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NO. COA05-128

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 04 CRS 59923

DAMON JAMAR OWENS

Appeal by defendant from judgment entered 25 August 2004 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 12 October 2005.

Attorney General Roy Cooper, by Special Deputy Attorney General James P. Longest, Jr., for the State.

White and Crumpler, by David B. Freedman and Jones P. Byrd, Jr., for defendant-appellant.

JOHN, Judge.

Damon Jamar Owens ("defendant") appeals the trial court's judgment entered upon his conviction by a jury of the offenses of second degree murder and possession of firearm by convicted felon. For the reasons discussed herein, we hold defendant received a trial free of prejudicial error.

Pertinent procedural and factual background information, the latter based upon the State's uncontested evidence at trial, includes the following: In the early morning of 7 September 2003, Antonio Devon Samuels ("Samuels") and several friends including Kevin McRae, Gilbert McRae, Victor Hines ("Hines"), Cory Barr

("Barr"), Carlos Moser, Gerard Samuels, Teron Jenkins ("Turfy") and a man named "Dennis" exited the Club Formula nightclub ("the Club") in Winston-Salem as the Club was closing for the night. Turfy jumped into the bed of defendant's white truck, described in the record as a "dually" pickup. Turfy began swinging his shirt and it struck the side of the truck. Defendant leaped into the bed of the truck and threw Turfy off, the latter's face striking the asphalt parking lot as he fell. Defendant then pulled a gun and used it to hit Turfy on the side of his face.

Kevin McCrae and Barr took Turfy to a white jeep in the Club parking lot. Barr and Samuels then approached defendant and words were exchanged regarding the incident. As Turfy and his friends congregated around the jeep, defendant and approximately twelve to thirteen individuals, including the Club owner and bouncers, gathered at the front of the Club. The two groups engaged in a "staring contest." Turfy's friends requested a fair fight and some brief physical confrontations ensued before defendant again drew his gun and chased Gilbert McCrae into the parking lot of a neighboring automobile dealership.

Turfy and his friends departed in the jeep and had reached the middle of Patterson Avenue when Hines insisted upon retrieving his truck from the Club parking lot. Hines requested a gun and one was furnished by a member of the group. Hines said, "I'm going to get my truck, I'm going to get my truck. I'll shoot him." As Hines and Samuels walked towards Hines' truck, defendant and six to eight men walked around various vehicles towards the pair. Hines said to

the men, "I gotta get my truck, I gotta get my truck." Defendant's group responded with profanity and name calling. Hines fired a single shot into the air in an attempt to frighten the advancing individuals into leaving. When they failed to do so, Hines turned around, placed the gun in his back pocket, and started running down the street. Samuels also ran in the same direction. Samuels thereupon was shot in the head and fatally wounded, a bullet entering his head on the left side behind the ear and traveling through the scalp, the left temporal bone of the skull and into his brain. Two witnesses identified defendant as the shooter.

On 22 March 2003, defendant was indicted on a charge of first degree murder, followed by a 2 August 2004 indictment for possession of firearm by convicted felon. The charges were joined for trial before a jury at the 23 August 2004 term of Forsyth County Criminal Superior Court. Defendant presented no evidence at trial, although he stipulated to the status of being a convicted felon. In addition to the firearm charge, the trial court submitted the offenses of first and second degree murder to the jury. Following verdicts of guilty of second degree murder and possession of firearm by convicted felon, the trial court sentenced defendant to an active term of imprisonment of 200 months to 249 months. Defendant appeals.

Initially, we note defendant's brief contains arguments supporting only four of the original eleven assignments of error. Pursuant to N.C.R. App. P. 28(b)(6) (2005), the omitted assignments

are deemed abandoned. Our review is limited to those assignments of error properly preserved by defendant for appeal.

The issues on appeal are whether the trial court erred by: (I) failing to instruct the jury on the offense of voluntary manslaughter, (II) joining for trial the charges of first degree murder and possession of a firearm by felon, (III) making certain statements in the presence of the jury, and (IV) failing to grant defendant's motion to dismiss.

We first consider defendant's assignment of error challenging the trial court's jury instructions. Specifically, defendant contends the trial court erred by failing to submit the lesser included offense of voluntary manslaughter to the jury. We hold to the contrary.

"[A] defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it." *State v. Johnson*, 317 N.C. 193, 205, 344 S.E.2d 775, 782 (1986). "Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (quotation and citation omitted).

"Voluntary manslaughter is the killing of another human being without malice and without premeditation and deliberation under the influence of some passion or heat of blood produced by adequate provocation." *State v. Watson*, 338 N.C. 168, 176, 449 S.E.2d 694, 699 (1994), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569,

overruled on other grounds, *State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724 (1995). "A person who kills another is guilty of manslaughter and not murder if the killing was committed under the influence of passion or in a state of heated blood brought on by adequate provocation." *State v. McConnaughey*, 66 N.C. App. 92, 95, 311 S.E.2d 26, 29 (1984). If there is any evidence of heat of passion or sudden provocation by the victim, the trial court must submit the possible verdict of voluntary manslaughter. *State v. Tidwell*, 323 N.C. 668, 673, 374 S.E.2d 577, 580 (1989). A victim's "words and gestures alone, where no assault is made or threatened, regardless of how insulting or inflammatory those words or gestures may be, do not constitute adequate provocation for the taking of human life." *State v. Watson*, 287 N.C. 147, 153, 214 S.E.2d 85, 89 (1975).

Defendant asserts the presence herein of evidence of an assault or threatened assault and maintains such evidence constitutes sufficient legal provocation to reduce murder to voluntary manslaughter. Applying the principles noted above, we conclude defendant's argument misses the mark.

Defendant relies exclusively upon the actions of Hines in support of his first argument. However, in all the authorities cited by defendant and in the cases noted above, the alleged provocation, assault or threat came from the homicide victim, not from another person. In the case *sub judice*, nothing in the record indicates defendant was present or able to hear Hines state, "I'll shoot him." Further, the firing of a single shot into the air by

Hines appeared to have had no effect upon defendant and his associates because they did not leave as Hines intended. Finally, defendant took no action until Hines and Samuels turned and ran away for a distance of approximately sixty yards, according to Hines, whereupon defendant began firing his pistol.

In short, there is simply no evidence herein that defendant was in any way assaulted, provoked or otherwise threatened by Samuels, the victim of the homicide. Further, no evidence was presented that defendant acted in the heat of passion or that he feared for his safety. To the contrary, all the evidence, defendant having offered none, was to the effect that he shot the unarmed Samuels through the back of his head while Samuels was fleeing the scene.

Under the evidence adduced at trial, defendant was not entitled to have the lesser included offense of voluntary manslaughter submitted to the jury and the trial court did not err by denying defendant's request for such an instruction. We therefore reject defendant's first argument.

Defendant next claims the trial court erred by joining for trial the charges of murder and possession of a firearm by felon. We disagree.

Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

N.C. Gen. Stat. § 15A-926(a) (2003).

Under the statute, a two-step analysis is required to determine whether joinder is proper. *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250, *cert. denied*, 353 N.C. 275, 546 S.E.2d 386 (2000). First, the trial court must examine whether the offenses have a transactional connection, and its conclusion as to "[w]hether such a connection exists is a question of law, fully reviewable on appeal." *Id.* Reversible error occurs only where "the charges are so separate in time and place and so distinct in circumstances as to render the consolidation unjust and prejudicial to defendant." *State v. Beckham*, 145 N.C. App. 119, 126, 550 S.E.2d 231, 237 (2001) (quotation and citation omitted).

Upon determining the presence of a transactional connection, the court must consider whether joinder "hinders or deprives the accused of his ability to present his defense." *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). "This second part is addressed to the sound discretion of the trial judge and is not reviewable on appeal absent a manifest abuse of that discretion." *Montford*, 137 N.C. App. at 498, 529 S.E.2d at 250. "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985), *rev'd on other grounds*, 323 N.C. 306, 372 S.E.2d 704 (1988).

In the instant case, the same firearm was at issue with regards to both the murder and the possession of a firearm by felon charges. The State did not seek to prove any other instances

of possession of a firearm by defendant. Without doubt, the charges arose from the same transaction and we so hold as a matter of law. See *Montford*, 137 N.C. App. at 495, 529 S.E.2d at 250.

Nonetheless, defendant argues consolidation of the charges constituted an abuse of discretion by the trial court by undermining defendant's right not to testify at trial, "unduly prejudicing the defendant in the eyes of the jury." However, defendant freely entered into the stipulation that he had a prior felony conviction and reiterated the stipulation upon questioning by the trial court. Under the facts of this case, the transactional connection aspect of the statutory test having been satisfied, we perceive no undue prejudice to defendant in joinder of the charges of murder and possession of a firearm by a convicted felon for trial. Accordingly, the trial court did not abuse its discretion in this regard. See *id.*

Defendant next argues the trial court erred by threatening to excuse a witness prior to cross examination. Officer M.S. York ("Officer York") of the Winston-Salem Police Department testified at trial concerning his observations when he arrived at the crime scene at approximately 3:30 a.m. on 7 September 2003. Officer York brought his written police report with him to the witness stand. Following direct examination, defense counsel was granted permission to retrieve the report from the witness.

In his appellate brief, defendant asserts the trial court thereupon "refused to allow defense counsel time to review the report, threatening to excuse the witness if counsel did not begin

asking him questions immediately." Defendant maintains "[t]he judge's threats to excuse the witness and reprimands of defense counsel tainted the atmosphere of the trial to the detriment of defendant." We conclude the trial court committed no prejudicial error.

"The judge's duty of impartiality extends to defense counsel. He should refrain from remarks which tend to belittle or humiliate counsel since a jury hearing such remarks may tend to disbelieve evidence adduced in defendant's behalf." *State v. Coleman*, 65 N.C. App. 23, 29, 308 S.E.2d 742, 746 (1983), cert. denied, 311 N.C. 404, 319 S.E.2d 275 (1984). "Whether the accused was deprived of a fair trial by the challenged remarks [of the court] must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant." *State v. Faircloth*, 297 N.C. 388, 392, 255 S.E.2d 366, 369 (1979). Moreover, "this Court has recognized that 'not every improper remark made by the trial judge requires a new trial. When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error.'" *Brinkley*, 159 N.C. App. at 447-48, 583 S.E.2d at 337 (quoting *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361 (1990)).

In the instant case, the following colloquy occurred:

MR. BYRD [defense counsel]: Your Honor, may I review his report?

THE COURT: You may.

MR. BYRD: May I approach?

THE COURT: You may.

MR. SAUNDERS [Assistant District Attorney]:
You have seen it before, haven't you, Mr.
Byrd?

MR. BYRD: Yes.

MR. SAUNDERS: Numerous times? About eight or
nine times?

MR. BYRD: I didn't keep count.

MR. FREEDMAN [defense counsel]: We didn't get
a copy of that so if we can just review it.

MR. SAUNDERS: Let me ask if this will refresh
your recollection.

THE COURT: All right, let's calm down the
banter. Any questions?

MR. FREEDMAN: We just need to finish
reviewing it, Your Honor.

THE COURT: You've already admitted you've
seen it before.

MR. FREEDMAN: Well, Your Honor, we don't have
a copy and we need to review it before we can
properly cross examine.

THE COURT: This witness has testified and you
can ask questions or I'm going to excuse
[him].

MR. FREEDMAN: We are entitled to get copies
of a witness [report] after they testify and
if we could just have a second to do that.

THE COURT: The report is not that long.

MR. FREEDMAN: It is, Your Honor.

THE COURT: All right, the witness may be
excused.

MR. FREEDMAN: Your Honor, we would note an
exception to that to have the opportunity to
cross examine the witness.

THE COURT: All right, start asking questions, Mr. Freedman or Mr. Byrd.

Defendant has failed to meet his burden of showing prejudice in the foregoing. See *Faircloth*, 297 N.C. at 392, 255 S.E.2d at 369. No comments "belittling or humiliat[ing] counsel" were made nor did the court's statement suggest any opinion regarding defendant's case. *Coleman*, 65 N.C. App. at 29, 308 S.E.2d at 746; see *Brinkley*, 159 N.C. App. at 447, 583 S.E.2d at 337. Significantly, moreover, the record contains no indication defendant moved for a mistrial or preserved this argument for error in some other manner. See N.C.R. App. 10(b) ("[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds"). Assuming *arguendo* this assignment of error is properly before us, therefore, it is unpersuasive.

Lastly, defendant claims the trial court erred by failing to grant defendant's motion to dismiss at the close of the State's evidence. We cannot agree.

In ruling upon a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, which is entitled to every reasonable inference to be drawn therefrom. *State v. Hyatt*, 355 N.C. 642, 666, 566 S.E.2d 61, 77 (2002), cert. denied, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). If there is "substantial evidence" of each element of the charged offense and of defendant being the perpetrator of the offense, the motion should be denied. *State v. Bell*, 359 N.C. 1, 23, 603 S.E.2d 93, 109 (2004). "Substantial evidence is that amount of evidence which

a reasonable mind might accept as adequate to support a conclusion." *State v. Rich*, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citing *State v. Cox*, 303 N.C. 75, 277 S.E.2d 376 (1981)).

"In order to convict a defendant of second-degree murder . . . the State must produce evidence that the defendant committed an 'unlawful killing of a human being with malice, but without premeditation or deliberation.'" *State v. Qualls*, 130 N.C. App. 1, 9, 502 S.E.2d 31, 37 (1998) (quoting *State v. Mapp*, 45 N.C. App. 574, 579, 264 S.E.2d 348, 353 (1980)). "[M]alice may be inferred from the intentional use of a deadly weapon." *State v. Camacho*, 337 N.C. 224, 233, 446 S.E.2d 8, 12 (1994). Malice may be negated where there is adequate provocation under the law. *State v. Huggins*, 338 N.C. 494, 497, 450 S.E.2d 479, 481 (1994). "Legal provocation must be under circumstances amounting to an assault or threatened assault." *State v. Montague*, 298 N.C. 752, 757, 259 S.E.2d 899, 903 (1979).

Defendant's argument directed at this assignment of error is nearly identical to that made in asserting that the lesser included offense of voluntary manslaughter should have been submitted to the jury. Defendant insists the element of malice required for second degree murder was negated herein by legal provocation. We reiterate our earlier observation that the record discloses no evidence the homicide victim Samuels assaulted or threatened to assault defendant, nor is there any indication defendant heard or perceived any threat from Hines. Suffice it to state, without

voluminous citations to the record, that the State presented substantial evidence of each essential element of the crime of second degree murder. It was not error to deny defendant's motion to dismiss.

In sum, the trial court committed no prejudicial error in defendant's trial.

No error.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).