NO. COA01-320

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v. Granville County
No. 99 CRS 3316

RON DALE JOHNSON

Appeal by defendant from judgment entered 6 October 2000 by Judge Donald J. Jacobs in Granville County Superior Court. Heard in the Court of Appeals 19 February 2002.

Roy Cooper, Attorney General, by Alexander McC. Peters, Special Deputy Attorney General, for the State.

J. Thomas Burnette and Teresa Gibson for defendant.

THOMAS, Judge.

Defendant, Ron Dale Johnson, appeals a conviction for first-degree murder, setting forth seven assignments of error. For the reasons discussed herein, we find no error.

The State's evidence tended to show the following: On 3 July 1999, Marvin Averette noticed a dead body lying on the ground in front of a car parked near a barn. He called for emergency services on his car phone. Sergeant Scott Baird of the Granville County Sheriff's Department arrived twenty minutes later. He examined the body and saw several wounds to the chest. The victim was eventually identified as James Craig Lewis. According to the

Medical Examiner's Office in Chapel Hill, there were four blunt force injuries on the top and front of Lewis's head, skull fractures, an incision around his neck, and stab wounds to his shoulder, chest, back, and abdomen.

On the same day the body was discovered, Nathaniel Trey Davis, III, of the Granville County Sheriff's Department, brought defendant to the department for questioning. He was read his *Miranda* rights, agreed to speak with the authorities, and signed a waiver. Defendant was cooperative and showed them a black pocketknife he carried. He denied killing Lewis.

In his statement, defendant claimed he was at Bernard Edgerton's home with Apollo Hunt and Lewis. They were all drinking beer and smoking crack cocaine. An argument eventually broke out between Hunt and Lewis about drug money owed by Lewis to Hunt. Around midnight, Hunt asked Lewis to ride with him and defendant to get more crack cocaine. Hunt, however, privately told defendant they were going to a barnyard to beat up Lewis. Defendant agreed.

Lewis drove them to the barnyard. After they exited the car, Hunt and defendant punched Lewis in the face. Hunt then repeatedly struck Lewis in the head and hands with a bat. Lewis fell to the ground and began begging for his life but the beating did not stop. Defendant kicked Lewis in the head as Hunt continued to hit Lewis with the bat. Lewis became unconscious, the bat broke, but Hunt hit Lewis several more times with the broken end of the bat. Defendant heard Lewis's skull crack. Hunt, however, told defendant he did not think Lewis was dead, so Hunt made slits in Lewis's

throat and stabbed him in the torso several times.

Defendant then told Hunt to get defendant's gas jug from the car so they could not be identified. Hunt did, and poured the gas on Lewis's body to "get the fingerprints off." Defendant told Hunt not to set the body on fire because the flames could attract attention. Unable to find the car keys, defendant and Hunt walked to defendant's house and removed their bloody clothing.

After defendant gave his statement, he was arrested and charged with first-degree murder.

At trial, defendant presented no evidence. He was convicted of first-degree murder and sentenced to life imprisonment without parole.

By defendant's first assignment of error, he argues the trial court erred in overruling his motion to have an impaneled juror excused. During the trial, she volunteered that, although she did not know any members of the victim's family, she did know two individuals who were sitting with the victim's family in the courtroom. We disagree.

Whether to excuse a juror rests within the sound discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. *West v. Tilley*, 120 N.C. App. 145, 461 S.E.2d 1 (1995). "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.'" *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998) (quoting

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

In the instant case, after the juror informed the bailiff that she knew the individuals, the trial judge conducted an inquiry. He found that one of the individuals owned the tanning bed the juror visited and the other was someone who frequented the tanning bed. The juror stated that although she knew their names, there was no emotional attachment and her knowledge of them would not influence her verdict or affect her duty as a juror. Defendant has not shown an abuse of discretion here and we therefore reject his argument.

By defendant's second assignment of error, he argues the trial court committed reversible error by allowing the testimony of Dr. Thomas Clark when: (1) Dr. Marco Ross actually conducted the autopsy; and (2) the autopsy was not certified. We disagree.

The State's evidence showed that Ross performed the autopsy, making notations and signing it. However, because Ross was believed to be out of North Carolina at the time and unavailable, the State called Clark to testify regarding the autopsy report. The defense objected, stating that conclusions as to death are not admissible absent the testimony of the person conducting the autopsy. *See State v. Watson*, 281 N.C. 221, 229, 188 S.E.2d 289, 294, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972).

All defendants have a right to confrontation according to the North Carolina and United States Constitutions. N.C. Const. Art. I, § 11; U.S. Const. Amend. VI. "The right of confrontation confirms the common-law rule that, in criminal trials, the witnesses must be present and subject to cross-examination."

Watson, 281 N.C. at 230, 188 S.E.2d at 294.

In the instant case, however, Clark had been present for the entire autopsy procedure and, further, he was the acting supervisor during the time Ross performed the autopsy. Clark signed the autopsy report and testified that Ross's opinions were identical to his own. He further stated that Ross was prohibited from expressing an opinion without Clark's approval.

Defendant was able to confront and cross-examine Clark. We therefore hold that the constitutional provisions were fully satisfied and reject defendant's argument.

Defendant also contends the trial court erred in admitting the autopsy report because it was not certified. Nonetheless, the North Carolina Rules of Evidence state that extrinsic evidence of the authenticity of a public record is not a condition precedent to its admissibility. N.C. R. Evid. 902(4). We therefore reject defendant's argument.

By defendant's third assignment of error, he argues the trial court erred in overruling defendant's objection to the testimony of Dr. Jefferson Burke concerning dental x-rays and radiographs when the defense was not provided with copies of the x-rays in discovery. We disagree.

Defendant states that the trial court ignored the provisions of N.C. Gen. Stat. § 15A-903. Section 15A-903 provides:

> Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the

> case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

N.C. Gen. Stat. § 15A-903(e) (2001). The record does not contain any indication that defendant made a motion pursuant to section 15A-903(e) to have the x-ray report produced or that the State failed to produce the x-ray report when ordered to do so. Thus, there is no violation of section 15A-903(e) and we reject defendant's argument.

By defendant's fourth and fifth assignments of error, he argues the trial court erred in denying defendant's motion to dismiss at the close of the State's evidence and at the close of all the evidence and by instructing the jury on acting in concert. We disagree.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be

considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

The elements of first-degree murder are: (1) the unlawful killing; (2) of another human being; (3) with malice; and (4) with premeditation and deliberation. *See* N.C. Gen. Stat. § 14-17 (1999); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). Defendant argues there was not sufficient evidence of premeditation to convict him of first-degree murder.

Premeditation is defined as a killing that was thought out beforehand for some length of time, however short, but no particular length of time is necessary. *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991). Premeditation and deliberation ordinarily are not susceptible to proof by direct evidence and must usually be proved circumstantially. *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975). Among the circumstances that are to be considered in determining whether a killing was with premeditation and deliberation are: (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 victim's death; (4) ill-will or previous difficulty between the parties; (5) evidence that the killing was done in a brutal manner; and (6) the nature and number of the victim's wounds. *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871,

93 L. Ed. 2d 166 (1986).

The evidence at trial showed that Hunt had told defendant that they were going "get" Lewis when they got to the barnyard. When they arrived, defendant struck Lewis with his fist. Although there is no evidence that Lewis provoked defendant, there is also no evidence of bad relations between defendant and Lewis or that defendant threatened Lewis before or during the beating. Defendant told police that a month before Lewis's death, Hunt had beaten up another individual, Rod Rice, with an iron table leg. Defendant agreed to help Hunt beat Lewis but there was never an agreement or an understanding on defendant's part that Lewis was going to be murdered.

Here, we need not address defendant's argument concerning premeditation because a person can be guilty of a crime, even though he did not commit it, if he acts in concert with another who commits the crime. *State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). In *Barnes*, our Supreme Court held that:

> [I]f "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof."

Id. at 233, 481 S.E.2d at 71 (quoting *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972)). It is not necessary that an accomplice individually possessed the *mens rea* to commit the crime,

only that he acted in concert with another who had the requisite *mens rea*. *See State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Further, each person acting in concert is guilty of any crime committed by any of them in pursuit of the common plan. *Id.* at 456, 533 S.E.2d at 228.

Here, it is clear that Hunt committed first-degree murder, with premeditation and deliberation. Hunt and defendant embarked on a plan to assault the victim. The plan then changed from assault to murder. Because defendant was involved in the plan and because the State showed sufficient evidence that Hunt possessed the requisite *mens rea* for first-degree murder, defendant is also guilty of first-degree murder. Additionally, Lewis begged for his life and said "Please don't kill me." Hunt replied that it was "too late." Defendant then resumed kicking Lewis in the head. Therefore, the trial court did not err in denying defendant's motion to dismiss or in instructing the jury on acting in concert and we reject defendant's arguments.

By his sixth assignment of error, defendant argues the trial court erred in denying his motion to exclude photographs of the victim's decomposed body. He argues they were cumulative and served no purpose other than to inflame the jury and inflate the dramatic effect of the State's evidence, prejudicing defendant in violation of Rule 403 of the Rules of Evidence. We disagree.

Rule 403 prohibits admissible evidence where "its probative value is *substantially* outweighed by the danger of unfair

prejudice." N.C. R. Evid. 403. (Emphasis added). The photographs here were used to show the victim's skull fractures and other injuries. Our Supreme Court has held that "[p]hotographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). Although the photos here were gruesome, defendant has not shown that they were not used for illustrative purposes or that he was prejudiced by them. Consequently, we reject defendant's argument.

By his final assignment of error, defendant argues the trial court erred in overruling his objection to the testimony of the victim's sister because it violated the hearsay rule. We disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. R. Evid. 801(c). Defendant contends there was impermissible hearsay when Dr. Marcia Lewis, the victim's sister, testified that during a telephone call a detective asked her to meet him at her dental office, where she later provided police with the victim's dental x-rays. This statement was not offered for the truth of the matter asserted. It was offered to show why she went to her office to meet the detective. "Statements of one person to another are not hearsay if the statement is made to explain the subsequent conduct of the person to whom the statement was made." *State v. Reid*, 335 N.C.

647, 661, 440 S.E.2d 776, 784 (1994). We therefore find the trial court did not err and reject defendant's argument.

NO ERROR.

Judges GREENE and MCGEE concur.

Report per Rule 30(e).