NO. COA11-215
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

STATE OF NORTH CAROLINA

v. Gaston County
No. 09 CRS 58657

DOUGLAS HAROLD McMICKLE

Appeal by Defendant from judgment entered 17 March 2010 by Judge Eric L. Levinson in Gaston County Superior Court. Heard in the Court of Appeals 31 August 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley, for the State.

Glover & Petersen, P.A., by James R. Glover, for Defendant.

BEASLEY, Judge.

Douglas Harold McMickle (Defendant) appeals from judgment entered based on his conviction for first-degree murder. For the reasons stated below, we find no error.

Defendant was indicted on 6 July 2009 for the first-degree murder of Teresa Dickerson (the Decedent). As the State chose not to seek the death penalty, Defendant was tried non-capitally

before a Gaston County jury. In December 2008, Defendant and the Decedent were engaged to be married. The Decedent's co-worker, Darlene Lindsey Clemmer (Ms. Clemmer), testified that Defendant frequently visited the Decedent at her place of employment, a Time Out convenience store. When Defendant and the Decedent began their relationship, they seemed very happy and in love. After the store manager instituted a policy barring the employees from having long-term visitors while working, Defendant and the Decedent began to argue. Defendant suspected that the Decedent had other men visiting her at the store, and that was the true reason he could not stay at work with her anymore.

On 19 June 2009, the night before the Decedent was killed, Defendant came to the store and argued with the Decedent. After the argument, Defendant left the store. The Decedent told Ms. Clemmer that she "just couldn't take it any more," and that the Defendant "had gotten too controlling, too possessive." The Decedent stated that she was not going over to the Defendant's house after work as she usually did, and asked Ms. Clemmer to follow her home. The Decedent told Ms. Clemmer that the next day she was going to give Defendant back the rings he gave her, along with the gun he gave her for protection.

On the afternoon of 20 June 2009, Deputy Sheriff Jason Long was dispatched to 2243 Old North Carolina Highway 27. When Deputy Long walked into the kitchen area of the Decedent's residence, he saw a white female lying face down on the counter, amidst a "good amount of blood." He briefly checked the body for any signs of life, but found none. The autopsy showed the cause of death was a gunshot wound to the back of the head.

On 16 March 2010, the jury unanimously found Defendant guilty of first-degree murder. For this crime, Defendant was sentenced to life imprisonment without parole. Defendant gave notice of appeal in open court.

I.

Defendant argues that the trial court erred in not granting his motion to dismiss on the basis of insufficiency of the evidence. We disagree.

A defendant's motion to dismiss for insufficiency of the evidence cannot be granted if "there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 62 (1991) (citing *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982)). Substantial evidence is defined as "such relevant evidence as a

reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)(citations omitted). If the trial court finds that there is sufficient evidence, "whether direct, circumstantial, or both" then "the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

Our Supreme Court has instructed that

> [w]hen ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered[.]

State v. Miller, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted).

Defendant alleges that the evidence in this case was not sufficient to support a finding that he was guilty of first-degree murder based on premeditation and deliberation. Defendant was charged with first-degree murder on the theory that the murder was a "willful, deliberate, and premeditated killing[.]" N.C. Gen. Stat. § 14-17 (2009). Because "[p]remeditation and deliberation relate to mental processes,"

they "ordinarily are not readily susceptible to proof by direct evidence." *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693 (1986). *Gladden* and other cases list factors to be used in determining whether a murder was committed with premeditation and deliberation, including

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

Id. at 430-31, 340 S.E.2d at 693.

We conclude that in the case *sub judice,* there was sufficient evidence of premeditation and deliberation to submit the question of Defendant's guilt on the first-degree murder charge to the jury. The testimony of Ms. Clemmer shows that Defendant's relationship with the Decedent was deteriorating over time, as the couple started out very happy but began fighting frequently. Ms. Clemmer also testified that Defendant and the Decedent fought the day before her murder, and that night, the Decedent chose not to go to Defendant's house as she usually did after work but instead, to go straight home. This

testimony establishes previous difficulties between the parties. Further, the Decedent asked Ms. Clemmer to follow her home that night which supports an inference that the Decedent wished to avoid a confrontation with Defendant.

The State's Exhibit 41, a photograph of the Decedent's kitchen after she was killed, suggests that the Decedent was shot from behind while she was unarmed and eating at the counter. The photograph does not show any signs of a struggle, or anything else to suggest the killing occurred in the heat of passion, or that it was provoked by the Decedent. Finally, Defendant himself admitted that he called the Decedent on the day of the murder and told her that he wanted to see her, and that while he was there he went into her closet and took her gun off the top shelf. In light of the foregoing evidence, we find that there was sufficient evidence to submit the first-degree murder charge to the jury on a theory of premeditation and deliberation.

II.

Defendant next contends that the trial court erred by not submitting the lesser included offenses of second-degree murder and involuntary manslaughter to the jury. We disagree.

When charging the jury, "[t]he trial court should refrain from indiscriminately or automatically instructing on lesser included offenses." *State v. Taylor*, 362 N.C. 514, 530, 559 S.E.2d 239, 256 (2008) (internal quotation marks and citations omitted). This restraint channels the jury's discretion so that the defendant may only be convicted of those crimes "fairly supported by the evidence." *Id.* (internal quotation marks omitted). It is well-established that where "the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . . and there is no evidence to negate these elements other than defendant's denial that he committed the offense", the defendant is not entitled to an instruction on a lesser included offense. *State v. Locklear*, 363 N.C. 438, 454-55, 681 S.E.2d 293, 306 (2009). *See also State v. Smith*, 351 N.C. 251, 268, 524 S.E.2d 28, 40 (2000) (finding where the State's evidence is sufficient to establish each element of first-degree murder, and there is no evidence to negate these elements other than defendant's denial, defendant is not entitled to an instruction on the lesser included offense of involuntary manslaughter).

We have already found that the State's evidence was sufficient to satisfy its burden of proving first-degree murder

by premeditation and deliberation. *See* Section I, *supra.* The only evidence Defendant offered to negate these elements was a contention that the shooting of Decedent was entirely accidental, a claim which amounts to a denial of guilt. The controlling case law is very clear in showing that a defendant's denial, without more, is not sufficient to negate the elements of first-degree murder if the State has already put forth sufficient evidence to prove those elements. *Locklear*, 363 N.C. at 454-55, 681 S.E.2d at 306. Accordingly, this argument is overruled.

III.

In addition to arguing that he was entitled to jury instructions on lesser included offenses, Defendant also contends that the statement made by his defense counsel that there were no grounds for submitting a lesser included offense to the jury amounts to ineffective assistance of counsel. In Section II, *supra,* we found no error in the jury instructions. Consequently, defendant's assertion of ineffective assistance of counsel with respect to that issue must also fail. *See State v. Seagroves*, 78 N.C. App. 49, 54, 336 S.E.2d 684, 688 (1985).

No Error.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).