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NO. COA01-1473

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

STATE OF NORTH CAROLINA

v.

Forsyth County
No. 94 CRS 24889, 26310

JOSE SALVADOR SERRANO CRUZ

Appeal by defendant from judgments dated 3 March 1999 by Judge William H. Freeman in Superior Court, Forsyth County. Heard in the Court of Appeals 11 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General W. Dale Talbert, for the State.

Lisa S. Costner, for defendant-appellant.

McGEE, Judge.

Jose Salvador Serrano Cruz (defendant) was indicted on two counts of first degree murder on 19 October 1998. Defendant pled guilty on 3 March 1999 to two counts of second degree murder. Testimony presented by the State at the sentencing hearing tended to show that defendant, Simon Ventura (Ventura), Jesus Silva Perez (Perez), Marcelino Olmedo (Olmedo), and others were drinking and arguing on 20 July 1994 while at Perez's home. The argument involved what beer tasted best, who would drink the beer, and who would drive Ventura's truck. Defendant had a history of confrontations with Perez and Olmedo. Defendant was also upset

about several incidents in which his car windows had been broken. Defendant said, "I won't get any justice. These people are going to wait until I kill someone."

The argument became more heated, particularly between Olmedo and defendant. Defendant pointed a semi-automatic handgun at Olmedo and chambered a round, but the weapon malfunctioned. Defendant chambered another round and shot Olmedo in the face at close range. As defendant, Ventura, and Perez left the house, Perez asked defendant why he had shot Olmedo. Defendant yelled obscenities at Perez and shot him in the face at close range. Perez died at the scene and Olmedo died several days later. There was no evidence that defendant had been struck, attacked, or threatened by anyone during the course of the argument prior to the shootings.

Defendant's counsel argued mitigating factors for the trial court to consider in imposing a sentence. The trial court sentenced defendant in the presumptive range to fifteen years in prison for the murder of Olmedo. For the murder of Perez, the trial court found a non-statutory aggravating factor of murder with premeditation and deliberation and determined that the aggravating factor outweighed the mitigating factor of no prior record. Defendant was sentenced in the aggravated range to twenty-five years in prison. Defendant appeals the sentence imposed by the trial court.

Defendant argues that the trial court erred in finding the aggravating factor that the murder of Perez was premeditated and

deliberated. Since defendant committed the offense in 1994, the Fair Sentencing Act (the Act) applies in this case. See N.C. Gen. Stat. § 15A-1340.4(a) (Cum. Supp. 1993). In upholding a non-statutory aggravating factor of premeditation and deliberation under the Act, this Court stated:

The trial judge may consider non-statutory aggravating factors which are reasonably related to the purposes of sentencing and are proved by a preponderance of the evidence. With respect to second degree murder, premeditation and deliberation is a non-statutory aggravating factor which is reasonably related to the purposes of sentencing. Furthermore, if a defendant charged with first degree murder pleads guilty to second degree murder, the sentencing judge may find premeditation and deliberation to be reasonably related to the purposes of sentencing. It is within the sole discretion of the trial court to determine the weight given to each aggravating or mitigating factor and the extent to which the sentence may exceed the presumptive term. In order to reverse, the defendant must show there is no support in the record for the court's decision.

State v. O'Neal, 116 N.C. App. 390, 393-94, 448 S.E.2d 306, 309 (1994) (citations omitted); see *State v. Vandiver*, 326 N.C. 348, 389 S.E.2d 30 (1990); *State v. Brewer*, 321 N.C. 284, 362 S.E.2d 261 (1987).

Premeditation requires that a specific intent to kill be formulated before the murder; however, no specific length of time is required. *State v. Thomas*, 350 N.C. 315, 347, 514 S.E.2d 486, 506, cert. denied, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). Deliberation is defined as the "execution of an intent to kill in a cool state of blood without legal provocation." *State v.*

Hutchins, 303 N.C. 321, 344, 279 S.E.2d 788, 802 (1981). Premeditation and deliberation may be proven through circumstantial evidence of:

1) want 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; and 6) evidence that the killing was done in a brutal manner.

State v. Gladden, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693 (1986). Consideration of the nature and number of the victim's wounds is also appropriate. *Id.*

In the case before us, there is evidence in the record to support the trial court's determination of the non-statutory aggravating factor of premeditation and deliberation. Testimony showed that defendant, Perez, and Olmedo had been arguing and drinking throughout the morning and that a history of confrontations previously existed between defendant and Perez and Olmedo. Defendant had suggested that he might kill whomever had wronged him. Defendant used a semi-automatic weapon to brutally shoot both Perez and Olmedo in the face at close range. This evidence is sufficient to support the trial court's decision.

Defendant had sufficient time to premeditate and deliberate to establish this aggravating factor. Based upon these facts, there was sufficient evidence in the record to support the trial court's finding of a non-statutory aggravating factor of premeditation and

deliberation. Accordingly, we overrule defendant's assignment of error and we affirm the judgment of the trial court.

Affirmed.

Judges WALKER and THOMAS concur.

Report per Rule 30(e).