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NO. COA02-148

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

STATE OF NORTH CAROLINA

v.

Edgecombe County
No. 99-CRS-11124

JAMES BUNN WIGGINS

Appeal by defendant from judgment entered 27 March 2001 by Judge Jerry R. Tillett in Edgecombe County Superior Court. Heard in the Court of Appeals 12 November 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Buren R. Shields, III, for the State.

Nora Henry Hargrove for defendant-appellant.

MARTIN, Judge.

Defendant, James Bunn Wiggins, appeals from a judgment imposing a sentence of life imprisonment entered upon his conviction by a jury of first degree murder.

The State's evidence tended to show defendant and the victim, Alfred Scott, were both present at an afternoon cookout on 10 September 1999 at the home of Lou Edna Battle. During the course of the gathering, defendant and Scott became involved in an argument and pushed each other. Defendant left the cookout and returned with a shotgun. Marvin Scott, Alfred Scott's nephew, testified that he and Alfred Scott were standing with others near

Battle's front porch when defendant approached with the shotgun. Marvin and Alfred asked defendant to stop pointing the shotgun at them and told him to put the gun away. Marvin Scott testified that defendant approached and showed them that the shotgun did not contain any ammunition. Defendant then left, and Marvin continued to stand and talk with Alfred. Marvin heard a shot and Alfred Scott fell to the ground. Marvin turned to see defendant holding the shotgun. According to Marvin, defendant declared he should have shot Marvin also. Defendant then walked away. Minutes later, Marvin observed defendant sitting on the front porch smoking a cigarette. When Marvin questioned defendant as to why he shot Alfred, defendant responded "I'll shoot you too if you mess with me." A witness to the shooting overheard defendant say that Alfred Scott had tried to choke him during their earlier affray. Witnesses testified that although defendant had consumed some alcohol during the cookout, he did not appear to be impaired. Defendant confessed to a law enforcement officer who responded to the scene that he was the one who had shot Alfred Scott. Alfred Scott died as a result of a shotgun wound to his back.

Defendant presented the expert testimony of Dr. Gary Bachara, a clinical psychologist. Dr. Bachara testified that he interviewed defendant on 4 October 2000, and administered an intelligence test, which revealed defendant to be in the "mental defective range of intelligence." Dr. Bachara testified that someone in this range of intelligence would be incapable of properly weighing consequences and "pretty much functions for the moment." Dr. Bachara testified

that, based on his evaluation of defendant, it was his opinion that defendant would act impulsively and would be immature and ineffective in decision-making, and that alcohol consumption could compound his poor decision-making. On cross-examination, Dr. Bachara testified defendant is capable of making independent decisions, though they may not be good ones, and that he understands right from wrong. Following Dr. Bachara's testimony, and out of the presence of the jury, the trial court presented questions to Dr. Bachara for clarification purposes. Dr. Bachara responded that he believed defendant was capable of understanding the nature and consequences of his actions on the day in question; that defendant was capable of understanding that his firing the shotgun at Scott could result in Scott's death; and that defendant was capable of forming the specific intent to kill Scott. Defendant did not testify.

At the close of the evidence, defendant's motion to dismiss was denied. Defendant's request for a jury instruction on diminished capacity was also denied, and the trial court instructed the jury it could consider the defendant's guilt of the offenses of first degree murder or second degree murder, or find him not guilty. The jury found defendant guilty of first degree murder.

Defendant presents three arguments in support of six assignments of error: (1) the trial court erred in refusing to instruct the jury on defendant's diminished capacity; (2) the trial court erred in limiting Dr. Bachara's testimony; and (3) the trial

court was without jurisdiction because the indictment was insufficient to allege first degree murder. The remaining assignments of error contained in the record on appeal are deemed abandoned. N.C.R. App. P. 28(a) and 28(b)(6). We conclude defendant received a fair trial free of prejudicial error.

I.

Defendant first maintains he was entitled to a jury instruction on his diminished capacity based upon Dr. Bachara's testimony that defendant was in the "mental defective range of intelligence" and incapable of properly weighing the consequences of his actions, and because there was evidence that defendant had consumed alcohol at the cookout, which Dr. Bachara testified could further lessen defendant's ability to make effective decisions. We disagree.

First degree murder is defined as the unlawful killing of another human being with malice, premeditation and deliberation. *State v. Patterson*, 146 N.C. App. 113, 130, 552 S.E.2d 246, 258, *disc. review denied*, 354 N.C. 578, 559 S.E.2d 548 (2001) (citations omitted). In order to establish premeditation and deliberation, the State must produce evidence that the defendant formed the specific intent to kill the victim before doing so, and that he then carried out the intent to kill in a cool state of blood. *Id.* "An instruction on diminished capacity is warranted where the 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 had the ability to form the necessary

specific intent." *State v. Lancaster*, 137 N.C. App. 37, 44, 527 S.E.2d 61, 66-67, *disc. review denied in part and allowed in part on other grounds*, 352 N.C. 680, 545 S.E.2d 723 (2000).

In *Lancaster*, this Court held the evidence insufficient to warrant an instruction on diminished capacity. The defendant presented evidence in the form of expert testimony on substance abuse addictions and cognizant behaviors. *Id.* at 44, 527 S.E.2d at 67. The defendant's expert testified the defendant could have been impaired at the time of the crime, and that such impairment could have had a negative impact on his ability to form a plan or course of conduct. *Id.* However, during a *voir dire* examination, the expert stated he could not testify about the defendant's ability to make judgments and distinguish right from wrong. *Id.* at 44-45, 527 S.E.2d at 67. In addition, the defendant himself testified he had smoked crack cocaine and drank several beers over the course of the evening in question. *Id.* at 45, 527 S.E.2d at 67. This Court concluded "there was insufficient evidence of defendant's mental condition to create a reasonable doubt in the jurors' minds that defendant was unable to form the specific intent necessary to commit these crimes." *Id.*; see also *State v. Clark*, 324 N.C. 146, 163, 377 S.E.2d 54, 65 (1989) (instruction on diminished capacity not warranted where expert testified to defendant's mental condition, but "never suggested that defendant's disorder might have rendered her incapable of forming a premeditated and deliberate specific intent to kill.").

In the present case, we acknowledge there was ample evidence

that defendant was limited in his abilities; however, the inquiry is not whether defendant was limited, but whether such limitations actually prevented him from forming the specific intent to kill Alfred Scott. As to that issue, defendant failed to present sufficient evidence that he was not capable of forming that intent. Dr. Bachara, defendant's sole witness, did not render an opinion or present any other evidence tending to support a conclusion that defendant's mental limitations hindered his ability to form a specific intent in any way. Dr. Bachara, on cross-examination, testified defendant was capable of making his own decisions, though they may not be good ones, and that he understands right from wrong. Dr. Bachara also opined, out of the presence of the jury, that he believed defendant was capable of understanding the nature and consequences of his actions, including that he understood death or serious injury would likely result from firing the shotgun at Scott, and that defendant was capable of forming a specific intent to kill.

Defendant has not cited any authority to support his position that he is entitled to a diminished capacity instruction based solely on evidence of his mental limitations, combined with evidence that witnesses observed him consuming alcohol at the cookout and that he had a disagreement with the victim, without producing more specific evidence tending to show these conditions and circumstances actually prevented him from forming a specific intent. Without evidence directly addressing the effect of a defendant's limitations on his ability to form specific intent, the

jury is left to improperly speculate on the issue. See *Clark*, 324 N.C. 146, at 162-3, 377 S.E.2d at 64 (noting principle that evidence establishing only a possibility of fact in issue insufficient to allow jury to consider the issue "particularly pertinent" where evidence is of defendant's mental condition and issue is defendant's ability to form intent; "'such facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of juries from material matters.'" (citation omitted)). Accordingly, we reject defendant's first argument.

II.

In his second argument, defendant contends the trial court erred in limiting Dr. Bachara's testimony. Prior to Dr. Bachara's testimony, the State moved *in limine* to prohibit Dr. Bachara from testifying to the following three statements: (1) defendant was fearful for his life during the altercation with Alfred Scott; (2) at some point during the altercation, defendant believed his life was in danger; and (3) Dr. Bachara believed defendant was in extreme fear. The trial court granted the motion *in limine*, finding as fact that defendant was not going to testify; that the statements were self-serving and inconsistent with the evidence already presented in the case, thereby creating confusion for the jury; that the statements were an improper attempt to provide expert testimony as to defendant's credibility; that self-defense was not an issue in the case and therefore, the evidence was not relevant; that the probative value of the evidence was outweighed

by the potential for prejudice; and that the pre-trial report provided to the State regarding the nature of Dr. Bachara's testimony did not contain any opinions or diagnosis of defendant, and therefore, the three statements were not relevant to any opinion or diagnosis expressed in the pre-trial report to which the State was entitled.

Defendant argues the trial court erred in limiting Dr. Bachara's testimony because the proffered testimony was relevant to the issue of whether defendant was capable of premeditation and deliberation in the shooting. However, a trial court "has wide discretion in ruling on motions *in limine* and will not be reversed absent an abuse of discretion." *State v. Maney*, __ N.C. App. __, __, 565 S.E.2d 743, 746 (2002). Such an abuse occurs where the ruling is so arbitrary that it could not have resulted from a reasoned decision. *Id.* Indeed, in the admission of all evidence, the determination of whether probative value is outweighed by prejudice, thereby rendering the evidence inadmissible, is a matter left to the sound discretion of the trial court, and we cannot disturb such a determination on appeal absent an affirmative showing it was manifestly unsupported by reason. *State v. Hyatt*, 355 N.C. 642, 566 S.E.2d 61 (2002). Applying these principles in the present case, we cannot say that the trial court erred in prohibiting Dr. Bachara from testifying to the three statements. The trial court made extensive findings of fact on the issue and the record shows clearly that the trial court's decision was a reasoned one, not wholly unsupported by valid bases. Accordingly,

the trial court did not abuse its discretion in granting the State's motion *in limine*.

Additionally, defendant objects to the trial court's limitation of Dr. Bachara's opinion testimony as to defendant's actions and personality and the effect of his lack of intelligence. However, the trial court limited such testimony only as to two of the questions specifically preserved by defendant in his assignments of error of record. With respect to the remainder of the questions to which defendant's assignments of error were directed, the trial court's rulings were based on the form, not the substance, of the questions. As to the two remaining questions, the trial court declined to permit Dr. Bachara to state how he would expect defendant to react to a stressful situation, or to give an "overall opinion" of defendant. Even assuming, though we do not decide, that the answers were relevant and should have been admitted, defendant has not established, in light of the other evidence, that a different result would have been reached had Dr. Bachara been permitted to answer these questions. See, e.g., N.C. Gen. Stat. § 15A-1443(a) (2001); *State v. Williams*, 355 N.C. 501, 565 S.E.2d 609 (2002). These assignments of error are overruled.

III.

Finally, defendant argues the trial court lacked jurisdiction due to the insufficiency of the indictment to allege all the elements of first degree murder. Defendant asserts this argument for preservation purposes only and concedes our Supreme Court has upheld as constitutional short-form murder indictments identical to

the indictment at issue. *See, e.g., State v. Holman*, 353 N.C. 174, 540 S.E.2d 18 (2000), *cert. denied*, __ U.S. __, 151 L. Ed. 2d 181 (2001). Accordingly, this argument is rejected. Defendant's trial was free of prejudicial error.

No error.

Chief Judge EAGLES and Judge GREENE concur.

Report per Rule 30(e).