

NO. COA14-104

NORTH CAROLINA COURT OF APPEALS

Filed: 17 March 2015

STATE OF NORTH CAROLINA

v.

FRANKLIN MARCUS GRULLON, JR.,
Defendant.

Mecklenburg County
Nos. 10 CRS 201663
10 CRS 201667
10 CRS 201670
10 CRS 201673

Appeal by defendant from judgments entered 27 August 2013 by Judge Robert T. Sumner in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 2014.

Attorney General Roy Cooper, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellant.

GEER, Judge.

Defendant Franklin Marcus Grullon, Jr. appeals his convictions of first degree murder, attempted robbery, and conspiracy to commit armed robbery. Defendant argues primarily that the trial court erred in instructing the jury on a lying in wait theory of first degree murder because the State offered no evidence that defendant had a "deadly purpose" to kill. However, because our courts do not require proof of a specific intent to kill -- which we hold is synonymous with a deadly purpose to kill

-- in order to support a lying in wait theory of murder, and because the evidence presented at trial was sufficient to support a jury instruction regarding lying in wait, we find no error.

Facts

The State's evidence tended to show the following facts. In the winter of 2009, defendant became acquainted with Raymond Ervin and stayed at Ervin's apartment in Charlotte, North Carolina several times. Ervin had previously sold drugs with Jonathan Crawford. While staying at Ervin's apartment, defendant saw Crawford's car and noted that it had valuable tire rims that were worth \$10,000.00 or more. This prompted defendant -- under the pretense of wanting to get involved in drug dealing -- to begin asking Ervin for information about Crawford and his car.

After several weeks, defendant formulated a plan to rob Crawford. When defendant told Ervin about his plan, Ervin informed defendant that Crawford did not carry a gun and that Crawford often frequented the Chocolate City Club in South Carolina, stopping afterward at a Hess 24-hour gas station.

On 7 January 2010, defendant engaged in a three-way phone call with his girlfriend and mother of his son, Lizzette Drumgo, and Jasmine Johnson. Throughout the call, Ervin could be heard in the background, sometimes instructing defendant on what to say. The four formulated a plan for Johnson to text Crawford, pretending

to have met him at the Chocolate City or the Hess station. Johnson would then lure Crawford to an empty apartment where the group could rob him.

Johnson texted Crawford as planned. Although Crawford was initially skeptical of Johnson's story regarding their purported encounter, he eventually believed it had occurred. Johnson continued to text with Crawford, and on the evening of 9 January 2010, Johnson met with Ervin, Drumgo, and defendant at Ervin's apartment and texted Crawford in order to lure him to the apartment to rob him. Crawford did not immediately reply, and Johnson began to feel sick and went home prior to any response from Crawford. Defendant decided to still go through with the plan, however, and had Drumgo begin texting Crawford, pretending to be Johnson using another phone.

Crawford was driving to a club with his friend Kelvin Clark when Crawford received Drumgo's texts and agreed to meet at the apartment complex where defendant, Drumgo, and Ervin were setting the stage for the robbery. Defendant told Ervin to wait for Drumgo to bring Crawford and Clark to the darkened apartment and then to grab one of the men while defendant came out from under the stairs and held the gun on the other. Defendant then hid under a dark stairwell with a gun, waiting for Crawford and Clark to arrive.

When Crawford and Clark arrived at the apartment complex, Drumgo met them and took them down to the darkened apartment. Immediately after Drumgo went to turn on the lights, leaving Crawford and Clark alone in the doorway, Crawford and Clark were pushed into the apartment from behind.

Either Ervin or defendant had a gun and dark cloth wrapped around his head and said something like, "You know what this is." Either Crawford or Clark responded, "we ain't got nothing." There was a scuffle with one or two gunshots, and Clark fell to the floor while Crawford dove through a window, ran into the woods, and called 911. Clark died minutes later from a gunshot wound through the chest.

Panicked, defendant, Ervin, and Drumgo fled, leaving Clark on the floor along with his jewelry and over \$1,300.00 in his wallet. Drumgo was later found at defendant's mother's house, and Ervin and defendant were arrested four days later in an abandoned apartment they had broken into in Fayetteville.

Defendant was tried in Mecklenburg County Superior Court on charges of first degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. On 27 August 2013, the jury returned verdicts finding defendant guilty of first degree murder, two counts of robbery with a dangerous weapon, and one count of conspiracy to commit robbery with a

dangerous weapon. The trial court sentenced defendant to life imprisonment without parole for the first degree murder charge, followed by two consecutive presumptive-range terms of 73 to 97 months imprisonment for two counts of attempted robbery with a dangerous weapon and a concurrent term of 29 to 44 months imprisonment for conspiracy to commit armed robbery. Defendant timely appealed to this Court.

Discussion

Defendant first argues that there was insufficient evidence to support a jury instruction on lying in wait. In examining the sufficiency of the evidence supporting a jury instruction on appellate review, "[a]ll evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered." *State v. Woodard*, 324 N.C. 227, 230, 376 S.E.2d 753, 755 (1989) (quoting *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984)). "[T]he evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence." *Id.*, 376 S.E.2d at 754-55 (quoting *Bullard*, 312 N.C. at 160, 322 S.E.2d at 387-88). We review the trial court's decision to give the instruction de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

The State contends that defendant has waived the right to appeal the issue. Although the State concedes that defendant initially objected to the instruction, the State argues that defendant then waived his objection by later not objecting when the court gave a verbatim repetition of the contested instruction.

Because a "defendant is not prejudiced by . . . error resulting from his own conduct[,]" N.C. Gen. Stat. § 15A-1443(c) (2013), "'a defendant who invites error . . . waive[s] his right to all appellate review concerning the invited error, including plain error review.'" *State v. Goodwin*, 190 N.C. App. 570, 574, 661 S.E.2d 46, 49 (2008) (quoting *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001)). In arguing invited error, the State relies exclusively on *State v. Wilkinson*, 344 N.C. 198, 474 S.E.2d 375 (1996).

In *Wilkinson*, the Supreme Court held that the defendant invited error regarding the instruction because the defendant "did not object to the charge as given," but instead "agreed at the charge conference to have the instruction given as it was" by saying, "'That will be fine.'" *Id.* at 235, 474 S.E.2d at 395, 396. The Court held: "'Since [the defendant] asked for the exact instruction that he now contends was prejudicial, any error was invited error.'" *Id.* at 214, 474 S.E.2d at 383 (quoting *State v. McPail*, 329 N.C. 636, 644, 406 S.E.2d 591, 596 (1991)).

In this case, however, defendant only assented when the trial court proposed re-reading the instructions in response to a direct jury question:

[THE COURT:] [The question] says, need judge's guidelines . . . [regarding] the law on the first-degree murder charge

. . . I understand his question to ask me to repeat the instructions, the substantive instructions for the two first-degree murder charges. And that's what I would propose to do.

Defendant responded to the trial court's proposal to repeat the instructions by stating, "If you wish to repeat them, that seems to make sense." The court then repeated the lying in wait instruction to the jury without further objection by defendant.

However, because the trial court had already decided the issue regarding the sufficiency of the evidence to support the lying in wait instruction, overruling defendant's objection, defendant did not invite error by failing to repeat that objection when the trial court proposed responding to the jury question by re-reading the exact same instructions the jury had already heard once. The State cites no authority, nor have we found any authority, holding that a defendant invites error when his objection to an instruction is overruled, and the defendant does not repeat that objection when the judge simply re-reads the instruction upon jury request. Compare *Goodwin*, 190 N.C. App. at 574, 661 S.E.2d at 49 ("[The

defendant's] attorney specifically requested that the jury not be instructed as to self-defense, and thus [the] defendant [invited the error.]"). We therefore conclude that defendant did not invite error by failing to renew his objection, and the jury instruction issue is properly preserved for appellate review.

We turn next to defendant's main contention that the trial court erred in instructing the jury on a lying in wait theory of murder due to insufficient evidence regarding defendant's intent. Defendant contends that the State must present evidence that "lying in wait was the perpetrator's 'means of' accomplishing a '*murder*'" and that, when lying in wait, defendant had a "deadly purpose" or "'purpose to kill.'" (Quoting N.C. Gen. Stat. § 14-17(a) (2013); *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320 (1990).) Our Supreme Court has, however, held otherwise.

N.C. Gen. Stat. § 14-17(a) defines murder generally and provides in pertinent part that:

A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined by G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree

Our Supreme Court has construed the statute as separating first degree murder into four distinct classes:

"(1) murder perpetrated by means of poison, lying in wait, imprisonment, starving or torture; (2) murder perpetrated by any other kind of willful, deliberate and premeditated killing; (3) murder committed in the perpetration or attempted perpetration of certain enumerated felonies; and (4) murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon."

State v. Evangelista, 319 N.C. 152, 157, 353 S.E.2d 375, 380 (1987) (quoting *State v. Johnson*, 317 N.C. 193, 202, 344 S.E.2d 775, 781 (1986)).

North Carolina defines "first-degree murder perpetrated by means of lying in wait" as "'a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim.'" *Leroux*, 326 N.C. at 375, 390 S.E.2d at 320 (quoting *State v. Allison*, 298 N.C. 135, 147, 257 S.E.2d 417, 425 (1979)). Our Supreme Court has specifically held that "[p]remeditation and deliberation are not elements of the crime of first-degree murder perpetrated by means of lying in wait, nor is a specific intent to kill. The presence or absence of these elements is irrelevant." *Id.* "[L]ying in wait is a physical act" and "does not require a finding of any specific intent." *State v. Baldwin*, 330 N.C. 446, 461, 462, 412 S.E.2d 31, 40-41 (1992).

A requirement that the State prove a "deadly purpose" or a "purpose to kill" is no different than requiring proof of a deadly intent or an intent to kill. "Purpose" is a synonym for "intent" and, therefore, our Supreme Court's precedent forecloses defendant's contention.

As the Supreme Court has previously held, "[h]omicide by lying in wait is committed when: the defendant lies in wait for the victim, that is, waits and watches for the victim in ambush for a private attack on him, intentionally assaults the victim, proximately causing the victim's death." *State v. Camacho*, 337 N.C. 224, 231, 446 S.E.2d 8, 12 (1994) (internal citations omitted). In other words, a defendant need not intend, have a purpose, or even expect that the victim would die. The only requirement is that the assault committed through lying in wait be a proximate cause of the victim's death.

Defendant points to references in Supreme Court opinions to a defendant's "purpose to kill" the victim. *See, e.g., Allison*, 298 N.C. at 148, 257 S.E.2d at 425. The Court in *Allison*, however, referenced the "purpose to kill" only if the victim is aware of the defendant's presence: "If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, *if he does know*, is not aware of his purpose to kill him, the killing

would constitute a murder perpetrated by lying in wait." *Id.* (emphasis added). See also *Leroux*, 326 N.C. at 375, 390 S.E.2d at 320 (holding that for lying in wait instruction, defendant "need not be concealed, nor need the victim be unaware of his presence[,] but if victim does know of defendant's presence, then victim must be unaware of defendant's purpose to kill him). As our Supreme Court explained, *Leroux* and *Allison* hold "that a lying in wait killing requires some sort of ambush and surprise of the victim." *State v. Lynch*, 327 N.C. 210, 217, 393 S.E.2d 811, 815 (1990). Consequently, when the defendant is not concealed and the victim is aware of the defendant's presence, then the ambush and surprise required for lying in wait is supplied by the victim's lack of awareness that the defendant has a purpose or intent to kill the victim. Since, in this case, defendant does not dispute that he hid under a darkened staircase for the purpose of robbing the victim, there was no need of any further showing of ambush and surprise.

In support of his contention that the State must show a "deadly purpose," defendant also cites several secondary sources: *Homicide: What Constitutes "Lying in Wait,"* 89 A.L.R.2d 1140 § 1b (stating that lying in wait contains a "mental element[]" of "purpose or intent to inflict bodily injury or to kill" another), and 40 Am. Jur. 2d *Homicide* § 42 (using nearly identical language

to describe "[w]hat constitutes lying in wait"). These authorities demonstrate that "purpose" and "intent" are synonymous -- therefore, those authorities define lying in wait in a manner inconsistent with our Supreme Court. However, "[the Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (internal quotation marks omitted).

With respect to the sufficiency of the evidence to support a lying in wait instruction under controlling Supreme Court precedent, our Supreme Court has upheld inclusion of the instruction in similar cases involving an intent to ambush a victim for the purpose of committing a robbery. *See, e.g., State v. Richardson*, 346 N.C. 520, 527, 488 S.E.2d 148, 152 (1997) (upholding lying in wait instruction when evidence tended to show defendant went to store where victim worked "so he could get some money," waited in a parked car until closing, attacked victim as she left store, killed her, then broke into store using victim's keys); *State v. Joyner*, 329 N.C. 211, 214, 404 S.E.2d 653, 654 (1991) (upholding lying in wait instruction when evidence tended to show defendant waited behind trailer, killed his victim, and later explained that "he had been thinking for a few days about

robbing the victim but did not want to do so in a place where the victim could see him").

Here, over the course of several weeks defendant formulated a plan to rob the victim and then waited underneath a darkened staircase for the opportunity to do so. Like *Richardson*, where the initial rationale for the concealed attack on the victim was to "get some money" but nevertheless ended in murder, 346 N.C. at 527, 488 S.E.2d at 152, here, the attack by defendant also was for the purpose of robbery but ended in murder. Consequently, viewing the evidence in the light most favorable to the State, the lying in wait instruction was sufficiently supported by the evidence.

Additionally, defendant argues that at least one of the attempted robbery convictions should be arrested due to the merger doctrine. The merger doctrine provides that "when the sole theory of first-degree murder is the felony murder rule, a defendant cannot be sentenced on the underlying felony in addition to the sentence for first-degree murder[.]" *State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996). However, because the jury found defendant guilty of first degree murder based upon both felony murder and lying in wait, and we have upheld the conviction based on lying in wait, the trial court properly did not arrest judgment on defendant's conviction of attempted robbery. See *id.* at 122-23, 478 S.E.2d at 510 (holding that "defendant can only be

punished for both murder and the underlying felony" if convicted
"of first-degree murder under [multiple] theories").

No error.

Judges BRYANT and CALABRIA concur.