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NO. COA01-607

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

STATE OF NORTH CAROLINA

v. | Halifax County
No. 98 CRS 11940-43

DEWEY CRAIG FISHER

Appeal by defendant from judgment entered 29 August 2000 by Judge Cy A. Grant in Halifax County Superior Court. Heard in the Court of Appeals 13 February 2002.

Attorney General Roy A. Cooper, by Special Deputy Attorney General Daniel F. McLawhorn, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliot Walker, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Dewey Craig Fisher ("defendant") was convicted of first-degree murder and first-degree kidnapping and was sentenced to life imprisonment.

The State's evidence at trial tended to show the following: On 7 October 1998, defendant went to the home of Bill Brannon ("Brannon"). Defendant was an employee of Brannon and on occasion, Brannon loaned defendant money. At the end of his employment with Brannon on 1 October 1998, defendant owed Brannon three hundred dollars. On 7 October 1998, defendant drove to Brannon's

residence, attempting to borrow an additional twenty dollars. When he realized that Brannon was not home, defendant left and returned to Brannon's home forty-five minutes later. Brannon answered the door and asked defendant if he had the three hundred dollars he owed him. Defendant replied "no" and indicated that instead, he brought a few tools that belonged to another employee. Brannon walked outside to defendant's car to retrieve the tools. Upon opening the trunk, Brannon discovered that the tools belonged to him. Defendant took this opportunity to ask Brannon if he may borrow twenty dollars. Brannon responded, "Hell, no, not until you pay me." Brannon then began reaching for a wrench in defendant's trunk. After informing Brannon that the wrenches did not belong to him, defendant hit Brannon in the head with his fist, knocking him into the trunk. Brannon then grabbed a two-pound hammer and charged at defendant. Defendant, who was thirty-four years younger than the seventy-year old Brannon, blocked Brannon's swing, then grabbed the hammer. Defendant then began hitting Brannon with the hammer, splitting his skull and rendering him unconscious as he fell into the trunk. Defendant then shoved Brannon into his trunk and drove to a deserted area of the woods. Unsure if Brannon was alive, defendant stabbed him repeatedly with a knife. Defendant removed the wallet from Brannon's pants, and dumped the body and covered it with leaves before leaving the area. At home, defendant burned the hammer, Brannon's shoes and wallet. He then drove back to the creek, threw the knife into the water and returned home.

The next day, defendant cleaned his car, burned the bloody

items remaining in his trunk, retouched the paint near the trunk latch of his car and buried the hammer behind his grandmother's shed. On 30 November 1998, two months later, Brannon's remains were found and identified. Approximately six to ten feet away, officers found a shirt that belonged to defendant.

On 15 December 1998, defendant voluntarily agreed to accompany the sheriff's investigators to the State Bureau of Investigation office in Greenville, North Carolina. Defendant was interviewed by Special Agent Kelly Moser ("Agent Moser") and Detective Neil Guay ("Detective Guay"). In the conference room, defendant confessed to the murder of Brannon. Defendant waived his *Miranda* rights and never requested an attorney. After defendant's statement was reduced to writing, he reviewed and signed it. Following his confession, defendant directed authorities to the instruments used to kill Brannon. Defendant was subsequently arrested.

From his first-degree murder and first-degree kidnapping convictions and resulting sentence, defendant now appeals.

In his first assignment of error, defendant assigns error to the trial court's admission into evidence of Detective Guay's handwritten notes prepared during his interview with defendant, whereby defendant confessed to the crimes charged. We disagree with defendant's argument for the following reasons.

First, the acknowledgment or adoption of the handwritten notes prepared by Detective Guay was not necessary because "[a] statement made by defendant and offered by the State against him is

admissible as an exception to the hearsay rule as a statement of a party-opponent." *State v. Gregory*, 340 N.C. 365, 401, 459 S.E.2d 638, 658 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Second, "there is no requirement that an oral confession be reduced to writing or that [an] oral statement, after transcription by another, be signed by the accused." *State v. Fox*, 277 N.C. 1, 25, 175 S.E.2d 561, 576 (1970).

Defendant argues that admission of the handwritten notes was "prejudicial" because: (1) the notes were neither signed nor acknowledged for accuracy and (2) the notes did not constitute a word-for-word rendition of his interview with Detective Guay. However, Detective Guay testified that his notes were a verbatim record of the questions he posed to defendant and the responses that were given concerning the murder of Brannon. Following defendant's oral statement, his *Miranda* rights were read to him by Detective Guay. Defendant subsequently gave another statement that he read and signed, revealing his confession to the crimes charged. Under the facts of this case, we conclude that the trial court did not err in its admission of the handwritten notes.

Even if the admission of the handwritten notes was error, it was harmless error in light of the overwhelming evidence of defendant's guilt coupled with defendant's repeated confessions of the crimes charged. This assignment of error is therefore overruled.

Defendant next contends that the trial court erred by denying his motion to dismiss the charge of first-degree murder.

Specifically, defendant contends that the short-form murder indictments authorized by N.C. Gen. Stat. § 15-144 and utilized in this case are unconstitutional under *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). Defendant argues that the indictments are unconstitutional for the following reasons: (1) the indictments do not allege the elements of first-degree murder in that they fail to state that the killing was committed during the commission of a felony or with premeditation and deliberation (2) the short-form indictment statute violates defendant's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States and North Carolina Constitutions. We disagree.

In light of *Jones* and *Apprendi*, our Supreme Court has recently reaffirmed the constitutionality of the short-form indictment, and has held that the short-form indictment alleges all necessary elements of first-degree murder, and is sufficient to indict on any theory of murder. *See State v. Holman*, 353 N.C. 174, 180, 540 S.E.2d 18, 22 (2000)(holding that the short-form indictment does not impinge upon defendant's Sixth Amendment right to notice or his rights under Article I, Section 19 of the North Carolina Constitution), *cert. denied*, ____ U.S. _____, 151 L. Ed. 2d 181 (2001); *State v. Braxton*, 352 N.C. at 158, 173-75, 531 S.E.2d 428, 436-38 (2000)(holding that "premeditation and deliberation need not be separately alleged in the short-form indictment"), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). We therefore reject defendant's argument.

Defendant next contends that the trial court erred in finding as an aggravating factor that (1) defendant took advantage of a position of trust or confidence to commit the offense and (2) the victim was very old. However, our review of the record reveals that defendant did not object to these findings during the sentencing hearing. Having failed to object, defendant contends that the trial court's finding of the above-stated aggravating factors amounted to plain error. It is well established that the plain error doctrine is limited and does not extend to errors alleged in matters other than jury instructions and to the admissibility of evidence. *See State v. Cummings*, 346 N.C. 291, 313-14, 488 S.E.2d 550, 563 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). Our Supreme Court "has not applied the plain error rule to issues which fall within the realm of the trial court's discretion." *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). In light of the facts of this particular case, we decline to hear defendant's assignment of error under the plain error rule. This assignment of error is dismissed.

By his final assignments of error, defendant contends that the trial court erred by: (1) providing a flight instruction and (2) failing to instruct the jury on imperfect self-defense. Having failed to object during the charge conference, defendant contends that the trial court's actions constituted plain error. We disagree.

Plain error is "'fundamental error, something so basic, so

prejudicial, so lacking in its elements that justice cannot have been done.'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *U.S. v. McCaskill*, 676 F.2d. 995, 1002 (4th Cir.), *cert denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Under the plain error doctrine, the defendant "must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

"A trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997). A flight instruction is proper where "there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged[.]" *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). "The relevant inquiry [is] whether there is evidence that defendant left the scene of the murder and took steps to avoid apprehension." *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990).

In the instant case, the trial court instructed the jury as follows:

> The State contends that the Defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show of consciousness of guilt.

Defendant contends that the trial court erred by instructing

on flight, because the evidence of flight was no more than conjecture or suspicion. We disagree.

In the instant case, the evidence reveals the following: defendant attacked the victim at his home; shoved the victim into the trunk of his car; removed the victim from the trunk; stabbed the victim repeatedly and concealed his body under leaves in a ditch. Defendant subsequently cleaned his car; retouched the paint near the latch of his trunk and then burned the items remaining in his trunk. This evidence clearly suggests that defendant left the scene of the murder and took steps to avoid apprehension. A flight instruction by the trial court was appropriate. We therefore hold that defendant has failed to demonstrate any error in the trial court's instruction on flight and this assignment of error is overruled.

Defendant further argues that the trial court committed plain error by failing to instruct the jury on imperfect self-defense. This argument is without merit.

"The right to kill in self-defense is based on the necessity, real or reasonably apparent, of killing an unlawful aggressor to save oneself from *imminent* death or great bodily harm at his hands." *State v. Norman*, 324 N.C. 253, 259, 378 S.E.2d 8, 12 (1989). Our law recognizes two types of self-defense: perfect and imperfect. Perfect self-defense may excuse a killing altogether, while imperfect self-defense may reduce the charge of murder to voluntary manslaughter. *Id.* at 260-61, 378 S.E.2d at 12. A defendant is entitled to an instruction on imperfect self-defense

if the defendant reasonably believed it was necessary to kill the victim in order to save himself from great or imminent bodily harm or death even if the defendant "(1) might have brought on the difficulty without murderous intent and (2) might have used excessive force." *State v. Jackson*, 145 N.C. App. 86, 92, 550 S.E.2d 225, 230 (2001).

Applying the foregoing principles to the present case, we conclude that the evidence, taken in the light most favorable to defendant, does not entitle defendant to an instruction on imperfect self-defense. Defendant argues that an imperfect self-defense instruction was proper because evidence presented by the State tended to show that he struck Brannon in the head with the hammer only after Brannon attempted to first strike defendant. However, defendant has failed to present any evidence from which a jury could find that he reasonably believed it was necessary to kill Brannon in order to protect himself from imminent death or great bodily harm. Instead, the evidence tended to show that defendant, with a hammer, struck Brannon in the head, stabbed him repeatedly with a knife, killing him, and then left his body buried under leaves. Under the facts of this case, we cannot conclude that defendant was entitled to a jury instruction on imperfect self-defense.

Based on the following analysis, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges WYNN and TYSON concur.

Report per Rule 30(e).