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NO. COA01-1469

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Davidson County
No. 00 CRS 3241

STEPHEN ALGIE COOPER

Appeal by defendant from judgment entered 19 April 2001 by Judge Larry G. Ford in Davidson County Superior Court. Heard in the Court of Appeals 11 September 2002.

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

Hough & Rabil, P.A., by S. Mark Rabil, for defendant-appellant.

WALKER, Judge.

Defendant was charged with first degree murder and convicted of second degree murder. Based on defendant's one prior record point, the trial court determined that defendant had a Record Level II, and he was sentenced to a minimum of 168 months and a maximum of 211 months in prison.

The State's evidence tended to show the following: Deputy Donna D. Gunn of the Davidson County Sheriff's Department was dispatched to defendant's residence, a single-wide mobile home, on the afternoon of 2 March 2000. Deputy Gunn walked to defendant's front door and knocked several times without response. Deputy Gunn

proceeded to the back door, knocked a second time, announced herself and called for the defendant to open the door. After announcing herself again, defendant came to the door.

Deputy Gunn followed defendant into his home where she saw the victim, Kathy McCracken, lying between the living room and the kitchen with a pool of blood under her head. A gun also lay on the floor near the victim. When Deputy Gunn asked defendant who the victim was, he responded, "that's my girlfriend; I think she's dead." Defendant claimed the victim had been like that for "about three hours."

When Deputy Gunn inquired as to what happened, defendant stated they "had been working on their taxes, the next thing he knew the gun was in her hand and the gun had went off." Defendant claimed he did not call for help because he thought the victim was bluffing. Defendant also told Deputy Gunn that the gun next to the victim was his, that he thought defendant had shot herself, and that he called a friend and his daughter and told them the gun had discharged.

At 5:50 p.m., Davidson County paramedics arrived at defendant's residence and observed the victim hemorrhaging from her head, an entry wound in her left eye and an exit wound at the back of her head. Additionally, the body had already become stiff, indicating the time of death was two to three hours earlier.

Defendant was subsequently taken into custody where he waived his right to counsel. He agreed to an interview and stated that the victim came to his home to pick up tax forms and collect her

belongings. He stated further that, at some point, she went into the bathroom and came out with a gun and told him she was going to kill "you or me." He then got out of his chair, approached the victim, took the gun away from her, which she had cocked, and shot her. Defendant also stated he was confused and upset and sat down in his recliner and drank a glass of wine. Subsequently, he called his daughter and a friend and told them he had shot the victim.

Michelle Cooper, defendant's daughter, testified that he called her sometime between 10:00 a.m. and 3:30 p.m. on 2 March and told her "there had been an accident and that he was in trouble." He stated "he had shot Kathy." Jerry Maynard testified that defendant called him that afternoon and when he asked to talk to the victim, defendant responded, "I can't. I killed her. I had to She's done me too dirty." Defendant's daughter's roommate testified that defendant called her and stated there had been a shooting and that "he had shot her."

Clyde Wilson, with whom the victim was residing on 2 March, testified that the victim had spoken with him about her relationship with defendant and said "on occasion they had an argument and he was drinking, he got abusive and slapped her around and stuck a gun to her head and threatened to blow her head off."

John Sprinkle, the victim's brother, testified that on 15 February, the victim called and asked him to come and get her because she feared for her life. Sprinkle further testified that the victim stated defendant had been abusive with her, beat her and held guns to her head on numerous occasions. Additionally, on 1

March, defendant talked with Sprinkle concerning the victim's new boyfriend and stated, "I can't handle that. I can't see her be with nobody else. If I cannot have her, I can't see her be with nobody else."

Judy Horey, the victim's substance abuse counselor, testified that at her counseling sessions the victim revealed the following: On 29 December 1999, she and defendant had fought; on 15 November 1999, she had been beaten by defendant; on 18 October 1999, defendant had physically and verbally abused her, held a gun to her head, and threatened to kill her; on 14 December 1999, defendant had threatened her; on 7 October 1999, defendant had held a gun to her head and she had called the police; on 7 September 1999, defendant was very controlling, had held a gun to her head and locked her in a closet; and on 9 February 1999, defendant was drinking and his abusiveness caused her stress.

Additionally, Ms. Horey was asked to describe the victim's "openness" in her counseling sessions. She testified that the victim, as is the usual case, initially was hesitant to share information; however, as the victim became more oriented into the group, she began to share information more freely.

Defendant first contends the trial court improperly allowed Ms. Horey to testify concerning the credibility of the victim during counseling sessions, in violation of Rules 405 and 702 of the North Carolina Rules of Evidence. Specifically, defendant argues that allowing Ms. Horey to describe the victim's "openness"

in counseling sessions amounted to impermissible expert testimony as to the victim's credibility.

Rule 405(a) of the North Carolina Rules of Evidence provides that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." Defendant cites the following cases from our courts where an expert improperly testified as to credibility: *State v. Halloway*, 82 N.C. App. 586, 587, 347 S.E.2d 72, 73 (1986) (expert testified the victim "testified truthfully"); *State v. Aguallo*, 318 N.C. 590, 598, 350 S.E.2d 76, 81 (1986) (expert testified the victim was "believable"); *State v. Heath*, 316 N.C. 337, 340, 341 S.E.2d 565, 568 (1986) (expert testified the victim had no "record of lying"); *State v. Chul Yun Kim*, 318 N.C. 614, 619-20, 350 S.E.2d 347, 350-51 (1986) (expert testified the victim had "never been untruthful with me"); *State v. Hannon*, 118 N.C. App. 448, 450, 455 S.E.2d 494, 495 (1995) (that victim was being "truthful"); and *State v. Jenkins*, 83 N.C. App. 616, 623, 351 S.E.2d 299, 303 (1986) (that the victim was "not making that up"). In each of these cases, the court held the witness had improperly testified to the victim's credibility. However, the present case is distinguishable in that Ms. Horey only testified as to the victim's "openness" and not her credibility.

Furthermore, our courts have held an expert's testimony that the victim "showed no evidence of an emotional disorder which would impair her ability to . . . distinguish reality from fantasy," *State v. Teeter*, 85 N.C. App. 624, 629, 355 S.E.2d 804, 807 (1987), and that the victim responded to a psychological test in an "honest

fashion," *State v. Kennedy*, 320 N.C. 20, 30, 357 S.E.2d 359, 365 (1987), to be proper.

The present case is most analogous to *State v. Wise*, 326 N.C. 421, 425, 390 S.E.2d 142, 145 (1990), where our Supreme Court found no error when a victim's counselor testified that the victim seemed "genuine" when asked to describe the victim's emotional state during counseling sessions. The Court reasoned the counselor "was not testifying that she believed what the victim told her was true, nor did she give her opinion as to the victim's character for truthfulness in general. She merely described her personal observations concerning the emotions of the victim during the counseling sessions." *Id.* at 427, 390 S.E.2d at 146. Thus, defendant's assignment of error is overruled.

Next, defendant argues that his motion to dismiss the lesser included offenses of second degree murder, voluntary manslaughter and involuntary manslaughter should have been granted because all the evidence showed only that defendant shot the victim accidentally or in self-defense. Defendant claims the State is bound by defendant's explanation that the victim died as a result of accident or self-defense because there was no evidence to contradict his statements.

In ruling on a defendant's motion to dismiss, the trial court need only determine whether there is substantial evidence of each essential element of the crime alleged and that the defendant is the perpetrator. *State v. Hyatt*, 355 N.C. 642, 665, 566 S.E.2d 61, 76 (2002), quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d

496, 518 (1998). Also, the trial court must consider the evidence in the light most favorable to the State, and the State must be given the benefit of every reasonable inference that may be drawn from the evidence. *State v. Oxendine*, __ N.C. App. __, __, 564 S.E.2d 561, 564 (2002). In ruling upon the sufficiency of evidence, the trial court shall apply the same test whether the evidence is direct, circumstantial or both. *State v. Butler*, __ N.C. __, __, 567 S.E.2d 137, 140 (2002), quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

"Second degree murder is an unlawful killing with malice, but without premeditation or deliberation." *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (citation omitted). The State has the burden of proving each element of the offense beyond a reasonable doubt. *State v. Nobles*, 350 N.C. 483, 516, 515 S.E.2d 885, 905 (1999). Here, there was evidence of defendant's intentional use of a deadly weapon proximately resulting in the death of the victim. The State also presented evidence that defendant was jealous of the victim, had abused her in the past and had held guns to her head on other occasions. From this evidence, the jury could infer the defendant acted with malice.

Examining the evidence in the light most favorable to the State, it showed that defendant, acting with malice, intentionally shot the victim in the face with a gun at close range. Defendant admitted in numerous statements that he shot the victim.

Furthermore, the trial court instructed the jury that it could find the killing was accidental or was done in self-defense. The

jury rejected the defendant's theory of how the killing occurred. This assignment of error is overruled. Defendant received a fair trial free from prejudicial error.

No error.

Judges McGEE and THOMAS concur.

Report per Rule 30(e).