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NO. COA02-576

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v.

Cumberland County
No. 00 CRS 57976

DEIDRA CHAVELLE DOSWELL,
Defendant.

Appeal by defendant from judgment entered 12 December 2001 entered by Judge Robert F. Floyd in Cumberland County Superior Court. Heard in the Court of Appeals 21 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Miles & Montgomery, by Lisa Miles, for defendant-appellant.

HUDSON, Judge.

Defendant Deidra Doswell was charged with first-degree murder of her fiancé Milton McLean. The State's evidence tended to show that on the evening of 28 March 2000, Officers Steven Briggs and Calvin Evilsizer of the Fayetteville Police Department responded to a call about a shooting at a house on Teachers Drive. Defendant's thirteen-year-old daughter let the officers into the house when they arrived. In the bedroom at the end of the hall, Officer Briggs observed the victim lying on the floor on his back, face up, and defendant lying face down, across the top of the victim.

Defendant was wearing a white wedding gown. She was moaning and moving her hands and arms across the victim's face. When defendant rolled over, police discovered a revolver next to the victim's face. The victim, who had blood coming out of a hole in his shirt, had no vital signs. The front of defendant's wedding dress had a black powder burn and blood on it. Defendant appeared to be bleeding from a gun shot wound to her lower left breast area and was transported to the hospital. Police did not find signs of forced entry into the residence.

At the scene, police observed a gunshot hole through the headboard of the bed, a gunshot hole in the closet, and a spent projectile laying flush against the headboard and baseboard of the floor. Police collected a brown wig, a wedding veil, beads, a revolver, four spent shell casings, and two live rounds from the bedroom. Agent Eugene Bishop of the State Bureau of Investigation testified that the bullet retrieved from the victim's abdomen during the autopsy, the bullet found at the scene, and the four shell casings retrieved from the scene all came from the revolver found at the scene of the shooting. Agent Charles McClelland, also of the State Bureau of Investigation, testified that the findings of the gunshot residue analysis on the victim's hands were "not consistent with the firing of a weapon." Police determined that defendant was a specialist in the Army Reserve and a security guard. Dr. John Butts, Chief Medical Examiner for the State of North Carolina, testified that the victim died as the result of a gun shot wound that struck the aorta. He further testified that

the lack of gunshot residue around the victim's gunshot wound indicated that he was shot from several feet away.

On top of the bedroom dresser, a note read: "His soul was tired so I gave him a rest and I loved him so much I went with him. Love, D." In a dresser drawer, police found an unsigned marriage certificate dated 23 November 1998. Detective Carolyn Pollard found a calendar with the following entries: "My wedding day, 9:00 a.m." on 15 August 1998; "My wedding day" on 15 November 1998; and "My babe's, husband's 60th birthday" on 18 November 1998. Detective Pollard testified that the victim's birthday was 18 November 1938.

The victim's daughter, Sharon Blackshear, testified that her father was engaged to defendant and that defendant's nickname was "D." Defendant and the victim had been living together in the victim's home along with defendant's three children for about a year and a half. Ms. Blackshear testified that defendant and the victim had set wedding dates in the past and that the next tentative date was in August 2000. She also testified that defendant was in the process of buying the wedding dress from Ms. Blackshear's sister.

Defendant did not present any evidence. A jury found defendant guilty as charged. The trial court sentenced defendant to life imprisonment. Defendant appeals.

Defendant contends that the trial court erred by denying her request to instruct the jury on second-degree murder and manslaughter as lesser included offenses of first-degree murder.

Defendant essentially asserts that the "uncertainties surrounding the shootings" would have given the jury a reasonable basis for deciding that the State did not prove premeditation or deliberation beyond a reasonable doubt. We disagree.

A lesser included offense instruction must be given if the evidence "'would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater.'" *State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983) (quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401 (1980)), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Second-degree murder and manslaughter are lesser included offenses of first-degree murder. See *State v. James*, 342 N.C. 589, 594, 466 S.E.2d 710, 713 (1996) (citing *State v. Yelverton*, 334 N.C. 532, 544, 434 S.E.2d 183, 190 (1993)). The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict the defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements. *State v. Skipper*, 337 N.C. 1, 26, 446 S.E.2d 252, 265 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995). First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Graves*, 343 N.C. 274, 278, 470 S.E.2d 12, 15 (1996).

In the present case, the evidence presented by the State is

positive and uncontradicted as to each element of first-degree murder. First, "malice is presumed where the defendant intentionally assaults another with a deadly weapon, thereby causing the other's death." *State v. McNeill*, 346 N.C. 233, 238, 485 S.E.2d 284, 287 (1997), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998). Malice may be presumed from the use of a deadly weapon. *Id.* At trial, the state introduced positive evidence of malice by showing that defendant shot the victim in the chest with a pistol. The shot punctured the victim's aorta, causing his death.

The evidence is similarly positive and uncontradicted as to premeditation and deliberation. "Premeditation means that the defendant thought out the act beforehand for some length of time, however short." *State v. Holt*, 342 N.C. 395, 397, 464 S.E.2d 672, 673 (1995). Deliberation means that the fatal act was "executed with a fixed design to kill notwithstanding defendant was angry or in an emotional state at the time." *State v. Ruof*, 296 N.C. 623, 636, 252 S.E.2d 720, 728 (1979). Circumstances that are illustrative of the existence of premeditation and deliberation include (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a

brutal manner, and (7) the nature and number of the victim's wounds. *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992).

Here, the State's evidence showed that defendant shot at the victim three times before shooting herself; defendant was dressed in her wedding gown when she shot defendant although her wedding day had been postponed for the third time until August 2000; either before or after the killing, defendant wrote the note on the dresser indicating her role in defendant's death; and the results of the gunshot residue tests were not consistent with the victim firing the revolver. Moreover, there was no evidence of provocation on defendant's part. The State's evidence established each and every element of first-degree murder, including premeditation and deliberation, without equivocation. Accordingly, the trial court correctly refused to submit the issue of defendant's guilt of second-degree murder, voluntary manslaughter, and involuntary manslaughter as lesser included offenses, and defendant's assignment of error to the contrary is overruled.

No error.

Chief Judge EAGLES and Judge MCCULLOUGH concur.

Report per Rule 30(e).