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NO. COA06-351

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

STATE OF NORTH CAROLINA

v.

Hertford County  
02 CRS 3719

WILLIAM CURTIS JOHNSON,  
Defendant.

Appeal by defendant from a judgment entered 24 August 2005 by Judge Clifton W. Everett, Jr. in Hertford County Superior Court. Heard in the Court of Appeals 15 November 2006.

*Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields, III, for the State.*

*Nora Henry Hargrove for defendant.*

BRYANT, Judge.

William Curtis Johnson (defendant) appeals from a 24 August 2005 judgment entered consistent with a jury verdict finding him guilty of first degree murder. Defendant was sentenced to life imprisonment without parole.

On 25 October 2002, Ray Anthony Johnkins (Johnkins) died as a result of a gunshot wound from a .357 Magnum. The State's evidence tended to show at the time of the shooting a number of individuals, including Terry Pitt, Demondz Langford and Jimmy Ray Vaughn, were "hanging out" near the Kool Dee Club in Ahoskie, North Carolina.

Terry Pitt testified that a car belonging to defendant's wife drove past the Kool Dee Club, turned around and came back to park on the curb in front of the Club. Defendant and another individual named Keith got out of the car and started walking toward the entrance to the Club. Pitt saw the impression of a gun under defendant's shirt. Defendant told those on the street that he "was about to clear the corner." Pitt told everyone to leave.

Defendant and Keith approached the entrance of the Club when Johnkins yelled to Keith from the alley. Defendant stopped, turned around and walked toward Johnkins. Defendant asked Johnkins "who are you getting loud with?" Johnkins replied "there's no harm in me speaking to Keith." Defendant pulled his pistol out. Johnkins backed up three steps from defendant and defendant shot him. Pitt described the weapon defendant used as a .357 long barrel pistol that he had seen previously when he worked with defendant. Defendant immediately got back into his wife's car and drove away as Johnkins fell and was calling "help me, help me."

Demondz Langford testified that, on the same night, he was "hanging out" near the Kool Dee Club. The car belonging to defendant's wife drove by, turned around and came back to park near him. Defendant got out of the passenger side of the car and walked toward the Club like he was looking for someone. As he walked, he repeatedly told everyone to leave the block. Johnkins said he was a grown man and did not have to leave. Defendant walked back toward Johnkins and shot him. Langford saw defendant shoot Johnkins. Defendant then walked back to his wife's car still

holding the pistol in his hand. As he walked by Langford, defendant said "didn't I tell you to leave?" Defendant drove away.

Jimmy Ray Vaughn testified that he recognized both defendant and the victim by sight. On the night in question, Vaughn saw defendant walking toward the Kool Dee Club and heard defendant telling everyone to be quiet. When defendant reached the door to the Kool Dee Club, Vaughn heard Johnkins response to defendant's comments. Next, Vaughn saw defendant shoot Johnkins.

Ahoskie Police Detective Troy Fitzhugh arrived within a minute of the 911 call to find Johnkins shot and lying on his back in the doorway of the Club. At the hospital, Johnkins said he did not know who shot him. Johnkins told police he was walking down the street and a man wearing dark clothes and a light colored baseball cap questioned him about why he was on the street. Johnkins told the man to mind his own business and the man shot him. On 26 October 2002, after Det. Fitzhugh was notified Johnkins had died, he learned Demondz Langford had knowledge of the shooting. Fitzhugh took two statements from Langford. Those statements were inconsistent with Langford's trial testimony with respect to actually seeing defendant shoot Johnkins. Defendant was apprehended in the green Thunderbird belonging to his wife on 28 October 2002. A search of the vehicle revealed a loaded .357 Magnum pistol. Defendant told police that this pistol belonged to him and he had owned it for twelve to thirteen years. An SBI firearms expert testified the bullet taken from Johnkins' spine was fired from the .357 Magnum pistol found with defendant when he was

arrested. The firearms expert also testified the round taken from Johnkins' spine was consistent with the ammunition found in defendant's possession. Defendant appeals.

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Defendant raises three issues on appeal whether the trial court erred in: (I) instructing the jury on flight; (II) denying defendant's motion for a mistrial; and (III) conferring jurisdiction on defendant where the first degree murder indictment did not include the words "premeditation, deliberation or the specific intent to kill."

I

Defendant argues the trial court erred in instructing the jury on flight based on insufficiency of the evidence. Defendant contends the instruction caused the jury to return a different verdict based on the fact that the "consciousness of guilt aspect of the flight instruction" *might* have caused the jury to change its decision about whether defendant was sufficiently intoxicated that he could not "form the specific intent required for premeditated and deliberate murder."

A jury instruction on flight is proper where there is "some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Lloyd*, 354 N.C. 76, 119-20, 552 S.E.2d 596, 625 (2001). "[M]ere evidence that defendant left the scene of the crime is not enough . . . . There must also be some evidence that defendant took steps to avoid apprehension." *Id.* There must be some evidence raising

a "reasonable inference that defendant was attempting to avoid apprehension." *State v. Holland*, 161 N.C. App. 326, 330, 588 S.E.2d 32, 36 (2003).

Here, the trial court instructed the jury as follows:

Now the State contends that the defendant fled. The evidence of flight may be considered by you together with all other facts and circumstances in the case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However proof of this circumstance is not sufficient in itself to establish the defendant's guilt. Further, this circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation or deliberation.

The trial court informed the jury that "proof of flight was not sufficient by itself to establish guilt." The trial court directed the jury not to consider evidence of flight as tending to show premeditation or deliberation.

In the present case, the State argues the evidence reasonably supports the inference defendant fled the crime scene and took steps to avoid apprehension. There is evidence defendant failed to assist Johnkins in any manner following the shooting. After leaving the crime scene, defendant returned thirty minutes later and was seen speaking with another individual as the police investigated the shooting. Three days later, defendant was apprehended several blocks from his home. Taken in the light most favorable to the State, this evidence may be sufficient to support an inference that defendant fled the scene and took some steps to avoid apprehension. *See, e.g. Lloyd*, 354 N.C. at 119-20, 552

S.E.2d at 626-27 (flight instruction not error where defendant drove around for thirty minutes to clear his head and then turn himself in). Also, evidence of defendant's behavior surrounding the shooting tends to support a finding of consciousness of guilt, as set out in the jury instruction. Further, defendant has failed to show the trial court's instruction on flight was prejudicial error, as there is no reasonable probability that the instruction caused the jury to return a different verdict as to first degree murder. See N.C. Gen. Stat. § 15A-1443(a) (2005). This assignment of error is overruled.

## II

Defendant next argues the trial court erred in denying defendant's motion for a mistrial. At trial, defense counsel moved for a mistrial based on the fact that witness Langford's testimony on direct examination indicated he saw defendant shoot the victim, contrary to Langford's earlier statement that he did not actually see the shooting.

Upon motion by a defendant, the judge must declare a mistrial if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. The decision to grant or deny a mistrial rests within the sound discretion of the trial court and will be reversed on appeal only upon a clear showing that the trial court abused its discretion. Thus, a mistrial should not be allowed unless there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict.

*State v. Hurst*, 360 N.C. 181, 188, 624 S.E.2d 309, 316 (2006) (citations and internal quotation marks omitted).

Prior to ruling on the motion for a mistrial, the trial court had defense counsel explain what he would have done differently in preparation for trial had he known Langford would reverse his prior statement as to seeing defendant shoot the victim. Upon considering defendant's motion, the trial court stated the following:

[T]he Court after having reviewed the statements, the State had the written statements the State had furnished to [defense counsel], and having determined that those statements indicated that Mr. Langford didn't see anything. And then later the information that was gleaned from [defense counsel's] investigator that Mr. Langford did in fact see the events and they were transcribed by his investigator and been in his possession for over two years, which indicated that he saw the defendant with the gun in his hand walking away from where Mr. Johnkins was between the buildings.

And that his testimony from the witness stand indicating that he actually saw Mr. Johnson, the defendant, fire the gun are all different. And that the witness is subject to be cross-examined by [defense counsel] in relation to those statements and their reliability and credibility of his testimony in the statements are being left for the jury to glean and consider.

On cross-examination, Langford admitted he had lied to the police about not actually seeing the shooting and stated he did so because he did not want to get involved in the case. In addition to Langford, two other eye witnesses, Terry Pitt and Jimmy Ray Vaughn, testified before the jury that they saw defendant shoot the victim.

Where other witnesses testified as to having seen defendant shoot the victim, defense counsel was not prejudiced by Langford's changed testimony. See *State v. Patterson*, 335 N.C. 437, 455, 439 S.E.2d 578, 589 (1994) (citations omitted) ("The purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate."). Given the circumstances of this case, defendant has failed to prove the trial court committed an abuse of discretion in denying his motion for mistrial. This assignment of error is overruled.

### III

Defendant next argues the trial court erred in allowing him to be tried on the first degree murder indictment where the indictment did not include the words "premeditation, deliberation or the specific intent to kill." In his brief defendant cites to *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001) and concedes that this issue is raised for preservation only as our State Supreme Court has upheld the constitutionality of the "short form" indictment. Therefore, this assignment of error is overruled. *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006).

No prejudicial error.

Judges MCGEE and STEELMAN concur.

Report per Rule 30(e).