated or more culpable . . . white co-defendants were allowed to enter favorable plea bargains.

On February 11, 2020, Defendant filed a petition for writ of certiorari with this Court that was allowed on April 9, 2020.

II. Discussion

¶ 21 As a preliminary matter, we note that Defendant makes two assignments of error on appeal. First, Defendant contends that the trial court erred in denying her MAR. Secondly, Defendant argues the trial court erred in denying her motion for additional post-trial discovery. However, in allowing Defendant's petition for writ of certiorari, this Court limited appellate review to "Judge Marvin P. Pope, Jr.'s 19 July 2019 order denying [D]efendant's motion for appropriate relief." Accordingly, we decline to address whether the trial court erred by denying her motion for additional discovery.

> We review a trial court's ruling on a motion for appropriate relief to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court. When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. As a general rule, any determination requiring the exercise of judgment, or the application of legal principles, is more properly

classified a conclusion of law.

State v. Jackson, 220 N.C. App. 1, 7-8, 727 S.E.2d 322, 329 (2012) (cleaned up). "We will review conclusions of law *de novo* regardless of the label applied by the trial court." *Id.* at 8, 727 S.E.2d at 329 (quoting *Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 131, 560 S.E.2d 374, 380 (2002) (citation omitted)). "If 'the issues raised by Defendant's challenge to [the trial court's] decision to deny his motion for appropriate relief are primarily legal rather than factual in nature we will essentially use a *de novo* standard of review in evaluating Defendant's challenges to [the court's] order." *Id.* (quoting *State v. Taylor*, 212 N.C. App. 238, 244, 713 S.E.2d 82, 86, *disc. review denied*, 365 N.C. 342, 717 S.E.2d 558 (2011)) (alterations in original).

¶ 22 Defendant challenges findings of fact 8, 9, 12, 25, and 26.[4] Since Defendant asserts that the prosecutors discriminated against her on the basis of race, we address the challenged findings of fact in order of the two-part test established for an equal protection violation: first, whether Defendant established a discriminatory effect or pattern in that she was treated differently than other similarly situated defendants; second, whether Defendant sufficiently established a discriminatory purpose.

A. Finding of Fact 12

[4] We do not address findings of fact 8, 9, or 26 as they relate to whether Defendant established a discriminatory purpose.

¶ 23 Defendant first challenges finding of fact 12. Finding of fact 12 states

> 12. Defendant's . . . testimony at trial in a recorded telephone call with her mother from the Swain County detention facility contradicted her assertion of innocence when she testified that she had knowledge of the robbery but not of the murder(s). In addition, Defendant returned to Georgia from North Carolina in a stolen van with stolen items and a dog in the van which all came from the scene of the crimes.

¶ 24 Defendant specifically assigns error to the trial court's finding that she "testified she had knowledge of the robbery," because she "consistently denied knowing about the robbery *before* it occurred." While it is true Defendant repeatedly denied that she had knowledge about the robbery before it occurred, she does not contend that she did not know about the robbery after it occurred. Indeed, Defendant returned to Georgia in one of the victim's vehicles driven by Miles, one of the undisputed shooters. Defendant knew the vehicle was stolen from one of the murder victims and knew that the others brought stolen property back to Georgia. Additionally, Defendant was arrested in an apartment in which the stolen items, including Compton's dog, were found. While in jail, Defendant made a phone call to her mother during which she stated she knew her co-defendants possessed stolen property after the robbery occurred. Finding of fact 12 does not state that Defendant had prior knowledge, merely that the phone call contradicted her trial testimony that she lacked knowledge regarding the events as they occurred on August 7, 2008.

Although finding of fact 12 states that Defendant returned to Georgia in a "stolen van," rather than in Wiggins' stolen truck, we decline to hold that such a typographical error is prejudicial to Defendant.

B. Similarly Situated Requirement

¶ 25 Defendant's primary argument on appeal concerns whether she was deprived of equal protection of the law by the prosecutors declining to offer her a plea deal. Finding of fact 25 states that Defendant failed to sufficiently establish a discriminatory effect or pattern to support this claim.

¶ 26 Notably,

> [d]istrict attorneys have wide discretion in performing the duties of their office. This encompasses the discretion to decide who will or will not be prosecuted. In making such decisions, district attorneys must weigh many factors such as "the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the State, and his own sense of justice in the particular case."

State v. Spicer, 299 N.C. 309, 311, 261 S.E.2d 893, 895 (1980) (citations omitted). "Of course, the district attorney may not, during the exercise of his discretion, transcend the boundaries of the Fourteenth Amendment's guarantee of equal protection." *Id.* at 312, 261 S.E.2d at 895. "The test for determining the limits of constitutionally permissible selective prosecution was first expressly articulated by the United States Supreme Court in *Olyer v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962)."

State v. Rogers, 68 N.C. App. 358, 366, 315 S.E.2d 492, 500 (1984).[5] Following *Olyer* and *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886), "a two-part test for discriminatory prosecution" has been developed:

> To prevail on a selective prosecution challenge, a defendant must first make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not. . . . If a defendant meets this first showing, he must then demonstrate that the government's discriminatory selection of him for prosecution has been invidious or in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Rogers, 68 N.C. App. at 367, 315 S.E.2d at 500 (citations omitted). Stated differently, a defendant may succeed on a selective prosecution challenge by showing both a discriminatory effect and a discriminatory purpose. *See Wayte v. U.S.*, 470 U.S. 598, 608, 105 S. Ct. 1524, 1531, 84 L. Ed. 2d 547, 556 (1985); *see also U.S. v. Armstrong*, 517 US. 456, 465, 116 S. Ct. 1480, 1487, 134 L. Ed. 2d 687, 699 (1996); *State v. Howard*, 78 N.C. App. 262, 266-67, 337 S.E.2d 598, 601-02 (1985); *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995) (citation omitted). "When a defendant

[5] "It is well established that there may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there is a showing that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification." *State v. Gibson*, 175 N.C. App. 223, 225, 622 S.E.2d 729, 731 (2005) (citation omitted).

alleges that he has been selectively prosecuted, the defendant must establish discrimination by a clear preponderance of proof." *State v. Pope*, 213 N.C. App. 413, 415-16, 713 S.E.2d 537, 540 (2011) (citation and internal quotation marks omitted).[6]

¶ 27 Finding of fact 25 provides that Defendant failed to establish a discriminatory effect or pattern that would support her equal protection claim. "To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *Armstrong*, 517 U.S. at 465, 116 S. Ct. at 1487, 134 L. Ed. 2d at 699. In determining whether individuals are similarly situated, "a court must examine all relevant factors." *U.S. v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996) (citations omitted). "[D]efendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." *Id.* at 744. After careful review, we hold the trial court did not err in finding Defendant was not similarly situated to her white co-defendants: Mangold and Goolsby.

1. Mangold

¶ 28 Defendant contends she sufficiently established discriminatory effect in that Mangold received a plea offer where she did not. We disagree.

[6] Although selective prosecution typically refers to instances in which one defendant is indicted and prosecuted for unlawful conduct where other similarly situated individuals are not prosecuted for the same conduct, we find the reasoning contained in our selective prosecution precedent persuasive and adopt it herein.

¶ 29 Defendant argues that "Mangold was more culpable than [Defendant.]" Mangold knew Wiggins personally, previously lived with him, and directed the group to Wiggins' residence that night. Mangold went to the residence armed with a firearm and lied to law enforcement when questioned about the firearm. Mangold went with Miles and Johnson earlier in the evening to try to sell a firearm, and told Miles and Johnson that the victims had drugs, money, and "all this stuff and [how Wiggins] owed [Mangold] money." However, the evidence presented at trial tended to show that, when the others began shooting the victims, Mangold ran from the house in surprise. Thereafter, Mangold told Defendant and Goolsby what had occurred and left the scene of the crime. Put plainly, Mangold disengaged; warned his friend; and fled the scene of the crime. No evidence presented at trial suggested Mangold profited from the robbery.

¶ 30 In support of her contention that she was less culpable than Mangold, Defendant testified she was never armed. She remained in the hotel room, where she and McCutcheon took ecstasy and smoked marijuana, while the others went to sell the firearm. Defendant had not previously met Wiggins, Compton, or Waldroup and did not advertise that they had drugs or owed anyone money. Unlike Mangold—who fled from the scene, warned Defendant and Goolsby "they are killing people in there," and invited Defendant to leave with him—Defendant remained by the van, smoked a cigarette, and walked up the hill toward the residence where she observed Johnson

sitting in a dark colored truck acting as a lookout and McCutcheon peering into one of the victims' vehicles. She shouted for McCutcheon and the others to "come on"; actively encouraging Miles, Johnson, and McCutcheon to hurry so that they could leave the Wiggins' residence together. Thereafter, Defendant returned to Georgia in one of the victim's stolen vehicles laden with property taken from the victim's home, thereby profiting from the crime. A careful review of the facts shows sufficient competent evidence presented at trial support the trial court's determination that the two were not similarly situated.

2. Goolsby

¶ 31 Defendant further contends that she was similarly situated to Goolsby, who received a plea offer. However, a careful review of the evidence reveals that the trial court did not err in finding Defendant was not similarly situated to Goolsby.

¶ 32 Goolsby went with Mangold, Miles, and Johnson earlier in the evening to try to sell the firearm. Goolsby sat in the van and did not go to Wiggins' residence after he deduced that the others were about to rob the victims, stating he "didn't want no part of it." When Goolsby learned that Miles and Johnson had shot Wiggins and Compton, Goolsby immediately fled the scene into the woods. After fleeing the scene of the crime, Goolsby remained in the woods, fearing that the others would come and "shoot him." When Goolsby heard the others calling into the woods that he and Mangold could "come out" from their hiding spot, he remained covered by leaves.

Although Goolsby initially mislead police in that he told law enforcement officers that they threw Mangold's firearm into a nearby pasture, Goolsby also demonstrated a willingness to help prosecutors by testifying in Defendant's trial. No evidence presented at trial suggested Goolsby profited from the robbery.

¶ 33 Defendant, however, waited for her associates at the scene of the crime. Defendant walked partially up Wiggins' driveway to encourage her associates to hurry and profited from the crime in that she traveled home to Georgia in one of the victim's vehicles that contained stolen items. Fingerprints lifted from Wiggins' truck matched those of Defendant corroborating the testimony that she was in the vehicle. Once they returned to Georgia, Defendant helped her co-defendants move and stayed in the apartment that contained the victim's stolen property. Defendant was found with Compton's dog at the time of her arrest. Defendant stated to law enforcement that she knew nothing about the crime and did not testify against any of her co-defendants. Moreover, Defendant stated to law enforcement that she did not know about the plan to rob Wiggins and Compton beforehand, but she admitted during a phone call made to her mother while in jail that "she knew about the robbery which was being discussed in the van on the way to" Wiggins' residence. Other evidence presented at trial suggested Defendant had knowledge of the robbery beforehand, including statements from McCutcheon that "everybody was talking about hitting a lick," or robbing someone because the group was out of money and "didn't know how

[they] were gonna [sic] get home." Defendant rode to the residence in the front seat of the vehicle and observed the others arm themselves prior to walking up the hill to Wiggins' residence. Thus, the evidence supports the trial court's conclusion that Defendant was not similarly situated to Goolsby.

3. Discriminatory Pattern

¶ 34 Defendant further contends she established a discriminatory pattern in North Carolina's Thirtieth Judicial District through statistical evidence regarding the disposition of first-degree murder cases between 1994 until 2013. However, "[s]tanding alone, these statistics simply show that the district attorney has in fact exercised . . . discretion." *Spicer*, 299 N.C. at 312, 261 S.E.2d at 896. Moreover, none of the prosecutors involved in Defendant's trial were represented by the statistics presented—these statistics did not pertain to the prosecutors' individual track records or prior cases.

¶ 35 Accordingly, we hold finding of fact 25 is supported by competent evidence. Defendant failed to show she was similarly situated to Mangold and Goolsby. Because we hold Defendant failed to meet her burden of proof that she was similarly situated to Mangold and Goolsby, we need not address whether the prosecutors in this case acted with a discriminatory purpose. Accordingly, we do not address whether the trial court's findings of fact 8, 9, and 26, which are related to a discriminatory purpose or intent, are supported by competent evidence.

III. Conclusion

¶ 36 After careful review of the record and applicable law, we hold Defendant failed to meet her burden in establishing she was similarly situated to her white co-defendants, Mangold or Goolsby. The record before us does not contain evidence to suggest Mangold and Goolsby profited from the crime, whereas competent evidence showed Defendant returned to Georgia in a stolen vehicle driven by one of the shooters, laden with stolen property, including a victim's dog, and was arrested in an apartment containing such property. Accordingly, we affirm the order of the trial court denying Defendant's MAR. It is so ordered.

AFFIRMED.

Judges DIETZ and INMAN concur.

Report per Rule 30(e).

STATE OF NORTH CAROLINA

COUNTY OF SWAIN

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE #s: 08 CRS 935-36, 938-40

STATE OF NORTH CAROLINA,

VS.

TIFFANY LEIGH MARION,
Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR APPROPRIATE RELIEF

THIS CAUSE coming on to be heard and being heard before the undersigned Judge Presiding on Motion for Appropriate Relief of Defendant Tiffany Leigh Marion, filed November 16, 2015 and amended on April 21, 2017. Multiple hearings being held before this Court including an evidentiary hearing that took place December 4-7, 2017. The Defendant moved to amend the Motion for Appropriate Relief to conform to the evidence adduced at the evidentiary hearing. The State was initially represented by Assistant District Attorney Eric Bellas and at subsequent hearings by Assistant District Attorney T. Jason Arnold. The Defendant was represented by Attorneys Lauren E. Miller and Mary S. Pollard. Based upon the testimony presented in the evidentiary hearing, a review of the record, including the court file and portions of the prior trial transcript in this matter, exhibits submitted by the parties, the opportunity of this Court to observe the demeanor and credibility of the witnesses, briefs, case law and written arguments submitted to the Court, the Court makes the following:

FINDINGS OF FACT:

1. Tiffany Leigh Marion was charged and indicted arising out of the August 8, 2008 murders of Scott Wiggins and Heath Compton in Swain County, North Carolina. The Defendant was charged along with five co-defendants: Jeffrey Miles, Jason Johnson and Jada McCutcheon who were black; and Dean Mangold and Mark Goolsby, who were white.

2. Defendant Marion was convicted of two counts of first-degree murder pursuant to the theory of felony-murder, attempted felony murder, first degree burglary and two counts of robbery with a dangerous weapon. The jury acquitted the Defendant of three counts of first degree kidnapping. Upon appeal, the North Carolina Court of Appeals vacated the Defendants conviction for attempted first degree felony murder and ordered the trial court to arrest judgment on at least one

of Ms. Marion's felony convictions which was corrected by the undersigned. The Defendant's convictions of first degree murder were affirmed. See *State v. Marion,* 233 N.C.App. 195, 756 S.E.2d 61, review denied 367 N.C. 520, 762 W.E.2d 444 (2014).

3. Jada McCutcheon committed suicide while awaiting trial. On December 28, 2010 Miles and Johnson entered pleas to first-degree murder and received sentences of life without parole to avoid possible capital punishment. On August 15, 2011, Mangold entered a plea to second-degree murder and other charges with specific sentences of 151 to 191 months, 61 to 83 months and 61 to 83 months. Goolsby was charged with first degree murder with possible life without parole. Goolsby testified at the Defendant Marion's trial and after the Marion trial, entered a plea pursuant to a plea agreement and received a total minimum sentence of seven years which was run concurrently with a five year sentence from the State of New Jersey.

4. Defense attorneys Jack Stewart and Caleb Decker tendered a proffer of testimony of the Defendant Marion concerning her knowledge (or lack thereof) of the events of the robbery and murders. Assistant District Attorneys Jim Moore and Ashley Welch felt that the Defendant Marion knew more than her proffered testimony indicated and no plea offer was given to Defendant Marion less than life without parole.

5. This Court will not recite evidence received at the trial of this matter having been heard by the trial jury and objections ruled upon by the North Carolina Court of Appeals.

6. The primary contentions and arguments of Defendant Marion in the Motion for Appropriate Relief originally filed and subsequently amended in this Cause together with other motions for relief are based upon the following:

   a. The conviction and sentences of the Defendant Marion violate her right to due process of law and equal protection under U.S. Constitution Amendments V, VIII and XIV and N.C. Constitution Article 1, Sections 19 & 23 because the State's decision to prosecute her for first degree murder was based on racial, political, geographical or other arbitrary and capricious factors.
   b. Defendant Marion's convictions and sentences violate her Eighth Amendment right to be free from cruel and unusual punishment and N.C. Constitution Article 1, Sections 19 & 23.
   c. Ineffective Assistance of Counsel due to trial counsels' errors in that Defendant Marion was denied her right to due process of law under U.S. Const. Amendments V, VI and XIV and the North Carolina Constitution Article 1, Sections 19 & 23.

7. The evidence presented at the hearing of this Motion for Appropriate Relief consisted of the testimony from three expert witnesses: Dr. Maureen Reardon, Dr.

Wilkie Wilson and Dr. Eric Howard. Six fact witnesses testified including Jack Stewart, Caleb Decker, Matthew Margiotta, Michael Bonfoey, James Moore and Ashley Welch.

8. Dr. Eric Howard testified as an expert on implicit bias and techniques to reduce the effect of implicit bias on decision making. ADA Jim Moore and ADA Ashley Welch testified they were familiar with implicit bias and techniques to reduce the effect of implicit bias on decision making. ADA Moore and ADA Welch both had attended district attorney conferences when this topic was discussed. In addition ADA Welch participated and presented in a conference on these issues in 2017.

9. The State did not offer any plea to Defendant Marion, which was less than life without parole. The Court does not find any merit to the Defendant's claim of implicit bias based upon the decision of the District Attorney's office not to offer Defendant Marion a plea to lesser offense(s). This Court specifically finds that implicit bias did not occur to the Defendant Marion in the preparation and trial of these matters.

10. Plea negotiations are within the discretion of the Office of the District Attorney. No statutory or case law has been presented to this Court requiring the District Attorney to offer a plea arrangement to every Defendant charged and/or indicted for a criminal offense.

11. As stated above, defense counsel was not offered a plea for Defendant Marion and proceeded to prepare for trial based on the assertion of innocence of Defendant Marion in that she did not participate in the robbery and murders and had no knowledge of the plan to commit robbery and/or murder.

12. Defendant Marion's testimony at trial in a recorded telephone call with her mother from the Swain County detention facility contradicted her assertion of innocence when she testified that she had knowledge of the robbery but not of the murder(s). In addition, Defendant returned to Georgia from North Carolina in a stolen van with stolen items and a dog in the van which all came from the scene of the crimes.

13. Matthew Margiotta testified and presented data summaries to the Court based on information from the Administrative Office of the Courts and other public record information on the prosecution of first degree murder cases in District 30 from 1994 to 2013. The Court specifically finds that the District Attorney at the time of this trial was Michael Bonfoey who has subsequently retired. No evidence was received that Michael Bonfoey was the District Attorney for the entire period of 1994 to 2013 thereby indicating a pattern of racial or sex discrimination or implicit bias for these 19 years.

14. The District Attorney Bonfoey and assistant district attorneys are not required by case or statutory law to research previous murder convictions in District 30 in

their determination as to whether or not to extend a plea arrangement to a criminal defendant in a pending case.

15. Michael Bonfoey trusted and granted to his assistant district attorneys the power to analyze each case on the facts, its merits, the culpability of each defendant, the law and other factors in determining whether to offer a defendant a plea to pending charges. Bonfoey was not involved with the decision as to whether or not to offer a plea arrangement to Defendant Marion.

16. Assistant District Attorney Jim Moore was the lead counsel for the State in the trial of Defendant Marion. ADA Moore and ADA Welch indicated that there was no written policies in place in the Bonfoey District Attorney Office governing case selection, charging criteria or pleas at the time of the trial of Defendant Marion's case. Plea arrangement decisions were made by the assistant district attorneys based on the facts and law.

17. As stated above, the trial of this case occurred in March 2012. District Attorney Bonfoey retired in 2014 thus requiring an election for this seat in 2014. ADA Jim Moore had indicated an interest in running for the Office of District Attorney. ADA Ashley Welch made a decision to run for District Attorney well after the trial of the Defendant Marion's case and was elected, taking office in January 2015. The fact that the two assistant district attorneys prosecuting the Defendant Marion's case subsequently campaigned against each other has no bearing on the outcome of Defendant Marion's case or convictions.

18. Jack Stewart was appointed to represent Defendant Marion when this case was designated as a capital case by the District Attorney. Mr. Stewart appropriately investigated the facts of the case, conferred with his client on multiple occasions and verily believed a plea offer would be made to Defendant Marion but when a plea was not forthcoming, he diligently prepared the case for trial. Jack Stewart has an excellent reputation across Western North Carolina as a well-respected criminal defense attorney handling many cases each year and having tried over 70 to 80 capital cases during his career as a trial attorney.

19. Attorney Caleb Decker ably assisted Jack Stewart in the research, preparation for trial and trial of this case.

20. Dr. Maureen Reardon testified as an expert forensic psychologist who evaluated Defendant Marion for the hearing on Defendant Marion's Motion for Appropriate Relief. Dr. Reardon found Defendant Marion's IQ to be 78 with deficits in her verbal abilities. Jack Stewart did not request or conduct a forensic psychological evaluation for Defendant Marion prior to the trial of this action. Mr. Stewart testified and the Court finds that Mr. Stewart and Caleb Decker met with their client on multiple occasions and the Defendant did not present to either attorney any indication that she lacked the ability to process or make accurate conclusions from information presented to Defendant Marion verbally. The Court specifically

finds that Mr. Stewart made his decision not to request a psychological evaluation based on his specific knowledge of Defendant Marion's case, his personal observations of Defendant Marion in conferences prior to the trial of this action and his legal expertise in handling capital and non-capital murder cases.

21. This Court observed Defendant Marion during the trial of this action, her trial testimony and during the evidentiary hearing(s) for this Motion for Appropriate Relief and did not note any obvious apparent deficits in the verbal abilities of the Defendant Marion.

22. This Court is unaware of any requirement for defense counsel to obtain a mental health evaluation for a criminal defendant.

23. Dr. Wilke Wilson testified as an expert neuro-pharmacologist on the effects of ecstasy and marijuana on the brain. Dr. Wilson opined that the drug use of Defendant Marion could have impaired her ability to critically think about her circumstances and to defend herself.

24. Attorney Jack Stewart stated that in his professional opinion the testimony of an expert witness in the field of neuro-pharmacologist perhaps would have been useful if he had asserted the "defense" of voluntary intoxication. Mr. Stewart based his decision on not asserting this defense due to the fact it would require Defendant Marion to admit to her participation in the criminal offenses with the other defendants which was contradictory to her defense of innocence to all knowledge of the criminal offenses which were committed, particularly the murders.

25. The Defendant Marion was prosecuted under the statutory and case law concerning felony murder. Defendant Marion has failed to establish a discriminatory effect or pattern, either racially or in selective prosecution, in the manner in which she was prosecuted for first degree murder, specifically in the manner in which her other co-defendants were prosecuted or the manner in which unrelated defendants in murder cases from 1994 to 2013 were dealt. The failure of the State of North Carolina to offer Defendant Marion a plea arrangement is not based upon racial discrimination, the history of murders prosecuted in District 30, the individual facts of other cases, abuse of discretion or any discriminatory intent.

26. Reasons given by the State of North Carolina for not offering Defendant Marion a plea arrangement were not pretextual but were supported by valid concerns discovered during the investigation of the facts of the entire case.

27. Defendant Marion was twenty-five years of age at the time of her offenses. Defendant Marion has failed to produce evidence of cruel and unusual punishment being imposed upon Defendant Marion pursuant to the jury's convictions of Defendant Marion under the theory of felony-murder. Defendant

was sentenced under the Structured Sentencing Act which was upheld by the North Carolina Court of Appeals.

28. Defendant Marion has failed to show ineffective assistance of counsel by Jack Stewart or Caleb Decker. The lack of psychological testing or assertion of the defense of voluntary intoxication was based upon the application of past strategic experience of Jack Stewart in the handling of multiple capital and non-capital murder cases and complete analysis of the facts and circumstances of Defendant Marion's case. The conduct of Jack Stewart and/or Caleb Decker was not egregious and prejudicial and does not rise to the level of ineffective assistance of counsel.

BASED UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING:

CONCLUSIONS OF LAW:

1. This matter is properly before the Court and the Court has jurisdiction of the subject matter of this action.
2. Defendant Marion has failed to meet her burden of proving the necessary facts by a preponderance of the evidence pursuant to N.C.G.S. 15A-1420(c)(5).
3. The District Attorney's office was not legally compelled to offer Defendant Marion a plea arrangement or plea bargain in this case.
4. Defendant Marion has failed to prove that the State's refusal to offer her a plea to less than a life sentence without parole had a discriminatory effect on her.
5. Defendant Marion failed to prove that the State's refuse to offer her a plea to less than a life sentence was motivated by a discriminatory purpose.
6. Defendant Marion failed to prove that similar situated individuals belonging to a different racial group received more favorable treatment by establishing that the State had no legitimate non-pretextual reason for refusing to offer Defendant Marion a plea to less than a life sentence when her similarly situated or more culpable white co-defendants were allowed to enter favorable plea bargains.
7. Defendant Marion has failed to show that the State's refusal to allow Defendant Marion to enter into a plea arrangement or plea bargain was a violation of Defendant Marion's rights to due process and to equal protection under the law pursuant to Articles V, VIII and XIV of the U.S. Constitution and N.C. Constitution Art. I, Sections 19 & 23.
8. Defendant Marion has failed to show that her sentences of life without parole violates her right to be free from cruel or unusual punishment guaranteed by the 8th Amendment to the U.S. Constitution and by Articles I and 27 of the N.C. Constitution.
9. Trial counsel's decisions to NOT pursue a defense and instruction on voluntary intoxication for Defendant Marion did NOT fall below an objective standard of professional reasonableness. There is NO reasonable probability that but for these decisions, the result of the trial proceeding would have been

different. Defendant is not entitled to relief pursuant to N.C.G.S 15A-1415(b)(3) and 15A-1417.

10. Trial counsel's decisions to NOT have Defendant Marion psychologically evaluated prior to trial did NOT fall below an objective standard of professional reasonableness. There is NO reasonable probability that but for these decisions, the result of the trial proceeding would have been different. Defendant is not entitled to relief pursuant to N.C.G.S 15A-1415(b)(3) and 15A-1417.
11. Defendant Marion's convictions of first degree felony murder and sentences of life without parole should remain in full force and effect.

BASED UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS **HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:**

1. Defendant Marion's original Motion for Appropriate Relief and subsequent amendment are **DENIED**.
2. Defendant Marion's convictions and sentences imposed for first degree murder are continued in full force and effect.
3. Defendant's Motion for a new trial is **DENIED**.

DATE: July 18, 2019

Marvin P. Pope, Jr.
Superior Court Judge

Cc: Ashley Welch, District Attorney
T. Jason Arnold, Assistant District Attorney
Lauren E. Miller, Attorney for Defendant
Mary S. Pollard, Attorney for Defendant

This Order was prepared and typed by Marvin P. Pope, Jr.

A TRUE COPY
SWAIN COUNTY
CLERK SUPERIOR COURT
BY _____ ASSISTANT