NO. COA10-1245

NORTH CAROLINA COURT OF APPEALS

Filed: 19 April 2011

STATE OF NORTH CAROLINA

v. Orange County
Nos. 07 CRS 56776-78

RANDALL ALLAN STANDIFER
Defendant.

Appeal by Defendant from judgments entered 26 March 2010 by Judge Abraham Penn Jones in Orange County Superior Court. Heard in the Court of Appeals 8 March 2011.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for Defendant.

STEPHENS, Judge.

I. Procedural History and Facts

On 4 February 2008, an Orange County grand jury indicted Defendant Randall Allan Standifer for first-degree murder, first-degree kidnapping, felonious breaking or entering, and assault on a female. A year later, the State announced it would

not seek the death penalty. Defendant was indicted for armed robbery on 30 November 2009. Defendant was tried on all charges at the 15 March 2010 Criminal Session of Orange County Superior Court. The jury returned guilty verdicts for first-degree murder (based on theories of premeditation and deliberation and felony murder), armed robbery, and misdemeanor breaking or entering. The jury could not reach a verdict on the kidnapping and assault on a female charges. The trial court imposed a sentence of life without parole for the first-degree murder conviction and a consolidated sentence of 77 to 102 months for the other convictions, to run consecutively. Defendant gave oral notice of appeal.

The evidence at trial tended to show the following: Defendant was in a romantic relationship with Diana Koutsis from late 2006 until November 2007. During this time, Koutsis lived with Defendant. After the couple broke up following an argument, a friend took Koutsis to stay at Jeffrey Walton's house. Koutsis and Walton began dating soon after.

On 24 December 2007, Koutsis and Walton encountered Defendant at a convenience store. Walton had entered the store while Koutsis waited in his truck. Defendant approached Koutsis and asked how she could leave him for Walton. When Walton

returned to the truck, the two men had a confrontation. Koutsis testified at trial that she thought Walton apologized for "taking [Defendant's] girl" but she could not "remember exactly what was said between the two of them."

Later that night, Defendant saw his friend, Wayne Baker. Baker testified that Defendant was "excited and confused" because he thought he was going to see Koutsis, but had not heard from her since their encounter at the convenience store. Also that night, Defendant asked his friend Ronnie Laws for shotgun shells, saying he planned to go deer hunting. Defendant then borrowed a shotgun and shells from Mike Walker, saying he needed to kill a raccoon at his mother's home.

On 25 December 2007, Defendant returned to Baker's residence and appeared fine. At 10:00 a.m., Defendant asked Wallace Wrenn if bird shot would kill a deer; Wrenn said that it could. Wrenn testified that Defendant appeared "disconnected." Defendant returned again to Baker's home between noon and 1:00 p.m. He still had not heard from Koutsis but believed that she was going to call him to come get her. After waking from a nap around 5:00 p.m., Defendant told Baker he was going to get Koutsis. He asked Baker to go with him, but Baker was preparing Christmas dinner and could not go.

Defendant left in his father's truck and parked near Walton's house on New Sharon Church Road in Orange County. Koutsis and Walton were sitting in the living room after using cocaine and drinking beers. Koutsis testified that around 5:30 p.m., Defendant forced his way into the house and shot Walton in the arm. Defendant hit Koutsis with the barrel of the shotgun and told her to get her belongings because she was leaving with him. While she was collecting her things, Koutsis heard a second gunshot and Defendant asking Walton for money.

At trial, Koutsis gave conflicting testimony about what she saw when she returned to the living room, first stating that she saw Walton hand his wallet to Defendant, but later saying that she never saw Walton give Defendant anything. Her written statement the night of the shooting claimed that "she didn't see [Walton] give [Defendant] the whole wallet."

Koutsis testified that Defendant pointed the gun at Walton and shot him a third time, the bullet striking him near his neck. However, in Koutsis' written statement on the day of the shooting, she said that the gun just "went off" when the third shot was fired and she was not sure if Defendant was pointing the gun at Walton. The State at trial asserted that the third shot was the "fatal shot."

Defendant asked Koutsis to see if Walton was still alive, but she refused. As they left, Defendant threw a cigarette butt down but then asked Koutsis to pick it up because it had his DNA on it. She picked it up and went with Defendant through some woods. As they approached Defendant's truck, two sheriff's deputies appeared. They had been called to investigate the gunshots by a neighbor who thought someone was hunting on his land.

The deputies ordered Defendant and Koutsis out of the woods. Deputy Jonathan McVey recognized Defendant and asked what was going on. Defendant told him that he and Koutsis were getting back together and trying to leave before Walton returned home. Deputy McVey asked Koutsis about an injury on her lip. She said, "Why don't you just tell him you killed Jeffrey." Deputy McVey then arrested Defendant. The other deputy, Shane Oakley, found a gun in the same area of the woods where the officers had first spotted Defendant and Koutsis. The deputies found eleven shotgun shells on Defendant - three spent, eight live - and Walton's wallet.

II. Discussion

Defendant brings forward three substantive arguments on appeal: that the trial court erred by (A) refusing to instruct

the jury on second-degree murder, (B) excluding evidence that Koutsis asked Defendant to pick her up, and (C) excluding evidence that the victim had threatened to kill Defendant and made other threats to third parties regarding Koutsis. For preservation purposes, Defendant also argues that (D) the State's short-form murder indictment violates his constitutional rights. As discussed herein, we find no error.

A. Jury Instructions

Defendant first argues that the trial court erred in failing to instruct the jury on second-degree murder because the evidence supported the charge. We disagree.

We review a trial court's decisions regarding jury instructions *de novo*. *State v. Jenkins*, ___ N.C. App. ___, ___, 688 S.E.2d 101, 105 (2010). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). Jury instructions should only be given if based on "facts or facts presented by a reasonable view of the evidence." *State v. Smart*, 99 N.C. App. 730, 735, 394 S.E.2d 475, 477 (1990), *disc. rev. denied*, 328 N.C. 576, 403 S.E.2d 520 (1991).

In deciding whether to instruct on a lesser-included offense, the trial court must determine "whether the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged." *State v. Strickland*, 307 N.C. 275, 283, 298 S.E.2d 645, 652 (1983), *overruled on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). If the State's evidence satisfies this burden and there is no other evidence than the defendant's denial, the trial court should not instruct on second-degree murder. *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841 (1995). "A trial judge is not required to instruct the jury on lesser-included offenses 'when there is no evidence to sustain a verdict of [the] defendant's guilt of such lesser degrees.'" *State v. Lyons*, 340 N.C. 646, 663, 459 S.E.2d 770, 779 (1995) (quoting *State v. Shaw*, 305 N.C. 327, 342, 289 S.E.2d 325, 333 (1982)). Conversely, "[e]rror in failing to submit the question of [the] defendant's guilt of a lesser degree of the same crime is not cured by a verdict of guilty of the offense charged because it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly submitted to the jury." *State v. Poole*, 298 N.C. 254,

257, 258 S.E.2d 339, 341-42 (1979).

At the charge conference, the State requested a first-degree murder instruction based on premeditation and deliberation and/or felony murder. Defendant sought an instruction on second-degree murder, based on two arguments. First, he contended that the Court would err by "instructing the jury on felony murder on the grounds that it's a denial of [D]efendant's rights to due process under the United States Constitution and the Constitution of North Carolina." Second, he pointed to the inconsistency between Koutsis' trial testimony that Defendant pointed the gun and fired at Walton and her out-of-court statement on the day of the crime when she said she thought the gun might have just gone off. Specifically, at trial, Koutsis testified regarding the third shot that "[Defendant] just - he pointed the gun at Jeff, and he shot him." The State later presented a statement that Koutsis gave to investigators the night of the shooting. In the statement, she said, "I was walking down the hallway; and the third, I think the gun just went off. I don't know if he was aiming it or not." Defendant objected to the statement, but the trial court admitted it "for corroborating purposes." However, Defendant did not request and the trial court did not give a

limiting instruction regarding this statement.[1] On cross-examination, Koutsis testified that she saw Defendant aim the gun at the victim. After hearing arguments of counsel, the trial court declined to instruct on second-degree murder.

Defendant argues that the inconsistency of Koutsis' characterization of the third shot is sufficient evidence to warrant an instruction on second-degree murder. He asserts that, because the trial court admitted it "for corroborating purposes[,]" but did not give a limiting instruction at the time, the out-of-court statement was actually substantive evidence. We are not persuaded.

"The admission of evidence which is relevant and competent for a limited purpose will not be held error in the absence of a request by the defendant for a limiting instruction. Such an instruction is not required unless specifically requested by counsel." *State v. Stager*, 329 N.C. 278, 309, 406 S.E.2d 876, 894 (1991) (citations omitted). While Defendant objected to the out-of-court statement at trial, which objection the trial court sustained by designating the statement "for corroborating purposes," Defendant did not request any further specific

[1] Immediately after Koutsis read this out-of-court statement from the stand, another prior out-of-court statement by Koutsis was admitted over Defendant's objection. On that occasion, the trial court did give a specific limiting instruction.

limiting instruction; thus, the trial court was not required to give any. Koutsis' out-of-court statement was admitted for corroborative purposes only and, thus, "[t]he prior statement should be considered only for the purpose of corroboration, and the trial court should so instruct the jury." *State v. Poole*, 298 N.C. 254, 259, 258 S.E.2d 339, 343 (1979). Because the out-of-court statement was entered for corroborative purposes only and not for the truth of the matter asserted, it could not be considered "conflicting evidence relating to any element of the crime charged." *Strickland*, 307 N.C. at 283, 298 S.E.2d at 652. Further, we note that in the jury charge, the trial court provided the following additional limiting instruction:

> Now, when evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with his or her testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such an earlier statement was made and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve the witness' testimony at this trial.

The record shows that the State met its burden on each

element of first-degree murder. Without any conflicting evidence to support a second-degree charge, the trial court properly declined to instruct the jury on second-degree murder.

B. Excluding Evidence under Rule 106

Defendant next argues that the trial court erred by excluding evidence which should have been admitted under Rule 106. Specifically, Defendant argues the trial court improperly applied Rule 106 to exclude evidence that Koutsis asked Defendant to pick her up, contending it was necessary to correct the misleading impression that Defendant had no legitimate reason to go to Walton's house. We disagree.

Rule 106 governs completeness of certain evidence: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." N.C. Gen. Stat. § 8C-1, Rule 106 (2009). "The purpose of the 'completeness' rule codified in Rule 106 is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot, because of 'the inadequacy of repair work when delayed to a point later in the trial.'" *State v. Thompson*, 332 N.C. 204,

220, 420 S.E.2d 395, 403-404 (1992) (quoting *United States v. LeFevour*, 798 F.2d. 977, 981 (7th Cir. 1986)).

Here, during direct examination of Baker, the State asked him about the events leading up to the shooting on 25 December and about Defendant's actions and behaviors on that day. Specifically, Baker was asked what happened when Defendant returned to Baker's home about noon or 1:00 p.m. on Christmas Day:

> Q. What happened when he got back to your house?
>
> A. He said he hadn't heard from Diana. She was supposed to call him to pick her up. And he was just kind of down like he didn't know if he was going to get to see her or not, if she lied to him again or what was going on. But I was just trying to comfort him as a friend but also trying to cook dinner at the same time. So -- but he was -- he sat in my den and watched TV for a while. And then he took a nap.

In his direct testimony, Baker referred at least four times to Defendant's belief that Koutsis would call him to pick her up at Walton's home, including the following exchange:

> Q. Now, on Christmas Day during the day, was [] [D]efendant upset?
>
> A. No. He -- his -- his feelings were hurt, if you mean upset like that. His feelings was (sic) hurt because she hadn't called. He hadn't heard from her yet, and she had promised to call him.

> Q. And how do you know that she promised to call him?
>
> A. Well, I -- like I say, I know how she is. I used to be with her. I'm one of her exes too, so . . .
>
> Q. But you -- did you have any direct knowledge that she was going to call him?
>
> A. Not direct. And I had no reason to think that she wouldn't call him because she jumped from one to four of us.

Later, the State asked Baker about a statement he had given to law enforcement:

> Q. Do you recall giving a statement to the sheriff's department in regards to this case?
>
> A. To the sheriff?
>
> Q. To Archie Daniel?
>
> A. Yes, sir. Yes, sir.
>
> Q. Do you recall telling him that -- that [] [D]efendant knew she wasn't coming back for Christmas?
>
> A. No. I probably had told him he should have known. He has been through this, too.

On cross-examination, defense counsel asked detailed questions about the contents of the statement Baker gave to the sheriff. When Baker stated, "Okay. He was talking about Diana, and he had talked to her. She said to come get her at Jeff's,

she was coming home," the State objected on the grounds of hearsay. Defense counsel responded that the evidence should come in under Rule 106 because the State had asked Baker about the statement on direct examination. The trial court sustained the objection, stating that Rule 106 only applied if the statement itself had been entered into evidence.

Defendant argues that the State's questions were "tantamount" to the introduction of the statement, citing *United States v. Pendas-Martinez*, 845 F.2d 938 (11th Cir. 1988). *Pendas-Martinez* involved a report from a Coast Guard officer, which the defense read from and used extensively during cross-examination. 845 F.2d at 943.

Here, the State did not introduce or read from Baker's statement. As noted above, the State asked only a single question which directly referenced Baker's statement. This passing reference is not tantamount to introduction of the statement. Further, nothing about Baker's reference to his statement created any misleading impression for the jury by taking matters out of context. The State asked Baker if he had warned Defendant that Koutsis was not coming back to him for Christmas and Baker replied, "No. I probably had told him he should have known. He has been through this, too." This

response did not create a misleading impression that Defendant did not have any reason to go to Walton's home. In fact, as noted above, Baker repeatedly testified that Defendant believed Koutsis was going to call him to pick her up from Walton's home and even expressed his own opinion that Koutsis probably had made such promises to Defendant. In light of these circumstances, we agree with the trial court that Rule 106 was not applicable here. We find no error in the trial court's sustaining the State's objection. This argument is overruled.

C. Excluding Evidence of the Victim's Threats

Defendant next argues that the trial court erred by excluding from the jury's consideration evidence that the victim threatened Defendant and third parties. We disagree.

Although he did not argue self-defense, Defendant tried to rebut the State's theory of the case by attempting to elicit evidence that Walton had threatened to kill Defendant and had attacked a third party because of Koutsis. Defendant made an offer of proof, but the trial court refused to admit the evidence, citing Rule 403.

The scope of appellate review of a decision under Rule 403 is limited to abuse of discretion. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). The trial court's

decision may only be reversed "upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985). Under Rule 403, the trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2009).

Defendant attempted to rebut the State's evidence of premeditation by showing that he took the gun to Walton's house because he was afraid of Walton. During Defendant's offer of proof, Baker testified that Defendant was afraid of Walton for three reasons. First, Baker said Walton had told him that if Defendant "didn't leave [Koutsis] alone . . . that he was going to kill [Defendant]." This incident occurred four months before Walton's death. Second, Baker testified that in January 2006, Defendant witnessed Walton fight Baker because Walton was under the mistaken impression that Koutsis was involved with Baker. Third, Baker testified that on 24 December 2007, Walton "jacked [Defendant] up at the store and told him he was going to kill

[Defendant]" if he caught Defendant near Koutsis again. Baker further testified that Walton told him that Walton had killed his own brother more than 20 years ago and that Defendant was aware of that fact as well.

After hearing arguments, the trial court ruled that Baker's testimony on these matters was not admissible, stating:

> THE COURT: . . . My ruling is based on 403. They are unduly prejudicial and irrelevant. Irrelevant unless -- in a case in which [] [D]efendant has not even raised self-defense. And I'm not even saying it would be relevant then.
>
> There is no fight between the gentleman. The evidence thus far as put out says it happened on Mr. Walton's property; that [D]efendant made a forceful entry armed; that Mr. Walton was unarmed. And then you want to bring in all this other stuff that supposedly was in [] [D]efendant's mind. And it's -- it's irrelevant and confusing. And those are the two reasons I am not allowing you to do it. It would be confusing to the jury. They would say, What difference does that make?
>
> That's the very question one would ask. And true in a murder case, what difference does it make? That's why I used the Al Capone example. He could be the worst guy in the world, but you don't have a right to go to his house, kick his door in, and shoot him. And if you start bringing in extraneous facts, as though it makes a difference, it confuses them. And I'm not going to allow that.

Defendant relies primarily on *State v. Macon*, 346 N.C. 109,

484 S.E.2d 538 (1997). We find that case instructive, but believe it dictates a conclusion that the trial court here did *not* abuse its discretion. In *Macon*, the defendant sought to introduce evidence of past threats to show why the defendant felt he needed to carry a gun when going to see the victim. 346 N.C. at 115, 484 S.E.2d at 541-42. This evidence was held relevant to rebut the State's contention that the fact that the defendant carried a gun with him the night of the shooting was evidence of premeditation. *Id.* However, the Court found no abuse of discretion in the exclusion of the evidence under Rule 403, stating that "[s]ince [the] defendant was not relying upon self-defense or other legal provocation as a defense, the trial court reasonably could have concluded that the admission of the proffered evidence would have substantially prejudiced the State and would have served only to delay the proceedings, to inflame the jury, or to confuse the issues." *Id.* at 116, 484 S.E.2d at 542. Likewise, we see no abuse of discretion in the trial court's similar decision here when faced with similar facts. This argument is overruled.

D. Preservation Issue: Short-Form Murder Indictment

In his fourth argument, Defendant contends that the trial court deprived him of his rights of notice and due process

because the short-form indictment of the murder charge failed to allege the essential elements of the offense. Defendant acknowledges that our State's Courts have repeatedly rejected this argument, but raises the issue for preservation purposes. *See* N.C. Gen. Stat. § 15-144 (2009); *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003) (holding that the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002) did not render North Carolina's short-form indictments a violation of the Sixth Amendment). We overrule this argument and conclude that Defendant received a fair trial, free of error.

NO ERROR.

Judges ROBERT C. HUNTER and ERVIN concur.

Report per Rule 30(e).