IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-39

Filed: 15 October 2019

Madison County, Nos. 15CRS213, 15CRS50414, 15CRS50418, 17CRS667

STATE OF NORTH CAROLINA

v.

NANCY CHERIE HOGAN, Defendant.

Appeal by defendant from judgments entered 5 July 2018 by Judge R. Gregory Horne in Madison County Superior Court. Heard in the Court of Appeals 22 August 2019.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Alexander McC. Peters, for the State.

Richard Croutharmel for defendant-appellant.

BERGER, Judge.

On July 5, 2018, a Madison County Jury found Nancy Cherie Hogan ("Defendant") guilty of first-degree murder, robbery with a dangerous weapon, conspiracy to commit murder, and conspiracy to commit robbery with a dangerous weapon. Defendant was sentenced to life in prison without the possibility of parole for her first-degree murder conviction and a consecutive seventy to ninety-six month prison sentence for the remaining convictions. On appeal, Defendant argues that the

trial court (1) erred when it declined to instruct the jury on imperfect self-defense, and (2) committed plain error by admitting the testimony of a State witness. We disagree.

Factual and Procedural Background

In 2013, Defendant lived with the victim, Edward Praytor ("Praytor"), in Madison County, North Carolina. Defendant and Praytor often engaged, as a couple, in sexual encounters with other consenting adults. Defendant's relationship with Praytor began to deteriorate in 2014, when Praytor refused to give up their open relationship in favor of a monogamous relationship with Defendant. In 2015, Defendant moved to Georgia, and Praytor remained in Madison County.

In June 2015, Defendant's son, Brandon Hogan ("Hogan"), and his girlfriend, Diane Chapman ("Chapman"), were living with Defendant in Georgia. Defendant often discussed her anger and resentment towards Praytor with Chapman. Additionally, Defendant told Chapman that she would inherit Praytor's Madison County land if he died, and that Defendant was the beneficiary of Praytor's life insurance policy. Defendant also told Chapman that she had keys and access to Praytor's property. On several occasions, Defendant stated her desire that Praytor would die.

On the evening of July 6, 2015, Defendant told Hogan and Chapman that she wanted to retrieve some of her personal belongings from Praytor because "[s]he

needed money." Rather than go to Madison County, Chapman offered to make money for Defendant by "flipping" drugs, but was refused. Defendant called Darrell Martin ("Martin"), a friend in Buncombe County, North Carolina, and asked if she, Hogan, and Chapman could stay with him later that night. Martin asked why Defendant was driving from Georgia to North Carolina so late in the evening, and Defendant responded, "Oh, I'm going to have some fun. Let's just say revenge is sweet." Martin then asked Defendant what happened, and Defendant responded, "Well, it's best you don't know."

At approximately 1:00 a.m., Defendant, Hogan, and Chapman left for North Carolina. They arrived at Praytor's Madison County home between 4:00 a.m. and 4:30 a.m. Upon reaching Praytor's property, Defendant got out of the car and telephoned Praytor. After speaking with Praytor, Defendant drove the group up to Praytor's home. Defendant went inside with Praytor while Hogan and Chapman waited in the vehicle. After roughly thirty minutes, Chapman exited the vehicle and walked around the side of Praytor's home to urinate. From outside the home, Chapman could hear Defendant crying and Praytor "being loud."

Chapman then heard loud noises coming from the front of the home, including Hogan yelling and Praytor's voice. Chapman also heard noises that sounded like punching and eventually heard Defendant yell, "Where is [Chapman]?" When Chapman returned to the front of the home she saw Hogan holding a knife and an

axe with a broken handle. Chapman also saw Praytor lying on the ground. The medical examiner determined that Praytor suffered twenty to twenty-five total injuries, including a stab wound to the back of the neck, fractures on the left side of his face, and a stab wound to the underside of his chin.

Defendant came out of Praytor's home with a trash bag and told Hogan to put the knife and the axe in the bag. Defendant then drove the group back to her home in Georgia. After arriving home, Defendant and Hogan put their clothes in a trash bag. Later that morning, Defendant, Hogan, and Chapman returned to Praytor's home to clean up the evidence so that "the police wouldn't be able to associate [Defendant with] the crime scene." Once there, Defendant went inside while Hogan and Chapman waited in the vehicle. While inside, Defendant took several items, including a laptop computer, jewelry, and several guns.

Robert Smith ("Smith"), Praytor's neighbor and friend, became concerned when Praytor did not respond to text messages or phone calls. Smith drove to Praytor's home where he saw Defendant, Hogan, and Chapman. Smith recognized Defendant due to a prior relationship with her and Praytor. Smith told Defendant he wanted to speak with Praytor, but Defendant demanded that he leave. Smith left the property and flagged down another driver.

Defendant then became frantic and the group soon fled Praytor's home. Once on the road, Defendant began to swear repeatedly and stated, "I'm going to jail. I'm

going to jail." Smith and the other driver watched Defendant, Hogan, and Chapman leave Praytor's property, and then went to Praytor's home to investigate. They found the home in disarray, as if "people had been looking through things." Praytor's wallet also appeared to have been rummaged through. After discovering Praytor without a pulse and not showing any other signs of life, Smith immediately contacted law enforcement. Once law enforcement arrived on the scene, Smith identified Defendant and informed officers that she lived in northeast Georgia. Using the information provided by Smith, the Madison County Sheriff's Office was able to determine that both Defendant and Hogan resided in Rabun County, Georgia.

After returning to Georgia, Defendant gave Chapman the items taken from Praytor's home, along with the knife and axe used to kill Praytor. Defendant then instructed Hogan and Chapman to hide the items in a nearby wooded area. By this time, the Madison County Sheriff's Office had contacted local law enforcement in Rabun County and provided a list of locations where Defendant might be found. Defendant was discovered by Georgia law enforcement alone in her home and was placed under arrest. While Georgia law enforcement was executing a search warrant of Defendant's home, Hogan and Chapman returned to the home and were quickly apprehended.

A Madison County grand jury indicted Defendant on charges of murder, conspiracy to commit murder, robbery with a dangerous weapon, and conspiracy to

commit robbery with a dangerous weapon. On June 25, 2018, Defendant's jury trial began in Madison County Superior Court with the Honorable R. Gregory Horne presiding.

At trial, Chapman denied having an agreement with Defendant or Hogan to rob or kill Praytor. Chapman further testified that she was unaware of any agreement between Defendant and Hogan to rob or kill Praytor, and that if she had been aware of such an agreement, she would not have gone with the two to Praytor's home. However, Chief Deputy Bronis Coy Phillips ("Chief Deputy Phillips") of the Madison County Sheriff's Office testified without objection that Chapman provided a statement in which she claimed to have warned Defendant and Hogan that it was "a bad idea to rob [Praytor]." According to Chief Deputy Phillips, Chapman also recalled Defendant telling Hogan that Praytor would not notice his property was missing.

Defendant testified at trial that she drove to North Carolina with Hogan and Chapman to purchase marijuana from Praytor. According to Defendant, the three smoked marijuana with Praytor at his home. Defendant further testified that at some point in the evening she and Praytor went outside together. According to Defendant, after she refused a proposition for sex, Praytor pinned her against a vehicle. Defendant testified that she raised her voice and Hogan came out of Praytor's home with a knife. Defendant claims Praytor said, "I got a gun.," and that he and Hogan began fighting.

Although Defendant testified that she did not witness any of the altercation, she did recall Hogan saying, "Don't you ever touch my mother again." Defendant denied ever seeing Hogan with an axe. Defendant also denied ever seeing Praytor with a gun during the altercation but testified that "he carried one with him at all times." After the alleged fight, Defendant lifted a paving stone off Praytor's face. According to Defendant, when she left Praytor's property with Hogan and Chapman the first time, Praytor was still gasping for breath. Praytor ultimately died at the scene from his injuries.

The jury found Defendant guilty of first-degree murder under theories of premeditation and deliberation, and felony murder. The jury also found Defendant guilty of robbery with a dangerous weapon, conspiracy to commit murder, and conspiracy to commit robbery with a dangerous weapon. Defendant appeals, arguing that the trial court (1) erred when it declined to instruct the jury on imperfect self-defense, and (2) committed plain error when it admitted the testimony of Chief Deputy Phillips concerning Chapman's prior statements. We disagree.

I. Jury Instruction

Defendant first argues that the trial court committed error by denying her request to instruct the jury on imperfect self-defense. Whether the evidence is sufficient to warrant an instruction on imperfect self-defense presents a question of

law that is reviewed *de novo*. *State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54 (2010).

A trial court must give all requested jury instructions, at least in substance, so long as the instructions are proper and supported by the evidence. *State v. Craig*, 167 N.C. App. 793, 795, 606 S.E.2d 387, 388 (2005). In determining whether there is evidence to support an instruction, the facts must be viewed in the light most favorable to the party seeking the instruction. *State v. Watkins*, 283 N.C. 504, 509, 196 S.E.2d 750, 754 (1973).

Generally, a defendant is entitled to an instruction on perfect self-defense after producing some evidence that tends to show:

> (1) it appeared to [the] defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) [the] defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) [the] defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) [the] defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Lyons, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995) (citation and quotation marks omitted). "The existence of these four elements gives the defendant a perfect

right of self-defense and requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well." *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 573 (1981) (emphasis omitted).

In contrast, a defendant will be entitled to an instruction on imperfect self-defense where the first two elements existed at the time of the killing, but the defendant, without murderous intent, either was the aggressor or used excessive force. *State v. Richardson*, 341 N.C. 585, 588, 461 S.E.2d 724, 727 (1995). Where a defendant "has only the imperfect right of self-defense" then he is "guilty at least of voluntary manslaughter." *Norris*, 303 N.C. at 530, 279 S.E.2d at 573 (emphasis omitted). For a defendant to establish entitlement to an instruction on perfect or imperfect self-defense,

> two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

State v. Harvey, 372 N.C. 304, 309, 828 S.E.2d 481, 484 (2019) (citation omitted).

Additionally, "[a] person has the right to kill not only in his own self-defense but also in defense of another." *State v. McKoy*, 332 N.C. 639, 643, 422 S.E.2d 713, 716 (1992). However, a person's ability to act in defense of another is limited to those

actions that the other could lawfully take on his own behalf. *Id.* at 644, 422 S.E.2d at 716. The elements of imperfect defense of another are effectively the same as those for imperfect self-defense. *State v. Perry*, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994). Generally, a person is entitled to an instruction on imperfect defense of another if he or she "believes [the killing] necessary to prevent death or great bodily harm to the other and has a reasonable ground for such belief . . . judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the killing." *Id.* at 466, 450 S.E.2d at 476.

Here, Defendant is claiming that she was entitled to an instruction on imperfect self-defense on the theory that Hogan acted either in self-defense or defense of another. However, there was insufficient evidence to support an instruction on imperfect self-defense. When there is no evidence from which a jury could reasonably find that an individual believed it necessary to kill in order to protect himself or another from death or great bodily harm, then a defendant is not entitled to an instruction on either defense. *Harvey*, 372 N.C. at 308, 828 S.E.2d at 484.

At trial, Hogan did not testify. The only evidence presented relating to Hogan's ability to claim self-defense or defense of others was Defendant's testimony. While the evidence at trial tended to show that Hogan was generally aware that Praytor owned several weapons, there was no evidence that Hogan ever saw Praytor brandish a gun, believed Praytor was armed, or believed that Praytor intended to use a gun

against either Hogan or Defendant. Any evidence of Hogan's observations or beliefs at the time of the altercation is purely speculative. Viewing the available evidence in a light most favorable to Defendant, there is no evidence from which a jury could determine what Hogan observed, and no evidence by which a jury could find that Hogan reasonably believed it necessary to kill in order to protect himself or another. Therefore, the trial court did not err when it denied Defendant's requested jury instruction on imperfect self-defense.

II. Plain Error

Defendant next argues that the trial court committed plain error when it admitted the testimony of Chief Deputy Phillips. Generally, "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). However, an issue that has not been preserved by objection at trial may be made an issue on appeal "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4). Our courts review unpreserved issues for plain error when they relate to either (1) error in the trial court's jury instructions; or (2) error in rulings on the admissibility of evidence. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

"[W]here a criminal defendant has not objected to the admission of evidence at trial, the proper standard of review is a plain error analysis rather than an *ex mero*

motu or grossly improper analysis." *State v. Gary*, 348 N.C. 510, 518, 501 S.E.2d 57, 63 (1998). Our Supreme Court recommends cautious application of the plain error rule. *State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012). The doctrine is reserved for situations in which the error results in the serious "miscarriage of justice" or affects the "fairness, integrity or public reputation of judicial proceedings." *Id.* at 516-17, 723 S.E.2d at 333. Under plain error review, a defendant must show that (1) a "fundamental error" occurred at trial, and (2) "absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

As a preliminary matter, we note that Defendant incorrectly conflates the plain error and *ex mero motu* standards with her argument that, "The trial court should have noticed [the error] and intervened *ex mero motu* when the defense failed to object [to the admission of testimony at trial]." Under the proper plain error analysis, Defendant has failed to demonstrate that a fundamental error occurred at trial and, even assuming the existence of error, that the jury probably would have reached a different verdict.

"New information contained in a witness' prior statement, but not referred to in his trial testimony, may also be admitted as corroborative evidence if it tends to add weight or credibility to that testimony." *State v. McDowell*, 329 N.C. 363, 384, 407 S.E.2d 200, 212 (1991). However, where evidence of a witness' prior statement

"directly contradict[s]" his trial testimony, that evidence of the prior statement is barred as hearsay. *Id.* at 384, 407 S.E.2d at 212; *see also State v. Burton*, 322 N.C. 447, 451, 368 S.E.2d 630, 632 (1988).

At trial, Chapman testified under oath that she was unaware of any agreement to rob Praytor and that she would not have travelled to North Carolina with Defendant and Hogan had such an agreement existed. Chief Deputy Phillips later testified that, during an interview with Chapman, she claimed to have warned Defendant and Hogan that it was "a bad idea to rob [Praytor]." Defense counsel did not object to Chief Deputy Phillips' testimony.

Turning to the first prong of the plain error analysis, Defendant has failed to demonstrate that a fundamental error occurred at trial.

Defense counsel's failure to object to Chief Deputy Phillips' testimony "may have been the result of strategic decisions made by Defendant and trial counsel," or Chief Deputy Phillips' testimony "may have been admitted because of questionable performance by counsel." *State v. Bice*, ___ N.C. App. ___, ___, 821 S.E.2d 259, 264 (2018). "Whatever the reason, a trial court is not required to second guess every decision, action, or inaction by defense counsel." *Id.* at ___, 821 S.E.2d at 264.

The trial court must ensure that the essential rights of an accused are preserved, but "the judge should not interfere in the attorney-client relationship" absent "gross incompetence or faithlessness of counsel." *Id.* at ___, 821 S.E.2d at 264

(citation and quotation marks omitted). A trial judge must not "relinquish his role as an impartial arbiter in exchange for the dual capacity of judge and guardian angel of [the] defendant." *Id.* at ___, 821 S.E.2d at 264 (citation and quotation marks omitted). Accordingly, Defendant has failed to demonstrate how the admission of conflicting testimony, following defense counsel's failure to object, amounts to a fundamental error at trial.

Turning to the second prong of the plain error analysis, even assuming that a fundamental error resulted from the admission of Chief Deputy Phillips' testimony, Defendant has failed to demonstrate that the jury probably would have reached a different verdict but for that testimony.

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner." *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 617 (1984). This agreement can be either express or implied from surrounding circumstances and can be shown by either direct or circumstantial evidence. *Id.* at 141, 316 S.E.2d at 617. Rarely is a conspiracy established by any single piece of evidence. *State v. Lawrence*, 352 N.C. 1, 25, 530 S.E.2d 807, 822 (2000). Rather, "proof of a conspiracy may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively . . . point unerringly to the existence of a conspiracy." *Id.* at 25, 530 S.E.2d at 822 (citation and quotation marks omitted). Where the State cannot show an

express agreement, "evidence tending to show a mutual, implied understanding will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991).

At trial, the State presented substantial evidence from which the jury could reasonably infer Defendant engaged in a conspiracy to rob and kill Praytor. The State's evidence tended to show that on July 6, 2015, Defendant, Chapman, and Hogan left Georgia together and arrived at Praytor's residence between 4:00 a.m. and 4:30 a.m. Defendant had at least contemplated not returning to Georgia immediately from this trip when she asked Martin if the three could stay at his residence. When Martin asked why Defendant was arriving in North Carolina so late on the night of the murder, Defendant responded, "Oh, I'm going to have some fun. Let's just say revenge is sweet." She also informed Martin that it was best that he not know what was taking place.

When the three arrived at Praytor's residence, Defendant did not drive up to Praytor's home until after verifying that he would be there. Defendant had previously commented that she would inherit Praytor's property when he died, and that she was the beneficiary of his life insurance policy. Defendant frequently made statements regarding her need for money and told Chapman that she had keys to everything Praytor owned. Defendant also expressed anger towards Praytor and stated on several occasions that she wished Praytor would die.

After Praytor was attacked by Hogan, Defendant yelled, "Where is [Chapman]?," plausibly indicating Defendant's need for assistance in dealing with the crime scene. Witnesses later discovered Praytor's home in disarray, as if "people had been looking through things." Praytor's wallet also appeared to have been rummaged through. Defendant took several items from Praytor's home and later gave those items to Chapman to hide in a wooded area near Defendant's home.

Following the attack on Praytor, Defendant produced a trash bag and directed Hogan to dispose of his weapons in the bag. Although Defendant claims the attack on Praytor was in self-defense, no member of the group ever attempted to contact emergency services to seek medical assistance for Praytor. When the group left North Carolina for the first time, Defendant claimed Praytor was still gasping for breath. After returning to Georgia, the three made a second trip to North Carolina to clean up evidence so that "the police wouldn't be able to associate [Defendant with] the crime scene." As the group traveled back to Georgia for the second time, Defendant continuously stated that she was going to jail, even though Hogan had actually killed Praytor.

At trial, there was no testimony that Chapman or Hogan were surprised they were taking Praytor's property and conflicting evidence as to whether Defendant was surprised by the attack on Praytor. Even after lifting a paving stone off of Praytor's face, Defendant remained calm enough to drive the group to Georgia, back to North

Carolina, and then to Georgia again. Additionally, Chapman indicated in her testimony that she begged Defendant to let her make money by "flipping" drugs, rather than go to Praytor's home. From this statement, the jury could reasonably infer that Chapman was attempting to avoid involvement in a plan or scheme to rob and murder Praytor.

Although Defendant's personal recollection of the events in question varied drastically from the evidence presented by the State, the jury was entitled to reject Defendant's narrative. Even in the absence of an express agreement, when taken as a whole, there was considerable evidence presented at trial from which a reasonable juror could infer Defendant's involvement with Hogan and Chapman in a mutual, implied understanding to rob and kill Praytor. Accordingly, Defendant has failed to demonstrate that a different result was probable absent Chief Deputy Phillips' testimony.

Conclusion

For the reasons set forth herein, the trial court did not err when it denied Defendant's requested jury instruction on imperfect self-defense. Additionally, the trial court did not commit plain error when it admitted the testimony of Chief Deputy Phillips.

NO ERROR.

Judge COLLINS concurs.

Judge ARROWOOD concurs in result only without separate opinion.

Report per Rule 30(e).