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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-200

Filed: 5 May 2020

Wake County, Nos. 16CRS206790, 206791

STATE OF NORTH CAROLINA

v.

ELHADJI SEYDOU DIOP, Defendant.

Appeal by Defendant from judgments entered 26 March 2018 by Judge Henry H. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 8 January 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne M. Middleton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for Defendant.

DILLON, Judge.

Defendant appeals the judgment entered upon a jury verdict finding him guilty of first-degree murder and second-degree murder. We conclude that Defendant received a fair trial, free from reversible error.

I. Background

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On 1 April 2016, Defendant moved into a townhome in Raleigh with his wife Amy, and their child, Fatou, and her two children from another relationship. They had recently moved to Raleigh, and Defendant was unemployed. On 5 April 2016, Amy and Fatou were found dead in the basement of the family home. Defendant was convicted of murder for the deaths.

The evidence at trial tended to show as follows:

On 2 April 2016, three days before the deaths of Amy and Fatou, Defendant became frustrated with Fatou and threw a shoe at her.

On 5 April 2016, starting at around 3:13 pm, Defendant posted various messages on Facebook, including: “Look was GD did to me,” “God do not exist,” “My last day on heart,” “Look what God did 2 me, a beautiful family all gone,” “They died and I’m next and wy God or anyone can stop me,” “Why, why, and why,” “I do not have answers yet,” and “Why God let them die?” Defendant also posted several pictures of his family; some were regular family photos, but one was a picture of the dead bodies of Amy and Fatou on their basement floor.

Someone viewing the posts contacted the police. When they arrived at the townhome, the police found Defendant in the bathroom on the second level, his shirt covered in blood. Defendant had cut himself on the neck and the wrist and had ingested household poisons. Police transported Defendant to the hospital.

Later that evening at the hospital, Defendant agreed to speak with a detective. The detective recorded the interview. During the interview, Defendant stated that around noon, Defendant and Amy got into an argument, which led to Amy attacking Defendant with a sharp object. During their struggle, Defendant and Amy fell on Fatou with Defendant on top. Defendant allegedly tried to get up, but Amy was holding him down. Once able to get up, Defendant checked on Fatou who was unresponsive. Defendant was trying to get to a phone to call 911 when Amy attacked him again. To calm her down, Defendant put her in a chokehold using “extreme force.” Amy eventually lost air and became unresponsive. Defendant attempted CPR on Amy, but nothing would bring her back. Defendant did not call 911 after that because he was afraid of what people would think when they saw what he had done. He then moved Amy and Fatou to the basement and stared at them for hours. During this time in the basement, Defendant created his Facebook account, posted pictures and status updates to Facebook, and texted relatives apologizing. He then tried to kill himself because he felt like he should have been the one to die.

Later, however, Defendant told an investigator from Wake County Child Protective Services (“CPS investigator”) a different rendition of the incident. He claimed that the child “fell out” while running around the home and “the mother fell on top of the child[.]” He stated that “when he got to them, the mother and child were already gone and there was starting to be blood.”

Amy died of asphyxia by strangulation. She had neck injuries that were consistent with a chokehold. Fatou died of asphyxia, but not by strangulation. Rather, Fatou's injuries were consistent with the story Defendant gave the detective.

The jury found Defendant guilty of first-degree murder of his wife, Amy, and second-degree murder of his daughter, Fatou. He was sentenced to life without parole plus 240-300 months imprisonment. Defendant timely appealed.

II. Analysis

A. Sufficiency of the Evidence – First-Degree Murder of Amy

Defendant contends insufficient evidence of premeditation and deliberation supports a verdict of first-degree murder of Amy and that the trial court should have granted his motion to dismiss of that charge. When deciding whether there was substantial evidence sufficient to support a finding of premeditation and deliberation, the trial court considers the evidence in the light most favorable to the State. *State v. Davis*, 325 N.C. 607, 629, 386 S.E.2d 418, 429 (1989).

Our Supreme Court has held “[p]remeditation means that the act was thought over beforehand for some length of time, however short. Deliberation means an intent to kill, carried out in a cool state of blood, . . . and not under the influence of a violent passion or a sufficient legal provocation.” *State v. Taylor*, 362 N.C. 514, 531, 669 S.E.2d 239, 256 (2008) (internal quotations marks omitted) (citation omitted). It has also been held that:

[t]he law does not lay down any rule as to the time which must elapse between the moment when a person premeditates or comes to the determination in his own mind to kill another person and the moment when he does the killing, as a test. It is not a question of time. It is merely a question of whether the accused formed in his own mind the determination to kill the deceased, and then at some subsequent period, either immediate or remote, does carry his previously formed determination into effect by killing the deceased.

State v. McClure, 166 N.C. 321, 328, 81 S.E. 458, 460 (1914).

Premeditation and deliberation are generally not proven by direct evidence; thus, the court considers circumstantial evidence to analyze these elements of first-degree murder. *Id.* at 328, 81 S.E. at 460. Circumstances that our courts have used to prove premeditation and deliberation include: (1) want of provocation on the part of the victim; (2) defendant's conduct and statements before and after the killing; (3) the manner in which or means by which the killing was done, including the evidence that the killing was done in a brutal manner or with use of grossly excessive force, and (4) unseemly conduct toward the victim's corpse. *See State v. Parker*, 354 N.C. 268, 280-81, 553 S.E.2d 885, 894-95 (2001).

Here, viewed in the light most favorable to the State, the jury could have inferred from the evidence that Defendant killed his wife with premeditation and deliberation after he had put his wife into a headlock and used enough pressure to cut off her airway and held that position long enough to kill her. It could be inferred that a headlock produces more time for the aggressor to premeditate and deliberate

a death than other methods of killing. The aggressor feels and controls the act taking place and ultimately determines when to release the hold on the victim's airway.

B. Sufficiency of the Evidence – B1 Second-Degree Murder of Fatou

Defendant alleges the State presented insufficient evidence of (B1) second-degree murder in Fatou's death. He argues there was insufficient evidence that he acted with malice, a required element of second-degree murder. *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citing N.C. Gen. Stat. § 14-17 (1999)).

There are three ways that malice can be proven for second-degree murder: (1) actual malice or an "express hatred, ill-will or spite," (2) an inherently dangerous act "done so recklessly and wantonly as to manifest a mind utterly without regard for human life," or (3) a "condition of the mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (citations and internal marks omitted). The first and third ways listed above have been categorized by statute as a B1 felony, and the second way as a B2 felony. N.C. Gen. Stat. § 14-17 (2018).

The jury found Defendant guilty of the second-degree murder of Fatou under two theories: he committed B1 murder by acting with a condition of the mind which prompted him to take the life of his daughter without just cause, excuse, or justification; and he committed a B2 murder by engaging in an inherently dangerous act. He was convicted by the jury for the B1 felony.

We conclude that the evidence, in the light most favorable to the State, is sufficient to support the jury's finding of (B1) malice. Specifically, evidence showed that Defendant threw a shoe at his helpless two-year old daughter a few days before her death; Fatou was suffocated without incurring any bruising or other outward injuries, from which a jury could infer that she died by some means other than being fallen upon; Defendant's wounds were very minimal; and police, otherwise, found no evidence of a struggle as described by Defendant. Also, Defendant's reaction to Fatou's death, by not immediately seeking help, but rather creating a Facebook account to post pictures of her and her mother's lifeless bodies, is probative. From this evidence, the jury could have found that Defendant acted out of ill-will or spite or acted to take Fatou's life without justification.

C. Failure to Instruct on Involuntary Manslaughter

Defendant argues that the trial court erred in failing to provide the jury with an instruction on involuntary manslaughter. The State asserts that this issue was not properly preserved. Indeed, Defendant does not point to anything in the record where his counsel ever expressly requested an instruction on "involuntary manslaughter" for the death of Fatou. Rather, Defendant only notes that his counsel made a general request that the jury be instructed for "first-degree murder and lesser." The trial court recognized this request at the charge conference, stating:

Okay. So what we're left with that you requested is your special instruction on first-degree murder *and lessers*,

intent, accident, weight of the evidence, credibility of witnesses, burden of proof, reasonable doubt, function of the jury. Is that correct?

(Emphasis added.) Later in the charge conference, though, the trial court indicated that it would give certain instructions, including for first-degree murder, second-degree murder, and accident, but would not give certain other instructions. The trial court never expressly mentioned that it was refusing a request for an “involuntary manslaughter” instruction for Fatou’s death, and Defendant’s counsel never called to the trial court’s attention that they thought the instruction should be given.

Presuming the trial court erred by failing to instruct the jury on “involuntary manslaughter,” we conclude that Defendant failed to preserve this error. Rule 10 of our Rules of Appellate Procedure states that “[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict” N.C. R. App. P. 10(a)(2). Our Supreme Court has held that the purpose of Rule 10 “is to require a party to call the court’s attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal.” *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991) (citation omitted). Here, Defendant’s counsel failed to expressly call to the trial court’s attention that an “involuntary manslaughter” instruction was warranted.

However, unpreserved instructional and evidentiary issues may be reviewed under the plain error standard. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). But an appellant waives “plain error” review by failing to argue plain error in its brief. *State v. Cabe*, 136 N.C. App. 510, 514, 524 S.E.2d 828, 831 (2000). Here, Defendant made no plain error argument. Defendant did not demonstrate that the trial court committed a fundamental error, nor did Defendant demonstrate that the fundamental error would establish prejudice against Defendant’s case.

We conclude that this issue was not properly preserved and that Defendant, otherwise, failed to argue the proper standard of review on appeal.

D. Defendant’s Custodial Statement

Defendant argues that the trial court erred in admitting his pre-trial statement to the CPS investigator. Procedurally, Defendant was required to file a pretrial motion to suppress on this matter. *See* N.C. Gen. Stat. § 15A-975 (2018) (“In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial[.]”). This statute “not only requires the defendant to raise his motion according to its mandate, but also places the burden on the defendant to demonstrate that he has done so.” *State v. Drakeford*, 37 N.C. App. 340, 345, 246, S.E.2d 55, 59 (1978). Without a pretrial motion, the evidence may be challenged

only if defendant demonstrates (a) that he did not have a reasonable opportunity to make the motion before trial; or

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(b) that the State did not give defendant sufficient notice of the State's intention to use such evidence; or (c) that after a pretrial determination and denial of the motion, additional facts have been discovered which could not have been discovered with reasonable diligence before determination of the motion.

State v. Harris, 71 N.C. App. 141, 143, 321 S.E.2d 480, 482 (1984).

Here, Defendant's counsel did not object to the statement at trial based on any of the above grounds, but merely on a contention that the CPS investigator was an "agent of the state" and that the statement was, therefore, a custodial statement. The State responded, contending that the CPS investigator was not an agent of law enforcement. The trial court did ask if the State had given pre-trial notice to Defendant that his statement to the CPS investigator might be offered by the State as evidence, in which the following exchange occurred:

THE COURT: Notice was given to the defendant?

PROSECUTOR: Yes, Your Honor. . . [The CPS investigator] is on the witness list and the report that she made in this case [which includes Defendant's statement to her] was provided as part of the discovery.

* * *

THE COURT: And y'all [Defendant] didn't object?

DEFENSE: That's correct, Your Honor. We did not, prior to now, no sir.

THE COURT: Okay. Objection is overruled.

We conclude that Defendant made no argument that the State had failed to

give adequate notice that it intended to use his statement to the CPS investigator, but rather only objected on the basis that the statement was custodial in nature. We further conclude that the above exchange does not establish that the trial court erred by not excluding the evidence based on inadequate notice, where Defendant's counsel seems to imply that he did have adequate notice by his admission that he had failed to object prior to trial.

Defendant made no argument to the trial court that the State failed to give the required notice, and Defendant failed to show that he had complied with Section 15A-975.

III. Conclusion

We conclude sufficient evidence tended to show premeditation and deliberation to justify a jury finding of first-degree murder. Likewise, we also conclude that there was sufficient evidence to support a jury finding that Defendant committed B1 second-degree murder.

Defendant did not properly preserve his challenge for an instruction of involuntary manslaughter, and ultimately waived our ability to review his challenge to the admission to the CPS investigator by failing to make a timely motion before the trial court.

NO ERROR.

Judges TYSON and MURPHY concur.

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Report per Rule 30(e).