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NO. COA11-350
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v.

Robeson County
No. 06 CRS 54284-85

CARLOS ANTONIO KEELS

Appeal by Defendant from judgment entered 3 June 2010 by Judge Douglas B. Sasser in Robeson County Superior Court. Heard in the Court of Appeals 27 September 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Attorney Sue Genrich Berry, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

I. Factual & Procedural Background

On 13 November 2006, a Robeson County grand jury indicted Defendant for first degree murder and felony child abuse inflicting serious bodily injury. Defendant was tried before a jury on 1 March 2010 and pleaded not guilty to all charges. The State's evidence at trial tended to show the following. Sarina Thompson and Defendant were in an intimate relationship and

lived together along with Ms. Thompson's five children, who ranged in age from two to twelve years old. Defendant was not the biological father of any of the children. Ms. Thompson worked two jobs, and Defendant cared for the children every weekend.

Defendant implemented different methods to discipline the children. This included ordering them to run laps around a pool table or do push-ups, as well as physical punishment using a comb or belt. The three-year-old, "Susan,"¹ was commonly subjected to discipline because she was not toilet trained. Velma Davis, Susan's aunt, suspected Susan was being abused. In April 2006, Ms. Thompson and Defendant traveled to Tennessee and the children were left with Ms. Davis. Ms. Davis noticed Susan had bruises on her buttocks, back, and legs, as well as a black eye and cigarette burns on her chest. Ms. Davis called Patricia McRae, Susan's grandmother, and told her Susan screamed when taking a bath and had marks on her body. Ms. McRae took Susan to the hospital.

On 15 July 2006, Ms. Thompson and Defendant both physically disciplined Susan because she called Defendant her biological father's name and referred to Ms. Thompson by her first name.

¹ A pseudonym conceals the minor victim's identity.

The next day, Ms. Thompson went to work and Defendant was left to care for the children. When Susan woke up, Defendant forced her to stand in one spot and each time she moved she received physical punishment. Defendant hit Susan with a comb ten to fifteen times. Afterward, he found Susan lying on the floor with urine on her pants; he hit her again with a comb, thumped her in the chest with his fingers, and hit her with a belt.

Defendant then called Ms. Thompson and asked her what to do with Susan; Ms. Thompson told him not to discipline Susan and said she would take care of it after work. Defendant stated in his confession that when he called Ms. Thompson on what to do about Susan because she "peed in her underwear," Ms. Thompson told him to punish Susan. After calling Ms. Thompson, Defendant instructed Susan to do push-ups and to run around the pool table. While running, she fell and hit her head; Defendant hit her again with a belt because she stopped running.

He took Susan into the master bedroom and closed the door. He placed Susan in the tub, but she was not washing herself, so he placed her on the shower floor while the water was running and left the house. Defendant returned and noticed Susan was lying on the floor in the master bedroom. He put her back in the shower and held her there. He then took her out and sat her on

the toilet seat. She told him her head was hurting. He said that's "what happens to little girls when they be bad." He asked if she would behave, and she said "yes." She then crawled into Ms. Thompson's bed. He noticed blood drops on her nose, bottom lip, and a red mark on her forehead. Defendant left the house, and told the other children not to enter the master bedroom.

Defendant picked Ms. Thompson up from work and asked to be taken to his cousin's house; he then informed Ms. Thompson that Susan was in bed with a headache. When Ms. Thompson arrived home, she noticed a vacuum cleaner cord wrapped around the doorknob of the master bedroom. She removed the cord in order to open the door and found Susan, who was not responding. Ms. Thompson then drove Susan to Susan's grandmother's house where they unsuccessfully attempted to resuscitate Susan. They then called 911, and emergency medical technicians were also unsuccessful at resuscitation efforts. Susan was pronounced dead four minutes after her arrival to the hospital. Medical personnel noticed multiple dark spots on Susan's arms and legs, a skin break on her left hip, and a hematoma on her forehead.

The autopsy report indicated that Susan suffered from blunt-force injuries to the head, body, arms, and legs. There

was significant bleeding under the skin, and many bruises overlapped. Her left lung and pancreas were also bruised. She suffered a broken adrenal gland and hemorrhaging in the mesentery of her intestines with blood in her belly area. The cause of death was hypovolemic shock, which resulted from blood loss due to bleeding from her injuries.

At the close of the State's evidence, Defendant moved to dismiss all charges for lack of evidence. In the alternative, he moved to dismiss the charge of first degree murder under the theory of felony murder on the basis that it was not a legitimate theory. The trial court denied all of Defendant's motions. Defendant presented no evidence.

The trial court instructed the jury on the elements of felonious child abuse inflicting serious physical injury, first degree murder, and felony murder. The definitions for serious bodily injury and serious physical injury were also provided by the court. When referring to felony murder, the court instructed on the basis of felonious child abuse inflicting serious physical injury.

Shortly after the jury began deliberations, it asked the court to explain the difference between serious bodily injury and serious physical injury. At that point, the jury returned

and the court reread the definitions of the terms. The jury returned with a verdict contradictory to the court's instructions on filling out the verdict form, and the trial court rejected the verdict.² Defendant then made a motion for a mistrial, which was denied. The court reinstructed the jury on the substantive offenses and the correct use of the verdict form and sent the jury back to deliberate. The jury ultimately convicted Defendant of first degree murder under the felony murder rule with felonious child abuse as the underlying offense.

During the penalty phase of the trial, Defendant called James Hilkey as an expert witness in the area of forensic psychology. Mr. Hilkey testified that Defendant was mentally competent and was not insane. Defendant was sentenced to life imprisonment without parole.

II. Jurisdiction & Standards of Review

Defendant is entitled to appeal his conviction as a matter of right, and we have jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27 (b) and 15A-1444 (2009). Defendant's motion to exclude a felony murder theory of conviction presents a question of law

² The record does not reflect the contents of the first verdict form. The trial judge stated, "The jury has failed to comply with the Court's instructions as to completing the verdict form."

that this court reviews *de novo*. See *State v. Bagley*, 183 N.C. App. 514, 523, 644 S.E.2d 615, 621 (2007). The power of the trial court to accept or reject the jury's verdict form "is restricted to the exercise of a limited legal discretion." *State v. O'Neal*, 67 N.C. App. 65, 70, 312 S.E.2d 493, 496 (1984).

III. Analysis

Defendant argues the trial court committed prejudicial error by denying his motion to exclude felony murder predicated on felonious child abuse as a theory of conviction for first degree murder. We disagree.

"First-degree murder by reason of felony murder is committed when a victim is killed during the perpetration or attempted perpetration of certain enumerated felonies or a felony committed or attempted with the use of a deadly weapon." *State v. Gibbs*, 335 N.C. 1, 51, 436 S.E.2d 321, 350 (1993). Felonious child abuse occurs when

[a] parent or any other person providing care to or supervision of a child less than 16 years of age [] intentionally inflicts any serious bodily injury to the child or [] intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child.

N.C. Gen. Stat. § 14-318.4(a3) (2009). "Serious bodily injury" is defined as "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4(d)(1) (2009).

Felony murder on the basis of felonious child abuse requires that the State prove the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon. See N.C. Gen. Stat. § 14-17. "When a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons." *State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997).

In *Pierce*, the victim was two years old at the time of her death. *Id.* at 479, 488 S.E.2d at 580. She was in the care of the defendant, who punished the victim by striking her with a belt, smacking her, and shaking her. *Id.* at 479-80, 488 S.E.2d at 581. On one occasion, the defendant punished the victim for saying she had to urinate when she did not, shaking her for one minute and causing her to go limp. *Id.* at 480, 488 S.E.2d at

581. When the victim arrived to the hospital, her body was covered in bruises, grab marks, pinch marks, scratches, and other injuries. *Id.* at 479, 488 S.E.2d at 580. Her cause of death was severe injury to the brain. *Id.* at 480, 488 S.E.2d at 581. The defendant's hands were classified as dangerous weapons, and our Supreme Court found no error in his conviction for first degree murder under the felony murder rule with felonious child abuse as the underlying offense. *See Id.* at 493, 488 S.E.2d at 589.

As in *Pierce*, the victim in the present case was a minor child who was under the care of an adult, Defendant. As a result of Defendant's abuse, the victim received numerous bruises and other injuries which eventually led to death. Both cases involve a non-biologically-related abuser who, through means of discipline, subjected the child to physical abuse. Both defendants were convicted of first degree murder under the felony murder rule with the underlying offense of felony child abuse. The present case is indistinguishable from *Pierce*.

Defendant relies on a footnote in *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000), to establish that felonious child abuse cannot be the underlying felony for his first degree murder conviction. In *Jones*, the defendant killed two people

and injured three people when driving while impaired. *Id.* at 161-62, 538 S.E.2d at 921. The defendant was convicted of felony murder with the underlying felony of assault with a deadly weapon inflicting serious injury. *Id.* at 163, 538 S.E.2d at 921. Our Supreme Court reversed the conviction, stating that the underlying felony required specific intent. *Id.* at 168-69, 172, 538 S.E.2d at 925, 927. In footnote three, the Court stated that the assault of a victim cannot be used as an underlying felony for purposes of the felony murder rule. *Id.* at 170 n.3, 538 S.E.2d at 926 n.3.

However, in *State v. Carroll*, our Supreme Court stated, “*Jones* precluded the use of assault as the underlying felony for a felony murder conviction only when there is a single assault victim who dies as a result of the injuries incurred during the assault.” *State v. Carroll*, 356 N.C. 526, 535, 573 S.E.2d 899, 906 (2002). In *Carroll*, the defendant struck the victim several times with a machete, took her to another room, and strangled her. *Id.* at 531, 573 S.E.2d at 904. The autopsy indicated the victim’s cause of death was strangulation. *Id.* at 532, 573 S.E.2d at 904. The Court held that the victim did not die as a result of the assault with the machete; the assault was a separate offense from the murder. Thus, *Jones* was not

applicable in *Carroll*. *Id.* at 535, 573 S.E.2d at 906.

In our case, similar to *Carroll*, the Defendant assaulted Susan in separate incidents over the course of one day. On the morning of 16 July 2006, Defendant hit Susan with a comb ten to fifteen times. Defendant left the house and when he returned he hit Susan with a belt and thumped her on the chest with his finger. Later on, Defendant hit Susan again with a comb on her chest, stomach, hips, buttocks, and hand. He told her to run around the pool table, which is when she fell and hit her head. Defendant then hit Susan with a belt and took her into the master bathroom, where he placed her in the tub and then shower.

We hold all of these incidents collectively cannot be directly responsible for Susan's death. At least one abusive incident was an occurrence that was not fatal. As in *Carroll*, there was at least one separate assault which was unrelated to the cause of death, and thus the footnote in *Jones* does not apply. The trial court properly denied Defendant's motion to exclude a possible conviction for first degree murder under the felony murder theory.

Defendant also argues the trial court erred by rejecting the jury's initial verdict form and rendering further instructions. We disagree.

"A verdict is a substantial right and is not complete until accepted by the court." *State v. Hampton*, 294 N.C. 242, 247, 239 S.E.2d 835, 839 (1978). The trial judge's authority to accept or reject a verdict "is restricted to the exercise of a limited legal discretion." *Id.* "'In a criminal case, it is only when a verdict is not responsive to the indictment or the verdict is incomplete, insensible or repugnant that the judge may decline to accept the verdict and direct the jury to retire and bring in a proper verdict.'" *State v. Abraham*, 338 N.C. 315, 359, 451 S.E.2d 131, 155 (1994) (citation omitted). "Verdicts in criminal cases ought to be clear and free from ambiguities and uncertainties." *Davis v. State*, 273 N.C. 533, 538, 160 S.E.2d 697, 702 (1968).

In *State v. Abraham*, the jury first returned with a verdict of guilty for two counts of assault with a deadly weapon with intent to kill, first degree felony murder, and second degree murder. *Abraham*, 338 N.C. at 358-59, 451 S.E.2d at 155. The court accepted the assault verdict, but instructed the jury once again to deliberate with regards to the murder charge. *Id.* at 359, 451 S.E.2d at 155. On review, the Court held the trial court did not err in rejecting the first verdict form. *Id.* at 360, 451 S.E. 2d at 155.

In the present case, as in *Abraham*, the trial court found the jury did not follow its instructions, and the trial court did not abuse its limited legal discretion in rejecting the verdict. Defendant argues that the trial court forced a verdict. However, there is no evidence that the court gave guidance or instructed the jury to come to a specific verdict. The instructions which were given to the jury after the initial verdict was rejected were the same instructions which were given the first time. The trial court in no way forced the jury to find Defendant guilty of first degree felony murder. The trial court's rejection of the jury's initial verdict was a proper exercise of its limited legal discretion because the jury failed to follow the verdict form instructions.

IV. Conclusion

Based on the foregoing, we find

No error.

Judges MCGEE and ELMORE concur.

Report per Rule 30(e).