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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-970

Filed: 21 August 2018

Rutherford County, Nos. 15-CRS-2289, 53380

STATE OF NORTH CAROLINA

v.

HOWARD EARL BATES, Defendant.

Appeal by Defendant from judgments entered 27 February 2017 by Judge J. Thomas Davis in Rutherford County Superior Court. Heard in the Court of Appeals 19 February 2018.

Attorney General Joshua H. Stein, by Sandra Wallace Smith, Special Deputy Attorney General, for the State.

James R. Parish, for defendant-appellant.

MURPHY, Judge.

Defendant seeks a new trial on his conviction of murder in the first-degree and first-degree burglary. He raises four issues: (A) whether there was substantial evidence of premeditation and deliberation presented at trial; (B) whether a jury instruction on flight was warranted; (C) whether the State's closing argument was grossly improper; and (D) whether Defendant was subjected to double jeopardy. We conclude that the trial court committed no error, and neither Defendant's

constitutional right to a fair trial, nor his right to be free from double jeopardy were violated.

BACKGROUND

On the evening of 5 November 2015, Defendant broke into the mobile home of Charles Carson and shot Lori Suhy in the head with a .357 caliber magnum. According to Defendant, he and Ms. Suhy had been in a relationship for four months, and she was living with him in Shelby. Ms. Suhy and Carson had previously been in a relationship and remained friends.

This particular evening, Ms. Suhy came to Carson's mobile home because she needed a place to stay. Later that night, they heard a vehicle pull into Carson's driveway. Someone knocked on the front door of the trailer and then left when no one answered. The evidence showed that the vehicle was Defendant's SUV and that Defendant was the person that knocked on the door. Approximately 15 minutes later, Defendant drove back to Carson's trailer, and knocked on the door again. Carson was now hiding in his bathroom, and Ms. Suhy was hiding in a spare bedroom on the opposite end of the trailer. Carson heard Defendant, who was standing outside the trailer, say "I am not going to leave." Defendant then "kicked in" the front door and went inside. Carson, still hidden in his bathroom, heard Defendant say, "Didn't I tell you?" Shortly thereafter, Carson heard a gunshot, and he exited his trailer through the rear door, running to his cousin's house who lived nearby.

Carson's cousin called 911, and Carson reported the shooting at his residence. Captain Warren Sprouse of the Rutherford County Sheriff's Office responded to the 911 call, and, when he arrived, the door to Carson's trailer was open. Captain Sprouse found Ms. Suhy in the spare bedroom already deceased, face down in a pool of her own blood.

Away from the scene, Master Trooper Scott Morrow of the North Carolina Highway Patrol observed Defendant's SUV traveling at a speed of approximately 75 mph in a 45 mph zone. Morrow initiated a traffic stop, and Defendant pulled into the parking lot of the local mall. However, he did not come to an immediate stop. Defendant slowly drove across the parking and made a U-turn before eventually stopping his vehicle. Morrow approached and observed Defendant crying and talking to his mother on his cell phone. Defendant stated to Morrow, "Man, I got to be honest with you. I just shot somebody." Defendant was placed under arrest without incident. Trooper Morrow then walked back over to Defendant's vehicle and saw a gun on the passenger seat.

Defendant was subsequently charged with first-degree murder and burglary. At trial, the State presented several witnesses, including Lieutenant Jamie Keever with the Rutherford County Sheriff's Office. As part of his investigation, Keever downloaded Defendant's cell phone data to review his call log and text messages. Defendant's cell phone data showed that he called Ms. Suhy fifteen times the day he

killed her, and that Ms. Suhy sent Defendant a text message at 9:03 p.m. that read "I am so sorry, Earl."

Berry Babb, a former co-worker of Defendant who knew Ms. Suhy, also testified for the State. Babb testified that Defendant called him on the evening of 5 November 2015 and indicated that he was looking for Ms. Suhy:

> *The State*: If you would, please, tell the jury about that phone call.
>
> *Babb*: [Defendant] called me on that night and asked me if I knew where [Ms. Suhy] was.
>
> . . . .
>
> *Babb*: And at the time, I did not, and [Defendant] told me to call [Ms. Suhy] and tell her that he was looking for her and that him and her were [sic] going to hell that night.

After the State rested, Defendant moved to dismiss the charges, and this motion was denied.

Defendant testified as part of his defense. He stated that on a typical workday, he would call Ms. Suhy two to three times during his breaks. However, on the day he killed her, Defendant called 15 times, and she never answered. Then, sometime after 8:45 p.m., when Defendant got off work, he started looking for Ms. Suhy. When Defendant called Babb, he told him "I hope she ain't playing with me." Defendant eventually went to Carson's trailer to locate Ms. Suhy, and after Defendant forcefully

entered the dwelling, he located her in the spare bedroom. Defendant testified that he thought Suhy and Carson were having sex and this made him "real angry."

> *Defendant*: I went to the bedroom door, and I opened the door, and she was putting on her shirt. I said, Lori, what's going on? She jumped up, and I don't remember after that. My mind -- took over my mind. I seen her putting her shirt on like they were having sex or something.

Defendant then admitted to shooting Ms. Suhy.

> *Defense Counsel*: Did you know what you had done at that point in time, Earl?
>
> *Defendant*: I just know -- I know I probably hit her, but I didn't know she was dead.

After a five day trial, the jury convicted Defendant of first-degree murder and first-degree burglary. He was sentenced to life imprisonment without parole and timely appealed.

ANALYSIS

Defendant advances four arguments on appeal which we address in turn. First, he argues that the trial court erred by failing to dismiss the first-degree murder charge because the evidence was insufficient to show that he acted with premeditation and deliberation. Second, he argues that the trial court committed plain error by giving the instruction on flight as it was unsupported by the evidence. Defendant's third and fourth arguments respectively contend that the trial court erred by failing to intervene during the State's allegedly improper closing argument

and that his concurrent sentences for first-degree murder and first-degree burglary subjected him to double jeopardy.

A. Denial of Motion to Dismiss – Premeditation and Deliberation

"When considering a motion to dismiss for insufficiency of evidence, the court is concerned only with the legal sufficiency of the evidence to support a verdict, not its weight, which is a matter for the jury." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987). "There must be substantial evidence of all elements of the crime charged, and that the defendant was the perpetrator of the crime." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Murder in the first-degree is defined by statute as the "willful, deliberate, and premeditated killing" of another person. N.C.G.S. § 14-17(a) (2017). "Generally, premeditation and deliberation must be proved by circumstantial evidence because they are not susceptible of proof by direct evidence." *State v. Misenheimer*, 304 N.C. 108, 113, 282 S.E.2d 791, 795 (1981) (quotation marks and citation omitted).

"To satisfy the element of premeditation, the State must present sufficient evidence indicating that the perpetrator thought out the act beforehand for some period of time, however short, but no particular amount of time is necessary." *State v. Williams*, 151 N.C. App. 535, 539, 566 S.E.2d 155, 159 (2002) (citation and quotation marks omitted). "The element of deliberation requires that the perpetrator carried out an intent to kill in a cool state of blood and not under the influence of a violent passion or sufficient legal provocation." *Id.* (citation and quotation marks omitted). "An unlawful killing is deliberated and premeditated if done as part of a fixed design to kill, notwithstanding the fact that the defendant was angry or emotional at the time, unless such anger or emotion was strong enough to disturb the defendant's ability to reason." *State v. Thomas*, 332 N.C. 544, 560, 423 S.E.2d 75, 84 (1992) (citation omitted), *disapproved of on other grounds by State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677 (1998). Our Supreme Court has found the following circumstances to be instructive as to whether premeditation and deliberation exists:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Joplin, 318 N.C. 126, 130, 347 S.E.2d 421, 423-24 (1986) (citations omitted).

In the instant case, the evidence tended to show the following that on the day of the killing, Defendant called Ms. Suhy 15 times, and she never answered, even though Defendant contended they were engaged. Also, approximately an hour before he killed her, Ms. Suhy sent Defendant a text message which read "I am so sorry, Earl." After receiving this text, Defendant called Babb frantically looking for Ms. Suhy. Defendant told Babb to tell Suhy they "were [sic] going to hell that night." The evidence also showed that after Defendant's shift ended, he began actively searching for the victim, driving around Cleveland and Rutherford counties. Defendant drove to the victim's place of employment and did not find her there. Defendant also drove to the residence of Carson, not once, but twice. Standing outside, Carson heard Defendant say that he was "not going to leave," and after no one came to the door to let him in, he forcefully entered, finding Ms. Suhy alone in a state of undress. Carson heard Defendant exclaim, "Didn't I tell you" and Defendant shot Ms. Suhy in the head with a .357 caliber magnum. Defendant then left the scene in his SUV.

This evidence, taken in the light most favorable to the State, is substantial evidence of a premeditated and deliberate murder. In addition to a want of provocation on the part of the deceased, and the existence of some tension between the parties, the evidence also showed that Defendant had sufficient time to contemplate his actions. Specifically, after Defendant came to the realization that Ms. Suhy did not want to be with him, he tracked her down, and his search for her

ended when he figured out that she was spending the night with her ex-boyfriend. The evidence also shows that Defendant made several threatening statements and declarations, which in context are suggestive of premeditation and deliberation (e.g. "were [sic] going to hell tonight," "I am not going to leave," "Didn't I tell you," and "I hope she ain't playing with me"). Furthermore, the brutal manner of this killing is additional evidence of premeditation and deliberation. Defendant shot the victim in the head at point blank range with a high-caliber handgun. From this evidence, a reasonable mind could conclude that Defendant, a man fueled by his own insecurity and a possessive, unrelenting nature, deliberately engaged in a course of conduct as part of a fixed design to kill.[1] As there was substantial evidence of premeditation and deliberation, Defendant's motion to dismiss was properly denied.

B. Flight Instruction

During the jury charge, the trial court provided a flight instruction[2] and Defendant did not object during trial. On appeal, Defendant argues that the trial

[1] Lastly, although Defendant testified that he was "angry" and that "my mind -- took over my mind" before he killed Ms. Suhy, we note that "[t]he requirement of a 'cool state of blood' does not require that the defendant be calm or tranquil." *Thomas*, 332 N.C. at 560, 423 S.E.2d at 84. "The phrase 'cool state of blood' means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason." *Id.* at 561, 423 S.E.2d at 84.

[2] The trial court provided the following instruction: "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 of 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."

court committed plain error by giving the instruction on flight because the evidence was insufficient to show that he took steps to avoid apprehension. We disagree.

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 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 and quotation marks omitted). "A trial court may properly instruct on flight 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. Taylor*, 362 N.C. 514, 540, 669 S.E.2d 239, 261 (2008) (citation omitted). "Evidence that the defendant hurriedly left the crime scene without rendering assistance to the homicide victim may warrant an instruction on flight." *Id.* at 540, 669 S.E.2d at 262.

In this case, it is undisputed that after Defendant fatally wounded the victim, Defendant fled the scene in his SUV without offering assistance or even calling 911. Defendant was then observed driving at a speed of approximately 75 mph in a 45 mph zone and when a State Trooper initiated a traffic stop, Defendant did not immediately stop. This evidence was therefore sufficient to support the trial court's flight instruction. As the trial court did not err in providing the flight instruction,

Defendant is unable to show plain error. *See State v. Baker*, 338 N.C. 526, 554, 451 S.E.2d 574, 591 (1994).

C. State's Closing Argument

In the closing argument, the State told the jurors:

> Right now, whether you realize it or not, as you sit there you are public officials. You are sworn in. You took an oath, we talked to you about it before you were selected. As Mr. Talbert indicated, you were carefully selected. We questioned you individually, and we put trust in you that you will do what the judge tells you to. You will follow the law and give both sides of this case a fair day in court.

On appeal, Defendant contends that by referring to jurors as "public officials," the State made an improper appeal to public sentiment, and the trial court's failure to intervene *ex mero motu* denied Defendant of his right to a fair trial.

Closing arguments are to be evaluated "in context." *State v. Larrimore*, 340 N.C. 119, 160, 456 S.E.2d 789, 811 (1995) "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene ex mero motu." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (citations omitted). "Thus, when defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so

grossly improper as to impede the defendant's right to a fair trial." *Id.*; *see also State v. Augustine*, 359 N.C. 709, 735, 616 S.E.2d 515, 533 (2005) ("Defendant can demonstrate that this closing argument amounted to gross impropriety warranting such trial court intervention by showing that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." (citation and quotation marks omitted)). "Our standard of review dictates that '[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.'" *Huey*, 370 N.C. at 180, 804 S.E.2d at 470 (alteration in original) (citation omitted).

Defendant contends that the State's reference to jurors as "public officials" was a veiled attempt to tell the jurors they should "lend an ear" to public sentiment and opinion. Although the State would be better advised to have refrained from using the term "public officials" to describe jury members, when evaluated in context, we do not find that this particular argument impeded Defendant's right to a fair trial. Rather, this closing argument reminded jurors that they were the conscience of the community and of their obligation to follow the law. Our appellate courts have upheld such closing arguments. *See, e.g.*, *State v. Murillo*, 349 N.C. 573, 609, 509 S.E.2d 752, 773 (1998) (upholding closing arguments "reminding the jury of its role and obligation

to follow the law"); *State v. Moseley*, 338 N.C. 1, 52, 449 S.E.2d 412, 443 (1994) (upholding closing arguments reminding jurors that they were "the conscience of the community"); *State v. Scott*, 314 N.C. 309, 311, 333 S.E.2d 296, 297 (1985) (upholding closing arguments that "correctly informed the jury that for purposes of the defendant's trial, the jury had become the representatives of the community"). Moreover, the State's closing argument did not go outside the record and make a direct appeal to jurors based on public sentiment. *See Scott*, 314 N.C. at 312, 333 S.E.2d at 298 (holding that the prosecutor's statement to the jury that "there's a lot of public sentiment at this point against driving and drinking" crossed the line because it "went outside the record and appealed to the jury to convict the defendant because impaired drivers had caused other accidents"). Accordingly, since the State's use of the term "public officials" was not grossly improper, the trial court did not abuse its discretion by failing to intervene *ex mero motu*.

D. Double Jeopardy

Defendant finally argues that he was subjected to double jeopardy. He contends that his burglary conviction should have been arrested because it merged into the murder charge and his concurrent sentences therefore constitute double jeopardy. We disagree, as this same argument has been previously advanced and held to be without merit by our Supreme Court in *State v. Parks*:

> Where a single criminal transaction constitutes a violation of more than one criminal statute, the test to determine if

> the elements of the offenses are the same is whether each statute requires proof of a fact which the others do not. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same. If at least one essential element of each crime is not an element of the other, the defendant may be prosecuted for both crimes, and such prosecution does not constitute double jeopardy under the fifth and fourteenth amendments to the Constitution of the United States or article I, section 19 of the Constitution of North Carolina.

State v. Parks, 324 N.C. 94, 97, 376 S.E.2d 4, 6 (1989) (citations, quotation marks, and alterations omitted). Like the instant case, the defendant in *State v. Parks* appealed from first-degree burglary and first-degree murder convictions arguing that trying him for both crimes based on his unlawful entry in the murder victim's home constituted double jeopardy. *Id.* at 95-97, 376 S.E.2d at 5-6. Our Supreme Court concluded that the defendant's double jeopardy argument had "no merit" because "the offenses of first-degree burglary and first-degree murder both require proof of an additional fact which the other does not." *Id.* at 97-98, 376 S.E.2d at 7. Similarly, "each crime requires proof of elements not present in the other." *Id.* ("To prove murder, there is no requirement that the perpetrator commit the act at night or that he break and enter an occupied dwelling; such elements, among others, are required to prove first degree burglary.").

Here, although Defendant's specific intent to kill Ms. Suhy satisfied the felonious intent element of burglary and the premeditation and deliberation element

of first-degree murder, "each crime requires proof of elements not present in the other." *Id*. at 98, 376 S.E.2d at 7. Therefore, Defendant's double jeopardy argument is without merit.

CONCLUSION

The evidence admitted at trial was substantial evidence of premeditation and deliberation and supported the inclusion of a jury instruction on flight. Furthermore, Defendant was not denied his right to a fair trial by the State's closing argument, nor was he subjected to double jeopardy.

NO ERROR.

Chief Judge McGEE and Judge BRYANT concur.

Report per Rule 30(e).