NO. COA01-914

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

STATE OF NORTH CAROLINA

v. Moore County
No. 99 CRS 3685

RONALD DEON BARRETT

Appeal by defendant from judgment entered 14 March 2001 by Judge W. Douglas Albright in Moore County Superior Court. Heard in the Court of Appeals 24 April 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

Cunningham, Dedmond, Petersen & Smith, L.L.P., by Bruce T. Cunningham, Jr., for defendant-appellant.

CAMPBELL, Judge.

Ronald Deon Barrett ("defendant") was indicted on 16 August 1999 for first degree murder in the death of Calvin Lee Steele, Jr. (hereinafter, "the victim" or "Steele"). Defendant pled not guilty. The State elected not to place defendant on trial for first degree murder but rather to try him for second degree murder or any lesser included offense supported by the evidence. Defendant was convicted of voluntary manslaughter and sentenced to a presumptive prison term of 60 to 81 months. Defendant appeals.

The State's evidence at trial tended to show the following: On the night of 28 April 1999, the victim and three of his friends,

Theodore Gill ("Gill"), John Hancock ("Hancock") and Clarence Davenport ("Davenport"), rode to the Cameron Elementary School gymnasium to play basketball. The four men traveled to the school in Gill's Ford Explorer, with Gill driving, Davenport in the front passenger seat, Hancock in the left rear passenger seat, and Steele in the right rear passenger seat. When the four men arrived at the school, defendant and his cousin, Chris Barrett ("Chris"), were in a car parked in the school's parking lot. Gill parked the Explorer and the four men waited in the truck for the gym to be opened for play. While the four men waited in Gill's truck, Chris walked up to the driver's side window and began talking across Gill to Davenport. Steele got out of the right rear passenger seat and walked around the Explorer towards Chris. Steele asked Chris "where was his man at" and Chris replied that "he's in the car." Steele then punched Chris, grabbed Chris' jacket, and pulled the jacket off over Chris' head. Chris ran back to the car in which defendant was sitting, while Steele calmly walked back around the Explorer to the right rear passenger side.

Defendant then got out of his car and walked at a fast pace towards the Explorer carrying a handgun in his left hand. As defendant approached, Steele stood there with his arms up and his hands empty. Defendant walked up to Steele, stuck the gun in his chest, and gave him a push. Steele responded by punching defendant in the face, and then the two men began wrestling for position. As defendant and Steele struggled with each other, the gun went off. Defendant then backed away with the gun still pointed at Steele.

After a brief second, defendant ran back to the car with the gun in his hand and drove away.

The operator of the gym testified that defendant and Steele had gotten into an argument a few weeks earlier while playing basketball and that defendant had slapped Steele in the face. The operator testified that, based on this previous incident, he immediately asked if defendant had done it when he saw Steele lying on the ground.

Detective Jeff Sheffield testified that defendant had no bruises, marks, scratches or abrasions, on him when he was arrested. Detective Richard Talbert testified that the photograph taken of defendant in the early morning hours of 29 April 1999 did not reveal any injuries to defendant.

Defendant presented no evidence and the jury returned a verdict of guilty of voluntary manslaughter.

At the sentencing hearing, defendant submitted five statutory mitigating factors and requested a sentence in the mitigated range. Defendant submitted evidence of his good character and his support system in the community through the testimony of family members. Following the sentencing hearing, the trial court found no aggravating or mitigating factors and sentenced defendant in the presumptive range.

Defendant brings forward five assignments of error in the record on appeal. Two of defendant's assignments of error are not set out or supported in his brief, and are therefore deemed abandoned pursuant to N.C. R. App. P. 28(b)(6).

By his first remaining assignment of error, defendant argues that the trial court erred in having the following exchange in the presence of the prospective jurors prior to jury selection:

> THE COURT: Call your case.
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> MS. KRUEGER [State]: Your Honor, the first matter is Ronald Deon Barrett.
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> THE COURT: Is the State ready?
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> MS. KRUEGER: Yes, your Honor.
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> THE COURT: Is the defendant ready?
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> MR. CROCKETT [Defense]: Yes, your Honor.
>
> MR. YATES [State]: Your Honor, in the indictment the defendant was charged with first degree murder. The State will proceed with second degree murder.
>
> THE COURT: Let the record show that the State does not place the defendant on trial for first degree murder, but will place the defendant on trial for second degree murder and will seek such other verdict as the evidence might warrant and the jury might find.

Defendant argues that the trial court violated both N.C. Gen. Stat. § 15A-1221(b) and defendant's right to due process under the state and federal constitutions by informing the prospective jurors that defendant had been charged with a greater offense (first degree murder) than the one the State sought to try him on (second degree murder), leaving the prospective jurors with the impression that defendant had already received a major concession from the State.

A review of the record reveals that defendant did not object at trial to the above exchange.

> 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.

N.C. R. App. P. 10(b)(1) (2002). In criminal cases, a question which is not properly preserved for appellate review by objection at trial and is not deemed preserved, "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." N.C. R. App. P. 10(c)(4). The scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with Rule 10. N.C. R. App. P. 10(a). In addition, constitutional arguments not raised in the trial court are deemed waived on appeal. *State v. Fernandez*, 346 N.C. 1, 18, 484 S.E.2d 350, 361 (1997). Defendant did not object at trial to the above quoted exchange and has failed to assert plain error. Accordingly, defendant has failed to preserve for appellate review any issue related to the exchange.

Assuming, *arguendo*, that these issues had been properly preserved for appellate review, we conclude that the trial court did not err in informing the prospective jurors that defendant had been charged with first degree murder but that the State had elected to try him for second degree murder.

N.C.G.S. § 15A-1221(b) prohibits any person from reading the indictment against the defendant to prospective jurors or to the

jury at any time during jury selection or trial. *See, e.g., State v. Knight*, 340 N.C. 531, 459 S.E.2d 481 (1995); *State v. Faucette*, 326 N.C. 676, 392 S.E.2d 71 (1990); *State v. Leggett*, 305 N.C. 213, 287 S.E.2d 832 (1982). N.C.G.S. § 15A-1213 is substantially similar, prohibiting the trial judge from reading the pleadings to the jury. N.C.G.S. § 15A-1213 (2001).

However, N.C.G.S. § 15A-1221(a)(2) requires the trial court to inform prospective jurors about the case in accordance with N.C.G.S. § 15A-1213. N.C.G.S. § 15A-1213 requires the trial court to identify the parties and their counsel and briefly inform the prospective jurors of the name of the defendant, the charge, the date of the alleged offense, the name of the victim alleged in the pleadings, defendant's plea, and any affirmative defense of which defendant has given proper notice. *Knight*, 340 N.C. at 556, 459 S.E.2d at 496. "To comply with these requirements, the trial court may draw 'information from the bills of indictment to the extent necessary to identify the defendant and explain the charges against him and the circumstances under which he was being tried.'" *Faucette*, 326 N.C. at 689, 392 S.E.2d at 78 (quoting *Leggett*, 305 N.C. at 218, 287 S.E.2d at 835-36 (1982)).

Defendant specifically argues that N.C.G.S. §§ 15A-1213 and 15A-1221 prohibit a judge from informing prospective jurors that a defendant has been charged with first degree murder when the State has elected not to pursue first degree murder but rather to try the defendant on second degree murder. We disagree.

The purpose of the requirement that the indictment not be read

to prospective jurors or to the jury is to prevent the jurors from being "given a distorted view of the case before them by an initial exposure to the case through the stilted language of indictments[.]" *Leggett*, 305 N.C. at 218, 287 S.E.2d at 836. In the instant case, the trial court simply informed the prospective jurors that defendant had been charged with first degree murder and that the State had elected to try him for second degree murder. The trial court did not read the indictment in its entirety and in particular did not recite the language indicating that twelve or more grand jurors had concurred in issuing the indictment. *See Knight*, 340 N.C. at 556, 459 S.E.2d at 496 (quoting *Faucette,* 326 N.C. at 688, 392 S.E.2d at 78). Accordingly, the trial court did not violate the proscription contained in N.C.G.S. §§ 15A-1213 and 15A-1221 against reading the indictment to prospective jurors or to the jury. In addition, we conclude that the trial court's failure to inform the prospective jurors of all the information required under N.C.G.S. § 15A-1213 did not rise to the level of prejudicial error, because there is not a reasonable possibility that, had the trial court done so, a different result would have been reached at trial. *See* N.C. Gen. Stat. § 15A-1443(a) (2001).

Finally, defendant's due process argument is overruled based on this Court's decision in *State v. Carter*, 30 N.C. App. 59, 226 S.E.2d 179 (1976). In *Carter*, the defendant was indicted for first degree murder, and was tried for and convicted of second degree murder. Defendant was arraigned immediately before trial and the indictment was read to the jury. The Court in *Carter* held that the

reading of the indictment to the jury was not a violation of defendant's right to due process and equal protection.[1] The Court further held:

> Nor is there any merit to defendant's contention that prejudicial error resulted from the court's reading the indictment to the jury and *advising the jury that the State had elected not to place the defendant on trial for murder in the first degree but would place him on trial for murder in the second degree or for such other offense as the evidence may warrant.*

Id. at 61, 226 S.E.2d at 180 (emphasis added). *Carter* is still binding precedent on the due process issue raised by defendant in the instant case. Therefore, defendant's constitutional argument lacks merit.

Defendant next contends that the trial court erred in failing to submit to the jury the issue of defendant's guilt of the lesser included offense of involuntary manslaughter. During the jury charge conference, defendant requested an instruction on involuntary manslaughter. The trial court denied the request and charged the jury on second degree murder and voluntary manslaughter. Prior to the jury retiring to consider its verdict, defendant renewed his objection to the trial court's failure to instruct on involuntary manslaughter.

"Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury." *State*

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[1] At the time the defendant in *Carter* was tried and this Court's decision in *Carter* was issued, N.C.G.S. §§ 15A-1213 and 15A-1221 had not been enacted by the Legislature.

v. Powell, 336 N.C. 762, 767, 446 S.E.2d 26, 29 (1994). Involuntary manslaughter has also been defined as "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Redfern,* 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976); *accord State v. Wingard,* 317 N.C. 590, 600, 346 S.E.2d 648, 654-55 (1986).

The trial court is required to charge on a lesser included offense only when there is evidence to support a finding of guilt of the lesser offense. *State v. Hickey,* 317 N.C. 457, 346 S.E.2d 646 (1986); *State v. Knight*, 87 N.C. App. 125, 360 S.E.2d 125 (1987). In determining whether the evidence is sufficient, it must be viewed in the light most favorable to the defendant. *State v. Barlowe,* 337 N.C. 371, 378, 446 S.E.2d 352, 357 (1994). Defendant contends that since there was evidence of a struggle between him and the victim and there was no witness that testified to actually seeing the gun when it was discharged, an inference can be drawn that he unintentionally shot and killed the victim. We disagree.

In the instant case, defendant did not testify or put on any evidence. The State's evidence tended to show that, a few weeks prior to the shooting, defendant and the victim had gotten into an altercation during which defendant had slapped the victim in the face. On the night of the shooting, defendant quickly walked towards the victim with a gun in his left hand. Defendant stuck the gun in the victim's chest and gave the victim a push. The

victim then punched defendant and the two men began to struggle with one another. The gun went off and defendant backed away with the gun still pointed at the victim. Defendant then ran back to his car and fled from the scene. The State's evidence, if believed, tends to show an intentional killing. There was no evidence presented from which the jury might infer that defendant did not intend to fire the weapon, nor does such an inference arise from the fact that defendant and the victim were engaged in a struggle. *See Knight,* 87 N.C. App. at 130, 360 S.E.2d at 129. Thus, the trial court did not err in failing to instruct on involuntary manslaughter. *See id. See also State v. Wingard*, 317 N.C. 590, 346 S.E.2d 648 (1986); *State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983).

Defendant's final contention is that the trial court erred in not considering on the record the mitigating factors requested by defendant.

Under the Structured Sentencing Act, the trial court is required to consider evidence of aggravating or mitigating factors, but it is within the trial court's discretion whether to depart from the presumptive range. N.C. Gen. Stat. § 15A-1340.16(a) (2001). The trial court is required to make findings of mitigating factors, "only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2)." N.C.G.S. § 15A-1340.16(c); *State v. Brown,* 146 N.C. App. 590, 553 S.E.2d 428 (2001). In the instant case, defendant requested that the trial court find five statutory

mitigating factors. Defendant was then allowed to present evidence through family members of his good character and his support system in the community. The State requested certain aggravating factors and the trial court also heard from members of the victim's family. At the conclusion of the sentencing hearing, the trial court stated:

> Upon consideration of the evidence, the Court will impose a judgment in the presumptive range specified by the Legislature and will sentence the defendant for a Class D felony, record level number one, and the sentence of the Court is the term of imprisonment, not less than 60, no[r] more than 81 months to be assigned to do labor as by law provided . . . .

Defendant concedes that the trial court was under no obligation to find the proposed mitigating factors because defendant was sentenced in the presumptive range. However, defendant maintains that, in order to demonstrate that it properly *considered* the mitigating factors under N.C.G.S. § 15A-1340.16(a), the trial court had a duty to comment on the record regarding its findings as to each of the mitigating factors upon which defendant presented evidence or argument. We disagree.

In the instant case, the record shows that the trial court allowed defendant to present evidence and argument in support of the requested mitigating factors. The record further shows that the trial court was engaged with the parties throughout the sentencing hearing. There is no evidence that the trial court disregarded or ignored any of the evidence in mitigation offered by defendant. Finally, the trial court indicated that its decision to

sentence defendant in the presumptive range was based "upon consideration of the evidence." Under the facts of this case, we conclude that the trial court did as it was required to do under the Structured Sentencing Act. When sentencing a defendant within the presumptive range, the trial court is not required to state on the record each individual mitigating factor that it considered, and the reasons why it has decided not to find the mitigating factor. Accordingly, defendant's final assignment of error is overruled.

For the foregoing reasons, we find that defendant received a fair trial and sentencing hearing free from prejudicial error.

No error.

Judges WALKER and McGEE concur.

Report per Rule 30(e).