

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-698
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

STATE OF NORTH CAROLINA

v.

Guilford County
No. 08 CRS 98970

SCOTTY LAMONT BRICE, JR.

Appeal by defendant from judgment entered 14 October 2010 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 8 November 2011.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert J. Blum, for the State.

Mary March Exum, for defendant-appellant.

CALABRIA, Judge.

Scotty Lamont Brice, Jr. ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of first degree murder. We find no error.

I. Background

In August 2008, Anna Davis ("Davis") and Vanessa Johnson ("Johnson") lived with Davis's cousin in Greensboro, North

Carolina ("the Acorn Rd. house"). Davis helped care for her cousin's small children. On 21 August 2008, around 8:30 p.m., Davis and Johnson were playing cards and the children were watching television when defendant entered the Acorn Rd. house uninvited. During the time defendant was in the residence, he fondled Johnson, struck Davis and pushed one of the children up against a refrigerator. Johnson and Davis repeatedly asked defendant to leave. When defendant refused to leave, Johnson sought help from a friend, Elio Charcon Anderson, II ("Anderson"), who also told defendant to leave.

Once defendant and Anderson went outside, defendant continued to yell at Anderson. Anderson remained calm until defendant struck him. At that point, Anderson hit him back. As defendant left the premises, he told Anderson, "I got you." Anderson stood outside the house while Johnson and Davis went back inside the house with the children.

Shortly after defendant left, Davis heard a dog barking and looked out the window. At that time, she noticed defendant returning to the house. In contrast to defendant's former attire, he wore all dark clothing. From the window, Davis observed something she described as "metal hit light" because she saw a knife either going in or coming out of Anderson's

body. When Johnson attempted to warn Anderson that defendant had returned, it was too late. As she opened the door, Anderson stumbled, fell on his face and gasped for air. Defendant ran away. Neighbors called 911. When law enforcement officers arrived, they found a knife, but were unable to locate defendant. With the assistance of the US Marshals task force, defendant was apprehended in Charlotte, North Carolina. Since Anderson died as a result of the stab wound, defendant was charged with first degree murder. He was also charged with two counts of assault on a female and one count of assault on a child under twelve.

At trial in Mecklenburg County Superior Court, Davis, Johnson and Antuane Manuel ("Manuel"), Anderson's brother, testified for the State. Manuel observed both the initial confrontation and defendant's return. Manuel's testimony corroborated Johnson and Davis's statements regarding defendant's departure from the premises after the initial confrontation and that he returned a short time later. Davis also testified that she heard Anderson yell, "oh, shit the bitch stabbed me."

For the murder charge, the jury was instructed on first degree murder, second degree murder, voluntary manslaughter, and

self-defense. The jury returned a verdict finding defendant guilty of first degree murder. Defendant was found not guilty on both counts of assault on a female and assault on a child under age twelve. Defendant was sentenced to life in prison, without parole, in the North Carolina Department of Correction. Defendant appeals.

II. Motion to Dismiss

Defendant alleges that the trial court erred by denying his motion to dismiss because the State produced insufficient evidence to support a charge of first degree murder. Specifically, defendant contends there was insufficient evidence to support the elements of premeditation, deliberation and malice. We disagree.

Upon a defendant's motion to dismiss, the trial court determines "only whether 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, 61 (1991). Whether substantial evidence exists "is a question of law for the court." *Id.* "'Substantial evidence' is that amount that 'a reasonable mind might accept as adequate to support a conclusion.'" *State v. Stevenson*, 328 N.C. 542, 545, 402 S.E.2d 396, 398 (1991)

(citation omitted). The evidence must be evaluated "in the light most favorable to the State" and "[t]he defendant's evidence is not to be considered unless it is favorable to the State." *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620-21 (2002).

A. Premeditation and Deliberation

The elements of first degree murder are "the unlawful killing of a human being with malice, premeditation and deliberation." *Vause*, 328 N.C. at 238, 400 S.E.2d at 62. "Premeditation means thought beforehand for some length of time, however short." *State v. Faust*, 254 N.C. 101, 106, 118 S.E.2d 769, 772 (1961) (internal quotations and citations omitted). Deliberation means "an intention to kill, executed by the defendant in a cool state of blood," for "revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation." *Id.* at 106-07, 118 S.E.2d at 772 (citations omitted). Premeditation and deliberation may be inferred by circumstantial evidence including the following factors identified in *Vause*:

- (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 difficulty 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.

Vause, 328 N.C. at 238, 400 S.E.2d at 62.

Defendant contends that there was insufficient evidence of premeditation and deliberation, as the State failed to prove the factors articulated in *Vause* were present in the instant case. Defendant relies on the *State v. Corn* Court's application of the circumstantial factors to illustrate that the facts here are insufficient to prove premeditation and deliberation. In *Corn*, the victim was intoxicated when he entered the defendant's house, grabbed the defendant, started an argument with him and called him a homosexual. 303 N.C. 293, 295, 278 S.E.2d 221, 222 (1981). The defendant took a gun from his couch cushions and shot the victim eight to ten times. *Id.* Because the Court found there was no "evidence that defendant acted in accordance with a fixed design" or had "sufficient time to weigh the consequences of his actions" the Court found the State presented insufficient evidence to support a finding of premeditation and deliberation. *Id.* at 298, 278 S.E.2d at 224.

Defendant's reliance on *Corn* is misplaced. In *Corn*, after the victim provoked the defendant, the defendant immediately shot him. *Id.* at 295, 278 S.E.2d at 222. In the instant case, after an initial altercation between defendant and the victim, defendant did not take immediate action. Instead, defendant left the premises. Once defendant returned, he stabbed the victim. Defendant's departure and return gave him sufficient time to weigh the consequences of his actions.

Defendant testified that the confrontation was continuous, and that Anderson provoked him prior to the stabbing. Yet, the evidence from three witnesses for the State conflicts with defendant's testimony and indicates there were two separate incidents. Johnson, Davis and Manuel testified that after the first altercation, Anderson stood in front of the Acorn Rd. house during the time defendant was gone. As defendant's evidence conflicts, rather than supports, the State's theory, it cannot be considered. See *Williams*, 154 N.C. App. at 178, 571 S.E.2d at 621.

Evaluating the circumstances of the case in light of the *Vause* factors, the State presented sufficient evidence of premeditation and deliberation to support a conviction of first degree murder. According to Johnson, in the first altercation,

defendant struck Anderson first, then Anderson struck defendant. This sequence of events indicates a lack of provocation by the victim. Additionally, after defendant returned, he stabbed Anderson, and then fled. This conduct shows he planned to use the knife when he confronted Anderson, and left once this was accomplished. Furthermore, the State's evidence implied defendant threatened Anderson. Before defendant left the premises the first time, he told Anderson, "I got you." Johnson testified that this statement was said "in an angry way...like a revenge kind of way." In the light most favorable to the State, defendant's statement to Anderson could potentially suggest a threat. Finally, the evidence of two separate altercations shows ill will already existed between the parties when defendant returned to the premises armed. While defendant is correct that all of the circumstances articulated in *Vause* were not present, the State was not required to prove all the factors existed in the instant case. Rather *Vause* provided some "circumstances from which premeditation and deliberation may be inferred." *Vause*, 328 N.C. at 238, 400 S.E.2d at 62.

While the length of time between the first and second encounter was short, premeditation only requires "thought beforehand for some length of time, however short," and

deliberation indicates the defendant acted in a "cool state of blood." *Faust*, 254 N.C. at 106, 118 S.E.2d at 772 (internal quotations and citations omitted). Even though the time period was relatively short, the fact that defendant left the premises, returned with a knife and then stabbed Anderson, indicates there was enough time to allow defendant to cool off and formulate a plan.

Viewed in the light most favorable to the State, there was sufficient evidence to indicate defendant acted with premeditation and deliberation. The trial court did not err in denying defendant's motion to dismiss.

B. Malice

Malice "is not necessarily hatred or ill will, but rather is an intentional taking of the life of another without just cause, excuse or justification." *State v. Wilds*, 133 N.C. App. 195, 199, 515 S.E.2d 466, 471 (1999) (internal quotations and citation omitted). The State may prove malice by either "direct evidence or by inference from the circumstances surrounding the killing." *State v. Batts*, 303 N.C. 155, 161, 277 S.E.2d 385, 389 (1981). "The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice." *State v. McAvoy*, 331 N.C. 583, 589-90, 417

S.E.2d 489, 494 (1992). "A knife can be found to be a deadly weapon if, under the circumstances of its use, it is an instrument which is likely to produce death or great bodily harm, having regard to the size and condition of the parties and the manner in which the knife [was] used." *Batts*, 303 N.C. at 161, 277 S.E.2d at 389 (where the victim was stabbed and the knife penetrated the heart and lungs, the Court found "sufficient evidence of use of a deadly weapon and of malice to withstand a nonsuit motion").

Defendant contends the presence of the first two elements of self-defense negate the element of malice and entitle him to imperfect self-defense. See *State v. Wood*, 149 N.C. App. 413, 419, 561 S.E.2d 304, 308 (2002). To prove self-defense, the defendant must prove four conditions were met:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

Id. at 418-19, 561 S.E.2d at 308. Once the defendant has presented evidence of self-defense, the State bears the burden of proving "the existence of malice and the absence of self-defense." *State v. Patterson*, 297 N.C. 247, 256, 254 S.E.2d 604, 610 (1979). While evidence of self-defense can rebut "the presumption of malice in a homicide with a deadly weapon" case, whether the evidence rebuts the presumption is a jury question. *State v. Barrett*, 20 N.C. App. 419, 422-23, 201 S.E.2d 553, 555 (1974).

In the instant case, defendant stabbed Anderson directly in the chest with a knife, perforating Anderson's heart. The manner in which defendant used the knife indicates the knife was used as a deadly weapon and therefore creates a presumption of malice. While defendant's evidence of self-defense *can* rebut this presumption, whether or not the presumption is rebutted is a question for the jury. *See id.* Therefore, evidence of self-defense cannot determine the absence of malice, as a matter of law, when defendant used a deadly weapon. Consequently, it was

not improper for the court to deny defendant's motion to dismiss for lack of sufficient evidence on the basis of malice.

III. Closing Arguments

Defendant contends the prosecutor made improper remarks during closing arguments, justifying a new trial. We disagree.

During closing arguments, attorneys "may not become abusive, inject [their] personal experiences, express [their] personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant...." N.C. Gen. Stat. § 15A-1230(a) (2009). While prosecutors are afforded wide latitude in presenting closing arguments to the jury the Supreme Court has determined closing arguments must "(1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *State v. Jones*, 355 N.C. 117, 135, 558 S.E.2d 97, 108 (2002). In the instant case, defendant objected to four of the prosecutor's statements and failed to object to one of them. Of the four statements, the trial court sustained two objections and overruled two of them.

A. Objections Sustained by the Trial Court

Generally, "when objection is made to an improper argument of counsel, it is not sufficient for the court merely to stop the argument without instructing the jury...to ignore the improper argument." *State v. Barber*, 93 N.C. App. 42, 48, 376 S.E.2d 497, 501 (1989). However, if the court sustained the objection and the defendant did not "request a precautionary instruction, there is no error if the court fails to give such an instruction." *Id.* at 49, 376 S.E.2d at 501. Additionally, when the trial court does sustain and strike a prosecutor's improper argument, the "impropriety of the prosecutor's remarks were therefore cured." *State v. Adcock*, 310 N.C. 1, 20, 310 S.E.2d 587, 599 (1984).

In the instant case, the prosecutor began her argument with a Bible verse from Proverbs, "[t]he wicked will flee when no one pursues, but the righteous stand bold as lions." After implying that Anderson, the victim, was righteous, the prosecutor stated "[t]he State has proven to you, also through this evidence, that [defendant] was wicked." Defendant objected, noting that the statement was irrelevant and added "[i]t's not at issue and there's no evidence of that." The Court responded by sustaining the objection but did not instruct the jury to ignore the improper argument and defendant failed to make a motion to

strike the statement. While, as recognized in *Barber*, the court here should have instructed the jury to ignore the improper argument, since the defendant did not request a precautionary instruction, the court did not err in failing to give such an instruction. *Barber*, 93 N.C. App. at 48-49, 376 S.E.2d at 501.

In addition, the prosecutor asked the jury if they, "ever hear[d] anyone ever say that [defendant] was known for his trustworthiness?" Defendant objected, the court sustained the objection, and then defendant moved to strike the statement. The court granted defendant's motion to strike and instructed the jury to disregard that statement. Since the trial court sustained the objection and struck the statement, the impropriety of the prosecutor's statement was cured and we find no error.

B. Objections Overruled by the Trial Court

When objections are overruled, the Court "must determine whether 'the trial court abused its discretion by failing to sustain the objection.'" *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003) (citation omitted). "Application of the abuse of discretion standard to closing argument requires" the Court "to first determine if the remarks were improper" and then, if found to be improper, to determine if the remarks

prejudiced defendant, and "thus should have been excluded by the trial court." *Id.* (citation omitted). "[I]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence." *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. "Such prejudice is established only where the defendant can show the prosecutor's comments...so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Nance*, 157 N.C. App. 434, 440, 579 S.E.2d 456, 460 (2003) (internal quotations and citation omitted). However, the prosecutor may "argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709-10 (1995).

1. Characterization of the victim

In the instant case, after the prosecutor quoted the Bible verse, she then defined righteous and argued the evidence showed that Anderson was "right," "decent" and "nice." Defendant objected to the characterization of the victim, but the court allowed the prosecutor to continue. The evidence presented at trial indicated that Anderson was a good, friendly person, that he went to the Acorn Rd. house daily to make sure Davis and Johnson were safe, and on the night of his death he protected

the women. The State's argument was proper as it was a reasonable inference from the evidence presented.

2. Characterization of defendant

Defendant contends another improper statement that the prosecutor made was, "[defendant], being the righteous person that he wants you to believe he is...he turned, he looked at [Anderson] and he said, 'I got you.' 'I got you, [Anderson].'" Defendant objected after the prosecutor's phrase "believe he is." The court overruled the objection.

Since the prosecutor may argue the facts in evidence and inferences from the evidence, it was not improper to draw inferences from defendant's testimony. Defendant testified at trial that on the evening of the altercation, his visit to the Acorn Rd. house and his physical contact with Johnson and Davis were consensual. He also testified that when Anderson kicked him out of the house, it was unexpected and unrequested. Furthermore, defendant claimed that Anderson initiated the altercation. Defendant also claimed that he feared for his life since Anderson pursued and attacked him, and that he inadvertently stabbed Anderson. The prosecutor used the words "free from guilt or sin," to define righteous. Defendant's testimony indicated that he wanted the jury and the court to

perceive him as one "free from guilt or sin." Therefore, it was not improper for the prosecutor to suggest that defendant wanted the jury to believe he was righteous.

C. The Trial Court's Role when No Objection was Made

Defendant also claims error occurred when the trial court failed to intervene after one of the prosecutor's statements. However, defendant did not object to the statement. Since defendant failed to object, this Court must determine "whether the argument was so grossly improper that the trial court committed reversible error in failing to intervene *ex mero motu* to correct the error." *State v. Braxton*, 352 N.C. 158, 200, 531 S.E.2d 428, 452-53 (2000) (internal quotations and citation omitted). Defendant must show "that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Campbell*, 359 N.C. 644, 676, 617 S.E.2d 1, 21 (2005) (internal quotations and citations omitted). While the prosecutor's personal opinions are improper, counsel may argue "the law, the facts in evidence, and all reasonable inferences drawn therefrom." *Alston*, 341 N.C. at 239, 461 S.E.2d at 709-10. Our Supreme Court "has stated that 'a defendant's eighth amendment rights are jeopardized only when the jury is urged to ignore such feelings

that are supported by facts in the record.'" *Id.* at 249, 461 S.E.2d at 715 (citations omitted).

Defendant claims the prosecutor admonished the jury to not have sympathy for defendant when she stated "[d]on't have sympathy for someone because he committed a heinous, horrible act when he was 18 and let him slide with a lesser charge." However, prior to that statement, the prosecutor reminded the jury of their duty to follow the law as set out by the legislature and to not have *undue* sympathy for defendant. As the Court has recognized, it is proper for the prosecutor to request that the jury convict defendant of the proper punishment. *See id.* at 250, 461 S.E.2d at 716.

While the prosecutor's request to withhold sympathy was not improper, her use of the word "heinous" in her argument to the jury was improper. The Supreme Court has recognized specific types of murder which qualify as "especially heinous, atrocious, or cruel" specifically those where the killing was "physically agonizing, or otherwise dehumanizing to the victim" or "conscienceless, pitiless or unnecessarily torturous to the victim." *Id.* at 253, 461 S.E.2d at 718. The crime in the instant case did not rise to the level of a "heinous" killing and therefore the prosecutor's implication that the crime was

"heinous" was improper. However, the prosecutor did not attempt to submit an aggravating factor alleging the crime was heinous and the State provided evidence to support each element of the offense of first degree murder. Furthermore, there is no evidence that but for the statement, defendant was prejudiced and would not have been found guilty of first degree murder. Therefore, since the State provided evidence to support each element of the offense, the prosecutor's statement did not prejudice the defendant by improperly influencing the jury. The trial court did not err when it failed to intervene *ex mero motu*.

IV. Conclusion

The trial court did not err when it denied defendant's motion to dismiss as the State presented sufficient evidence to establish each element of first degree murder. In addition, the trial court did not abuse its discretion when it overruled defendant's objections or commit reversible error when it failed to intervene *ex mero motu* during the prosecutor's closing arguments. We find no error.

No error.

Judges MCGEE and HUNTER, Robert C. concur.

Report per Rule 30(e).

