NO. COA11-696
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

STATE OF NORTH CAROLINA

v. Wilson County
No. 10 CRS 50043

DANNY RAY HINNANT, JR.

Appeal by defendant from judgment entered 19 January 2011 by Judge Jerry R. Tillett in Wilson County Superior Court. Heard in the Court of Appeals 7 November 2011.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for Defendant-Appellant.

ERVIN, Judge.

Defendant Danny Ray Hinnant, Jr., appeals from a judgment sentencing him to life imprisonment without the possibility of parole based upon his conviction for first degree murder. On appeal, Defendant contends that the trial court erred by instructing the jury that it could consider the use of grossly excessive force in determining whether he acted with premeditation and deliberation. After careful consideration of Defendant's challenge to the trial court's judgment in light of

the record and the applicable law, we conclude that Defendant is not entitled to relief from the trial court's judgment.

I. Factual Background

A. Substantive Facts

1. State's Evidence

On 4 January 2010, James Kearney, Jermorris Jones, and Dexter Graham walked to a convenience store from a nearby house. After entering the store, the three men ordered food and sat down at a table. Shortly thereafter, Defendant entered the store and began arguing with Mr. Kearney about a debt that Mr. Kearney owed to Defendant. At the end of the argument, Defendant told Mr. Kearney that, if the debt was not paid, "[Defendant] was going home to get something and . . . was going to F [Mr. Kearney] up."

After Defendant left the store, Mr. Jones asked Mr. Kearney why Mr. Kearney did not simply pay Defendant given that Mr. Kearney had indicated that he only owed Defendant $10.00. In response, Mr. Kearney told Mr. Jones that he was going to give Defendant the money and made a phone call. The three men then walked back to the house.

Upon arriving at the house, the group went to the back porch, at which point Mr. Kearney said he was going inside to get his cellular phone charger. After Mr. Kearney had been

inside the home approximately three minutes, Mr. Jones and Mr. Graham heard a gunshot from inside the building. The two men entered the house and found Mr. Kearney lying beside a mattress on the floor with blood emanating from his face. Mr. Jones and Mr. Graham ran outside and told a neighbor to call the police.

After Detective Todd Tant of the Wilson Police Department arrived at the house, he was told that Mr. Kearney was "inside [and] had been shot in the head." Upon entering the residence, investigating officers found Mr. Kearney lying on the mattress and determined that he was dead. Mr. Kearney had died from a single gunshot wound to the head fired from a weapon that was no closer than eighteen inches, give or take five or six inches, from his body when the shot that caused his death was fired.

Shortly after the shooting, Sergeant Kevin Smith of the Wilson Police Department determined that Defendant was a suspect and arranged to interview him. At that time, Defendant said that, following his argument with Mr. Kearney at the convenience store, Mr. Kearney telephoned Defendant and told him to come to the house, where Mr. Kearney would give him the money that he was owed. Once inside the house, Defendant became upset when Mr. Kearney would not give him more than $10.00 despite the fact that Mr. Kearney owed him $60.00 and had more than $10.00 in his possession. Defendant said he was about to hit Mr. Kearney when

Mr. Kearney reached into his coat pocket and pulled out a gun. As the two men wrestled for control of the gun, it discharged, at which point Defendant ran from the house.

After the conclusion of this interview, officers took items of clothing from Defendant and seized the clothing that Defendant had been wearing the day of the shooting from the group home where he lived. A laboratory analysis revealed the presence of particles characteristic of gunshot residue on the back of Mr. Kearney's left hand, the clothes worn by Defendant on the day of the shooting, and a pair of gloves seized during a search of the home of Brandon Dew, one of Defendant's friends.

On the day after the shooting, Defendant agreed to another meeting with Sergeant Smith. At the conclusion of this interview, Defendant signed a statement written by the interviewing officer in which he indicated that, when he saw that Mr. Kearney had more than $10.00 in his possession, he stated that Mr. Kearney "might as well give me all my s---." After Mr. Kearney responded by stating "f--- that s---," Defendant hit Mr. Kearney in the head, an action that precipitated a fight between the two men. According to Defendant, he and Mr. Kearney were fighting on the mattress when Mr. Kearney reached in his coat and attempted to pull out a gun. At that point, Defendant grabbed the gun from Mr. Kearney, stood

up, and pointed the gun at Mr. Kearney. When Mr. Kearney charged at Defendant, the gun went off. Defendant denied having had a gun in his possession prior to entering the house and said that, if he had possessed one at that point, he "would have just shot [Mr. Kearney] before going in the house."

2. Defendant's Evidence

At trial, Defendant testified that he had sold Mr. Kearney a hat for which Mr. Kearney owed him $60.00. Defendant was "tired [of] chasing [Mr. Kearney] after [the money]" and admitted that, at the end of the argument that he had with Mr. Kearney in the convenience store, he told Mr. Kearney that he was going to "f--- him up." However, Defendant claimed that this statement meant nothing more than that the two of them would fight.

After leaving the convenience store, Defendant received a call from Mr. Kearney in which Mr. Kearney told Defendant to come get his money. Upon arriving at the house at which the shooting occurred, Defendant saw Mr. Kearney enter the front door and followed him inside. Although Mr. Kearney had more than $10.00 in his possession, he refused to give Defendant the rest of the money that he owed Defendant, causing the two of them to begin to fight. During the fight, Mr. Kearney attempted to pull out a gun. While Mr. Kearney held the gun in his left

hand, Defendant pushed it back until it was pointed up at Mr. Kearney, at which point the gun discharged. After he realized that Mr. Kearney had been shot, Defendant panicked and ran from the home. Defendant's written statement differed from his trial testimony because the interviewing officer told Defendant that his "first story . . . wasn't going to work [because] the victim was shot from a couple feet away," causing Defendant to tell the officer what he wanted to hear so he could "just . . . go home."

B. Procedural History

On 5 January 2010, a warrant for arrest charging Defendant with first degree murder was issued. On 5 April 2010, the Wilson County grand jury returned a bill of indictment charging Defendant with first degree murder. The charge against Defendant came on for trial before the trial court and a jury at the 17 January 2011 criminal session of the Wilson County Superior Court. On 19 January 2011, the jury returned a verdict convicting Defendant of first degree murder. As a result, the trial court sentenced Defendant to life imprisonment without the possibility of parole. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

On appeal, Defendant contends that the trial court committed plain error by instructing the jury that it could

consider the use of grossly excessive force in determining whether he acted with premeditation and deliberation at the time of Mr. Kearney's death. More specifically, the trial court instructed the jury that:

> [n]either premeditation nor deliberation is usually acceptable of direct proof. They *may* be proven by circumstances from which they may be inferred *such as* the lack of provocation by the victim, conduct of the Defendant before, during and after the killing, threats and declarations of the Defendant, use of grossly excessive force, manner in which or means by which the killing was done, ill will between the parties and, last, that the Defendant did not act in self-defense or that the Defendant was the aggressor in bringing on the fight with the intent to kill or inflict serious bodily harm upon the deceased.

(emphasis added) In challenging this instruction on appeal, Defendant argues that the record contains no evidence tending to show that he used grossly excessive force and that the trial court erred by permitting the jury to infer that he acted with premeditation and deliberation for that reason. We do not find Defendant's argument persuasive.

As Defendant candidly acknowledges, he did not lodge a contemporaneous objection to the challenged instruction at trial in accordance with the requirements of N.C.R. App. P. 10(a)(2) (providing that "[a] party may not make any portion of the jury charge . . . the basis of an issue presented on appeal unless

the party objects before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection"). As a result, Defendant correctly notes that we must evaluate Defendant's challenge to the trial court's premeditation and deliberation instruction utilizing a plain error standard of review. *State v. Andrews*, 131 N.C. App. 370, 375, 507 S.E.2d 305, 309 (1998), *disc. review denied*, 350 N.C. 100, 533 S.E.2d 471 (1999). In order to establish plain error, an appealing party must show "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (citation omitted).

The Supreme Court rejected the contention that Defendant has advanced before us in this case in *State v. Leach*, 340 N.C. 236, 241-42, 456 S.E.2d 785, 788-89 (1995), reasoning that no error occurred as the result of the delivery of a substantively identical instruction because the instruction in question merely "inform[ed] [the] jury that the circumstances given [were] only illustrative; [meaning that] they [were] merely examples of some circumstances which, if shown to exist, permit[ted] premeditation and deliberation to be inferred." After

referencing the fact that the challenged instruction informed the members of the jury "that they '*may*' find premeditation and deliberation from certain circumstances, '*such as*' the circumstances listed," the Supreme Court determined the "instruction [did] not preclude a jury from finding premeditation and deliberation from direct evidence or other circumstances; more importantly, it [did] not indicate to the jury that the trial court [was] of the opinion that evidence exist[ed] which would support each or any of the circumstances listed." *Id.* at 241-42, 456 S.E.2d at 789 (emphasis added). As a result, the Supreme Court held that "the trial court did not err by giving the instruction at issue . . . *even in the absence of evidence to support each of the circumstances listed.*" *Id.* at 242, 456 S.E.2d at 789 (emphasis added). Given that the instruction that Defendant seeks to challenge in this case is indistinguishable in any meaningful sense from the instruction at issue in *Leach*, we cannot hold that the trial court erred, much less committed plain error, by giving the challenged instruction "even [if we were to assume there was] an absence of evidence to support" a finding that Defendant used grossly excessive force at the time of Mr. Kearney's death. *Id.*; *Andrews*, 131 N.C. App. at 376, 507 S.E.2d at 309 (holding that the trial court did not commit plain error by instructing the

jury concerning the circumstances from which premeditation and deliberation could be inferred, even if one or more of the enumerated circumstances lacked adequate evidentiary support, in reliance on *Leach*). As a result, Defendant is not entitled to relief from the trial court's judgment based upon the delivery of the challenged instruction.[1]

III. Conclusion

Thus, for the reasons set forth above, we conclude that Defendant's challenge to the trial court's judgment lacks merit. Therefore, the trial court's judgment should, and hereby does, remain undisturbed.

NO ERROR.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).

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[1]Although Defendant acknowledges the Supreme Court's decision in *Leach*, he argues that "*Leach* did not hold [that] there can never be" error as the result of the delivery of an instruction like that at issue here and contends that "[a] careful review" of the relevant cases "reveals [that] those cases . . . stand for the proposition that error in instructing on certain factors as evidence of premeditation and deliberation is not reversible where other evidence of those essential elements is overwhelming." A careful reading of *Leach* reveals, contrary to Defendant's contention, that the Supreme Court meant exactly what it said – the various factors listed in the trial court's premeditation and deliberation instruction are simply for illustrative purposes and need not have specific evidentiary support as a precondition for their inclusion in the trial court's instructions to the jury.