NO. COA01-853

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

STATE OF NORTH CAROLINA

v. Wilson County
No. 99 CRS 55786

PEDRO A. HAGANS

Appeal by defendant from judgment entered 5 February 2001 by Judge Dwight L. Cranford in Wilson County Superior Court. Heard in the Court of Appeals 24 April 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Bobby G. Abrams, for defendant-appellant.

BIGGS, Judge.

Pedro Hagans (defendant) appeals his conviction of first-degree murder. For the reasons herein, we find no prejudicial error.

On 27 July 1999, defendant went to the home of Janet Lucas, the mother of his former girlfriend, Patricia Cox Williams. Although defendant and Williams no longer dated, defendant continued to visit her mother. On this occasion, defendant stayed approximately five minutes. Williams was in the back room with her fiancée Wallace Moody (the victim). They did not come out while defendant was there. Defendant, who drove a taxi cab for a living, left in the cab to pick up a passenger.

When defendant returned to the house approximately fifteen minutes later, Williams and the victim were standing outside on the front porch. Defendant parked in front of the house and told his passenger, Jamar Neal, "I gotta [sic] go do something right quick." Upon seeing defendant drive up to the house, Williams went inside and called the police. Defendant followed her into the house and the two began to argue. Defendant said that he would not leave until the police came. He and Williams then moved out to the front porch.

Moody, who was also outside on the porch, told defendant to "stop this childish stuff." He also said, "I see you got your mess in your pocket." Defendant replied, "Damn right I do"; he then pulled a gun from his pocket. Moody said to defendant, "I am covered under the blood of Jesus." Defendant then began shooting Moody, who ultimately died from multiple gunshots to his body. Defendant returned to the cab, still occupied by Neal, the passenger, and drove off before the police arrived. With Neal still in the cab, defendant immediately disposed of the gun in a garbage can.

Defendant was tried and convicted of non-capital first degree murder. From this conviction, defendant appeals.

At the outset, we note that, while defendant sets forth 20 assignments of error, those assignments not addressed in his brief are deemed abandoned pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure.

I.

Defendant first assigns as error the trial court's failure to record jury selection, opening statements and final jury arguments. Specifically, defendant argues that the court's failure to preserve "important evidence and other matters" violated his constitutional rights to full appellate review and effective assistance of counsel. We disagree.

N.C.G.S. § 15A-1241 (2001), provides in pertinent part:

> (a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:
>
> (1) Selection of the jury in noncapital cases;
>
> (2) Opening statements and final arguments of counsel to the jury; and
>
> (3) Arguments of counsel on questions of law.
>
> (b) Upon motion of any party . . ., proceedings excepted under subdivisions (1) and (2) of subsection (a) must be recorded. The motion for recordation of jury arguments must be made before the commencement of any argument and if one argument is recorded all must be. Upon suggestion of improper argument, when no recordation has been requested or ordered, the judge in his discretion may require the remainder to be recorded.

Thus, jury selection, opening statements and closing jury arguments must be recorded upon a motion by any party. *State v. Tripp,* 52 N.C. App. 244, 278 S.E.2d 592 (1981); *State v. Pittman,* 332 N.C. 244, 420 S.E.2d 437 (1992). Failure to do so is error. *Id.*

In the case *sub judice,* it is undisputed that defendant filed a pretrial motion for complete recordation of all the proceedings. Although three-hundred-eighty four (384) pages of the trial proceedings were recorded during the three-day trial, the trial court did not require the court reporter to record any of the jury selection, opening statements, or closing arguments. We conclude

that the trial court's failure to record these specific portions of the proceedings was error.

However, not every error committed by the trial court requires a new trial. *State v. Hensley,* 120 N.C. App. 313, 462 S.E.2d 550 (1995). "The defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983) (citation omitted). The burden of showing prejudice is on the defendant. *Id.* Prejudicial error, not arising under the state or federal constitution, occurs when there is a reasonable possibility that, had the error not been committed, a different result would have been reached. *State v. Ramey,* 318 N.C. 457, 349 S.E.2d 566 (1986).

Defendant, in the present case, contends he is not required to show that he was prejudiced by the statutory error. In fact, he argues that he need not show any particularized need for the unrecorded portions of the trial. Rather, he contends that the failure to record jury selection, opening statements or closing arguments deprived him of his constitutional rights to full appellate review and effective assistance of counsel and therefore, prejudice is presumed.

A defendant is entitled to appellate review of only those errors that he has properly preserved for appeal and to which he has assigned error. N.C.R. App. P. 10(b)(1) (Rule 10(b)(1)); *see also State v. Lawrence,* 352 N.C. 1, 530 S.E.2d 807 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). Rule 10(b)(1) of

the North Carolina Rules of Appellate Procedure, reads in pertinent part:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

Not having objected at trial or assigned as error anything related to the unrecorded portions of the transcript, defendant has failed to show that his right to appellate review has been denied. Nor has he set forth in his brief any argument for his contention that he was denied effective assistance of counsel due to the unrecorded portions of the trial. N.C.R. App. P. 28(b)(5) ("assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

Moreover, "'[i]t is a well established rule of this Court that it will not decide a constitutional question which was not raised or considered in the court below.'" *In Re Maynard*, 116 N.C. App. 616, 448 S.E.2d 871 (1994) (quoting *Kaplan v. Prolife Action League,* 111 N.C. App. 1, 31, 431 S.E.2d 828, 844, *disc. review denied*, 335 N.C. 175, 436 S.E.2d 379 (1993), *cert. denied*, *Winfield v. Kaplan*, 512 U.S. 1253, 129 L. Ed. 2d 894 (1994)) (holding that we may not consider constitutional questions for the first time on

appeal), *disc. review denied*, 339 N.C. 613, 454 S.E.2d 254 (1995); *Rivenbark v. Southmark Corp.* 93 N.C. App. 414, 378 S.E.2d 196 (1989). Thus, since defendant failed to raise any constitutional issues before the trial court, he will not be allowed to raise them here.

Assuming *arguendo,* that defendant has properly preserved these issues for appellate review, any "error is harmless beyond a reasonable doubt," where, as here, evidence of defendant's guilt is overwhelming. *State v. Mickey*, 347 N.C. 508, 520, 495 S.E.2d 669, 676, *cert. denied,* 525 U.S. 853, 142 L. Ed. 2d 106 (1998). In the case *sub judice,* evidence of defendant's guilt included the testimony of three eye witnesses to the shooting. Each witness testified that they observed defendant shoot the victim. One witness to the shooting observed defendant discard the murder weapon. No evidence was presented, other than defendant's own testimony, supporting his theory of self-defense.

Based on defendant's failure to specifically allege any prejudice to the lack of complete recordation and the overwhelming evidence of defendant's guilt, we hold that the trial court's failure to completely record the trial proceedings was harmless beyond a reasonable doubt. This assignment of error is overruled.

II.

In defendant's next three assignments of error, he contends that the trial court erred in admitting into evidence certain testimony. We disagree with each of these contentions.

As a general rule, the determination of whether to exclude

evidence is a matter left to the sound discretion of the trial court, and its determination will not be disturbed on appeal absent an abuse of discretion. *See generally, State v. Lloyd,* 354 N.C. 76, 552 S.E.2d 596 (2001).

Defendant first contends that the trial court erred in admitting testimony that defendant "beat [Williams] up" in violation of Rule 701 of the Rules of Evidence. We disagree.

On re-direct, defendant objected to the following exchange between the prosecutor and Lucas:

> Q: [Defense counsel] has asked you about the relationship between the defendant and your daughter (Williams). Was that always a good relationship?
>
> A: No.
>
> Q: Why not?
>
> A: They [sic] was always fighting and fussing, and he would go get her off the street because she was on drugs at that particular time.
>
> Q: Now, was there any kind of physical altercation between [defendant] and your daughter?
>
> A: Yes, he beat her up.
>
> [Objection]; [Overruled].
>
> Q: And, when did this happen in relationship to the shooting?
>
> A: Approximately around six months before that. She got herself -- [Williams] got herself together, went to drug treatment center.

Though defendant contends that the court erred in the admission of this evidence pursuant to N.C.G.S. § 8C-1, Rule 701 (2001), we find nothing in the record to suggest that Rule 701 was

the basis of the court's ruling. This evidence was not offered by the State pursuant to Rule 701 as opinion evidence. Rather this evidence was offered in response to the earlier testimony on cross-examination about defendant's relationship with Williams. Lucas' testimony, on cross-examination, can be summarized as follows: defendant had "a very good relationship with [Williams'] children"; defendant was a "good person" whom she never heard "cuss" or saw with a gun prior to the shooting; Lucas believed defendant was a truthful person; and defendant was "a man that would never kill nobody [sic] in front of [her]." Thus, Rule 701 has no application.

Rather, we conclude that defendant, having opened the door to the introduction of this evidence, cannot now claim error. *State v. Sexton,* 336 N.C. 321, 444 S.E.2d 879 (1994). Our Supreme Court has stated that "where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially." *Id.* at 360, 444 S.E.2d at 901. Here, the State offered Lucas' testimony to rebut her earlier testimony on cross-examination regarding defendant's relationship with Williams. Thus, we hold the trial court did not err in admitting the evidence.

Defendant's next two contentions concern the admission of certain leading questions by the State. Specifically, defendant contends that the trial court erred in admitting leading questions

with respect to the following: (1) statements made by Lucas regarding photographs depicting the crime scene and; (2) statements made by Neal, the passenger in defendant's cab at the time of the shooting. We disagree with both contentions.

"A leading question has been defined as one which suggests the answer desired and is a question which may often be answered by yes or no." *State v. Greene*, 285 N.C. 482, 492, 206 S.E.2d 229, 235 (1974) (citations omitted). Whether to allow leading questions is in the sound discretion of the trial court and the ruling of the trial court will not be disturbed on appeal absent an abuse of discretion. *State v. White*, 349 N.C. 535, 556, 508 S.E.2d 253, 267 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). Abuse of discretion occurs when the ruling of the trial court is manifestly unsupported by reason. *State v. York*, 347 N.C. 79, 90, 489 S.E.2d 380, 387 (1997).

In addition, leading questions should not be used on direct examination except to develop the testimony of a witness. N.C.G.S. § 8C-1, Rule 611(c) (2001). "It is generally recognized that an examining counsel should not ask his own witness leading questions on direct examination." *Greene*, 285 N.C. at 492, 206 S.E.2d at 235. The reasoning behind this general proposition is to prevent counsel from suggesting the desired answer to an "eager and friendly witness." *State v. Hosey*, 318 N.C. 330, 334, 348 S.E.2d 805, 808 (1986). Nonetheless, counsel will be permitted to ask leading questions on direct examination when:

. . . .

> (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject matter at hand without suggesting answers and (8) the mode of questioning is best calculated to elicit the truth.

Greene, 285 N.C. at 492-93, 206 S.E.2d at 236.

In the case *sub judice,* defendant objected to the following dialogue with regards to the photographs shown to Lucas:

> Q. Now we see some red spots there?
>
> A. That's Wallace [sic] blood, when he shot him the last time, Mr. Hagans.
>
> Q. Mrs. Lucas, I don't want to upset you, but the red spots we see some on the floor there, and some on the side of the house?
>
> A. It's where he stumbled over there. He was stumbling after he got shot.
>
> Q. I take it none of those spots were there before the shooting?
>
> A. No, they was [sic] not.
>
> Q. And, in looking at this, and referring you back to State's Exhibit Number Two, is the -- we're looking at both of these (indicating), and this (indicating) is the front door here (indicating);
>
> Are the steps off to this side here (indicating), going out there where that stone thing is right there (indicating)?
>
> [Objection; overruled]
>
> A. He ain't got to lead me. I know what happened.

Upon review of the record, we are not convinced that the State's questions were leading. However, assuming *arguendo* that they were

leading, we discern no abuse of discretion. The witness had testified at length about a number of photographs of the crime scene including the ones in question. Moreover, the questions were aimed to elicit background such as the location of the steps and other locations in her home, and not to suggest the events surrounding the murder.

In addition, we reject defendant's argument that the trial court erred in admitting testimony regarding a specific date Jamal Neal was a passenger in defendant's cab when he witnessed the shooting.

Defendant objected to the following dialogue:

> Q: Now, Mr. Neal, I want to go back about a year and a half to July 27th, 1999;
>
> Do you remember that particular day?
>
> A. Well . . . [n]ot the particular date.
>
> Q. Do you remember the particular date you had an awfully unusual cab drive?
>
> [Objection; overruled.]
>
> A. Yes.

We conclude that this was a permissible use of leading questions to refresh the witness' recollection. The witness was 16 years old at the time of the murder and the testimony was being elicited nearly two years later at trial. Again, we find no abuse of discretion.

Each of the assignments related to the admissibility of the evidence discussed above are overruled.

III.

Defendant argues next that the trial court erred in its denial of his motion to dismiss for insufficiency of the evidence. Specifically, he contends that there was insufficient evidence of premeditation and deliberation. We disagree.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged . . . and (2) [that] defendant[is] the perpetrator of such offense." *State v. Fritsch,* 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis,* 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "Any contradictions or discrepancies in the evidence are for resolution by the jury." *State v. Brown,* 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

Our Supreme Court in *State v. Larry* defines first degree murder in pertinent part as follows:

> 'First-degree murder is the unlawful killing of another human being with malice, premeditation, and deliberation. Premeditation means that the act was thought out beforehand for some length of time, however short; but no particular amount of time is necessary for the mental process of premeditation. . . . Deliberation is an intent to kill carried out in a "cool state of blood" without the influence of a violent

passion or a sufficient legal provocation.'

State v. Larry, 345 N.C. 497, 513, 481 S.E.2d S.E.2d 907, 916 (quoting *State v. Harden*, 344 N.C. 542, 554, 476 S.E.2d 658, 663 (1996), *cert. denied*, 520 U.S. 1147, 137 L. Ed. 2d 483 (1997)), *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997) (citations omitted). Both premeditation and deliberation may be proved by circumstantial evidence. *State v. Bruton*, 344 N.C. 381, 474 S.E.2d 336 (1996). Further, premeditation and deliberation can be inferred from statements and conduct of the defendant before and after the killing. *State v. Olson*, 330 N.C. 557, 411 S.E.2d 592 (1992). "A killing committed during the course of a quarrel or scuffle may constitute first degree murder if the defendant formed the intent to kill in a cool state of blood before the quarrel or scuffle began and the killing during the quarrel or scuffle was the product of this earlier formed intent." *Harden,* 344 N.C. at 555, 476 S.E.2d at 664.

In the case *sub judice,* when viewed in the light most favorable to the State, there was substantial evidence presented from which a jury could reasonably infer that defendant killed Moody with premeditation and deliberation. A few weeks before the shooting, defendant threatened Williams that if he ever saw her with the victim, he would kill them both. The passenger, Neal, testified that prior to the shooting when defendant drove past the Lucas' residence, he made a u-turn, parked in front of the house, told Neal that he had to "do something right quick" and then mumbled, "I'm going to go get him." Defendant then exited the car

and went inside the house. Lucas testified that she overheard the victim say to defendant, "I see you got your mess in your pocket", which referred to defendant's gun, just before defendant began shooting at him. In addition when defendant returned to the cab after the shooting, he stated to Neal "you ain't seen nothing," after which he left the scene and disposed of the gun.

We conclude that there was sufficient evidence of premeditation and deliberation to submit the offense of first degree murder to the jury, and therefore, the trial court properly denied the defendant's motion to dismiss. Accordingly, this assignment of error is overruled.

IV.

Defendant argues next that the trial court erred in admitting his 1979 assault and battery conviction. We find no prejudicial error.

Generally, evidence of a defendant's prior conviction is not admissible if more than "10 years has elapsed since the date of the conviction" unless "the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence." N.C.G.S. § 8C-1, Rule 609 (2001). However, "where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal thereof, even though the rebuttal evidence would be incompetent or irrelevant had it been offered initially." *State v. Sexton*, 336 N.C. 321, 360, 444 S.E.2d 879, 901 (1994).

In the case *sub judice*, defendant objects to the State's

questions about an assault and battery conviction that occurred in 1979. As a general rule, the State would not have been allowed to question defendant about the 1979 conviction unless the State had given proper written notice that it intended to use the conviction. However, on direct examination, defendant testified that his criminal record consisted only of misdemeanor convictions. The State was entitled to introduce evidence to further explain this statement and, therefore, the trial court did not err by allowing this testimony. Accordingly, this assignment is overruled.

V.

Defendant argues next that the trial court erred by instructing the jury on "flight". We disagree.

A flight instruction is properly given to show consciousness of guilt when the record contains evidence "'reasonably supporting the theory that defendant fled after commission of the crime charged.'" *State v. Jackson*, 137 N.C. App. 570, 574, 529 S.E.2d 253, 256 (2000) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). "The sole rationale for instructing a jury on flight is that a defendant's flight from the scene of a crime for which he has been charged may be some evidence the defendant committed the crime." *Id.* at 574, 529 S.E.2d at 256; *State v. Self*, 280 N.C. 665, 672, 187 S.E.2d 93, 97 (1972) ("accused's flight from a crime shortly after its commission is admissible as evidence of guilt"). "The relevant inquiry is whether the evidence shows that defendant left the scene of the crime and took steps to avoid apprehension." *State v. Grooms*, 353

N.C. 50, 80, 540 S.E.2d 713, 732 (2000), *cert. denied* __ U.S. __, 151 L. Ed. 2d. 54 (2001).

In the case *sub judice,* defendant testified that immediately after he shot the victim, he returned to his cab and drove off before the police arrived. Defendant and Neal testified that defendant disposed of the weapon and then told Neal to switch to a different cab so defendant could leave. We conclude that this evidence is sufficient to reasonably infer that defendant fled the scene shortly after shooting the victim and further, that this flight is admissible as some evidence of his guilt. Thus, we hold that the trial court properly submitted instructions on flight to the jury. This assignment of error is overruled.

VI.

Lastly, defendant argues that the trial court erred in sentencing him to life imprisonment without parole. This assignment is without merit.

Under N.C.G.S. 15A-1340.17(c) (2001), the prescribed sentence for first degree murder, a Class A Felony, is life imprisonment without parole or death. Moreover, "'[t]here is a presumption that the [sentencing] judgment of a court is valid and just.'" *State v. Ahearn*, 307 N.C. 584, 597-98, 300 S.E.2d 689, 698 (1983) (quoting *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 130 (1962)) (citations omitted). "'The burden is upon appellant to show error amounting to a denial of some substantial right.'" *Id.*

Defendant has failed to assign any specific error related to the statutory punishment; nor has he offered any support or

authority for his contention that the trial court erred in imposing the statutorily prescribed sentence. Accordingly, this assignment of error is overruled.

We hold that defendant received a fair trial free of prejudicial error.

No error.

Judges WYNN and MCCULLOUGH concur.

Report per Rule 30(e).