NO. COA11-340
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Catawba County
No. 08 CRS 54875

RICKY CLYDE PRESTWOOD

Appeal by defendant from judgment entered 28 July 2010 by Judge Richard D. Boner in Catawba County Superior Court. Heard in the Court of Appeals 28 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Brock, Payne & Meece, P.A., by C. Scott Holmes, for defendant-appellant.

STEELMAN, Judge.

The trial court did not err in sustaining the State's objections to portions of the deceased's criminal record that were not convictions, but merely charges. The trial court did not err in sustaining the State's objections to questions posed to defendant concerning his state of mind that were not properly phrased.

I. Factual and Procedural Background

Ricky Prestwood (defendant) was homeless and lived in a campsite behind a Rack Room Shoes in Hickory. Defendant met Travis Gilley (Gilley) on 16 June 2008. Gilley stated that he had been abandoned at a stock car race in Charlotte by his girlfriend and some other "friends." He had walked to Hickory from Charlotte for two days, had not eaten, and had nowhere to go. Defendant offered to take Gilley to his campsite. On Tuesday or Wednesday of the same week defendant and Gilley met Dewey Sweet (Sweet) while dumpster diving at the Aldi store. Sweet was also homeless. Defendant told Sweet about another campsite, similar to his own, where Sweet could make a temporary shelter, and promised to help Sweet get a tent and check in on him.

On 20 June 2008, defendant gave Gilley money to buy some food, but Gilley used it to buy alcohol. Defendant stopped by a mini-mart to buy some beer. Defendant arrived at Sweet's campsite at approximately 5:30 p.m. Gilley arrived approximately 30 minutes later. Defendant made three trips to get more beer and Gilley made three trips for beer during the evening. However, Gilley did not get any beer on his last run, because the mini-mart had closed. The three men were still drinking beer at 11:00 p.m.

Gilley became angry about his friends abandoning him in Charlotte. Gilley had a knife that he always kept in reach, occasionally opening and closing it. The knife made defendant nervous, so he asked Gilley to put the knife away, or he was going to have to take it away.

As the night progressed, Gilley became agitated and irate towards defendant based on defendant's comments about Gilley's service in Desert Storm. Defendant asserted that Gilley threatened to kill defendant and Sweet, and then took out his knife and approached defendant. Sweet did not hear this threat. Defendant caught Gilley by the wrist, while Gilley placed his other hand around defendant's throat, pushing defendant off the cinder block upon which he was sitting. Defendant grabbed a piece of broken cinder block, and hit Gilley in the side of the head. Defendant struck Gilley a second time with the block. Gilley fell to the ground, but was still conscious. As Gilley tried to push himself off the ground, defendant struck him again with the cinder block. This blow rendered Gilley unconscious.

Defendant and Sweet then left the campsite, and briefly returned to defendant's campsite before going to a store to purchase beer and cigarettes. When they returned to Gilley's campsite, Gilley was dead. Defendant and Sweet bound Gilley's arms and legs together with wire, and moved the body into the woods about a hundred yards from the campsite.

Sweet called the police. Officer Anderson responded to the dispatch. Officer Anderson found blood on the ground and what appeared to be drag marks along a path in the woods. Officers later found Gilley's body in the woods.

Dr. Patrick Lantz performed the autopsy, and opined that Gilley died from blunt force trauma to the head. The autopsy revealed three to five separate blows to the head. Gilley did not die immediately and probably lived 30 minutes after the trauma. Gilley had a blood alcohol level of .14.

On 7 July 2008, defendant was indicted for the murder of Gilley. The trial judge submitted first-degree murder, and the lesser included offenses of second-degree murder and voluntary manslaughter to the jury. The jury was also instructed that the State had the burden of proving that defendant did not act in self-defense. On 28 July 2010, the jury found defendant guilty of voluntary manslaughter. Defendant was sentenced to an active term of imprisonment of 108 to 139 months, from the presumptive range.

Defendant appeals.

II. Exclusion of Specific Incidents of Gilley's Aggressive Behavior

In his first argument, defendant contends that the trial court erred in sustaining the State's objection to evidence of specific incidents of Gilley's aggressive behavior based upon

Gilley's criminal record. Defendant contends that this was both constitutional error and evidentiary error. We disagree.

A. Constitutional Argument

The North Carolina Supreme Court has held that "[a] constitutional issue not raised at trial will generally not be considered for the first time on appeal." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (quotation and citation omitted), *cert. denied*, ____ U.S. ____, 176 L. Ed. 2d 568 (2010). Because defendant did not raise this constitutional issue below, we decline to address it now.

The constitutional portion of this argument is dismissed.

B. Admissibility of Defendant's Criminal Record

i. Standard of Review

We review evidentiary rulings for an abuse of discretion. *State v. Boston,* 165 N.C. App. 214, 218, 598 S.E.2d 163, 166 (2004). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson,* 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985) (citation omitted).

ii. Analysis

Defendant sought to introduce Gilley's criminal record. Defendant contends that this record shows Gilley's propensity for violence when drinking.

Defendant sought to introduce Gilley's criminal record through his cross-examination of Sergeant Demas of the Hickory Policy Department. Sergeant Demas testified, without objection, that Gilley was convicted of aggravated burglary in 2007, for violation of probation in February of 2008, and had an outstanding order for arrest for failure to appear in May of 2008. Defendant then sought to examine Sergeant Demas concerning charges for resisting arrest, public intoxication, and evading arrest on 6 October 2004; charges for resisting arrest, public intoxication, and disorderly conduct on 9 September 2005; and charges of disorderly conduct, resisting arrest, assault, and public intoxication on 22 March 2007. The trial court sustained the State's objections to questions concerning the last three sets of charges because the NCIC record did not indicate a conviction for any of the charges.

Since these were merely charges and not convictions, the trial court clearly did not abuse its discretion in sustaining the State's objections. *State v. Martin*, 322 N.C. 229, 238, 367 S.E.2d 618, 623 (1988).

We hold that the trial court did not err in sustaining the State's objection to evidence of specific incidents of Gilley's aggressive behavior based upon Gilley's criminal record.

This argument is without merit.

III. Limitation of Defendant's Testimony Regarding His State of Mind and Reasonable Belief of Fear or Imminent Harm

In his second argument, defendant contends that the trial court erred in limiting defendant's testimony regarding his state of mind and reasonable belief of fear or imminent harm. Defendant again attempts to cast his argument in both constitutional and evidentiary terms. We disagree.

A. Constitutional Argument

Defendant did not raise a constitutional issue at trial, and we dismiss this portion of the argument.

B. Limitation of Defendant's Testimony

i. Standard of Review

Evidentiary error does not require a new trial unless the erroneous admission was prejudicial. *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009), *cert. denied*, ___ U.S. ___, 176 L. Ed. 2d 734 (2010). A defendant is prejudiced by an error "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2009). The rule also applies to the exclusion of evidence. *State v. Brewer*, 325 N.C. 550, 565, 386 S.E.2d 569, 577 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990).

ii. Analysis

The excluded testimony of which defendant complains on appeal is as follows: (1) the trial court sustained the State's objection to the form of the question, "Did you for no reason whatsoever take a cinder block and kill that man in cold blood?"; (2) the State's objection to the question "Had you not located that cinder block with your right hand, what would have happened?" was sustained; and (3) Defendant responded to the question "Why did you take that block and strike him in the head?" by answering "[b]ecause I thought he was going to kill me." Defense counsel followed with "Did you also feel he was going to --." The State's objection to this partial question was sustained. We hold that the trial court did not err in sustaining any of these objections.

We note that defendant, at other places in his testimony, testified concerning his state of mind in response to properly posed questions. Defendant testified that he was "absolutely terrified" when Gilley came at him; that he thought Gilley was "going to cut me to the bone"; that when Gilley put his hand to defendant's throat he was going to lose consciousness; and that he had no "other option" but to strike Gilley in the head in self-defense. As noted above, defendant also testified that he thought Gilley was going to kill him.

Thus, even assuming *arguendo* that the trial court erred in

sustaining the State's objections, because of other testimony, defendant cannot show prejudice rising to the level required by N.C. Gen. Stat. § 15A-1443(a).

This argument is without merit.

DISMISSED, in part, NO ERROR, in part.

Judges HUNTER, Robert C., and McCULLOUGH concur.

Report per Rule 30(e).