NO. COA01-710

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

STATE OF NORTH CAROLINA

v. Pender County
No. 99 CRS 050662

MARK DEWAYNE BAKER

Appeal by defendant from judgment entered 14 December 2000 by Judge Jay D. Hockenbury in Pender County Superior Court. Heard in the Court of Appeals 16 April 2002.

Attorney General Roy A. Cooper, by Assistant Attorney General Jennie Wilheim Mau, for the State.

Jeffrey Ryan for defendant-appellant.

TIMMONS-GOODSON, Judge.

Mark Dewayne Baker ("defendant") appeals from his conviction of second degree murder. For the reasons stated herein, we hold that defendant received a fair trial, free from prejudicial error.

The State's evidence at trial tended to show the following: On 3 September 1999, Christopher Fogleman ("Christopher") visited the home of defendant. Defendant was close to Christopher as a result of his relationship with Angela Fogleman ("Angela"), Christopher's sister. Christopher, who was twelve years old at the time of the incident, would often visit and spend the night at defendant's home to play video games. On 4 September 1999, at

approximately 3:25 p.m., Angela telephoned defendant's home and talked to Christopher. Christopher informed Angela that he and defendant were playing video games. After speaking with Christopher, Angela attempted to talk to defendant; however, he abruptly hung up the phone. Angela subsequently tried calling defendant's home several times but no one answered the phone. At approximately 3:55 p.m., the 911 dispatcher received a telephone call from defendant, reporting a shooting.

Officer Christian Anderson ("Officer Anderson") of the Pender County Police Department arrived at the home accompanied by Deputy Sheriff Andrew Paluck ("Deputy Paluck"). The officers entered the home and found Christopher lying on the mattress of defendant's bed in a back bedroom. After checking for vital signs, Deputy Paluck discovered a gunshot wound to Christopher's chest.

Upon describing the incident that led to the shooting, defendant stated that he was in the living room playing video games when he heard a "clicking noise" coming from the back bedroom. As he walked into the bedroom, Christopher pointed a shotgun at him. Defendant stated that he went over to place his finger in the trigger guard and to get the gun away from Christopher, however, a struggle ensued and the gun "went off." In a written statement provided to Officer Anderson, defendant insisted that Christopher was playing with the shotgun and it discharged when defendant tried to take the gun away from Christopher.

On 4 September 1999, Special Agent Hans Miller ("Agent Miller") of the North Carolina State Bureau of Investigation

arrived at the scene to assist in the investigation of the shooting. A Mossberg, .410-gauge caliber shotgun, was discovered at the foot of the mattress pointing away from Christopher's body. Agent Miller also discovered an unfired black Remington .410 shell to the right of the body. Upon examination of the gun, Agent Miller found a fired Remington shotgun shell in the chamber of the weapon and two unfired rounds with "slugs" in the magazine of the weapon.

On 7 September 1999, Dr. Charles L. Garrett ("Dr. Garrett"), an expert in the field of forensic pathology, conducted an autopsy of Christopher. Dr. Garrett discovered a circular entrance wound approximately one-half inch in diameter, surrounded by a larger area of burned skin. Dr. Garrett opined that the "pattern" of shotgun pellets was consistent with the shotgun being almost perpendicular to the wound. Dr. Garrett also measured the distance between Christopher's armpit and his extended middle finger, which was twenty-one and a half inches. Based upon this measurement and measurements compiled by the State Bureau of Investigation, Dr. Garrett opined that it was physically impossible for Christopher to have pulled the trigger with the gun pointed at himself; or that the gun could have turned 180 degrees during a struggle so as to have struck Christopher in the center of his chest.

Due to the discrepancies in defendant's statement, Agent Miller and Detective Kevin Kemp ("Detective Kemp") asked defendant to reenact what happened on the day in question. On 10 September 1999, the officers arrived at defendant's home and defendant

consented to participating in a videotaped re-enactment. The resulting videotape contained conflicting versions of what occurred. After several re-enactments, the officers informed defendant that his explanation was inconsistent with physical evidence gathered in the case. Upon completing a final re-enactment, defendant made a written statement to Detective Kemp describing what occurred on 4 September 1999. In the statement, defendant stated that Christopher was lying on the mattress. At this point, defendant admitted, he picked up the gun, "pumped it," and pointed the gun at Christopher, thinking it was unloaded. Defendant then fired a gunshot that killed Christopher. Defendant stated that he was "just playing around" with the gun when the incident occurred.

At trial, defendant moved to dismiss the charge of second degree murder at the close of all evidence, which was denied. The trial court instructed the jury on second degree murder and involuntary manslaughter. Defendant was subsequently convicted of second degree murder and was sentenced to a minimum term of 114 months and a maximum term of 146 months. Defendant appeals.

In his sole assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charge of second degree murder. We disagree.

When reviewing a motion to dismiss, we must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.

State v. Gainey, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996). "The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt may be drawn therefrom, and the test is the same whether the evidence is direct or circumstantial. *Id.* "When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). If there is substantial evidence, whether direct or circumstantial, of each element of the charged offense and of the defendant being the perpetrator of the offense, the case is for the jury, and the motion to dismiss should be denied. *See State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

Second degree murder is defined as "the unlawful killing of a human being with malice but without premeditation and deliberation." *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998). "While intent to kill is not an essential element" of murder in the second degree, the "crime cannot exist without some intentional act in the chain of causation leading to death." *State v. Lathan*, 138 N.C. App. 234, 242, 530 S.E.2d 615, 622, *disc. review denied*, 352 N.C. 680, 545 S.E.2d 723 (2000). Our Supreme Court has recognized three types of malice:

> One connotes a positive concept of express hatred, ill-will or spite, sometimes called actual, express, or particular malice. Another kind of malice arises when an act

> which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. Both these kinds of malice would support a conviction of murder in the second degree. There is, however, a third kind of malice which is defined as nothing more than 'that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.'

State v. Reynolds, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (citations omitted). Additionally, "the law implies that a killing was done with malice and unlawfully when the defendant intentionally inflicts a wound upon a victim with a deadly weapon, resulting in death." *State v. Maynard*, 311 N.C. 1, 33, 316 S.E.2d 197, 215, *certs. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984) and 502 U.S. 1110, 117 L. Ed. 2d 450 (1992).

In the instant case, the State argues that the second type of malice was present in that defendant acted with "recklessness of the consequences of his actions," in such a way as to indicate a total disregard of human life. Our Supreme Court has described this kind of malice as

> "'[Malice] comprehend[ing] not only particular animosity,'but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person.' . . . "'[It] does not necessarily mean an actual intent to take human life; it may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.'" "In such a situation 'the law regards the circumstances of the act as so harmful that the law punishes the act as though malice

did in fact exist.'"

State v. Rich, 132 N.C. 440, 445, 512 S.E.2d 441, 445 (1999) (alteration in original), *affirmed*, 351 N.C. 386, 527 S.E.2d 299 (2000)(quoting *State v. Wilkerson*, 295 N.C. 559, 578-79, 247 S.E.2d 905, 916 (1978)) and (quoting *State v. Wrenn*, 279 N.C. 676, 686-87, 185 S.E.2d 129, 135 (1971), *cert. denied*, 282 N.C. 430, 192 S.E.2d 839 (1972)).

Defendant, relying on *State v. Blue*, 138 N.C. App. 404, 531 S.E.2d 267 (2000), *affirmed in part, reversed in part, and remanded in part*, 353 N.C. 364, 543 S.E.2d 478 (2001), argues that there existed insufficient evidence of malice to submit the case to the jury. However, defendant's reliance on *Blue* is misplaced.

In *Blue*, defendant was convicted of second degree murder after his girlfriend's daughter died as a result of shaken baby syndrome. The evidence showed that defendant had placed the victim on his knee and had begun to bounce her in an attempt to get her to stop crying. *Id.* at 407, 531 S.E.2d at 271. The next morning, the victim-baby was found dead and defendant was charged with second degree murder. On appeal, defendant argued that his second degree murder conviction must be vacated for insufficient evidence of malice. This Court noted that "recklessness of consequences" denotes a high degree of recklessness required for murder as opposed to the lesser degree for manslaughter. *Id.* at 410, 531 S.E.2d at 272. The Court emphasized that a "defendant's shaking a baby and the baby's death by shaken baby syndrome" standing alone, were insufficient factors to permit a rational jury to find the

existence of malice beyond a reasonable doubt. *Id.* at 413, 531 S.E.2d at 274. In holding that the facts did not satisfy the *Wilkerson* definition of malice, the Court concluded that the evidence was only sufficient to raise a suspicion or conjecture that defendant acted with the type of malice required for a conviction of second degree murder. *Id.* at 414, 543 S.E.2d at 275. Clearly, the facts of this case are distinguishable from *Blue* because of the degree of recklessness involved. Moreover, in *Blue*, the evidence was insufficient to support a finding that defendant's conduct evidenced "recklessness of consequences and total disregard for human life," unlike the conduct evidenced by defendant in the present case.

In the instant case, the evidence establishes that defendant intentionally pointed a gun at Christopher and fired a shot that killed him. Evidence tended to show that it was physically impossible for Christopher to have pulled the trigger with the gun pointed at himself or that the gun could have turned during a struggle so as to have struck Christopher in the center of his chest. Whether or not defendant realized that the gun was loaded, his conduct was extremely reckless and utterly without regard for Christopher's life. We therefore hold that the evidence was sufficient for a rational jury to conclude that defendant acted with malice in order to sustain a conviction of second degree murder. Thus, the trial court did not err in denying defendant's motion to dismiss.

Accordingly, we find no error.

Judges GREENE and HUNTER concur.

Report per Rule 30(e).