

NO. COA97-697

NORTH CAROLINA COURT OF APPEALS

Filed: 2 June 1998

STATE OF NORTH CAROLINA

v.

JOHN FRANCES HAYES

Appeal by defendant from judgment dated 26 November 1996 by Judge Chase B. Saunders in Mecklenburg Superior Court. Heard in the Court of Appeals 17 March 1998.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Rudolf & Maher, P.A., by David S. Rudolf and Thomas K. Maher, for defendant appellant.

GREENE, Judge.

John Frances Hayes (defendant) appeals a sentence of life imprisonment based upon a jury verdict finding him guilty of second-degree murder of his wife, Fran Hayes (Mrs. Hayes). This conviction came after the defendant's capital trial for first-degree murder.

The evidence presented tends to show the following: On 11 July 1994, the defendant, approximately sixty years old, occupied a home with his wife, Mrs. Hayes. That afternoon, in the garage of their home, the defendant informed Mrs. Hayes that he planned to seek a divorce from Mrs. Hayes. She flew into a rage and threw a hammer at the defendant which struck him on the leg. Mrs. Hayes then picked up a baseball bat, threatening to kill the defendant, and started swinging it at the defendant. The defendant wrestled

the bat away from her, as she kicked him, and the defendant struck Mrs. Hayes, with the baseball bat, in her head, neck, torso, and legs, causing her death.

Prior to the trial, the State gave notice of its intent to offer hearsay evidence pursuant to the hearsay exceptions set forth in the North Carolina Rules of Evidence. The defendant filed a motion *in limine* to exclude the introduction of this evidence which the trial court denied after conducting a pre-trial hearing. The State offered, at trial, the hearsay evidence (which was the subject of the motion *in limine*) without objection from the defendant. After the State had completed the presentation of its evidence and during the defendant's offer of evidence, the defendant's attorney addressed the trial court: "With regard to [the hearsay evidence which had been previously admitted] I want to make sure I'm preserving those, and I didn't intend in any way to waive any objections I previously had. I didn't want to keep objecting after the Court had already ruled [at the pre-trial hearing on the motion *in limine*]." The trial court responded that it believed it had included in its order denying the motion *in limine* "a line noting your objection to everything" The defendant's attorney responded: "That's fine." The record does not reflect any objection by the defendant at the time the motion *in limine* was denied.

At trial, the defendant sought to introduce evidence through the testimony of Annie Lindsey (Ms. Lindsey) that he had told Mrs. Hayes that "[h]e loved her." Ms. Lindsey's testimony indicates

that this statement was made while she worked for the defendant and Mrs. Hayes from October of 1984 until January 1986, approximately eight years before the death of Mrs. Hayes. The State objected to this statement and the trial court sustained the objection. The trial court did allow other evidence which showed that the defendant was concerned about Mrs. Hayes' health, provided for her needs, and never threatened or hit Mrs. Hayes even when she attempted to provoke him.

The trial court held several in-chambers conferences during the course of the pre-trial hearings and the trial. While the record does not affirmatively show that the defendant was not in those in-chambers conferences, the State does not argue or object to the defendant's contention that he was not present. The first instance of an unrecorded in-chambers conference between the trial court and counsel occurred at a pre-trial hearing on 24 October 1996. The transcript shows the following:

The Court: Do you have any other witnesses
 to call at this time or are
 they scheduled for 2:00?

Prosecutor: Not until 2:00.

The Court: All right. Gentlemen, I'll see
 you briefly in chambers.

(Whereupon, a brief recess was observed.)

The Court: Let the record reflect that Mr.
 Diehl^[1] has come to court and
 is waiting on a jury, and that

¹ William K. Diehl (Mr. Diehl) had, prior to Mrs. Hayes death, advised and counseled with her about her domestic problems. He had been requested by at least one of the parties to appear in this criminal proceeding and turn over his files.

there was a motion pursuant to the suggested guidelines by the state bar that the Court consider the issue of confidentiality, that the Court is in a position to order that the file be turned over in the interest of the administration of justice and the discretion of the Court. . . . [T]he Court would at this point direct that [Mr. Diehl] turn over copies of the file, . . . to counsel for the State and counsel for the defense.

. . . .

I will order that the file be turned over and that Mr. Diehl is authorized to discuss the contents of the file and his attorney-client relationship with counsel for the State and defendant.

The defendant later presented into evidence Mr. Diehl's files concerning Mrs. Hayes and called him as a witness in the trial.

The following indicates the dialogue after the second in-chambers conference cited by the defendant which occurred at the beginning of the trial.

The Court: Counsel, just a couple of matters on the record. At this time we're in the absence of the jury, Madame Reporter.

. . . .

The Court met briefly in chambers with counsel. Counsel for the defendant requested full recordation; granted. Request for sequestration for witnesses for both sides, excluding the coordinators

. . . .

The third occurrence cited by the defendant is as follows:

The Court: Do you have a list you can represent as being the -- well, at this point bring the photographs into chambers; we will go through them briefly. Anything we do in chambers will be reported on the record. I'll make no decision in chambers, but we will at least look at the photographs and see whether or not there is -- preliminarily where we are and put all of that on the record. Bring them on up here. [Defense counsel] step on up here and look at the photographs.

(Whereupon [counsel for State and defendant] confer)

(Pause in Proceedings)

(Whereupon [counsel for State and defendant] confer in jury room)

The Court: Madam reporter, we're going to recess until tomorrow at nine o'clock. If you will be here at nine o'clock we will probably voir dire on some photographs. Nine o'clock for us and the jury at nine thirty. Sheriff, come with me; we will get that order in.

(Court stands in overnight recess)

The fourth in-chambers conference cited by the defendant is the following:

The Court: We will take a fifteen minute recess. Let me see counsel in chambers.

(Court stands in recess)

(Court reconvenes)

(Defendant in courtroom)

The Court: Let the record reflect, Madame Reporter, in the absence of the jury the Court met with counsel in chambers and this is the procedural outline of what we discussed. Counsel may supplement, of course. Understanding that, we discussed the status of the case procedurally, and that at this time Mr. Guerrette is going to complete identification of the records for purposes of use by the expert witness, that any of the complaint, treatment, or chronology analyses are materials that may be used by the parties but not introduced as of this point. That tomorrow the Court will hear from counsel for the State and the defense regarding the methodology of presenting voluminous medical records and address of any 403 issues of relevancy, cumulative, prejudice, confusion, or misleading of the jury that may arise from some of the records and discuss that issue after the District Attorney has had an occasion to review the large number of records. Investigator Guerrette is going to be asked to identify some abstracts of records of the parties' financial transactions within the past--within several months proceeding the incident. Likewise the medical records for purposes of use by the expert will be identified. This afternoon there will [sic] a voir dire of Dr. Gullick, the psychologist, for purposes of understanding the underlying basis of the expert opinion she will offer. Her testimony will come tomorrow at 9:30 A.M.

Tomorrow we will address those issues of the medical records, as I indicated previously. Potentially the evidence may conclude on Wednesday. This particular declaration, of course, is non binding, and potentially there may be arguments and instructions on Thursday. That is the substance of what we discussed in chambers. [Prosecutor] is that accurate? Do you wish to supplement or make any statements?

[Prosecutor]: No, sir.

The Court: Mr. Rudolph?

[Defense Counsel]: No, sir, Your Honor.

The fifth in-chambers conference appears in the record as follows:

The Court: In the absence of the jury let the record reflect the Court met with counsel in order to determine whether or not issues that arose yesterday concerning the presentation of some of the medical evidence were resolved.

Finally, the substance of the sixth in-chambers conference contested by the defendant was summarized by the trial court on the record, as follows:

The Court: Let the record reflect that the Court met briefly with counsel and that the Court on the record will state the substance of that conversation. We met briefly in order to see if there were any other matters outstanding that we needed to address this afternoon before we proceeded tomorrow. It appears that there is nothing that we need to do before tomorrow.

After the presentation of the evidence, the trial court gave instructions to the jury. The trial court agreed to instruct on self-defense but refused to give the following instructions, as requested by the defendant:

When a person is attacked in their own home, he is under no duty to retreat and may stand his ground, even when the attack itself is not murderous. Rather, a person attacked in their own home is justified in fighting in self-defense, regardless of the character of the assault, and is entitled to stand his ground, repel force with force, and to increase his force, so as not only to resist, but also overcome the assault and secure himself from all harm. A person, however, may not use excessive force to repel an attack in their home.

In instructing on self-defense, the trial court informed the jury as follows:

The defendant would be excused of first and second degree murder on the grounds of self-defense, . . . if first, it appeared to the defendant and he believed it to be necessary to kill the victim in order to save himself from death or great bodily harm.

And second, the circumstances as they appear to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

It is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time.

In making this determination you should consider the circumstances as you find them to have existed from the evidence, including the size, age, and strength of the defendant as compared to the victim; the fierceness of the assault, if any, upon the defendant; and whether or not the victim had a weapon in her possession.

The defendant would not be guilty of any murder or manslaughter if he acted in self-defense, as I have defined it to be, and if he was not the aggressor in bringing on the fight, and did not use excessive force under the circumstances.

. . . .

A defendant uses excessive force if he uses more force than reasonably appeared to him to be necessary at the time of the killing.

It is for you, the jury, to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to him at the time.

. . . .

Therefore in order for you to find the defendant guilty of murder in the first or second degree the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense, or failing in this that the defendant was the aggressor with intent to kill or inflict serious bodily harm upon the deceased.

If the State fails to prove either that the defendant did not act in self-defense or was the aggressor with intent to kill or inflict serious bodily harm you may not convict the defendant of either first or second degree murder, but you may convict the defendant of voluntary manslaughter if the State proves that the defendant was simply the aggressor without murderous intent in bringing on the fight in which the deceased was killed or that the defendant used excessive force.

In the sentencing phase of the trial, the trial court found as an aggravating factor that the "offense was especially heinous, atrocious or cruel." Although the trial court found several mitigating factors, it did not find that the defendant suffered from a physical condition that reduced his culpability or that he

acted under duress or coercion which significantly reduced his culpability.

The issues are whether: (I) the defendant's motion *in limine* properly preserved his objections to the testimony of Ila Martin, John Munn, Jean Coffey, Mary Losee, Jennifer Smathers, and Pete Chambers when he did not object at trial at the time the evidence was offered; (II) the exclusion of the evidence that the defendant loved Mrs. Hayes was prejudicial error; (III) the defendant's right to be present at every stage in his trial was violated by his absence from several in-chambers conferences; (IV) the trial court's instructions on self-defense were in error; and (V) the trial court erred in not finding as mitigating factors that (A) the defendant suffered from a physical condition which reduced his culpability and (B) the defendant acted under duress or coercion which significantly reduced his culpability.

I

Motion *in Limine*

The use of motions *in limine* is well established in North Carolina. *T & T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). A trial court's ruling on a motion *in limine* is a preliminary ruling and "is subject to change during the course of trial, depending upon the actual evidence offered at trial and thus an objection to an order granting or denying the motion 'is insufficient to preserve for appeal the

question of the admissibility of evidence.'" *Id.* (quoting *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995)). A party must object to the evidence "at the time it is offered at the trial . . ." in order to preserve the evidentiary issue for appeal. *Id.*

In this case, we have reviewed the transcript and do not find that the defendant made any objections when the hearsay evidence in question was presented at trial. The defendant has thus waived any objection he has to the alleged hearsay evidence which was the object of the motion *in limine*. Furthermore, the defendant's attempt to preserve his objection after the fact is not helpful. Finally, even if the defendant had objected to the entry of the denial of his motion *in limine*, that objection is not sufficient to preserve the issue for appeal.

II

Evidence Question

The defendant contends that the trial court erred by not allowing evidence that he loved Mrs. Hayes because this evidence falls within Rule 803(3), the then-existing emotion or state of mind exception to the hearsay rule.

Assuming the correctness of the defendant's argument, the defendant has failed to demonstrate that a reasonable possibility exists that a different verdict would have been reached had the excluded evidence been admitted. N.C.G.S. § 15A-1443(a) (1997). The statement was made approximately eight years before the defendant killed Mrs. Hayes and did not shed any light on his

feelings for her at the time of her death. Moreover, the trial court allowed other evidence which showed that the defendant provided for all of Mrs. Hayes' needs, was concerned about her health, did not threaten her even if she provoked him, and treated her well. Accordingly, the defendant is not entitled to a new trial on this issue.

III

In-Chambers Conferences

Our State Constitution provides that "[i]n all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony" N.C. Const. art. I, § 23. While the confrontation clause of the United States Constitution has been interpreted to mean that criminal defendants have the right to be present at "*all critical stages of the trial*," *Rushen v. Spain*, 464 U.S. 114, 117, 78 L. Ed. 2d 267, 272 (1983) (emphasis added), our State confrontation clause has been interpreted broadly and guarantees the rights of the "accused to be present at every stage of his trial," *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (1989), *sentence vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990), including pre-trial hearings on motions *in limine*, see *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985), and any in-chambers conferences related to either the trial or the motion *in limine*; *State v. Exum*, 343 N.C. 291, 294, 470 S.E.2d 333, 335 (1996), provided "anything is done or said affecting [the defendant] as to the charge against him . . . in any material

respect," *State v. Brogden*, 329 N.C. 534, 541, 407 S.E.2d 158, 163 (1991) (quoting *State v. Kelly*, 97 N.C. 404, 405, 2 S.E. 185, 185-86 (1887)). The defendant's right to be present at his capital trial, motions *in limine* related to that trial, or in-chambers conferences related to those proceedings, "cannot be waived" and the trial court has an affirmative duty to "insure the defendant's presence" at these proceedings. See *Huff*, 325 N.C. at 31, 381 S.E.2d at 652. The defendant's right to be present at non-capital trials and related proceedings can be waived. *Braswell*, 312 N.C. at 559, 324 S.E.2d at 246.

The defendant's absence from some part of a capital trial to which he is entitled to be present, however, "does not require automatic reversal." *Brogden*, 329 N.C. at 541, 407 S.E.2d at 163. A new trial is not required if the State can show that the error is harmless beyond a reasonable doubt. *Id.*; N.C.G.S. § 15A-1443(b) (State has burden because error is of constitutional dimensions). Even though an in-chambers conference is not recorded, if the "nature and content of the private discussion" can be gleaned from the record, for example by a subsequent recordation by the trial court of the substance of the in-chambers conference, the reviewing court may review that record and determine if the defendant was prejudiced by his absence. *Exum*, 343 N.C. at 295-96, 470 S.E.2d at 335.

After the first in-chambers conference the trial court indicated for the record that the issue discussed in-chambers related to the confidentiality of Mr. Diehl's records and his

availability as a witness. This discussion did not relate to the charges against the defendant and his absence was harmless error. In any event, the trial court ordered these records be shared with both the State and the defendant in this case and the defendant called Mr. Diehl as a witness and examined him about these documents.

With respect to the second in-chambers conference, the record reveals that the trial court, in-chambers, allowed the defendant's request to record the trial in its entirety and discussed with the attorneys the possible sequestration of certain witnesses. These discussions do not relate in any material aspect to the charges pending against the defendant and his absence from the conference was harmless error. See *Brogden*, 329 N.C. at 541, 407 S.E.2d at 162-63 (in-chambers charge conference conducted outside the presence of defendant does not constitute prejudicial error).

The third in-chambers conference contested by the defendant does not appear to even involve an actual in-chambers conference. The record reveals only that the trial court invited the defendant's attorney to the bench to look at certain photographs. After this occurred, the attorneys, without the presence of the judge, conferred in another room. Thus the record reveals no in-chambers conference, as such a conference necessarily involves the trial judge. To the extent there was a bench conference conducted without the presence of the defendant, the defendant has not shown that his presence would have been useful. *State v. Buchanan*, 330 N.C. 202, 223-24, 410 S.E.2d 832, 845 (1991) (defendant has burden

to show that his presence at bench conference would have been useful; otherwise, no error to have conference without defendant's presence). It thus follows that the bench conference conducted without the defendant was not error.

At the fourth in-chambers conference the attorneys and the judge discussed the identification and presentation of certain medical records. Again these are not matters affecting in any material aspect the charges against the defendant and therefore his absence from the conference was harmless error. The fifth in-chambers conference, as indicated from the statements made by the trial court after that conference, reveal a discussion of the same issues discussed at the fourth in-chambers conference. Thus the defendant's absence was harmless error.

The sixth in-chambers conference, as revealed from the comments placed in the record by the trial court, show a discussion to determine if "there were any other matters . . . that . . . needed" to be addressed before continuing with the trial on the next day. The trial court noted "there is nothing that we need to do." Again, for the reasons previously given, the error committed by not inviting the defendant to the conference was harmless.

IV

Self-Defense Instruction

A trial court is required to comprehensively instruct the jury on a defense to the charged crime when the evidence viewed in the light most favorable to the defendant reveals substantial evidence of each element of the defense. See *State v. Roten*, 115 N.C. App.

118, 122, 443 S.E.2d 794, 796 (1994); *State v. Brown*, 117 N.C. App. 239, 241, 450 S.E.2d 538, 540 (1994), *disc. review denied*, 340 N.C. 115, 456 S.E.2d 320 (1995).

The law of perfect self-defense completely excuses a killing if four elements are satisfied:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and (3) defendant was not the aggressor in bringing on the affray, . . . ; and (4) defendant did not use excessive force

State v. Wilson, 304 N.C. 689, 694-95, 285 S.E.2d 804, 807 (1982) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)). If the first two elements of the defense are satisfied and elements (3) or (4) are not shown, the defendant is not completely excused from the killing and "is guilty at least of voluntary manslaughter." *Id.* at 695, 804 S.E.2d at 808. This latter situation is known as imperfect self-defense. *Id.*

The defense of self-defense is not, however, limited to those situations where the defendant kills another person after being threatened with death or great bodily harm. Self-defense also applies to excuse a defendant's assault of another, "even though he is not . . . put in actual or apparent danger of death or great bodily harm." *State v. Anderson*, 230 N.C. 54, 56, 51 S.E.2d 895, 897 (1949). "If one is without fault in provoking, or engaging in, or continuing a difficulty with another, he is privileged by the

law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other" *Id.* When confronted with an assault that does not threaten the person assaulted with death or great bodily harm, however, the person assaulted "may not stand his ground and kill his adversary, if there is any way of escape open to him, although he is permitted to repel force by force and give blow for blow." *State v. Pearson*, 288 N.C. 34, 39, 215 S.E.2d 598, 602-03 (1975); *Anderson*, 230 N.C. at 56, 51 S.E.2d at 897. There is no duty to retreat when (1) the person assaulted is confronted with an assault that threatens death or great bodily harm or (2) the person assaulted is not confronted with an assault that threatens death or great bodily harm and the assault occurs in the dwelling, place of business, or premises of the person assaulted, provided the person assaulted is free from fault in bringing on the difficulty. *Pearson*, 288 N.C. at 39-40, 215 S.E.2d 603.

In this case the defendant argues that because Mrs. Hayes attacked him in his own home the jury was entitled to know that in evaluating his belief that he needed to kill her to protect himself, he had no duty to retreat. It is true that a jury is entitled to have this information, but only when there is substantial evidence that the defendant, asserting self-defense, has a reasonable belief that the killing is necessary to protect himself from death, great bodily harm, or some less serious bodily harm. In this case there simply is not substantial evidence to

create a reasonable belief in the mind of a person of ordinary firmness that killing Mrs. Hayes was necessary to save the defendant from death, great bodily harm, or some less serious bodily injury. This is assuming that the defendant had the right to stand his ground and had no duty to retreat. The defendant, approximately sixty years old, was assaulted by Mrs. Hayes in the garage of their home. She threw a hammer at him, striking him on the leg. She kicked him and attempted to hit him with a baseball bat. The defendant wrestled the bat from her and only after obtaining sole possession of the bat did he proceed to strike her multiple times about her body with the bat causing her death. There is no evidence in this record that shows that Mrs. Hayes presented any threat to the defendant after he acquired the bat from her. Although the initial assaults by Mrs. Hayes justified defensive action by the defendant, after the bat was obtained by the defendant, there is no evidence from which a reasonable jury could conclude that killing Mrs. Hayes was necessary in order to protect the defendant. See *Wilson*, 304 N.C. at 695, 285 S.E.2d at 807. Therefore, the defendant was not entitled to any instruction on self-defense and any error in the instruction given is therefore harmless.

V

Sentencing

"Under the Fair Sentencing Act, a trial court must find a statutory mitigating factor if that factor is supported by uncontradicted, substantial, and manifestly credible evidence."

State v. Brewington, 343 N.C. 448, 456, 471 S.E.2d 398, 403 (1996). "In order to show that the trial court erred in failing to find a mitigating factor, the defendant has the burden of showing that no other reasonable inferences can be drawn from the evidence," *id.* at 456-57, 471 S.E.2d at 403, and establishing the mitigating factor by a preponderance of the evidence, *State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983). Evidence that a physical condition exists is not enough to establish a mitigating factor and the defendant must establish a link between his condition and his culpability. *State v. Salters*, 65 N.C. App. 31, 36, 308 S.E.2d 512, 516 (1983), *disc. review denied*, 310 N.C. 479, 312 S.E.2d 889 (1984). A mitigating factor such as duress implies some type of external pressure which is "directly exerted upon the defendant in an attempt to force commission of the offense." *State v. Holden*, 321 N.C. 689, 695, 365 S.E.2d 626, 629 (1988). Internal psychological forces can be caused by external factors such as emotional and physical abuse; however, to find duress, the external factors must force the defendant to commit the crime. *Id.*

A

In this case, the defendant claims that his recent cancer surgery reduced his culpability for the murder. Although the defendant contends that the "recent surgery made him more vulnerable to a physical attack," he does not establish a link between his illness and his culpability by demonstrating how or why

the illness reduced his culpability for killing his wife. As a result, this argument is unpersuasive.

B

The defendant also contends that the trial court should have found as a mitigating factor that the defendant acted under duress in killing Mrs. Hayes. We disagree. The defendant did present evidence of Mrs. Hayes' infidelity, her attempt to remove a large sum of money from the defendant's bank account, and her attempt to attack him in the garage. This evidence, however, does not establish that the defendant was under duress and forced to do some act that he otherwise would not have committed. See *Black's Law Dictionary* 504 (6th ed. 1990) (duress is defined as "unlawful threat or coercion used by a person to induce another to act . . . in a manner he or she otherwise would not"). There was no unlawful threat or coercion placed upon the defendant forcing him to kill his wife. This argument is therefore unpersuasive.

No Error.

Judges WALKER and TIMMONS-GOODSON concur.