IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-719

Filed: 16 July 2019

Chatham County, No. 14CRS51852, 15CRS00036, 17CRS000585

STATE OF NORTH CAROLINA

v.

DEMETRIUS JOHN JOHNSON, Defendant

Appeal by defendant from judgments entered on or about 27 July 2017 by Judge Reuben F. Young in Superior Court, Chatham County. Heard in the Court of Appeals 22 May 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ryan F. Haigh, for the State.

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

STROUD, Judge.

Defendant appeals his convictions for robbery with a dangerous weapon, first degree burglary, and first degree murder. The trial court properly exercised its discretion to limit defendant's presentation of evidence, and defendant has shown no prejudice from the trial court's ruling on the State's objection during his closing argument. We conclude there was no prejudicial error in defendant's trial.

I. Background

The State's evidence showed that in late December 2014, defendant went to the home of his friend, Mr. Christopher Person. Mr. Jones[1] and Ms. Davis were already at Mr. Person's home. Mr. Person gave defendant drugs and money and asked Mr. Jones to take defendant home. Mr. Jones left with defendant, but then defendant returned in a dark toboggan covering his face; he ordered everyone to sit down and demanded money and drugs. When Ms. Davis did not sit down, defendant hit her with a stick. Mr. Person "swung his arm up" and according to Ms. Davis, defendant then "stuck that knife thing across his stomach."[2] The cut injured Mr. Person's pulmonary artery and caused massive bleeding from which he soon died. Defendant then made Ms. Davis go through Mr. Person's pants looking for money, which he took, and then he fled the scene.

Ms. Davis called 911 and informed them the perpetrator was defendant. Emergency personnel and law enforcement came to the home, but Mr. Person died before emergency personnel arrived. In the investigation, officers found a "knot" of money, bloody clothes, and a toboggan; the DNA on the clothes and toboggan was consistent with defendant's DNA. Defendant was arrested.

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[1] We will use pseudonyms to protect the privacy of the witnesses.

[2] The "knife" was a cane sword blade.

Defendant initially told law enforcement he had been visiting a relative, but during his trial he claimed self-defense. A jury found defendant guilty of robbery with a dangerous weapon, first degree burglary ("burglary"), and first degree murder under the felony murder rule ("felony murder"). The trial court arrested judgment on the conviction for robbery with a dangerous weapon and entered a judgment sentencing defendant to life imprisonment without parole for the felony murder and burglary. Defendant appeals.

II. Gang Activity

During defendant's testimony, defendant claimed he cut Mr. Person in self-defense because he feared Mr. Person. Defendant attempted to present evidence of Mr. Person's gang affiliation. The State objected and the trial court sustained the objection. Defendant again attempted to introduce evidence of Mr. Person's gang affiliation, but the trial court ruled the evidence was "more prejudicial than it is probative." Defendant contends "the trial court erred by sustaining the State's objection to testimony from defendant . . . about [Mr. Person's] gang membership and violent gang activities."

We first note that because the jury found defendant guilty of felony murder, with the felony being either robbery with a dangerous weapon or burglary. Evidence of gang membership or *any* other evidence defendant may have wanted to present to show why he feared Mr. Person and needed to act in self-defense would not be a

defense to felony murder because "[t]he only requirement for purposes of G.S. 14–17[, felony murder,] is that the felony involved be one of the specified felonies or an unspecified felony within the purview of G.S. 14–17[,]" *State v. Wall*, 304 N.C. 609, 613, 286 S.E.2d 68, 71 (1982), which defendant's was. *See* N.C. Gen. Stat. § 14-17(a) (2015) (listing both robbery and burglary as applicable underlying felonies).

> The term "felony murder" is an abbreviation for a homicide committed in the commission of or attempt to commit a felony such as specified in G.S. 14-17. Any felony which is inherently dangerous to human life, or foreseeably dangerous to human life due to the circumstances of its commission, is within the purview of G.S. 14-17.

State v. Foster, 293 N.C. 674, 687, 239 S.E.2d 449, 458 (1977) (citation and quotation marks omitted).

Defendant contends in his reply brief that the evidence of Mr. Person's gang affiliation was still relevant to his case because "the excluded evidence would have made it more likely that [Mr. Person] was the aggressor." But again, the "aggressor" analysis is irrelevant for the purposes of felony murder. *See State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995) ("We hold that the trial court correctly instructed on the felony murder rule and on self-defense as it related to the underlying felonies. *Self-defense, perfect or imperfect, is not a defense to first-degree murder under the felony murder theory*, and only perfect self-defense is applicable to the underlying felonies." (emphasis added)). As to the underlying felony, "perfect self-defense" applies only to certain felonies. *See, e.g., State v. Jacobs*, 363 N.C. 815, 822,

689 S.E.2d 859, 864 (2010); *Richardson*, 341 N.C. at 666-69, 462 S.E.2d at 498-99. For example, the defendant was not entitled to a self-defense instruction on the underlying felony of robbery. *See generally Jacobs*, 363 N.C. at 822, 689 S.E.2d at 864 ("As to felony murder, self-defense is available only to the extent that it relates to applicable underlying felonies. We fail to see how defendant could plead self-defense to a robbery the jury found he had attempted to commit himself."). But self-defense may be available where the underlying felonies were discharging a firearm into occupied property and assault with deadly weapon with intent to kill inflicting serious injury. *See State v. Richardson*, 341 N.C. at 666-69 462 S.E.2d at 498-99. Like robbery, self-defense is also not applicable to burglary. *See generally Jacobs*, 363 N.C. at 822, 689 S.E.2d at 864.

Defendant also contends "[i]t is much less likely that the jury would accept the State's theory that [defendant] decided to break into his residence in an effort to steal money if they knew of [Mr. Person's] violent gang activity." But defendant testified about Mr. Person's violent behavior, including Mr. Person punching another individual, "hitting him numerous times and stomping him while he was on the ground." Further, a law enforcement officer testified for the defense about his difficulty in dealing with Mr. Person in a prior incident when he physically threatened the officer. Thus, to the extent knowledge of Mr. Person's violent behavior would make the jury believe defendant was unlikely to steal from such a person, he

was able to present that defense. *State v. Lytch*, 142 N.C. App. 576, 585, 544 S.E.2d 570, 576 (2001) ("[N]o prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence. Given that the trial judge allowed the essential information proffered by defendant into evidence, we conclude that there was no prejudice in excluding the statements to which objections were sustained." (citation and quotation marks omitted)), *aff'd per curiam*, 355 N.C. 270, 559 S.E.2d 547 (2002). This argument is overruled.

III. Defendant's Potential Sentence

Defendant argues that the trial court erred by sustaining the State's objection to his closing argument noting that he would be imprisoned for the rest of his life if he was sentenced to life, and he would not be eligible for parole. During defendant's closing argument, his counsel argued:

> Now when we look at the burden of proving all of these elements, then in essence when it comes to first degree murder, whether it be by premeditation or deliberation or first degree murder or felony murder, the punishment is the same. The punishment is life in prison without parole. That's what the punishment is. And I remember in the old days, people always talked about, well, it said in the old days life without parole.
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> MS. TABER: Objection.
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> THE COURT: That objection will be sustained.
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> MR. WEBB: Okay. Life without parole in North Carolina means that you will serve life without parole. You have no chance of it.

MS. TABER: Objection.

THE COURT: That objection will be sustained.

Defendant contends that

> the trial court erred by sustaining the State's objection to defense counsel's statements in closing argument that the penalty for both premeditated and felony first degree murder was life imprisonment without parole which meant never being released on parole.

(Original in all caps.) We review this issue for abuse of discretion. *See generally Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) ("The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection.").

Defendant is correct that he has a right to inform the jury of the possible sentence he may receive, but he overlooks that he was allowed to present that argument. *See generally State v. Lopez*, 363 N.C. 535, 539, 681 S.E.2d 271, 274 (2009) ("[T]he penalty prescribed for a criminal offense is part of the law of the case and that it is, consequently, permissible for a criminal defendant in argument to inform the jury of the statutory punishment provided for the crime for which he is being tried." (citation, quotation marks, and brackets omitted)). As noted above, defense counsel twice informed the jury that defendant was subject to life imprisonment without parole. The State only objected when defense counsel began to amplify on this point. And, while defendant rightly notes that the objection was sustained, the State did not

seek to strike the defense counsel's statement regarding the possible sentence defendant might receive. Even assuming the objection should not have been sustained, it did not have the effect of preventing defense counsel from informing the jury of the potential sentence. Therefore, defendant has shown no prejudice from the trial court's ruling. This argument is overruled.

NO ERROR.

Judges HAMPSON and BROOK concur.

Report per Rule 30(e).