NO. COA01-552

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Columbus County
No. 98 CRS 3368

JAMES BRIAN McPHERSON,
Defendant

Appeal by defendant from judgment entered 3 March 2000 and from order denying defendant's motion for appropriate relief entered 12 January 2001 by Judge Jack A. Thompson in Columbus County Superior Court. Heard in the Court of Appeals 15 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for the defendant.

BRYANT, Judge.

On 26 May 1998, defendant James Brian McPherson was indicted for the first degree murder of victim Michael Piecha. This matter came for jury trial at the 22 February 2000 session of Columbus County Superior Court with the Honorable Jack A. Thompson presiding. Defendant was found guilty as charged, and sentenced to life without parole on 3 March 2000.

On 13 March 2000, defendant made a motion for appropriate

relief pursuant to N.C.G.S. § 15A-1414. After an October 2000 hearing, defendant's motion for appropriate relief was denied by order filed 12 January 2001. Defendant appeals from both the underlying judgment and the order denying his motion for appropriate relief.

I.

First, defendant argues that the trial court committed error by failing to investigate the possibility of juror misconduct or bias evidenced by a question raised by a juror. We disagree.

During the testimony of defendant's father, juror Doretta Brown presented the trial judge with a written note asking whether the witness knew a certain person. The trial court ruled that the question would not be addressed because it was not relevant to the proceeding. Defendant did not object to the trial court's ruling on this issue, and the trial continued.

In order to have properly preserved this issue for review, defendant must have presented an objection before the trial court contesting the relevancy of the posed juror question. *See* N.C.R. App. R. 10(b)(1). In reviewing the record, it does not appear that defendant presented any objection or otherwise contested the trial court's decision not to investigate the juror's question. Therefore, defendant has not properly preserved this issue for review.

In the alternative, defendant assigns as error that this failure to investigate constituted plain error. Our Supreme Court, however, has previously articulated that the plain error doctrine

applies only to evidentiary rulings and jury instructions. *State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). As neither an evidentiary ruling nor a jury instruction is at the heart of the issue presented, this Court is precluded from reviewing this issue under a plain error standard. Therefore, this assignment of error is overruled. See sections V and VI for a discussion of a related issue.

II.

Second, defendant argues that the trial court erred in sustaining the prosecutor's objections to proffered expert testimony from Dr. Claudia Coleman regarding defendant's personality characteristics and mental condition of passivity and social conformity. We disagree.

Character evidence, as generally discussed in the Rules of Evidence, is defined as "'a generalized description of a person's disposition, or the disposition in respect to a general trait, such as honesty, temperance or peacefulness'; it is a 'person's tendency to act prudently in all the varying situations of life — business, at home, in handling automobiles and in walking across the street.'" *State v. Baldwin*, 125 N.C. App. 530, 536, 482 S.E.2d 1, 5 (1997) (citation omitted).

N.C.R. Evid. 405(a) provides that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." At trial, defendant sought to elicit expert testimony from Dr. Coleman that defendant is a

very socially conforming person, is not prone to anger, and is passive in interacting with others. Following *voir dire* of Dr. Coleman and in defense of the objections to the admissibility of this evidence, defense counsel stated, "we're simply trying to show that this is a passive individual who is not prone to the type of anger that would cause one to, without - - to take the life of another without just reason." Defendant argues that this evidence concerned conditions affecting his mental state, and is not evidence prohibited by Rule 405(a).

In reviewing the record and applicable case law, however, we hold that the proffered testimony of Dr. Coleman is not admissible evidence regarding defendant's mental condition; but rather is inadmissible, generalized character evidence. This proffered testimony does not provide insight about defendant's mental condition on the date and at the time in question. Rather, the proffered testimony only serves to inform the jury as to defendant's general disposition. The trial court did not err in excluding this proffered testimony. Therefore, this assignment of error is overruled.

III.

Third, defendant argues that the trial court committed plain error in failing to instruct the jury on diminished capacity. We disagree.

Our standard of review under the plain error doctrine is whether:

> [I]t can be said the claimed error is a *fundamental* error, something so basic, so

> prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial . . . .

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks omitted) (alteration in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). Defendant has the burden of showing that absent the alleged error, the jury would have reached a different verdict. *State v. Morganherring*, 350 N.C. 701, 722, 517 S.E.2d 622, 634 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000). In determining whether a diminished capacity instruction is warranted, it must be determined whether "evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant has the ability to form the necessary specific intent." *State v. Connell*, 127 N.C. App. 685, 692, 493 S.E.2d 292, 296 (1997).

In the instant case, the record does not reflect that the defendant requested an instruction on diminished capacity. Moreover, our review of the record reveals that defendant attempted to exonerate himself by demonstrating that he either acted in self-defense because he thought the victim was going to shoot him or that he was unconscious at the time of the incident due to a head injury.

By claiming self-defense to a murder charge, "defendant admits . . . that he intentionally shot his assailant but that he did so

justifiably to protect himself from death or great bodily harm." *State v. Ray*, 299 N.C. 151, 164, 261 S.E.2d 789, 797 (1980). The defense of automatism would completely excuse the charge based on the theory that defendant was unconscious of his actions. *See State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975). The defense of diminished capacity, on the other hand, neither justifies or excuses the commission of an offense. Rather, the defense of diminished capacity negates only the element of specific intent, and the defendant could still be found guilty of a lesser included offense (i.e., second degree murder). *See, e.g., State v. Holder*, 331 N.C. 462, 473-74, 418 S.E.2d 197, 203-04 (1992). In the instant case, the trial judge instructed the jury on both the theories of self-defense and automatism.

In addition to instructions on self-defense and automatism, the trial court provided instructions on second degree murder, and voluntary manslaughter. Second degree murder is the unlawful killing of a human being with malice, but without the element of premeditation and deliberation. *State v. Cozart*, 131 N.C. App. 199, 505 S.E.2d 906 (1998). Voluntary manslaughter is the unlawful killing of a human being without malice, and without premeditation and deliberation. *State v. Richardson*, 14 N.C. App. 86, 187 S.E.2d 435 (1972).

In light of the fact that a finding of diminished capacity would negate only the specific intent to commit first degree murder, and because the trial court instructed the jury on the lesser included (general intent) offenses of second degree murder

and voluntary manslaughter, we hold that the trial court did not commit plain error in failing to instruct the jury on the theory of diminished capacity. Therefore, this assignment of error is overruled.

IV.

Fourth, defendant argues that in violation of the mandatory admonition contained in N.C.G.S. § 15A-1236(a)(3), the trial court erred in failing to instruct the jurors not to form an opinion about the guilt or innocence of the defendant prior to their deliberations. We disagree.

In *State v. Richardson*, 59 N.C. App. 558, 563-64, 297 S.E.2d 921, 925-26 (1982), *aff'd in part, rev'd in part*, 308 N.C. 470, 302 S.E.2d 799 (1983), our Court stated, as relates to N.C.G.S. § 15A-1236, "Failure by the trial court to fully admonish the jury on every occasion does not of itself constitute prejudicial error. . . . In any event, defendant must show prejudice, and when counsel for defendant is in the courtroom, he or she must object to any failure to instruct the jury properly." In the case at bar, in his opening remarks to the jury, the trial judge stated, "I will remind you of the instructions I've previously given you and ask that you abide by those instructions, particularly that you not read anything about the case, not allow anyone to talk with you about the case, or not talk with anyone about the case, not talk with any of the parties, witnesses, or attorneys about anything."

Defendant concedes that at no time during trial did he object to the admonitions, nor did he request supplemental admonitions in

accordance with N.C.G.S. § 15A-1236(a)(3). Defendant argues that even though he failed to object to the trial court's failure to fully admonish the jury, this failure was either prejudicial error per se or is preserved for appellate review by the doctrine of plain error. However, as stated by the *Richardson* Court, failure by the trial court to fully admonish the jury does not of itself establish prejudicial error. Moreover, in *State v. Ward*, our Supreme Court found in a similar case that

> By an additional assignment of error, defendant contends that the trial court erred in failing to instruct the jurors at every recess regarding their conduct and duties in accordance with N.C.G.S. § 15A-1236. Defendant acknowledges, however, that he did not object to the trial court's failure to give the necessary instructions. Further, we note that while defendant argues plain error in his brief, he failed to include plain error as an alternative in his assignment of error in the record on appeal. Therefore, defendant has not properly preserved this argument for our review. *See* N.C. R. App. P. 10(c)(4) (providing that "a question which was not preserved by objection noted at trial . . . nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error"); *State v. Thibodeaux,* 341 N.C. 53, 62, 459 S.E.2d 501, 507 (1995) (stating that "defendant must object to any failure of the trial court to give the required admonitions to the jury in order to preserve this issue for appeal")

State v. Ward, 354 N.C. 231, 263, 555 S.E.2d 251, 271-72 (2001).

Turning to defendant's second assignment of error, he does not specifically assign, as plain error, the trial court's failure to fully admonish the jurors not to form an opinion prior to deliberations in accordance with N.C.G.S. § 15A-1236(a)(3).

Therefore, this assignment of error is overruled.

V.

Fifth, defendant argues that the trial court erred when it excluded from evidence at the motion for appropriate relief hearing, testimony regarding possible biases of several jurors toward defendant or defendant's father. We disagree.

N.C.G.S. § 15A-1420(c)(6) (2001) provides, "A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443."

N.C.G.S. § 15A-1443 (2001) provides:

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.
>
> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.
>
> (c) A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.

Defendant argues that three jurors, Doretta Brown, Patricia Best, and Michael Lennon had either a direct or indirect connection with his father's place of employment. Based on these connections, defendant argues that the jurors' biased feelings toward his father

deprived defendant of a fair trial before an impartial jury. We disagree.

N.C.G.S. § 15A-1240(c)(1) (2001) provides:

> (c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:
>
> (1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him . . . .

N.C.R. Evid. 606(b) provides:

> (b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

In *State v. Heatwole*, our Supreme Court stated that extraneous information, as specifically discussed in Rule 606(b) (and generally discussed in N.C.G.S. § 15A-1240(c)(1)), "mean[s] information that reaches a juror without being introduced into evidence and that deals specifically with the defendant or the case

being tried . . . [and] does not include general information that a juror has gained in his day-to-day experiences." *State v. Heatwole*, 344 N.C. 1, 12, 473 S.E.2d 310, 315 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997).

In reviewing the record, when juror Doretta Brown presented a question to the trial judge concerning whether the witness (defendant's father) knew a person by the name of Michael Waddell (the juror's son), the trial judge deemed the question irrelevant and did not investigate the question posed. Even if the trial court had investigated the question posed, any potential bias that Waddell had against the defendant's father would not necessarily reveal any bias juror Brown may have had against the witness, defendant's father. The mere possibility that a bias existed between a juror and a witness based upon an indirect relationship does not create "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a). Nor would the question have revealed any extraneous information about the defendant or about the case being tried. *See* N.C.G.S. § 15A-1240(c)(1); N.C.R. Evid. 606(b). Therefore, the trial court did not err in excluding testimony concerning juror Brown's alleged bias against defendant's father.

As relates to jurors Best and Lennon, the record reveals only the father's bare allegation that those jurors were biased against defendant due to their employment with DuPont or its subsidiaries (which is also the father's place of employment). Without any

evidence to substantiate this claim, defendant has failed to meet his burden pursuant to N.C.G.S. § 15A-1443. Therefore, this assignment of error is overruled.

VI.

Sixth, defendant argues that the trial court erred in refusing to allow defendant to make to an offer of proof regarding the excluded testimony referenced in section V. We disagree.

At the hearing on the motion for appropriate relief, defendant's father alleged that jurors Brown, Best, and Lennon were biased against the father because of their varied employment relationships with the father's place of employment. In response, the trial judge articulated that the "issue would be whether any matter is prejudicial to the Defendant. As to what somebody feels about the Defendant's father, or cousin, or in-laws, or even his lawyer, is not relevant."

Defendant argues that in refusing his offer of proof, the trial court has disallowed him the opportunity to effectively present this issue on appeal. However, upon careful review of the record and briefs, it is apparent that the elicited evidence concerned the jurors' potential biases against the father. Defendant has not shown or even clearly articulated how the alleged biases against the father deprived him of a fair trial before an impartial jury. The trial court did not err in refusing defendant's offer of proof. Therefore, this assignment of error is overruled.

VII.

Last, defendant argues that his conviction must be vacated because he was tried and convicted of first degree murder upon a short form indictment that failed to allege the essential elements of premeditation and deliberation. We disagree.

In *State v. Braxton*, our Supreme Court noted that "indictments for murder based on the short-form indictment statute are in compliance with both the North Carolina and United States Constitutions." *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797, (2001). *See, e.g.,* cases upholding use of short-form murder indictment, *State v. Anderson*, 355 N.C. 136, 558 S.E.2d 87 (2002); *State v. Long*, 354 N.C. 534, 557 S.E.2d 89 (2001); *State v. Wilson*, 354 N.C. 493, 556 S.E.2d 272 (2001); *State v. King*, 353 N.C. 457, 546 S.E.2d 575 (2001), cert. denied, ___ U.S. ___, 151 L. Ed. 2d 1002, *reh'g denied*, ___ U.S. ___, 152 L. Ed. 2d 646 (2002); *State v. Call*, 353 N.C. 400, 545 S.E.2d 190 (2001), *cert. denied*, ___ U.S. ___, 151 L. Ed. 2d 548 (2001); *State v. Locklear*, 145 N.C. App. 447, 551 S.E.2d 196 (2001); *State v. Lytch*, 142 N.C. App. 576, 544 S.E.2d 570, *review on additional issues denied,* 354 N.C. 224, 554 S.E.2d 653 (2001), *aff'd*, 355 N.C. 270, 559 S.E.2d 547 (2002). The *Braxton* Court further held that the elements of premeditation and deliberation for first degree murder need not be separately alleged in the short-form indictment. *Braxton*, 352 N.C. at 175, 531 S.E.2d at 438.

Defendant's argument fails in light of our Supreme Court's ruling in *Braxton*. As defendant's argument is without merit, we

overrule this assignment of error.

NO ERROR.

Chief Judge EAGLES and Judge HUDSON concur.

Report per Rule 30(e).