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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-190

No. COA20-760

Filed 15 March 2022

Washington County, No. 17CRS050253, 50256

STATE OF NORTH CAROLINA

v.

ROBERT LA'SHAUN HOLLEY, Defendant.

Appeal by Defendant from judgments entered 29 August 2019 by Judge Walter H. Godwin Jr., in Washington County Superior Court. Heard in the Court of Appeals 2 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for the Defendant.

DILLON, Judge.

¶ 1 Defendant Robert Holley was convicted of first-degree murder and other crimes for fatally shooting Kendra Norman. We conclude Defendant received a fair trial, free of reversible error.

I. Background

¶ 2 On 7 May 2017, first responders were dispatched to the home of Defendant's parents, where they found the victim, who was pregnant, unconscious with a bullet wound in her chest. Neither she nor her unborn baby survived.

¶ 3 Defendant was found guilty by a jury of first-degree murder and murder of an unborn child. Defendant filed a defective *pro se* written notice of appeal. Defendant has also filed a petition for writ of *certiorari*. In our discretion, we grant the writ.

II. Analysis

A. Motion to Dismiss

¶ 4 Defendant argues that the trial court erred by denying his motion to dismiss, contending that there was insufficient evidence from which the jury could reasonably find that he committed first-degree murder. We disagree.

¶ 5 On a motion to dismiss based on insufficient evidence, "all of the evidence, whether competent or incompetent, must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). Our Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Mckinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982).

¶ 6 When viewed in the light most favorable to the State, there was sufficient evidence of first-degree murder, which is defined as "the unlawful killing of a human being with malice, premeditation and deliberation." *State v. Misenheimer*, 304 N.C.

108, 113, 282 S.E.2d 791, 795 (1981). This evidence tended to show as follows: The victim was living in the home belonging to Defendant's parents. Defendant's father told the victim to move out, but she refused. Sometime later, Defendant came by and was holding a gun outside the home. Defendant walked inside into the first-floor bedroom, gun in hand, and closed the door. The victim was inside that room at the time. Defendant told the victim to do what his father told her and "get the f*** out of here, or I'm going to make you." The victim refused, replying, "Well, B****, I ain't going no f***ing where." Seconds later, a gunshot rang out from the bedroom. Defendant then exited the room unharmed. The victim, though, had been shot in the chest. Defendant testified that he did not shoot the victim and was not even present.

¶ 7 It could be inferred from this evidence that Defendant fatally shot the victim. It could also be inferred from this evidence that Defendant killed her with malice. Malice can be established by the "intentional[ ] infliction of a wound with a deadly weapon which results in death." *State v. Coble*, 351 N.C. 448, 451, 527 S.E.2d 45, 47 (2000). And a gun is a deadly weapon. *State v. Barnes*, 333 N.C. 666, 686, 430 S.E.2d 223, 234 (1993).

¶ 8 It could be inferred from the evidence that Defendant acted with premeditation. "Premeditation means that the act was thought out beforehand for some length of time, however short; but no particular amount of time is necessary for the mental process of premeditation." *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d

673, 693 (1986). Here, there was evidence that Defendant came to the house with a gun; that he closed the door to the bedroom where he was alone with the victim; and that he threatened to use force against her.

¶ 9 It could be inferred from the evidence that Defendant acted with deliberation. Deliberation means the "intent to kill was formed while the defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation." *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991). It is true that the evidence tended to show that the parties were in an argument. However, loud arguing and name calling, on their own, have never been held to be the type of uncontrollable urge contemplated by the deliberation element. *Cf. State v. Watson*, 287 N.C. 147, 156, 214 S.E.2d 85, 91 (1975) ("Mere words, however abusive, are never sufficient legal provocation to mitigate a homicide to a lesser degree."). Further, our Supreme Court has noted that "[d]eliberation may occur during a scuffle or a quarrel between the defendant and the victim if the emotions produced by the scuffle or quarrel have not overcome the defendant's faculties and reason." *State v. Harden*, 344 N.C. 542, 555, 476 S.E.2d 658, 664 (1996).

¶ 10 Lastly, it could be inferred that Defendant shot the victim with the intent to kill her because shot her in the chest.

B. *Ex Mero Motu*

¶ 11 Defendant argues that the trial court erred by failing to intervene *ex mero motu* during the State's cross-examination of Defendant's father. Specifically, the prosecution quoted a law enforcement officer who said that he concluded Defendant shot the victim:

> Q: Do you recall agent Godfrey, again, on more than one occasion during this almost hour interview looking at you and saying, "Mr. Holley, we know Shaun Killed Kendra Norman. We know your son killed her in your house, but you're not being truthful about it," at which time you would hang your head. You'd say, "Well, I – I didn't see Shaun"? Isn't that right?
> A. Yes.

Defendant did not object to the question at trial. Thus, "defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998). "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *Id.* at 23, 506 S.E.2d at 467.

¶ 12 While it may be improper for an officer's opinion concerning the defendant's guilt to come into evidence, *see, e.g., State v. Carrillo*, 164 N.C. App. 204, 210, 595 S.E.2d 219, 223 (2004), we cannot say that the trial court had a duty to intervene. "[T]he remarks must be viewed in context and in light of the overall factual circumstances to which they refer." *State v. Womble*, 343 N.C. 667, 693, 473 S.E.2d

291, 306 (1996). Defendant's father had denied seeing Defendant at the home immediately after the shooting. During the cross-examination, the State sought to show that Defendant's father hung his head in response to the officer's statement to him to show that the father was being untruthful. The officer's statement contained in the State's question was not introduced to prove the truth of the matter asserted but to show how the father's response to the statement tended to show that he had lied about not seeing his son at the home.

¶ 13 But even assuming the statement was inappropriate and the judge had a duty to intervene, we conclude that such error was not prejudicial given the evidence against Defendant in this case. *See State v. Vines*, 105 N.C. App. 147, 156, 412 S.E.2d 156, 163 (1992) (improper comments were not sufficiently prejudicial in light of the strong case against the defendant).

C. Witness Statement

¶ 14 Defendant's next argument centers on the way the State's key witness, who testified to seeing Defendant immediately after the shooting, described the look he gave her. She testified that Defendant "was looking at me like he wanted to shoot me . . . like, 'B****, if you say something or tell something I'm going to shoot you[.]' "

¶ 15 Defendant's attorney did not object when the statement was made. Therefore, we must review the statement under plain error. To prevail under a plain error analysis, Defendant must first show that the trial court committed some type of error.

Therefore, assuming the testimony was otherwise inadmissible, Defendant must show that the trial court erred by failing to intervene *ex mero motu*. Indeed, the trial court does not have a duty in every instance to intervene when evidence not allowed by our Rules of Evidence is offered. However, Defendant makes no such argument on appeal, but simply argues that the testimony was inadmissible.

¶ 16 But even assuming Defendant met this burden of showing error by the trial court, we conclude that Defendant failed to establish that "absent the error, the jury probably would have reached a different result." *State v. Cummings*, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000) (citation omitted).

¶ 17 Even if the witness should not have made the statement to describe how she perceived Defendant, we cannot say that the jury probably would have reached a different result but for this statement. She gave plenty of admissible testimony to show that Defendant shot the victim.

III. Conclusion

¶ 18 We conclude that there was sufficient evidence from which the jury could reasonably conclude that Defendant committed first-degree murder. Defendant received a fair trial, free of reversible error.

NO ERROR.

Judges WOOD and GORE concur.

Report per Rule 30(e).