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NO. COA01-1432

NORTH CAROLINA COURT OF APPEALS

Filed: 01 October 2002

STATE OF NORTH CAROLINA

v.

Cleveland County
Nos. 98 CRS 9636
98 CRS 9637

MICHAEL SCOTT PASOUR

Appeal by defendant from judgments entered 26 March 2001 by Judge J. Gentry Caudill in Cleveland County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Ronald M. Marquette, for the State.

The Law Firm of Charles L. Alston, Jr., by Charles L. Alston, Jr., for defendant-appellant.

THOMAS, Judge.

Defendant, Michael Scott Pasour, appeals after being convicted of second-degree murder and felonious breaking and entering. He was sentenced to a minimum term of 230 months and a maximum term of 285 months for second-degree murder and seven to nine months for felonious breaking and entering. We find no error.

The State presented evidence tending to show that on 21 August 1998, defendant and Kenneth Wood killed Roger McDaniel, whom they suspected of attempting to molest the six-year-old son of defendant's girlfriend. They had seen the boy talking to a man in an automobile. The boy reported that the man had asked him to get

into his vehicle. Later that day, Wood saw a similar vehicle parked in a nearby neighborhood. Wood and defendant went there and encountered the victim outside a nearby residence. They knocked him to the ground and proceeded to punch and kick him.

Defendant and Wood admitted to police that they had beaten and kicked the victim. Defendant stated that the victim had pulled a gun on them. The police found a gun on the ground approximately eight to twelve feet from the victim's body.

The victim died as a result of "[b]lunt trauma to the head with a fracture of the neck." In addition to suffering a fractured neck, the victim sustained fractures to his nose and cheekbone, multiple bruises to his head, abdomen and arm, dual "black eyes" and internal hemorrhages as a result of the assault.

Defendant's testimony tends to show that he and Wood tackled the victim when the victim drew a gun on them. They kicked the victim in order to get the gun from the victim's hand.

By defendant's first assignment of error, he contends the trial court erred by allowing the State's motion *in limine* to limit defendant's cross examination of a witness regarding the victim's reputed sexual orientation and association with a reputed child molester. However, this argument is not properly before us.

During the course of trial the prosecutor filed a motion to prohibit such inquiry by defendant. The trial court allowed the motion as to hearsay statements regarding the victim's reputation and associations. As for the witness's personal knowledge or observation of the victim's proclivities and associations, the

trial court reserved ruling. Subsequently, when defendant cross examined the witness, he asked only eight questions, none of them concerning matters named in the motion *in limine*.

An objection to an order denying or allowing a motion *in limine* is insufficient to preserve the issue for appellate review. *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999). The appellant must object to the evidence when it is offered in the case of a ruling allowing evidence, or must attempt to offer the excluded evidence in the case of a ruling excluding evidence. *State v. Locklear*, 145 N.C. App. 447, 452, 551 S.E.2d 196, 199 (2001). Defendant did not attempt to offer the evidence at trial. Defendant has not assigned plain error. Thus, this argument is not properly before us and we decline to address it. See N.C. R. App. P. 10(b)(1).

Defendant's remaining contention is that the trial court erred by denying his motion to dismiss the charge of second-degree murder for insufficient evidence. He argues the evidence at most only proves voluntary manslaughter.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence: (1) of each essential element of the charged offense; and (2) of perpetration of the offense by the defendant. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). The court must view the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference that may be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

The court must disregard contradictions and discrepancies in the evidence and leave them for resolution by the jury. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

Second-degree murder consists of the unlawful killing of another human being with malice but without premeditation and deliberation. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). The difference between second-degree murder and voluntary manslaughter is that the element of malice is required for a conviction of the former but not the latter. *State v. Wilkerson*, 295 N.C. 559, 578, 247 S.E.2d 905, 916 (1978). Malice is defined as a condition of the mind that prompts one to take the life of another intentionally without just cause, excuse, or justification. *State v. Fleming*, 296 N.C. 559, 562-63, 251 S.E.2d 430, 432 (1979). Malice may be inferred from the circumstances connected to the homicide, the viciousness and depravity of the defendant's acts, and other conduct of the defendant relative to the homicide. *Id.* at 563, 251 S.E.2d at 432.

The record contains ample evidence to support a finding by a jury that defendant killed the victim with malice. Defendant and Wood sought out the victim with intent to harm him. Defendant and Wood mercilessly continued to beat and kick the victim as he lay, helpless, on the ground. As they pummeled the victim, the two men called him an "M F pervert." Defendant stated to an officer that the victim was a "f'ing pervert" who "got what he deserved." After completing their assault of the victim, defendant and Wood gave each other congratulatory "high-fives."

Accordingly, we hold there was sufficient evidence that defendant killed the victim with malice. Nevertheless, the trial court submitted the lesser included offense of voluntary manslaughter. The trial court properly denied defendant's motion to dismiss.

NO ERROR.

Judges WALKER and BIGGS concur.

Report per Rule 30(e).