NO. COA01-844

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

STATE OF NORTH CAROLINA

v. Chatham County
No. 99 CRS 051393

FRANKIE BURNETT ROUNDTREE

Appeal by defendant from judgment dated 23 January 2001 by Judge A. Leon Stanback, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 23 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Buren R. Shields, III, for the State.

Russell J. Hollers, III, for defendant-appellant.

GREENE, Judge.

Frankie Burnett Roundtree (Defendant) appeals a judgment dated 23 January 2001 entered consistent with a jury verdict finding him guilty of second-degree murder.

On 5 June 2000, Defendant was charged with first-degree murder pursuant to a short-form indictment. At trial, Juanita Williams (Williams) testified she and Defendant had been in a relationship from October 1995 until August 1999. Thereafter, Williams began seeing DeMarcus Rone (Rone). On the evening of 7 December 1999, Rone was with Williams at her residence. Defendant telephoned Williams repeatedly that evening, but Williams, who could recognize

Defendant's home telephone number on her caller identification device, refused to pick up the telephone. The last time Defendant placed a telephone call to Williams' residence was at 4:45 a.m. on 8 December 1999. At that time, Defendant was calling from his car telephone.

Williams, who found herself unable to sleep any longer, got out of bed shortly after Defendant's last telephone call. Rone had spent the night at Williams' place and awoke around 6:10 a.m. At 6:20 a.m., Williams and Rone left Williams' residence to go to work. Because their vehicles were covered with ice, Williams got de-icer from her vehicle while Rone searched for an ice scraper in the back seat of his vehicle. After Williams had used the de-icer on both vehicles, she looked up and saw Defendant standing next to the driver's side light of her vehicle. According to Williams, Defendant had never come to her residence this early in the morning.

Rone only became aware of Defendant's presence when Williams called out to him. At that point, Defendant "walked [up] to [Rone] and stabbed him in the middle of his chest" with a pocketknife. Williams saw blood on Rone's shirt as he wrestled with Defendant who continued stabbing him. Williams ran to her landlady to tell her to telephone 911. She then grabbed a garden hoe and hit Defendant on the side of his head three times. After the third blow, Defendant stepped away from Rone. Williams helped Rone sit in a chair outside and went into her residence to get bandages for his wounds. When Williams came back outside, she saw Defendant

pick up the garden hoe. Rone told Williams to go back into the house. When Williams refused, saying she was not afraid of Defendant, Rone attempted to rise from his seat. At this moment, Defendant struck Rone once on his arm and once on his forehead with the garden hoe. The impact of the second blow broke the garden hoe in half and caused Rone to collapse on the driveway. Defendant then went to his vehicle, which he had parked out of sight, and drove past Williams' residence as he left the area. Williams testified at trial that, during previous visits to her residence, Defendant had always parked in her driveway.

When the authorities arrived at Williams' residence between 6:47 a.m. and 6:52 a.m., Rone was still alive but unable to respond verbally. He died shortly thereafter. The medical examiner testified at trial that of the several wounds Rone had suffered, "the only one that was of true medical significance was the one [stab wound] present in the central chest area." When Defendant inflicted this wound, the knife passed into the right ventricle of Rone's heart. While the wound was not immediately fatal, it was "relatively rapidly fatal."

Jennifer Garner (Garner), a school bus driver, testified she had seen Defendant at 6:05 a.m. on 8 December 1999 in a parked vehicle approximately 200 yards from Williams' residence.

At the conclusion of the State's evidence, the trial court sent the jury to the jury room in order for the trial court to hear Defendant's motion to dismiss the first-degree murder charge for insufficiency of the evidence. After arguments on the motion were

concluded and the motion denied, the following exchange occurred:

> [DEFENDANT]: Judge, in addition, there is an item of evidence that has been introduced and passed to the jury that I think they still have in their possession. I don't think it's appropriate for them to have it . . . .
>
> THE COURT: Excuse me?
>
> [DEFENDANT]: I think they still have the exhibit, the stipulations to the jury.
>
> THE COURT: Okay. We will get that back. I didn't realize. Did they take it to the jury room with them?
>
> [DEFENDANT]: I think they did. At least I saw [it] as they were walking out.

The trial court collected the exhibit of stipulations from the jury without giving instructions on the erroneous removal of the evidence from the courtroom, and Defendant offered no objection and made no motion for a mistrial. At the close of all the evidence, Defendant renewed his motion to dismiss the first-degree murder charge, which the trial court again denied.[1]

The jury found Defendant guilty of second-degree murder. During sentencing, the trial court found as aggravating factors that: (1) Defendant committed an offense that "was especially heinous, atrocious or cruel" and (2) "Defendant lay[] in wait for [the] victim." After finding that the aggravating factors outweighed the mitigating factors, the trial court sentenced Defendant to a minimum of 200 and a maximum of 249 months.

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[1]While Defendant assigns error to the trial court's denial of his motion to dismiss the first-degree murder charge, he failed to argue this assignment of error in his brief. Accordingly, it is deemed abandoned. *See* N.C.R. App. P. 28(a).

The issues are whether: (I) the short-form indictment was sufficient to charge Defendant with first-degree murder; (II) the trial court erred in failing to declare a mistrial after learning the jury had taken evidence into the jury room prior to deliberations; and (III) the trial court erred in finding as aggravating factors that Defendant committed an offense that "was especially heinous, atrocious or cruel" and "lay[] in wait for [the] victim."

I

Defendant contends the short-form indictment used in this case was invalid because it failed to state the elements of first-degree murder. The record, however, indicates Defendant never moved the trial court to dismiss the indictment on this basis. *See* N.C.R. App. P. 10(b)(1) ("[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion"). Furthermore, the use of the short-form murder indictment has already been upheld by our Supreme Court, *see State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000); *State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996); *State v. Randolph*, 312 N.C. 198, 210, 321 S.E.2d 864, 872 (1984), and Defendant has presented no argument on the issue not already presented in previous cases. Accordingly, this assignment of error is overruled.

II

Defendant further argues the trial court erred in not declaring a mistrial after the jury took evidence into the jury room prior to deliberations. Defendant, however, has not properly preserved this issue for appeal as he failed to object or move for a mistrial once the error was discovered. *See* N.C.R. App. P. 10(b)(1). In any event, Defendant failed to demonstrate any prejudicial error that arose from the jury having taken the exhibit of stipulations into the jury room prior to deliberations. *See State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991) ("'a mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible . . . to receive a fair and impartial verdict'"). Thus, this assignment of error is also overruled.

III

Finally, Defendant asserts the trial court erred in finding aggravating factors that were not supported by the evidence. We disagree.

The trial court found as an aggravating factor that Defendant had committed an offense that "was especially heinous, atrocious or cruel." In *State v. Blackwelder*, our Supreme Court held that "the focus [in analyzing this factor] should be on whether the facts of the case disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense." *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983) (emphasis omitted). Further

considerations include whether the victim suffered multiple injuries, the manner in which the wounds were inflicted, and whether death was not immediate. *Id.* at 412-13, 306 S.E.2d at 785-86. "[E]vidence of bruises and cuts, if inflicted prior to death by the defendant, . . . support a conclusion that there was physical and psychological pain or torture not normally present in a murder." *Id.* at 414, 306 S.E.2d at 786.

In this case, the first stab wound into Rone's chest was responsible for his ultimate death. Defendant and Rone subsequently wrestled as Defendant continued to stab Rone. Defendant did not pause in his attack until Williams had struck him on the head with a garden hoe three times. After Williams helped Rone to a chair, Rone just sat there. It was only when Williams would not retreat to the safety of her home that Rone attempted to stand up. At this point, Defendant attacked Rone a second time, using the garden hoe to strike Rone with such force that it broke in half and Rone collapsed on the driveway. This evidence indicates not only that death was not immediate but that Rone suffered multiple wounds, encountered excessive brutality, and endured physical and psychological suffering subsequent to Defendant's initial attack beyond what was necessary to establish second-degree murder. Accordingly, the trial court did not err in finding the offense committed by Defendant "especially heinous, atrocious or cruel."

Defendant further argues the evidence does not support the trial court's finding that Defendant lay in wait for the victim on

the morning of 8 December 1999. "An assailant who watches and waits in ambush for his victim is lying in wait." *State v. Richardson*, 346 N.C. 520, 536, 488 S.E.2d 148, 157 (1997) (citing *State v. Allison*, 298 N.C. 135, 147-48, 257 S.E.2d 417, 425 (1979)), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d. 652 (1998). Our Supreme Court has found sufficient evidence of lying in wait where a defendant drove into the parking lot of a store from the side entrance so that the victim would not see him, waited fifteen minutes for the victim to come out and close the store, ran up to the victim, and the victim did not see him until he was right next to her. *Id.* at 536-37, 488 S.E.2d at 158. Furthermore, this Court has upheld the use of lying in wait as an aggravating factor where a defendant waited behind a store for the victim to come out. *State v. McIntyre*, 65 N.C. App. 807, 810, 310 S.E.2d 119, 120, *appeal dismissed and disc. review denied*, 311 N.C. 308, 317 S.E.2d 906 (1984).

In this case, the evidence established Defendant's last telephone call to Williams' residence occurred at 4:45 a.m. on 8 December and, unlike his earlier telephone calls from his home, was placed from his vehicle. At 6:05 a.m., Garner observed Defendant in a parked vehicle approximately 200 yards from Williams' residence. According to Williams, Defendant has always parked in her driveway during previous visits. Shortly after 6:20 a.m., Defendant surprised Williams and Rone in the driveway of Williams' residence and attacked Rone. As this evidence was sufficient under *Richardson* and *McIntyre* to show Defendant lay in wait for the

victim, the trial court committed no error.[2]

No error.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).

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