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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-299

Filed: 4 December 2018

Onslow County, No. 15 CRS 53805

STATE OF NORTH CAROLINA

v.

TIMOTHY A. NOBLE

Appeal by defendant from judgment entered 22 June 2017 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 15 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State.

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

TYSON, Judge.

Timothy A. Noble ("Defendant") appeals from his conviction of first-degree murder. We find no error.

I. Factual Background

Defendant and the victim, Debra Holden, lived together on Dawson Cabin Road in Jacksonville. They were engaged to be married, but no wedding date had

been set. Defendant owned a plumbing business in Swansboro, and Holden managed their home. Holden suffered from pain due to injuries sustained in an automobile accident and took medication to treat her chronic pain.

Defendant and Terrie Strange had been involved in a romantic relationship for several years. Strange lived on Banister Loop in Jacksonville. Strange was aware Defendant and Holden were living together and had repeatedly asked Defendant to request Holden to move out. Defendant was also engaged to Strange. Defendant had purchased engagement rings for both women and paid their cell phone bills. Strange had reserved a cabin in Pigeon Forge, Tennessee, for their wedding and wedding guests.

During the summer of 2014, Defendant told Holden about his relationship with Strange. Holden was upset, gave Defendant back his ring, left the home, but returned later the same day. Defendant promised Holden he would end the relationship with Strange, but did not.

Defendant left home early in the morning on 31 October 2014 and drove to the plumbing company he owned in Swansboro. Defendant left his cell phone at his office and returned to his and Holden's home on Dawson Cabin Road around 12:30 p.m. Defendant left Dawson Cabin Road and headed back to Swansboro and his office around 2:14 p.m.

Later that same day, Defendant presented an injury to his left thigh, near his groin, to friends who operated a fight club in the area. Defendant stated the injury was due to a piece of shrapnel from an aerosol can, which had exploded out of a bonfire and hit him.

Later in the day, Defendant visited Terrie Strange and returned to his home after 6:00 p.m. Defendant called 911 at 6:48 p.m. to report Holden had committed suicide. Defendant reported that he had been at work since early in the morning and had just arrived home to find Holden had killed herself.

Holden's body was lying on the couch with her arms and hands close together tucked to her body. Holden's legs were bent as if in a sleeping position. Holden's head was facing towards the television. Dried blood was found on Holden's face, indicating some period of time had passed between her fatal injury and her "discovery." A pool of blood had collected upon the floor.

Officers discovered a Taurus .38 caliber revolver and a pillow lying on the floor in front of the couch. The gun was oily. An oil mark was observed on Holden's cheek in addition to the location of the bullet's entry. Holden had been shot in the left temple. The bullet's exit wound was immediately above her right ear. Testimony showed Holden was left-handed. No significant concentration of gunshot residue was present on or recovered from Holden's left hand.

The Taurus revolver found at the scene did not have a "hair trigger." The trigger weight, the force required to pull the trigger to fire the pistol, was between six and a half to eleven pounds.

Paramedics and law enforcement responded to Defendant's 911 call. Defendant told them he had come home after work and found Holden as she was and then had immediately called 911. Paramedic and rescue squad personnel described Defendant as very calm and collected. No suicide note was found in Defendant and Holden's home. No spent bullet or projectile from the .38 Taurus revolver was found inside the residence or within Holden's body.

Onslow County Sheriff's Office Detective Linwood Foy was the detective on duty on 31 October 2014. He took Defendant's statement that night. By the time Defendant met with police on 31 October, he had deleted his dialed call history from his cell phone with the exception of one call received from Terrie Strange at 6:17 p.m.

On 4 November 2014, Defendant presented the injury to his thigh to medical personnel at a Morehead City hospital. He provided the same description of the aerosol can shrapnel flying from a bonfire as the cause of the injury. X-ray and ultrasound images showed the injury appeared to be a bullet wound with the bullet still lodged in Defendant's thigh.

Morehead City police met with Defendant at the hospital and confronted him with the inconsistency of the nature and source of his injury and his assertion it was

aerosol can shrapnel from a bonfire. Defendant changed his story to saying maybe someone had thrown bullets into the bonfire. After being confronted by police, Defendant left the hospital without hearing the results of his ultrasound or receiving treatment for his injury.

Based upon the information provided by the Morehead City police, Detective Foy began investigating Holden's death as a potential homicide. Foy ordered a second autopsy. Relying upon statements provided by Defendant, Medical Examiner Anuradha Arcot initially opined that Holden's death was consistent with suicide. Once the homicide investigation began, Dr. Arcot performed a complete autopsy.

Dr. Arcot found the bullet had entered Holden's head, and traveled straight through to exit the other side. She opined that Holden would have lost consciousness immediately. Once Holden lost consciousness, gravity would have caused her hands to fall to their lowest point. Further, livor, or blood pooling, would occur once Holden died. Based upon the position of Holden's arms and hands at the time rigor mortis had set in, Dr. Arcot opined that "it doesn't make sense for her left hand, which would have been used to shoot -- pull the trigger, is folded -- under her."

Detective Foy obtained video footage from a convenience store near Defendant and Holden's home at the intersection of Dawson Cabin Road and Highway 17. The store's video cameras recorded Defendant's white Nissan "hard body" truck with a

distinctive ladder rack traveling to and from his home several times that day, wholly contradictory to his earlier statements.

Terrie Strange testified Defendant had visited her on the evening of 31 October telling her he had some Halloween candy for her, but left none. He told Strange he had told Holden to leave and he "can't take her [Holden] anymore."

At trial, the State offered testimony tending to show Holden had taken her medications that day and had spoken to her brother on the morning of her death around 10:00 a.m. Holden had set Halloween candy out on the table ready to distribute. Holden's brothers testified that she had an aversion to guns and was religiously opposed to suicide, believing that one would not enter heaven if they had committed suicide. In the last ten days prior to her death, Holden had engaged in forward-thinking activities: refilled her pain medications, committed to pet sit for her brother's dogs the weekend of her death, and discussed plans to go on a cruise with her brother's family. Her treating physician noted no suicidal ideations.

Analysis of Defendant's work computer showed he had searched for how to obtain poisons such as ricin, cyanide, and succinylcholine. Defendant's searches included an article called "10-poisons-used-to-kill-people." Defendant had visited a suicide assistance site and a link to "The Peaceful Pill Handbook" on 27 October 2014.

On 23 October 2014, Defendant visited a physician's assistant. Defendant claimed to need to help his sister "put down" her horse and asked if the physician's

assistant could prescribe "succinate." At trial, Defendant stipulated that his sister did not own any horses.

Defendant testified and denied he had shot and killed Holden. He denied ever planning to marry Terrie Strange. He also testified he had been dishonest about the circumstances of his discovery of Debra Holden's death. Defendant stated he had come back home from work on the morning of 31 October 2014. He sat down on the couch and Holden lay down beside him with her head in his lap. Defendant testified he fell asleep, until the loud bang of the revolver startled him awake.

Defendant traveled back to his office in Swansboro, discovered blood on his clothing and his leg wound. Defendant returned home to change his clothing. Defendant disposed of the clothing in a dumpster behind his friend's club where he had sought assistance with his leg wound. Defendant acknowledged his continuing affair with Terrie Strange. Defendant admitted asking his physician's assistant for succinate, but had meant to say succinylcholine.

The jury returned a unanimous verdict and found Defendant guilty of first-degree murder. The trial court sentenced him to life in prison without the possibility of parole.

II. Jurisdiction

Jurisdiction lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issue

Defendant argues the trial court erred by refusing to submit the lesser-included offense of second-degree murder to the jury.

IV. Standard of Review

We review *de novo* a trial court's decision to submit or deny to the jury an instruction of a lesser-included offense. The trial judge is required to

> charge upon a lesser included offense, even absent a special request therefor, whenever there is *some* evidence to support it. The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense.

State v. Wright, 304 N.C. 349, 351, 283 S.E.2d 502, 503-04 (1981) (citations omitted).

V. Analysis

Defendant argues the trial court erred by not instructing the jury on second-degree murder. He asserts the jury could have concluded he did not kill Holden with premeditation and deliberation. The State initially contends the Defendant did not clearly request an instruction on second-degree murder at the charge conference. We disagree.

The trial transcript clearly reflects defense counsel argued that the court could instruct on all possible lesser-included offenses. Counsel argues that it would be possible for the jury to conclude Holden "did not commit suicide . . . but that

[Defendant] had some involvement in it, but that the State had failed to prove the necessary elements for -- that level of homicide." As explained below, trial court correctly denied Defendant's request.

A. Premeditation and Deliberation

First-degree murder is defined as the "intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Fisher,* 318 N.C. 512, 517, 350 S.E.2d 334, 337 (1986) (citation omitted); N.C. Gen. Stat. § 14-17(a) (2017). Second-degree murder is defined as the unlawful killing "with malice but without premeditation and deliberation." *State v. Gainey*, 355 N.C. 73, 91, 558 S.E.2d 463, 475-76 (2002) (citation omitted); N.C. Gen. Stat. § 14-17(b).

Premeditation requires an advance thought, "but no particular amount of time is necessary for the mental process of premeditation; it is sufficient if the process of premeditation occurred at any point prior to the killing." *State v. Hunt*, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991) (citations omitted). "Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* (citation omitted).

Premeditation and deliberation are usually proven "by circumstances from which the facts sought to be proven may be inferred." *State v. Watson*, 222 N.C. 672, 673-74, 24 S.E.2d 540, 542 (1943).

B. Evidence to Support Lesser-Included Offense

Our Supreme Court has held,

> If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Millsaps, 356 N.C. 556, 560, 572 S.E.2d 767, 771 (2002) (citation and internal quotation marks omitted); s*ee State v. Andrews,* 122 N.C. App. 274, 277, 468 S.E.2d 597, 599 (1996) (where evidence exists that would permit a jury rationally to find the defendant guilty of the lesser offense and acquit him of the greater one, "due process requires that the lesser included offense instruction be given."(citations omitted)).

The trial court is required to provide an instruction on a lesser-included offense only "if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *Id.* at 561, 572 S.E.2d at 771 (citation omitted). Here, Defendant is entitled to an instruction on the lesser-included offense of second-degree murder only if evidence suggests he had acted without premeditation and deliberation. *Gainey*, 355 N.C. at 91, 558 S.E.2d at 476.

Defendant argues there are circumstances from which a juror could conclude "that he never formed the specific intent to kill while his mind was in a cool state of blood." This assertion is unsupported by any evidence at trial.

In *State v. Leazer*, 353 N.C. 234, 238-39, 539 S.E.2d 922, 925 (2000), our Supreme Court held an instruction on second-degree murder was not required where there was uncontradicted evidence of each element of first-degree murder. Defendant-Leazer was indicted for the murder of another inmate in his cell block. *Id.* at 236, 539 S.E.2d at 923.

Leazer presented no evidence at trial and the State's evidence did not reveal any acts or words of provocation on the part of the victim. *Id.* at 238-39, 539 S.E.2d at 925. A witness had observed Leazer and the victim speaking with each other at a table in the recreation room, Leazer appeared to be unarmed, and there was no evidence of any argument between Leazer and the victim. *Id.*

The evidence showed Leazer had entered the recreation room "carrying a shank" and waited until the guard was not looking to strike his victim. *Id.* The Court found this evidence indicated Leazer "had anticipated a possible confrontation" and had "given some forethought to how he would resolve that confrontation." *Id.* (citation omitted).

Further, the Supreme Court recognized the nature and number of the victim's wounds and the passage of time between each blow were indicators of premedication

and deliberation. *Id.* at 239, 539 S.E.2d at 926. The Supreme Court concluded that "mere speculation as to the rationales for defendant's behavior is not sufficient to negate evidence of premeditation and deliberation." *Id.* (citation, brackets and ellipses omitted). The Court found the trial court's failure to instruct on the lesser-included offense of second-degree murder was not error. *Id.*

In *Gainey*, the defendant asserted the trial court had erred by denying his request for an instruction on second-degree murder. 355 N.C. at 92, 558 S.E.2d at 476. The defendant presented no evidence at trial. The State's evidence showed the victim had been shot six times. *Id.* The defendant told police he and a friend had waited for the victim to arrive to attack him and take his car. *Id.* at 89, 558 S.E.2d at 474. The defendant shot the victim and loaded the still-alive-victim into the victim's car's trunk. *Id.* at 82, 558 S.E.2d at 470.

The evidence showed the "defendant deliberately walked to the car, got the gun out, and shot the victim twice." *Id.* at 92, 558 S.E.2d at 476. Our Supreme Court noted the "defendant shot the victim as he was helpless and crying out for help." *Id.* He then dragged the victim's body into the woods and hid it. *Id.* The defendant immediately disposed of the murder weapon and a cloth comforter in which the victim had been wrapped. *Id.* The evidence also showed the defendant and friend had talked about stealing the victim's car before the date of the offense. *Id.*

Our Supreme Court held the evidence fully supported a finding of premeditation and deliberation for the instruction on first-degree murder. The Court held no evidence supported an instruction on second-degree murder, and "to suggest that defendant acted without premeditation and deliberation is to invite total disregard of the evidence." *Id.*

Here, the State's evidence tended to show premeditation and deliberation for first-degree murder. Defendant and the victim Holden lived together and were engaged while Defendant was also engaged to Terrie Strange. Strange had told Defendant he could not be with both women and had initially set an October 2014 wedding date. Defendant had been dishonest with Holden about his continuing relationship with Strange. Defendant researched fatal toxins on the internet shortly before Holden's death and attempted to get a prescription for one of the toxins by falsely stating it was to "put down" his sister's nonexistent horse.

A circular grease spot on the victim's cheek indicated that the gun had been held against her head more than one time, and the revolver did not have a hair trigger. Holden was left-handed and no significant gunshot residue was found on her left hand.

Defendant did not immediately seek aid for Holden, as evidenced by the dried blood and the condition of her body when found. Defendant appeared calm and unemotional at the scene. Defendant had deleted his cell phone history.

Defendant lied to officers that he had not been home when Holden died. He lied about the cause of his leg injury. He disposed of the clothing he was wearing and the bloody pillow Holden's head had been resting on at the time she was killed. His act of leaving his cell phone at his office in Swansboro, while he traveled back to his home in Jacksonville could indicate Defendant may have been trying to create an alibi.

There was no evidence of any animosity or ongoing argument between Defendant and Holden. His trial testimony described her as having been in the kitchen when he arrived home and coming to lie down on the couch in a familiar position while he fell asleep. At trial, Defendant denied he had shot and killed Holden. Defendant claimed Holden had killed herself. No evidence tended to show he had acted in the heat of passion, without a cool state of blood or without premeditation and deliberation.

The State's uncontradicted evidence tends to show a premeditated and deliberate murder. Defendant testified, but offered no evidence to negate premeditation and deliberation, other than a denial that he had shot Holden. Nothing presented by Defendant or any other witness at trial negates premeditation and deliberation.

Defendant is not entitled to a jury instruction on the lesser-included offense of second-degree murder, where there is no evidence to suggest that he acted without

premeditation and deliberation. *See Gainey*, 355 N.C. at 92, 558 S.E.2d at 476 ("There is no evidence supporting second-degree murder, and to suggest that defendant acted without premeditation and deliberation is to invite total disregard of the evidence.").

VI. Conclusion

Defendant's assertion that the jury could have concluded Defendant had shot and killed Holden as the result of some unspecified and unsupported sudden event is insufficient to negate the State's evidence of premeditation and deliberation to require an instruction on any lesser-included offense. The trial court correctly refused Defendant's request for an instruction on lesser-included offenses to first-degree murder. Defendant received a fair trial free of errors he preserved and argued on appeal. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).