NO. COA01-511

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

STATE OF NORTH CAROLINA

v. Robeson County
No. 99 CRS 6847

KIMBERLY AMES LEGGETT

Appeal by defendant from judgment entered 27 October 2000 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 14 February 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.*

*Bowen, Berry and Powers, PLLC, by Sue Genrich Berry, for defendant-appellant.*

CAMPBELL, Judge.

On 6 July 1999, defendant was indicted by the Robeson County Grand Jury for the murder of William Glen Bass ("Bass"). Defendant pled not guilty and was tried noncapitally before a jury at the 24 October 2000 Criminal Session of the Robeson County Superior Court, Judge Robert F. Floyd, Jr. presiding. The following evidence was introduced at trial:

The State's evidence tended to show that defendant, a dog owner, moved in with her mother and stepfather after her fourteen-year marriage ended in divorce. Defendant's parents did not want defendant's dog in the house with their dog; therefore, defendant

asked Bass, a man whom she occasionally dated, to care for her dog until she could find a place of her own. Bass agreed and actually took care of defendant's dog for approximately two years.

On 3 April 1999, a friend told defendant that her dog had heartworms. Defendant became very upset and responded, "My damn dog better not die because I've been paying Glenn Bass the money to buy heartworm pills, and he better been giving them to him. If not, I will kill that son-of-a-bitch." Defendant retrieved her dog from Bass' yard that same day. The dog died the following day (4 April 1999) and was buried by defendant.

On 5 April 1999, defendant drove to Bass' place of employment and, from a distance of approximately 120 feet, shot at him five times with a Colt .38 revolver. Three of the bullets hit Bass. Defendant reloaded the revolver before walking over to where Bass was lying and throwing a pack of heartworm pills on his body. Afterwards, defendant returned to her car and drove away.

After shooting Bass, defendant stopped and drank a beer with a neighbor. Defendant told the neighbor that she had just shot Bass, but he thought she was joking. Once she left the neighbor's house, defendant drove to her parent's house, gave her stepfather the revolver, which she had taken from his nightstand, told them what she had done and then drove herself to the police department. She explained to the police that Bass "got what he deserved" because he had not given her dog his medication. Thereafter, defendant accompanied the police back to Bass' place of employment to show them where he was lying. Bass died as a result of gunshot

wounds to his neck and back area.

Once the State rested, defense counsel began its case with an opening statement, which conceded that defendant was "guilty of something less than first-degree murder" because she was substantially impaired at the time she shot Bass. Immediately following the opening, the court excused the jury and swore in defendant to determine if she had given defense counsel permission to make that concession to the jury. Defendant testified that she and her counsel had discussed this trial strategy prior to the trial and that he had her permission to make the concession. During closing argument, defense counsel stated that defendant should be found guilty of second-degree murder.

Defendant's mother and stepfather testified on her behalf. Their testimony tended to show that defendant had experienced significant losses in her life. Those losses included the death of her biological father, two brothers, and the loss of her husband and marital home. Her stepfather further testified that defendant went "crazy like" after losing her dog. Prior to shooting Bass, defendant dug up her dog and placed a leaf over his eye to keep dirt out. Defendant's parents also testified that defendant appeared intoxicated and was acting unlike herself when she came home after shooting Bass.

Defendant presented additional evidence which consisted of testimony from three medical experts.

Psychologist Claudia R. Coleman, Ph.D. ("Dr. Coleman"), interviewed defendant prior to trial. She found that defendant

had long-standing anxiety and depression problems stemming from the losses in her life. Dr. Coleman further found that defendant abused alcohol and drugs, including painkillers and tranquilizers. Dr. Coleman concluded that at the time of the murder, defendant's use of drugs and alcohol and her distress over her dog's death, impaired her thinking and her ability to reasonably assess events, actions and situations.

After interviewing defendant and reviewing her case file, psychiatrist George P. Corvin, M.D. ("Dr. Corvin") also determined that defendant had a history of tragic loss, and suffered from chronic anxiety and drug abuse. Defendant consistently told Dr. Corvin that her dog's death was like the loss of a child and that she began drinking and using pills very heavily after she buried him. According to defendant, she consumed approximately seventeen pills (painkillers and tranquilizers) on the day of the shooting. Dr. Corvin ultimately concluded that even though it appeared defendant made decisions and planned the shooting, she did not have the capacity to form the specific intent required to commit the offense.

Finally, toxicologist Andrew P. Mason, Ph.D., testified that if defendant ingested painkillers, alcohol, and tranquilizers, as she had indicated to Dr. Coleman and Dr. Corvin, the ingestion of those substances might have resulted in confusion, disorientation, impaired comprehension, impaired judgment, and a decrease in her capability to make rational decisions.

Defendant's trial concluded on 27 October 2000 when the jury

returned a verdict of guilty of first-degree murder. She was sentenced to life imprisonment without parole. Defendant appeals this judgment. Defendant brings forth fourteen assignments of error, seven of which she abandons in her brief to this Court and three others that involve a preservation issue we will not address. The four remaining assigned errors present this Court with three issues. For the following reasons, we find no error in the trial court's judgment.

I.

The first issue raised by defendant is whether the trial court abused its discretion by failing to intervene *ex mero motu* during the State's (A) opening statement and (B) closing argument. We find that the court did not err.

"As a general rule '[p]rosecutors are granted wide latitude in the scope of their argument[s].'" *State v. Walls*, 342 N.C. 1, 48, 463 S.E.2d 738, 762 (1995) (quoting *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911 (1987). Nevertheless:

> [C]ontrol of counsel's arguments is left largely to the discretion of the trial court. When no objections are made at trial . . . the prosecutor's argument is subject to limited appellate review for gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. In order to determine whether the prosecutor's remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual circumstances to which they refer.

*State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995) (citations omitted).

A.

With respect to the State's opening statement, defendant argues the trial court should have intervened *ex mero motu* when the prosecutor sought to shift the burden of proof to defendant by communicating the following to the jury:

> [Members of the jury, y]ou're sitting back asking yourselves right now . . . what's for us to do in this case? Well, let me tell you, there's always something else. In this case the something else is whatever the defendant may present to you. I can't speak for the defendant; I don't know what they're going to do. . . . [T]he only thing I can say to you now is . . . you may hear . . . expert opinion . . . from up to three experts. . . . [T]here will not be any factual support whatsoever for their opinions. The lone source of their information that they will rely their opinions upon will be the defendant, herself.

We disagree.

This Court has held that in an opening statement, counsel is allowed to set forth a general forecast of the evidence, as well as state his legal claim or defense in basic terms. *See State v. Freeman*, 93 N.C. App. 380, 389, 378 S.E.2d 545, 551 (1989). Additionally, counsel may use an opening statement to "point out to the jury facts which he reasonably expects to bring out on cross-examination." *State v. Paige*, 316 N.C. 630, 648, 343 S.E.2d 848, 859 (1986). Here, the prosecutor used the opening statement to generally forecast that the opinions given during the trial by defendant's expert witnesses would be biased. Furthermore, the opening statement pointed out that the prosecutor expected to prove this bias through cross-examination by establishing that there was no factual support for their opinions. These statements therefore

are not so grossly improper that they result in shifting the burden of proof to defendant.

B.

With respect to the State's closing argument, defendant argues the trial court should have intervened *ex mero motu* when the State improperly referred to defendant's failure to testify. Specifically, defendant takes issue with the following portion of the argument made by the State:

> [Dr. Coleman] tells you that she talked to the main witness in the case. . . . Who's the main witness in this case, according to Dr. Coleman? The defendant. Because she's the only one that knows what happened.
>
> Well, between her and God, yes, she's the only one that knows what happened that's going to be here in this courtroom, that's going to tell us.

It is well established that a prosecutor is prohibited from commenting on a defendant's failure to testify during closing argument. *See State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976). However, in the case *sub judice*, defendant apparently chose not to view these statements in their proper context before assigning error to the prosecutor's argument. A more accurate viewing of the prosecutor's closing argument shows that the statements immediately following those statements cited by defendant were as follows:

> But there are other people involved in this, there are other people that ha[d] contact with [defendant], within the very close knit time frame around this crime that have relevant, have objective, even have observations of what happened, of what they saw. Not once did [Dr. Coleman] talk to anybody [other than

defendant].

We find this argument, when "viewed in context and in light of the overall factual circumstances to which they refer[,]" shows that the prosecutor made no direct reference to defendant's failure to testify. *Alston*, 341 N.C. at 239, 461 S.E.2d at 709. Instead, the closing argument attacked the credibility of Dr. Coleman by pointing out her failure to communicate with anyone other than defendant about the events relevant to this case. Thus, we find that there was no abuse of discretion by the trial court when it did not intervene *ex mero motu* because the State's argument in no way so infected the trial with unfairness that it constituted a denial of due process." *State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 229 (1994).

II.

The second issue is whether defendant received ineffective assistance of counsel when defense counsel conceded her guilt during his opening statement even though defendant had previously consented to this concession. Defendant argues that her privilege against self-incrimination, right to confrontation and right to a fair trial were violated because she did not have the capacity to know the difference between first-degree murder and a lesser charge when she gave her consent. We disagree.

This Court recognizes that any concession of a client-defendant's guilt absent a consent by that defendant to do so constitutes ineffective assistance of counsel *per se* in violation

of the Sixth Amendment. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985). Our courts have declined to set out what constitutes an acceptable consent by a defendant in this context. *See State v. McDowell*, 329 N.C. 363, 387, 407 S.E.2d 200, 213 (1991). However, consent may be given before or after defense counsel's concession of the defendant's guilt because a defendant may "ratif[y] defense counsel's earlier statement and cure[] any possible error[.]" *State v. Basden*, 339 N.C. 288, 299, 451 S.E.2d 238, 244 (1994). Also, our Supreme Court has held a defendant's consent was acceptable where, after the argument was made, the trial court was told on the record that counsel and defendant had previously discussed the concession made and defendant had expressly stated that counsel acted according to defendant's wishes. *See McDowell*, 329 N.C. at 387, 407 S.E.2d at 213.

As stated previously, after defense counsel's opening statement, the court swore in defendant to determine whether she had consented to defense counsel conceding her guilt. The court addressed defendant as follows:

> Q [Court]: [Defendant,] did you hear [defense counsel] concede that you killed [Livingston]?
>
> . . .
>
> A [Defendant]: Yes, sir.
>
> Q: Did you and he discuss that as a trial strategy?
>
> A: Yes, sir we did.
>
> Q: Did he have your permission to make that concession?
>
> A: Yes, sir.

> Q: Did you also hear him concede that you are . . . guilty of something but it should be something less than first-degree murder?
>
> A: Yes, sir.
>
> Q: Did you and he discuss that prior to his argument to the jury?
>
> A: Yes, sir.
>
> Q: And did he have that -- your permission to make that concession or that argument to the jury?
>
> A: Yes, sir.
>
> Q: Was there anything about his argument to the jury that you found to be in opposition of your permission that you gave him to argue to the jury, or opposition to what you and he had discussed?
>
> A: No, sir.

The court's inquiry of defendant was sufficiently specific to determine whether defendant consented to defense counsel's concession. There was nothing in the record or the trial transcript to indicate defendant did not have the capacity to understand the court's questions and answer them effectively. Finally, defense counsel's argument conceding defendant was "guilty of something less than first-degree murder" was a reasonable tactical decision given the facts and circumstances in this case. *See McDowell*, 329 N.C. at 388, 407 S.E.2d at 214. Therefore, defense counsel was not ineffective when he conceded defendant's guilt after obtaining her consent to do so.

III.

Defendant's final issue is whether the trial court erred in

denying her request to submit an instruction on voluntary intoxication to the jury at the conclusion of all the evidence. We find that the court did not err.

"It is well established that when a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance." *State v. Garner*, 340 N.C. 573, 594, 459 S.E.2d 718, 729 (1995) (citations omitted). However, when requesting an instruction on voluntary intoxication, evidence of mere intoxication is not enough to entitle defendant to this instruction. *See State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). Our courts have held that "an instruction on voluntary intoxication is not required in every case in which a defendant [presents some evidence] that he killed a person after consuming intoxicating beverages or controlled substances." *State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 41 (1992). Our trial courts are not required to give this instruction until after a defendant:

> [P]roduce[s] substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried 'defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.'

*State v. Cheek*, 351 N.C. 48, 74-75, 520 S.E.2d 545, 560-61 (1999), *cert. denied*, *Cheek v. North Carolina*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000) (quoting *State v. Strickland*, 321 N.C. 31, 41, 361

S.E.2d 882, 888 (1987) (citation omitted)).

In the present case, there is no evidence to support a finding that defendant was so completely intoxicated that she was utterly incapable of forming the requisite intent for first-degree murder. On the contrary, the evidence shows that defendant methodically planned to murder Bass by taking her stepfather's gun, driving to Bass' place of employment, shooting him three times from a distance of 120 feet, throwing heartworm pills on his body, and then simply driving away to tell her neighbor and parents about what she had done. Such behavior is indicative of a capacity for premeditation and deliberation. Thus, defendant has not made the showing necessary to entitle her to a voluntary intoxication instruction.

In conclusion, we find all of defendant's assignments of error to be without merit. Accordingly, we hold that the trial court's judgment finding defendant guilty of first-degree murder should be upheld.

No error.

Judges MARTIN and HUDSON concur.

Report per Rule 30(e).