NO. COA01-1471

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Edgecombe County
No. 99CRS5674

DORIS MICHELLE PITTMAN

Appeal by defendant from judgment entered 11 April 2001 by Judge Clifton W. Everett, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 29 July 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Angela H. Brown, for defendant-appellant.

BIGGS, Judge.

Doris Michelle Pittman (defendant), age eighteen, was charged with second-degree murder of her live-in boyfriend, J.M. (hereinafter "the victim"), age seventeen. Prior to trial, defendant moved to suppress her statement made while in police custody and certain items seized by police officers during a search of the crime scene, the residence shared by defendant and the victim. During the suppression hearing, the State's evidence tended to show the following: that during the early morning hours of 28 January 1999, Officer A.B. Moore, of the Rocky Mount Police

Department, responded to a call for assistance at 916 North Raleigh Street, Apartment E in Rocky Mount, North Carolina. Officer W.W. Rhodes arrived on the scene at about the same time. When Officer Moore arrived, he observed defendant laying on top of the victim. Defendant was crying. Moore testified that he heard Officer Rhodes ask defendant what happened. In response, defendant continued to cry, but raised herself from the body of the victim, and stated, "I didn't mean to stab him. I just wanted him to leave me alone." The officers could then see that the victim had a stab wound, and both defendant and the victim were covered with blood. Officer Moore subsequently transported the defendant to the police station, where he placed her in an interrogation room to await questioning by Detective Mark Rosenfield. Officer Moore identified as State's Exhibits 1 through 3 a signed "Interview--Advisement of Rights" form, defendant's signed statement, and a signed "Consent to Search" form. Further the officer confirmed that he was present when defendant was questioned by Detective Rosenfield and gave consent to search her residence.

Detective Rosenfield testified that as a Major Crimes Investigator for the Rocky Mount Police Department, he too traveled to the scene of the subject stabbing, arriving at approximately 5:15 a.m. Upon arriving, the detective observed the crime scene and spoke to another officer who was on the scene. Thereafter, Detective Rosenfield traveled back to the police department, where he advised defendant of her rights, telling her to ask him if she had any questions or did not understand something he said.

Defendant waived her *Miranda* rights, and gave a statement in which she detailed the circumstances that resulted in her stabbing the victim. Defendant stated that she and the victim had been arguing over bills, that the victim hit her in the nose, causing her nose to bleed; that they then pushed each other, and she scratched the victim; that the victim hit her in the head; that she picked up an iron and hit the victim in the head and on the hand with it; that the victim then took the iron and threw it on the floor, threatening to kick her in the head; that she went to the kitchen and got a knife off of the counter; that the victim pushed over a chair, and came towards her, at which time she went towards him with the knife; that the victim continued to travel towards her, and that she stabbed him. She asked that Detective Rosenfield write the statement while she dictated it, whereupon she checked the statement for error, made changes, and signed and dated it. After defendant signed the statement, the detective asked for and received defendant's permission to search the apartment at 916 North Raleigh Street. Defendant was taken to the hospital as a safeguard, since she had complained that her nose was hurting.

Both Officer Moore and Detective Rosenfield noted that defendant had blood on her clothing. Detective Rosenfield testified that defendant seemed a little upset when he arrived, and also noticed some minor swelling on defendant's nose but she was in fact calming down and completely coherent during the interview.

After hearing the evidence and the arguments of counsel, the trial court denied defendant's motion to suppress her statement and

to render her consent to search invalid. The matter proceeded to trial where the State's evidence was in conformity with the evidence presented during the suppression hearing.

In addition, Corporal Barbara Wright, of the Rocky Mount Police Department, testified that while transporting defendant to the hospital to be examined for possible injury, defendant told the corporal that "she didn't mean to kill [the victim]. She was only defending herself." At the hospital, defendant told emergency room personnel that she had been punched in the nose, and that she was in a lot of trouble, but did not want to discuss it. After examination, defendant was determined to have a small amount of swelling to the bridge of the nose, and a small bruise under her left eye. Officer Gary Wester, of the Rocky Mount Police Department, testified that he searched the apartment that defendant and the victim shared and found the steak knife which was determined to be the murder weapon. Officer Wester further testified that, during the search, he observed a broken iron laying on the floor, as well as upended furniture and other objects strewn about. The officer also found a loaded sawed-off shotgun and a letter, written by defendant to the victim and dated 5 November 1998, on a shelf in the bedroom closet. The testimony of the Medical Examiner verified that the victim died as a result of being stabbed in the chest, which resulted in massive internal bleeding. The victim was 5'4" tall and weighed 117 pounds, and defendant is 5'2" tall, weighing 117 pounds.

A jury found defendant guilty of voluntary manslaughter. The

trial court entered judgment on the jury verdict and sentenced defendant to 60-81 months imprisonment. Defendant appeals.

Defendant first argues that the trial court erred in denying the motion to suppress her statement made to police officers as well as evidence obtained by police officers during a search of the apartment she shared with the victim. Specifically, defendant alleges that she did not knowingly, intelligently, and voluntarily waive her rights under *Miranda* before making her statement to law enforcement, nor did she knowingly, intelligently and voluntarily consent to a search of the apartment she shared with defendant. We disagree.

In reviewing the trial court's ruling on a motion to suppress, this Court need "determine only whether the trial court's findings of fact are supported by competent evidence in the record, and whether th[ose] findings of fact support the court's conclusions of law." *State v. Colbert*, 146 N.C. App. 506, 511, 553 S.E.2d 221, 224 (2001). The trial court's findings are binding on appeal if supported by competent evidence, even if there is evidence to support contrary findings. *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 502 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001). The court's conclusions of law, if supported by the findings, are likewise binding on appeal. *Id.*

We initially note that we need not address the merits of whether defendant's statement was knowingly and voluntarily made,

as defendant has waived review of that issue. Here, defendant testified in her own defense at trial. Her testimony detailed the events of the early morning hours of 28 January 1999 leading up to the stabbing death of the victim. Significantly, that testimony was essentially the same as the statement which defendant seeks to challenge here. In *State v. Terry*, 337 N.C. 615, 447 S.E.2d 720 (1994), our Supreme Court was confronted with a similar set of facts. There, the Court held that the defendant waived his objection to the admission of his statement to police "when he testified on direct examination that he had made this statement, that the statement was not true, and that he made it because he was afraid of going to jail." *Id.* at 624, 447 S.E.2d at 725. The Court explained,

> While the Constitutions of the United States and North Carolina protect a defendant's privilege against compulsory self-incrimination, a defendant who testifies to the same facts that he alleges to be inadmissible and then fails "to claim that his in-court testimony was compelled or impelled by the trial court's errors . . . [has] cured the errors of the trial judge and rendered them harmless."

Id. (quoting *State v. McDaniel*, 274 N.C. 574, 584, 164 S.E.2d 469, 475 (1968)). The Supreme Court in *McDaniel* stated:

> To hold that a defendant in a criminal action, once evidence has been erroneously admitted over his objection, may then take the stand, testify to exactly the same facts shown by the erroneously admitted evidence, and from that point embark upon whatever testimonial excursion he may choose to offer as justification for his conduct, without thereby curing the earlier error, gives to the defendant an advantage not contemplated by the constitutional provisions forbidding the State

to compel him to testify against himself.

McDaniel, 274 N.C. at 584, 164 S.E.2d at 475 (quoting *Terry*, 337 N.C. at 624, 447 S.E.2d at 725).

In the instant case, defendant testified in conformity with her statement made to police. Defendant explained during her testimony that she was afraid of the victim and acted in self-defense. Notably, defendant does not contend that she was "compelled or impelled" to testify as the result of the admission of her prior statement into evidence. Accordingly, we conclude that defendant's objection to the admission of her statement made to police officers during questioning on 28 January 1999 has been waived. We move, then, to defendant's contention that her consent to search was not done knowingly and voluntarily.

While the Fourth Amendment, as applied to the States through the Fourteenth Amendment Due Process Clause, protects the citizenry from unreasonable searches and seizure, it is well settled that "a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997). However, to pass constitutional muster, the consent must be voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 36 L. Ed. 2d 854, 860 (1973); *see also* N.C.G.S. § 15A-221(a),(b)(2000) (providing for warrantless searches and seizures if consent is voluntarily given for a law enforcement officer to conduct a search). Whether the consent is voluntary is to be determined from a totality of the circumstances. *State v. Brewington*, 352 N.C. 489, 499, 532 S.E.2d

496, 502 (2000).

The totality of the circumstances in the present case supports the trial court's finding that defendant "voluntarily and understandingly" consented to the search of the apartment shared by her and the victim. The evidence tends to show that defendant was transported to the police station after she stabbed the victim during the early morning hours of 28 January 1999; that initially, she was quite upset, but calmed down sufficiently to be interviewed by investigating officers; that defendant executed a waiver of rights form after her *Miranda* rights were explained to her; that after dictating a statement to one of the officers, she read, made changes and signed the statement detailing the events leading up to the victim's death; and that thereafter, when asked for permission to search the crime scene, defendant signed a consent to search form. Although defendant was only eighteen years old at the time of the commission of the offense and execution of the document, had never been in any trouble with the law, and had been understandably crying and distraught after stabbing the victim, these facts do not negate the voluntary nature of her consent to search. *See State v. Murry*, 277 N.C. 197, 176 S.E.2d 738 (1970) (holding that the confession of a 16-year-old was knowing and voluntary); *State v. Lewis*, 298 N.C. 771, 259 S.E.2d 876 (1979) (holding that the statement of the defendant, made after being informed of his rights, was admissible despite the fact that defendant was nervous and distraught at time of his confession to the murder of his wife). Similarly, the fact that the police did not inform

defendant that the victim was dead until after questioning, does not render defendant's consent to search involuntary or unknowing. *See State v.* Schneider, 306 N.C. 351, 355, 293 S.E.2d 157 (1982) (stating that the failure to inform a defendant of the nature of the charge for which he or she is being questioned, does not render the confession inadmissible).

We also reject defendant's contention that her consent to search was not valid under N.C.G.S. § 15A-222 (2001) as specious. This provision reads in pertinent part:

> (3) By a person who by ownership or otherwise is reasonably apparently entitled to give or withhold consent to a search of premises.

N.C.G.S. § 15A-222 (3). First, this claim is contrary to evidence adduced at trial, and indeed, the very affidavit filed in support of her motion to suppress. In her affidavit, defendant specifically averred, "Jerry and I had lived together as a couple at 916-E Raleigh Street in Rocky Mount, North Carolina." More importantly, defendant did not raise the issue of her authority to consent to search during the hearing on her suppression motion, and therefore, this issue is not properly before the Court. *See* N.C.R. App. P. 10(b)(1); *State v. Pinchback*, 140 N.C. App. 512, 518 n.2, 537 S.E.2d 222, 225 n.2 (2000). Finally, if defendant was truly without authority to consent to the instant search, she is also without standing to claim the protections of the Fourth Amendment, so as to challenge the alleged unlawful search of the apartment and the seizure of items therein. *State v. Fernandez*, 346 N.C. 1, 16, 484 S.E.2d 350, 360 (1997). Accordingly, the trial court properly

concluded that evidence seized from the apartment shared by defendant and the victim was admissible.

Defendant next argues that the trial court erred in denying her motion to dismiss as "the evidence was insufficient to persuade a rational trier of fact of each essential element of second degree murder beyond a reasonable doubt." Again, we disagree.

In *State v. Bryant*, our Supreme Court stated, "[i]t has long been recognized in this State that submission of a question regarding the guilt of a defendant of murder in the second degree bec[omes] harmless when the jury return[s] a verdict of manslaughter." 282 N.C. 92, 101, 191 S.E.2d 745, 751 (1972), *cert. denied*, 410 U.S. 958, 35 L. Ed. 2d 691 (1973), *cert. denied*, 410 U.S. 987, 36 L. Ed. 2d 184 (1973). In accordance with *Bryant* and its progeny, defendant, who was convicted of voluntary manslaughter instead of second degree murder, cannot show prejudicial error in the trial court's denying his motion to dismiss the second degree murder charge. Defendant's argument to the contrary, therefore, fails.

Defendant specifically abandons her remaining assignments of error by failing to argue this in her brief or otherwise set forth authority. N.C.R. App. P. 28(b)(5). In light of all of the foregoing, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges WALKER and THOMAS concur.

Report per Rule 30(e).