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NO. COA11-1036  
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

STATE OF NORTH CAROLINA

v.

Wayne County  
No. 04 CRS 57797

TAVARIS KINTE WORESLEY

On writ of certiorari to review judgment entered 20 September 2006 by Judge Jack W. Jenkins in Superior Court, Wayne County. Heard in the Court of Appeals 10 January 2012.

*Attorney General Roy Cooper, by Senior Deputy Attorney General Robert T. Hargett for Special Deputy Attorney General Amar Majmundar, for the State.*

*William D. Spence for Defendant-Appellant.*

McGEE, Judge.

Tavaris Kinte Woresly (Defendant) was convicted of second-degree murder on 20 September 2006. Defendant was sentenced within the mitigated range to 120 months to 153 months in prison. Defendant filed a petition for a writ of certiorari with this Court on 4 October 2010, which was granted in a 20 October 2010 order.

At trial, the evidence tended to show that Officer L.D. Bethea (Officer Bethea) of the Goldsboro Police Department responded to a call at an apartment complex in Goldsboro on 22 August 2004. Officer Bethea testified that, upon arriving at the apartment complex, he observed three men on the scene. Officer Bethea testified that one of the men "had been shot -- well, he was wounded, he said he had been shot -- he was in obvious pain." Officer Bethea testified that the wounded man was having difficulty breathing and that the "other two men [who] were there, they were -- they were excited, they were yelling, they were screaming, trying to tell us that the shooter was back up in this area over here." The wounded man was later identified as LaTerrance Gooding (Mr. Gooding).

Officer Daniel Snyder (Officer Snyder) was dispatched to the scene as backup. When Officer Snyder arrived at the apartment complex, he found a crowd of people and asked them what was happening. In response to Officer Snyder's question, Defendant approached Officer Snyder with a 9-millimeter handgun in one hand and a clip in his other hand, and stated: "This is the gun I shot that n----- with." Officer Snyder took possession of the handgun and the clip. Officer Snyder testified that Defendant told him the following:

[Defendant] stated that there was a confrontation in front of his apartment. He

said that a couple of individuals were fighting with his brother. He went inside of the apartment and got a gun. He came back outside with the gun in his hand, and the individuals were fighting -- the individuals that were fighting his brother began to run away. He started shooting at them. He said they ran down 9th Street. He also stated that it was an ongoing disturbance between his brother and these individuals, and he said he was not going to let them assault his brother.

Dr. John Butts (Dr. Butts), Chief Medical Examiner for the State of North Carolina, testified that he did not perform the autopsy of Mr. Gooding. Rather, Mr. Gooding's autopsy had been performed by a forensic pathologist who had since moved out of North Carolina. Dr. Butts testified concerning Mr. Gooding's autopsy report and opined that the cause of Mr. Gooding's death was "gunshot wounds, most specifically the wounds of the chest that caused damage to the lungs." Defendant did not object to the testimony of Dr. Butts.

At trial, Defendant testified to the following. He, his wife and two children lived in the apartment complex. Defendant was watching television in his apartment on the evening of 22 August 2004 when his brother rushed into Defendant's apartment and said that Mr. Gooding "and those dudes are out to get you." Defendant's wife called 911 and Defendant retrieved his 9-millimeter handgun and ran outside. Defendant testified he saw

Mr. Gooding running towards him and he thought Mr. Gooding was armed. Defendant then shot Mr. Gooding "at least twice."

### I. Issues on Appeal

Defendant raises the following issues on appeal: (1) whether the trial court committed plain error in allowing Dr. Butts to testify concerning Mr. Gooding's autopsy and to opine concerning the cause of Mr. Gooding's death; (2) whether the trial court erred by failing to intervene *ex mero motu* during the State's closing arguments; and (3) whether the trial court erred by denying Defendant's motion to dismiss for insufficient evidence.

### II. Testimony of Dr. Butts

Defendant argues that the trial court committed plain error by allowing Dr. Butts to testify concerning Mr. Gooding's autopsy report and to opine as to Mr. Gooding's cause of death. Defendant contends that "the admission in evidence of Dr. [Butts'] testimony . . . violate[d] the Confrontation Clause of the 6th amendment to the United States Constitution[.]" At trial, Defendant did not object to Dr. Butts' testimony and therefore we are limited to reviewing this issue for plain error. See N.C.R. App. P. 10 (a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such

action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, \_\_\_ N.C. \_\_\_, \_\_\_ 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.'" *Id.* (citation omitted).

Assuming *arguendo* that the trial court erred by allowing Dr. Butts' testimony, we hold that such error is not plain error. The State presented evidence that police officers responded to an emergency call at the apartment complex and found Mr. Gooding at the scene, wounded. Mr. Gooding had wounds to his chest area and was having trouble breathing. Defendant admitted to having shot Mr. Gooding with a 9-millimeter handgun and, when Officer Snyder arrived at the scene, Defendant gave him a gun and said: "This is the gun I shot that n----- with." Dr. Butts' testimony consisted of his opinion that the cause of Mr. Gooding's death was "gunshot wounds, most specifically the wounds of the chest that caused damage to the lungs." Thus, the State presented ample evidence that Mr. Gooding was shot

multiple times, sustained wounds to his chest area, and subsequently died. Dr. Butts' testimony served largely to provide expert opinion that the multiple gunshot wounds to Mr. Gooding's chest were the cause of Mr. Gooding's death.

"The law is realistic when it fashions rules of evidence for use in the search for truth. The cause of death may be established in a prosecution for unlawful homicide without the use of expert medical testimony where the facts in evidence are such that every person of average intelligence would know from his own experience or knowledge that the wound was mortal in character. . . . There is no proper foundation, however, for a finding by the jury as to the cause of death without expert medical testimony where the cause of death is obscure and an average layman could have no well grounded opinion as to the cause."

*State v. Luther*, 285 N.C. 570, 574, 206 S.E.2d 238, 241 (1974) (citations omitted); see also *State v. Thompson*, 3 N.C. App. 193, 196, 164 S.E.2d 402, 404 (1968) ("We hold that the evidence, including the shot fired by the defendant, the location of the bullet wound and the circumstances surrounding the death shortly thereafter, afford such causal relation between the shooting and the death as to withstand the motion of the defendant for a directed verdict and to require submission to the jury under proper instruction for a finding of fact as to the cause of death."). Our Court has continued to apply these principles in recent unpublished opinions. See *State v. Thomas*,

\_\_\_ N.C. App. \_\_\_, 721 S.E.2d 408, 2012 WL 123329 at \*6 (2012), *disc. review denied*, \_\_\_ N.C. \_\_\_, 722 S.E.2d 598 (2012) ("[A witness] testified that, on the night of the shooting, she heard shots inside the apartment, saw [d]efendant in her mother's bedroom with a gun, and observed her mother struggling with [d]efendant. The record leaves no doubt, wholly aside from the autopsy report, that [d]efendant killed [the victim]."); see also *State v. Folk*, \_\_\_ N.C. App. \_\_\_, 718 S.E.2d 737, 2011 WL 2462929 at \*4 (2011) *appeal dismissed, disc. review denied*, 365 N.C. 343, 717 S.E.2d 558 (2011) ("In other words, even without Dr. Butts' testimony concerning cause of death, the jury was empowered to form its own opinion as to cause of death. Given the nature of the injuries [the victim] suffered, we find no reasonable possibility that the jury would have reached any other conclusion.").

In light of the State's evidence that Defendant shot Mr. Gooding in the chest multiple times and, when officers arrived at the scene, Mr. Gooding's condition appeared be worsening and he later died, we hold it is not likely the jury would have reached a different result had Dr. Butts not been allowed to testify as to the cause of Mr. Gooding's death. We therefore find no plain error in the admission of Dr. Butts' testimony.

### III. Closing Argument

Defendant next argues that the trial court committed plain error by failing to intervene *ex mero motu* during the State's closing argument. Defendant contends the following statement by the State was improper:

Well, let me tell you, juries want to be fair, and when they're faced with the prospect of finding somebody guilty of a lesser crime, then many times that's what's done, because they want to be fair. They say: Well, you know, there's some things in this case that we consider that benefit . . . Defendant, and so we'll find him guilty of a lesser degree of homicide and we feel like that would be fair to both sides. I understand that. I understand that. *But I want you to understand that the State has already been fair to this man, has already considered those aspects of the case that are beneficial to him; and we have not indicted him for the crime of attempted first[-]degree murder, a crime that would subject him to the death penalty or to life in prison without parole. He is not even charged with that. He's not exposed to that. The only charge indicted is for that of a second[-]degree murder, which is what this case is. He's already had the benefit of that consideration.*

[Emphasis added by Defendant]. Because Defendant failed to object to this portion of the State's closing argument, Defendant must now "show that the prosecutor's argument was 'so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*.'" *State v. Campbell*, 359 N.C. 644, 676, 617 S.E.2d 1, 21 (2005) (citation omitted). "To make this showing, defendant must demonstrate 'that the



prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.'" *Id.* (citation omitted).

In the present case, Defendant contends that the State's argument concerned matters outside of the record and was "simply unfair." Defendant cites several cases addressing closing arguments similar to the one at issue here. In *State v. Smith*, 279 N.C. 163, 165, 181 S.E.2d 458, 459 (1971), the prosecutor argued to the jury:

"I know when to ask for the death penalty and when not to. This isn't the first case; it's the ten thousandth for me. . . . I did . . . have in this courtroom three weeks ago a man charged with a sexual assault . . . who was as innocent of it as I. . . . I hope my reputation in this community where you elected me to this office that I try not an innocent man. . . . When I found that out about that case . . . no one was on his feet faster than I to come to his defense . . . . I wanted to tell you about that and get back to the facts of this case."

*Id.* (citation omitted). The Supreme Court observed that: "The foregoing are the more flagrant of the solicitor's transgressions. Too much of his argument, however, was pitched in the same tone." *Id.* at 166, 181 S.E.2d at 460. The Court then stated:

When the prosecutor becomes abusive, injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate and it becomes the duty

of the trial judge to intervene to stop improper argument and to instruct the jury not to consider it. Especially is this true in a capital case. When it is made to appear the trial judge permitted the prosecutor to become abusive, to inject his personal experiences, his views and his opinions into the argument before the jury, it then becomes the duty of the appellate court to review the argument.

*Id.* In *Smith*, our Supreme Court granted the defendant a new trial, observing that: "The intemperance, the assertions of personal belief, the claim that the solicitor knows when and when not to call for a conviction in a capital case, require this Court, in spite of its reluctance, to award the defendant an opportunity to go before another jury." *Id.* at 167, 181 S.E.2d at 460-61.

In *State v. Tuttle*, 33 N.C. App. 465, 235 S.E.2d 412 (1977), this Court further examined the rule set forth in *Smith*. The prosecutor in *Tuttle* stated during closing argument: "'If I didn't believe this was a case worth trying, I have got the power to throw it out.'" *Id.* at 470, 235 S.E.2d at 415. The defendant in *Tuttle* relied on *Smith* in arguing that the trial court had erred, but in *Tuttle* this Court distinguished *Smith* as follows:

That case is distinguishable from this one because there the remark that the solicitor knew "when to ask for the death penalty and when not to" was one small part of an argument which the court characterized as a

"tirade" with "inflammatory and prejudicial effect." Although it would have been better had defendant's objection been sustained, in view of the numerous instances in which the judge properly admonished both attorneys and gave curative instructions to the jury, we conclude there was no prejudicial error in the failure to sustain defendant's objection. We find no merit to this assignment of error.

*Id.* at 470-71, 235 S.E.2d at 415.

This Court addressed a similar statement in *State v. Peterson*, 179 N.C. App. 437, 467-68, 634 S.E.2d 594, 616 (2006) *aff'd*, 361 N.C. 587, 652 S.E.2d 216 (2007). In *Peterson*, the defendant argued that the prosecutor's statements, including a statement that "there are other cases, there are other people that are prosecuted, and he's not so special that we're willing to risk everything for him[,] " amounted to an invitation for "the jury to rely on the prosecutor's personal assurance that [the State] would not prosecute [the] [d]efendant improperly.'" *Id.* at 467, 634 S.E.2d at 616 (citation omitted). This Court noted that "we must view the statements in context." *Id.* (citing *State v. Augustine*, 359 N.C. 709, 725-26, 616 S.E.2d 515, 528 (2005) ("[A] prosecutor's statements during closing argument should not be viewed in isolation but must be considered in the context in which the remarks were made and the overall factual circumstances to which they referred[.]")). This Court stated that "[i]t is evident from the record that the

State was attempting to refute defendant's theory of bad faith prosecution." *Peterson*, 179 N.C. App. at 467, 634 S.E.2d at 616. We held that "the trial court did not abuse its discretion in overruling defendant's objection." *Id.* at 468, 634 S.E.2d at 616.

In the present case, the State contends that the prosecutor's remarks were "meant to give context to the notion of 'fairness[.]'" Viewing the full context of the State's closing argument in this case, we conclude that the prosecutor was not engaged in an inflammatory and prejudicial tirade such as the one involved in *Smith*. Rather, the prosecutor was making an argument concerning fairness that had been touched on by Defendant during Defendant's closing argument. We are not persuaded that the prosecutor's statements "'so infected the trial with unfairness that they rendered the conviction fundamentally unfair.'" *Campbell*, 359 N.C. at 676, 617 S.E.2d at 21 (citation omitted). Thus, Defendant has not shown "that the prosecutor's argument was 'so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*.'" *Id.* (citation omitted). We therefore hold that the trial court did not abuse its discretion.

#### IV. Sufficiency of the Evidence

Defendant next argues the trial court erred by denying his motion to dismiss the charge of second-degree murder because "the evidence at most could support only a verdict of voluntary manslaughter." Specifically, Defendant contends the State presented insufficient evidence of his having killed Mr. Gooding "with malice." We disagree.

When ruling on a motion to dismiss for insufficient evidence, the trial court must determine whether "'there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.'" *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). "'Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion.'" *State v. Williams*, 186 N.C. App. 233, 234, 650 S.E.2d 607, 608 (2007) (citation omitted). "'In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence.'" *Id.* (citation omitted).

"Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. McBride*, 109 N.C. App. 64, 67, 425 S.E.2d 731, 733

(1993). "What constitutes proof of malice will vary depending on the factual circumstances in each case." *Id.* In *McBride*, this Court observed that:

North Carolina courts have recognized at least three kinds of malice:

One connotes a positive concept of express hatred, ill-will or spite, sometimes called actual, express, or particular malice. Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. Both these kinds of malice would support a conviction of murder in the second degree. There is, however, a third kind of malice which is defined as nothing more than "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."

*Id.* at 67-68, 425 S.E.2d at 733 (citation omitted).

This Court has observed, however, that "it is well-established that '[t]he intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice.'" *State v. Bruton*, 165 N.C. App. 801, 806, 600 S.E.2d 49, 53 (2004) (quoting *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984)). The presumption of malice arising from the use of a deadly weapon "is sufficient to withstand a motion to dismiss for insufficient evidence." *State*

v. *Taylor*, 155 N.C. App. 251, 266, 574 S.E.2d 58, 68 (2002).

"The issue of whether the evidence is sufficient to rebut the presumption of malice in a homicide with a deadly weapon is then a jury question." *Id.* In this case, Defendant argues that "[t]he State was not entitled to any inference of malice or unlawfulness from Defendant's use of a deadly weapon because the uncontroverted evidence established justification, mitigating circumstances, and excuse[.]" Specifically, Defendant contends the uncontroverted evidence suggested at most that he was either acting under the influence of a passion aroused by the provocation of a sudden quarrel or that Defendant acted in imperfect self-defense.

Officer Snyder testified that Defendant told him the following:

He stated that there was a confrontation in front of his apartment. He said that a couple of individuals were fighting with his brother. He went inside of the apartment and got a gun. He came back outside with the gun in his hand, and the individuals were fighting -- the individuals that were fighting his brother began to run away. He started shooting at them. He said they ran down 9th Street. He also stated that it was an ongoing disturbance between his brother and these individuals, and he said he was not going to let them assault his brother.

In light of the fact that Officer Snyder testified that Defendant told him that the individuals who were fighting with

his brother "began to run away" when Defendant came outside, there was sufficient evidence that Defendant fired a gun at individuals who were running away from a confrontation with Defendant's brother. Because there was sufficient evidence for the jury to conclude that Defendant fired a gun at individuals running away from him, we disagree with Defendant's assertion that these facts "established justification, mitigating circumstances, and excuse[.]" Thus, we conclude the evidence was sufficient to support a presumption of malice arising from Defendant's use of a firearm and, as in *Taylor*, "[t]he issue of whether the evidence is sufficient to rebut the presumption of malice in a homicide with a deadly weapon is . . . a jury question." *Taylor*, 155 N.C. App. at 266, 574 S.E.2d at 68. We therefore hold there was sufficient evidence to survive Defendant's motion to dismiss the charge of second-degree murder.

No error.

Chief Judge MARTIN and Judge CALABRIA concur.

Report per Rule 30(e).