NO. COA08-539

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

STATE OF NORTH CAROLINA

v. Durham County
No. 01 CRS 50252

RODNEY COFFIN

Appeal by defendant from judgment entered 3 December 2007 by Judge A. Leon Stanback in Durham County Superior Court. Heard in the Court of Appeals 23 October 2008.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Gilda C. Rodriguez, for defendant-appellant.

CALABRIA, Judge.

Rodney Coffin ("defendant") appeals his sentence from a judgment entered upon a guilty plea of second-degree murder. Defendant was sentenced in the aggravated range to a minimum of 210 months and a maximum of 261 months in the North Carolina Department of Correction. We find no error.

On 6 August 2001, defendant was indicted for the July 2001 murder of his girlfriend, Bonnie Bassett ("the victim"). Defendant's trial was held during the 3 November 2003 criminal session in Durham County Superior Court. On 7 November 2003, the trial court declared a mistrial because the jury could not reach a

unanimous verdict. The same day, defendant entered a guilty plea to second-degree murder. The trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense. Defendant appealed on the basis that the aggravating factor was not found beyond a reasonable doubt by a jury in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). The Court of Appeals remanded for resentencing. The Supreme Court vacated the Court of Appeals' decision and remanded to the Court of Appeals to conduct a harmless error analysis under *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). On remand, the Court of Appeals reversed and remanded for resentencing.

The resentencing hearing was held on 27 November 2007. The jury found two aggravating factors: (1) that defendant took advantage of a position of trust or confidence to commit the offense and (2) that defendant acted with premeditation and deliberation. The trial court judge sentenced defendant in the aggravated range to a term of 210 months for a maximum of 261 months in the North Carolina Department of Correction. From this sentence, defendant appeals.

I. Admissibility of Evidence

Defendant first argues he is entitled to a new sentencing hearing because the trial court allowed testimony that he killed a puppy. We disagree.

The victim's mother testified to the following:

> Bonnie and Rodney had a small puppy and one day they had an argument, and Rodney had the

> puppy in his hand, and the last thing Bonnie said to him in the argument was, "Do what you have to do, Rodney," and Rodney took the puppy and just threw it down on the bricks in front of the fireplace, and it went whomp, and it was killed instantly.

This incident occurred in February 2000, more than a year prior to the victim's murder. Defendant objected to any references to defendant killing the puppy and his objection was overruled. Defendant argues this testimony was irrelevant to show premeditation and deliberation and was highly prejudicial. We conclude defendant waived his right to review of this issue.

"Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). Here, defendant later presented testimony by Dr. Moira Artigues ("Dr. Artigues") to support his argument that defendant did not act with premeditation and deliberation. Dr. Artigues testified that defendant had a long history of impulsive behavior and cited as an example the incident with the puppy. Since defendant introduced the same evidence without objection, the benefit of his objection is lost. We overrule this assignment of error.

II. Closing Argument

Defendant next contends it was prejudicial error for the trial court to allow the prosecutor to express her personal beliefs during closing arguments. We disagree.

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citing *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984) ("The appellate courts will ordinarily not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and clearly calculated to prejudice the jury.")). Abuse of discretion occurs when the trial court's decision "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985). "When the prosecutor becomes abusive, injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate and it becomes the duty of the trial judge to intervene to stop improper argument and to instruct the jury not to consider it." *State v. Smith*, 279 N.C. 163, 166, 181 S.E.2d 458, 460 (1971).

Here, defense counsel implied in his closing arguments that the prosecutor represented the victim just as the defense counsel represented the defendant. Defense counsel stated, "I'm Mr. Coffin's advocate. . . . and I come to this case with a lens . . . of an advocate." Defense counsel then stated, "[The prosecutor] also has been working on this case for years, and she comes to the case with the same kind of lens as an advocate."

Defendant later objected to the following remarks by the prosecutor:

[The State]: . . . There’s one thing I want you to understand, the difference between a criminal defense lawyer and a prosecutor. A criminal defense lawyer is an advocate for his client, even if the person is guilty. His job is to fight, as he should, for his client. Even if [defense counsel] felt personally there was not evidence of premeditation and deliberation, or there was evidence of premeditation and deliberation, or position of trust, his job is to be an advocate for his client. As a prosecutor, if I do not believe -

[Defense]: Objection.

THE COURT: Overruled.

[Defense]: Your Honor, she's calling her beliefs -

THE COURT: Okay. All right. I'll sustain it.

[The State]: If the prosecution, whoever the prosecutor might be, does not believe they have sufficient evidence -

[Defense]: Objection, Your Honor.

[The State]: Judge, he argued about -

THE COURT: Overruled, go ahead. Go ahead.

[The State]: [Defense counsel] said we're all advocates, but it's a whole lot of difference. The State has to have evidence, and that prosecutor must personally believe that there's evidence to support their position, because I don't represent Bonnie Bassett, I don't represent Juanita Bassett, I represent the State of North Carolina, Durham County.

[Defense]: Objection, for the record, Your Honor.

THE COURT: All right

[The State]: So if there is no evidence of that, and the prosecutor doesn't believe it, they cannot proceed on it.

[Defense]: Objection for the record.

THE COURT: Overruled.

The prosecutor's comments were in direct response to the defense counsel's closing argument and clarified that the prosecutor's duties are not equivalent to those of the defense counsel. In this context, these remarks are not "extreme and clearly calculated to prejudice the jury." Any impropriety was invited by defense counsel's characterization of the State's role. *See Huffstetler*, 312 N.C. at 112, 322 S.E.2d at 123. Accordingly, we do not review the judge's exercise of discretion. *Id.* at 111, 322 S.E.2d at 122. We also note that the trial judge later instructed the jury to disregard any reference to personal beliefs held by either counsel.

III. Ruling on Motion in Presence of Jury

Defendant next contends he was prejudiced by the trial court's ruling on his motion to dismiss in the presence of the jury. We disagree. While the jury was in the courtroom, defendant made a motion to dismiss at the close of the State's evidence. The trial judge denied defendant's motion.

Defendant argues that by ruling on his motion in the presence of the jury, the trial judge impermissibly expressed an opinion in the jury's presence in violation of N.C. Gen. Stat. § 15A-1222. We disagree. In *State v. Welch*, 65 N.C. App. 390, 393-94, 308 S.E.2d 910, 912-13 (1983), this Court concluded the trial court did not prejudice defendant by summarily denying defendant's motion to dismiss in the presence of the jury. "Generally, ordinary rulings

by the court in the course of trial do not amount to an impermissible expression of opinion." *Id.* at 393-94, 308 S.E.2d at 913.

We also note that by defendant's own actions, defendant waived his right to review this issue. "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2007). "[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *rev. dismissed*, 355 N.C. 216, 560 S.E.2d 142 (2002). Accordingly, this assignment of error is overruled.

IV. Insufficient Evidence

Defendant finally contends the trial court erred in denying his motion to dismiss because the finding of premeditation and deliberation was not supported by the evidence. We disagree.

The standard of review of a motion to dismiss is whether there is substantial evidence of each element of the offense and substantial evidence that defendant is the perpetrator. *State v. Johnson*, 183 N.C. App. 576, 580, 646 S.E.2d 123, 126 (2007). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). In ruling on the motion to dismiss, "the trial court must consider the evidence in the light most favorable to the State and give the State every

reasonable inference to be drawn therefrom." *State v. Truesdale*, 340 N.C. 229, 234, 456 S.E.2d 299, 302 (1995).

"Premeditation and deliberation are usually proved by circumstantial evidence because they are mental processes that ordinarily are not readily susceptible to proof by direct evidence." *State v. Ginyard*, 334 N.C. 155, 158, 431 S.E.2d 11, 13 (1993) (citation omitted). In *State v. Whitaker*, 100 N.C. App. 578, 397 S.E.2d 372 (1990), testimony of defendant's wife and evidence regarding their relationship supported the trial court's finding as an aggravating factor that defendant committed assault with a deadly weapon with premeditation and deliberation. The evidence showed that there was ill will between the parties which culminated in violence on at least two occasions prior to the offense, that defendant showed his wife the type of knife used in the assault and told her drug dealers were after him and were going to get her to get at him, and that defendant approached his wife hours before the assault and told her she was dead, or was going to die. *Id.* at 583, 397 S.E.2d at 375.

Defendant argues he presented evidence of defendant's impulsive behavior, therefore showing he did not act with premeditation and deliberation. This argument is without merit. On appeal, we review whether there is any "evidence [tending] to prove the fact [] in issue or which reasonably" leads to a conclusion and "[i]f the evidence . . . at trial gives rise to a reasonable inference of guilt, it is for the . . . jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's

guilt." *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981) (quotation and citations omitted).

Here, evidence was presented that defendant left the bedroom to smoke a cigarette, checked on their son, who was sleeping in the next room, then returned to the bedroom and shot the victim while the victim was laying in bed. *See Truesdale*, 340 N.C. at 234, 456 S.E.2d at 302 (defendant deliberates if he forms the intent to kill in a cool state and not as the result of violent passion due to sufficient provocation). Defendant shot the victim twice using a revolver that required some force to manually pull the trigger to fire more than once (as opposed to a semi-automatic weapon), which establishes that there was a pause between firings. Even a small amount of time can be sufficient to establish premeditation. *See State v. Arrington*, 336 N.C. 592, 594, 444 S.E.2d 418, 419 (1994) (defendant premeditates if he forms the specific intent to kill for some length of time, no matter how short, before the actual killing). In addition, the State presented evidence of domestic violence and other incidents showing ill will between the parties. A reasonable juror can infer from this evidence that defendant acted with premeditation and deliberation.

No error.

Judges McCULLOUGH and TYSON concur.

Report per Rule 30(e).