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NO. COA04-1654

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

STATE OF NORTH CAROLINA

v.

Mecklenburg County
No. 01 CRS 50680

BECKY SEHORN HILLIER

Appeal by defendant from judgement entered 22 January 2004 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 September 2005.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General John F. Maddrey, for the State.

Public Defender Isabel Scott Day by Assistant Public Defender Julie Ramseur Lewis, for defendant-appellant.

JACKSON, Judge.

Defendant was found guilty, at a jury trial, of second-degree murder on 22 January 2004. Defendant was sentenced to term of imprisonment for a minimum of 157 and a maximum of 198 months. Defendant timely appeals.

At trial the State's evidence tended to show that defendant and the deceased, Michael Walker ("Walker") began dating and living together in 1999. For approximately the first year they were together, defendant and Walker resided in defendant's apartment in Cabarrus County. In June or July of 2000 Walker's father purchased a trailer home for Walker and he and defendant moved into the

trailer together. Defendant and Walker continued to reside at the trailer until Walker's death.

On 21 July 2001, defendant and Walker drove to a cookout with Chris Beeler, his wife Robin and his father Jerry Beeler, Sr. ("Beeler, Sr."), arriving at about noon. The cookout was held at Jerry Beeler, Jr.'s home. Both defendant and Walker drank beer at the cookout and Walker may have smoked marijuana and taken a Valium. Defendant and Walker left the cookout at about midnight with the same people with whom they had arrived. The drive to their trailer was approximately thirty minutes.

Robin Beeler testified that during the ride home defendant was crying because Beeler, Sr. had been picking on her and was angry because Walker had not come to her defense. Defendant testified that nothing had happened at the cookout to upset her and she was not aware of any animosity between her and Walker on the ride home.

At approximately 1:30 a.m. on 22 July, police were dispatched to defendant's and Walker's trailer in response to a report of a person shot in the head. Upon arrival, the officers were motioned into the trailer by Beeler, Sr. When the officers entered the trailer they observed defendant leaning over Walker, who was lying on his back just inside the door between the couch and coffee table. Defendant was crying hysterically and appeared to be attempting to perform CPR on Walker. When defendant saw the officers, she said, "Please help him. I'm sorry." When asked by the officers what had happened, defendant stated that Walker had shot himself in the head. A small handgun was located next to

Walker's feet. Medical personnel arrived and began treating Walker. After the emergency personnel began treating Walker, but before he was taken to the hospital, his hands were placed in manilla envelopes in an effort to preserve any available evidence. Walker later died at the hospital.

When officers questioned defendant further, she stated that, after arriving home, Walker began accusing her of wanting to sleep with the other men at the cookout. An argument ensued and she decided to leave. Defendant stated that she went to the bedroom to retrieve her gun for protection, as she was going to be walking alone in the dark. After retrieving her gun from under the mattress, Walker began to struggle with her over the gun, eventually taking it away from her. Defendant stated that Walker then followed her into the living room, said "Let's see if this thing is loaded," pulled the slide of the pistol back, released it, put the gun to his head, and pulled the trigger. Defendant told police that after Walker shot himself, she moved him in an effort to find a cell phone she thought was in his pocket so she could call 911, but she was unable to locate the phone. Defendant then went to Beeler, Sr.'s house to call for help. She returned to the trailer with Beeler, Sr. and attempted CPR using instructions relayed from Beeler, Sr. who was on the phone with 911. On 2 August 2001, defendant voluntarily gave a taped statement regarding the incident to investigators. This statement was substantially similar to the account that she provided at the time of the incident.

Gun Shot Residue ("GSR") tests were performed on both defendant's and Walker's hands. The test on Walker's hands gave no indication that he had fired a gun. The State Bureau of Investigation ("SBI") agent who conducted the tests noted, however, that the negative GSR test results did not eliminate the possibility that Walker had fired a gun. The results of the GSR test from defendant's left palm revealed the presence of one of three elements indicating that a person has fired a gun. The SBI agent went on to testify that the residue found could have originated from the firing of a gun, the handling of a gun, or from another source that produces similar particles.

On 10 October 2001, defendant voluntarily went to the police station after being requested to do so. Defendant was confronted with the evidence of the GSR tests and was asked if she had given a truthful account of the incident. Defendant asserted that she had. Officers told her that they did not believe she was being truthful, that the evidence did not support her version of the events, and that she needed to be completely truthful. Defendant then gave a taped statement in which she told the investigators that Walker had never put the gun to his head and said "Let's see if this thing is loaded." Defendant stated that the shooting was an accident and that the gun went off in her hand while she and Walker were struggling for control of it. Based upon this statement, officers obtained a warrant for defendant's arrest on a charge of murder on 15 November 2001.

At trial, the State presented John Walker, Walker's father, as a witness. John Walker testified that he purchased the trailer for his son because, approximately fourteen or fifteen months before Walker's death, Walker showed him defendant's handgun and stated that defendant had pulled it on him. Walker told his father that he needed the trailer because he wanted to move out and needed a place to go. The trial court allowed John Walker's testimony regarding Walker's statements, over defendant's objection, after extensive *voir dire*. In ruling on the admissibility of the testimony the trial court held that the remoteness in time between the statements by Walker and the incident did not prevent the testimony from being relevant to Walker's state of mind and emotions; the evidence fell within the scope of Rule 404(b) of the North Carolina Rules of Evidence as it related to proof of accident or lack thereof; and the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice.

After an extended offer of proof regarding the proposed testimony of Robin Beeler, the trial court entered a similar order concluding that her testimony also was admissible for the same reasons as John Walker's. Robin Beeler testified that sometime during 2000, Walker had "four big, deep, red scratches" down his face and neck that he told her were caused by defendant. Robin Beeler further testified that Walker had related an incident to her in which defendant "pulled a gun on him" scaring Walker to the point that he felt he had to move out. Robin Beeler also testified that she had been present when Walker had a discussion with her

husband telling her husband that he hid the gun and bullets in different places because he was afraid defendant would pull the gun on him again or there would be an accident. Immediately following the testimony regarding defendant's having allegedly pulled a gun on Walker, the trial court issued a limiting instruction, on defendant's motion, to the jury regarding that testimony.

On cross-examination by the State, Beeler, Sr. testified that he had heard defendant talk a few times about killing the S.O.B. - referring to Walker. On re-direct examination, defendant asked Beeler, Sr. whether, when he had made a statement to the police regarding defendant's comments about killing the S.O.B., he had told the officer that defendant's comments were made in a joking manner and that he had not taken the comments seriously. Beeler, Sr. answered that he vaguely remembered telling the officer that.

At the close of the State's evidence and again at the close of all evidence, defendant made motions to dismiss for insufficient evidence. After hearing arguments of counsel, the trial court denied defendant's motions on both occasions.

The trial court instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter. At the charge conference, defendant objected to instructing the jury on second-degree murder. Defendant's objection was overruled.

Defendant was convicted of second-degree murder and sentenced to a minimum of 157 months and a maximum of 198 months confinement. From this verdict and sentence defendant appeals.

On appeal, defendant makes twenty-eight assignments of error. However, defendant only argues, and provides authority for, those assignments of error pertaining to: (1) the admission of testimony regarding statements allegedly made by Walker; (2) the admission of testimony regarding prior bad acts allegedly committed by defendant; (3) ineffective assistance of counsel by defendant's trial attorney in failing to object or preserve objections to allegedly improper evidence; (4) the submission of a jury instruction on second-degree murder over defendant's objection; (5) denial of defendant's motion to dismiss for insufficient evidence; and (6) ineffective assistance of counsel by defendant's trial attorney in calling a rebuttal witness without the court's assurance that questioning of that witness would be limited to matters concerning the testimony he was called to rebut. Therefore, defendant's remaining assignments of error are deemed abandoned. N.C. R. App. P. 28(b)(6) (2005).

Defendant first argues that the trial court erred in allowing three witnesses to testify about statements allegedly made by Walker regarding threatening conduct by defendant, Walker's having hidden the gun and bullets in separate locations, and physical injuries to Walker allegedly caused by defendant. Defendant contends that this testimony was prohibited because it was evidence of prior bad acts by defendant offered to show that she acted in conformity therewith and also was hearsay which did not fall within a recognized exception.

Defendant first takes exception to the admission of John Walker's testimony regarding his son's statements to him to the effect that defendant had pulled a gun on him and that, consequently, he needed his father to purchase him a trailer so he had somewhere to go. Prior to allowing this testimony to be presented to the jury, the trial court conducted an extensive *voir dire* of John Walker and heard his proposed testimony. After the *voir dire* and arguments of counsel, the trial court entered an order overruling defendant's objection to John Walker's testimony, concluding, as a matter of law, that the testimony in question was admissible to show Walker's state of mind and to show an absence of accident. The trial court also concluded that the probative value of the questioned testimony was not substantially outweighed by the danger of unfair prejudice.

After John Walker's testimony was admitted, the State called Robin Beeler to testify. Defendant requested a *voir dire* of Robin Beeler. After hearing arguments of counsel, the trial court entered an order denying defendant's request for *voir dire* of Robin Beeler as unnecessary as she had made a written statement to police regarding the incident making defendant aware of the substance of her testimony. The trial court also found the testimony to be relevant and admissible for the same reasons that the court had admitted John Walker's testimony.

Robin Beeler's testimony regarded statements allegedly made by Walker concerning: (1) defendant's pulling a gun on him; (2) his wanting to get a place of his own to get away from defendant

because he was scared; (3) defendant's causing scratches on his face and neck; and (4) his hiding defendant's gun and bullets in different places because he was afraid defendant would pull it on him. After Robin Beeler's testimony regarding Walker's statement that he hid the gun and bullets in different locations, the trial court issued a limiting instruction to the jury at defendant's request. The trial court instructed the jury that the testimony was being admitted for the limited purposes of showing accident or lack thereof, to show Walker's state of mind prior to his death, the nature of Walker and defendant's relationship, and the impact of defendant's behavior on Walker's state of mind.

Defendant also takes exception to the testimony of Beeler, Sr. regarding Walker's alleged statement to him that he hid the gun and ammunition separately.

"Evidence of another offense is admissible under Rule 404(b) so long as it is relevant to any fact or issue other than the character of the accused." *State v. Simpson*, 327 N.C. 178, 185, 393 S.E.2d 771, 775 (1990). Evidence of other crimes or acts may be admissible for purposes such as proof or absence of accident. N.C. Gen. Stat. § 8C-1 Rule 404(b) (2005). In the case *sub judice*, defendant contends that Walker's death was accidental and therefore evidence which tends to prove or disprove the accidental nature of Walker's death is relevant. Testimony regarding misconduct by a defendant towards a victim in domestic situations has been found to be relevant to show lack of accident. *State v. Syriani*, 333 N.C. 350, 376-77, 428 S.E.2d 118, 132, *cert. denied*, 510 U.S. 948, 126

L. Ed. 2d 341 (1993). The testimony of John Walker and Robin Beeler that defendant had pulled her gun on Walker previously, that there was prior animosity between Walker and defendant, and Robin Beeler's testimony regarding a prior physical altercation between Walker and defendant taken together tend to diminish the likelihood that Walker's death was accidental.

Rule 403 is a rule of inclusion which is subject to only one exception - that evidence of prior bad acts must be excluded if its *only* probative value is to show that the defendant acted in conformity with the past behavior. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Accordingly, as the trial court found the statements in question to be offered to prove lack of accident, we hold that the testimony was properly admitted pursuant to Rule 404(b).

We now must turn to whether the testimony should have been excluded as hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen Stat. § 8C-1 Rule 801(c) (2003). Hearsay statements which are not subject to a recognized exception are inadmissible. N.C. Gen. Stat. § 8C-1 Rule 802 (2003).

The trial judge found the testimony in question here to be admissible under Rule 803(3) which allows the admission of statements regarding, among other things, the declarant's state of mind and emotions. N.C. Gen. Stat. § 8C-1 Rule 803(3) (2003). Walker's statements that he needed his father to buy him a trailer

so he could move out of defendant's home, made after relating that defendant had pulled a gun on him; that defendant had pulled a gun on him which scared him to the point that he felt he had to move out; and that he hid the gun and ammunition separately because he was afraid that defendant would pull it on him again and there would be an accident, clearly indicate that Walker was frightened by defendant's past behavior and fearful of what might happen eventually as a result of defendant's possession and use of the gun.

Defendant contends that the hearsay exception in Rule 803(3) is not applicable in this case. Defendant argues that the statements do not clearly show Walker's state of mind and are merely recitations of facts describing events. Mere recitations of fact that describe events and which do not indicate the declarant's state of mind are not admissible under Rule 803(3). *State v. Hardy*, 339 N.C. 207, 228-29, 451 S.E.2d 600, 612 (1994). However, where the recited facts tend to show the declarant's state of mind and demonstrate the basis for the declarant's emotions they clearly fall within the scope of Rule 803(3). *State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997), *overruled in part on other grounds*, *State v. Long*, 354 N.C. 534, 542, 557 S.E.2d 89, 95 (2001).

The testimony in question, although partially consisting of recitations of fact describing events as related to the witnesses by Walker, clearly demonstrates Walker's state of mind with regard to his fear of defendant. Accordingly, we hold that the statements

in question fall within the scope of the exception in Rule 803(3). This assignment of error is overruled.

Defendant next argues that she received ineffective assistance of counsel in the event the two previous assignments of error were not properly preserved for appeal. The testimony in question was properly objected to before the trial court and defendant's related assignments of error were considered on the merits by this Court. As these assignments of error were properly preserved, this assignment of error is overruled.

Defendant's next argument is that the trial court erred by instructing the jury on the lesser included offense of second-degree murder as the evidence at trial did not support that charge. An instruction on a lesser included offense must be given to the jury if the evidence would allow the jury rationally to find the defendant guilty of the lesser offense and acquit the defendant of the greater offense. *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000); *State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983), *overruled in part on other grounds by*, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

In the case *sub judice*, the trial court instructed the jury on the charges of first-degree murder, second-degree murder, and voluntary manslaughter. Defendant objected to the instruction on second-degree murder, and the court overruled the objection. "First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Thomas*, 350 N.C. 315, 346, 514 S.E.2d 486, 505, *cert.*

denied, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). "Murder in the second-degree is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). Our Supreme Court has stated the rule regarding the inclusion of a jury instruction on the lesser included offense of second-degree murder as:

[I]f the State's evidence is sufficient to satisfy its burden of proving each element of first-degree murder, including premeditation and deliberation, and there is no evidence other than defendant's denial that he committed the crime to negate these elements, the trial court should not instruct the jury on second-degree murder.

State v. Hyatt, 355 N.C. 642, 659-60, 566 S.E.2d 61, 73 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003) (quoting *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995)).

Defendant contends that the evidence at trial rationally could not support a conviction for second-degree murder. Defendant argues that the evidence of want of provocation, defendant's attempts to cover her involvement in the killing, the manner of killing being a point blank shot to the head, the prior threats made by defendant regarding killing Walker, and the ill will between defendant and Walker could rationally be construed only to support a conclusion that the killing, if committed by defendant, was done with deliberation and premeditation. Defendant argues that, if the jury finds that defendant killed Walker, no evidence

was presented that could negate the element of premeditation or deliberation.

The State argues that defendant's testimony that she and Walker had engaged in a heated argument; Walker had grabbed her arms; and Walker had pushed her three times shortly before his death was sufficient to negate the elements of premeditation and deliberation and, therefore, justify an instruction on second-degree murder.

A killing is "premeditated" if the defendant contemplated killing for some period of time, however short, before he acted. . . . A killing is "deliberate" if the defendant formed an intent to kill and carried out that intent in a cool state of blood, "free from any 'violent passion suddenly aroused by some lawful or just cause or legal provocation.'"

State v. Robinson, 355 N.C. 320, 336-37, 561 S.E.2d 245, 256, cert. denied, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002) (quoting, *State v. Laws*, 345 N.C. 585, 593-94, 481 S.E.2d 641, 645 (1997)) (internal quotations omitted). Words or conduct that do not rise to the level of assault or threatened assault can be enough to negate the element of deliberation if those words or conduct are sufficient to arouse a sudden passion in the defendant. *State v. Huggins*, 338 N.C. 494, 498, 450 S.E.2d 479, 482 (1994). It is logical to conclude that, if words and conduct not rising to the level of assault can possibly negate deliberation, an assault which is not sufficient to justify self-defense or negate the element of malice also may be sufficient to negate deliberation.

The evidence presented at trial in no way supports self-defense as there is no indication that the shooting was committed

to protect defendant from harm. Nor does the evidence necessarily negate the element of malice as there is ample evidence that supports that the shooting was done with malice. The evidence supporting the existence of malice includes the manner of the killing, the prior threats made by defendant with regard to Walker, and the prior ill will existing between them. Accordingly, we hold that the heated argument and physical confrontation do not necessarily reduce the offense to manslaughter, and could support a verdict of second-degree murder. This assignment of error is overruled.

Defendant next contends that the trial court erred in denying her motion to dismiss for insufficient evidence at the close of all evidence. In support of this assignment of error, defendant merely realleges by incorporation her argument regarding the second-degree murder instruction. However, the defendant's motion to dismiss was for the charge of first-degree murder. Defendant argues in her brief in support of her assignment of error regarding the jury instruction on second-degree murder, that there was sufficient evidence presented at trial to support a jury instruction on first-degree murder. Accordingly, defendant concedes that the evidence was sufficient to submit the first-degree murder charge to the jury. Therefore, this assignment is overruled.

Defendant's final assignment of error is that she received ineffective assistance of counsel due to her trial counsel offering Beeler, Sr. as a witness to rebut Robin Beeler's testimony without ensuring that the scope of cross-examination would be limited to

his rebuttal testimony. To prevail on an assignment of error alleging ineffective assistance of counsel, a party must show that the conduct of counsel “fell below an objective standard of reasonableness.” *State v. Augustine*, 359 N.C. 709, 718, 616 S.E.2d 515, 524 (2005) (quoting *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985)). In *Braswell*, our Supreme Court adopted a two part test for meeting a party’s burden in an appeal premised on ineffective assistance of counsel that was promulgated in the United States Supreme Court case of *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). 312 N.C. at 562, 324 S.E.2d at 248.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693) (emphasis in original).

Trial counsel are afforded “wide latitude in matters of strategy” *State v. Roache*, 358 N.C. 243, 279, 595 S.E.2d 381, 405 (2004) (quoting *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), cert. denied, 537 U.S. 846, 154 L. Ed. 2d 73 (2002)); *State v. Lowery*, 318 N.C. 54, 68, 347 S.E.2d 729, 739 (1986). “Moreover, this Court engages in a presumption that trial counsel's representation is within the boundaries of acceptable

professional conduct." *Roache*, 358 N.C. at 280, 595 S.E.2d at 406 (quoting *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986)).

In the case *sub judice*, trial counsel called Beeler, Sr. to rebut the testimony of Robin Beeler. Offering the testimony of a witness to rebut the prejudicial testimony of another witness is clearly an acceptable - and expected - function of counsel as guaranteed to a defendant pursuant to the Sixth Amendment. Defendant bases this argument, in part, on her counsel's failure to obtain an assurance from the trial court that cross-examination of the witness would be limited to the rebuttal testimony elicited on direct examination. "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2003). As the scope of cross-examination is not limited to the testimony elicited on direct-examination, the court could not give defendant an assurance that the cross-examination would be so limited.

The decision of defendant's trial counsel to offer the testimony of Beeler, Sr. to rebut Robin Beeler's testimony was a strategic one. Offering the testimony of a rebuttal witness is within the boundaries of acceptable professional conduct, although there exists a risk that prejudicial testimony may be elicited on cross-examination. "Ineffective assistance of counsel claims are 'not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.'" *Lowery*, 318 N.C. at 68, 347 S.E.2d at 739 (quoting *State v. Milano*, 297 N.C. 485, 495, 256 S.E.2d 154, 160 (1979)). We hold that the performance of

defendant's trial counsel was not ineffective in this case. Accordingly, this assignment of error is overruled.

No error.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).