NO. COA01-303

NORTH CAROLINA COURT OF APPEALS

Filed: 07 May 2002

STATE OF NORTH CAROLINA

v. Carteret County
No. 99 CRS 9314

TERESA JEAN CULPEPPER

Appeal by defendant from judgment entered 4 October 2000 by Judge Carl L. Tilghman in Carteret County Superior Court. Heard in the Court of Appeals 23 January 2002.

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

McCotter, McAfee & Ashton, PLLC, by attorneys Ruldolph A. Ashton III and Kirby H. Smith, III, for defendant-appellant.

THOMAS, Judge.

Defendant, Teresa Jean Culpepper, was found guilty of first-degree murder and sentenced to life imprisonment without parole. On appeal, she argues four assignments of error. We find no error.

Ray Culpepper (Culpepper) and defendant were married in May of 1999, after Culpepper's ex-wife assured him that there was no chance of reuniting. Culpepper, a Beaufort police officer, was non-abusive and cared for defendant and her five children. Defendant described her marriage to him as perfect and what she had always wanted, but in August defendant noticed that Culpepper had become quiet, cold, and distant.

On Monday, 20 September 1999, Culpepper told defendant that he was still in love with his ex-wife, and while defendant was special, he could no longer be married to her. The next day Culpepper moved his personal belongings to his mother's home.

Defendant planned to commit suicide. On Wednesday, she removed a .38 caliber gun from the closet and placed it under a bed pillow. At 1:00 A.M. Thursday she wrote suicide notes to Culpepper and her children.

At 11:00 A.M. Thursday, Culpepper returned to their home to see how defendant was doing. They had a discussion in their bedroom, but never argued. Culpepper told defendant that she would "go on." Defendant responded that she did not want to live anymore. Culpepper told defendant that she was not going to kill herself, she was special and he still loved her, and he thought he was moving on but she was not. As Culpepper turned from defendant and looked out of the bedroom window, defendant pulled the gun from under the pillow and shot him four times.

Defendant dialed 911 and told the dispatcher she shot her husband and was also going to shoot herself. Defendant then called her pastor and told him the same. Deputies were immediately dispatched to the scene, where they found defendant in the bedroom trying to reload the gun with shells scattered on the floor. As the officers ran into the room, defendant closed the cylinder to the revolver but did not point the gun toward herself. They wrestled her to the ground and took the gun from her.

By her first assignment of error, defendant contends that the

trial court erred in allowing into evidence ten photographs of the deceased victim. Defendant made no objection at trial to the introduction of any of the photographs. As a general rule, where no objection or exception is made at trial to the allegedly improperly admitted evidence, the appellant may not challenge the item for the first time on appeal. *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 75 (1990); N.C.R. App. P. 10(b)(1). At most, defendant is entitled to a plain error review of this issue by this Court. N.C.R. App. P. 10(c)(4). However, defendant has failed to specifically and distinctly assign plain error as required by Rule 10(c)(4) of the North Carolina Rules of Appellate Procedure. Defendant's right to review on this issue is therefore waived, but we choose to proceed under Rule 2. N.C.R. App. P. 2.

In determining whether to admit photographic evidence, the trial court must weigh the probative value of the photographs against the danger of unfair prejudice to a defendant. N.C. Gen. Stat. § 8C-1, Rule 403 (1999). This determination lies within the sound discretion of the trial court, and the trial court's ruling will not be overturned on appeal unless the ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Each of the ten photographs here showed all or a portion of Culpepper's body. Such photographs, however gruesome, are admissible if they serve to illustrate the testimony of a witness, and so long as an excessive number of photographs are not used

solely to arouse the passions of the jury. *Id.* at 284, 372 S.E.2d at 526.

In the present case, a deputy sheriff used one photograph during his testimony regarding the position of the body when the deputy entered the room. A detective used three photographs to also describe the location of the body, and to identify the purse, assorted shells, and papers lying on the floor at the crime scene. Finally, the doctor performing the autopsy used six photographs to illustrate his testimony regarding Culpepper's injuries.

Each photograph was relevant, competent, and used for the limited purpose of illustrating witnesses' testimony. *See id.* Arousal of the jury's passions clearly was not the sole purpose of the photographs' use. Moreover, to prevail under an analysis for plain error, a defendant must convince this Court that: (1) there was error; and (2) absent this error, the jury would have probably reached a different result. *State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991). Defendant failed to establish that there even was error. Accordingly, we reject this assignment of error.

By defendant's second assignment of error, she argues that the trial court committed error in allowing the prosecutor to ask defendant on cross-examination whether she committed a "very angry act." Defendant contends this question improperly forced her to give an opinion of whether or not she was guilty of first-degree murder, the "intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Flowers*,

347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d. 150 (1998). We disagree.

Rule 704 of our Rules of Evidence allows admission of lay opinion evidence on ultimate issues, provided the opinion is helpful to the jury. N.C.R. Evid. 704. Here, defendant's opinion that she had committed an angry act when she shot her husband was helpful to the jury in deciding whether or not defendant acted with malice, a necessary element of first-degree murder. The court did not commit error.

By her third assignment of error, defendant complains that the trial court erred in denying her motion to dismiss the first-degree murder charge at the close of the State's evidence and at the close of all the evidence in that there was insufficient evidence of premeditation and deliberation. Rather, defendant asserts, the State's evidence showed only that defendant acted out of emotional distress and depression.

In ruling on a motion to dismiss:

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Vause, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citation omitted). As stated above, "[m]urder in the first-degree . . . is the intentional and unlawful killing of a human being with

malice and with premeditation and deliberation." *Flowers*, 347 N.C. at 29, 489 S.E.2d at 407. "'Premeditation' means that the defendant formed the specific intent to kill the victim some amount of time, however short, before the actual killing." *Vause*, 328 N.C. at 238, 400 S.E.2d at 62. "'Deliberation' means that the intent to kill was formed while the defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation." *Id.* In the context of determining the existence of deliberation, however, the term "cool state of blood" does not necessarily mean that the defendant acted with an absence of passion or emotion. *Id.* A person may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, even though prompted, and to a large extent controlled by, passion at the time. *Id.* Among other circumstances, premeditation and deliberation may be inferred from lack of provocation on the part of the deceased, the nature and number of the victim's wounds, and the dealing of lethal blows after the deceased had been felled and rendered helpless. *Id.*

Here, defendant testified that Culpepper in no way provoked her. She admitted shooting the unarmed Culpepper in the back while he looked out of the bedroom window. Defendant further stated that, after the first shot, she got off the bed and kept shooting. Culpepper received four gunshot wounds, one to the shoulder, one to the lower back, and two to the head. The evidence tended to show that one of the shots to the head was a close distance wound, meaning the gun was touching the skin when the trigger was pulled.

We hold that this evidence is substantial evidence tending to show premeditation and deliberation. The trial court did not err in denying defendant's motion to dismiss.

By her fourth and final assignment of error, defendant contends that it was plain error for the trial court to give the pattern jury instruction on diminished capacity. Defendant argues that the trial court should have modified the pattern jury instruction so that it referred to defendant's mental and emotional condition. The trial court's instruction, taken from N.C.P.I.--Crim. 305.11 (1989), instead refers only to defendant's "lack of mental capacity," providing in pertinent part: "If you find that defendant lacked mental capacity, you should consider whether this condition affected her ability to formulate the specific intent which is required for conviction of first-degree murder."

Although defendant requested a modification of the pattern instruction during the jury charge conference, no objection was made at trial. "A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . ." N.C.R. App. P. 10(b)(2). Nonetheless, a party may assign error to a jury instruction if the party alleges the error in instruction amounts to plain error. N.C.R. App. P. 10(c)(4). As stated above, to prevail under a plain error analysis, defendant must convince this Court that there was error and that absent this error, the jury would have probably reached a different result. *Faison*, 330 N.C. at 361, 411 S.E.2d at 151.

In support of her argument that the trial court should have instructed on defendant's mental status and not just on diminished capacity in general, defendant relies on our Supreme Court's decision, *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988). *Shank* held that testimony regarding the defendant's mental or emotional condition at the time of the crime should have been allowed. Here, testimony regarding defendant's mental condition at the time of the shooting was allowed. Dr. J. Thomas Stack, a clinical psychologist, testified that defendant, "was in such a disturbed state emotionally or mentally that she did not have the capacity to perform specific intent." We find no authority for the contention that, when instructing on lack of mental capacity, the trial court under the facts of this case must reference the defendant's mental and emotional conditions beyond the pattern instruction given. Accordingly, the trial court did not err in giving the instruction.

NO ERROR.

JUDGES HUDSON and JOHN concur.

Report per Rule 30(e)