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NO. COA01-1319

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

STATE OF NORTH CAROLINA

v. Rockingham County
No. 00 CRS 11795

DANIEL LANDON CHRISCO

Appeal by defendant from judgment entered 29 June 2001 by Judge Lindsay R. Davis, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy A. Cooper, by Special Deputy Attorney General James P. Longest, Jr., for the State.

John T. Hall, for defendant-appellant.

TYSON, Judge.

Daniel Landon Chrisco ("defendant") appeals from the trial court's entry of judgment after a jury returned a verdict finding him guilty of second-degree murder. We find no error.

I. Facts

The State's evidence tended to show that, on the morning of 4 October 2000, defendant, Zachary Rogers ("Rogers"), and Bradley Brown ("Brown") left Brown's house in defendant's car with defendant driving and traveled to Rockingham County High School in search of marijuana. Rogers was seated in the back seat and saw a rifle laying behind the seat.

Defendant, Rogers, and Bradley parked near the school, exited the car, and headed into the woods to look for marijuana plants. Rogers carried a Ginsu knife to cut down the growing plants. The three found a three-inch tall plant in a pot, grabbed it, and placed it in the car.

On the way back to Brown's house, defendant stated, "Let's go check out Alex's plants." Rogers was apprehensive as he knew that Alex Grove ("Alex") would be watching his property. Defendant assured Rogers that they would only drive by and look. Evidence was presented that defendant had previously stolen marijuana from Alex.

Defendant drove toward Alex's house, located about ten minutes from the school. Defendant drove past the house looking for any movement. Seeing none, defendant parked the car close to Alex's house but out of direct sight. The three exited the car, and walked toward the house.

Alex pulled his truck behind defendant's car, parked ten to fifteen feet behind it, jumped out of his truck, and ran toward defendant. Defendant grabbed his rifle out of the back seat of his car. As Alex approached defendant, Alex said, "What are you going to do, kill me?" Alex grabbed the barrel of the rifle. Defendant jerked away from Alex and, according to Rogers, stepped backwards four to five feet, raised the rifle, cocked the lever, and fired, hitting Alex between the eyes with one shot. Alex staggered backward in a semicircular motion and fell onto the ground with his feet twitching. Blood was pouring from the gunshot wound.

Defendant ejected the bullet casing and gave it to Brown. The three jumped into defendant's car and drove off. Rogers noticed that he had left his Ginsu knife at the scene. Defendant drove back to the scene and waited in his car while Rogers and Brown retrieved the knife. After retrieving the knife, Brown stole four marijuana plants from Alex's porch and placed them in defendant's car. Defendant, Brown, and Rogers again left the scene and drove to Brown's house. Brown discarded the knife and shell casing in a wooded area behind his house. Alex was later found dead by a neighbor.

Later that day, defendant, Rogers, and Brown again met and smoked some marijuana. The following night, Rogers told his father what had happened. On 6 October 2000, Rogers gave a voluntary statement to the police with his father present. Based on that statement, officers searched behind Brown's house and found the shell casing and the Ginsu knife.

Officers interviewed defendant on 7 October 2000. Defendant was neither under arrest nor handcuffed. Defendant, knowing he was being interviewed and investigated for a murder, communicated a written statement to the officers and initialed each page. Defendant was arrested for first-degree murder on 7 October 2000. A Grand Jury returned an indictment for second-degree murder on 4 December 2000.

The State gave notice to defendant on 16 March 2001 that they intended to introduce his written statement into evidence. Defendant made no pretrial motion to exclude his statement.

Defendant objected to the statement when it was admitted into evidence during trial on 26 June 2001. The trial court ruled that defendant had waived his objection by failing to file a pretrial motion to suppress. Defendant's statement was read to the jury. Defendant testified before the jury that he had no intent to kill Alex. Defendant filed a pretrial motion to use Brown's statement at trial. The trial court denied this motion without prejudice to reapply in the event subsequent evidence became apparent to the moving party.

The jury convicted defendant of second-degree murder on 29 June 2001. Defendant was sentenced to 100 months minimum and 129 months maximum. Defendant appeals.

II. Issues

Defendant assigns as error the trial court's (1) overruling defendant's objection to the State's use of defendant's statement to officers, (2) violating defendant's state and federal constitutional right to effective confrontation of a witness, (3) denying defendant's motion to declare a defense witness unavailable and for introducing his statement into evidence, and (4) failing to dismiss the charges against defendant for insufficiency of the evidence.

III. Defendant's Statement

Defendant claims that the officers failed to fully inform defendant, who was seventeen years old at the time that he communicated his statement to police, of his rights pursuant to G.S. § 7B-2101(a)(3) and argues that defendant "did not know his complete

pre-interrogation rights, [and] he could not have knowingly, voluntarily and willingly waived his rights."

Defendant concedes that he made no motion to suppress his statement prior to trial. Defendant also concedes that "after raising the first objection ..., no action was taken by the defendant or by his trial counsel to challenge the use of defendant's statement at trial in order to preserve the error or to bring it to the attention of the trial court."

The following exchange occurred at trial:

> [STATE]: I move to introduce State's Exhibit 15.
>
> THE COURT: Any objection?
>
> [DEFENSE]: Objection. Yes.
>
> THE COURT: Pardon?
>
> [DEFENSE]: Yes, we object.

The trial court excused the jurors. Prior to conducting *voir dire*, the trial court asked defendant's counsel the reason for the objection.

> [DEFENSE]: Just, basically, the State has already introduced evidence that his parents were present. They neglected to have a parent present, and they were not present, and the statement was taken without them. So, we object to its introduction based on that.
>
> . . . .
>
> [DEFENSE]: I'm still going to assert my objection. We intend to testify, *and we think it would come into evidence in any event in the cross examination*. We

> just don't feel it's appropriate at this point in time in view of the fact that his parents were present. They knew they were present and did not allow him to come in in advance. (Emphasis supplied).
>
> . . . .
>
> [DEFENSE]: . . . . As I indicated, *I think it would probably come* in at some point. I just want to preserve that for the record. (Emphasis supplied).
>
> THE COURT: All right. In light of the previous ruling about requiring the filing of motions under North Carolina law and the defendant's failure to move to suppress or in some other fashion within the time set by that order, I am concluding that the objection is waived and will permit the statement to come in, if that is the sole basis of the objection.
>
> [DEFENSE]: Yes. We just except for the record.

This issue is controlled by *State v. Jenkins*, 311 N.C. 194, 203-04, 317 S.E.2d 345, 350-51 (1984). Any failure to warn defendant in accordance with G.S. § 7B-2101(a)(3) "was not raised in the motion to suppress and was not argued in the trial court. Defendant may not, therefore, raise this issue for the first time on appeal." *Id.* This assignment of error is overruled.

IV. Confrontation of Witness

Defendant contends that the "outcome of this trial is in doubt because of the denial of the defendant's constitutional right for effective confrontation of the widow of the victim." Defendant

argues that the trial court "did not allow [defendant] to introduce . . . three prior statements made by [Tammy Groves Moore, the widow of Alex] to law enforcement officers . . . for distribution to the jury after they were used during cross-examination of the witness."

Defendant concedes that the decision to exclude evidence is within the trial court's discretion. Defendant subpoenaed Moore as a hostile witness to impeach the character of the deceased. Moore was not a witness to events that led to defendant's shooting and killing Alex. Moore and four other witnesses testified about Alex's marijuana use, spousal abuse, and work habits. The jury heard all this evidence. Defendant objects to the trial court's failure to publish Moore's statements to the jury.

Defendant has failed to show that the trial court abused its discretion by refusing to publish the prior statements. The substance of these statements was heard by the jury during in-court testimony by the declarant. This assignment of error is overruled.

V. Witness Unavailable

Defendant contends that he "had access to evidence that the shooting was accidental, but [the trial court's] ruling denied him use of that evidence." Defendant argues that the trial court's pre-trial ruling to exclude the statement by Brown "caused the jury to reach a decision it would not have made if the statements had been included in the evidence presented by the defendant."

At the pre-trial hearing, the trial court found that "as a matter of law, that Brown will be unavailable for trial" if he continued to follow the advice of counsel to assert his fifth

amendment privilege. The trial court went on to find that "the statement does not possess any inherent reliability of credibility. It has no indicia of reliability of credibility and does not constitute a statement against interest so as to render the statement admissible pursuant to 804 B(3) [sic]." It further found that "the Court is of the opinion given the same bases for the inconsistency between Brown's statement, Chrisco's statement, and Roger's statement, and the exculpatory nature of the Brown statement that insofar as the Court's inquiries under 804 B(5) [sic] are concerned that this statement is in no way credible and possesses none of the indicia of reliability." The trial court ruled that none of the exceptions to the hearsay rule applied and the statement of Brown was inadmissible.

However, the trial court's order concluded "This ruling is without prejudice to the defendant to apply to the trial Court for any further reconsideration in the event subsequent evidence shall come available apparent to the moving party." Defendant never attempted to have Brown's statement admitted into evidence during the trial nor did he ask for reconsideration of the order as the trial court expressly allowed him to do. We hold that defendant has waived his right to address on appeal the order finding Brown's statement inadmissible. We overrule this assignment of error.

VI. Insufficiency of the Evidence

Defendant contends that the evidence showed, if anything, that he was guilty of manslaughter. Defendant argues that "the evidence showed that [defendant] acted in imperfect self-defense, did not

intend to kill the victim, and there was no malice to support the conviction of second-degree murder." We disagree.

The trial court must determine whether substantial evidence exists (1) for each essential element of the offense charged and (2) that defendant is the perpetrator of the offense when ruling on a motion to dismiss for insufficiency of the evidence. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

"In ruling on a motion to dismiss, the trial court must view all of the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence." *State v. McAllister*, 138 N.C. App. 252, 259, 530 S.E.2d 859, 864, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000) (citation omitted). "If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Horner,* 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958). "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals." *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986) (citing *State v. Vestal*, 283 N.C. 249, 195 S.E.2d 297, *cert. denied*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973) (other citations

omitted)). Once substantial evidence is before the jury, any conflicts and discrepancies are for the jury to resolve. *Id.* (citing *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971); *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972)).

Malice is presumed when "an individual intentionally takes the life of another with a deadly weapon." *State v. Deans*, 71 N.C. App. 227, 232, 321 S.E.2d 579, 582 (1984), *disc. rev. denied*, 313 N.C. 332, 329 S.E.2d 386 (1985).

Here, there was sufficient evidence that defendant shot defendant with malice. Alex confronted defendant entering his property. Alex knew that defendant had previously stolen marijuana from him. Alex was unarmed. Alex saw defendant with a rifle. Alex asked defendant if he was going to kill him. Alex attempted to disarm defendant. Alex was shot between the eyes by defendant who was standing four to five feet away. Defendant did nothing to render any aid or assistance to Alex after the shooting.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence to submit second-degree murder to the jury. The trial court did not err by failing to dismiss the case for insufficiency of evidence. This assignment of error is overruled.

VII. Conclusion

We have carefully reviewed all of defendant's assignments of error and find no error in the conviction of defendant for the second-degree murder of Alex Grove.

No error.

Judges MARTIN and THOMAS concur.

Report per Rule 30(e).