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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-769

Filed: 5 June 2018

Brunswick County, Nos. 12-CRS-50974, 50975, 13-CRS-2020, and 2021

STATE OF NORTH CAROLINA

v.

MONTEY ANDREA MURRAY, Defendant.

Appeal by Defendant from judgment entered 14 April 2015 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 9 January 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

MURPHY, Judge.

Montey Andrea Murray ("Defendant") was convicted, *inter alia*, of first-degree murder, and now seeks a new trial on the grounds that his constitutional right to a public trial was violated when several of his school-aged relatives were prohibited from attending his trial. Defendant also argues that he is entitled to a new trial because the trial court erroneously instructed the jury on flight, a theory he contends

was unsupported by the evidence. We do not reach the merits of Defendant's constitutional issue as it was not properly raised below and is therefore unpreserved for appellate review. Regarding Defendant's claim of instructional error, we find no error.

BACKGROUND

On 29 February 2012, Defendant visited Candice Young, a woman he was dating, at her apartment in Shallotte. Defendant stayed with her several times a week, and on this particular evening, Defendant brought his cousin and two puppies with him to her apartment.

Ms. Young worked third-shift as a dispatcher in New Hanover County. Before leaving for work that evening, she asked Defendant to supervise her three year old son, J.M., until she returned from work. Defendant babysat J.M. many times before and agreed to do so again that night.

At 2:01 A.M. on 1 March 2012, Defendant texted Ms. Young:

> I let the dog get him playing, but we all up. He's scared now. You know my dog mean and bite him. Laugh out loud. But he good. Will talk to you later.

Defendant texted her again at 8:51 A.M. stating "[n]eed you now, now, now." Ms. Young responded asking what was wrong and Defendant replied that he "couldn't wake [J.M.] and that he had put him in a tub of water to see if he would respond, and he didn't." Defendant also called another woman he was in a relationship with that

morning and told her, "[m]an, they're probably going to get me for manslaughter. . . [J.M.]'s dead."

Defendant then went to a neighbor's apartment and got a ride to take J.M. to the hospital. In the emergency room, the treating nurse and physician observed bruising on J.M.'s back, chest, and upper abdomen. J.M.'s treating physician also observed that none of J.M.'s injuries were consistent with injuries that typically result from a dog bite. After trying to save J.M.'s life, hospital staff informed Ms. Young that he had died. J.M.'s autopsy later revealed that his "cause of death was multiple blunt force trauma."

Upon learning that J.M. was dead, Defendant "bolted out the waiting room" and drove away from the hospital in a Mercury Mountaineer that Ms. Young had parked outside with the keys still in it. Defendant drove the vehicle back to Ms. Young's apartment, where his cousin was sleeping and told him "we was about to go." Around this same time, Officer Braxton Strickland of the Shallotte Police Department received a radio dispatch put out by the Brunswick County Sheriff's Office advising local enforcement to "Be-On-The-Lookout" for a Mercury Mountaineer that had just left the local hospital. Officer Strickland then proceeded to Ms. Young's apartment complex and approached Defendant in the parking lot. Officer Strickland informed Defendant that he was to remain present at the apartment complex until further notice, but Defendant did not comply with Officer Strickland's request. Instead, he

drove away from the apartment complex in the Mountaineer and engaged law enforcement (with sirens and blue lights activated) in a high-speed pursuit. Defendant ran red lights, weaved between lanes, and rammed law enforcement vehicles multiple times. The pursuit lasted for approximately three miles and ended when Brunswick County Sheriff's deputies executed a precision immobilization technique, known as a "PIT" maneuver, which caused the Mountaineer to safely come to a stop.

Defendant was subsequently indicted for first-degree murder in the death of J.M., two counts of assaulting a government official with a deadly weapon, and one count of felony fleeing and attempting to elude a law enforcement officer in violation of N.C.G.S. § 20-141.5. Defendant's charges were joined for trial which began on 23 March 2015.

During Defendant's trial, the trial court entered an oral order prohibiting several school-aged children, including Defendant's niece, from attending his trial. On the first day of the trial, during jury selection, but outside the presence of the jury pool, the trial judge addressed the presence of Defendant's 11-year-old niece and asked:

> *Trial Court*: Why is she missing school to be here? Is she a witness for this case or anything like that because she's been here just as long as I have.
>
> *Defense Counsel*: She's here for her uncle. . . .
>
> *Trial Court*: Who is her parent or grandparent?

> *Unidentified Female*: Mom and Dad.
>
> *Trial Court*: Stand up, please. Your child shall not miss school to be here and observe this trial. She is not to miss another day sitting in my courtroom. All right. Any more children in the courtroom?

The trial court then addressed a young man present in the courtroom and asked how old he was and who his parents were.

> *Trial Court*: That young man . . . How old is he?
>
> *Unidentified Male*: Twelve.
>
> . . .
>
> *Trial Court*: All right. Stand up. Who are his parents?
>
> *Unidentified Female*: We are.
>
> *Trial Court*: Same parents? Okay. You cannot miss school to be sitting up in this courtroom. Anybody else?

The trial court also told a 15-year-old male and a 14-year-old female that they will both "be in school tomorrow." Finally, the trial court informed the parties and all others in the courtroom that if the parents of the four children "bring these children to the courthouse during the course of this trial without the Court's permission, they will serve 30 days in jail." The next day, two children came back to the courthouse, and the trial judge told Defendant's attorney that she "better not – with the capital 'B' – see another child walk into these proceedings."

After the parties rested, the trial court informed the parties during the charge conference that it intended to give the jury a flight instruction in accordance with the

pattern instruction, N.C.P.I.—Crim. 104.36. Defendant's objection to the instruction was overruled, and the trial court noted the objection.

> *The Court*: Okay. 104.36 Flight, First-Degree Murder.
>
> *Defense Counsel*: We object.
>
> *The Court*: I know you do. Noted for the record.

The following flight instruction was provided to the jury:

> Ladies and gentlemen of the jury, the State contends and the Defendant denies that the Defendant fled. Evidence of flight may be considered by you, together with all other facts and circumstances in this 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 as premeditation or deliberation.

After all jury instructions were given, defense counsel did not renew his previous objection to the flight instruction.

The jury then convicted Defendant of first-degree murder, assaulting a government official with a deadly weapon, and felony fleeing to elude arrest. Defendant timely appealed.

ANALYSIS

A. Right to Public a Trial

Defendant first argues that the trial court violated his Sixth Amendment right to a public trial by prohibiting several school-aged children, including Defendant's niece, from attending his trial. He maintains that the right to a public trial is not limited to the right to have adult relatives observe the trial. Therefore, in the absence of an "overriding interest" that might be prejudiced by the presence of the school-aged children, the trial court's mandate barring them from the courtroom denied Defendant of his constitutional right to a public trial under *Waller v. Georgia*. *Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct. 2210, 2216-17, 81 L.Ed.2d 31, 39 (1984) (stating that "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced").

Defendant has failed to preserve this issue for appellate review because he did not make a contemporaneous objection to the trial court's directive to remove the school-aged children from the courtroom. Under Rule 10(a)(1) of our appellate rules, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Moreover, it is well-settled that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Anthony*, 354 N.C. 372, 389, 555 S.E.2d 557, 571 (2001) (citation omitted). The rule requiring a defendant to raise constitutional issues

at trial also applies to the "structural errors" identified by the United States Supreme Court, which includes the right to a public trial. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) ("Structural error, no less than other constitutional error, should be preserved at trial.").[1]

Notwithstanding Defendant's argument on appeal that the trial court committed a "structural error" by denying him his right to a public trial, to preserve this issue, our appellate rules and related precedent required Defendant to object to the trial court's order and to state the specific grounds for the objection (e.g. that the removal of the school-aged children from the proceedings violated his constitutional right to a public trial). One statement by Defendant's trial counsel that Defendant's niece was "here for her uncle" was insufficient to inform the trial court that Defendant objected to the trial court's order on the basis that it violated his Sixth Amendment right to a public trial. This argument is overruled.

B. Flight Instruction

Defendant next argues that the trial court erred by giving an instruction on flight. Although Defendant did not renew his objection to the flight instruction after the jury retired for deliberations, Defendant's objection during the charge conference

[1] The United States Supreme Court "has identified only six instances of structural error to date: (1) complete deprivation of right to counsel; (2) a biased trial judge; (3) the unlawful exclusion of grand jurors of the defendant's race; (4) denial of the right to self-representation; (5) denial of the right to a public trial; and (6) constitutionally deficient jury instructions on reasonable doubt[.]" *Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 (internal citations omitted).

was sufficient to preserve this issue for appellate review. *State v. Young*, 196 N.C. App. 691, 697, 675 S.E.2d 704, 708 (2009) ("Rule 10(b)(2) does not require a party 'to repeat their objections to the jury instructions after the charge was given in order to preserve their objections for appellate review[,]' where the party's objection was stated at the charge conference." (citations omitted)).

Arguments "challenging the trial court's decisions regarding jury instructions are reviewed de novo by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

Our courts have long held that "a trial court may not instruct a jury on defendant's flight unless there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged." *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (citations and internal quotation marks omitted). "The relevant inquiry is whether there is evidence that defendant left the scene of the crime and took steps to avoid apprehension." *State v. Hope*, 189

N.C. App. 309, 319, 657 S.E.2d 909, 914 (2008) (citing *Levan*, 326 N.C. at 165, 388 S.E.2d at 434 (alterations and internal quotation marks omitted)). Defendant argues that the flight instruction was erroneously given because the evidence was insufficient to show that he took steps to avoid apprehension. We disagree, because Defendant engaged in a high-speed police pursuit after he had reason to believe he was a person of interest in the investigation of J.M.'s death and knew that investigators were coming to talk to him.

Shortly after learning of J.M.'s death at the hospital, Defendant left in the Mountaineer and drove toward Ms. Young's apartment. After Defendant arrived at the apartment complex, Officer Strickland parked his marked vehicle next to the Mountaineer, made contact with Defendant, and advised him that he needed to stay at the complex until Sheriff's Deputies arrived at the scene. Moments later, Defendant got back into the Mountaineer and drove away. This was the beginning of a high-speed police pursuit. Defendant ran traffic lights and executed several other evasive driving maneuvers to counter law enforcement's attempts to stop his vehicle.

Defendant argues that this evidence, taken as a whole, amounts to nothing more than "speculation and surmise" that Defendant did anything that could be construed as an effort "to avoid apprehension on these charges." Defendant's position is not the law in this jurisdiction. To provide an instruction on flight, the evidence need not show that a defendant took actions with the intent to specifically avoid being

apprehended for a particular charge or charges. Rather, a flight instruction is proper when the evidence shows that a defendant left the scene of a crime and then took steps to avoid apprehension by law enforcement. *See Hope*, 189 N.C. App. at 319, 657 S.E.2d at 915. Here, the evidence showed that Defendant, after making inculpatory statements, engaged law enforcement in a high-speed pursuit after learning of J.M.'s death at the hospital. This is sufficient evidence that Defendant left the scene of the crime and took steps to avoid apprehension.

Defendant also argues that "he was going to the hospital" and that "he was driving in that direction" when Sheriff's Deputies were finally able to end the chase with a "PIT" maneuver. However, "[t]he fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). "So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given." *Id.*

The evidence admitted at trial reasonably supports the theory that Defendant fled after the commission of a crime. It was not error for the jury to be instructed on flight.

CONCLUSION

Defendant's argument that he was deprived of his constitutional right to a public trial is dismissed because the issue was not preserved for review. Regarding

Defendant's second argument that the flight instruction was not supported by the evidence, we find no error.

NO ERROR.

Judges BRYANT and BERGER concur.

Report per Rule 30(e).