NO. COA01-770

NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2002

STATE OF NORTH CAROLINA

v. Ashe County
No. 00CRS521-522

BILLY DEAN WHITAKER

Appeal by defendant from judgment dated 23 May 2000 by Judge Michael E. Helms in Ashe County Superior Court. Heard in the Court of Appeals 26 March 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General James P. Longest, Jr., for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellant.

GREENE, Judge.

Billy Dean Whitaker (Defendant) appeals a judgment dated 23 May 2000 entered consistent with a jury verdict finding him guilty of first-degree murder, N.C.G.S. § 14-17 (1999), and assault with a deadly weapon with intent to kill inflicting serious injury, N.C.G.S. § 14-32(a) (1999).

Defendant was charged with the first-degree murder of Brenda Bumgarner Whitaker (Whitaker) and assault with a deadly weapon with intent to kill inflicting serious injury on John Wayne Mullis (Mullis). The evidence tends to show that Defendant and Whitaker

had once been married, but separated, and thereafter divorced in April 1999. The two, however, continued to see each other regularly, sometimes living together. At around 4:00 p.m. on 28 June 1999, after having been drinking for most of the day with Whitaker's brother, Defendant traveled to Whitaker's residence. Whitaker had also been drinking on that day, and the two began to argue. In response to an earlier call from Whitaker to come and drink with her and Defendant, Mullis also traveled to Whitaker's residence. Mullis often drank with Defendant and Whitaker, and Defendant and Mullis shook hands in greeting when Mullis arrived at the residence. At the request of Defendant and Whitaker, Mullis went to the store to buy more beer. In Mullis' absence, Defendant and Whitaker continued to argue. At times, Defendant would briefly leave and then return. When Mullis came back from the store, Defendant and Whitaker were inside talking. Mullis left the beer on the porch, entered Whitaker's residence, and sat on the couch. Thereafter, Defendant stood up and walked toward the door, as if he were going to get a beer. As Defendant walked past Mullis, he turned and cut Mullis, slicing his jugular vein. Defendant also cut Whitaker's throat, which resulted in her death.

A jury found Defendant guilty of the first-degree murder of Whitaker under the felony murder rule and assault with a deadly weapon with intent to kill inflicting serious injury on Mullis, recommending life imprisonment for the murder conviction. The trial court arrested judgment on the assault conviction and in accordance with the jury's recommendation, sentenced Defendant to

life imprisonment for the murder of Whitaker.

The sole issue on appeal is whether the short-form murder indictment used against Defendant is defective in that it failed to adequately charge the offense of first-degree murder.

Defendant candidly concedes that our Supreme Court has rejected similar challenges to the short-form murder indictment, which is commonly used in this State, but presents this issue for reconsideration in light of a recent ruling by our Supreme Court in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001). Defendant also explains that the issue is raised to preserve his right to present it in future appellate proceedings.

As Defendant concedes, our Supreme Court has found the use of short-form indictments to charge first-degree murder to be constitutional. Specifically, the Supreme Court noted in *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001), that:

> [t]he crime of first-degree murder and the accompanying maximum penalty of death, as set forth in N.C.G.S. § 14-17 and North Carolina's capital sentencing statute, are encompassed within the language of the short-form indictment . . . . Thus, no additional facts need[] to be charged in the indictment. Given the foregoing, [the] defendant had notice that he was charged with first-degree murder and that the maximum penalty to which he could be subjected was death. Moreover, under the law of this State, whenever a defendant is charged with murder, questions of fact related to guilt or innocence and to capital sentencing must be determined by the jury; and the State has the burden of proving all elements of the crime and aggravating circumstances beyond a reasonable doubt.

Id. at 175, 531 S.E.2d at 437-38. In *Lucas*, our Supreme Court addressed the issue of whether the firearm enhancement provision under N.C. Gen. Stat. § 15A-1340.16A, which could subject a defendant to being sentenced to a prison term greater than the prescribed statutory maximum, had to be charged in an indictment, submitted to the jury for determination, and proven beyond a reasonable doubt. *Lucas*, 353 N.C. at 597, 548 S.E.2d at 731 Our Supreme Court held that under the holdings of the United States Supreme Court in *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), the firearm enhancement under section 15A-1340.16A must be charged in the indictment, proven beyond a reasonable doubt, and passed upon by the jury. *Lucas*, 353 N.C. at 597, 548 S.E.2d at 731. Contrary to Defendant's argument, we conclude that the Supreme Court's holding in *Lucas* in no way affects its previous holdings in regard to the use of the short-form indictment to charge first-degree murder. Having so concluded, we see no error.[1]

No error.

Judges HUDSON and TYSON concur.

Report per Rule 30(e).

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[1]Defendant's remaining assignments of error, which were not discussed in his brief, are deemed abandoned. N.C.R. App. P. 28(a).