NO. COA02-33

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

STATE OF NORTH CAROLINA

v. Buncombe County
No. 99 CRS 056852

LEO ARFOCAR SWAIN

Appeal by defendant from judgment entered 30 October 2000 by Judge James L. Baker in Buncombe County Superior Court. Heard in the Court of Appeals 10 October 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Leo Arfocar Swain, pro se, defendant appellant (Haley H. Montgomery, appellate counsel for defendant appellant, allowed to withdraw by order of this Court).

TIMMONS-GOODSON, Judge.

Leo Arfocar Swain ("defendant") appeals from the judgment of the trial court sentencing him to life imprisonment without parole for the first-degree murder of Antonio Lynch ("Lynch"). For the reasons stated herein, we uphold defendant's conviction.

Evidence presented at defendant's trial tended to show the following: Defendant met and entered into a relationship with Mishia Latoya Carson ("Carson") in February of 1998. Carson was nineteen years old at the time, and defendant was fifteen years old. After Carson gave birth to defendant's child, defendant moved

into Carson's apartment in order to help care for the infant. The relationship quickly deteriorated, however, and defendant moved into a motel with his mother and two brothers. Defendant's older brother, Jason, had recently been released from prison at the time.

On 1 June 1999, defendant argued with Carson at her apartment. Several other persons, including the victim, Lynch, were present. Carson informed defendant that she had a new boyfriend, whose "manhood was bigger than [defendant's]." Defendant became angry, slapped Carson, and left the apartment. Defendant returned to the motel at which his family was staying and attempted to contact Carson by telephone, but she refused to speak with defendant. Before Carson hung up the telephone, Lynch ordered defendant to "stop calling." Defendant became enraged, and told Carson that "I'm going to get . . . whoever that is."

The next morning, defendant returned to Carson's apartment, but she again refused to talk to defendant. Defendant then accompanied his mother and brothers to a pawn shop, where Jason selected a rifle, which defendant's mother then purchased. After obtaining bullets for the rifle, the family returned to the motel. Later that afternoon, defendant telephoned Carson's home and spoke with Lynch. The men exchanged threats and curses. After defendant spoke with Lynch, Jason approached defendant and told him that he "need[ed] to go over there and handle your business." Jason then persuaded defendant's mother to drive them to a dirt road located behind Carson's apartment. Nigel Swain, defendant's younger brother, and Willis Tyrone Foster ("Foster"), a close friend of the

Swain family, accompanied them. When they reached the dirt road, defendant retrieved the rifle purchased earlier that day from the trunk of the automobile, and he and Jason began walking through the woods toward Carson's apartment. Nearing Carson's apartment, defendant observed Lynch standing outside talking on a cordless telephone. Defendant testified that when he saw Lynch, "I just shot. I didn't know I hit him, really. I just -- I heard him scream, but I didn't know if I hit him or not." Defendant and Jason returned to the automobile, and defendant's mother drove them back to the motel, stopping only briefly to discard the rifle in the woods. Emergency assistance transported Lynch to a hospital, where he was pronounced dead from a gunshot wound to the abdomen. Law enforcement officers arrested defendant, Jason, and Foster the following morning. Further facts are set out in the following opinion as necessary.

Upon considering the evidence, the jury found defendant guilty of first-degree murder, and the trial court sentenced him to life imprisonment without parole. Defendant appeals.

Defendant presents three assignments of error on appeal, arguing that the trial court erred in (1) excluding certain evidence offered by defendant for purposes of impeaching a witness; (2) failing to instruct the jury on voluntary intoxication; and (3) denying defendant's motion to dismiss the murder indictment. We note initially that, although the record on appeal contains nine assignments of error, defendant's brief addresses only the three

above-stated assignments of error. "Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned." N.C.R. App. P. 28(a) (2002). We therefore limit our review to the assignments of error argued by defendant in his brief on appeal.

By his first assignment of error, defendant contends that the trial court erred in excluding evidence of Jason Swain's conviction of aiding and abetting second-degree murder for his involvement in Lynch's death. Defendant argues that the State introduced hearsay testimony by Jason through another witness. As Jason did not testify, defendant contends that Jason was a non-testifying declarant, and that defendant had the right to impeach Jason's credibility by introducing evidence of his conviction. Defendant asserts that the trial court's exclusion of Jason's conviction constitutes reversible error.

At trial, the State introduced two statements given by Foster to law enforcement officers after his arrest for his involvement in Lynch's death. In the statement dated 3 June 1999, Foster recounts that, while they were driving to the dirt road behind Carson's apartment,

> Jason kept pumping [defendant] up[,] saying[,] ["N]o one's gonna [sic] f___ with my little brother and get away with it[."] . . . . So I Willis Tyrone Foster again tried to talk them out of this because Jason Swain was trying to pass me a knife and asked me to come along[.] And I gave it back through Nigel[.] And I told him to give it back to Jason because I wanted no part of this[.] So then I was called sell out by Jason and also a punk[.] And I told Nigel we should leave them but he couldn't leave his mom because she was crying.

The second statement by Foster introduced at trial included the following information:

> [Foster] stated that Jason Swain asked him to go along with them and handed him a knife that he had with him. He stated that Jason Swain told him to come with them and help them if they had any trouble in the apartments and stated "show me some love." He stated that he took this to mean that he had to go along to be one of them. Willis Foster stated that he gave the knife to Nigel Swain who then handed it back to Jason Swain and told him that he would wait in the car. He stated that Jason Swain called him a "punk" and a "sell out" for not going with them.

Defendant did not object to the admission of either of these statements into evidence. When defendant testified, he stated that Jason had been convicted for his involvement in the crime and was presently serving a sentence of twenty-five years. Defense counsel then attempted to introduce evidence that Jason had been convicted of aiding and abetting second-degree murder for his involvement in Lynch's death. The trial court denied the admission of this evidence.

We conclude that, even if the exclusion of evidence regarding the specific nature of Jason's conviction was error, such error was harmless in light of the overwhelming evidence of defendant's guilt. It was uncontroverted at trial that defendant repeatedly threatened Lynch, and then shot and killed him. There was moreover ample evidence from which the jury could conclude that the killing was premeditated. Further, the jury understood that Jason had been convicted for his role in Lynch's murder, and that he did not receive a life sentence, but merely twenty-five years. The

exclusion of the specific details of Jason's conviction, purportedly offered by defendant in an attempt to "impeach" those statements made by Jason contained within Foster's testimony, could not have possibly resulted in a different verdict. We therefore overrule this assignment of error.

By his second assignment of error, defendant argues that the trial court erred in declining to instruct the jury on voluntary intoxication. Defendant contends there was substantial evidence to support a finding that when defendant shot and killed Lynch, he was incapable of forming the specific intent necessary to convict defendant of first-degree murder. We disagree.

Before the trial court will be required to instruct on voluntary intoxication, the defendant must produce substantial evidence that, at the time of the crime for which he is being tried, the defendant was intoxicated to the point that his mind and reason were overthrown, and that he was thus utterly incapable of forming the requisite intent to commit the crime. *See State v. Long*, 354 N.C. 534, 538, 557 S.E.2d 89, 92 (2001). "Evidence of mere intoxication is not enough to meet defendant's burden of production." *State v. Kornegay*, 149 N.C. App. 390, 395, 562 S.E.2d 541, 545, *appeal dismissed and disc. review denied*, 355 N.C. 497, 564 S.E.2d 51 (2002). Where the defendant fails to meet this high burden, the court is not required to charge the jury on voluntary intoxication. *See id.*

In the instant case, defendant presented evidence tending to show that, on the day of the shooting, he drank one-half of a one-

fifth bottle of wine, shared a marijuana joint with several people, and took several pills that made him "dizzy." Dr. Jerry W. Noble, a clinical psychologist who examined defendant, further testified that defendant's "mental capacity was affected" by his substance abuse disorders, and that, on the day of Lynch's death, defendant "was in an intoxicated state."

Although defendant presented some evidence of his intoxication the day of the murder, he failed to produce substantial evidence that, at the time of the killing, he was so intoxicated as to be "utterly incapable of forming a deliberate and premeditated purpose to kill." Moreover, the evidence showed that defendant disposed of the rifle used to kill Lynch in the woods before returning to the motel. Such behavior, designed to hide defendant's participation in the murder, demonstrates that defendant "could plan and think rationally and was, thus, not so intoxicated at the time of the murder as to negate defendant's ability to form specific intent." *Long*, 354 N.C. at 539, 557 S.E.2d at 92; *see also Kornegay*, 149 N.C. App. at 396, 562 S.E.2d at 545 (stating that the defendant's disposal of the murder weapon was one of the acts by the defendant "clearly indicative of a capacity to form premeditation and deliberation"). We further note that the trial court submitted the lesser-included offense of second-degree murder to the jury. "Having heard defendant's expert testimony, if the jurors had a reasonable doubt as to whether defendant's intoxication precluded him from forming the specific intent necessary for premeditated and deliberate murder, the jurors had the option of convicting

defendant of the lesser offense." *Long*, 354 N.C. at 539, 557 S.E.2d at 93.

We conclude that the evidence regarding defendant's intoxication at the time of the murder was insufficient to warrant an instruction on the defense of voluntary intoxication. The trial court therefore did not err in declining defendant's request for this instruction, and we overrule defendant's second assignment of error.

By his final assignment of error, defendant argues that the short-form indictment used in the instant case is unconstitutional, because it failed to charge all of the elements of first-degree murder. Defendant contends that the trial court therefore erred in denying his motion to dismiss the murder indictment against him. Our Supreme Court has repeatedly rejected this argument in recent years, holding that the short-form indictment is constitutional. *See State v. Braxton*, 352 N.C. 158, 175, 531 S.E.2d 428, 437-38 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 504-05, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). We therefore overrule this assignment of error.

No error.

Judges HUDSON and CAMPBELL concur.

Report per Rule 30(e).