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NO. COA11-296
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v.

Wake County
No. 09 CRS 048279

LESLIE EDWARD SMITH

Appeal by defendant from judgment entered 1 September 2010 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 13 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Hollis, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant.

ELMORE, Judge.

Leslie Edward Smith (defendant) was found guilty by a jury of first degree murder. He now appeals, alleging that the trial court erred by excluding evidence about the victim's medical and mental health history. Because we conclude that the trial court did not abuse its discretion by excluding the evidence, we hold that defendant received a trial free from error.

I. Background

On 26 July 2009, defendant shot Jackie Gore in the chest once, killing her. Defendant and Gore had known each other for several years, and Gore had lived with defendant in his trailer for several months beginning in December 2007. However, she moved out to live with another man in February 2008. She stayed in contact with defendant and moved back in with him in August 2008 after a third man, whom she hoped to live with, turned her away because he was married. Gore and defendant did not have a sexual relationship when she returned, but defendant supported Gore financially. When asked about this arrangement, defendant explained that he wanted Gore to be able to focus on overcoming her alcoholism, so he was glad to help provide for her.

By all accounts, Gore was an alcoholic who sometimes became violent when she was drunk. For example, in December 2007, Gore became drunk and, after threatening defendant with a knife, cut her own wrist with the knife, exclaiming that she was going to kill herself. According to defendant, she told him how many times she had cut herself, explaining that she had been cutting herself all her life. She also told him that she had been committed multiple times. Eventually, defendant subdued her and

called the authorities. When deputies arrived, they asked defendant to let go of Gore's hands. As soon as he did, she punched defendant in the face. Then Gore began fighting with the deputies. The deputies eventually took Gore to Dorothea Dix where she stayed for about a week.

Gore stopped drinking for awhile, and defendant took her to meetings with Ellen Clemmer, a clinical social worker who worked as a therapist at Dorothea Dix. However, according to defendant, after the third meeting with Clemmer, Gore told defendant, "I don't need no damn help. I have been in and out of these places all my life and there ain't nobody been able to help me and I am not going any damn more." According to defendant, she left his home in February 2008 because he would not let her drink in his home anymore. When she returned that August, she had stopped drinking and remained sober for about six months.

Around the same time that Gore began drinking again, defendant suffered a series of unfortunate events in his own life. He was diagnosed with prostate cancer, his mother died, and he lost the job that he had held for twenty years. On his way back from his mother's celebration of life ceremony, defendant heard that Gore had been hospitalized after another

violent episode while she was drunk. Five days later, on 24 July 2009, defendant lost his job. When he came home, Gore was not sympathetic, which struck defendant as "cold." Eventually this led to another violent fight with Gore when defendant suggested that she cut back on drinking sodas sweetened with aspartame because he had read that the artificial sweetener could be one cause of her aches and pains. According to defendant, this comment set her off:

[S]he lit into me like [the] Devil himself trying to tell me I don't need your damn help, ain't nothing wrong with me, I can drink Mountain Dew ever since I was ten years old and stuff like that. And, you know, you can't tell me this and you can't tell me that.

Then Gore began calling defendant names, so he grabbed her by the throat and pushed her down on the couch. As soon as he let her go, she punched him in the face and threatened to call the authorities. Defendant responded that he didn't care, that she could have shot him and he wouldn't have cared. Gore called the authorities and then punched defendant again.

When deputies arrived, they suggested that Gore and defendant not live together anymore. Because Gore claimed not to have anywhere else to go, defendant offered to stay with his brother in the mountains. He packed some clothes, but he forgot to pack his diabetes medications, including his insulin. He

also asked one of the deputies to take the handgun that was in his truck because he was afraid that he would kill himself if he kept the gun. The deputy removed the clip, which he left in the truck, and gave the gun to defendant's next door neighbor and friend, Russell. After defendant arrived at his brother's house, about two-and-a-quarter hours away, he realized that he had forgotten his insulin. He decided to go back home the next day to retrieve his insulin, with the intent of moving in with his brother permanently.

When defendant arrived in the trailer park that Sunday morning, he first went to Russell's house to retrieve his gun. He brought the clip with him from the truck and loaded the gun. While he was in Russell's home, Gore "busted in and started screaming and yelling," waving her arms "around like a banshee." He did not respond to Gore and instead left Russell's trailer and walked to his own, with the gun still in his hand. Although he had originally intended to return the gun to his truck, he said that he walked straight to his trailer because the neighbors were watching and he was embarrassed.

Gore followed him, screaming. He laid the gun down on his kitchen table and noticed that all of his guitars, which he described as his most precious possessions, were strewn about

the floor. At that point, Gore was still screaming at him, calling him a "balless wonder," a "son of a bitch," and other expletives. He described her as looking as though "she had lost about 100 pounds and was strung out on crack or something." Defendant responded, yelling at her to shut up and get out of his house. She responded by saying that she did not have to leave his house and that she planned to stay there and make his life "a living hell."

Then defendant asked her about the guitars, and she responded that she was planning to sell them and had already sold two of them. He replied, "[W]ell, Jackie, I could shoot you, you know." He described his mental state as the angriest he had ever been, "ballistic." According to defendant, Gore said, "well, I guess you just going to have to shoot me," and then she "start[ed] coming at" him, yelling "shoot me you balless wonder." Defendant picked up the gun, removed the safety, and pointed it at her. According to defendant, Gore kept coming towards him, yelling "shoot me, shoot me," until she slammed her chest against the muzzle of the gun. The gun went off, and Gore fell to the ground.

Defendant dialed 911 and, following the operator's instructions, performed rescue breathing and chest compressions.

Gore died from the single gunshot wound to her left chest. Her autopsy showed that her blood alcohol concentration was .250 milligrams per deciliter.

Approximately eleven hours before Gore died, she called Ellen Clemmer and left a voicemail. The jury heard the recording of the voicemail, in which Gore said, in part:

Ellen, I'm tired. I'm so goddamn sick of living with a man and thinking he would love me forever and then of trying to kill me! So guess what part, baby girl? I'm done. I'm tired. And I'm done. . . . Ellen I'm done. And I'm so tired. I'm so so f_____ tired. I love you. I want you to know that. I thank you for talking with me last year. I'm sick to death. I say the way I feel. . . . I love you Ellen, thank you for everything. Bye.

At trial, Clemmer described Gore as sounding "upset," "somehow impaired," and "like she was just giving up." However, the trial court did not permit Clemmer to testify about any further clinical impressions of the message.

Defendant was sentenced to life imprisonment without parole for the first degree murder of Jackie Gore.

II. Argument

Defendant argues that the trial court abused its discretion by excluding certain evidence under Rule 403(b). Defendant sought to admit additional evidence about Gore's mental

condition, particularly her borderline personality disorder diagnosis. Other evidence excluded by the trial court includes Ellen Clemmer's clinical notes and impressions about Gore's 26 July 2009 phone call, Gore's exceptionally high blood alcohol concentration on 19 July 2009 when she was hospitalized, and Gore's long history of mental health symptoms, self-injury, and alcohol abuse. Defendant argues that this evidence was not, as the trial court characterized it, merely cumulative, and instead was additional evidence of provocation that would have corroborated defendant's testimony about the shooting. After careful consideration, we hold that the trial court did not abuse its discretion by excluding this evidence.

[U]nder Rule 403, relevant evidence may be excluded 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.G.S. § 8C-1, Rule 403 (2009). The exclusion of evidence under the Rule 403 balancing test lies within the trial court's sound discretion and will only be disturbed where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.

State v. Jacobs, 363 N.C. 815, 823 689 S.E.2d 859, 864 (2010)
(additional quotations and citations omitted).

Here, defendant argues that the excluded evidence would have helped him establish provocation, which would have negated the elements of premeditation and deliberation, and possibly malice, which the jury had to find to convict defendant of first degree murder.

A killing is "premeditated" if the defendant contemplated killing for some period of time, however short, before he acted. A killing is "deliberate" if the defendant formed an intent to kill and carried out that intent in a cool state of blood, free from any violent passion suddenly aroused by some lawful or just cause or legal provocation.

State v. Robinson, 355 N.C. 320, 336-37, 561 S.E.2d 245, 256 (2002) (quotations and citations omitted). As our Supreme Court has explained,

There are two kinds of provocation relating to the law of homicide: One is that level of provocation which negates malice and reduces murder to voluntary manslaughter. Mere words, however abusive or insulting are not sufficient provocation to negate malice and reduce the homicide to manslaughter. Rather, this level of provocation must ordinarily amount to an assault or threatened assault by the victim against the perpetrator.

The other kind of provocation is that which, while insufficient to reduce murder to manslaughter, is sufficient to incite defendant to act suddenly and without deliberation. Thus, words or conduct not amounting to an assault or threatened assault, may be enough to arouse a sudden

and sufficient passion in the perpetrator to negate deliberation and reduce a homicide to murder in the second degree.

State v. Burr, 341 N.C. 263, 300 461 S.E.2d 602, 622 (1995) (quotations and citation omitted). Here, only the second kind of provocation is at issue, that which would negate deliberation.

With respect to the relationship between provocation and deliberation, our Supreme Court has explained that a "[d]efendant's mere anger at the victim is not alone sufficient to negate deliberation. . . . What is required to negate deliberation . . . is a sudden arousal of passion, brought on by sufficient provocation during which the killing immediately takes place." *State v. Watson*, 338 N.C. 168, 178, 449 S.E.2d 694, 700 (1994). Thus, "'Cool state of blood' does not mean the perpetrator was devoid of passion or emotion. A perpetrator may deliberate, premeditate, and may intend to kill after premeditation and deliberation, although prompted to a large extent and controlled by passion at the time." *Id.* (quotations and citations omitted). Premeditation and deliberation may be inferred from the following circumstances:

- (1) lack 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 occurrence

giving rise to the death of the deceased, (4) ill-will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

Robinson, at 337, 561 S.E.2d at 256 (quotations and citations omitted).

Here, defendant did put forth evidence of provocation. His evidence showed that Gore had been screaming at defendant, insulting him, threatening him, and invading his personal space. The evidence also recounted Gore's history of physically abusing defendant when she was drunk. Defendant's evidence also showed that Gore had dared defendant to shoot her. However, there was also evidence that showed deliberation and premeditation, such as defendant's statement that he would shoot Gore shortly before he did so, previous ill will between the parties, and defendant retrieving and loading his gun before returning to his home. It is not clear how additional testimony about Gore's medical history would have negated this evidence of deliberation and premeditation or have bolstered defendant's evidence of provocation. Defendant does not assert that he himself knew the content of Gore's July 2009 voicemail to Ellen Clemmer, nor does he assert that he knew about Gore's borderline personality

disorder diagnosis or the other details of her medical record. Because, as we understand defendant's argument, this evidence was relevant only to help the jury understand defendant's state of mind at the time of the shooting (i.e., whether he was provoked), whether defendant had personal knowledge of the information is essential to its relevance. Whether Gore had privately expressed a wish to commit suicide to Ellen Clemmer would not have any bearing on defendant's interpretation of Gore's actions towards him. Moreover, even if defendant had known that Gore wished to kill herself, shooting her based in part on that knowledge would have weighed on the side of deliberation rather than provocation.

To the extent that medical testimony about Gore's borderline personality disorder diagnosis and its attendant symptoms would have bolstered defendant's credibility, we cannot conclude that the trial court erred by determining that the evidence's prejudicial value outweighed its probative value. The jury heard ample evidence of Gore's erratic behavior and heavy drinking as well as her history of physically assaulting defendant. We cannot conclude that the trial court's decision to exclude the medical testimony was so arbitrary that it could not have been the result of a reasoned decision given the volume

of evidence that the jury had already heard about Gore's behavior and personality.

III. Conclusion

Accordingly, we hold that the trial court properly excluded the evidence in question.

No error.

Judges MCGEE and HUNTER, JR., Robert N., concur.

Report per Rule 30(e).