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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-673

Filed: 21 March 2017

Cumberland County, No. 13CRS052365

STATE OF NORTH CAROLINA

v.

FRANCISCO ECHEVERRIA, Defendant.

Appeal by Defendant from judgment entered 20 April 2015 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 11 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Peter A. Regulski, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for the Defendant.

DILLON, Judge.

Francisco Echeverria (“Defendant”) appeals from a judgment convicting him of first degree murder. Defendant’s sole argument on appeal concerns a trial court jury instruction. For the following reasons, we conclude that Defendant had a fair trial, free from prejudicial error.

I. Background

On 19 February 2013, Defendant and the victim got into a verbal confrontation at a nightclub. The victim then left the nightclub on his motorcycle, turning right onto a public street.

About a minute after the victim left the nightclub, Defendant left the nightclub in his car, also turning right onto the same public street. Defendant pulled alongside the victim and fired five gunshots, four of which struck the victim. After shooting the victim, Defendant drove away from the scene.

The victim was found dead in the roadway, and his motorcycle was found several yards down the road.

A jury found Defendant guilty of first degree murder. The trial court sentenced Defendant to life imprisonment without the possibility of parole. Defendant gave oral notice of appeal.

II. Analysis

On appeal, Defendant argues that the trial court erred in giving a portion of N.C.P.I.-Crim. 206.10 to the jury over his objection. This instruction provides examples as to how “premeditation” and “deliberation” may be proven. The pertinent part of the instruction was as follows:

Neither premeditation nor deliberation is usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the [lack of provocation by the victim] [conduct of the defendant, before, during and after the killing] . . . [use of grossly excessive force] . . . [*brutal or vicious circumstances*]

of the killing] [manner in which or means by which the killing was done]

N.C.P.I.-Crim. 206.10 (2014) (emphasis added). Defendant's specific argument is that the trial court erred in giving the italicized portion of the above instruction because there was no evidence from which a jury could have found that Defendant ambushing and then shooting the victim four times while the victim rode down a highway on his motorcycle was "brutal or vicious."

Even assuming that there was no evidence that Defendant's actions were "brutal or vicious," based on our Supreme Court's holding in *State v. Leach*, 340 N.C. 236, 456 S.E.2d 785 (1995), we must conclude that the trial court did not commit error in this case. In *Leach*, the defendant made the identical argument that Defendant raises here concerning N.C.P.I.-Crim. 206.10. The Court, however, rejected that argument, holding as follows:

The instruction in question informs a jury that the circumstances given are only illustrative; they are merely examples of some circumstances which, if shown to exist, permit premeditation and deliberation to be inferred. The instruction tells jurors that they "may" find premeditation and deliberation from certain circumstances, "such as" the circumstances listed. The instruction does not preclude a jury from finding premeditation and deliberation from direct evidence or other circumstances; more importantly, it does not indicate to the jury that the trial court is of the opinion that evidence exists which would support each or any of the circumstances listed. *Therefore, the trial court did not err by giving the instruction at issue here, even in the absence of evidence to support each of the circumstances listed.*

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Id. at 241-42, 456 S.E.2d at 789.

Much like *Leach*, here there was evidence to support some of the other circumstances listed in the pattern instruction. For example, there was evidence from which the jury could have found that Defendant was not provoked by the victim, that the firing of five gunshots at close range constituted “grossly excessive force,” and that the manner of the killing supported a finding of premeditation and deliberation. Accordingly, we find no error.

NO ERROR.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).